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# Liability of the Common Carrier for Loss or Damage to Goods in Ohio

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". . . If a man shall deliver unto his neighbor money or stuff to keep . . . If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast to keep . . . And if a man borrow ought of his neighbor. . . ."[1] These, the Bible tells us, are a few of the ancient problems significant enough to be dealt with by the Mosaic law. People have, in fact, always found it convenient, for any one of a number of reasons, to intrust their goods to other men; and rules regarding rights, duties, and liabilities of the parties to such a transaction have been developed under nearly all of the systems of law that the world has known.[2]

While doubtless of humble origin, the carriage of goods from place to place as a purpose for such transactions has taken on great commercial importance through the centuries. As men began to hire out to the public their services as carriers of freight, carrying the goods of many people simultaneously, the development of legal rules regarding rights, duties, and liabilities, as between individual shippers and carriers, began to be tempered by considerations of the public good. To briefly examine one of these rules, developed by the common law but greatly modified and relaxed by the courts and legislature of Ohio, is the purpose of this note.

## I. The Common Law Heritage

The leading case in the law of bailments in general, and the liability of carriers in particular, is *Coggs v. Bernard*,[3] wherein Lord Holt announced that the common carrier ". . . is bound to answer for the goods at all events."[4] Thus, the common carrier was an insurer of the goods intrusted to him. The reasoning behind the imposition of the rule of absolute liability, in the quaint language of Lord Holt, is as follows:

> And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with theives, and so forth, and yet doing it in such a clandestine manner as would not be possible to be discovered.[5]

1. Exodus 22:7, 10, 14.
2. See, *e.g.*, Morey, Outlines of Roman Law 355-58, 365-68 (1d ed. 1914).
3. 2 Ld. Raym. 909 (1703).
4. Coggs v. Bernard, 2 Ld. Raym. 909, 918 (1703).
5. *Ibid.*

Mr. Justice Holmes denies that Lord Holt's decision was a mere pronouncement of settled principles of the common law; it being, rather, a fragmentary survival of the long overthrown rule that originally imposed absolute liability upon all bailees, applied by Lord Holt to common carriers because of his own notions of public policy.[6] At any rate, the principle became firmly engrafted upon the law by 1785, when Lord Mansfield decided *Forward v. Pittard*,[7] announcing the following to be the rule and its rationale:

> . . . to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests.[8]

It must be noted that there is an important distinction between a common and a private carrier. The common carrier may be treated as an insurer of goods intrusted to him, but the private carrier suffers only the responsibility of the ordinary bailee — the duty to use ordinary care and liability only for losses caused by his own negligence.[9]

It is of extreme importance, therefore, that a determination be made as to whether a particular carrier may be classified as common or private. The traditional statement of the distinction has been provided by Mr. Justice Story in the following language:

> It is not every person who undertakes to carry goods for hire that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of any ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*.[10]

## II. The Common Carrier of Goods in Ohio

When called upon to define which haulers are common carriers, the courts of Ohio have adopted the substance of this definition,[11] with par-

6. Holmes, The Common Law 180 (1881).

7. 1 Term Rep. (Durnford & East) 27 (1785).

8. Forward v. Pittard, 1 Term Rep. (Durnford & East) 27, 33 (1785). The latter part of the quotation indicates that certain exceptions to the insurer's liability existed at the common law. These will subsequently be discussed in greater detail.

9. Dobie, Bailments & Carriers § 106 (1914).

10. Story, Bailments § 495 (7th ed. 1863).

11. Motor Freight, Inc. v. Public Utilities Commission, 120 Ohio St. 1, 165 N.E. 355 (1929); Breuer v. Public Utilities Commission, 118 Ohio St. 95, 160 N.E. 623 (1928); Hissem v. Guran, 112 Ohio St. 59, 146 N.E. 808 (1925).

ticular emphasis being placed upon a holding out as being ready to transport for all persons indiscriminately.[12] Thus, a man who makes his living hauling dairy products for a milk producer's association is not a common carrier, having made no representation to the public at large that he would carry goods for all persons choosing to employ him.[13] Even the actual solicitation of hauling contracts will not qualify a man as a common carrier unless he has made an offer to do business with the public generally.[14] Conversely, the mere fact that a hauler of goods requires his customers to sign individual contracts and to meet certain credit standards will not protect him from treatment as a common carrier, as long as he represents that he will haul for anyone who is willing and able to meet those requirements.[15]

The common carrier, by this representation that its services are available to the public generally and indiscriminately, in effect dedicates its property to public use. It is small wonder, then, that considerations of public policy should play a dominant role in judicial determinations regarding the incidents of the relationship between the common carrier and its customers — the public. Such were the apparent sentiments of the Ohio courts, which early adopted the rule of the English common law, making the common carrier an insurer of all goods with which it is intrusted.[16]

> The general rule in reference to a bailee for hire — that he is only answerable for the loss of the goods where he has been wanting in ordinary care and diligence — is in most cases a reasonable and just one, and is only departed from in the case of a common carrier, on account of the peculiar relation he has assumed to the community.[17]

Such were the early judicial pronouncements, and modern authorities have reiterated the rule that a common carrier is an insurer of freight against all losses.[18] Pragmatically speaking, however, the modern common carrier does not normally suffer this absolute liability. Extensive exceptions to the common law rule have developed, and the courts have

12. "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently. The contributing factor in determining the status of one as a common carrier is his public profession or holding out, by words or course of conduct as to the service offered or performed." Columbus-Cincinnati Trucking Co. v. Public Utilities Commission, 141 Ohio St. 228, 232, 47 N.E.2d 623, 625 (1943).

13. Hissem v. Guran, 112 Ohio St. 59, 146 N.E. 808 (1925).

14. Samms v. Stewart, 20 Ohio 69 (1851).

15. Bruer v. Public Utilities Commission, 118 Ohio St. 95, 160 N.E. 603 (1928).

16. Graham v. Davis, 4 Ohio St. 362 (1854); Davidson v. Graham, 2 Ohio St. 131 (1853).

17. Samms v. Stewart, 20 Ohio 70, 73 (1851).

18. See *e.g.*, 8 OHIO JUR. 2d, *Carriers* § 68 (1954).

allowed carriers to limit their liability by contract. The remainder of this paper is devoted to an examination of the dilution of the common law rule in these two respects, in order that a more realistic conclusion as to the liability of a common carrier for loss or damage to freight may be reached.

### A. Exceptions to the Common Law Rule

It is now recognized that a common carrier is an insurer of freight against losses except those attributable to: 1) an act of God, 2) an act of the public enemy, 3) an act of the shipper, 4) an act of the public authority, 5) the inherent nature of the goods themselves.[19] Only the first two were mentioned in the early cases;[20] but later authorities have universally agreed[21] that the passage of time has expanded the list to five in number, each of which will be discussed below.

#### 1. *Acts of God*

That loss or damage caused by an act of God absolves the carrier of his insurer's liability is agreed upon by all the authorities. Trouble obviously arises, however, when an exact definition of the term is attempted. It may perhaps be best explained by means of a negative approach: "act of God" is *not* synonymous with "inevitable accident." The latter includes, but is greater than, the former. A carrier remains liable for those inevitable accidents which are the result of a chain reaction set in motion by a human agency, such as a fire not caused by lightning, or a shipwreck caused by a sunken mast or false lights.[22] An act of God, on the other hand, is a force due entirely to physical causes: ". . . a flood or tornado or volcano or something that is without the intervention or control of man."[23]

The general rule in this area seems to be that the act of God must be the sole cause of the loss; if it is mingled with negligence on the part of the carrier, it will be lost as a defense to a suit by the shipper.[24] The Ohio courts, while ostensibly adhering to this rule,[25] have weakened its

19. Goddard, Bailments & Carriers § 231 (2d ed. 1928).

20. Coggs v. Bernard 2 Ld. Raym. 909 (1703); Davidson v. Graham, 2 Ohio St. 131 (1853).

21. Dobie, Bailments & Carriers § 116 (1914).

22. Goddard, Bailments & Carriers § 233 (2d ed. 1928).

23. St. Louis-San Francisco Ry. v. Glow Electric Co., 35 Ohio App. 291, 307, 172 N.E. 425, 430 (1929).

24. 9 Am. Jur., *Carriers* § 713 (1937).

25. Cincinnati, Hamilton & Dayton Ry. v. Myers & Patty Co., 4 Ohio App. 493 (1915).

effectiveness by their decisions in one area; namely, the question of the effect of an antecedent negligent delay on the part of a carrier. When the carrier's negligent delay in transporting the goods results in their exposure to an unforeseeable act of God, the defense is still available to the carrier, the theory being that the delay was a remote factor in the chain of causation.[26]

### 2. *Act of Public Enemy*

The second exception to the rule of insurer's liability operates when the loss is occasioned by the act of a public enemy, meaning the forces of a country with whom the nation is at war.[27] As noted, the ease of practice and the difficulty of proving fraud and collusion is one of the prime reasons behind the rule making a carrier liable as an insurer. It was felt unlikely, however, that a carrier would be in league with his country's enemies; hence, the carrier does not suffer insurer's liability for losses attributable to the public enemy. The exception obviously does not apply, however, when the loss is occasioned by thieves, no matter how great their numbers.[28]

### 3. *Act of the Shipper*

A third exception to the rule of absolute liability comprehends losses caused by the act of the shipper. To hold another liable for one's own wrong would be repugnant to the principles and spirit of our law; the common carrier is, therefore, not liable for losses caused by the shipper's negligence. If the goods have been improperly packed or loaded by the shipper, causing their loss or damage, the carrier is relieved from its absolute liability, provided the defect would not have been readily discernible upon ordinary inspection.[29] As is the case with all the exceptions, this defense is available only where the act of the shipper is the sole cause of the loss or damage; the carrier must prove that the loss was proximately caused by the defective packing and not by any fault or negligence on its part.[30]

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26. Toledo & Ohio Central Ry. v. Kibler, 97 Ohio St. 262, 119 N.E. 733 (1918); Daniels v. Ballantine, 23 Ohio St. 532 (1872).

27. GODDARD, BAILMENTS & CARRIERS § 236 (2d ed. 1928).

28. Coggs v. Bernard, 2 Ld. Raym 909 (1703).

29. St. Louis-San Fransisco Ry. v. Glow Electric Co., 35 Ohio App. 291, 172 N.E. 425 (1929).

30. Union Express Co. v. Graham 26 Ohio St. 596 (1875); Norfolk & Western Ry v. Hartford Fire Insurance Co., 7 Ohio L. Abs. 371 (Ct. App. 1929).

### 4. *Act of Public Authority*

Another exception to the common law rule comes into play when the loss or damage is caused by the act or mandate of public authority; public policy demands that a carrier be protected in surrendering freight when required to do so by the sovereign authority.

> . . . the rule now seems to be established that a common carrier is not liable, if the goods be taken from his possession by legal process against the owner, or if, without his fault, they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure or destruction.[31]

In keeping with the rationale behind the whole scheme of absolute liability for common carriers, the seizure must be made without the procurement or connivance of the carrier; and prompt notice to the shipper of the seizure seems to be a condition precedent to the successful interposition of this exception as a defense to a suit brought by the shipper.[32]

### 5. *Inherent Nature of the Property*

The fifth exception relieves the common carrier of absolute liability when the loss or damage is due to the inherent nature of the property that has been shipped. This exception covers many situations and is probably more important than the other four combined. It is founded upon the same principles as the exception for losses caused by an act of God, and may, in fact, be a mere illustration of the latter. It is usually stated, however, as a separate exception, and it generally comprehends physical forces of a gradual nature, as opposed to those sudden catastrophes that are thought of as acts of God. The natural decay of perishable goods falls within this exception.[33] It is the duty of the carrier, however, to exercise reasonable care in the transportation of such goods, in order to prevent damage from lapse of time.[34] Furthermore, a jury question is presented in the issue of whether the damage was due to the inherent nature of the goods or to the defective condition of the carrier's facilities; if the latter be the case, the carrier would be liable.[35] The exception is also generally held to apply to the shipment of livestock.[36]

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31. Raliroad Co. v. O'Donnell, 49 Ohio St. 489, 500, 32 N.E. 476, 479 (1892).

32. Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N.E. 476 (1892).

33. American Express Co. v. Smith, 33 Ohio St. 511 (1878).

34. Hines v. Dinovo, 14 Ohio App. 119, 32 Ohio C.C.R. (n.s.) 1 (1920).

35. Fean v. Alabama Great Southern R.R., 26 Ohio App. 96, 159 N.E. 487 (1927).

36. The shipment of livestock has also been given special treatment by the legislature. OHIO REV. CODE § 959.13 provides that a carrier must supply food and

> Accordingly, in the case of a shipment of livestock a common carrier is not an insurer but is liable only in the case of negligence; the exception is due to the inherent nature of the shipment, or as it is sometimes said to the peculiar nature and propensities of the animals.[37]

Even such a cursory glance at the five exceptions to the common law rule making the common carrier an insurer reveals that the various situations in which the carrier might be absolved of his extraordinary liability are legion. When one of these exceptions is applicable, the carrier sheds his absolute liability, and is rendered subject only to the liability of the ordinary bailee — the duty to use reasonable care still remains with the carrier.

### B. CONTRACTUAL EXEMPTIONS

The exceptions to the rule of absolute liability do, it is true, cover a multitude of situations. Of even greater consequence from a commercial standpoint, however, is the doctrine permitting a common carrier to limit the extent of his liability by contract, since it could potentially apply to every carrier-shipper transaction.

It will be noted that the common law imposed a short of "two-level" liability upon the common carrier of goods: 1) the responsibility of the ordinary bailee for hire — liability for negligence; 2) The extraordinary liability of an insurer — absolute liability. This distinction has been brought into play when the courts have been called upon to determine the extent to which a carrier may limit his liability by contract. The cases make it clear that a carrier may contract for exemption from liability as an insurer, but any attempt to secure immunity from liability for negligence is invalid.[38]

As is the case throughout the law of common carrier, this phase of the law has been determined by means of a trek along the arduous and occasionally ill-defined trail of public policy. The policy favoring complete freedom to contract must surely give way to the policy which gives the greatest protection to the public safety; to allow contractual exemption from liability for negligence would have the effect of encouraging negligence, thereby endangering property of others.

> Now one of the strongest motives for the faithful performence of these duties is found in the pecuniary responsibility which the carrier incurs for

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other necessary attention when the livestock is detained for more than 28 hours. OHIO REV. CODE § 957.21 requires a carrier to take all necessary steps to prevent the spread of disease once it has been discovered.

37. Wilson v. Pennsylvania R.R., 135 Ohio St. 560, 562, 21 N.E.2d 865, 866 (1939).

38. Welsh v. Pittsburgh, Ft. Wayne & Chicago R.R., 10 Ohio St. 65 (1859); Graham v. Davis, 4 Ohio St. 362 (1854); Davidson v. Graham 2 Ohio St. 131 (1853).

> failure. It induces him to furnish safe and suitable equipment, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility, reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral, because it diminishes the motives for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have.[39]

This same public policy does not, however, apply to a contractual exemption from insurer's liability; negligence is not encouraged by such a contract.[40] Such a contract will be valid, then, in spite of the policy considerations which made the common carrier an insurer of goods in the first place.

Thus, an agreement that goods are to be transported at the shipper's risk has only the effect of relieving the carrier of the "liabilities imposed by the common law on public carriers where there was no fault or neglect on the part of the carrier."[41] A provision that the shipper assumes the risk arising from any defect in the body of a railroad car will not exempt the carrier from responsibility for a loss caused by the defective condition of a car.[42] Conversely, the carrier will not be liable for the value of goods shipped under an agreement limiting the carrier's liability for loss by fire to fires resulting from the negligence of the carrier, where the jury has determined that the fire was not caused by the negligence of the carrier.[43] If the period of time be a reasonable one, a contract requiring the shipper to make a claim for damages within a certain period after the loss will be effective; the carrier will not be held liable unless given such timely notice.[44]

A detailed examination of the scope of permissible contractual exemption from liability is beyond the purview of this note; no discussion would be complete, however, without a word as to one area that has given the courts particular difficulty. This is the phenomenon known as agreed valuation, whereby the shipper sets a value on freight and agrees that the named figure shall be the maximum amount recoverable for loss or damage to the goods, even when caused by negligence of the carrier. The first such agreement to come before the Ohio courts involved a situation in which the goods were known by both parties to have been under-

39. Graham v. Davis, 4 Ohio St. 362, 377 (1854).

40. Randolph v. American Airlines, Inc., 103 Ohio App. 172, 175, 144 N.E.2d 878, 881 (1956), quoting Hart v. Pennsylvania R.R., 112 U.S. 331, 340 (1884); Graham v. Davis, 4 Ohio St. 362 (1854).

41. Union Express Co. v. Graham, 26 Ohio St. 596, 598 (1875).

42. Welsh v. Pittsburgh, Fort Wayne & Chicago R.R., 10 Ohio St. 65 (1859).

43. Cincinnati, Hamilton & Dayton Ry. v. Berdan & Co., 22 Ohio C.C.R. 326, 12 Ohio C.C. Dec. 487 (Ct. App. 1901).

44. Pennsylvania R.R. v. Shearer, 75 Ohio St. 249, 79 N.E. 431 (1906).

valued, such agreement being entered into in consideration of reduced rates. The shipper, nevertheless, recovered the full value, the contract being held invalid on the grounds that the same public policy which precludes total exemptions from liability for negligence must invalidate an attempt to partially exempt such liability.[45] Later cases, have retreated in great strides from this position. This case has been distinguished from that in which there was no evidence that the carrier knew of the undervaluation; the shipper's recovery in the latter situation has been limited to the agreed value.[46] We are told that this does not run afoul of the public policy which precludes limitation of liability for negligence, since this is not a limitation on liability but upon the amount of liability.[47] Since a carrier's knowledge of an undervaluation would be extremely difficult of proof, the practical effect of these cases is that liability may effectively be limited to an agreed figure, which will constitute the maximum recovery for negligence, even if it be far less than the actual value of the goods lost or damaged.

By these contractual devices, then, the common carrier can greatly immunize himself from the sting to which the common law subjected him. By statute in Ohio, a common carrier may insert any conditions in a bill of lading which do not relieve him of the duty to use due care.[48] The Code further provides that the terms of a bill of lading become binding when the bill is received without objection to its terms.[49] It is obvious that the experienced corporate carrier will make the fullest permissible utilization of contractual exemptions in its bills of lading.[50]

One legislative restriction upon contractual exemptions must still be mentioned. By statute in Ohio, the *initial* carrier is made liable for loss or damage caused by any connecting carrier, and this liability may not be exempted by any contract.[51] This enactment has not appreciably

45. U.S. Express Co. v. Backman, 28 Ohio St. 144 (1875).

46. Baltimore & Ohio Ry. v. Hubbard, 72 Ohio St. 302, 74 N.E. 214 (1905).

47. *Ibid. But cf.* New York, Chicago & St. Louis Ry. v. Euclid Builders Supply Co., 11 Ohio App. 196 (1919), in which one lower court subsequently again reversed the field, at least in the case in which the negligence of the carrier amounted to a conversion.

48. OHIO REV. CODE § 4965.03.

49. OHIO REV. CODE § 4965.04. This statute abrogates the common law, which would presume that a shipper intended to insist upon his full rights, in the absence of clear proof that he assented to a limitation of liability. Pittsburgh, Cincinnati & St. Louis Ry. v. Barrett, 36 Ohio St. 448 (1881); Graham v. Davis, 4 Ohio St. 362 (1854).

50. See, for example a "uniform livestock contract." Wilson v. Pennsylvania R.R., 135 Ohio St. 560, 21 N.E.2d 865 (1939).

51. OHIO REV. CODE § 4965.54. The Interstate Commerce Act contains a similar provision. 34 Stat. 595 (1906), 49 U.S.C. § 20(11) (1946).

changed the general case law in the field; it merely makes the initial carrier liable to the extent he would have been had the loss occurred on his line, as defined by the framework discussed above.

## III. CONCLUSION

That a common carrier is the insurer of goods is still ostensibly the law of Ohio. This is not, however, an entirely realistic statement of the carrier's responsibility. The exceptions to the rule are applicable to numerous situations, thus extinguishing absolute liability. A carrier may, furthermore, escape this extraordinary responsibility by means of the relatively simple device known as a contractual exemption. The practical result, then, is that the common carrier will seldom, if ever, suffer the liability of an insurer; it will be liable only to the same extent as any other bailee for hire.[52]

It is submitted that this practical result is a just one and one more in harmony with the development of our economic and social institutions. Road agents no longer are a significant threat to commerce, nor is the possibility of collusion with thieves on the part of our great carrying corporations. Many other occupations constitute a public employment, none of which suffers insurer's liability. One wonders, indeed, as to the soundness of the rule even at its inception. Speaking of the reasons originally given by Lord Holt[53] for the rule, Mr. Justice Holmes has this to say:

> These reasons apply to other bailees as well as common carriers . . . If there is a sound rule of public policy which ought to impose a special responsibility upon common carriers, as those words are now understood, and upon no others, it has never yet been stated.[54]

This is not to say, however, that the common carrier should not be made to suffer some special burden, owing to its peculiar status. One of the reasons given for the common law rule was the fact that negligence on the part of the carrier is difficult of proof: "Doing it in such a clandestine manner as would not be possible to be discovered."[55] ". . . [G]o-

52. Interstate carriers are, as a practical matter, generally liable only for their own negligence. This is true because of certain uniform tariff rules which have been filed with the Interstate Commerce Commission. Arpaia and Jensen, *Common Carrier Liability in the Atomic Age*, 51 MICH. L. REV. 1173, n.4 (1953).

In Ohio, however, a common carrier may not relieve himself of any liability by means of a rule contained in the schedule on file with the Public Utilities Commission. Erie R.R. v. Steinberg, 94 Ohio St. 189, 113 N.E. 814 (1916).

53. Coggs v. Bernard, 2 Ld. Raym. 909 (1703).

54. HOLMES, THE COMMON LAW 204 (1881).

55. Coggs v. Bernard, 2 Ld. Raym. 909, 918 (1703).