THE

LEGAL NEWS.

VOL. XX. NOVEMBER 1, 1897. No. 21.

CURRENT TOPICS.

The retirement of the Master of the Rolls, the death of Mr. Justice Cave, and the resignation of Lord Ludlow, have opened three judgeships, and have led to other changes on the English Bench. Sir Edward Clarke, Q.C., was offered the position of Master of the Rolls, but although this office ranks third in dignity among judicial appointments, the offer was declined. It was then tendered to Lord Justice Lindley, and accepted. The appointment has been very generally commended, though the age of the newly appointed Master of the Rolls hardly justifies the expectation that he will be able for many years to discharge the onerous duties of the office unless he rivals Lord Esher in vigour and staying power. One of the vacant Lord Justiceships of Appeal has been filled by the promotion of Mr. Justice Vaughan Williams, of the High Court, and the other by the promotion of Mr. Justice Henn Collins, also of the High Court. These are both excellent appointments and acceptable to the profession. Mr. Justice Williams has been succeeded in the High Court by Mr. Arthur M. Channell, Q. C. The new

judge is the only surviving son of the late Baron Channell, of the Court of Exchequer. Mr. Justice Collins has been succeeded by Mr. Darling, Q. C. It may be noted that the newly appointed judges were sworn in openly in the Lord Chief Justice's Court, in the presence of a number of the judges and a large attendance of the Bar and the public, amongst the latter being several ladies.

The ex-Master of the Rolls (Viscount Esher), and ex-Lord Justice Lopes (Lord Ludlow), retire on ample allowances. Lord Esher is to receive an annuity of £3,750, for life, and Lord Ludlow £3,500, for life.

A change has also occurred in the judiciary of this Province. Mr. Justice Marc Aurèle Plamondon has retired from the bench of the Superior Court. Mr. Justice Plamondon was appointed a puisne judge of the Superior Court, for the judicial district of Arthabaska, on the 9th September, 1874, and has therefore completed twenty-three years of service. Only three of the present occupants of the Bench are his seniors, viz., Chief Justice Casault, and Justices Routhier and Bélanger. Mr. Justice Plamondon is succeeded by Mr. François-Xavier Lemieux, of the city of Quebec, son-in-law of the retiring judge. Mr. Lemieux was born in Levis. He was called to the bar in 1872. He was elected for Levis to the local legislature in 1883, and re-elected in 1886 and 1890. At the time of his appointment to the bench he was *bâtonnier* for Quebec, and also *bâtonnier-général* of the General Council of the Bar.

Attention was directed some time ago to the large number of rejections among aspirants to practice in England. The apparent severity of the examinations has not yet spurred students generally to attain the standard

of proficiency, for, in a recent examination, out of 114 candidates who presented themselves only 52 succeeded in passing.

Constables and detectives are doubtless fired with zeal to make the course of justice sure, but they should not allow their zeal to carry them too far. It seems to us that the severe remarks repeatedly made from the bench in England with reference to the extortion of confessions from criminals would apply to a recent case in this province, where the accused had to undergo several searching interrogations by officers of justice, until a confession was obtained. This is a proceeding which should not be encouraged nor even permitted. Juries, it is true, will naturally regard with considerable distrust admissions obtained under such circumstances, but this does not excuse the course pursued by the detectives.

NEW PUBLICATION.

TAYLOR'S MEDICAL JURISPRUDENCE.—Twelfth American edition, by Mr. Clark Bell, LL. D. Publishers, Lea Brothers & Co., New York and Philadelphia.

The present edition of this celebrated work is from the twelfth English edition, by Dr. Thomas Stevenson, and brings the subject of Medical Jurisprudence up to date. Lawyers will find in it a rich storehouse of judicial decisions, both by the courts of Great Britain and of the United States. The subjects of insanity, poisoning, etc., are fully treated. Medico-legal surgery is an important branch of knowledge in these days when actions for damages for personal injuries are so numerous, and considerable attention is given to it in this work. The American editor is a distinguished writer, publisher of the Medico-Legal Journal of New York, and has done his part well in making the work a complete treatise on the subject.

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 evén 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

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[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.

liable for goods taken from him? It may be so; Pollock and Maitland seem to give a hesitating recognition to the doctrine,[1] but the evidence is not quite convincing.

No one versed in English legal history will deny that the bailee of goods was the representative of them, and the bailor's only right was in the proper case to require a return; and therefore that when a return was required it was incumbent upon the bailee to account. Nor can it be doubted that the law then tended to lay stress on facts rather than reasons,—to hang the man who had killed another rather than hear his excuse. We should therefore not be surprised, on the one hand, to find that, where one had obliged himself to return a chattel, no excuse would be allowed for a failure to return. On the other hand, by the machinery of warranty, it was always possible to explain away the possession of an undesirable chattel; why not to explain the non-possession of a desired one? We should therefore not be greatly surprised if the authorities allowed some explanation.

Three actions were allowed a bailor against a bailee; detinue, account, and (after the Statute of Westminster) case. Let us see whether in either of these actions the defendant was held without the possibility of excuse.

Case lies only for a tort; either an active misfeasance, or, in later times, a negligent omission. There must therefore be at the least negligence; and so are the authorities. The earliest recorded action against a carrier is case against a boatman for overloading his boat so that plaintiff's mare was lost; it was objected that the action would not lie, because no tort was supposed; the court answered that the overloading was a tort.[2] So in an action on the case for negligently suffering plaintiff's lambs, bailed to defendant, to perish, it was argued that the negligence gave occasion for an action of tort.[3] So later, in the case of an agister of cattle, the negligence was held to support an action on the case.[4] In these cases the action would not lie except for the negligence.[5] In the case of ordinary bailments, therefore, negligence of the bailee must be alleged and proved to support

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[1] Hist. Eng. Law, 169.

[2] 22 Ass. 41 (1348).

[3] 2 H. 7, 11, pl. 9 (1487).

[4] Moo. 543 (1598).

[5] The *assumpsit* is also mentioned in them; but this means, not a contract that they shall be safe, but an undertaking to perform a certain purpose. Holt, C. J., in Coggs *v.* Bernard, 2 Ld. Raym. 909, 919.

an action on the case against him. I shall hereafter consider actions on the case against those pursuing a common occupation.

In the action of account there is hardly a doubt that robbery without fault of bailee could be pleaded in discharge before the auditors.[1] To the contrary is only a single dictum of Danby, C.J., and there the form of action is perhaps doubtful.[2] Indeed, in Southcote's case the court admitted that the factor would be discharged before the auditors in such a case, and drew a distinction between factor and innkeeper or carrier.

In the action of detinue then, if anywhere, we shall find the bailee held strictly; and the authorities must be examined carefully.

The earliest authority is a roll where, in detinue for charters, the bailee tendered the charters *minus* the seals, which had been cut off and carried away by robbers. On demurrer this was held a good defence.[3] The next case was detinue for a locked chest with chattels. The defence was that the chattels were delivered to defendant locked in the chest, and that thieves carried away the chest and chattels along with the defendant's goods. The plaintiff was driven to take issue on the allegation that the goods were carried away by thieves.[4] A few years later, counsel said without dispute that if goods bailed were burned with the house they were in, it would be an answer in detinue.[5]

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[1] Fitz. Accompt, pl. 111 (1348); 41 E. 3, 3 (1367); 2 R. 3, 14 (1478); Vere *v.* Smith, 1 Vent. 121 (1661).

[2] 9 E. 4, 40 (1469). In an action of account, the court held that robbery could not be pleaded in bar, but if it was an excuse it must be pleaded before the auditor. Danby's remark, that robbery excuses a bailee only if he takes the goods to keep as his own, has no reference to the action itself. Brooke abridges the case under *Detinue*, 27.

[3] Brinkburn Chartulaly, p. 105 (1299).

[4] Fitz., Detinue, 59 (1315). According to Southcote's case and Judge Holmes (Com. Law, p. 176), Fitzherbert states the issue to have been that the goods were delivered outside the chest. Neither the first (1516) edition of Fitzherbert, nor others (1565, 1577) to which I have access, are so. In the printed book (8 E. 2, 275) it is indeed laid down as Gawdy and Holmes state it; we have therefore a choice of texts. It is common knowledge that Maynard's text is often corrupt; it is a century and a half further from the original; and in this case the inaccuracy is manifest. The text throughout has to be corrected by comparison with Fitzherbert in order to make it sensible. From internal evidence Fitzherbert's text must be chosen. It would be interesting to have a transcript of the roll.

[5] 12 & 13 E. 3, 244 (1339).

Then where goods were pledged and put with the defendant's own goods, and all were stolen, that was held a defence; the plaintiff was obliged to avoid the bar by alleging a tender before the theft.[1] Finally in 1432, the court (Cotesmore, J.) said: "If I give goods to a man to keep to my use, if the goods by his misguard are stolen, he shall be charged to me for said goods; but if he be robbed of said goods it is excusable by the law."[2]

At last, in the second half of the fifteenth century, we get the first reported dissent from this doctrine. In several cases it was said, usually *obiter*, that if goods are carried away (or stolen) from a bailee he shall have an action, because he is charged over to the bailor.[3]

In several later cases the old rule was again applied, and the bailee discharged.[4] There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's Case.[5]

This was detinue for certain goods delivered to the defendant "to keep safe." Plea, admitting the bailment alleged, that J.S. stole them out of his possession. Replication, that J.S. was defendant's servant retained in his service. Demurrer, and judgment for the plaintiff.

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[1] 29 Ass. 163, pl. 28 (1355). Judge Holmes, following the artificial reasoning of Gawdy (or Coke?) says the pledge was a special bailment to keep as one's own. The reason stated by Coke is exactly opposed to that upon which Judge Holmes' own theory is based; it is that a pledgee undertakes only to keep as his own because he has "a property in them, and not a custody only," like other bailees. The court in the principal case knows nothing of this refinement. "For W. Thorpe, B., said that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged." After refusal of tender, defendant would have been, not, as Judge Holmes says, a general bailee, but a tortious bailee, and therefore accountable. The refusal was the detinue, or as the court said in Southcote's case, "There is fault in him."

[2] 10 H. 6, 21, pl. 69.

[3] 2 E. 4, 15, pl. 7, by Littleton (1462); 9 E. 4, 34, pl. 9, by Littleton and Brian, JJ. (1469); 9 E. 4, 40, pl. 22 (1469), by Danby, C. J. (*ante*); 6 H. 7, 12, pl. 9, per Fineux, J. (1491); 10 H. 7, 26, pl. 3, per Fineux, J. (1495). In the last two cases, Keble, *arguendo*, had stated the opposite view; and Brooke (Detinue, 37) by a query appears rather to approve Keble's contention.

[4] 1 Harvard M. S. Rep. 3a (1589, stated later), *semble;* Woodlife's Case Moo. 462 (1597); Mosley *v.* Fosset, Moo. 543 (1598), *semble.*

[5] 4 Coke 83 b, Cro. Eliz. 815; Harv. MS. Rep. 42-45 Eliz. 109 b (1600).

The case was decided by Gawdy and Clench, in the absence of Popham and Fenner; and it is curious that Gawdy and Clench had differed from the two others as to the degree of liability of a bailee in previous cases.[1] It would seem that judgment might have been given for plaintiff on the replication; the court, however, preferred to give it on the plea. This really rested on the form of the declaration; a promise to keep safely, which, as the court said, is broken if the goods come to harm. The only authority cited for the decision was the Marshal's Case, which I shall presently examine and show to rest on a different ground. The rest of Coke's report of the case (of which nothing is said in the other reports) is an artificial, and, *pace* Judge Holmes, quite unsuccessful attempt to reconcile, in accordance with the decision, the differing earlier opinions. The case has probably been given more authority than it really should have. At the end of the manuscript report cited we have these words: "Wherefore they (*cæteris absentibus*) give judgment for the plaintiff *nisi aliquod dicatur in contrario die veneris proximo.*" And it would seem that judgment was finally given by the whole court for the defendant. In the third edition of Lord Raymond's Reports is this note: "That notion in Southcote's Case, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione Magistri Bunbury.*"[2] It was not uncommon for a case to be left half reported by the omission of a *residuum;* and it may be that Southcote's Case as printed is a false report. One would be glad to see the record.

Southcote's case is said to have been followed for a hundred years. The statement does it too much honor. It seems to be the last reported action of detinue where the excuse of loss by theft was set up; and, as has been seen, the principle it tries to establish does not apply to other forms of action. It was cited in several reported actions on the case against carriers, but seems never to have been the basis of decision; on the other hand, in Williams *v.* Lloyd,[3] where it was cited by counsel, a general bailee who had lost the goods by robbery was discharged. The action was upon the case.

Having thus briefly explained why Judge Holmes' theory of the carrier's liability is not entirely satisfactory, I may now

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[1] Woodlife's Case, Moo. 462; Mosley v. Fosset, Moo. 543.

[2] 2 Ld. Raym. 911 *n.*

[3] Palmer, 548; W. Jones, 179 (1628).

suggest certain modifications of it. I believe, with him, that the modern liability is an ignorant extension of a much narrower earlier liability;[1] but the extension was not completed, I think, for eighty years after the date he fixes, and the mistaken judge was not Lord Holt, but Lord Mansfield.

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a "common" or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers,[2] victuallers, taverners, smiths,[3] farriers,[4] tailors,[5] carriers,[6] ferrymen, sheriffs,[7] and gaolers.[8] Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business. In the language of Fitzherbert, "If a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."[9] By undertaking the special duty he warrants his special preparation for it. The action is almost invariably on the case.

One of the earliest cases in the books was against an innkeeper stating the custom of England for landlords and their servants to guard goods within the inn; it was alleged that while plaintiff was lodged in the inn his goods were stolen from it. There was no allegation of fault in the defendant, and on this ground he demurred; but he was held liable notwithstanding. The plaintiff prayed for a *capias ad satisfaciendum.* Knivet, J., replied, that this would not be right, since there was no tort supposed, and he was charged by the law, and not because of his fault; it was like the case of suit against the hundred by one robbed within it; he ought not to be imprisoned. The plaintiff was

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[1] See The Common Law, pp. 199, 200.

[2] 11 H. 4, 45, pl. 8; 22 H. 6, 21, pl. 38; ib. 38, pl. 8.

[3] 46 E. 3, 19.

[4] Often called "common marshal." 19 H. 6, 49, pl. 5.

[5] 1 Harv. M.S. Rep. 3a.

[6] These were "country" carriers; the term did not at first include carriers by water.

[7] 41 Ass. 82.

[8] 33 H. 6, 1, pl. 3.

[9] F. N. B. 94 d.

forced to be content with an *elegit* on his lands.[1] A few years later a smith was sued for "nailing" the plaintiff's horse; the defendant objected that it was not alleged *vi et armis* or *malitiose*, but the objection was overruled, and it was held that the mere fact of nailing the horse showed a cause of action.[2] An action was brought against a sheriff for non-return of a writ into court; he answered that he gave the writ to his coroner, who was robbed by one named in the exigent. He was held liable notwithstanding, Knivet, J. saying, "What you allege was your own default, since the duty to guard was yours."[3]

In 1410, in an action against an innkeeper, Hankford, J. used similar language: "If he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence."[4] A noteworthy remark was Judge Paston's a few years later: "You do not allege that he is a common marshal to cure such a horse; and if not, though he killed your horse by his medicines, still you shall not have an action against him without a promise."[5] Soon after was decided the great case of the Marshal of the King's Bench.[6] This was debt on a statute against the Marshal for an escape. The prisoner had been liberated by a mob; the defendant was held liable. The reason was somewhat differently stated by two of the judges. Danby, J. said that the defendant was liable because he had his remedy over. Prisot, C.J. put the recovery on the ground of negligent guard. This case was frequently cited in actions against carriers; but not, I think, in actions against ordinary bailees before Southcote's Case.

The earliest statement of the liability of a common carrier occurs, I think, in the Doctor and Student (1518), where it is said that, "if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired;

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[1] 42 E. 3, 11, pl. 13 (1367). In 43 E. 3, 33, pl. 38, it was alleged that a "marshal" had undertaken to cure a horse, but had proceeded so negligently that the horse died. The defendant was driven from a denial of the undertaking, and was obliged to traverse the defect of care.

[2] 46 E. 3, 19, pl. 19 (1371).

[3] 41 Ass. 254, pl. 12 (1366).

[4] 11 H. 4, 45, pl. 18 (1410).

[5] 19 H. 6, 49 pl. 5 (1441).

[6] 33 H. 6, 1, pl. 3 (1455).

that he shall stand charged for his misdemeanor."[1] In the time of Elizabeth, the hire paid to the carrier was alleged as the reason for his extraordinary liability.[2] Finally, in Morse *v.* Slue[3] the court "agreed the master shall not answer for inevitable damage, nor the owners either without special undertaking; when it's *vis cui resisti non potest;* but for robbery the usual number to guide the ship must be increased as the charge increaseth."

Thus stood the law of carriers and of others in a common employment down to the decision in Coggs *v.* Bernard.[4] Two or three things should be noted. First, carriers are on the same footing with many other persons in a common employment, some bailees and some not, but all subjected to a similar liability, depending upon their common employment; and there is no evidence in the case of these persons of anything approaching a warranty against all kinds of loss. The duty of the undertaker was to guard against some special kind of loss only. Thus the

[1] Doctor and Student, c. 38. A little later is found this curious case, Dall. 8 (1553). "Note by Browne, J., and Portman, J., as clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability." This is the only hint at a less liability of the common carrier than of the private carrier. It is interesting to notice that it was regarded as the duty of the innkeeper, and not of the carrier, to guard the goods in the inn. The duty is imposed by law for a purpose that purpose is served by putting the duty on the innkeeper here; the law need not require a double service.

[2] "It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will.' 1 Harv. MS. Rep. 3a. To the same effect is Woodlife's Case, as reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitiy took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed."

[3] 3 Keb. 135 (1672).

[4] Ld. Raym. 909 (1703).

gaoler warranted against a breaking of the gaol, but not against fire; the smith warranted against pricking the horse; the innkeeper against theft, but not against other sorts of injury;[1] the carrier against theft on the road, but probably not against theft at an inn.

Secondly.—This is put on different grounds; but all may be reduced to two. On the one hand, it may be conceived that the defendant has undertaken to perform a certain act which he is therefore held to do; either because the law forces him into the undertaking (as a hundred is forced to answer a robbery), or, as seems to have been in Judge Paston's mind, because there was some consent which took the place of a covenant. On the other hand, it may be conceived that the defendant has so invited the public to trust him that certain avoidable mischances should be charged to his negligence; he ought to have guarded against them. "The duty to guard" is the sheriff's or the carrier's or the innkeeper's; he is bound to have deputies for well keeping the inn; if a mob breaks in he shall be charged for his negligent guard; the usual number must be increased as the charge increases; if he go by the ways that be dangerous, or at an inconvenient time, he shall stand charged for his misdemeanor. It is to be remembered that during this time case on a *super se assumpsit* had this same doubtful aspect; to use a modern phrase, it was even harder then than now to tell whether such an action sounded in contract or in tort. The test of payment for services is a loose and soon abandoned method of ascertaining whether the defendant was a private undertaker or in a common employment.[2]

Another thing important to notice is that all precedents of declarations against a carrier or an innkeeper allege negligence.[3] It is of course impossible to prove that this did not become a mere form before rather than after Lord Holt's time; but it is on the whole probable that it originally had a necessary place.

We have now brought the development of the law to the great case of Coggs *v.* Bernard.[4] This was an action against a gratuitous carrier, and everything said by the court about common

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[1] Dawson *v.* Chamney, 5 Q. B. 164.

[2] Woodlife's Case, Moore, 462, makes that clear, I think. Though both are paid, a distinction is drawn between factor and carrier.

[3] Holmes, Common Law, 200.

[4] 2 Ld. Raym. 909 (1703).

carriers was therefore *obiter*. Three of the judges did, however, treat the matter somewhat elaborately. Gould, J., put the liability squarely on the ground of negligence: "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." Powys, J. "agreed upon the neglect." Powell, J. emphasized the other view, that "the gist of these actions is the undertaking......The bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is in 1 Jones, 179; Palm. 548. For the bailee is not bound upon any undertaking against the act of God." Holt, C.J. seized the occasion to give a long disquisition upon the law of bailments. In the course of it he said that common carriers are bound "to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable." And the reason is, that otherwise they "might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves," &c.

Was this the starting point of the modern law of carriers? It seems to be a departure from the previous law as I have stated it, but how far departing depends upon what was meant by act of God. Powell appears to include accidental fire, and cites a case where the death by disease of a horse bailed was held an excuse. Lord Holt does not explain the term; but his reasoning is directed entirely to loss by robbery. That "act of God" did not mean the same thing to him and to us is made probable by the language of Sir William Jones,[1] whose work on Bailments follows Lord Holt's suggestions closely. After stating Lord Holt's rule as to common carriers, he adds that the carrier "is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of ruffians any more than for hostile violence or unavoidable misfortune," but that policy makes it "necessary to except from this rule the case of robbery." As to act of God, "it might be more proper, as well as more decent, to substitute in its place inevitable accident," since that would be a

[1] Bailments, pp. 103 *et seq.*

more "popular and perspicuous" term. He cites the case of Dale *v.* Hall,[1] which appeared to have held the carrier liable though not negligent; but explains that the true reason was not mentioned by the reporter, for there was negligence. Much the same statement of the law of carriers is made by Buller in his Nisi Prius.[2] It would seem, then, that the change in the law which we should ascribe to Lord Holt was one rather in the form of statement than in substance; but the new form naturally led, in the fulness of time, to change in substance.

In the fulness of time came Lord Mansfield, and the change in substance was made. In Forward *v.* Pittard,[3] we have squarely presented for the first time a loss of goods by the carrier by pure accident absolutely without negligence,—by an accidental fire for which the carrier was not in any way responsible. Counsel for the plaintiff relied on the language of Lord Holt. Borough, for the defendant, presented a masterly argument, in which the precedents were examined; the gist of his contention was, that a carrier should be held only for his own default. Lord Mansfield, unmoved by this flood of learning, held the carrier liable; and he uttered these portentous words: "A carrier is in the nature of an insurer."

From that time a carrier has been an insurer without the rights of an insurer.—*Joseph H. Beale, in "Harvard Law Review."*

THE NEWLY APPOINTED MASTER OF THE ROLLS.

The Queen has been pleased to approve the appointment of the Right Hon. Lord Justice Lindley to be Master of the Rolls, in the place of Lord Esher, resigned. Sir Nathaniel Lindley is the only son of the late Dr. John Edward Lindley, F.R.S., who was Professor of Botany at University College, London, where the new Master of the Rolls was educated. He is sixty-nine years of age, having been born at Acton Green in 1828. The period of his active connection with the law is only three years short of half a century; he was called to the Bar at the Middle Temple in 1850. It was as an author that he laid the foundations of his success at the Bar. His treatise on "The Law of Partnership," which immediately obtained a large measure of success,

[1] 1 Wils. 281.

[2] Page 69 (1771),

[3] 1 T. R. 27 (1785).

has become, through the merits of successive editions, a legal classic, while his "Study of Jurisprudence" gave early promise of that wide legal learning which has distinguished Sir Nathaniel Lindley on the Bench. The honour of silk was conferred upon him in 1872, and he at once obtained a leading position in Vice-Chancellor Hall's Court, where his chief opponent was Mr. Dickinson, Q.C. His appointment as a Queen's Counsel was followed within an exceptionally short period by his appointment as a judge. This was in 1875, when it was thought that equity and common law had been so fused by the Judicature Act that Chancery judges could be chosen to preside in common law Courts. The appointment of Mr. Lindley to the Common Pleas proved an unqualified success, but other equity lawyers showed themselves to be less adapted to the work of the common law Courts, and the fusion that was predicted so confidently now seems farther off than ever. Sir Nathaniel Lindley was created a serjeant-at-law before he became a judge of the Common Pleas. Within a few months of his appointment he became, owing to the operation of the Judicature Act, a judge of the Common Pleas Division of the High Court of Justice, and in 1879 he became a judge of the Queen's Bench Division. He was promoted to the Court of Appeal in 1881, and since the retirement of Lord Justice Cotton he has been the presiding member of Appeal Court II. As chairman of the Council of Legal Education—an office he held for four years—he proved the deep interest he takes in the welfare of the profession of which he is so distinguished and esteemed a member.—*Law Journal.*

GENERAL NOTES.

SOLICITOR AND CLIENT.— It is settled law that a solicitor has an implied authority to compromise an action in which he is retained for one of the parties. Even when the settlement has been made in violation of the client's prohibition, it has been held that the latter is bound, provided that the other party has acted *bona fide* and without notice of such prohibition, though, of course, the solicitor is in such cases liable to the client for his breach of duty. As regards the power of a solicitor to settle a claim before the issue of a writ which he is retained to prosecute, there has hitherto been little authority. The only reported case bearing directly on the point seems to be *Duffy* v. *Hanson*. 16 L.T. (N.S.) 332, in which Mr. Justice Willes ruled at Nisi Prius that

a compromise entered into before the issue of a writ by an attorney's clerk was not binding on the client. The Court of Appeal has just held that the same rule applies where a solicitor before action brought accepted a small sum in discharge of his client's claim without the latter's sanction. Why the issue of a writ should make a difference in the authority of the solicitor is by no means obvious. It is, however, unsatisfactory that a client should ever be bound by a compromise made without his knowledge or approval, and for this reason the decision of the court is a welcome one.—*Law Journal (London)*.

THE LAW OF EVIDENCE.—We recommend to the attention of the opponents of the Criminal Evidence Bill a case heard before Mr. Alderman Davies at the Guildhall Police Court on October 19. A wife was charged with the forgery of her husband's indorsement on a bill of exchange. The husband was not a competent witness either to allege or deny the genuineness of the indorsement, or the authority of the wife to make it for him. This state of the law may on the one hand enable a husband or wife with impunity to forge the name of the other; or on the other hand may subject an innocent husband or wife to a suspicion, which cannot be dispelled by sworn evidence, of having committed such an offence.—*Ib.*

NOVEL ACTION OF DAMAGES.—A case of almost novel impression has recently been decided in North Carolina. The holding is that the sale of laudanum as a beverage to a married woman, knowing that it is injuring her mentally and physically, and causing loss to her husband, when continued after his repeated warnings and protests, subjects the seller to a right of action in favour of the husband. This is founded on an old decision in the Supreme Court of New York, and these are the only cases of the kind on record. The doctrine apparently ignores the free moral agency of the wife, but it may be supportable on the same ground that warrants an action of damages for seduction of the wife. Some stress was laid in argument on the novelty of the cause of action, but the Court wisely gave no heed to it. The novelty of the action certainly is no greater than that of a very recent one in New York, in which a man who, in the belief that a woman was virtuous, was induced to marry her by the false representations of a third person by whom she was then pregnant, was allowed to recover damages from the latter on the ground of loss of society.