LECTURE XL.

OF BAILMENT.

1. *What is a bailment?*—558.

A delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.

2. *How many species of bailment are there, according to Sir William Jones?*—558.

Five; viz.: 1. *Depositum*, or a naked deposit without reward. 2. *Mandatum*, or commission, which is gratuitous, and by which the mandatary undertakes to do some act about the thing bailed. 3. *Commodatum*, or loan for use without pay, and when the thing is to be restored in specie. 4. *A pledge*, as when a thing is bailed to a creditor as a security for debt. 5. *Locatio*, or hiring for reward.

3. *To how many kinds has Judge Story reduced bailments?*—559, *n.* (*b.*)

To three kinds: 1. Those in which the trust is for the benefit of the bailor, and which embrace deposits and mandates. 2. Those in which the trust is for the benefit of the bailee, as the *Commodatum*, or gratuitous loan for use. 3. Those in which the trust is for the benefit of both parties, as pledges or pawns, and hiring and letting to hire.

4. *What is* Depositum, *and what care is required in such a case from the bailee?*—560.

This is a bailment of goods to be kept for the bailor, and returned upon demand, without a recompense; and as the bailee or depositary derives no benefit from the bailment, he is to keep the goods with reasonable care; and he is responsible, if there be no special undertaking to the contrary, only for gross neglect, or for a violation of good faith. As a general rule, he is not answerable for mere neglect, if the goods be injured or destroyed while in his custody, if he takes no better care of his own goods, of the like value and under the like circumstances, and they be also spoiled or destroyed.

5. *In what cases is a mere naked depositary liable for ordinary neglect?*—565.

1. When he makes a special acceptance to keep the goods safely. 2. When he spontaneously and officiously proposes to keep the goods of another. A third case is, when the depositary is to receive a compensation for the deposit. The depositary is then held to ordinary care, and answerable for ordinary neglect; and the same conclusion follows when the deposit is made for the special accommodation of the depositary.

6. *What is* Mandatum?—568, 569.

Mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed. In the case of a deposit, says Mr. Justice Story, the principal object of the parties is the custody of the thing, and the service and labor accompanying the deposit are merely accessorial. In the case of a mandate, the labor and service are the principal objects of the parties, and the thing is merely accessorial.

7. *What amount of care is required from such a bailee?*—569-573.

If the mandatary undertakes to carry the article from one place to another, he is responsible only for gross neglect, or a breach of good faith. But if he undertakes to perform, gratuitously, some work relating to it, then, in that case, Sir William Jones maintains that the mandatary is bound to use a degree of diligence and attention suitable to the undertaking, and adequate to the performance of it. But Mr. Justice Story controverts the accuracy of this proposition, and the distinctions on this point, as well as on the questions of non-feasance and misfeasance, in bailments of this description, are very nice and difficult of being stated with precision.

8. *What is* Commodatum, *and what amount of diligence is required from the borrower?*—573, 575.

This is a bailment or loan of an article for a certain time,

to be used by the borrower without paying for the use; and the same identical article is to be returned, in as good plight as it was when it was first delivered, subject, however, to the deterioration arising from the ordinary and reasonable use of the loan, and which deterioration the lender is to bear. The borrower is bound to bestow, on the preservation of the thing borrowed, not merely ordinary, but the greatest care; and he is responsible, not merely for slight, but for the slightest neglect.

9. *What of pledging?*—577, 578, *n.* (1.)

A pawn or pledge is the *pignori acceptum* of the civil law; and, according to that law, the possession of the pledge passed to the creditor (though it is not necessary that the possession of the thing should be actual, and it will be sufficient if the article be properly within the control of the pledgee); but the possession of the thing hypothecated did not. The pawnee is bound to take ordinary care, and is answerable only for ordinary neglect; for the bailment is beneficial both to debtor and creditor.

10. *What was the common law rule about redeeming the pledge?*—581.

At common law, if the pledge was not redeemed by the stipulated time, it did not then become the absolute property of the pawnee, but he was obliged to have recourse to process of law to sell the pledge; and until that was done, the pawnor was entitled to redeem.

11. *What is the present rule?*—582.

The law now is, that after the debt is due, the pawnee may proceed personally against the pawnor without selling the pawn, or he has the election of two remedies against the pledge itself—he may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure, or he may sell without judicial process, upon giving reasonable notice to the debtor to redeem.

12. *What of* Locatum, *or hiring for a reward?*—585.

It is a contract by which the use of a thing, or labor or services about it are stipulated to be given for a reasonable compensation, express or implied. It includes the thing let, the price

or recompense, and a valid contract between the letter and hirer.

13. *How many kinds are there of this bailment?*—586.

Three: *locatio rei*, by which the hirer, for a compensation, gains a temporary use of the thing; *locatio operis faciendi*, or letting out of work and labor to be done, or care and attention to be bestowed by the bailee on goods bailed, for a recompense; *locatio operis mercium vehendarum*, as when goods are bailed to a public carrier or private person, for the purpose of being carried from one place to another, for a stipulated or implied reward.

14. *What diligence is required in the first two cases?*—586–591.

In the case of the *locatio rei*, the hirer gains a special property in the thing hired, and the letter to hire an absolute property in the price, and he retains a general property as owner of the chattel. The hirer is bound to ordinary care and diligence, and is answerable only for ordinary neglect; for this species of bailment is one of mutual benefit. He is bound to use the article with due care and moderation, and not apply it to any other use, or detain it for a longer period, than that for which it was hired. In the case of *locatio operis faciendi*, the workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. If he performs the work unskillfully, he becomes responsible in damages.

15. *What is meant by negligence, in those cases?*—587.

Negligence is a relative term; and the value of the article, and the means of security possessed by the bailee, are material circumstances in estimating the requisite care and diligence. That may be gross negligence, in the case of a parcel of articles of extraordinary value, which in the case of another parcel would not be so; for the temptation to theft, and the necessity for care are in proportion to the value.

16. *How does Justice Story subdivide the head of* Locatio?—591.

Into, 1. *Locatio operis faciendi*, or hire of labor and ser-

vices. 2. *Locatio custodiæ*, or receiving goods on deposit for hire.

17. *What does he include under the head of* locatio custodiæ ?—591.

Agisters of cattle, warehouse-men and wharfingers, and also forwarding men, or merchants. They are all responsible for want of good faith, and of reasonable care and ordinary diligence, and not to any greater extent, unless the business and duty of carriers be attached to their other character.

18. *How are innkeepers considered in respect to liability ?*—592.

They are held to be responsible to as strict and severe an extent as common carriers ; and the principle was taken from the Roman law, and adopted into modern jurisprudence. In general, an innkeeper is responsible for the acts of his domestics, and for thefts, and he is bound to take all possible care of the goods and baggage of his guests, deposited in his house, or intrusted to the care of his family or servants.

19. *Who is an innkeeper within the meaning of the law ?*—596.

One who keeps a house, and holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received. But the keeper of a mere coffee house, or private boarding or lodging house, is not an innkeeper in the sense of the law. In New York, and throughout the Union, inns and taverns are under statute regulations, and their definition and character are contained in the statute.

20. *What are the principal rules governing the class of bailees called carriers ?*—597.

That the carrier for hire, in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier. But if he be a common carrier, he is in the nature of an insurer, and is answerable for all accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of

God (meaning inevitable accident, without the intervention of man), and public enemies.

21. *Who are common carriers ?*—598.

Persons who undertake generally, and for all persons indifferently, to convey goods, and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price.

22. *Into what two classes are they divided ?*—598.

Into inland carriers by land or water, and carriers by sea ; and in the aggregate body are included the owners of stages, wagons, and coaches, and railroad cars, who carry goods as well as passengers for hire, wagoners, teamsters, cartmen, porters, the masters and owners of ships, vessels, and all watercraft, including steam vessels, and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen, barge owners, canal boatmen, and ferrymen. As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite conveyance to carry, and are offered a reasonable or customary price ; and if they refuse without some just ground, they are liable to an action.

23. *What are the duties and obligations of coach proprietors ?*—600, 601.

They do not warrant the safety of passengers in the character of common carriers, and are not responsible for mere accidents to the persons of passengers, but only for the want of due care. Slight fault, unskillfulness or negligence, either as to the competence of the carriage, or the act of driving it, may render the owner responsible in damages for an injury to the passengers ; they are to be transported as safely as human foresight and care will permit. The coach proprietor is not at liberty to turn away passengers if he has sufficient room and accommodation. He is bound to provide competent vehicles, suitably equipped, and with careful and skillful drivers. He is bound to give all reasonable facilities to the reception and comfort of the

passengers, and to use all precautions, as far as human care and foresight will go, for their safety on the road. He is answerable for the smallest negligence in himself and his servants. The modern doctrine, and tendency of modern cases, seem to be, to place coach proprietors, in respect to baggage, upon the ordinary footing of common carriers. But their responsibility is now usually so limited, by means of a special notice, as probably to render this point quite unimportant.

24. *Have carriers by water been relieved of any of their common law liabilities?*—606, *n.* (2.)

Yes; in England statutes, passed in the reigns of George II. and George III., have exempted them from responsibility for losses by fire, and provided that the owners of vessels should not be liable for the loss of gold, silver, precious stones, etc., by robbery or embezzlement, unless the nature and value of the articles were specially declared, in writing, by the shipper to the master or owner of the vessel. Similar provisions are to be found in an act of Congress, passed March 3d, 1851.

25. *May carriers limit their responsibility by special notice of what they mean to assume?*—606, 607.

It seems that they can; and the goods in that case are understood to be delivered on the footing of a special contract, superseding the strict rule of the common law; and it is necessary, in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailor, and be clear, explicit and consistent. But it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence, or misfeasance in him or his servants; and the question of responsibility has generally turned upon the fact of gross negligence.

LECTURE XLI.

OF PRINCIPAL AND AGENT.

1 *On what is agency founded?*—612.

Upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business, and render an account of it.

2. *How may the authority of an agent be created?*—612.

By deed or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient.

3. *May agency be inferred without proof of any express appointment?*—613.

It may, from the relation of the parties, and the nature of the employment. It is sufficient, that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust.

4. *Can an agent convey real estate under an implied contract?*—614.

He can not; to convey lands he must have an appointment in writing; and where the conveyance is required to be by deed, the authority to the attorney to execute it must be commensurate, in point of solemnity, and be by deed also.

5. *When is the agency to be created?*—614.

It may be antecedently given, or be subsequently adopted; and in the latter case, there must be some act of recognition.

6. *Is an acquiescence in the assumed agency of another, equivalent to an express authority?*—614–616.

It is, when the acts of the agent are brought home to the