

an action on the case against him. I shall hereafter consider actions on the case against those pursuing a common occupation.

In the action of account there is hardly a doubt that robbery without fault of bailee could be pleaded in discharge before the auditors.¹ To the contrary is only a single dictum of Danby, C.J., and there the form of action is perhaps doubtful.² Indeed, in Southcote's case the court admitted that the factor would be discharged before the auditors in such a case, and drew a distinction between factor and innkeeper or carrier.

In the action of detinue then, if anywhere, we shall find the bailee held strictly; and the authorities must be examined carefully.

The earliest authority is a roll where, in detinue for charters, the bailee tendered the charters *minus* the seals, which had been cut off and carried away by robbers. On demurrer this was held a good defence.³ The next case was detinue for a locked chest with chattels. The defence was that the chattels were delivered to defendant locked in the chest, and that thieves carried away the chest and chattels along with the defendant's goods. The plaintiff was driven to take issue on the allegation that the goods were carried away by thieves.⁴ A few years later, counsel said without dispute that if goods bailed were burned with the house they were in, it would be an answer in detinue.⁵

¹ Fitz. Accompt, pl. 111 (1348); 41 E. 3, 3 (1367); 2 R. 3, 14 (1478); Vere v. Smith, 1 Vent. 121 (1661).

² 9 E. 4, 40 (1469). In an action of account, the court held that robbery could not be pleaded in bar, but if it was an excuse it must be pleaded before the auditor. Danby's remark, that robbery excuses a bailee only if he takes the goods to keep as his own, has no reference to the action itself. Brooke abridges the case under *Detinue*, 27.

³ Brinkburn Chartulaly, p. 105 (1299).

⁴ Fitz., *Detinue*, 59 (1315). According to Southcote's case and Judge Holmes (Com. Law, p. 176), Fitzherbert states the issue to have been that the goods were delivered outside the chest. Neither the first (1516) edition of Fitzherbert, nor others (1565, 1577) to which I have access, are so. In the printed book (8 E. 2, 275) it is indeed laid down as Gawdy and Holmes state it; we have therefore a choice of texts. It is common knowledge that Maynard's text is often corrupt; it is a century and a half further from the original; and in this case the inaccuracy is manifest. The text throughout has to be corrected by comparison with Fitzherbert in order to make it sensible. From internal evidence Fitzherbert's text must be chosen. It would be interesting to have a transcript of the roll.

⁵ 12 & 13 E. 3, 244 (1339).