The case was decided by Gawdy and Clench, in the absence of Popham and Fenner; and it is curious that Gawdy and Clench had differed from the two others as to the degree of liability of a bailee in previous cases.[1] It would seem that judgment might have been given for plaintiff on the replication; the court, however, preferred to give it on the plea. This really rested on the form of the declaration; a promise to keep safely, which, as the court said, is broken if the goods come to harm. The only authority cited for the decision was the Marshal's Case, which I shall presently examine and show to rest on a different ground. The rest of Coke's report of the case (of which nothing is said in the other reports) is an artificial, and, *pace* Judge Holmes, quite unsuccessful attempt to reconcile, in accordance with the decision, the differing earlier opinions. The case has probably been given more authority than it really should have. At the end of the manuscript report cited we have these words: "Wherefore they (*cæteris absentibus*) give judgment for the plaintiff *nisi aliquod dicatur in contrario die veneris proximo.*" And it would seem that judgment was finally given by the whole court for the defendant. In the third edition of Lord Raymond's Reports is this note: "That notion in Southcote's Case, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione Magistri Bunbury.*"[2] It was not uncommon for a case to be left half reported by the omission of a *residuum;* and it may be that Southcote's Case as printed is a false report. One would be glad to see the record.

Southcote's case is said to have been followed for a hundred years. The statement does it too much honor. It seems to be the last reported action of detinue where the excuse of loss by theft was set up; and, as has been seen, the principle it tries to establish does not apply to other forms of action. It was cited in several reported actions on the case against carriers, but seems never to have been the basis of decision; on the other hand, in Williams *v.* Lloyd,[3] where it was cited by counsel, a general bailee who had lost the goods by robbery was discharged. The action was upon the case.

Having thus briefly explained why Judge Holmes' theory of the carrier's liability is not entirely satisfactory, I may now

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[1] Woodlife's Case, Moo. 462; Mosley v. Fosset, Moo. 543.

[2] 2 Ld. Raym. 911 *n.*

[3] Palmer, 548; W. Jones, 179 (1628).