

stitute *negligence*, which is the ground of the Plaintiff's claim and *the gist of the action*. It is a circumstance, even a material one, but not sufficient to dispose of the case. The position never can be maintained, that all departures from the bailor's instructions is such negligence as gives him a right to cast the loss of his goods upon the bailee. It never can be maintained that every such departure is such negligence as will give a right to recover damages. The loss ought to be more immediately connected with a departure from the instruction. The holding him so liable must extend to the case of his having stored the goods in the very best and safest warehouse in the town. Now he might make himself liable to loss even in that case, but only if he accepted the goods upon the condition, and that in the present case is neither proved by the evidence, nor averred by the pleadings, nor found by the verdict.

The sum of £758 14 8, is proved by the judgment to be due from the Defendant, independently of the damages assessed at £753, though there is no count for an account stated in the declaration, and though this sum is stated in the judgment to be for the balance of accounts, we think it may justly be given, as there are many counts, and this may be referred to the balance remaining unpaid as the sum in one or other of these counts.

The judgment below, therefore, must stand for that sum, and *quoad* the damages assigned a *venire de novo* is to be awarded, reversing *pro forma* the judgment below, but with leave to both parties to amend the pleadings, if they are so advised, and without prejudice to any question except, so far only, as the *venire de novo* goes.

Vice Chancellor, Knight Bruce.—The pleadings are to be amended on both sides.

Mr. Bliss.—The judgment is reversed as to that portion which relates to the damages.

Lord Brougham.—Reversed as to the £753, affirmed as to the £758.

Vice Chancellor.—Execution may go for that sum.