Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Giblin and others v. *Mc Mullen, from the Supreme Court of the Colony of Victoria; delivered the 19th February*, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

THIS is an Appeal from a Judgment of Nonsuit of the Supreme Court of the Colony of Victoria in an action by the Appellant's testator against the Respondent.

The action was brought against the Defendant as Inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the Bank to be safely kept and taken care of.

The Plaintiff, who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857.

From the earliest period of his becoming a customer of the Bank, he had placed in their care a box, of which he kept the key, containing securities, deeds, and debentures. The Bank received no consideration for taking care of the deposits of their customers. In the month of January 1862, the Plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the Bank were placed. There were also in this strong room the Manager's box, containing bills for discount and collection, worth from 1,500,000*l.* to 2,500,000*l.*, teller's boxes, worth 50,000*l.*, and securities of the

Royal, Central, and Agra Banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about five feet high. In this compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this compartment which opened upon a flight of steps leading to the room where the Plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the Bank.

Beyond the room where the box was there were two other rooms; in the outer of the two uncoined gold was kept, in the inner, bullion and unsigned notes of the Bank. The Manager kept the key of the outer of these two rooms, and one of the Directors of the Bank that of the inner one.

The Plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during the bank hours, but always in the presence of a bank clerk. The Plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons when taken from the debentures were always given by the Plaintiff to Fletcher to collect for him.

On the 19th April, 1864, the Plaintiff went to the Bank and asked for his box. Fletcher brought it to him. The Plaintiff opened the box, took out his debentures, and carried them away. He then cut off the coupons, took back the debentures, replaced them in the box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the Plaintiff's next visit to the Bank, Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July 1864, as Fletcher then

left the Bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The Plaintiff did not come again to the Bank till the 3rd of July, 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the Bank and had his box brought up to him, when he discovered that the debentures were gone.

All the material facts above stated were proved in the course of the Plaintiff's case; that the Bank were gratuitous bailees; that the Plaintiff had known for years the manner in which the Bank kept the property of their customers deposited with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher.

At the close of the Plaintiff's case, the Counsel for the Defendant applied for a nonsuit on the ground that the Bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The Judge refused to stop the case, but reserved leave to the Defendant to move to enter a nonsuit. The Defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the Plaintiff's witnesses were the keeping in the strong room in which the Plaintiff's box with the debentures was placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the Bank; the good character of Fletcher, and his leaving the Bank in the end of the month of July, 1864; and that after Fletcher left, but before the loss of the Plaintiff's debentures was discovered, a rule was made in the Bank that two clerks instead of one (as formerly), should go with a customer wishing to examine his box in the strong room. The jury found a verdict for the Plaintiff upon an issue as to the delivery of the debentures to be kept by the Bank without reward, and also upon the plea of not guilty (which raised the question of negligence), and they assessed the damages at 10,450*l*.

The Defendant, upon the leave reserved at the trial, moved for, and obtained a rule from the Supreme Court to set aside the verdict and to enter a verdict for the Defendant or a judgment of

nonsuit. That rule was afterwards made absolute, the Chief Justice stating that "in the opinion of the Court the Defendant was entitled to a verdict, but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the Appeal, the Counsel for the Appellant, admitting that the Bank were gratuitous bailees, and therefore not responsible except for the highest degree of negligence usually styled "gross negligence," insisted that it was a question of fact for the Jury whether the Bank had been guilty of this species of negligence, and that the Judge would not have been justified at the close of the Plaintiff's case in withdrawing the question from the Jury and directing a non-suit, and that after the Defendant's case had been gone into, and the Jury had pronounced a verdict upon all the evidence on both sides, it was not competent to the Court to give a Judgment of nonsuit or to do more than to direct a new trial upon the question of negligence. The learned Counsel contended that the Bank had been guilty of negligence, because there being two iron doors with protecting locks to the strong room where the Plaintiff's debentures were, the cashier was permitted to keep both keys. And they urged that the Bank by their own act admitted that they had not been sufficiently careful, as after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice.

The first question to be considered is, whether the Supreme Court was right in directing a non-suit to be entered.

It was the duty of the Court to do what the Judge ought to have done at the trial; and if, at the close of the Plaintiff's case there was not evidence upon which the Jury could reasonably and properly find a verdict for him, the Judge ought to have directed a non-suit.

Formerly it used to be held, that if there were what was called a scintilla of evidence in support of a case, the Judge was bound to leave it to the Jury. But a course of recent decisions (most of which are referred to in the case of Ryder *v.* Wombwell

(4 Law Reports, Exch., p. 32), has established a more reasonable rule, viz., that in every case before the evidence is left to the Jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a Jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

If, therefore, the Plaintiff's evidence in this case was such that the Judge ought to have considered that it fell short of proving the Bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the Jury, and directed a non-suit.

But the Appellant's Counsel insisted, that as the Defendant at the trial did not rest upon his objection to the sufficiency of the Plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favourable to the Plaintiff, they might be used in answer to the application to the Court for a non-suit, upon the leave reserved at the close of the Plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the Counsel for the Respondent agreed that the Appellant's Counsel might be at liberty to use in argument any facts which they could extract from the Defendant's evidence in support of their case.

But it may be convenient to see how the Plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the Defendant's witnesses.

Did the Plaintiff, then, give any evidence of the Bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him?

From the time of Lord Holt's celebrated Judgment in Coggs *v.* Bernard, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last,

Lord Cranworth (then Baron Rolfe), in the case of Wilson *v.* Brett (11 Mee and Wels., 113), objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent Judges.

Of course, if intended as a definition, the expression "gross negligence" wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt, and Sir William Jones in his Essay on the Law of Bailments.

In the case of Grill *v.* General Iron Screw Collier Company (1 Law Reports, C.P. 612), Mr. Justice Willes, after agreeing with the dictum of Lord Cranworth, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in Beal *v.* the South Devon Railway Company (3 Hurlst and Colt, 337), said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the Defendant to use." It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Mr. J. Crompton, in delivering the opinion of the Court, said, "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and, he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence." Mr. J. Montagu Smith, in the case in which the above-mentioned observations of Mr. J. Willes were made, said, "The use of the term gross negligence is only one way of stating that less care

is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise, corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility.

In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguisable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the Judge to distinguish, as well as they can, degrees of things which run more or less into each other.

It is clear, according to the authorities, that the Bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs.

The case resembles very closely one that was mentioned by the Counsel for the Respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of Foster *et al.*, Executors, *v.* the Essex Bank, 17 Massachusetts Reports, 478. The Plaintiff in that case deposited with the Bank for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the Bank, and the Agent of the Plaintiff was in the habit of coming to the Bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the Plaintiff gave orders to the Bank (which he fre-

quently did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The Court, after argument, gave judgment for the Defendants. The Chief Justice, who delivered the opinion of the Court, entered fully into the law of bailments applicable to the case, holding that "as far as the Bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the Bank which could tend to increase its liability beyond the effect of such a contract." "That the Bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the Plaintiff's property as of other deposits, and of the property belonging to the Bank itself." And the Court held that the Bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the Plaintiff's gold from the cask they were not acting within the scope of their employment; "and the Bank was no more answerable for their act than it would have been if they 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."

Their Lordships entertain no doubt that it was the duty of the Judge at the close of the Plaintiff's case, upon the application of the Counsel for the Defendant, to have ordered a nonsuit, or if the Plaintiff refused to be nonsuited, to have directed the Jury to find a verdict for the Defendant, as there was an entire failure of evidence of the want of that ordinary care which the Bank was bound to bestow upon the Plaintiff's deposit.

But the Judge having refused to nonsuit, the Defendant thereupon went into his case and called witnesses, and having done so the Counsel for the Appellants contend that there being evidence on

both sides the question could not be withdrawn from the jury, and that as the Judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the Judge could not have nonsuited the Plaintiff after the Defendant had entered upon his case, as it was decided in the case of Davis *v.* Hardy (6 B. and Cr., 225), that the evidence given by a Defendant may be used for the purpose of a nonsuit.

The Defendant's evidence added to the Plaintiff's case the important fact that in the strong room in which the Plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities, and specie, the property of the Bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in Doorman *v.* Jenkins (2 A. and E., 256), where Lord Denman told them that "it did not follow from the Defendant's having lost his own money at the same time as the Plaintiff's, that he had taken such care of the Plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence."

No one can fairly say that the means employed for the protection of the property of the Bank and of the Plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the Appellant's Counsel insisted that the fact appearing for the first time in the Defendant's case, that the Bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argu-

ment goes the length of contending that if a gratuitous depositary does not multiply his precautions, so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence.

Their Lordships are clearly of opinion that the Plaintiff failed upon his own evidence to prove a case of negligence against the Bank, and that the evidence produced by the Defendant showed more strongly the absence of any such negligence for which they would have been liable. They will, therefore, recommend to Her Majesty that the Judgment appealed from be affirmed, and the Appeal dismissed with costs.

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