1959

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Recommended Citation
G. Nathan Calkins Jr., Cause of Action under the Warsaw Convention, The, 26 J. Air L. & Com. 217 (1959)
https://scholar.smu.edu/jalc/vol26/iss3/1

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THE CAUSE OF ACTION UNDER THE WARSAW CONVENTION

PART I

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"The Warsaw Convention established, whether one might wish it or not, the rule of contractual liability of the carrier..."—Per E. Georgiades, writing in the Revue Française de Droit Aérien.¹

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"The Warsaw Convention does not change the basic rule that the contract of carriage is not the gravamen of the action for wrongful death... The cause of action is created by the lex loci."—Per Judge Leibell in Komlos v. Compagnie Nationale Air France.²

These two excerpts vividly point up the contradictory interpretations of the basic philosophy of the Warsaw Convention as between certain United States courts on the one hand and French legal thought on the other. While the contest is primarily one of legal philosophy, since in most cases there will be an underlying right of action in tort upon which a plaintiff may recover, the contest is not entirely a sterile one.

If the Convention does not establish a cause of action upon which suit may be brought within the United States in accordance with the terms of the treaty, the next of kin of a passenger killed in an aircraft accident abroad will have to establish his right to recover on the basis of the law of that foreign country. This is so because of the normal rule of conflict of laws that actions in tort are governed by the law of the place where the tort occurs.³

Thus the personal representative of a person killed in a foreign accident would be required to show first that the law of the foreign country granted a right of recovery for wrongful death, the persons to whom such right was granted, and the circumstances under which it was allowed. While under both the Georgiades and Leibell views, a reversal of the burden of proof would be available to the plaintiff, the Leibell view could be substantially limiting, in case the foreign cause of action for wrongful death carried a limitation of liability lower than that of the Convention.⁴ Moreover, if there

The resolution of this question becomes important at the present time because the Hague amendments to the Warsaw Convention consisting of a protocol increasing the limits of liability and making other modifications in the convention has now been submitted to the Senate for action looking toward ratification. The protocol substantially improves the Convention but the doubt in the United States whether the Convention accords a cause of action for wrongful death leaves litigants and particularly plaintiffs with less than the full measure of rights the Convention was designed to give.

It is not the purpose of this article either to defend or attack the Warsaw Convention. However, the author is convinced that the draftsmen of the Convention intended to create a right of action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today. In light of the circumstances it is believed useful to lay these elements out in plain view.

Collaterally involved in this discussion is the effect of such a cause of action in the United States.

At the present writing there are two basic cases in the Court of Appeals for the Second Circuit which have adopted the view of Judge Leibell. In each of these cases the Court held that a cause of action was not created by the Warsaw Convention. In view of the important effect which these cases might have on future decisions, notwithstanding the original intent of the Warsaw draftsmen, it is desirable to examine them at close range.

Consequently, this article is arranged in two parts. The first, appearing in this issue, deals with the background, preliminary conferences, drafting and debate at the Warsaw conference concerning this Convention. The second, to be published in the next issue, will be directed to a study of the United States cases involved.

Background of the Convention

Prior to the meeting in Warsaw in the fall of 1929 eight different drafts dealing with the subject matter of the final convention had been considered by international groups. Mr. De Vos, the reporter, describes the history of the drafting of these documents as follows:

“This draft is the end result of a number of preparatory studies which have found expression in eight earlier drafts concerning either the liability of the carrier or the air waybill.”

“A first rough draft of convention fixing the basis of liability of the carrier and of the limitation of that liability in the matter of air transport was presented by the French Government to an international conference held in Paris, October 26, 1925.”

“This conference created a commission, which reviewed the text. An amended first draft was submitted to the conference November 3, 1925, and modifications were made in it by the Conference on November 6, 1925.”

“A first initial draft on the air waybill was submitted to the second commission of Citeja, which had been created in the meantime, meeting in Paris on March 30, 1927.”

“As a result of the study of this draft in April of 1927 by the Citeja, the text was slightly amended.”

“However, Citeja having during the course of this same meeting decided to examine the possibility of combining the two matters in a single


6 Minutes and Documents, Second International Conference on Private Air Law, October 4-12, 1929, Warsaw, p. 159. Throughout this article any reference to either the Warsaw Conference documents or the Citeja documents is to the French text. The quotations in English from these documents are the author’s translation.

7 Comite International Technique d’Experts Juridiques Aeriens.
convention—liability and documents of carriage—a new draft was submitted in June of 1927."

"The text of this last draft was modified as a result of the deliberations of the second commission of Citeja meeting in Brussels November 7-10, 1927."

"A further meeting of this commission was held in Paris on March 21 and 22, 1928, during the course of which the earlier drafts were again amended."

"Finally, all these came before the Citeja in May of 1928 at Madrid where they were put into final form."

The reporter continues by describing the limited character of the Convention, and so doing he repeats the basic principles to which the draftsmen had directed their attention in the preparation of the first eight drafts. The reporter says:

"Before turning to the articles of the draft convention, it is proper to bring out that in this matter international understanding may be established only if it is limited to certain fixed areas. Thus the text applies single-mindedly to the contract of carriage—first in its outward manifestations of form and then in the legal ties which are established between the carrier and the persons carried or who ship. It does not regulate any other question which might be raised by engaging in the carriage."

"Thus the convention creates no system of compulsory insurance."

"Similarly, liability being limited from the point of view of the carrier, the principle of abandonment is not raised."

"As it involves liability arising by reason of specific contracts of carriage, the convention very evidently will apply only to damage caused by the equipment used in such carriage in the performance of the contract."

( emphasis added)

It is quite apparent from the foregoing that the reporter believed that the draft convention dealt with the contractual liability of the carrier and was basically limited to such liability. Was he justified in this belief?

He was. But to prove it, it is well to go over the background and development of the draft. The convention originated through the efforts of the government of France by convening an international conference on the subject and presenting to it a draft convention for consideration. It is therefore appropriate to start with the law of France regarding the liability of French carriers in 1925—the time when the international conference was called.

French Law of Carrier Liability

According to Juglart, prior to 1911 the law of France, with regard to the liability of common carriers for death, was based on tort. This liability was founded on Articles 1382 and 1383 of the French Civil Code. However, beginning in 1911 French jurisprudence took a radical swing in direction and held that a public carrier was liable in the case of death or personal injuries to a passenger on an undertaking in the contract to carry safely, and the tort in effect disappeared. What he said about it follows:

"In times past the contract of carriage of persons dealt only with the means of locomotion, the price, the space to be occupied by the traveler, and where necessary with the duration of carriage. But suppose an accident occurred to the traveler. Under such circumstances the latter had to prove the negligence of the carrier on the basis of Articles 1382 and 1383—because he was in the field of tort. Now, since 1911 we have passed from the tort field to the contractual field. The law decided that from the carriage of persons there arose against the carrier a contractual duty to achieve performance. It held that a carrier undertakes to deliver the passenger safe and sound at the place of destination. Here is an example of extension of obligation which we can happily point to in studying the expression of consent in contracts. Thereafter and since 1911 whenever an accident occurred to travelers in the course of carriage, the carrier found

8 Warsaw Minutes and Documents, p. 160.
9 Michel de Juglart Traite Elementaire de Droit Aerien (1952) p. 240.
himself liable no longer tortiously but contractually. Negligence is no longer tortious harm but a contractual breach. As a consequence the victim no longer need prove negligence."

This doctrine—so singular to the eyes of the common lawyer—was not confined to France. Thus Rigalt in his *Principios de Derecho Aereo*\(^\text{10}\) says at page 124:

"Contractual liability is founded in the non-performance of the obligations flowing from the contract of air transport in which third persons have or possess the status of simple contracting parties and the carrier undertakes to carry the passengers or merchandise with absolute security throughout the journey. Such obligation even without being specifically stipulated subsists, and in case of non-performance places the carrier in the role of a contractual debtor and the passenger as his creditor."

In Chile likewise liability of the carrier is based on the contract of carriage as Eduardo Hamilton says in his *Manual de Derecho Aereo:*\(^\text{11}\)

"Liability of the carrier is born in the contract of carriage and the obligations which flow from it and may be summarized as follows: to carry the passenger free of damage and within the terms and times stipulated."

*Paris Conference of 1925*

The French draft was considered by the full conference after it had been revised by a commission. The reporter, Mr. Pittard, explained the reasons for the system of liability adopted as follows:

"What can one require of air transport? A proper organization of its business, a judicious choice of its staff, a constant surveillance of its servants and agents and a business-like supervision of its aircraft, accessories and prime materials."

"It is certainly necessary to recognize that he who uses an aircraft is not unaware of the risks inherent in this mode of travel, which has not yet attained the point of perfection which a hundred years have given to the railroads."

"It is therefore fair not to impose on the carrier an absolute liability but to relieve him of all liability whenever he has taken reasonable and normal measures to avoid damage—it is the diligence that one can require from a good family father."

The foregoing excerpts show that the reporter gave basic consideration to the system of liability which the convention was to impose on the carriers. Imposition of absolute liability would be unfair, and the decision was here taken, which was to be reflected in the convention as signed, that where harm is caused, liability would flow if the carrier failed to show he had exercised the diligence that a good father exercises in respect of his family.

*Consideration by C.I.T.E.J.A. (Second Session)*

Citeja did not immediately begin consideration of the draft convention on liability of the carrier. Instead, it first took up the related matter of the air waybill. A draft convention on this subject was discussed by the full committee in its second session, held in Paris beginning April 4, 1927.

The discussions directed to the air waybill do not concern the issue here in question. However, the point was raised during the debate of the possibility of combining the air waybill draft with the liability draft. Both subjects were assigned to Citeja's Second Commission; the reporter—Mr. De Vos—was the same for both drafts, and the Committee directed the Second Commission to come up with a consolidated draft.\(^\text{12}\)

At this point Mr. Ambrosini, who was the reporter for the Third

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\(^{10}\) Antonio François Rigalt, San Luis Potosi, Mexico, 1939 (Translation G.N.C.).

\(^{11}\) Santiago, Chile, 1950, p. 449. (Translation G.N.C.)

\(^{12}\) Citeja, Minutes and Documents, 2nd Session, April 1927, p. 40.
Commission (charged with studying third party liability matters) moved that his commission be included. The debate which followed shows the thinking of the Citeja members:

"Mr. Pittard was not in favor of this amendment. He was aware that in Italy the same system is in force respecting third party liability as for carrier-passenger liability—such undoubtedly is the reason for the Italian experts' proposing the same basis for both liabilities. If we envisage the possibility of having a system of absolute liability for third persons on the surface and one based on negligence for passengers, the question becomes divided. The basic question which arises here is to know whether to take as the basis of liability toward third persons the system of risk (absolute liability) and for the passengers the system of negligence; or to provide the system of risk in the two cases or the system of negligence in the two cases.

"Mr. Ambrosini (Italy) agreed that it might be well to adopt the principle of absolute liability for passengers and goods carried and to adopt the principle of absolute liability for damage to third persons. But what matters is that all questions relating to liability be regulated in a uniform way so that insurance covering air transport may be made the subject of practical rules, and it is for this reason he recommended consultation between the two Commissions.

"Mr. Wolterbeeck Muller (Netherlands) in his capacity as President of the Third Commission, believed it was necessary to proceed gradually. The work had been begun with the liability of the carrier, that is to say, contractual liability; the Third Commission is now discussing liability in tort, which is a separate question. It thus appeared to him to be preferable to take one step at a time."

The Reporters' Combined Draft

The draft combining the texts of the two draft conventions was prepared by Mr. De Vos and was considered by two successive meetings of the Second Commission. The combined draft was then submitted to the third session of Citeja, meeting in Madrid in May of 1928.

The draft convention was arranged in three chapters: the first dealt with definitions and objectives of the convention; the second with documents of carriage; and the third with liability of the carrier.

It is the liability articles which most concern us, and because of the importance of this initial draft both in the respects in which it remained unchanged as well as the respects in which it was either changed, modified, or provisions deleted, it is desirable to set this chapter forth in full. Translated it reads as follows:

CHAPTER III.

LIABILITY OF THE CARRIER

ARTICLE 21

The period of carriage within the meaning of this convention extends from the moment travelers, goods, or baggage enter the airport of departure until the moment they leave the airport of destination; the period does not cover any transportation whatsoever outside the limits of the airport other than by aircraft.

If loss, damage, or delay occurs during the course of any carriage as to which only a part is governed by this convention, such loss, damage, or delay shall be presumed, subject to rebuttal, to have occurred during such part of the carriage.

ARTICLE 22

The carrier shall be liable for damage during the carriage:

(a) In case of death, wounding or other physical bodily injury of every description suffered by a traveler;

(b) In case of destruction, loss or damage to goods or baggage;

(c) In case of delay suffered by a traveler, by goods, or by baggage.

18 Id., pp. 40, 41.
ARTICLE 23
The carrier shall not be liable if he proves that he and his employees have taken reasonable measures to avoid the damage or that it was impossible for him to take them, unless the damage arises from a latent defect in the aircraft.

ARTICLE 24
The carrier shall be liable for the errors and omissions of his servants and agents. Nevertheless, in case of an error in piloting, of aircraft handling, or of navigation the carrier shall not be liable if he submits the proof required in the preceding article.

ARTICLE 25
The liability of the carrier shall be limited to the sum of 25,000 francs per passenger. Nevertheless, by special agreement with the carrier, the traveler may fix a higher limit of liability.

In the carriage of goods, as well as in the carriage of baggage, liability of the carrier shall be limited to the sum of 100 francs per kilogram subject to a special declaration of interest in delivery made by the shipper at the time of handing over the parcel to the carrier and subject to the payment of a supplementary charge if required. In such case, the carrier shall be held to pay the declared sum, unless he shall prove that such sum is higher than the real value at point of destination or higher than the interest which the shipper has in its delivery.

The values set forth above are based on the gold standard. They may be converted into any national currency in round figures.

ARTICLE 26
In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this convention, unless the damage arises through an intentional unlawful act as to which he bears the liability; in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability or that derived from the errors or omissions of his servants or agents.

ARTICLE 27
In case of death of the person holding the cause of action, every liability action, however founded may be exercised, within the terms and limits provided by this convention, by those persons to whom such action belongs in accordance with the national law of the deceased or, in default of such law, in accordance with the law of the place of his last permanent residence.

ARTICLE 28
Every clause tending to exonerate the carrier from his liability or establishing a lower limit than that which is fixed in this convention shall be null, void and of no effect, but the nullity of any such clause shall not carry with it the nullity of the contract which remains subject to the provisions of this convention.

ARTICLE 29
The liability action shall be brought at the option of the plaintiff in one of the contracting states either before the court of the principal place of business of the operator or of the place where the latter maintains an establishment through which the contract was made, or before the court of the place of destination or, in case of non-arrival of the aircraft, of the place of the accident.

In case of death, every action shall be brought before the first court which shall have been properly seized of the case, and the judgment rendered shall be res adjudicata in every contracting state.

Procedure shall be governed by the law of the forum; however no special formality or bond may be required of a plaintiff by reason of his nationality.

ARTICLE 30
When the consignee takes the goods away without protest, such taking shall constitute a rebuttable presumption that the goods have been delivered in good condition and in conformity with the document of carriage. However in the case of non-apparent damage or of delay, the consignee shall have seven days beginning with the receipt of the goods to protest to the carrier or to his agent at the place of delivery.
Every protest shall be made by an express reservation on the document of carriage or by another writing sent within seven days of the receipt of the goods.

**ARTICLE 31**

The liability action shall be brought within two years beginning from the arrival at destination or from the stopping of the aircraft. The method of calculating the period of limitation as well as the causes of suspension or interruption of the period shall be determined by the law of the forum.

**ARTICLE 32**

In the case of carriage governed by the definition of the last paragraph of Article 1, to be performed by several successive carriers, each carrier accepting passengers, cargo or baggage, shall be subject to the rules established by this convention and shall be considered to be one of the contracting parties to the contract of carriage, to the extent that such contract deals with the portion of the carriage performed under his supervision.

In the case of transportation of this nature, the passenger or the persons claiming through him shall not take action except against the carrier having performed the carriage in the course of which the accident occurred, except in a case where by express agreement, the first carrier assumes liability for the entire journey.

As regards cargo or baggage, the shipper shall have recourse against the first carrier and the consignee who is entitled to delivery against the last carrier and further each shall be entitled to take action against the carrier performing the carriage in the course of which the loss, damage or delay occurred. These carriers shall be jointly and severally liable to the consignor and the consignee.

**ARTICLE 33**

Every clause in a contract of carriage in derogation of the rules of this convention and all special agreements made prior to the occurrence of the damage shall be null and void whether such derogation is by the determination of applicable law, or by a modification of rules of jurisdiction. Nevertheless, arbitration clauses may be permitted within the limitations of this convention whenever the arbitration is to be performed in the places in which courts would have jurisdiction pursuant to Article 29, paragraph 1 above.

Even a cursory reading of this text will convince the reader that the French law of contractual liability of the carrier was intended to be the governing basis of the convention. Thus Article 21 establishes the period during which the convention is to apply.

Article 22 imposes liability on the carrier in certain specified cases including death of a passenger.

Article 23 relieves the carrier of liability if he proves that he and his employees have taken reasonable measures to avoid damage or that it was impossible for him to have taken such measures. This is subject to one exception—where the damage arises through a latent defect in the aircraft. The effect of this clause is to impose absolute liability on the carrier where damage arises through a latent defect in the aircraft. While the clause was subsequently eliminated at Warsaw, for reasons which will be discussed later, it is absolute evidence that at this stage the instrument was regarded as one imposing the liability specified in the convention upon the carrier.

Article 24 imposes vicarious liability on the carrier, but at the same time relieves the carrier from such liability in case of errors in piloting, in operation of the aircraft and in navigation.

Article 25 is the limitation of liability article.

Article 26 also demonstrates that a contractual right of action under the convention was intended. The first clause of the paragraph reads—"in case of accident, loss, damage or delay, the liability action may not be instituted against the carrier except on the basis of this convention . . ." (Emphasis supplied). Outside rights in tort were excluded subject to one exception. This is found in the material which immediately follows in draft Article 26. Today we refer to it as the "willful misconduct" provision, which makes
inapplicable only such provisions of the Convention as exclude or limit liability. In this draft, however, it was quite clear that all claims were to be under the convention unless the damage arose from an intentional and illegal act as to which the carrier was liable. In short, actions arising out of willful misconduct of a carrier were to be based on national law rather than on the contract.

Article 27 also shows the intent of the draftsmen with respect to the basis of liability. The article provided that in case of the death of the holder of the cause of action every liability action no matter how brought could be pursued by the persons to whom such action belonged in accordance with the national law of the deceased or in default of such national law in accordance with that of the place of last permanent residence. As the minutes show:14

"The reporter drew attention to the fact that in Article 27 there are two provisions. The first, in case of the death of the holder of the right (of action) every liability action shall be exercised within the terms and limitations provided by the convention—that is to say that the system of limitation of liability shall always apply whenever there is a death of the holder of the right.

"The second idea is that of knowing by whom the action shall be brought.

"The proper means of expressing these thoughts has been sought in vain. One or two of the elements were given, but it is not possible at the present time to come to a definitive formula which is capable of dealing with the question in its entirety."

Action by Citeja at its Third Session on the Reporter's Draft

While Article 21 of the reporter's draft was modified to some extent, particularly in regard to the second paragraph, modifications made seem to have little bearing upon the instant question.

Article 22 was not changed in substance. However, during the course of the debate a question arose with respect to hand baggage and personal effects. This discussion throws considerable light upon the intention of the committee in Article 22 of the draft.15

Mr. Friis (Denmark) asked if it would not be possible to deal with the question of liability regarding hand baggage and personal effects. Objects contained in hand baggage frequently are of great artistic or material value. If it were desired in every such case to eliminate liability, it would be necessary to insert in article 4 "as to which the traveler retains custody and the risk" but it seems to him that that might be a rather harsh principle.

The Reporter answered that it had been understood that the personal effects which the traveler retained in his custody would not come under the system of liability of the convention. The traveler has the custody and must assume the risk. The system of liability is based only on the document of carriage. Since the baggage check makes no provision for these personal goods, the system of liability does not apply.

Mr. Ripert. The animating spirit of the convention is the understanding that the application of the convention does not prevent a person not covered by the application of the convention from acting in accordance with national or general law. If a traveler has his clothing damaged by the negligence of the carrier, he can always prove negligence of the latter.

Subsequently, the Committee decided to insert a limitation of liability in respect of personal effects although no cause of action was given with respect to them. This is discussed under Article 25, infra.

Article 23 of the Reporter's draft was discussed by the committee together with Article 24. The draft produced by the committee combined both these articles in a new article, and changed the substance of the

14 Minutes and Documents, Third Session of Citeja, p. 55.
15 Minutes and Documents, Citeja, Third Session, Madrid, p. 46.
carrier’s exoneration from liability (in case of pilot error, etc.) to confine such exception to damage occurring to goods and baggage. This was done on motion of the German delegation, which considered that there would be no effective balance in the Convention if an injured passenger or his representative were precluded from suing because the damage arose from errors in piloting, handling or navigation. In the course of the debate the Hungarian representative said:

“Mr. de Szent Istvany (Hungary) seconded the proposal of the German Delegation, and drew attention to the fact that under the laws of certain countries, the system of liability for air carriers is based on absolute liability. For this reason, and for the purpose of making adherence to the Convention by these states easier, the Hungarian expert believed it preferable to increase, to the greatest possible extent, the liability of the carriers—at least so far as passengers are concerned.”

It will be noted that the committee retained the provision with respect to latent defects in the aircraft and the absolute liability of the carrier for them, although not without considerable debate. This discussion was subsequently renewed at Warsaw and the phrase was there eliminated. Consequently, there is no need to set forth the full discussion here. However, the final speech, by the Reporter, is interesting:

“The reporter shares the opinion of Mr. Pittard. It is certain that the convention contemplates complete liability. It was only last year at the request of the Italian delegation, that this system had been changed and that by a rather small majority. The big argument put forward is that which was stated by Mr. Pittard: it’s the right of recourse (of carrier against manufacturer). There is one person who is liable—that is the manufacturer, but the traveler is never in a position to sue the manufacturer, it is therefore necessary that it be the carrier. It was before this practical argument of fairness that the commission bowed and accepted this exception to the theory of negligence.”

Article 25 was amended in only one particular. That related to inserting a limitation of liability on objects which the passenger keeps in his own custody and came about as follows:

“The reporter made an observation regarding the special rules requested by the British delegation in regard to personal objects which have not been registered with the carrier and which have real value.

“Mr. Clarke recalled what he had said earlier. When the traveler registers his baggage there is a known situation. Outside of that, there are personal effects and belongings the possible loss of which it would be appropriate to subject to the rules of the Convention, prohibiting recovery under this heading in a greater amount than a given figure. It did not appear necessary to declare these objects, because the burden of proof falling on the traveler, and the liability being limited, the carrier would always know the extent of his risk.

“The chairman before requesting the committee whether it was agreed on the substance and whether there was occasion to return the matter to the drafting committee requested what the maximum limit would be for these personal objects.

“Mr. Babinski proposed as a maximum limit the amount of a thousand gold francs.”

Thus a special status was created by this action of Citeja in regard to these personal objects and effects. The convention imposed no liability as to them but merely limited liability arising under national law.

During the course of its third session the Citeja began a surgical operation with regard to Articles 26 and 27 of the reporter’s text which destroyed the organizational clarity of the original document. It also eliminated a

16 Id., p. 49.
17 Minutes and Documents, Citeja, Third Session, Madrid, 1928, pp. 50, 51.
18 Id., p. 51.
19 Id., p. 52.
phrase, which coupled with a slight mis-translation from the French to the English text is probably the basic reason for Judge Leibell's decision. In short, if the language which the Citeja excised at this moment had remained, this article might never have been written. I refer, of course, to the phrase "the liability action shall not be brought against the carrier except on the basis of this convention..."

The reason for the surgery is explained by the reporter: 20

"The reporter explained: Former Article 26 contained two ideas—first, every liability action must be brought on the basis of the convention; the second idea covered the intentional unlawful acts as to which the carrier had assumed liability. It appeared absolutely necessary to separate these two ideas. There were thus two new paragraphs. In addition, since there had been eliminated from Article 27 the part relating to the person who would be entitled to bring suit on the death of the holder of the right, the article no longer contained more than a declaration that all action must be brought on the basis of the convention. This was a repetition of the same idea contained in Article 26. The drafting subcommittee had therefore combined the two articles in a new Article 24 which is drafted thus:

"In the cases provided in Article 21, even in case of the death of the interested person, every liability action however founded may not be exercised except with the terms 21 and limits provided by this convention.

"If the damage arises from an intentional unlawful act as to which the carrier is liable, he shall not have the right to avail himself of provisions of this convention which exclude in whole or in part his direct liability or that derived through the errors of his servants or agents."

The earlier floor debate on Article 26 shows the considerations which the draftsmen gave to the effect of the article. The following colloquy took place: 22

"Mr. Richter. Article 26 (of the Reporter's draft) says in short that the action shall be based either on the convention or on national law and the injured person will choose which is the better for him. For an action under national law, it is the victim who must prove negligence and this sometimes is quite difficult. The victim will say in such a case 'I renounce receiving full reparation for my damage in order to be sure of receiving something.'"

There followed an exchange of views between Messrs. Ripert, Richter, Pittard, Clarke, and the chairman, and the following draft was presented:

"In the cases provided in Article 22, the liability action shall not be brought against the carrier except on the basis of this convention unless the damage occurs from an unlawful intentional act as to which he bears a liability."

"The chairman observed that this text said in certain cases the special law arising from the convention ceases to apply and in such instances general principles of law are to be applied. The two cases must be provided for—'the liability action shall not be brought except on the basis of this convention'—and this is the first and the 'unless' clause which immediately follows forms the basis of the second.

"Messrs. Clarke and Ripert observed that the initial idea had been that no action could be brought except on the basis of the convention, but that if one found an intentional unlawful act, the limit of liability would not apply. By the text just submitted every exception to the convention would be permitted. It would be enough to charge the carrier with an 'intentional unlawful' act. That might or might not succeed, but in every case it would permit the plaintiff to bother the carrier."

20 Id., pp. 66, 67.
21 Fr.—conditions. The English translation of this word as "conditions" in the official U.S. text of the Convention, Article 24 may be one of the reasons for Judge Leibell's decision. See 111 F. Supp. 393 at 402. Le Nouveau petit Larousse gives "conditions" several meanings, including the English legal sense. However, it also defines it as "the fundamental basis," and it is apparent that the Citeja was using it in the latter sense. Thus "terms" appears to be a better translation. 22 Id., pp. 53, 54.
"The Chairman. It would seem that the best way out would be to maintain Article 26 in the initial sense which had been given it. It would be appropriate to speak here only of the loss of the limitation of liability, without trying to explain in detail the general question of the possibility of suing by virtue of national law."

The Discussions at Warsaw

The Warsaw conference lasted eight days—from October 4 to October 12, 1929. During this time most of the discussion was directed to specific amendments to the Citeja draft. There was consequently little basic discussion of the philosophy of the convention. Moreover, such a discussion was unnecessary, since most of the active delegates present were members of Citeja and had participated in the drafting.

There is nothing to indicate any change in direction which would modify the original draft from a convention creating a complete system of liability based on the contract of carriage to one which merely imposed conditions and limitations on rights of action otherwise accorded under national law. On the contrary, the evidence is overwhelming that the conference reaffirmed the theory throughout that the convention would establish a system of liability complete in itself. This evidence is of two types. The first is the adoption of amendments to the Citeja draft which are compatible only with the complete liability system philosophy. The second is specific statements made on the floor of the conference. Statements of this nature appear during the course of debate, and are set forth in the discussion below.

In the first category come the following actions taken by the conference modifying the Citeja draft (or refusing to modify it):

1. The rejection of a Japanese proposal to permit individual states by legislation to lower the limitation of liability of carriers in operations subject to the convention.
2. The elimination from Article 28 of the place of accident as a possible forum for bringing suit.
3. Admitting the defense of contributory negligence of the person injured but basing its effect not on the law of the place where the accident occurred, but on the law of the forum.
4. The adoption by the conference of a limitation of liability for articles retained in the passenger's possession, but according no right of action to sue for such loss under the convention.
5. Specification of the rules of respondeat superior and the accompanying rejection of a British proposal that such liability be determined by reference to national law.
6. The elimination on the ground of unfairness to the operator of absolute liability provided in the earlier Citeja draft for damage arising from latent defects in the aircraft.

These items will be discussed more fully below.

The Japanese Proposal

The debate on the Japanese proposal occurred during the first stages of the conference and is reproduced at pages 24, 25 of the Warsaw documents. It is set forth in full below in translation.

"Mr. De Vos—reporter. We thus have in the first classification (of proposed amendments to the draft convention submitted by various governments) concerning the principles of the system of liability itself, a first amendment coming from the Japanese delegation which reads as follows:

"Article 26—the Japanese delegation is of the belief that in present state of air navigation and in view of the extremely different conditions which exist in various countries in the world, it is prac-
tically impossible to apply the provisions of Article 23 (final Article 22—limits of liability) in a uniform way."

"The delegation proposes therefore in order to allow consideration of specific local circumstances, to weaken the thrust of Article 25 (final Article 23) by reserving to the states the ability to authorize by legislative act a departure from this article if they believe it necessary.

"The Japanese delegation proposes to amend as follows paragraph 1 of Article 25:—add after 'of no effect' the words 'unless it be authorized by national law adopted in view of special circumstances' and by modifying the beginning of the following sentence as follows: 'nullity of the clause specified above shall not entail . . .'

"Article 25 prohibits all clauses of exoneration from liability of any sort; the Japanese delegation would authorize each national law in the case where it judged such action necessary to depart from this article.

"The opinion of your reporter is very clear and very brief; it is absolutely impossible to accept this amendment; to do so would be to completely upset the basic principles of this draft, which is a compromise and of which one of the first principles is the interdiction of clauses of exoneration.

"The Chairman. The delegate of Japan has the floor.

"Mr. Motono (Japan). I will also be very brief. The Japanese delegation has considered at length the text of this convention and we have no intention of running counter to its basic principles; but as Mr. Giannini said, we are the representatives of governments; we are here to make a convention to which the whole world should be able to adhere, and this requires reciprocal concessions. Moreover, if we want to make any progress at all and accomplish something, I believe that we should above all take heed of considerations of a practical nature. My government believes, as you can see, that in the present state of air navigation, given the extremely different conditions that exist in the various countries, it is practically impossible to apply Article 23 in a uniform manner. This is particularly important for the non-European countries. I can well understand that for European countries a system can be adopted which is just about uniform as has indeed been done in several conventions; but if you want to include all the countries of the world such as Asia, America, Africa, and perhaps Oceania, you can establish a principle, but it is necessary to make it somewhat flexible. What we propose, therefore, is not to say to the companies 'You may do what you want,' but to make subject to national law the possibility of attenuation of liability (below the convention limits).

"Sir Alfred Dennis (Great Britain). As regards the British Government, the sole reason which it has for entering into this convention is the desire to attain uniformity. If the conference adopts the viewpoint of Japan, we would be completely defeated in this desire. The draft convention is contrary on many points to our own law and to our customs, but we have decided to make sacrifices in order to attain this uniformity of system.

"The Chairman. Does anyone else wish to speak?

"Mr. Ripert (France). What is the opinion of the reporter?

"Mr. De Vos (Reporter). He has already given it to you in a very clear but brief way.

"The Chairman. Then, gentlemen, I will put the amendment of the Japanese delegation to vote."

(The amendment was rejected by unanimous vote less one of the conference.)

The presentation and rejection of this amendment is important, since it demonstrates that the government of Japan believed it necessary in order to permit it and other countries to provide lower death limits than the Convention provided. If the cause of action for wrongful death was to be based on national law, the desired result could have been accomplished by Japan acting either unilaterally or in cooperation with the neighboring countries to which its airlines flew. The unanimous rejection (except for Japan) showed that the Conference would tolerate no such idea. The action taken shows that neither airline nor government can place a lower limit on deaths covered by the Convention than that provided in the Convention.
Elimination of the Place of Accident as a Possible Forum

Article 28 of the Warsaw Convention provides that an action for damages must be brought at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principle place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

This Article appeared as Article 26 of the Citeja draft, and in addition to the tribunals specified in the final convention, the draft provided: “And, where the aircraft fails to arrive, the place of the accident.”

The discussion on the floor of the Conference when it was agreed to delete this last forum from those given common jurisdiction to decide questions arising out of the Convention, follows.23

Mr. De Vos—(Reporter)

“We now come to the matter of jurisdiction over liability actions.

“According to the British proposal, the jurisdiction of the place where the accident occurred should be eliminated. The British delegation believes that the retention of this place as one where action may be brought could bring about difficulties and give rise to actions against which the carrier might find it difficult to defend.

“We had recognized the place of the accident as a possible jurisdiction within which suit might be brought by reason of the ease with which one might there establish the circumstances of the accident.”

Mr. Clarke—(Great Britain)

“We have not very much to say on this question apart from what appears in the document you have before you.

“The first point to be brought out is that the place of accident has absolutely no connection with the contract or with the place to which the parties are considered to have given jurisdiction. Ordinary contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract.

“The second point which concerns us is that in the course of long journeys, such as the trip from London to India, you pass through countries where courts are not at all well organized. You will have very great difficulty for example in bringing suit before the courts of Persia or Mesopotamia. The carrier would have enormous trouble in defending a case which might be brought in these far-off countries, where the courts really are not well organized. It is for these two reasons that the British delegation proposes the deletion of the words ‘or in the case of the failure of the aircraft to arrive, at the place of the accident.’”

Mr. Babinski—(Poland)

“It appears to me that the British delegation in making the proposal just explained bases it on a point of view which deals with specific cases. For us in Europe, the situation is presented a bit differently, and it would be quite difficult to eliminate the forum loci which appears to be an altogether natural one from the point of view of procedure in which to bring an action.

“If we consider the material elements of the accident which produce the liability action, we think at once of the place of the accident so that from the legal point of view it would be difficult not to include that place. Moreover, in the rail conventions such a tribunal is accepted.

“Furthermore, I would like to observe that the convention does not deal with matters of execution. He who would bring an action will have to assure himself whether the foreign forum gives him a means of levying execution. He will naturally choose a tribunal of a country where the judgment may be thereafter enforced in the defendant’s country.

“To sum up, I believe that for reasons of general policy and for the others which I have pointed out, it would be preferable to retain the text of the Citeja draft.”

23 Warsaw Conference Documents, pp. 77-79.
Mr. Youpis—(Greece)

"I agree with the points just raised by the delegate from Poland. "It is difficult not to accept jurisdiction of the place of the accident. The person suffering damage, as well as the carrier himself, has a very special interest in having easy proof, and certainly proof cannot be easier than on the very spot where the accident occurred. "Against this are raised objections that there are countries where justice is badly organized and the injured person might take advantage of this fact as a sort of blackmail. This is true, but if it is difficult for air navigation enterprises to appear in a far-off country where justice works poorly, the same difficulty confronts the injured person with even greater force. Moreover, the limitation which we have fixed for liability (25,000 francs) would not allow a person to run the risk of going to a far-off country if he knew that justice was not certain there. "In this same Article 26 there is listed the place of destination as a jurisdiction in which the injured person may bring said recourse; but the place of destination can also be in Mesopotamia—a country where the courts don't work very well; and such being the case we are logically consistent if we maintain our present draft. "For all these reasons I believe that the grounds advanced for opposing the text before us are invalid."

Mr. Ripert—(France)

"I wish to support the amendment which has been proposed. "Jurisdiction in courts of the place where the accident occurred is justified when the victim is a third person, a stranger to any contract of carriage, and who has the right to be protected against the carrier. But when there is involved a shipper of goods or a traveler who has entered into a contract and who by that fact alone has placed himself under the governing rules of the convention and the law of the contract, there is no reason at all for that person to go trying his case before any old court which happens, by chance, to be the court of the place of accident. Not only is there no reason for it but it is extremely dangerous because if in the convention we say that the court of the place of accident has jurisdiction; it will not have jurisdiction unless the state where one wants to begin action has ratified the convention. Consequently, we would find ourselves in the presence of a very complicated rule. It would be necessary for the victim to know whether the state at the place of accident has ratified the convention. "We have inserted this rule in the draft convention on third party liability (in Citeja) where there is justification for it; but for liability arising out of an accident, I believe that we must let the usual rule of contracts apply and suppress this novel rule, which is not found in any other convention."

Mr. Pittard—(Switzerland)

"I believe that we can support the amendment of the British delegation, and I am disposed to do so because up to the present time, with the exception of Mr. Youpis, only disadvantages have been shown respecting the forum of the accident. "If an accident occurs, without any invitation being issued, the police of the place of accident will turn up on the spot. They will be concerned not with matters relating to the transportation but with those relating to the accident. With respect to the accident the question will be brought to light immediately on the very spot by the authorities of the country if it is well organized. And if it is a non-organized country all the objections of the forum loci are presented. "Every time an accident occurs there is an immediate police intervention. If there are no police, what kind of courts would you have? On the other hand if there are police the facts observed by them will be carried before the courts selected by the parties in the contract. That is to say, the court of the place of departure or of arrival. For these reasons I wholeheartedly concur with the British proposal."

The Chairman—

"No one else desires the floor? "I'll put the British proposal to vote. Vote by states has not been requested."

(The British proposal was adopted.)
The foregoing debate would have been absolutely incredible if the delegates had had the vaguest intention of recognizing the local law of the place of accident as the gravamen for wrongful death action. If such had been their intention it certainly would have been urged in argument as a reason for allowing the local court to hear the case. What forum could better apply local laws than the local court? Yet local law was nowhere mentioned.

Contributory Negligence

It will be recalled that the Citeja draft contained no reference to contributory negligence and the effect that this might have upon the liability of the carrier. This lack was noted in the comments and suggestions of the United Kingdom. The proposal made by the United Kingdom was as follows:

"Article 22.—Addition of the sentence 'liability established by Article 21 shall be avoided if the carrier proves that, notwithstanding his own negligence or that of his servants or agents, the injured person would have been able to avoid the damage by taking reasonable measures to that end.'" (emphasis added)

This amendment was first brought before the conference on the second reading of the draft. The discussion amounted only to a statement by the reporter that the commission had accepted the idea as to substance and suggested referring the matter to the drafting committee. This suggestion was adopted.

The drafting committee made a separate article, incorporating it in the convention as Article 21. It was substantially revised and as revised was adopted. It now reads as follows:

**ARTICLE 21**

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier fully or partly from his liability.

While not stated in the Minutes directly, it is obvious that the British proposal, which contemplated proof of contributory negligence as a complete bar to recovery, was not acceptable to the majority of the delegates, who were used to the doctrine of comparative negligence. Thus rather than inserting a defense of contributory negligence, the effects of which were specified in the Convention, they determined that contributory negligence would be given the effects which the law of the forum might specify. It was a *renvoi* of this matter to local law.

But which local law? The general rule is that contributory negligence is a matter of substance, not procedure, and whether it constitutes a complete bar or only a matter in mitigation is determined not by the law of the forum, but by the law where the contributory negligence took effect. As Learned Hand said in *Jerrell v. New York Central R. Co.*:

"So far as the Canadian law (Section 4) apportioned damages according to the relative negligence of the parties, it went to the substance of the liability, and must be followed where suit is brought elsewhere."

What pixie-like imagination the draftsmen at Warsaw must have had, if we credit them with the intent of making local law the gravamen of the cause of action for wrongful death! By international action, dedicated to uniformity, they would have bottomed the entire right of recovery for death on the disparate laws of the countries of the world, scalped the right by

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24 Warsaw Minutes and Documents 188, 192.
25 Id., p. 112.
imposing a uniform limitation of liability, added to the right by requiring the highest degree of care of the carrier, and finally torn the right apart by throwing the determination of a major part of its substance—the defense of contributory negligence—to the forum chosen by the plaintiff from four possibilities determined in each case by reference to the specific contract of carriage. Conceivably, they could have adopted local law as a basis and prescribed a uniform defense of contributory negligence with uniform effect—this is substantially what was done in the case of the limitation of liability for personal effects; but to scatter the substance of the right to the four winds makes absolutely no sense at all. Not even an international conference could be so demented.

The action, however, is completely consistent with a Conventional cause of action. While the solution of referring a substantive defense to such an action to the law of the forum may not be ideal, it is not dramatic nonsense. First of all, since the law governing the creation of the Conventional right has to be the law of the forum (because only courts of governments which have ratified the Convention have jurisdiction) no violence is imposed on judicial principles. Secondly, while the goal of uniformity is not attained in this respect, it is obvious that if a uniform rule had been promulgated, the Convention would not have been acceptable to one bloc or the other of the participating nations. As the Chairman of the commission that drafted the article said:27

"Mr. Giannini—Chairman of the Commission—

"I would like to request the Conference to leave unchanged the draft article as presented by the Commission, because it is the fruit of a great deal of labor.

"We encountered tremendous difficulty in finding a means of expression which would equally meet the objections of the English and Anglo Saxon peoples and the peoples of Continental law. If we were to eliminate this renvoi to the local judge, we would encounter the very great difficulty pointed out by Sir Alfred Dennis; in his law, judges do not know or understand the doctrine of comparative negligence. Contributory negligence is either a complete bar or has no effect."

Personal Effects

One of the hidden keys to a solution of the question of whether the Warsaw Convention establishes an independent cause of action is Article 22 (3). This provision reads:

"As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger."

This innocuous provision is certainly minor in effect. It was not debated at all in the conference; and except for changing the limitation from 1,000 to 5,000 francs, is unaltered from the provision in the Citeja draft.

While it was not debated in the Conference, it was considered by the Conference in view of the fact that it formed part of the report of the reporter which was circulated in advance of the Conference and presented to the Conference itself. Speaking of this provision, the reporter says:

"With respect to the personal effects retained in the custody of the passenger: they do not come under the system of the convention; the traveler has the custody and the risk. The system of liability of the convention is based only on the document of carriage. The baggage check not covering these objects and personal effects, the system provided (in the convention) does not apply. It is to be understood, however, that the convention does not prevent the application of general law: if a traveler's clothing is damaged by the negligence of the carrier, the passenger can

27 Warsaw Minutes and Documents, p. 137.
prove the latter's negligence. In such a case, special limitation of liability is provided as will hereafter be stated."

The effect of this minor provision on the instant question is out of all proportion to its significance to the Convention as a whole. The background in Citeja has been heretofore explained, and it is with respect to the liability regarding such articles that the opinion of Judge Leibell in the Komlos case may be paraphrased:

"Those defenses (of exoneration and limitation) are not strictly speaking defenses ex contractu. They are in fact conditions attached to the 'cause of action.' The cause of action is created by the lex loci. The conditions which are attached thereto are created by the Warsaw Convention. The gravamen of the action is the negligence of the defendant which wrongfully caused . . . (the loss or damage to the personal effects) . . . The Warsaw Convention does not change the basic rule that the contract of carriage is not the gravamen of the action . . . (for loss or damage to personal effects retained in the custody of the passenger)."

Inclusio unius est exclusio alterius.30

Respondeat Superior

The Citeja draft Article 22 (final Article 20 (1)) provided that "the carrier shall not be liable if he proves that he and his servants and agents have taken all reasonable measures to avoid the damage or that it was impossible for them to take such measures." This provision, coupled with Article 21 of the draft (imposing liability), formed the basis of carrier liability under the draft convention. Although the final result was liability measured by the carrier's negligence, the burden of proof was upon the carrier to establish that both he, his servants and agents took all reasonable measures to avoid the damage. This fact alone took care of the liability of the carrier's principal for his negligent agent within the limitations prescribed. It also took care of the agent who negligently failed to act, as well as the agent who wasn't there at all, when he reasonably should have been.

Significantly, the discussion failed to reflect this point, either in Citeja or at Warsaw. Where the matter of respondeat superior did arise was in connection with the carrier's unlimited liability. Under what circumstances should the carrier be liable without limit for the intentional unlawful acts of his agents and servants?

The Citeja draft (Article 24, second paragraph) had sidestepped this point by stating: "If the damage is caused by an intentional unlawful act for which the carrier has liability, the carrier shall not be entitled to avail himself, etc." Under what law of vicarious liability is this "having liability" to be tested? The British suggested that the problem should be solved by adding after the word "liability" the phrase "in accordance with the law of the country where the contract was made."31

This proposal caused a violent explosion. Delegates from all countries expressed horror at the thought of vicarious liability being decided by reference to the law of any state. Because it is principally a matter of color, only the last few speeches are included here:32

"Mr. Clarke (Great Britain) . . . Moreover, what we say is that if the employer is to be held liable in certain cases for the acts of his employees, we must decide by what law the question will be governed. For example, English law might decide in a given case that the employer is liable, while the French law would hold to the contrary, and vice versa. We must therefore say in the Convention what is the law to be applied.

30 Supra, note 2, 111 F. Supp. 393 at 401.
31 11 Coke 68b.
32 Warsaw Minutes and Documents, 188, at 193.
33 Id., p. 44.
"Consequently, we have two questions to be answered: to know exactly the meaning of 'intentional unlawful act' (and we have a proposal in this respect) and then, to indicate what law shall determine whether liability is to be imposed on the employer.

"Those are the two questions to be resolved."

"Mr. Ambrosini (Italy)—"We want the convention to be applied in all cases and that is why I have proposed the expression which we adopted. Clearly, it may be possible to find something more precise but that's a question for the drafting committee. In any case, we must push aside any recourse to national law."

"Sir Alfred Dennis (Great Britain)—"We thought it necessary to find an expression which would safeguard all rights and would avoid every doubt. That is why we proposed saying that the law to be applied in such cases shall be the law of the country where the contract was entered into or such other law as you may wish, but the convention must fix the law under which the liability or non-liability of the carrier will be determined, because I believe that if you seek to find a law (in the convention) which every country will accept, it will be a very difficult matter. It is possible that we may be mistaken. We do not believe so."

"The Chairman—Does anybody else wish to speak on this question?

"Then I believe we have before us two proposals, the British proposal and the French proposal. The proposal of the French delegation as formulated by Mr. Ripert is to return the matter to the drafting committee."

"Mr. Ripert (France)—"We shall make every effort to find an expression which will be satisfactory, but it should be well understood, here and now, that we are absolutely opposed to any provision which would return the application of the matter to national law. This is the first time that national law is sought to be applied, and if we were to accept it in this instance, it would be sought for other questions. As we see it, the convention would be destroyed, if recourse to national law is established for each article. We wish to be as conciliatory as possible on the expression we adopt; we will work it over as much as possible, but I implore the delegates not to take this dangerous path which consists of reserving the solution of the litigation to national law."

It must be admitted that the final text, although adopting an international and uniform rule, leaves the trial judge much discretion, for what is regarded as within and without the "scope of employment" may differ from country to country.

Liability for Latent Defects

The Citeja draft imposed absolute liability on the carrier in case the damage was caused by a latent defect in the aircraft. The theory under which this was adopted was one of "fairness" to the passenger. Predicated on the assumption that the passenger would have no rights of any kind against the manufacturer in such circumstances, Citeja counted on a right of reimbursement of the carrier from the manufacturer to even things up.

If this exception to the rule of negligence had been retained in the final Convention, there could be not the slightest doubt that the Convention, rather than the lex loci, provided the basic cause of action. However, the exception was not retained, and it becomes necessary to examine the reasons for its rejection. Obviously, if it had been rejected because it was out of harmony with the lex loci theory, the rejection would support Judge Leibell's view of the Convention.

However, the minutes are quite clear that the reason for its rejection was the result of a compromise involving also the defenses of error in piloting, handling of the aircraft or in navigation.

The scene was set by the advance submission of proposals by the delegations of Great Britain, France and the U.S.S.R. The British wanted to

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33 So in the official U.S. text of Article 25. It may be that this is slightly broader than the French—"l'exercice de ses fonctions."
eliminate the latent defect liability and extend the error in piloting defense to the carriage of persons.\textsuperscript{34} France made similar suggestions.\textsuperscript{35}

Russia, on the other hand, urged that errors in piloting, etc., be removed as a defense even for the carriage of goods and baggage, and said nothing about eliminating the absolute liability for latent defects.\textsuperscript{36}

The debate is reported at pages 25-37 of the Warsaw Minutes, and is far too long to set forth here in full. However, one or two excerpts are worth recording, particularly portions of the speech made by Sir Alfred Dennis of Great Britain. What he says is important from our point of view, since the British delegation was the only representative of any common law country at the conference; England had given us the common law; it had also given us Lord Campbell’s Act. Presumably Sir Alfred was well aware of the English law. Here is what he said, in part.\textsuperscript{37}

“This provision (carrier exoneration in case of pilot error) was adopted—specifically, at the Maritime Conference in The Hague; it was also adopted in our initial draft drawn up in 1925. But in this respect, and in others as well, since 1925 the tendency has been to impose ever heavier liability on the carrier. This is exactly what we are doing on this first point (limiting pilot error exemption to carriage of goods and baggage). By the same token we are accepting liability of the carrier in cases of defects in the aircraft, and, moreover, we are increasing the amount of damage recoverable under the limitation of liability. In my opinion, or rather in the opinion of my Government, it is difficult to separate these three points. We must recognize that the liability of the carrier is provided for and governed by Articles 22, 23, 24 and 25 (of the Citeja draft). I can say that the principle currently adopted by our Government is to consider that these matters should be governed by the free will of the parties. In the Convention we propose to replace the system of freedom of contract by a system of rights, rules, and by-laws. My Government believes that these rules should be of such nature that they may be incorporated in a fair and equitable contract between parties equally situated. It is in accordance with this principle, I believe that the 1924 maritime convention was agreed upon.

“The convention we are now considering originally contained the terms which are found in the maritime law, and it is for that reason that my Government tentatively accepted in its general lines the 1925 draft convention on carrier liability. Since then, in the course of our discussions, changes have come about which modify the general character of this draft convention as it relates to the liability of the carrier. My Government has directed me to support my amendment as forcefully as I possibly can, because in its opinion, taken as a whole, the liability which is imposed on the carrier is much too heavy.

“So far as latent defects are concerned, I have very carefully looked into the matter: never, in our law, have we imposed such a liability on a carrier. In maritime law, there also has never been given an absolute guarantee of seaworthiness. The same is true in the railroad field, and not only today when railroad manufacturing is a well developed science, but even 50 years ago, in opinion after opinion our courts have held that if railroad companies had taken reasonable measures, they would not be liable.”

There followed a speech by Richter (Germany) in support of the Citeja draft, a long discourse by Mr. Pittard (Switzerland) on the justification for the rule on latent defects, a declaration by Mr. Giannini (Italy) stating he could not accept the British and French proposals, a rebuttal by Mr. Ripert of France, another by Sir Alfred, and a comment by the Reporter that: “It is evident that all these questions are connected, and constitute the several parts of a whole which is the system of liability.”\textsuperscript{38}

At this point Giannini proposed that the matter be resolved by leaving

\textsuperscript{34} Warsaw Minutes and Documents, p. 192.
\textsuperscript{35} Id., p. 188.
\textsuperscript{37} Warsaw Minutes and Documents, p. 29.
\textsuperscript{38} Warsaw Minutes and Documents, p. 34.
the exoneration provision unchanged, thus meeting neither the French and British nor the Russian amendment, but by striking liability for latent defect.

This was accepted by Britain and France, voted against by Russia and carried 17 to 5.

**Conclusion**

So far as the draftsmen at Warsaw are concerned, the conclusion can be short. Nowhere, either in the minutes of the Warsaw Conference or in the minutes of Citeja, is there a scintilla of evidence that they were adopting the lex loci theory for actions based on the death of a passenger. On the contrary, it is apparent that the goal of unification was sought with unremitting zeal—that the intent was to supply that unification by a contractual right of action under which liability was not to be absolute in case of non-performance, but measured by the negligence of the carrier.

What the conference at Warsaw decided is history. The more interesting aspect, perhaps, is what the United States common law courts have done with it, may do, and should do. If the contract right is recognized, can it exist side by side with actions for wrongful death based on the lex loci—and if the contract right is not recognized, what do our courts do with wrongful death suits based on foreign law, where the foreign law is that the action is governed by a contractual right accorded by the Convention!

These problems will be examined in the next issue.

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89 Warsaw Minutes and Documents, p. 37.