

Eng. Rep.]

GIBLIN ET AL. v. McMULLIN.

[Eng. Rep.]

regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Crompton, J., in delivering the opinion of the court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence." M. Smith, J., in the case in which the above-mentioned observations of Willes, J., were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs inability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise, corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other. It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. The case resembles very closely one that was mentioned by the counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster, et al (Executors), v. The Essex Bank*, 17 Mass. Rep. 478. The plaintiff in that case deposited with the bank for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently

did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of \$2,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the court, entered fully in the law of bailments applicable to the case, holding that, "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the court held that the bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank." Their Lordships entertain no doubt it was the duty of the judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit. But the judge having refused to nonsuit, the defendant thereupon went into his case and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of *Davis v. Hardy* (6 B. & C. 225), that the evidence given by a defendant may be used for the purpose of a nonsuit. The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no