LIABILITY OF GRATUITOUS BAILEES.

There are many advantages in the system, or want of system, by which English law is allowed to grow, now in one direction, now in another, as new questions arise for judicial decision. It gives great flexibility to the law, and allows, as the wants of the people change, a constant and even development without the aid of Legislative enactments. There are, however, on the other hand, great disadvantages in this method of law-making, not the least of which is the doubt and confusion that is often caused by carelessly-given judgments which, even although they may be correct in their conclusion, may yet cause much harm if they contain inaccurate statements of principles or ill-considered *dicta*. Succeeding judges are slow to overrule the decisions of their predecessors, or even to express dissent from the *dicta* ascribed to them in their reports. The consequence of this is, that an erroneous decision, or even a correct decision on erroneous grounds or inaccurate *dicta*, may cause much difficulty in the law, and may remain for years neither overruled nor altered, although the errors may be generally recognized. It is not until some state of facts requires a decision directly on the point that a judicial expression of disapproval can be obtained.

The law respecting the liability of gratuitous bailees is a curious instance of the way in which confused and incorrect legal notions may arise, and be continued for a long series of years with but the merest shadow of authority in their support. The case of *Coggs* v. *Barnard* (1 Sm. Lead. Cas.) is the leading case on bailments, and the judgment of Holt, C.J., has received a great deal of praise, and is often spoken of in very exaggerated terms. Its real merit is that it endeavoured to treat the whole subject of bailments in a more complete and scientific manner than had before then been attempted, and it was, no doubt, useful at the time it was delivered (A.D. 1704) when there were but few law-books of any kind. If the judgment is to be considered with reference to the present state of the law, it is open to much criticism. It is unnecessarily elaborate, and, for the sake of an apparent symmetry, useless distinctions are made between different kinds of bailments. The point actually decided was, that "if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage." Holt, C.J., examines generally the law of bailments, and says that, "where a man takes goods into his custody for the use of the bailor, he is not answerable if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." He then goes on to say that, in the case of a loan, the borrower is bound "to the strictest care and diligence to keep the goods," and if the bailee is paid for the bailment he is "bound to take the utmost care," but that if, notwithstanding such care, the goods are lost or destroyed, in either of these cases the bailee is not liable. Holt, C.J., therefore thought that there was a clear distinction between the liability of an unpaid bailee and of a paid bailee or borrower. It has been usual, since this decision, to say that a paid bailee or borrower is liable for simple "negligence," but that an unpaid bailee is liable only for "gross negligence."

As the liability of a paid bailee and of a borrower is the same in common sense, as well as by the judgment of Holt, C.J., and all other authorities, what is an authority in the one case is an authority in the other, and the two classes of cases may be dealt with together.

If the mere fact of payment affects the liability of a bailee, it is convenient to distinguish between the negligence which will charge a paid and that which will charge an unpaid bailee, and the terms "negligence" and "gross negligence" answer very well for this purpose. If, however, the mere fact of payment does not alter the liability, the negligence necessary to charge the bailee in either case is the same, and the term used to denote that negligence ought also to be the same.

After the decision of *Coggs* v. *Barnard* it was discovered, as might have been expected, that the difference made by Holt, C. J., between "gross neglect" and neglect of the "utmost care" was extremely vague and unsatisfactory. It was difficult for a judge to direct a jury accurately on this principle, and the difference itself was rather a subtle creation of the law than a substantial difference which could be practically recognised in dealing with the two classes of bailments. Every bailment gives rise to a contract the terms of which may or may not be regulated by express agreement. If there is no express agreement, the idea that is present to the mind of both parties on the delivery of the goods whether the bailee is or is not paid, would almost without exception, be that the bailee was to use that ordinary diligence and care in preserving the goods which, under the circumstances, any man of ordinary prudence would adopt, and the contract implied by the law in such a case ought to be to that effect. Although this is opposed to *Coggs* v. *Barnard*, there is ample authority for the proposition that such are the terms of the contract now implied by the law on a paid or unpaid bailment without any express agreement. *Coggs* v. *Barnard* has never been formally overruled, and the correctness of the actual decision has never been questioned; but cases have been decided which are inconsistent with some of the *dicta* of Holt, C.J.

The case that most clearly shows the liability of a gratuitous bailee is *Wilson* v. *Brett* (11 M. & W. 113). The defendant rode a horse of the plaintiff's gratuitously, at the plaintiff's request. The horse fell on a piece