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GIBLIN ET AL. V. McMULLIN.

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there being no lien for any price of its custody, and it was not right that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or simple deposit, this was one. . . . Such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-house or stores. . . . (P. 507): The contract being, then, only a general bailment, the third question to be discussed is whether the contract has been cancelled by the bank. . . . The rule to be applied to this species of bailment is that the depositary is answerable in case of loss for gross negligence only or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred here, for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. . . . We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. . . . No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect. The point, then, is narrowed to the consideration whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers. (Authorities were reviewed by the court) . . . I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy. We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it, and so could not lawfully communicate any such authority, and that they did not in fact give any, is found by the verdict. . . . The cask was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were

over, that this, together with other property, should be secure from theft. He cannot, therefore, in any view be considered as acting within the scope of his employment when he committed this villainy, and the bank is no more answerable for this act of his than they would be if he 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. . . . The undertaking of banking corporations, with respect to their officers, is that they shall be skilful and faithful in their employments; they do not warrant their general honesty and uprightness." The principles above stated are all applicable to the present case; though the latter is weaker against the bank than the American case, for in that it appears that an exact account of the gold deposited was left with the cashier, who gave a receipt for it, while here the bank knew nothing about the contents of the plaintiff's box. There are doubtless observations in *Doorman v. Jenkins*, 2 A. & E. 256, tending to show that the question of negligence is for the jury. But there was some evidence of gross negligence in the opinion of the court. And many modern cases establish the proposition that, unless there is some evidence upon which the jury can reasonably find that negligence existed, the question should be withdrawn from them. Thus in *Toohey v. London, Brighton, and South Coast Railway Company*, where the plaintiff, while waiting at the defendants' station, mistook the lamp room for the urinal, fell down some steps and was injured, Williams, J., says, "It is not enough to say there was some evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." And this rule was adopted and approved in *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781, and in *Cotton v. Wood*, 8, C. B., N. S. 568. In the latter case Erle, J., observes (p. 573), "The very vague use of the term 'negligence' has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty or any evidence of a breach of it." And Williams, J., adds, "There is a rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz., that, where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury. A still stronger case is that of *Crafter v. Metropolitan Railway Company*, 1 L. Rep. C. P. 300, where the plaintiff was injured by falling, in consequence of the slippery brass nosings on the stairs. Two witnesses of the plaintiff's, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, and the defendants called no witnesses to contradict. Yet it was held that there was no evidence to go to a jury. M. Smith, J., remarks, "The court is, in an especial manner, bound to see that the