Then where goods were pledged and put with the defendant's own goods, and all were stolen, that was held a defence; the plaintiff was obliged to avoid the bar by alleging a tender before the theft.[1] Finally in 1432, the court (Cotesmore, J.) said: "If I give goods to a man to keep to my use, if the goods by his misguard are stolen, he shall be charged to me for said goods; but if he be robbed of said goods it is excusable by the law."[2]

At last, in the second half of the fifteenth century, we get the first reported dissent from this doctrine. In several cases it was said, usually *obiter*, that if goods are carried away (or stolen) from a bailee he shall have an action, because he is charged over to the bailor.[3]

In several later cases the old rule was again applied, and the bailee discharged.[4] There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's Case.[5]

This was detinue for certain goods delivered to the defendant "to keep safe." Plea, admitting the bailment alleged, that J.S. stole them out of his possession. Replication, that J.S. was defendant's servant retained in his service. Demurrer, and judgment for the plaintiff.

---

[1] 29 Ass. 163, pl. 28 (1355). Judge Holmes, following the artificial reasoning of Gawdy (or Coke?) says the pledge was a special bailment to keep as one's own. The reason stated by Coke is exactly opposed to that upon which Judge Holmes' own theory is based; it is that a pledgee undertakes only to keep as his own because he has "a property in them, and not a custody only," like other bailees. The court in the principal case knows nothing of this refinement. "For W. Thorpe, B., said that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged." After refusal of tender, defendant would have been, not, as Judge Holmes says, a general bailee, but a tortious bailee, and therefore accountable. The refusal was the detinue, or as the court said in Southcote's case, "There is fault in him."

[2] 10 H. 6, 21, pl. 69.

[3] 2 E. 4, 15, pl. 7, by Littleton (1462); 9 E. 4, 34, pl. 9, by Littleton and Brian, JJ. (1469); 9 E. 4, 40, pl. 22 (1469), by Danby, C. J. (*ante*); 6 H. 7, 12, pl. 9, per Fineux, J. (1491); 10 H. 7, 26, pl. 3, per Fineux, J. (1495). In the last two cases, Keble, *arguendo*, had stated the opposite view; and Brooke (Detinue, 37) by a query appears rather to approve Keble's contention.

[4] 1 Harvard M. S. Rep. 3a (1589, stated later), *semble*; Woodlife's Case Moo. 462 (1597); Mosley *v.* Fosset, Moo. 543 (1598), *semble*.

[5] 4 Coke 83 b, Cro. Eliz. 815; Harv. MS. Rep. 42-45 Eliz. 109 b (1600).