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GIBLIN ET AL. v. McMULLIN.

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ference between his case and that of a borrower; because the only difference is, that then the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant had it." And in the judgment of Rolfe, B., who tried the case, occurs the passage, "If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability? I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet—and I intended to leave it to the jury to say whether the defendant, being, as it appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." [Lord CHELMSFORD said that *Wilson v. Brett* was a case of misfeasance, not of negligence, and that he saw no objection to the term "gross" negligence, which was useful in expressing the degree of negligence for which certain classes of bailees are responsible. The term, moreover, had been approved by Lord Holt, Sir William Jones, and other eminent authorities.] A similar rule was laid down in *Beal v. South Devon Railway Company*, 3 H. & C. 341; 11 L. T. Rep. N. S. 181. See, too, the cases of *Peninsular and Oriental Steam Navigation Company v. Shand*, 1 Moo. P. C. N. S. 272; 12 L. T. Rep. N. S. 809; *Dansey v. Richardson*, 3 E. & B. 144.

Mellish Q.C., for the respondent.—Where bankers take charge of their customers' goods under such circumstances as the present, it must be understood that the customers will take their chance of loss. If whether they have taken proper care is to be a question dependent on the opinion of a jury, what banker would accept such a liability without reward? There was no evidence of negligence, except that the cashier was allowed to have access by himself to the strong room. The plaintiff knew that this was the custom of the bank, and after the deposit of his property if any change was made it was for his benefit, rather than to his disadvantage. And, indeed, to allow access to the confidential servant alone would probably involve less risk than to let two go together. The boxes were kept in the strong room for the convenience of depositors, and it cannot be contended that there was any negligence in the bankers because they did not put these bonds in the one of the two inner rooms which they reserved for bullion and unsigned notes. Lord Holt, in his judgment in *Coggs v. Bernard*, in saying that, when a man takes goods into his custody to keep for the bailor without reward, the bailee will be chargeable if guilty of "some gross neglect," clearly means "wilful" negligence, which would be near to fraud. [Lord CHELMSFORD.—It is difficult of definition; but gross negligence seems to mean "utter carelessness."] For he bases this part of his judgment on Justinian's Institutes, Book III., tit. 15, where the liability of a depositary is thus defined: "Ex eo solo tenetur, si quid dolo commissit; culpæ autem nomine, it est, desidie ac negligentie non tenetur." And this rule was acted on in an American case, very like the present, *Postler v. Essex Bank*, 17 Mass. 478, where a cask of doubloons was deposited by the plaintiff with the defend-

ants, and the cashier or clerk of the bank stole a great portion and afterwards absconded. The bank was held not to be liable on the grounds expressed in the following passage from the judgment of Parker, C. J., (p. 497). "It will not be disputed that if (this contract) amounts only to a naked bailment, without reward, and without any special undertaking, which in the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to breach of faith; as everyone who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of them. The degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest, and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns. . . . The dictum of Lord Coke that the bare acceptance of goods to keep implies a promise to keep them safely so that the depositary will be liable for loss by stealth or accident (*Southcole's case*, 4 Co. 83), is entirely exploded. . . . having been fully and explicitly overruled by all the judges in *Coggs v. Bernard*. . . . 'Now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own.' (2 Bl. Comm. 453.) And this certainly is the more reasonable doctrine, for the common understanding of a promise to keep safely would be that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor. The doctrine, as thus settled by reason and authority, is applicable to the case of a single deposit in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable." The court then went into the facts, and proceeded (p. 504): "Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest or the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it,