## *THE CARRIER'S LIABILITY: ITS HISTORY.*

The extraordinary liability of the common carrier of goods is an anomaly in our law. It is currently called "insurer's liability," but it has nothing in common with the voluntary obligation of the insurer, undertaken in consideration of a premium proportioned to the risk. Several attempts have been made to explain it upon historical grounds, the most elaborate that of Mr. Justice Holmes.[1] His explanation is so learned, ingenious, and generally convincing, that it is proper to point out wherein it is believed to fall short.

His argument is in short this. In the early law goods bailed were absolutely at the risk of the bailee. This was held in Southcote's case,[2] and prevailed long after. The ordinary action to recover against a bailee was detinue. But as that gradually fell out of use in the seventeenth century its place was necessarily taken by case; and in order that case might lie for a nonfeasance, some duty must be shown. There were two ways of alleging a duty: by a *super se assumpsit*, and by stating that the defendant was engaged in a common occupation. It was usual to include an allegation of negligence, from abundant caution, but that was "mere form." Chief Justice Holt[3] finally overthrew the doctrine of the bailee's absolute liability, except where there was a common occupation, or (of course) where there was an express assumpsit. The extraordinary liability of a carrier is therefore a survival of a doctrine once common to all bailments.

Judge Holmes does not explain satisfactorily why this doctrine should not have survived in the case even of all common occupations, but only in the case of the common carrier of goods; nor does he account for the fact that the carrier is held absolutely liable, not merely, like the bailee once, for the loss of goods, but, unlike that bailee, for injury to them. The difficulties were not neglected from inadvertence, for he mentions them.[4] But without laboring these points, his main proposition should be carefully considered. Is it true that the bailee was once absolutely

---

[1] The Common Law, Lecture V.

[2] 4 Co. 83 b; Cro. Eliz. 815. A fuller and better report than either of these is in a manuscript report in the Harvard Law Library, 42-45 Eliz. 109 b.

[3] In Lane *v.* Cotton, 12 Mod. 472, and Coggs *v.* Bernard, 2 Ld. Raym. 909; *obiter* in both cases.

[4] Page 199.