sentence of deprivation against him, and the fee full of another who acted *de facto;* and there cannot be two bishops of a diocese, and the sentence of deprivation was set aside as void; yet it was resolved, that all institutions and inductions, &c. by the colourable bishop were good, as if done by a rightful one; and shall not the same reason hold here? Another case, stronger rather than this, is that of 1 Leon. 288, cited at the Bar; my *Lord Darcy's case*, who being lord of a manor, made a steward, with power to make a deputy; and the steward, instead of making a deputy, sends his servant to hold the court, and in that court a surrender was made; and though it was said there, that a subsequent act of the lord's amounted to a confirmation, it could not avail as such, if there were no copyhold tenant before, and in by surrender and admittance. *Vide* 4 Co. 25. And if it works by way of confirmation, it must have wrought upon the estate granted by the surrender to the servant; and yet that surrender was not at any real court, nor could the lord's subsequent agreement amount to a grant, and he is copyhold tenant no otherwise than by the surrender to the servant; and surely if a servant may hold a court to take a surrender, he may take one out of court, and the lord's consent after could only make it undefeasible, but not give a being to his estate.

CASE 796. LANE *against* SIR ROBERT COTTON.

[Referred to, *Mersey Docks* v. *Gibbs*, 1866, L. R. 1 H. L. 111; 11 H. L. C. 712; *Bennett* v. *Bayes*, 1860, 29 L. J. Ex. 227. *Bainbridge* v. *Postmaster-General* [1906], 1 K. B. 186.]

The post-master general is not liable to an action for the recovery of Exchequer-bills contained in a letter and delivered to a clerk at the post-office, and lost from the office (*a*).—S. C. 5 Mod. 455. S. C. Salk. 17, 143. S. C. Comy. Rep. 100. S. C. Carth. 487. S. C. 11 Mod. 12. S. C. Holt, 582. S. C. 1 Ld. Ray. 646.

In an action on the case the plaintiff declared, reciting the statute of 12 Car. 2, c. 35, by which one general post-office, and one general post-master are erected, for the sending of letters all over the three kingdoms, &c. and also the Statute of Jac. 2, c. , and that Sir Robert Cotton was made post-master by letters patent of the fifth of May, in the third year of William and Mary, pursuant to the said Act of 12 Car. 2, by which the said master has power to make deputy and deputies, and other officers and servants under them, as they shall think fit; that the **[473]** said master by these patents is to obey such rules and orders as shall be given him by the King under the sign manual; and as to the revenues of the office, the master is to observe the order and direction of the Lords of the Treasury; and in the said letters patent the King covenants, that he shall be only answerable for such miscarriage and neglect as shall be his own, and not for that of any other body; and for the executing of this office an annuity of fifteen hundred pounds a-year is granted him out of the profits of the office: that the plaintiff being possessed of eight Exchequer-bills in London did inclose them in a letter, directed to one Jones, a goldsmith in Worcester, and delivered the said letter, with the bills so inclosed, to one B. then an officer under the defendant, duly elected to take in, and deliver out, letters at the office in London, to be sent according to the direction; that this B. received his salary by the hands of the receiver-general; and that the said letter, being so delivered to him, was taken out of the office of London, by an unknown hand, and lost.

The question was, whether an action lay against the post-master, or not?

It was argued *for the plaintiff*, the office of post-master was an antient common-law office, but exerciseable by any, and as many as would take it upon themselves; against whom any person had his remedy for any damage that happened through their default; this was the law before the said statute, whereby one general post-master

(*a*) It has also been decided, that an action will not lie against the post-master general for a bank-note stolen by one of the sorters out of a letter delivered into the post-office, *Whitfeld* v. *Lord le Despencer*, Cowp. 754.

is appointed, but not by way of creating a new office, but making one public office of all the prior private ones. And the end proposed by the Parliament in so doing, as the Act tells us, was a more speedy and safe conveyance of letters. So that this being an antient common-law office, ought to be governed by the same law with other common law offices; and therefore the posts, whether private or public, are to be considered as common carriers of small packets; and consequently liable to make satisfaction for miscarriages, as other common carriers. And that the statute meant to make them liable, appears by its saying the office is made public for greater safety: and since before, the party that sent letters by a private post had the security of an action against him if he miscarried, of necessity that remedy still continues in like manner against the post-master general, or else the preamble of the statute were false. By the second section of the statute it is ordained, there should be one master, or general officer, who from time to time should have the sending of all letters and packets, &c. to **[474]** their several addresses; from whence I infer, first, that *all* letters are to be sent by him. Secondly, that he is an officer. By the eighth section, none but the master general, or his deputy, is to receive or carry letters by the sea or land, or hire horses or boats for that purpose; the Act does not say that none shall carry letters but the master, or other officer put under him by the King; but, by *him* authorised. *Vide* s. 2 and 10. By the fifteenth section he is bound to find post-horses, under pain of five pounds for every failure; which shews that he is to answer for his under-officers; and in the letters patent, whereby the defendant is nominated, there is a covenant from the King, that the defendant shall not answer for the default of any but his own; which shews, he apprehended himself liable for those of his officers, and therefore provided against it by the covenant. And it is no reason to say, that the under-officers are the King's servants, and not his, because the King, and not he, pays them; for that is not so by the Act of Parliament, but only by a private agreement between the King and him; and such agreement cannot deprive the subject of a benefit which the law gives him. The sheriff, who by law is obliged to take upon him his office, is answerable for the miscarriages of his under officers; *à fortiori* in this case, where one is not compellable to take the office upon him; and it is for this reason that a grant of the office of a county clerk by the King is void. 4 Co. 32. Then there is a manifest neglect in the defendant; for by the statute, the master and his servants are to send letters and packets to their directions; and it is part of the case, that the letter in question was delivered to the person appointed to receive letters in the office, which is the same thing as if it were delivered to the defendant himself; and his duty was to send it, wherein he failed; for it is agreed it was taken by a stranger out of the office. Besides, the letter was given to be sent, and he received it so; and his receiving to send, was to send safely, according to *Southcoat's case*, 4 Co. And it is upon this reason, that all tradesmen are obliged to do things carefully and skilfully; and if they fail therein, case will lie against them; for the very taking upon them to do it is a taking to do it carefully and well: and if it be so in every private person's case, *à fortiori* it will be so in the case of a public officer, whom one is compellable to use. And upon this reason also it is, that **[475]** case lies against a sheriff for the escape suffered by his bailiff; much a harder case than the present. By the same reason the defendant, having taken upon himself this office, has also taken upon himself to do it carefully; but instead of that, the letter is taken away in the very office, where none could come without his leave. And if this be through the neglect of him, or his servants, he ought to answer for it; like the case of an inn-keeper, who shall answer for his servant's neglect. It is objected, the King has all the revenue of the office, and the master but a salary insufficient to answer casualties of this kind. *Answer.* It was his folly to take the office upon those terms. And this is a stronger case against them than that of Ray. 202, for here it does not appear that any trick was used to get the letter from them, or that they used convenient care. If the master be not liable to our action, we have an injury done us and no remedy for it: we have it not against the King, for he is only to nominate this officer; and the under-officers are only servants, and accountable to their master only. And then the consequence would be very dangerous both to the King and subject: for by the Act none can send letters by any private post; and if one cannot send his letters but by one hand, and that he may with

impunity embezzle all letters, farewel to all trade and commerce, one of whose chief supports is correspondence by letters; and what can be more fatal to the revenue than a decay of trade?

It was argued *on the other side*,

First, that *Exchequer-bills* were not such things as the post-master was, by the duty of his office, obliged to take in.

Secondly, that by the Act he is not bound to make satisfaction for every particular man's loss in the things within the extent of his office.

Thirdly, that in this case he is not answerable.

The first depends on the construction of the statute, what it intends to be sent by post; and the statute intended a maintaining of correspondence at home and abroad; and that by carrying of letters, not goods or money, for that is not necessary for mutual correspondence. Indeed, whatever thing, by the intent of the statute, is within the office of the post-master, is not to be done by any other; but without doubt any other may carry money or goods, without offence against the statute; *ergo* such things are not within the extent of the post-master's office; and a carrier may carry a letter along with goods. Now Exchequer **[476]** bills are of the same nature with money, and current as such; and by consequence may be sent with a letter by a carrier: *ergo* not within the duty or extent of the post-master's office; and one may as well say the post-master is bound to send jewels. And it would be a hard construction that the master should carry Exchequer-bills, for these reasons. First, he must send his packets by day and night, for the speed required by the statute. Secondly, he must trust boys and indigent people, whose poverty will make them obnoxious to temptation; for none of substance or ability to give security will undergo such slavery. Thirdly, it is impossible for him to send sufficient guard, from the smallness of the *præmium*, the dispatch they must go with, and incertainty of wind and weather: therefore, from the nature of the thing, the Parliament intended the office for such things as in their nature might be sent with speed and safety, which Exchequer bills, being current as money, are not. There is a clause in the statute which shews it intended not that things of value should be sent by the posts; for it says such things might be sent by messengers; and bills of exchange are the only things which may seem of value that it mentions might be sent by it: but the reason of that is, because, first, it was very convenient for trade. Secondly, there was no danger in it; for when this statute was made, bills of exchange were payable to a third person, or order, and if they were foreign bills, there were letters of advice; so there was no temptation of stealing them, and by consequence no danger.

Secondly, if we consider the smallness of the *præmium*, we find it bears no proportion with the risque he would run if he were liable for miscarriages; which is a demonstration the Parliament did not intend he should; for they do not proportion the *præmium* according to the value of the thing sent, but according to the weight and distance of place. And there is a clause, that the price should not be enhanced upon account of bills of exchange; which plainly shews they did not intend he should answer for a miscarriage of them. The statute impowers him to appoint agents and deputies all over the world; and the argument used would make him liable for the miscarriages of them. And such construction would destroy the office itself. There is no comparison between the office of carrier and this: a carrier is not bound to travel but by day, and if he be robbed he has his remedy over. He himself may travel **[477]** with his waggon in person. If a thing of value be sent, he may make his own price, according to the risque he runs; whereas the post must travel by night, trust deputies, has no remedy over if he be robbed by night, and cannot insist upon a price, but what is cut out by the statute. This is not like the case of a master of a ship, who is answerable to the owners for damage done by the seamen to their goods; because, first, he is there in person, to see and correct what is amiss. Secondly, that is upon a particular contract between him and the owner, according to the maritime law; and he may choose whether he will go or not, if he does not like his reward; but in our case, one may send one thousand pounds worth of Exchequer-bills, and the master know nothing of it. Nor is it like the case of a sheriff, who though liable to serve against his will, yet must answer for escapes of his officer. For, first, he is answerable only for the affairs of one county. Secondly, he may raise the *posse com.* to secure his prisoners.

Thirdly, this letter was taken out by an unknown person, and that must be understood to have been forcibly and against our will; and if so, we would not be answerable, no more than a factor would be to his principal for what he is robbed of.

And Turton, Powis, and Gould, Justices, were of opinion that the action did not lie against the master, because this was not like common-law offices, in which the superior answers for the inferiors as his servants; but this was an office newly created by Act of Parliament;

And, as Gould, Justice, called it, founded in Government, that is, in which each had a distinct branch to exercise; yet with subordination and dependancy on the chief master, but not as servants, but by the very constitution and erection of the office; and this by Act of Parliament, to which every one is consenting; and he said, every one of these, in his own peculiar station, was as much an officer *pro tempore* as the master; and compared it to a corporation, in which the head is over the rest, yet not answerable for the miscarriage of an inferior member. 1 Edw. 5, 5.

And Turton, Justice, and he agreed, that Exchequer bills were not things proper to be sent by post; and they also all agreed the reasons before offered for the defendant.

But Powis, Justice, held, there were sufficient words in the Act to comprehend Exchequer-bills.

Holt, Chief Justice, *cont.* argued thus: Notwithstanding what has been said at the Bar by Mr. Attorney, (since Chief Justice of the Common Pleas), **[478]** my brother Wright (since Lord Keeper), and Cowper, King's Counsel, and by my three brothers on the Bench, I am of opinion that the plaintiff ought to have judgment.

This case is comprehended in a narrow compass. Before I give my reasons, it will be proper to observe upon what points I go and insist on. And for that it is to be considered, that it is no part of the question here, whether if a letter be put into the post, and sent safely out, and the mail on the road is robbed, or some other mischance happen whereby the letter is lost; whether, I say, the post-master be liable in that case is not the question now, for that is merely foreign, and deserves a separate consideration. But as this case stands now before us, where a letter is delivered to the proper officer in his office in London, and there lost in the very office, though no diversity has been taken between these two cases, either at Bar or the Bench, yet I think them different. There is reason the master should answer for the miscarriage of any letter or packet that is lost in the office, though not actually delivered to him, but to his servant; because by the constitution of the office he is entrusted with the profit and interest of the subject; and a trust is reposed in him, for the discharge of which he has a certain duty or salary. He is made a public officer by Act of Parliament, "that there shall be one general post-master." And it is plain the statute designed this for the benefit of the subject, as appears by the preamble thereof; and this was a matter of general concern for trade and commerce, and to the end that speed and safe dispatch should be had of letters and packets which, in the judgment of the Parliament, was more likely to be had, by making one general office and officer; so it appears to have been done for the more benefit and safety of the subject. Secondly, this office is fixed at London, which is the center of business, from which all letters are sent, and all letters are to come, so there is a certain place settled where this office is to be. Thirdly, it is an office of care, and that care is committed to the post-master, that none but he, his deputy or servant, &c. is to take, receive, or send any letter, except such as may be sent by the carrier, coach, &c. as the Act directs. So there is one man set up, and all the rest to be his deputies or servants; so that, from the nature of the trust, he is bound to keep safely in his office all letters and packets delivered in there at his peril, because it is a trust **[479]** reposed in him by Act of Parliament, that is by law. This office is not at all distinguishable from that of marshal of this Court, or of warden of the Fleet, who are entrusted with such offices by common law; and it is no excuse for them to say that their prisons were opened by unknown persons, though it be by people in open rebellion, as in the case of 23 Hen. 6, 1, the case of *The Duke of Norfolk*; and the reason is, because it is a trust by law in a public officer, and it being done under a Government in which it is supposed he may have a remedy over, at least such remedy as the law allows, though the wrong was by persons in open rebellion; and there it was held, that debt lay

against the gaoler for such an escape upon the statute of 2 Rich. 2. This was the case at common law, where a *capias* only lay for damages in trespass, but not for any action of debt, till 25 Edw. 3, c. 17. 3 Co. 12. And upon this subsequent Act, which gives *capias* in debt upon a judgment in it, if the sheriff suffer one in execution on such *capias* to escape, debt will lie against him for it; though at common law, which made sheriff liable for escape, where *capias* then lay, no such proeess as a *capias* on a judgment in debt was known: and he is as much bound to keep those that are in for debt since that statute, as those who were in for damages in trespass before; and so is the law upon a *levari facias*. By the Statute of Westminster the Second, c. 18, an *elegit* is given; and if sheriff take goods upon an *elegit*, he shall be liable to answer for them, if they are rescued, as if they had been taken upon the common-law process of *levari facias*. Upon the Statute of 13 Edw. 3, de Mercatoribus, the sheriff is liable for goods which he takes in execution by *extendi facias*, by consequence of law merely, for such a thing was not before that statute. Then what difference can be made between the marshal of this Court and warden of the Fleet, and this officer? for the master is to keep the letters safe till he sends them out, as the gaoler is to keep his prisoners till they are legally discharged out of his custody.

Another reason why the master should be liable here is, because the subjects pay a reward for keeping and sending away their letters, and this reward is paid to one who makes it his business and employment to take and send letters and packets delivered to him; and wherever a man takes upon himself the exercise of an office, the exercise whereof is for the benefit and advantage of the public, and takes a reward for the same, he shall be answerable at law for any **[480]** harm the subjects receive by his ill administration of that office or employment, and for all events and chances, even from thieves and like malefactors, 2 Cro. 188. If goods be left with an innkeeper by one who is no guest or traveller, and they are lost, he shall not answer for them, because he has no benefit for the keeping, and it is not his employment to keep such; but if a horse be left in his stable, and he is lost, he shall answer for it, because he receives profit thereby, arising from the meat consumed by the horse. And Hob. 80, in the action against the hoyman, which is the first of the kind to be met with in books, is upon that reason, because he had a hire for it.

My brother Gould says, This is an office founded in Government: if he means that it is an office created and framed by law, he ought to make a quite contrary conclusion; for so is the office of a marshal, and yet he shall answer for escapes: and should not it be so too in case of an officer created by Act of Parliament? for the one and the other are by law, the one and the other for the benefit of the subject; in the one case, the prisoners to be kept for their benefit to have their debts paid; in the other, that their letters be safely kept and sent away with speed; and why then should the officer in one case be answerable to the subject for his neglect or default, and not in the other? And since then he is entrusted with this office for the benefit and advantage of the subject, whatever consequential damage befalls the subject through his neglect, he ought to answer for it.

Another reason of Brother Gould against the action was, that if it did lie, it must be upon a contract express or implied; and truly I do not think that, but that he is chargeable by the law and the nature of his office.

Another objection was, that the reward does not go to the defendant. Whoever gives a reward to have a thing done for him, ought to have a remedy if the thing be not done; and when a reward is given to an officer of public trust, that intitles the party to a remedy if he be grieved through neglect, or other default of such officer: and if he ought to have such remedy, surely it must be against him who received his reward. And is fifteen hundred pounds a-year so small a *præmium* as not to encourage those that enjoy it to be more diligent in the execution of their office, so at least as to suffer no neglect within the very walls of the office, as it was here? And though all the salary or revenue of the office goes not to the defendant, yet his salary is to be paid out of the revenue of the office. **[481]** And there is no diversity between this case and the case of *Mosse and Slew* (*a*), which was thus: Goods to be

(*a*) In the King's Bench in Hilary term, 24 Car. 2, but entered Mich. term, 23 Car. 2, Roll 421. Reported 3 Keb. 72, 112, 135. 1 Vent. 190, 238. Raym. 220. 1 Mod. 85. 2 Lev. 69. 2 Keb. 866.

transported to foreign parts were shipped in the river Thames; and there were a competent number of men on board for sailing the ship, but they were in the river overpowered and robbed; and the question was, whether an action would lie against the master of the ship? And at a trial at Bar the special matter was found, and in arrest of judgment this very exeeption was taken to excuse the master, that he did not receive the hire, but the owners did, and the master had only a salary from them. But it was resolved against him, first, because he was a public officer: secondly, because his salary was part of the hire, and did arise for the care and diligence that ought to be taken for the safe custody of the goods. And so here the post-master is a public offieer, and he has a salary from the profits of the office. My brothers have taken a difference between the two cases; for that in the case of the master of a ship he might have taken precaution, which post-master cannot use. But what caution could there be used in one case and not in the other? It is true, it is said in that case, that if the owners of the goods had brought them before such time as was convenient before the ship was ready to sail, he might refuse to receive them; and that may be: and it is so in the case of a carrier; if goods be brought to his inn before the convenient time for him to be gone, he may refuse to take them; but in both cases, if one whom they entrust to receive goods before such convenient time receive goods, and they be lost, the carrier shall answer for them, and so shall the master. But no man shall by law justify to deny the duty of his office, for there is a perpetual obligation upon them to keep the things to them committed, till they have discharged their trust; and when they have done, and no sooner, are they discharged. This case is within the same reason of justice and equity of law upon which all actions of this nature are brought; and it has all the ingredients whereby one is made responsible in like cases for negligent keeping of goods; for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular **[482]** default in them, they having such opportunity as they have by the trust reposed in them to cheat all people, they would be so apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. And this is the reason of the civil law in this case, which though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all Governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things (*a*). And all this may be, though the common law be time out of mind. And it is to be doubted that there was intelligence given here, that there were Chequer-bills in this letter, otherwise it is improbable this letter should be singled out from all the rest. I do not here arraign the integrity of the gentlemen that manage the office, but we must here consider the whole mass of mankind; and though these are worthy persons, yet bad may succeed them, who may search and open men's letters, and none be the wiser, or able to fix it upon them; being transacted in their own office, and lying only in the offender's privity, who thus may with impunity abuse the trust reposed in him. And a common carrier, or innkeeper, or master of a ship, must have answered. And in the case of *Mosse* v. *Slew*, it appeared the defendant was guilty of no particular default, for a power came upon him and robbed him; but surely more care might have been taken in this case, for if Breese had done his duty, the bill could not have been taken out of the letter in the office. And the diversity between the case of a common carrier and this, upon account of the carrier's having a remedy against the hundred if he be robbed, it is

(*a*) See Justinian's Institutes, Book 4, title De Lege, 5.

none at all in the reason of the thing; for before that remedy was given, which was only by the Statute of Win-**[483]**-chester, the action did lie against him; and yet he had no remedy but against the robbers, if he could catch them, and the master has the like remedy here: and even now they are without remedy in some cases upon the Statute of Stannaries, other than against the thief or wrong-doer. As to the case of an inn-keeper, this diversity is offered between it and this; for that it is within his house, which is his castle, and he may make his servants watch all night; but surely they do not consider that these bills were lost within the walls of the office in Lombard-Street, which is likewise the defendant's castle, and that he may keep his servants up all night if he pleases: and the care in keeping up his servants to watch, if notwithstanding that a misfortune should happen, ought rather to discharge than to charge him; and therefore no more reason the one should be bound than the other. The case of the innkeeper is much a stronger case, for he is bound to receive all manner of people into his house till it be full, but the post-master need let none into his office but such as he pleases. As to the case of *Herbert* v. *Page* (*a*), an action brought against him for suffering a rasure to be made in a record in his custody, and it was thought *prima facie* the action lay; but on better consideration, inasmuch as it appeared that he had not the sole custody of them, but that strangers of right had access to them without his permission, the plaintiff was barred: but here the post-master had the sole custody, and nobody had liberty to come into the office without his leave. I am apprehensive here some may think I would carry this point farther than I have already declared, by comparing it to the carrier's case; and that by the same reason an action would lie if the letter had been lost upon the road. But I do not mean any such thing, for I would not give any opinion either the one way nor the other in that case, for it is a thing that probably may come in question hereafter: but let that be as it will, there is a difference between that case and the present, for the carrier receives the goods to carry safely, and the post-master the letter to send safely, and those are the words of the Act; and I wonder no diversity has been taken between the case of a letter lost in the office and lost on the road, being sent safe out of the office, for there seems to be a great deal of difference; and it maybe a question, upon the **[484]** words of the statute, whether when the master sends the letter safely away he be not discharged? Suppose then he was not chargeable in case of a robbery on the road, it will not follow from thence that he is not bound to keep a letter safe in the office. And in the case of *Mosse* v. *Slew*, if the ship had been robbed at sea, the master had not been answerable, yet he was chargeable at land; so here, though he may not be chargeable for a robbery on the road, he may for a loss in the office. If a man bring a horse to an inn, and desire the master to put him into a stable till it cools, and then send him to grass; if the horse be stole before he sends him to grass, he shall answer for him; though if he had sent him to grass pursuant to the owner's desire, he would not be answerable; and so he shall be chargeable till he has performed the trust reposed in him, and as soon as he has performed it he shall be discharged. So here perhaps, if the letter had been sent away safe out of the office, he had performed his trust, and had been discharged; yet it will lie as the case is, where he has not performed his trust by safely sending it out.

Then by the duty of his office he is to take Chequer-bills, though this has been denied by Mr. Attorney and my two brothers; but it is his duty to receive them for these reasons: first, by the words of the Act he is to receive any "letter, packet, or thing proper to be sent by post." Secondly, this is a thing proper to be sent by post. As to the first, where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see Kelway 50. If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade (*a*). If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against

(*a*) Sid.

(*a*) Keilwood, 50, pl. 4.

him (*b*), and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported. And why should not an action lie against a post-master here, if he should refuse to take in a letter, or **[485]** any other thing proper to be sent by post? and doubtless an action would lie in that case. If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public. Surely then where it is a public employment created by law, the obligation is the greater; as if the sheriff refuse a writ, an action will lie against him, because the law charges him with an employment for the conveniency and good of the public; so here the law, viz. an Act of Parliament, charges the post-master with an employment for the good and convenience of the public; therefore the reason is the same. As to the second, these Chequer-bills are proper to be sent by the post, for the Act does not confine what things are to be sent, but leaves it very general; it does not mention any species, but any letter or packet whatsoever; then it is plain the Act meant other things than letters or packets of letters should be sent, for the prices are different, for there is so much a sheet for letters, and so much an ounce for other things, as packets of writs, deeds, or other things; which words are as general as may be: so the priees are varied from that for letters, and any thing whatsoever that may be sent by post. And all things, which by their nature may be sent with dispatch, and without danger of hurting the horses, are proper to be sent by post, of what nature soever they be; and nothing can be more portable than Chequer-bills, for a small packet of them may contain to the value of ten thousand pounds.

It is objected, that they ought not to be sent by post, because they are new things, created long after the Act for erecting the post-office.

I answer, they are within the reason of other things which were *in esse*, and within the Act when it was made 4 Co. 4 a. b. No agreement made before or after marriage barred a woman of her dower, though she accepted what was agreed on after the death of the husband; but the statute of 27 Hen. 8, c. 10, makes estates for life of the wife, to take immediately after the death of her husband, to be a bar of dower, if it be made in satisfaction of her dower. And at the time of making that Act, no land of freehold or inheritance was devisable but by special custom; and after by the statute of 32 Hen. 8, they are made devisable. If such husband, whose wife is entitled to dower, devise land to her in satisfaction of dower, and she accept of it after his **[486]** death, though it be a thing not known or *in esse*, at the time of making the statute of 27 Hen. 8, that makes a jointure a bar of dower; yet being within the same reason with other jointures mentioned in that statute, it is judged to be a jointure within it. And by the same reason, if Chequer-bills be as proper to be sent by post as other things that were in being at the making of the statute of 12 Car. 2, though Chequer-bills were not then known, yet they shall be within the same reason, and the post as much bound to take and send them as any other thing whatsoever. Another instance of the like is in the same case in 4 Co. by the Statute of Marlbridge, made the 52 Hen. 3. A man seised in fee, infeoffing his son and heir to defraud the lord of his wardship, the feoffment is made void as to the lord. And by 1 Rich. 3, c. , *cestuy que use* has power to make a feoffment of the land out of which the use arises; by 4 Hen. 4, c. , the heir of *cestuy que use* shall be in ward; and if, since that statute, *cestuy que use* make a feoffment by virtue of 1 Rich. 3, c. , to his son and heir, it shall be void by the Statute of Marlbridge, made two hundred years before; and it will be as good an argument to say, that if one come by the Chequer-bill of another unlawfully, that trover will not lie for it, for that they are new things; as that they shall not be sent by post, because they are new things. But when an Act of Parliament creates a new interest, it shall be governed by the same law that like interests have been governed before.

It has been objected at the Bar, that the post-master is not bound to answer, first, for bills of exchange payable "to bearer;" because it was the party's folly to make them so payable. Secondly, he is not liable for the loss of them, though made

(*b*) Dyer, 158. Godb. 346. Moor, 432. 1 Vent. 333. 3 Bl. Com. 165, 166.

payable the ordinary way, viz. "to such a man or order," because he is to have nothing for them as such, no hire or postage. As to the first, a bill of exchange payable to bearer is lawful; and it is prudence in any man that has a mind to negotiate a bill of exchange, to get it drawn in that form, for then it needs no indorsement, and by consequence, if he does negotiate it, shall not be chargeable; whereas, if it were made payable to one or order, for every negotiation there must be a new indorsement, and every indorsor is become liable *in infinitum*. And all bills, without exception, are to be sent by post, and this sort of bills, being lawful, may therefore be sent.

[487] But they pay no reward for sending or carrying them; therefore the post-master ought not to answer for a miscarriage of them.

Answer. Whoever writes or sends a letter with a bill of exchange in it, it shall be intended that the letter was writ and sent for the sake of the bill, and therefore though the post do not receive an immediate direct reward for the bill, yet it receives a mediate consequential one; as in the case of an innkeeper, a passenger pays nothing for the keeping of his goods in the inn, but pays only for his victuals and lodgings, and the reward which he pays for his victuals and lodgings intitles him to an action for the loss of his goods. Besides, Chequer-bills are not exempt from paying; and without doubt if a man sends a great packet or bundle of them, he is bound to pay according to the bulk of his packet. But suppose nothing were due for Chequer-bills, no more than to a sheriff for executing a writ of execution; yet if the goods so taken in execution be lost, he shall answer for them, he being a public officer for that purpose. And there never was an instance, that an officer intrusted by law with the goods of a subject, but that, if he lose them, the officer by consequence of law was liable for them. And *Southcot's case* (*a*) is very strong, though, by the by, that case, as reported there, is not all law; but where there is a special undertaking to keep the goods. For if there be but a general bailment, and a general acceptance, and so the matter left to a construction of law thereupon, how the goods shall be kept; the law will make construction, you should keep them as you do your own: but where there is a special acceptance to keep them safely, there, at your peril, you are bound by your special acceptance to keep them safe, though you have no reward, and that you are not compellable by law to take them; which is stronger than our case (*b*). But when goods are given to an officer of law, surely there it must be intended that they are to be safely kept; and therefore he shall be charged. And I do not think there can be a case put, where a public officer, or his deputy, was ever discharged in case against him for a miscarriage in them for goods, or other things, lost through their neglect.

Another reason to charge the defendant is, because before the statute of 12 Car. 2, the subject had liberty to send his packet by any other post-master he pleased, of which there were many in those days; it being then lawful **[488]** for any man to set up such an office. And if such, as had set up such an office then, had been robbed, the subject would have had his action, and recover against them, as much as against a common carrier; and this is admitted by the other side. So it is very reasonable, that those that take it now should take it upon the same terms it then stood; and the office is not new, but only, that instead of being exercised by many before, it is now exercised only by one; and all persons by this Act are forbid to use any other post, or to send by any but by this one that is to be by letters patent under the Great Seal. And the post-master was, as I said, chargeable at common law before, and the employment is now the same that it was then, only that of being exercised by one person; therefore every thing that was incident to it then remains so still. And since the subject is deprived of his election of trusting whom he pleased with his letter, surely to compel him to send by one against whom he should have no remedy, would be the most unreasonable thing in the world, and the most unjust construction upon the statute.

It was objected at the Bar, that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might any body else on whom they could fix that fact; but for a neglect in him they

(*a*) 4 Co. 83.

(*b*) And note, this case is better reported in Cro. Eliz. 816.—*Note to former Edition.*

can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or prineipal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it (*a*); but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer, or rescuer; and it will lie against any other that will rescue in like manner; and for this diversity *vide* 1 Leon. 146. 3 Cro. 175, 143. 41 Ed. 3, 12. 1 Ro. 78, which is not well reported, but the inference may be well made from it.

And here the defendant hath the power in him to manage the office by himself, his deputy or servant; and every deputy or servant is by him that puts him in, and therefore he ought to answer for him; and the reason why a **[489]** principal shall answer for his deputy is, because as he, as principal, has power to put him in, so he has power to put him out, without shewing any cause; and that, though he had expressly given him an estate for life in the deputation. *Vide* Hob. 13. Mo. 856. 39 H. 6, 34. And a deputy or servant may bring a greater mischief than this comes to upon his principal; for if one has an office of inheritance, in its nature forfeitable for such and such offences, or misdemeanors, and he puts in a deputy who commits such acts as would be a forfeiture in the principal if he had done them, he shall forfeit the office for his principal. 39 H. 6, 34.

The case in Dy. 238, to my great wonder has been quoted by my brother Gould as an authority for him, for it is directly against him; by the 3 Hen. 6, c. 3, any customer that shall conceal any of the King's customs due for merchandize, shall forfeit treble the value of the merchandize; and by the statute of 1 Eliz. c. 11, the customer of any port may make a deputy for the customs of any creek belonging to that port; and a deputy so appointed had concealed the custom, and the principal, ignorant of this fraud, certifies his account into the Exchequer, without taking notice of this fraud, or the custom due for the concealment; and an action brought against the principal, and adjudged it lay; and what is the reason thereof, but because the principal shall answer for his deputy? And where it is said, that the deputies of the post-master by the Act have power to make deputies, and they are to have servants, who are to act under them, that makes no matter, for the principal shall answer for all the neglects, not only of the deputies he makes, but also of that deputy's deputy and servants, and so down; for he shall be answerable for every act of them, that shall tend to the prejudice of another in their deputation. But that is not this case; for Breese, in this case, through whose neglect this letter has been lost, was immediately put in by the defendant himself; though if it were by his deputy or servant, it had been the same.

My brother Powis says, they are all fellow-servants; that is, the post-master and letter-carrier, beeause they all receive their salaries from the King, though retained and put in by the defendant; and compares them to a steward and servants of a nobleman's house. But I answer, that they are paid by the King as deputies and servants of the defendant; and there is no diversity but in the manner of paying **[490]** them, for they are under the command of the defendant, and to act according as he directs; and it was intended by the Act, that he should pay all his servants out of his salary; and if he agree with the King to have so much clear for himself, and that the King shall pay his servants, they are no less his servants because the King pays them; and if they be not his servants, what becomes of the defendant, who is by the Act to manage the office by him and his deputy, and servants? And if he let people manage it who are not his servants, and over whom he has no power, and they imbezil goods or other things, surely the defendant shall answer for it, for he does not manage the office as the statute directs; and his letting people in that

(*a*) See the case of *Stone* v. *Cartwright*, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal; but the principal, or those actually employed, are only liable. 6 Term Rep. 411.

are mere strangers, that ought not to be there at all, shall not excuse him from negleet or other mischance.

But now my brother has found out a better employment for him, and compares him to a captain, and his deputies and servants to the soldiers of a company, and as the captain shall not answer for the valour and courage of his soldiers, so neither shall he for the care and diligence of his servants. I am of opinion, that if any particular person suffer a particular prejudice by the want of courage of a soldier, whom the captain takes in by his own eleetion, he shall have an action against the captain for it; but that is not the case: for where a trust is put in one person, and another, whose interest is intrusted to him, is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified. And the case of a master of a ship is much more like that of a captain than the present; and yet he shall answer for the neglect of his seamen, and it is not his captainship will save him; and he shall answer for a robbery eommitted on him on land, and for neglect of his men at sea; though he shall not be answerable for a robbery on the sea.

And it seems plain to me the Act intended he should be answerable for all the letters and packets they should reeeive, and for the default of their servants. For first, it has given the whole power and government of the office to the master-general; and as this care is delivered to him, so nobody is to intermeddle but he, and such as he shall intrust; and if this Act were said to create this office as a new office, notwithstanding the action would lie; for when an Act erects a new office for the benefit of the subject, under the same circumstances with other offices, in which the **[491]** subject has an interest, in respect whereof the person exercising them would be liable to an action for the default of his servant, it must be presumed the Act designed the new officer should be liable; for why else should they make it so like in reason? And in this case he is intrusted with the interest of the subject as much as the sheriff, or other officer of justice is; and the Act directs the letters should be sent with safe dispatch; and who is to do that but the post-master?

Further it appears, that it was the design of the statute, that he should be answerable for the default of his deputy; and for that consider these two clauses. First, "that the post-master and his deputies, and no other, should find horses; and if through default of post-master, any person shall fail of getting horses, in all such cases the master shall forfeit five pounds." Consider the words, "And if through default of *the master*," not of his *deputy;* which shews they intended, that if any fault be, that it shall be reckoned that of the master. For if one that rides post cannot be furnished with horses, who shall forfeit the five pounds for every default? The master, and not the deputy; and then surely the default of the deputy is the default of the master; and this appears plainly by this branch of the Act.

It is objected, that this will ruin the office. But I think the contrary; and that it will be the means to have the office well kept; and will make them more careful to do their duty, and to discharge the trust reposed in them. But it is objected, that one may choose whether he will send his letter by post or not, for he may send a messenger of his own; and that is true; yet it is no excuse for the defendant; for if there be several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper. So here, the plaintiff had election to send by the post or messenger; and if he send by post, and that there is default in him, he shall have his action. And he cannot send by the messenger with speed, as by the post; and speed was one of the benefits designed by the statute to the subject; and it took away the advantage he had of sending by a speedy messenger before, and so would put him in a worse condition, which never was the intent of the Act; and as to the smallness of the *prœmium*, there is nothing in that, for the law thinks it a reasonable reward; and if one do not like the conditions of an office, he may let it alone.

[492] Then as to the clause in the patent, that the defendant should not be answerable for any neglect, but his own immediate neglect; it must be intended only in relation to the management of the revenue, for which they are to account to the Lord Treasurer, or to be against law; for it is not a grant by letters patent, that shall

deprive the subject of the benefit given by the Act; for the post-master is to act according to the statute, and not according to the letters patent. And where it is said, that they shall from time to time observe such directions as are sent to him under the sign manual; if any ill consequence happen by such an observation, they are not excused; I say then, that this clause, that they shall not answer for miscarriage of servants, or any but their own, may have this effect, to exempt them from any mismanagement of the revenue of the office; because that being the King's, he may order that as he pleases. But that clause in a patent shall never deprive the subject of his benefit ordained for him by the statute, though it were with a *non obstante*, when *non obstante's* were in their utmost vigour.

So for these five reasons I hold the action lies:

First, because it is a public office, intrusted to them by Parliament, for the profit and benefit of the subject, which in its nature requires care and diligence.

Secondly, because the defendant has a reward for his care at the expence of the subject.

Thirdly, the same reason holds to charge them in this case as to charge carriers, inn-keepers, and such like, *videlicet*, the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would lie under to imbezil goods intrusted to them, without possibility of proving a particular neglect.

Fourthly, they are within the meaning of 12 Car. 2, liable; and if that were not so, in this case defendant would be liable by his acceptance.

Fifthly, they might send these things by other messengers before the statute, against whom an action would lie for miscarriage, which is taken from them by this Act; which being designed for their benefit, it must be intended in reason that the statute leaves them a like remedy. These are my reasons, and I do not see any to the contrary.

[493] CASE 797. THE KING *against* STUKELY.

If a coroner in taking an inquisition *super visum corporis*, exclude some of the jurors sworn, in order to find the deceased *non compos*, the Court will grant an information against him, and order a new enquiry.—S. C. Holt, 167.

Stukely was coroner of Dorsetshire; and a person having killed himself, as there was reason to believe, feloniously, for that he had made a formal will just before; and this coroner having sworn the jury to inquire, finding the evidence given very strong, took off some of the inquest.

Holt, Chief Justice. It is not in a Judge's power to take off a juryman after he is sworn: and though this coroner be a weak silly man, yet that is no reason why there should not be an information against him; for such men must learn they must not thrust themselves into offices. The return of the inquisition finding the deceased *non compos*, not being filed, it was quashed by the Court. Holt, Chief Justice, cited a case of one Tombs, who had killed himself at Highgate in the year 1655, and the inquest was set aside for practice. And he said, if there be a new inquest, it must be by those that had the view of the corpse.

CASE 798. ANONYMOUS.

Bail may plead usurious contract. A *special plea* is no plea till paid for.

Holt, Chief Justice. The bail to the action may plead an usurious contract, though he be not privy to it.

And a special plea is no plea till it be paid for; but if the party accept it without insisting upon that, it will be well (*a*).

(*a*) See *Anonymous*, *post*, 496.