LIMITATION OF AIRLINE PASSENGER LIABILITY*

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I. INTRODUCTION.

The air transport industry is at present in a similar position to that occupied by the railroad industry early in the last century. It is a new method of commercial intercourse, seeking to establish itself upon a firm financial foundation. One of the greatest obstacles to that end is contingent tort liability, for increased speed and mechanization of transportation have been consistently accompanied by an increased capacity for accidents. Safety has been a less important consideration than the tapping of new markets by rapid extension of facilities. It is only natural that a new device or machine first be made to work before it be made to work safely —although the airlines of this country have made tremendous progress in increasing the safety of air travel.

When the railroads faced the possibility of substantial tort liability and realized that it would take time to reduce travel risks to a minimum—a minimum which, at best, could never be absolute—it became essential to devise other than mechanical methods to avoid or limit that liability. The same problem now confronts the air transport industry. The obvious solution of the problem was, and still is, to shift the risks of travel, in whole or in part, from the shoulders of the transporter to those of the transported. The railroads attempted to do so by contract, and air carriers are doing the same thing now.

It is the purpose of this study to determine whether such a method is legally feasible and, if not, what other methods may be employed to obtain the desired result. It will be necessary to examine the rules developed in the railroad cases for they are being carried over to a considerable extent in cases involving aviation. From the railroad cases it will be apparent that the courts have frowned on the attempt to avoid or reduce liability to paying passengers—with whom this study is primarily concerned. If it can be demonstrated that the reasons for the attitude taken in the railroad cases are not compelling, it may be that courts can be induced

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to look more leniently upon restriction of liability contracts in air passenger tickets. Finally, the legislative method remains open and will require examination.

To thoroughly consider the subject of limiting airline liability, the liability for goods carried should be discussed. It is believed, however, that the factors applicable to passengers and goods are sufficiently distinct to allow a study of either alone. For reasons of space, this study then is concerned primarily with the question of avoiding or limiting liability for physical injuries to passengers, and it will be assumed that the airlines dealt with are common carriers of passengers.¹

II. THE RAILROAD CASES.

Liability of Common Carriers of Passengers:

There is a well-defined distinction in the law between the liability of a common carrier of goods and a common carrier of passengers.² As to goods, the liability is said to be that of an insurer, that is to say, it is absolute, except for acts of God and of the public enemy. As to passengers, the care required is not so great. To the obvious sneer that the law thinks more of property than of life, the answer given is that the carrier cannot control passengers as it can chattels; the former are mobile, the latter immobile.³ The economic burden on the carrier would be too great if it were held to insurer liability as to passengers, who are not subject to complete control. The formulas used in the passenger cases vary from the ordinary prudent man instruction to some more varied statements, emphasizing the fact that defendant is a common carrier and must use some greater measure of caution, that its liability exceeds the usual mean. Thus some courts go to the extent of requiring an exercise of “extraordinary diligence”;⁴ or the degree of care to be used may “be measured by the dangers which attend the carriage, dictated by the utmost care and prudence of a very cautious person”;⁵ or “it is liable for the utmost

¹. For liability to persons on the ground, see Kingsley & Gates, “Liability to Persons and Property on the Ground,” 4 JOURNAL OF AIR LAW 515 (1933). This article also will not treat of avoiding liability by insurance, except incidentally; see Ball, “Compulsory Airplane Insurance,” 4 JOURNAL OF AIR LAW 52 (1933).

². According to the Georgia court, “common carrier” refers only to common carriers of goods, at common law: Central of Ga. Ry. v. Lippman, 110 Ga. 665, 36 S. E. 202 (1900). This distinction in definition between “common carrier” and “common carrier of passengers” is well to keep in mind in reading the statutes, though most statutes include as common carriers both carriers of goods and of passengers.


⁴. Ibid.

⁵. Smith v. New York Central Rd., 24 N. Y. 222 (1862), opinion of Wright, J.
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... care and vigilance consistent with the character and mode of conveyance, but it need not take every possible precaution." It is well settled that the same measure of liability extends to gratuitous, as to non-gratuitous passengers.7 The fact that a greater quantum of care is required in these cases than in ordinary tort situations, together with the old idea of degrees of negligence have caused many courts and legislatures to express the liability of common carriers of passengers in terms of slight, ordinary and gross negligence, or wilful and wanton, or reckless, or criminally negligent conduct.8 Though many courts have repudiated this method of statement because of its cumbersomeness, and its practical inefficiency for trial purposes,9 many more still use it, and in some cases a difference in the rules concerning tort liability contracts results. In some cases, the degrees of negligence theory is repudiated as far as slight, ordinary and gross fault is concerned, but it is retained to the extent of distinguishing between ordinary and wilful or wanton wrongdoing;10 here also a difference in the rules concerning exemption and limitation contracts may result.

Description of the Railroad Cases:

Whatever may be its method of expression, a stringent rule of liability exists against common carriers of passengers, and they have attempted to avoid it by contract. Though railroads were not, of course, the only kind of common carrier during the formative period of the rules to be discussed, the overwhelming number of cases are railroad cases, and emphasis will therefore be put on the problems of that particular industry. The situations in which attempts have been made to secure exemption from liability may conveniently be described as falling into two groups, in each of which the contracts assume somewhat common form. There are, (1) the cases of passengers for full fare and for reduced fare, passengers for consideration other than monetary,11 and

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6. Ibid.
7. Ibid.
9. Railroad Co. v. Lockwood, 84 U. S. 357 (1872—in any case, the degree of negligence for which liability attaches is that which the situation demands, and should be called simply "negligence"; different situations require different degrees of care); Griswold v. N. Y. & N. E. Rd., 53 Conn. 371, 4 A. 261 (1885); Chicago, R. I. & P. Ry. v. Hamler, 215 Ill. 525, 74 N. E. 705 (1905); Jacobus v. St. P. & C. Ry., 20 Minn. 125 (1873).
11. For example, passes to employees to use in getting to their places of employment. Harris v. Puget Sound Elec. Ry., 52 Wash., 106 P. 828 (1909); Railway Co. v. Stevens, 95 U. S. 655 (1877—plaintiff inventor of a
gratuitous passengers. The method of attempted immunization in these three cases was simply to print on the ticket or pass a clause providing that the bearer agreed to assume the risk, and that the company should not be liable for injuries or death, however caused. The wording in the various cases differs, but the idea expressed is typical.\(^2\) (2) The second group includes the carriage of drovers of livestock, caretakers of vegetables, etc., express messengers, Pullman porters, news agents, and circus employees riding in their employers' cars. In the drover and caretaker cases, the men are sent along to care for the chattels shipped; their passage is almost always denominated gratuitous, but most courts hold that consideration is given for them, not only by their fare being included in the freight rate, but also by their performance of services which the railroad would otherwise have to do.\(^1\) Express messengers are employees of the express companies, and ride and perform their duties in the express cars. Pullman porters, similarly, are employees of the Pullman company, and perform their duties in cars owned by that company and leased to the railroads. News agents are employees of companies which usually have exclusive licenses to sell magazines, candy and the like articles on the trains. The circus cases are unique; circuses own their own cars in which to transport their equipment, animals and employees; the railroads merely supply the motive power for hauling the circus cars.\(^4\) The exemption agreements in these six types of cases are very similar. Usually the parties enter a tripartite system of contracts. The railway company and the employer agree that the latter will hold the former harmless against any liability that it may incur as to the employee because of negligence or otherwise. The employer and employee contract that the latter assumes all the risks of transportation, ratifies any contracts between the employer and the carrier as to liability to him, and agrees to execute a release to the railway company, or agrees to reimburse his employer any sum which the latter may have to pay to the railway company if the carrier has to pay the employee.\(^6\) It is rare that the employee contracts

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12. Many states require signatures, and the railroads usually also required that formality. Many states, also, construe the clause very strictly; thus in \(^{1,2}\) Mynard v. Syracuse, B. & N. Y. Rd., 71 N. Y. 180 (1877), the clause read “from all claims, demands, and liabilities of every kind whatsoever.” This was held not to include negligence; \(^{1,2}\) ipotesimis verbs are required.

13. New York is an exception to the general rule, holding as it does that drovers are free passengers.

14. The relation between the carrier and the circus has been variously defined. It has been called a towage contract: \(^{1,2}\) Baltimore & Ohio S. W. Ry. v. Voigt, 79 Fed. 661 (C. C. Ohio, 1897—dictum); and a lease of trackage rights and motive power: \(^{1,2}\) Clough v. Grand Trunk Ry., 156 Fed. 81 (C. C. A.—6, 1907).

15. A typical drover's contract states that the shipper will indemnify and
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directly with the carrier, though often the latter issues a pass to him, containing an exemption clause.

Most of the situations just described can have little direct application to air transportation. It is not customary (if it has ever happened) for a caretaker to accompany freight shipped by air. Airlines furnish their own stewards and do not carry express messengers. Nor, of course, do they tow circuses. Thus, only the passage for hire and the gratuitous cases are directly applicable. But on the other hand, the exigencies of the discussion require a description of all these cases. The courts have not sharply distinguished between all the situations; in other words, the rules with which we are concerned have been developed in all the railroad cases, as a unit or, rather, as two units. Complete conception of the field and understanding of the rationalizations about to be examined could not be had without a knowledge of their factual background.

Validity of Exemption From Liability Contracts:

There is a respectable split of authority in regard to the validity of contractual exemptions and limitations of liability. The majority views are such as to admit of a logical classification of save harmless the carrier from all claims and liabilities of every kind by reason of personal injury sustained by the drover. The drover signs a "release" providing that he voluntarily assumes all risks of injury, and releasing the carrier from all claims on account of such injuries.

In a Pullman porter contract, the porter assumes all risks of accident, and releases the Pullman Company from all claims from liability on account of such injuries or death; he states his knowledge of the contract between his employer and the railroad wherein the former agrees to indemnify the latter against liability to himself, and he ratifies that contract, agreeing further to indemnify his employer against any liability to which it might be subject under such contract; and he releases the railroad from all claims for liability on account of his injury or death.

16. An Indiana statute raised a difficult problem in this regard: §7082a (Burns, 1901), providing, inter alia, that contracts between employer and employee to release third parties from liability for their negligence to the employee, were void. The case involved a circus employee, who had entered the typical arrangement, but on trial set up the statute to avoid his contract with the circus. He had no contract with the railroad company. The court held that decedent by entering the employment "in a modified sense made himself a party to the contract [between the employer and the railroad]. So far as it was the decedent's contract, it was with the railroad company." It therefore did not fall within the terms of the statute: Cleveland, C. C. & St. L. Rd. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908). The holding is questionable. At the most, the decedent entered into a third party beneficiary contract with his employer, and it is that very type of contract that was condemned.

17. Sometimes the arrangement is only bipartite. It may be, for example, only between the railroad and the employer. In such case, although the jurisdiction would otherwise hold the exemption valid, it may be held to be of no effect in the particular controversy: Sager v. No. Pac. Ry., 166 Fed. 526 (C. C. Minn., 1906—employee is justified in assuming that his employer will protect his rights, in absence of notice of the exemption); Kansas City, M. & B. Rd. v. So. Ry. News Co., 151 Mo. 373, 52 S. W. 205 (1899—suit on the indemnity clause by the railroad; tacit assumption of liability to the news agent); Western Md. Ry. v. Shatzer, 142 Md. 274, 120 A. 840 (1922—same). Or the contract may be merely between the employer and the employee: Shannon's Adm. v. Chesapeake & Ohio R. R., 104 Va. 645, 52 S. E. 376 (1906—distinguishing Voight case, q.v. Appendix, Federal); Peterson v. Chicago, M. & St. P. Ry., 119 Wis. 197, 95 N. W. 333 (1903—makes no difference; good third party beneficiary contract).
the fact situations into two groups. (1) In those cases in which the carrier is performing its duties as a common carrier (or to put it more graphically, where the passage is for a consideration), the majority forbid either exemption from or limitation of liability. In this class fall passengers for hire and for special consideration, drovers and caretakers. (2) In the second group of cases, the carrier steps outside of its character as a common carrier, it is said, and may thus, under the majority rule, contract as a private carrier. Exemptions or limitations, therefore, as to express messengers, Pullman porters, news agents, circus employees, and those travelling gratuitously are usually held valid. Thus if a case holds that an exemption on a ticket bought and paid for is void, it is a safe guess that the same jurisdiction will hold an exemption on a drover's pass void. And if an exemption in an express messenger's contract is held good, one in a porter's contract will probably also be given effect. These statements are not always true, but in the great majority of jurisdictions, if the language and reasoning of the opinions can be trusted, the cases will work out in the way suggested.18

These rules have been settled for quite a long time. The leading cases were decided in the middle of the last century, and almost all of the other cases were adjudicated sometime before the end of that century or early in this one. It seems a musty task indeed to stir up problems long ago settled. But re-examination of old principles is sometimes very necessary, and becomes so now when they are being carried over into aeronautical law. It may be said in advance that the old principles to be here examined are not wholly impeccable.

The leading case is Railroad Company v. Lockwood.19 It involved an accident to a drover who was on the train by virtue of the ordinary drover's exemption contract. This exemption the Su-

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18. For detailed treatment of each jurisdiction, see Appendix. Applying the rule of thumb suggested, I have reached the following count, which cannot be considered entirely accurate, but if liberal allowances are made, is approximately so:

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The four states allowing exemptions as to paying passengers are California, Montana, Oklahoma, and South Dakota. The result, in these states, is dictated by statute, and in all of them, gross, wilful and wanton negligence are excluded from the statutory rule. This same reason also explains the drover and caretaker cases, except as to New York, which is the only jurisdiction holding a drover to be a gratuitous-passenger.

19. 84 U.S. 357, at 378 (1873).
preme Court of the United States held void. After a lengthy view of the authorities, the court said:

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried... Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual in a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what one or the other contains. In most cases, he has no alternative but to do this, or abandon his business... The [carrier] business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept.

Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness.... But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.... When they ask to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary.

The court did not exhaust all the reasons advanced in the decisions. A few more quotations will complete the picture. The following is found in Smith v. New York Central Rd.:\(^{20}\)

The state is interested not only in the welfare, but in the safety of its citizens. To promote these ends is a leading object of government. Parties are left to make whatever contracts they please, provided no moral or legal obligation is thereby violated, or any public interest impaired; but when the effect or tendency of the contract is to impair such interest, it is contrary to public policy and void. Contracts in restraint of trade are void because they interfere with the welfare and convenience of the state; yet the state has a deeper interest in protecting the lives of its citizens. It has manifested

\(^{20}\) 24 N. Y. 222, at 231 (1862).
this interest unmistakenly in respect to those who travel by railroads. Her policy, and the uniform policy of the law has been, in regard to the safety of the citizen who has recourse to this dangerous mode of travel, upon a road and by agencies over which he has no control to hold the carriers to the exercise of the utmost foresight even as to possible dangers, and the utmost prudence in guarding against them. This policy is dictated both by a desire to protect the citizen, and because the public is interested in his safety. . . . It is said that the passenger should be left to make whatever contract he pleases; but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company to whom he commits his person from the discharge of those duties which the law has enjoined upon it in regard for the safety of men. [The effect of such contract,] if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is perhaps the only one adequate to secure the highest degree of caution and vigilance.

In Russell v. Pittsburg, C., C. & St. L. Rd.,21 the court said:

The fundamental reason, however, for holding common carriers . . . liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the state has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract, rid itself of the burden of responsibility, which is one of the conditions of its creation. . . . In Cleveland etc. Ry. Co. v. Curran, 19 Ohio St. 1, at page 12, the court says: "It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence."

Finally, the summation made by a Massachusetts court is significant:22

The powerful and dangerous agencies usually employed, the absolute control of them which they have, the trust necessarily reposed in them, the compulsion which they might otherwise exercise, and the public nature of their service render the rule, we think, just and reasonable.

It takes no argument to point out that bald assertions that exemptions are void because they are against public policy or are unfair and unreasonable can be readily dismissed from consideration. Obviously, the question to get at is why exemptions are

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unreasonable and against public policy. The many ideas expressed in the quoted paragraphs can in essence be reduced to two: (1) though the passenger may not wish to take advantage of the duty required by law as to him, the state in its desire to preserve the lives and safety of its citizens, cannot permit any condition which might tend to result in the exercise of less care; (2) the shipper or passenger himself may want to hold the company to its legally required duty of care, and since the law gives him that right, the law should prevent the carrier from using its superior bargaining power to avoid its responsibility. Much is said, also, to the effect that the carrier cannot be allowed to evade the essential duties which are the condition of its existence. As an independent reason, unconnected with the two suggested, this one is not satisfying. In view of the fact that there are many instances in which parties may contract to do away with rights and duties secured by law in absence of contract, the question naturally arises: What is there in this situation which forbids such a contract? It is believed that this third idea finds meaning only in connection with the first thought expressed above.

Critique of the Rules:

(a) The State's Interest in the Safety of Its Citizens—In respect to the first reason for forbidding exemptions from liability for negligence, it may be said in the beginning that political theory does not necessarily postulate that a state can forbid a citizen from disposing of his life as he wishes. A distinction must be drawn between the situation where a citizen is impelled by forces beyond his control to order his life in a way he does not wish, and the situation where he himself determines what to do with himself. The former case, for example, would exist where a person is forced to undertake a dangerous employment because the state of the labor market is such that he must take any job he can get in order to avoid the breadlines or starvation. In that situation, a state founded on the idea of democracy should have the duty of alleviating his lot to the greatest extent possible. But suppose, for example, that an adventurous soul wishes to explore the clouds in a rickety air crate of his own make and invention. Except for the purpose of protecting unsuspecting and innocent persons on the ground, need it be said that the state must act to save the adventurer's own skin? Suicide is a crime only in a few states.

23. To make the problem simpler, I am assuming without discussion that it is desirable to force common carriers to use the greatest practicable caution in transporting passengers.
But this is not the place to go into the interesting questions suggested by political philosophy. Suffice it to say that there is enough doubt of the proposition that a person's life belongs not to himself but to the state, to cast some doubt on the rest of the syllogism.

The purely theoretical difficulty just dismissed would probably have little effect on courts or legislatures. But a practical objection seriously disturbs the whole proposition. One of its premises, we have seen, is that exemption from liability will reduce the care used by carriers. No longer being obliged to watch out for the lives and safety of its passengers, a care once imposed because of the existence of large contingent tort liability, nothing will force carriers to preserve that degree of prudence essential to the public welfare. Almost certainly, this deduction is purely a priori; the courts never mention statistics when they make the statement, but argue that the result, more accidents, must necessarily follow from the cause, release from the duty of exercising care. But certainly other factors may be operative which will preserve the desired degree of caution. In the first place, common carriers have competitors. Not only do railroad companies compete between themselves, but also against the merchant marine, trucking concerns, private carriers and, now, airlines. A reputation for few mishaps, high efficiency, careful service, is a valuable aid in the struggle. Again, almost every accident of any serious nature results in destruction of or injury to the carrier's property. The consequent loss of its own assets is an inducement to do all that is possible to prevent such accidents. There are possibly other factors which might be mentioned. But it must be concluded that in absence of statistical proof that in states where exemptions are allowed there are more accidents, directly traceable to that fact, than in states where they are not allowed, or in absence of statistics showing a higher accident rate among private carriers (which everywhere are allowed to contract for exemptions) than among common carriers, the premise is not without demerits.

There is yet another reason for attacking the validity of the objection that the interest of the state in the lives of its citizens requires that nothing be done which might tend to endanger those lives. If the statement were true, it must necessarily be true for every case in which contract might endanger human life. Yet that is not the holding where the carrier is private. Nor is it the rule, in most states, in the cases of gratuitous passengers, express messengers, Pullman porters, news agents and circus employees. It is true that many courts have rationalized these cases thus:


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the carrier, by doing something it is not by law required to do—that is, furnish free transportation, or tow circus trains or Pullman cars, or furnish facilities to express companies—steps out of its character of a common carrier, and becomes for that purpose a private carrier. True, this reasoning would distinguish the passenger for consideration cases, but it does not answer the query: If life must be protected at all costs, why must it not be protected as well when the carrier is private as when it is public?

It might be interesting to note just how the courts have rationalized the cases in which they have allowed exemptions. In the free pass cases, it is frequently argued that since a common carrier is under no duty to transport persons gratuitously, it can impose its own terms for the favor. There can be no issue of inequality of bargaining power, for the prospective guest is not bargaining, he is asking a favor. It is difficult to meet this proposition. Certainly it is an appealing argument to maintain that a person who accepts a gift should not protest or repudiate its conditions. True as this may be, many courts reply that the question is not one of morals but of the state's interest, as parens patriae, in the lives of all of its citizens. If any court accepts this idea in any type of case, it is certainly inconsistent on its part to discard it merely because the passenger is carried free. Yet many are guilty of the inconsistency. Some have answered by saying that railroads do not carry so many free passengers that negligence is increased. But such an answer only begs the question; it admits that if many are carried, decreased care would result. There are examples of accidents to large excursion groups carried free. And further, there is no guaranty that equal diligence will be used in looking after a free passenger as in guarding one for hire. As a matter of fact, it is probably true that railroads are being as careful as possible whoever the passenger, but on other grounds than tort liability alone. Tort liability is not the only reason for diligence and prudence, though no doubt it is an important factor.

Similar arguments are made in the express messenger, Pullman porter, circus employee, and news agent cases. It is first pointed out that the relation of common carrier does not exist, for various reasons. Thus, it is said that the employee is not a passenger because he is not riding the trains to get from one place to another, but he is merely working on moving premises. Or it is argued that there is no duty on the railroad to deal with express companies, or Pullman companies and the rest; the presence of the duty to carry being essential to the status of a common carrier,
its absence allows the carrier to contract as a private individual. Or again, it is often said that there is no consideration to the railroad for carrying porters or express messengers or news agents; the absence of consideration puts the employee in the position of a gratuitous passenger, whose exemption contract will be enforced. Here again, if the court accepts, in the passenger for hire cases, the idea that a person cannot dispose of his own life because of the interest of the state, it cannot be consistent in ignoring that interest, no matter how the person is rightfully on the train.

There is a serious doubt, however, whether the employees, whose plight we are considering, do travel gratuitously. Only one court, New York, considers drovers gratuitous travellers. The others find a consideration in the service performed, a service otherwise devolving on the carrier, and on the rate paid for the shipment. It seems difficult to distinguish the other cases. As one court has quoted, “the voice is Jacob’s voice, but the hands are hands of Esau.” There is no more duty to carry drovers than there is to carry Pullman porters. The reasoning for the distinction is best summed up in the leading case, Baltimore & Ohio S. W. Ry. v. Voigt, an express messenger contract being the disputed point. The basis of that decision was that railroads are not common carriers of express companies, that, therefore, they are free to contract with such companies and may impose such terms as they desire. But it is submitted that the heart of the problem is ignored by such reasoning. The question is not as between the carrier and the express company or the Pullman company, but as between the carrier and the employee. Now it cannot be denied that though a carrier is under a duty to haul livestock, it is under no duty to carry drovers to care for the stock. Yet, it is said, when the drover is carried he is travelling for a consideration. Similarly, it would seem, the carrier is under no duty to transport men to look after express matter or Pullman sleepers; yet when it does carry them, they perform duties which the railroad would otherwise have to do through its own servants. The duty to perform those services arises out of the contract with the express or Pullman company. It may be argued that without the contract there would be no obligation on the railroad to perform those services, and that all the conditions of performance are settled at once by the agreement; in other words, the contract does not first create an obligation to perform services, which after-

26. Express Cases, 117 U. S. 1, 6 S. Ct. 542 (1886).
wars the railroad may surrender for consideration. But equally well can it be said that other things being equal, a railroad need not hold itself out as a carrier of livestock or other classes of freight. It may confine its business to the carriage of passengers. Yet once the duty to perform is accepted, either by holding out or by contract, when the burden is shifted to someone else in exchange for transportation, the transportation is for consideration.

Furthermore, it is said in the drovers' cases, that the passage fare is included in the fare paid for hauling the freight. It may with equal reason be said that the price paid for the privilege of sending express, or hauling Pullman cars, or having an exclusive news agency, or shipping circuses includes fare for the individuals as well as the chattels. That these individuals are carried by the railroad as a private carrier may be true, but the point is this: the drover also is in that position. The railroad is under no duty to transport a drover as drover. Yet the courts are almost unanimous in condemning exemptions in that case.

It seems, then, that the first reason relied on by the courts is not without fault. It is not entirely clear, theoretically, that the state can validly interfere with a citizen's own desires as to his safety. Nor is it entirely clear that the care exercised by the carrier will be decreased if its tort liability for injuries to its passengers is removed. Again, it is difficult to explain why the courts feel more concerned for the safety of one class of passengers than that of another. The reasons for the distinction are not convincing.

(b) Unequal Bargaining Power—There remains to be considered the second reason advanced for refusing exemptions in the case of passengers for hire, that is to say, to prevent railroad companies from using their superior bargaining power to avoid their legal responsibilities. It must be admitted that this is a more convincing argument than the one just discussed, but it is open to one objection. At the time it was first formulated, and for some time afterward, railroad rates were not regulated by public bodies. It was quite true, therefore, that carriers could charge what they pleased and on what conditions they pleased, limited only by economic laws of competition, monopoly price and the like. That situation is now materially changed; rates are now under government supervision, and the shipper need never fear being forced to pay an exorbitant charge if he refuses to accept the risk of transportation accidents. It is submitted that this fact almost completely
undermines the reason so forcefully advanced in the Lockwood case. *Cessantia ratione legis, cessat lex.*

**Limitation of Liability:**

Up to this point, discussion has been directed towards the reasons for refusing validity to exemptions from liability for negligence. But conceding that to allow complete exemption from liability for tort would tend to decrease care and increase accidents, and conceding that even though rates are no longer solely within the carriers' discretion, the railroads could still enforce harsh bargains of exempted liability for lower fares, we are faced with another alternative. Would it be possible to limit liability to some reasonable figure, in return for some rate consideration or special privilege?

One form of limitation may be dismissed with just a mention. It is well settled, even in jurisdictions that allow complete exemptions from wilful and wanton wrongdoing. Those courts would say also that gross negligence is excluded. Whatever the practical difference between these kinds of tort and ordinary negligence may or may not be, the distinction exists in theory.

27. The "bargaining power" idea suggests another digression into the decisions allowing exemptions in the express messenger, Pullman porter, news agent and circus employee cases. I have discussed previously the theory that exemptions in these cases are valid because the railroad acts as a private carrier. Another reason advanced in those decisions starts from the proposition that where bargaining power is unequal, it is unreasonable to allow the stronger party to exempt itself from its legal responsibilities. But in these situations, it is argued, bargaining power is equal. The express companies and the Pullman Company are large corporations, fully capable of caring for their own interests in negotiating with the railroads. To a lesser degree is this true of circus companies and news agencies, but even these are on stronger ground than the ordinary shipper. Out of their negotiations, therefore, will no doubt emerge agreements fair to both sides. The worker, voluntarily entering his employment, under no compulsion to choose the particular job, accepts these fair agreements with eyes open, as a man of common sense and experience. The most surprising thing about such obtuse reasoning is the fact of its almost blind acceptance even in recent years. No doubt, the first premise is true; the railroad and the employer are bargaining on equal terms. But our interest, for the present, is with the person who is to be carried in this dangerous instrumentality upon whose owners the law imposes the greatest measure of care, a standard owing equally to everyone rightfully aboard. It is a matter of common knowledge that economic theorists of the last century continually propounded the untruth that one worker can and should bargain singly with one employer. That is the basis of the reasoning of the Voight case, and that is its fault. The worker is in just as weak a position to bargain as is the shipper, and in the absence of collective action has had usually to accept without objection such terms of employment as were offered him. If unequal bargaining power drives the courts to protect the shipper against undesired exemptions, so also should it have led them to protect the employee.

28. Another type of partial exemption, earliest expressed in the New York cases, may be mentioned. It is that, except in the case of passengers for hire, a person can exempt himself from the malicious wrong or gross negligence of his servants. Only two other jurisdictions have favored that rule, Connecticut (*Griswold v. N. Y. & N. E. Rd.*, 54 Conn. 393, 4 A. 241 (1886)); and New Jersey (*Kinney v. Central Rd. of N. J.*, 32 N. J. L. 407 (1868)), on the grounds that the doctrine of respondent superior is not based on natural justice, but is merely a legal fiction, which should, therefore, be open to rejection by freely contracting parties, and that a master could not be morally culpable for the morally culpable acts of his servants. The doctrine has been repudiated (*Railroad Co. v. Lockwood*, cit. note 9; *Illinois Central Rd. v. Read*, 37 Ill. 485 (1855); *Gulf, C. & S. F. Ry. v. McDown*, 65 Tex. 640 (1886) on the
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The type of limitation in which a specific sum is named beforehand as the maximum recovery to be allowed deserves more careful study. But two railroad cases directly on point could be found, and neither was well considered. In one, a drover's pass limiting liability to one thousand dollars was involved, and in the other there was a free pass with the same sum as the maximum. In both cases, the contracts were held void, in one because of statute, in the other because of previous decisions, which, however, were all exemption cases. Dicta in one other case are similarly opposed to the practice. In favor of allowing limitation can be found only some vague language in a Montana case, and the holding of a New York case that if consideration, in the form of reduced fare, is given, exemptions will be allowed.

In states which allow exemptions, it is almost certain that, a fortiori, limitations would also be allowed. And it is also quite certain that where exemptions are not allowed, limitations will not be. And yet if the reasons for refusing validity for exemptions are considered, it is quite possible to remove limitations from their scope, so long as the amount named is a reasonably large sum. If the maximum is a sizeable figure, the financial inducement for exercising care, so strongly relied on by the courts, is still present. Thus the sum found in the cases mentioned above, one thousand dollars, is comparatively small, and it is conceivable that the carrier would rather gamble against contingent tort liability than install expensive safety devices. But a figure of ten or fifteen thousand dollars, in addition to the possibility that one accident may produce many fatalities, would probably induce a great measure of caution indeed. Secondly, it would seem that if a maximum rate with unlimited liability, approved by the state commission, were accompanied by an offer of a reduced rate with limited liability, there would be little to object to as far as “bargaining power” is concerned. The customer would be forced into nothing, but would be given a clear choice between two reasonable opportunities.

III. THE RULE AND AERONAUTICAL LAW.

Despite easily raised objections, the rule forbidding a com-
mon carrier to enter into contracts exempting itself from liability for negligence to its passengers is strongly entrenched in this country. And, if recent cases are accurate prophets, the rule will be applied to air transport companies. They are common carriers; the rule developed for one type of common carrier should apply to all, runs the argument. But the matter is not so simple. The rule is not based on entirely firm ground, and there are reasons for urging that it be not extended to the field of air law.

Motive for Reducing Airline Tort Liability:

The most compelling motive for urging the abandonment of the rule is an economic one. Aviation corporations are not in a strong financial position. They probably could not exist and develop as they should without government subsidies of some sort: direct grants in Europe, mail revenues in this country. Capital is not quickly drawn into the field because of the large risk involved. One of the most uncertain of these risks is tort liability. One accident might easily give rise to damages running into six figures, not only because of the number of people killed or injured, but also because of large jury verdicts. The res ipsa loquitur formula, and the difficulty of proving just how an accident did happen may often result in large verdicts where no actionable negligence exists. And not only are people injured, but relatively fragile planes may be utterly demolished in almost unpreventible accidents. Again, the industry is yet just beginning to grow, and has not, therefore, the resources which create stability. Invention and improvement make obsolescence and amortization rapid, and the expense of continual rebuilding and improvement must be enormous. Operation costs are high: the best materials must be used, the personnel must be highly trained and command, as a consequence, high wages. An important item is the fact that payloads are comparatively small. While one engine can haul a large number of cars, one plane can carry only a certain quantity of freight or number of people; any excess must be sent by another plane, at the same cost as the first. It can be seen that it is of vital importance to the industry to reduce these costs if possible. If some method, both fair to the public and beneficial to the air carrier, for re-

36. Most of these statements will be found set out in an elaborate way in Kaftal, "Liability and Insurance," 5 Air Law Rev. 167, at 275 (1934).
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ducing tort liability can be found, the law should encourage that solution.

Exemption or Limitation:

It would seem that total exemption from liability is not that solution. It is not fair to the passenger to ask him to bear the total burden which, if fault lies in some measure at the basis of tort responsibility, properly belongs to another. However beneficial financially it may be to the carrier to escape the cost of injuries, we must not lose sight of the fact that the individual harmed may be equally or even more unable to bear the loss than the company. Again, the overwhelming tradition of American law opposes such exemptions. It would be extremely difficult to induce courts or legislatures to adopt it.

Limitation, rather than complete exemption, seems to be the ideal solution. More persuasive arguments for it could be made to the courts, probably, than for exemption. Consider, for example, the theory which is one of the two bases for the rule against exemptions, that the interest of the state in the citizens’ lives precludes the allowance of any factor to exist that might result in decreased care. It has already been pointed out that even as to complete exemptions the argument is not thoroughly convincing, and that it is less so in the case of limitation of liability. Financial responsibility of a substantial degree would probably provide just as complete a motive of self-interest as unlimited responsibility. It may be pointed out here that there is yet another reason for doubting the validity of the safety theory. It has always been held that common carriers can insure themselves, and thus relieve themselves from liability. The courts, in these cases, have recognized other motives that induce care. For example, the desire to reduce premium expense causes the company to carry less insurance and increase its vigilance. And the better record the carrier has for skill and prudence, the less will be its premium rates. In view of these cases, it could not be argued that the existence of limited liability would allow air transport companies to insure and tend to reduce the prudent conduct of their business.

37. Excluding insurance from consideration; see note 1. It has been suggested that limitation of liability alone would not be enough, because the cumulative liability from one accident might be large enough to embarrass the company materially; Kaftal, op. cit. note 37. He suggests compulsory insurance up to a certain limit, with a total exemption to the carrier. But if the carrier is allowed to set a maximum liability, it can easily insure for that amount, and thus obtain the same result. O’Ryan, op. cit. note 36, makes the same suggestion as Kaftal.

Not only would financial responsibility produce such vigilance in the case of air carriers, but other factors exist that tend strongly to the same end. It has already been pointed out that they are present in the case of railroads. The drive of competition, the desire for business success, and the necessity of preserving expensive machinery are sufficient incentive for the corporation's directors to take precautions, and the lower rank servants of the corporation are urged to caution by their need of remaining employed, by fear for their own skins, and even by common humanity. Even more are these considerations applicable to air carriers. Public confidence in the safety of air travel is small now; accidents diminish it still more. One accident can probably nullify large and expensive advertising campaigns. To increase their volume of business, air carriers must increase their safety. Again, aircraft and their equipment are not only expensive, but also are relatively fragile. Little can be salvaged after a serious accident. Comparatively speaking, these companies are not financially strong, as it is, and they must take every precaution to preserve the physical assets in which they have invested. Finally, the self-interest of the pilots, mechanics and the like must be very great. Not only their positions but their very lives are threatened to a greater extent than those of railroad employees. These factors, together with the financial burden of even limited liability should allay all fears of the possibility that care will decrease with decreased tort responsibility.

In this connection, another reason for distinguishing air carriers from other kinds of common carriers becomes apparent and significant. The physical distinction between them itself raises a problem in the case of the former not present in the others. The fact that what goes up must come down creates an extra hazard in the air carrier industry. To this it might be said, "Even more reason for requiring greater care by every possible means." But the fact is overlooked that there always remains, at least at the present time, a possibility of something going wrong, something that even an extremely cautious mechanic could not discover or forestall. To other types of transport devices, such small troubles present no problem. They can limp along to the next station, or even stop where they are for repairs. But in the case of airplanes, this is usually impossible. The craft must land at once, with the dangerous possibility of crashing. It may be said that where all

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40. See Allen, "Limitations of Liability to Passengers by Air Carriers," 1 JOURNAL OF AIR LAW 325 (1930).
possible care is used, there would be no tort liability anyway. But
the instructions which tell the jury that the greatest possible cau-
tion must be used, the application of the *res ipsa loquitur* formula,
and the technical ignorance of juries and courts may often result
in verdicts even in the cases where the carrier could do nothing
more to protect its passengers. Finally, the as yet irreducible
minimum of risk is well recognized by passengers, and if they
voluntarily travel by air because of its comfort, speed or novelty,
they should be willing to take part of the financial risk of accident.
To promote air commerce, the law should recognize its problems,
and cast its rules accordingly.

Nor does the "unequal bargaining power" idea necessarily
militate against the adoption of limited liability into aeronautical
law. It is true that air transport companies are not yet subject
to government rate regulation. But even so, the rationalization
adduced in the *Lockwood* case is hardly applicable to these com-
panies today, if for no other, at least for one compelling reason—
the presence of competition. Air carriers cannot dominate trans-
portation, as could the railroads in the last century and the early
part of this one. Trucks, ships, and railroads compete with air-
craft, and rates must be fixed, to some extent, accordingly. The
only case in which the compulsion, feared by the courts, can be
exercised, is the situation where speed is essential. But mere speed
is probably not the only reason for travelling by air, and if it is a
reason it must be paid for, under our economic system. Rates,
however, are no doubt fixed with other factors also in view, and,
being common carriers, the company could not raise its fare in the
particular instance when it knew that the particular passenger
was in special need of rapid transportation. Accepting for the
moment, however, the argument that by its control of speedy car-
rriage the company had superior bargaining power, we are not faced
with an impasse in attempting to limit liability. It is still possible
to give the passenger an option between unlimited liability at a
fixed, non-exorbitant rate, and limited liability at a lower fare.
And if neither choice suits him, he can travel more cheaply by
other means of transportation.

*Is Liability Limitation Possible?*

(1) *By Contract—*

(a) *The Cases*—If limited liability, then, is a reasonable
method of cutting down the expense of accidents, fair to the pas-
senger and beneficial to the carrier, the problem of adoption remains. How can such limitation be made legal? The method now being tried is that of private contract. Since such contracts will be tested in the courts, the emphasis, in analyzing the method, must be placed on the question: what attitude will the courts take to such contracts? No wild guess is necessary; there are already cases on point.\(^4\) Several types of contract are in use, and four typical ones have already been held invalid. One of these contained an absolute exemption clause;\(^42\) another attempted to limit liability to $10,000.\(^43\) The objection to both was that a common carrier cannot compel a passenger to release liability for negligence. This same objection proved fatal to a contract which set out three fares, each fare carrying with it a certain maximum liability; since no choice of unlimited liability was allowed, the contract was held void.\(^44\) It must be noted that the case so holding was in New York, where exemptions for reduced fare are allowed.\(^45\) In that state, therefore, the following ticket would probably be good: "This is a Class A ticket. The fare under a Class A ticket is lower than under a Class B ticket. In consideration of said reduced fare, the passenger agrees that the Company shall in no event be liable to said passenger, his heirs or representatives, for injury or damage to said passenger in an excess of $25,000."\(^46\) A possible objection to its efficacy is that it does not, in so many words, include negligence as a type of harm for which liability is limited. Some courts would construe the language that strictly.\(^47\) Another type of ticket, not expressly exempting from or limiting liability, is designed to reduce the measure of care ordinarily imposed on a common carrier. It provides that the company is not a common carrier, but is liable merely for negligence, and that the mere occurrence of an accident shall not be considered evi-


\(^{42}\) "The user of this ticket agrees that the company, in the performance of the transportation covered by his ticket, is not a common carrier for hire, and/or liable as such, but is a private carrier; and that the company shall not be liable for injury or death to the person . . . caused in any manner however, whether attributable to negligence or not, occurring during, and/or arising out of the performance, or failure of performance of the transportation for which this ticket is issued . . . ;" refused effect in Law v. Transcontinental Air Transport, cit. note 41.

\(^{43}\) "... in the event of the injury or death of the holder due to any cause for which the Company is legally liable, the Company’s liability is limited to $10,000;" invalidated in the Glose case, cit. note 34.

\(^{44}\) Conklin v. Canadian Colonial Airways, cit. note 41. The contract is set out in full in the note in 6 JOURNAL OF AIR LAW at page 284.

\(^{45}\) Anderson v. Erie Rd., cit. note 33.

\(^{46}\) Edmunds, op. cit. note 41. He thought also that this ticket would be good in New York.

\(^{47}\) See note 12.
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dence of negligence. This attempt to contract away a legal status was early nullified.\(^4\) That holding throws some doubt on the practical value of a provision in the proposed uniform air passenger ticket: "... if I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein shall not be responsible save for its or their own neglect of duty. ..."\(^4\) This provision has correctly been criticized; since a common carrier must exercise the highest possible care, there seem to be no "ordinary risks" which a passenger can assume.\(^6\) The company would not be liable in any event for extraordinary risks.

It is apparent that all the contracts of any practical effect have already been held bad, but one, and that one would be considered valid probably only in one state, if at all. In other words, the tradition and authority of the railroad cases are too strong to be overcome in the courts. Whatever faults may be pointed out in their reasoning, the decisions are too well fixed, the rules are too well settled to be revised to any extent now. And there is no indication that different rules will be fixed for the air cases. There are other disadvantages in trying to work piecemeal through the courts. One of these is the confusion that arises out of conflict of laws problems. A good deal of air transportation is interstate, and in the absence of federal law, state rules control. Different states may probably have different rules, and since the extent of liability will be determined by the fortuitous circumstance of the geographical location of the accident, it will be practically as difficult to provide beforehand for meeting that liability as it is now.

(b) Conflict of Laws—In general, the courts have developed three rules for determining the validity of contracts in the conflict of laws: place of making, place of performance, and place contemplated by the parties. But the particular situation here is even more complicated by the fact that tort, as well as contract, is involved. The usual rule is that the place of injury determines what tort law applies. To these possibilities may be added a fifth: if the law sought to be applied is contrary to the public policy of the forum, it will not be enforced. The interaction of these various methods of settling the problem causes great confusion.\(^5\)

\(^{49}\) See 1 JOURNAL OF AIR LAW 228 (1930).
\(^{50}\) Edmunds, op. cit. note 41; Logan, Wikoff, 1 JOURNAL OF AIR LAW 515-516 (1930).
\(^{51}\) There would seem to be no logical necessity for choosing one rule rather than another. One school, however, has argued that only the state where the contract is made can give it validity; if that state refuses, no other jurisdiction can give the contract legal effect, and if its laws support the agreement, it should be valid everywhere. Beale, "What Law Governs Validity
The easiest case is that in which the contract is made in one state, to be completely performed there, and the accident happens there. Suit is then brought in some other state. All of the various formulas are satisfied by the former jurisdiction: place of making of the contract, place of performance, probably the place intended by the parties, place of injury. The courts have found no difficulty in applying the law of that jurisdiction. The case should likewise be easy in which, although the contract is made in one state, both complete performance and the injury occur elsewhere, in other words, where the place of making the contract is disassociated entirely from its performance. It may be difficult in such a case to determine which law should govern as between that of the start or completion of performance or that of injury, but it would seem that the purely fortuitous circumstance that the ticket was bought in a certain place should not be considered. Yet the majority of the court, in Oceanic Steam Navigation Co. v. Corcoran, held that federal law governed a contract of carriage from Canada to England, the ticket having been bought in Boston. The court relied on the territorial theory of conflict of laws: since the contract where made was void, it must necessarily be void at all places and for all purposes. It also relied on the Kensington, a Supreme Court case, in which in respect to a ticket issued in Belgium for transportation to this country, it was held that Belgian law would not be applied because of the public policy of the United States against exemptions. But in that case, performance was to be partly in the United States, and the court probably had reference to that fact.

More difficult cases are those in which part of the performance is to take place in the state where the contract is made. When the injury also occurs in the state of contracting, the court has

of a Contract," 23 Harv. Law Rev. at 260 (1910). But it has been pointed out that "A sovereign state has in the very nature of things the power to attach any legal consequences whatever to any state of facts whatever, including acts in other countries, even by persons not citizens or residents of the former." Lorenzen, "Validity and Effect of Contracts in Conflict of Laws," 30 Yale Law Jour. 655 (1921); Cook, "Logical and Legal Bases of the Conflict of Laws," 33 Yale Law Jour. 457 (1924).

52. Shelton v. Canadian No. Ry. Co., 189 Fed. 163 (C. C. Minn., 1911); Knowlton v. Erie Rd., 19 Ohio St. 260 (1869); Forepaugh v. Del. etc. Ry., 128 Pa. St. 217 (1882—Injury to goods; held: no public policy prevents enforcement of New York law, though Pennsylvania rule is contra; that law, in this case, does not directly affect the state or its citizens, nor is it contrary to justice and morality.)

53. 9 F. (2d) 724 (C. C. A.—2, 1922); Maucher v. Chicago, R. I. & P. Ry., 100 Neb. 237, 155 N. W. 122 (1916—contract made in Illinois, but there is no showing that it was to be even partly performed there. Injury in Nebraska. Held: Nebraska law governs; against public policy to enforce Illinois rule).


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little difficulty in applying the law of that state. Supposing the contract to have been made in State A, the injury to have occurred in State B, and the suit to have been brought in State A, the latter jurisdiction, again, will probably apply its own law, though it could easily use that of State B, conforming to the rule as to torts. But the case is more difficult where, in the same situation, suit is brought in State B rather than State A. In some of the decisions, the law of the forum was applied, but on different theories: one court looked to the tort rule of place of injury; another looked to the contract rule of place of making, but thought that public policy precluded that state’s law from being applied; another looked to the “intention” of the parties, presuming that the contract was intended to have effect rather than be void; a fourth relied on the place of performance formula. Other courts have applied the law of State A. Finally, assuming the same fact situation, suit may be brought in State C. At least one possibility should be easy to eliminate in a case of that nature: the internal law of the forum should not be involved. Yet the problem of choosing between States A and B has divided the courts. These cases well show the confusion that varying state rules, both as to conflict of laws and as to internal law, result in, a confusion and uncertainty that would remain if limitation of aircraft liability by private contract is attempted.

As a final objection to attaining limited liability through private contract and court action, there should be mentioned a psychological factor. Air transport companies have trouble enough in persuading the public that air travel is safe. They could hardly emphasize that fact in advertising and then ask the passenger to bear part of the financial risk of his trip. It might make him re-
pent of his hardiness. At least, that seems to be the attitude of many of those connected with the industry.62

(2) Legislation—It would seem, therefore, that because the common law rule is so well established that it will be very difficult, if not impossible, to get the courts to apply different rules to air carriers, because of the uncertainty arising from varying state rules and the conflict of laws, and finally because of the psychological disadvantage of arranging for limited liability by individual stipulation, the method of contract and court-made rule is not the best means of reaching the desired end. The only other is legislation, both by the federal government and by uniform state action. The process may take time, but so also would the piecemeal method of judicial legislation. It would probably be easier to induce legislatures in the various jurisdictions to act than courts, especially now when uniform state aviation laws are being adopted. The resulting desirable uniformity is obvious. And finally, the psychological factor would be absent, since the passenger's attention would not have to be directed to the dangers of flight in the graphic way in which it is when he is asked to relieve the carrier from part of its liability. Precedent is not lacking for such an act. The Marine Limitation of Liability Act,63 passed by Congress in 1851, was the result of one of the very factors discussed here as to air carriers, that is to say, the weak financial position of the industry and the need of attracting capital to it. That Act provides that the liability of the owner of a vessel be limited, in certain instances, to the amount or value of the interest of the owner in the vessel. This would hardly be fair in the case of aircraft, because the value of one plane would not be sufficient to give the passenger much of a recovery. Even under the Marine Act, be it noted, if the ship is totally lost, the owner is not liable at all.64 A fortiori, an act which merely seeks to limit liability to a named amount should not be objected to by the Federal Congress. The consideration that in their early history, railroads were aided by huge and valuable land grants should also not be lost sight of. Finally, the government has expressed itself in favor of limited liability by its adherence to the Warsaw Convention.

Constitutional provisions in five states will prevent any such law from being passed. A typical article reads: "No law shall be enacted in this state limiting the amount of damages to be re-

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62. See Report of the Proceedings at the National Legislative Air Conference, 1 JOURNAL OF AIR LAW at 536 (1930).
63. See Appendix.
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covered for causing the death or injury of any person.\textsuperscript{65} In four more, no statute limiting liability for death can be passed, but their constitutions say nothing of limitation of liability for injuries not resulting in death.\textsuperscript{66} The constitution of one state provides that corporations engaged in transportation for hire are common carriers, and are liable as such, and that they shall not make any contracts relieving themselves from any of that liability as to passengers.\textsuperscript{67} It is an open question whether this provision would be construed to prevent legislation limiting liability. Nine states have statutes forbidding common carriers to exempt themselves from liability.\textsuperscript{68} It may be difficult to get their legislatures to pass a statute allowing limitation to a maximum sum. Four states have similar statutes, which, however, are limited to gross negligence, fraud, or wilful wrong.\textsuperscript{69} Nineteen states have adopted that section of the Uniform State Aeronautical Act which reads: "The liability of the operator of an aircraft carrying passengers, for injury to or death of such passengers, shall be determined by the rules of law applicable to torts on land arising out of similar relationships."\textsuperscript{70} Pennsylvania has a statute to the same effect. It is doubtful that the public policy declared by this provision would present much more of an obstacle to the passage of the proposed act than the common law rules as to railroad transportation now in force in these states. On the other hand, some states have already begun to legislate in respect to limitation of liability of aircraft owners. Thus California has a statute doing away with liability for injury to gratuitous passengers except for intoxication or wilful wrong. Maryland has a statute very similar to the Federal Marine Act discussed above, limiting liability of the owner of aircraft in \textit{interstate} commerce to the amount of his interest in the value of the plane and its freight. Four states limit liability to a specified sum,\textsuperscript{71} and only two provide for unlimited liability for negligence expressly in the case of aircraft.\textsuperscript{72} Finally, it should be noted that fifteen states have set a maximum limit of recovery

\textsuperscript{66.} New York, Ohio, Oklahoma, and Utah.
\textsuperscript{67.} South Carolina.
\textsuperscript{68.} Iowa, Kansas, Kentucky (constitution), Massachusetts (an ambiguous statute, referred to "passengers whom it [the carrier] suffers to enter or leave by a door or its car or train, to do so at their own risk), Missouri, North Dakota, Texas (referring to injuries resulting in death), Virginia and Wisconsin.
\textsuperscript{69.} California, Montana, Oklahoma, and South Dakota.
\textsuperscript{70.} Arizona, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin. It will be noted that seven of these states have appeared in the lists previously set out in notes.
\textsuperscript{71.} Colorado ($2000-$5000), Massachusetts ($500-$5000), Missouri ($2000-$10,000), New Mexico ($7500). All of these are death acts.
\textsuperscript{72.} Arizona and Connecticut.
in their death by wrongful act statutes. In those states, however, a statute is still desirable to cover the case of injury not resulting in death. With the precedent of the limitation in the death acts, it should not be difficult to urge the adoption of the same thing in an injury by aircraft statute. If allowances are made for duplications in the lists just given, it is apparent that no grave statutory or constitutional provisions stand in the way of the statute being proposed in most of the states. There is no tradition in federal legislation against it; in fact, the Marine Limitation of Liability Act and the Warsaw Convention are precedents in its favor. A federal act would cover most commercial flying, and the small number of states which could not or would not pass the statute would not materially affect the situation.

There would be little doubt of the constitutionality of such a statute, especially if it is limited to prospective accidents, as far as due process of law is concerned. The Supreme Court of the United States has said:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will... of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

Following this reasoning, workmen’s compensation and employers’ liability acts have been held valid. And in answer to the attempted distinction that those statutes augment, and do not diminish liability, the Supreme Court held that the distinction was one without a difference.

73. $12,500—Wisconsin; $10,000—Connecticut, Illinois, Indiana, Kansas, Missouri, New Hampshire, Oregon, South Dakota, Virginia, and West Virginia; $500-$10,000—Massachusetts; $7500—Minnesota; $7000—New Hampshire; $5000—Colorado and Maine.

74. Several of the states having limitations on recovery for death are among those listed in previous notes. Thus Kansas, Massachusetts, Missouri, Virginia and Wisconsin are found listed in note 68, South Dakota in note 69, Indiana, Minnesota, Missouri, South Dakota and Wisconsin in note 70, and Connecticut in note 72.

75. In at least one of them, New York, a properly worded contract will accomplish the same end, as was pointed out above.


77. New York Central v. White, 243 U. S. 368, 37 S. Ct. 247 (1917)—no objection that amount recoverable may be curtailed; “no person has a vested interest in any rule of law...”; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260 (1917)—not a deprivation of trial by jury.

78. Supra note 76.

79. Martin v. Pittsburgh & Lake Erie Rd., 203 U. S. 284, 27 S. Ct. 100 (1906). There is an old Pennsylvania case in which a statute limiting liability of railroads to passengers to $3000 was held void: Thirteenth & Fifteenth St. Ry v. Boudreau, 22 Pa. St. 478 (1899). The decision seemed to rely on constitutional provisions that for every injury to the person, he shall have a remedy; the court apparently construed “remedy” to mean the full amount of the
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IV. CONCLUSION.

In determining whether to limit the liability of air carriers, two interests must be balanced. On the one hand is that of the individual carried, that he remain unharmed by the negligence of the carrier, and that reparation in damages be made for any harm caused by such negligence. On the other hand is the social interest in the development of transportation by air. Sacrifice on both sides should be made, and if a method can be found by which sacrifice will not be too great, so much the better. It is believed that limitation of liability admirably fits the situation. A substantial sum will fairly compensate the passenger for his injury or his family for his death. At the same time, the fact that liability cannot exceed a maximum not only will reduce high contingent financial loss, but will allow insurance to be carried at reasonable rates. This also will react to the benefit of the passenger in the form of more certain recovery at smaller cost. The following statute is suggested:

In any action hereafter brought to recover damages for the injury or death of any passenger of a common carrier by air [in interstate or foreign commerce], caused by the negligence of such common carrier or its servants, the damages shall not exceed the sum of ten thousand dollars. 80

Appendix

Key:  A. Rules, by States, as to Exemption from and Limitation of Liability for Negligence in Railroad and Marine cases.

B. Law Relating to Exemption from and Limitation of Liability of Aircraft Owners and Operators.

C. Death by Wrongful Act Statutes.
   2. Citation to Statute.
   3. Elements To Be Considered in Measuring Damages.
   4. Limitation On Amount Recoverable.
   5. Miscellaneous Statutes. 1

Pecuniary damage sustained. Two judges dissented. A case in the lower courts on which the court relied had held the statute invalid on the same ground, but had also pointed out that an express constitutional provision prohibited it: Central Rd. of N. J. v. Cook, 1 W. N. C. 319. See Barnett, "Statutory Limitation of Tort Liability," 12 Ore. Law Rev. 109 (1932).

80. The bracketed words are, of course, for the Federal statute. Ten thousand dollars has been suggested merely because it is the sum found in most death by wrongful act statutes. The air lines themselves have gone as high as $25,000: see Allen, op. cit. note 40.

1. Cross-references between divisions A, B, and C have been omitted. To obtain an accurate picture of the law of any particular state, therefore each division should be examined. Thus, if the Death Act has a limitation on the amount recoverable, that fact would bear on the liability of aircraft owners. Similarly, a constitutional provision prohibiting any law limiting the liability of common carriers would be applicable to air transport companies.
ALABAMA

C. 1. None.


3. "... such damages as the jury may assess."

ARIZONA

B. Revised Code of Arizona (Struckmeyer, 1928, Supp.), §§175z32, 175z33:

Provides that pilots and their employers be responsible for damage to persons caused by negligent operation of aircraft by such pilots; and that the liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. Article II, § 31: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."


3. "... the jury shall give such damages as they deem fair and just."

ARKANSAS

A. Constitution of Arkansas, Art. XVII, §12: "All railroads which are now or may be hereafter built and operated, either in whole or in part, in this State shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the General Assembly."

Digest of Statutes (Crawford and Moses, 1921), §8562: Pursuant to Art. XVII, §12 of the Constitution, provides that railroads be liable for all damages to persons or property.

St. Louis, I. M. & St. Ry. Co. v. Pitcock, 82 Ark. 441, 101 S. W. 725 (1907); no exemption allowed either as to pay or free passengers.

C. 1. Article V, §32: "No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property."

2. Digest of Statutes (Crawford & Moses, 1921), §§1074, 1075.

3. Fair and just compensation, with reference to the pecuniary injuries resulting to the wife and next of kin.

CALIFORNIA

A. Civil Code (Deering, 1931), §2174: The obligations of a common carrier cannot be limited by general notice on its part, but may be by special contract. [*"Common carrier" includes carrier of persons: §2168.*]

Same, §2175: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants."

Walther v. Southern Pacific Rd. Co., 159 Cal. 769, 116 P. 51 (1911): Secs. 2174 and 2175 (supra) apply to free as well as pay passengers; exemption from liability for negligence allowed, but not for wanton, willful or gross negligence.

B. California Statutes (1933), Ch. 438, p. 1135: Provides that no free guest of or joint adventurer with an airman, "nor shall any other person have" a right of action for damages for injury or death during flight, unless the accident resulted from the intoxication or willful wrong of the pilot. [The quoted words probably refer only to the death by wrongful act beneficiaries of the deceased person.]

Civil Code (Deering, 1931), §1714½: Provides that owners of "motor vehicles" be responsible for injury or death of persons caused by
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negligent operation of the vehicles by persons operating them with the permission, express or implied, of the owners. If the relation between owner and driver is not that of master-servant or principal-agent, liability is limited to $5000 for one person and $10,000 for more than one.

If "motor vehicles" be construed to include aircraft, a possible construction, the section could apply to air transport companies, but since in such case the imputed negligence would probably always arise through the relationship of master and servant, the liability would be unlimited.

C. 1. None.
3. Such damages as under all the circumstances of the case may be just.

COLORADO

A. Compiled Laws (1921), §6302: Provides that when a person shall die from any injury caused by the negligence or criminal intent of the driver or person in charge of a train, coach "or other public conveyance," the employer shall be liable for every person so killed in a sum of between $3000 and $5000.

Denver & R. G. R. R. Co. v. Whan, 39 Colo. 230, 89 P. 39 (1907): Pullman porter case: exemption valid. The language of the case restricts the holding to the situation where the injured person is not a "passenger," for example, probably, express messenger and news agent cases. There are dicta to the effect that the exemption would be invalid as to passengers for hire. No guess should be hazarded as to free passengers.

C. 1. None.
2. Compiled Laws (1921), §§6303, 6304.
3. Such damages as are fair and just, with reference to the necessary injury to the surviving parties who are beneficiaries under the act.
4. Not exceeding five thousand dollars.

CONNECTICUT

A. Griswold v. N. Y. & N. E. Rd. Co., 53 Conn. 371, 4 A. 261 (1885): news agent case. (1) no exemption as to passenger for hire allowable; (2) exemption allowable as to free passenger, both as to ordinary and gross negligence.

B. General Statutes (Revision of 1930), §3077: Provides that pilots and their employers be responsible for damage to persons caused by negligent operation of aircraft by such pilots.

C. 1. None.
2. General Statutes (Revision of 1930), §5987.
3. Just damages.
3. Not exceeding ten thousand dollars.

DELAWARE


Perry v. Phil. B. & W. Ry. Co., 1 Boyce 399, 77 A. 725 (1910—express messenger): (1) exemption allowable; (2) exemption good defense in suit under death by wrongful act statute. Though the cases are not clearly to this effect, it may be said that the exemption is good as against free, but not as against pay passengers.
C. 1. None.
2. Revised Statutes (1915), §4155.
3. Damages for the death and loss occasioned by it.

FLORIDA

A. Compiled General Laws (1927), §7051: "A railroad company shall be liable for any damage done to persons . . . by the running of the locomotives, or cars or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence . . ."

Eubanks v. Southern Ry. Co., 244 Fed. 891 (D. C., Fla., 1917—Pullman porter): the statute (supra) merely declares the railroad's common law liability, and does not inhibit the right to contract as to liability. The exemption here is valid.

There are no Florida state cases on point; the authority of this case, therefore, is doubtful.

C. 1. None.
3. Such damages as may have been sustained by the persons entitled to sue by reason of the death.

GEORGIA

A. Georgia Code (1933), 94-702: Provides that where a person is injured by the negligence or improper conduct of a railroad company or its servants, the company shall be liable notwithstanding any by-laws, rules, regulations, or notices limiting its liability.

In Central of Ga. Ry. Co. v. Lipman, 110 Ga. 665, 36 S. E. 202 (1900), it was held that a carrier of passengers for hire cannot exempt itself from liability for its negligence. Defendant relied on a section of the Code (2276, Code of 1895) prohibiting limitation of liability by notice, but allowing it by express contract. The court held that, in view of the common law definition of "common carrier," which was carried into the Code (§§2263, 2264, Code of 1895), the section referred only to carriers of goods. The statute set out supra was not mentioned in the opinion, though it was passed in 1855 (Acts 1855-6, p. 155). In Wright v. Central of Ga. Ry., 18 Ga. A. 290, 89 S. E. 457 (1916), an exemption in a free pass was invalidated, under orders of the Railroad Commission (3, 20) that such passes be governed by the Federal Hepburn Act (q. v.).

B. Georgia Code (1933), Ch. 11-107: Similar to Arizona §175z33.

C. 1. None.
2. Georgia Code (1933), Ch. 105-1302, 1306, 1307.
3. The full value of the life of the decedent.
4. None

IDAHO

B. Session Laws (1931), Ch. 100, §6: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
2. Idaho Code Ann. (1932), Ch. 5-310, 311.
3. Such damages as under all the circumstances of the case may be just.
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ILLINOIS

A. No exemption is allowable as against a passenger for hire, either for ordinary or gross negligence. As to free passenger, express messenger, and Pullman porter cases, exemption is valid, both as to ordinary and gross negligence, but (possibly) not as to wilful wrongs.

The Illinois rule evolved slowly. The first case (Ill. Cent. Rd. v. Read, 37 Ill. 485 (1865) involved a free pass; the court held the exemption valid as to ordinary, but not as to gross negligence or wilful wrong. In Arnold v. Ill. Cent. Rd., 83 Ill. 273 (1876), plaintiff had purchased a ticket for passage on a freight train. The court held the exemption good as to ordinary negligence, but not as to gross negligence or wilful wrong. But in Ill. Cent. Rd. v. Beebe, 174 Ill. 13, 50 N. E. 1019 (1898), a case involving a drover's pass, which the court held to be a ticket for consideration, the Arnold case was overruled, and the exemption was held bad, both as to ordinary and gross negligence, where the passage was not gratuitous. Although the particular case was governed by Iowa law, the contract having been executed and was to be partly performed there, the Illinois rule was nevertheless laid down. It is noteworthy, that the Arnold case was not attempted to be distinguished on its facts, as was possible, dealing, as it did, with passage on a freight, instead of a passenger train. The Beebe case is still law in Illinois. In Blank v. Ill. Cent. Rd., 182 Ill. 332, 1899, an express messenger case, the court reaffirmed its view that an exemption is valid in a free passage case. This view was further reaffirmed, both as to ordinary and gross negligence, in Chicago, R. I. & Pac. v. Hamler, 215 Ill. 525, 74 N. E. 705 (1905), a Pullman porter case, the court relying on Blank v. Illinois Cent. The court there did away with the distinction between degrees of negligence in Illinois, but retained the distinction between negligence and wilful or intentional wrong. There is a possibility, therefore, that exemptions from wilful wrong, even in free passage cases, will be considered void.

C. 1. None.
2. Revised Statutes (Smith-Hurd, 1933), Ch. 70, §§1, 2.
3. Such damages as are a fair and just compensation with reference to the pecuniary injuries resulting to the beneficiaries.
4. Not to exceed ten thousand dollars.

INDIANA

A. Burns' Indiana Statutes Ann. (1933), 55-1001: Provides that no company operating public passenger conveyances shall issue any tickets containing any clause limiting or abridging its liability, unless the clause be printed in nonpareil type or larger, but that this act shall not be construed to change the law as to its right so to limit or abridge its liability.

Same, 55-1008: Nor shall §1001 apply to special, half-fare, or excursion tickets.

The Indiana rule is well settled that as to a passenger for hire, no exemption is valid, but as to all others, exemptions are valid. In the first passenger case, Indiana Cent. Ry. v. Mundy, 21 Ind. 48 (1863), the court intimated that it would not classify degrees of negligence, and the later decisions have not done so. In that case (caretaker's pass), the court approved an instruction that there would be no liability, because of the exemption, for any negligence, unless it was "wilfully gross." But this holding was overruled in Ohio & Miss. Rd. v. Selby, 47 Ind. 471 (1874), a drover's pass case (same holding: Louisville, N. & C. Ry. v. Faylor, 126 Ind. 126, 25 N. E. 869 (1890)). But exemptions were held valid in

B. Burns' Indiana Statutes Ann. (1933), 14-106: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
3. No statement.
4. Not to exceed ten thousand dollars. If decedent leaves no widow, widower, or dependent children or next of kin, recovery is limited to $850 in certain proportions for certain enumerated expenses.

IOWA


B. Code of Iowa (1931), §8043: Prohibits any corporation or person engaged in transporting persons for hire to exempt themselves from their liability as such carriers by any contract, receipt, rule or regulation.

C. 1. None.

KANSAS

A. Revised Statutes Ann. (1923), 66-173: No railroad company shall be permitted, except as otherwise provided by regulation or order of the commission, to change or limit its common law liability as a common carrier. Same, 66-234: Provides that railroads be liable for all damage done to person or property by their negligence. Same, 66-240: Provides that no common carrier shall attempt to exempt itself from liability by any contract, rule, regulation or device. Chicago, R. I. & P. Ry. v. Posten, 59 Kan. 449, 53 P. 465 (1898): a provision in a drover's pass limiting liability to $1000 is invalid, under the statute (supra).

Sewell v. Atchison, T. & S. F. Ry., 78 Kan. 1, 96 P. 1007 (1908): exemption from liability for negligence against express messenger is valid. The court did not even consider the statute involved in the Posten case, which had not been repealed. Nevertheless, the rule of the Sewell case probably applies to free passage and Pullman porter cases. The correctness of the decision is doubtful, in view of the statute.

C. 1. None.
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3. No statement.
4. Not to exceed ten thousand dollars.

KENTUCKY

A. Constitution of Kentucky, §196: No common carrier shall be permitted to contract for relief from its common law liability.

Louisville & National Rd. v. Brown, 186 Ky. 435, 217 S. W. 686 (1919—free pass); the constitutional provisions do not apply to the case of a free pass. But a railroad cannot exempt itself from liability for gross negligence. The court expressly refused to decide as to exemption from ordinary negligence in free pass case. The rule of this case seems to violate the intent of the constitutional provisions cited herein.

C. 1. Section 241: “Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same.”

2. Carroll’s Kentucky Statutes (1930) §6.

3. Punitive damages may be recovered where the wrongful act was wilful or grossly negligent.

4. None.

5. Constitution, §54: “The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”

LOUISIANA


B. General Statutes (Dart, 1932), §§1, 2, 4: Provide that every company carrying person for hire by air execute an indemnity bond with a surety company authorized to do business in the state in favor of any person who may be injured by the operation of the aircraft, or for his beneficiaries under the survival statute, the amount to be $15,000 for the first plane, and $1000 more for each additional plane.

C. 1. None.

2. Civil Code (Dart, 1932), §2315.

3. Damages suffered both by the deceased and the survivors mentioned in the Act.

MAINE


C. 1. None.

2. Revised Statutes (1930), Ch. 101, §§9, 10.

3. Such damages as may be fair and just with reference to the pecuniary injuries resulting to the beneficiaries.

4. Not to exceed five thousand dollars.

MARYLAND

A. Exemption as to passenger for hire is invalid, but as to express messengers, Pullman porters, circus employees, etc., it is valid: Western Md. Ry. Co. v. Shatzer, 142 Md. 274, 120 A. 840 (1923).
B. Ann. Code of Md. (Bagby, 1924, Supp.), Art. 1A, §6: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

Laws of Md. (1931), Ch. 403, §40: Provides that the liability of the owner of aircraft engaged in interstate commerce for any loss incurred without his privity or knowledge be limited to the amount or value of his interest in the aircraft "and her freight then pending." [This Act is copied from U. S. Code, Title 46, §183 (q. v.) and may receive the construction, as that section has, that it applies to injuries to passengers. But the surrounding sections of the chapter are all directed towards the carriage of goods, and since the working of this one is not entirely clear, the doctrine of noscitur a sociis may be applied to limit it to the carriage of goods.]

C. 1. None.
2. Annotated Code (Bagby, 1924), Art. 67, §§1, 2.
3. Such damages as may be proportioned to the injury resulting to the beneficiaries.

MASSACHUSETTS

A. General Laws of Mass. (1932), Ch. 159, §3: Provides that no rule, regulation, sign or other device shall prevent any passenger of any common carrier who "enters or leaves by a door of its car or train" from recovering damages for any injury.

Same, Ch. 229, §3: Provides that when the death of a passenger or other person is caused by negligence of a railroad company, it shall be punished by a fine of from $500 to $10,000, which goes to the administrator of the estate, and shall also be liable in damages, in a sum of between $500 and $10,000.

Same, Ch. 229, §6: Provides for additional recovery of damages for conscious suffering resulting from the injury: Gilpatrick v. Colling, 214 Mass. 426, 101 N. E. 993 (1913).

Exemptions from negligence are valid in cases of express messengers (Bates v. Old Colony Rd., 147 Mass. 255, 17 N. E. 633 (1888)), free passage (Quimby v. Boston & M. Rd. Co., 150 Mass. 365, 23 N. E. 205 (1890)), and circus employees (Robertson v. Old Colony Rd., 156 Mass. 525, 31 N. E. 650 (1892)). But no exemption is valid in the case of a non-gratuitous passenger (Doyle v. Fitchburg Rd. Co., 166 Mass. 492, 44 N. E. 611 (1896)). Though the court in the Quimby case doubted whether the degrees of negligence idea should be applied in Massachusetts, a dictum in the Doyle case indicated that even in a free pass situation, an exemption as to wilful negligence would be invalid. Finally dictum in the Quimby case forbids limitation of liability for reduction in fare. Chapter 229, §3, supra, would not apply in the first three cases, which were personal injury actions, but was not even mentioned in the Doyle case, a death action.

B. Gen. Laws of Mass. (1932), Ch. 229, §2: Provides for an action for death caused by the negligence of a common carrier of passengers, other than railroads, the limits of recovery, being a minimum of $500 and a maximum of $5000.

C. 1. None.
2. General Laws (1932), Ch. 229, §§5, 6.
3. Damages to be assessed with reference to degree of culpability of defendant or his wrong doing servants. Further damages for the conscious suffering of the deceased may be recovered.
4. Not less than five hundred nor more than ten thousand dollars.
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5. General Laws (1932), Ch. 229, §1. Provides for death caused by a defect, want of repair, or insufficient railing of a road or bridge, the limit of recovery being $1000.

MICHIGAN
B. Compiled Laws of Mich. (1929), §4816: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.
C. 1. None.
3. Such damages as may be fair and just, with reference to the pecuniary injury resulting from the death.
4. None.

MINNESOTA
A. No exemptions are allowable either as to free (Jacobus v. St. P. & C. Ry. Co., 20 Minn. 125 (1873)) or paying passengers (Gerin v. Chicago, M. & St. P. Ry. Co., 133 Minn. 395, 158 N. W. 630 (1916—drover's pass)).
B. Minn. Stat. (Mason, 1927), §5494-12: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.
C. 1. None.
2. Minn. Statutes (Mason, 1927), §9657.
3. No statement.
4. Not to exceed seven thousand five hundred dollars.

MISSISSIPPI
A. Miss. Code Ann. (1930), §6152: Provides that railroad companies be liable for all damages to any person caused by the negligence of their servants.
Exemptions from liability are not recognized in Mississippi. In Illinois Cent. v. Grudup, 63 Miss. 302 (1882) it was held proper to exclude from evidence a free pass on which a mail agent was riding. The decision rested on two grounds: first, that there was no consideration for the waiver; second, that such exemptions are against public policy. In Yazoo & M. V. R. Co. v. Grant, 86 Miss. 565, 38 So. 902 (1905), the court relied on the Grudup case in excluding a free pass held by defendant's employee, from evidence, ruling that the statement in the latter case as to free passengers was not dictum.
MISSOURI

A. Revised Stat. of Mo. (1929), §3262: Provides an action for death of any person caused by wrongful acts of employees of public conveyance companies, or for death of passengers of such companies caused by defects in the conveyance, minimum recovery to be $2000 and maximum $10,000.

Same, §4829: Provides that no common carrier of persons or property shall exempt itself from liability by any contract, receipt, rule, notice or regulation.


B. Rev. Statutes of Mo. (1929), §13908: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.


3. Such damages as may be deemed fair and just, with reference to the necessary injury to the beneficiaries, and having regard to the mitigating and aggravating circumstances attending the accident.

4. Not to exceed ten thousand dollars.

MONTANA

A. Revised Code of Mont. (Choate, 1921), §7853: Provides that a common carrier cannot by contract exonerate itself from liability for gross negligence, fraud, or wilful wrong.

In a free pass case (John v. No. Pac. Ry., 42 Mont. 18, 111 P. 632 (1910)), the court said that it was settled in Montana that a common carrier can exonerate itself from liability for ordinary negligence. Reliance was placed on a case involving chattels (Nelson v. Great Northern Ry., 28 Mont. 297, 72 P. 642 (1903)), wherein nothing was said as to passengers. Nevertheless, the language in the case is broad enough to cover passage for consideration, as well as gratuitous transportation. As to limitation of liability, a dictum in Miley v. No. Pac. Ry., 41 Mont. 51, 108 P. 5 (1910) is significant. That was not a personal injury case; plaintiff, traveling on an excursion ticket, was carried past her station. The court said: "... that, in the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket, whereby its liability is restricted and its obligations curtailed, is recognized by the authorities generally." It must be noted, however, that reliance was placed on only one case, and that case involved liability for baggage: Rose v. No. Pac. Ry., 35 Mont. 70, 88 P. 767 (1907).

C. 1. None.

2. Revised Codes (Choate, 1921), §§9075, 9076.
3. Such damages as under all the circumstances of the case may be just.

NEBRASKA

A. Constitution of Neb., Art. X, §4: The liability of railroad corporations as common carriers shall never be limited.

Compiled Statutes of Neb. (1929), Ch. 74, §701: Provides that railroad companies be liable for injuries to passengers, unless caused by the criminal negligence of the person injured or by his violation of some rule or regulation of the railroad actually brought to his attention.

Same, Ch. 74, §714: Provides that no notice shall limit the liability of railroad companies unless it was actually brought to the passenger's knowledge and assented to by him.

Exemptions in drover's pass cases are invalid: Omaha & R. V. Ry. v. Crow, 47 Neb. 84 (1896). This is true also in circus employee cases, in view of constitutional and statutory provisions requiring railroads to provide transportation to everyone on equal terms: Maucher v. Chicago, R. I. & P. Ry., 100 Neb. 237, 159 N. W. 422 (1916). Exemptions in free passes are also void: Chicago, R. I. & P. Ry. v. Collier, 1 Neb. (unof.) 278, 95 N. W. 472 (1901). In this case, the court construed the statutes cited above, and it was held that no implication drawn from the wording of the latter could be allowed to overcome the express command of the former.

C. 1. None.

2. Compiled Statutes (1929), Ch. 30, §§809, 810.

3. Damages sustained by the beneficiaries.

NEVADA

B. Nev. Compiled Laws (Hillyer, 1929), §280: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.

2. Compiled Laws (Hillyer, 1929), §§9194, 9195.

3. Such damages, pecuniary and exemplary, as may be deemed fair and just, taking into consideration the pecuniary injury to the beneficiaries.

NEW HAMPSHIRE

A. Exemption in case of non-gratuitous passage is not allowable: Baker v. Boston & M. Ry., 74 N. H. 100, 65 A. 386 (1906—caretaker; covenant not to sue). And, likewise, exemptions in free pass cases are void: Weissman v. Boston & M. Ry., 84 N. H. 475, 152 A. 476 (1930). In this case, the court expressly refused to comment on the rule in Pullman porter, express messenger and circus cases, but distinguished the free pass case in that the nature of the service rendered in the former cases is exceptional, while in the latter, nothing exceptional beyond mere transportation, is performed. The distinction may be carried into rule. The court also intimates that it would hold invalid exemptions from liability based on rate concessions.

C. 1. None.

2. Public Laws (1926), Ch. 302, §§9, 11, 12, 13.

3. The mental and physical pain suffered by decedent, the reasonable expenses occasioned his estate by the injury, the probable duration of his life but for the injury, his capacity to earn money, other elements allowed by law may be considered.
4. Not to exceed seven thousand dollars, unless decedent left a widow, widower, minor children, or dependent father or mother, in which case the maximum is ten thousand dollars.

NEW JERSEY
A. Exemptions in free pass cases (Kinney v. Cent. Rd. of N. J., 32 N. J. L. 407 (1868), aff'd 34 N. J. L. 513 (1869)) and express messenger cases (Sheridan v. New Jersey & N. Y. Ry., 104 N. J. L. 622, 141 A. 811 (1928—dictum)) are valid. But they are not valid in passenger for hire cases, even where the passenger is riding on a half-fare ticket (Sheridan case, supra).

B. New Jersey Laws, §§15-26: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
2. Compiled Statutes (1910), §7, p. 1907; §8, p. 1908.
3. Such damages as may be deemed fair and just with reference to pecuniary injury resulting to the beneficiaries.

NEW MEXICO
A. New Mexico Statutes Ann. (1929), 36-101: Provides an action for the death of any person caused by wrongful acts of employees of public conveyance companies or for death of passengers of such companies caused by defects in the conveyance, the maximum recovery being $7500 (as amended, Laws of 1931, ch. 19, §1).

C. 1. None.
3. Such damages, compensatory and exemplary, as may be deemed fair and just, taking into consideration the pecuniary injury resulting to the beneficiaries, and also the mitigating and aggravating circumstances attending the accident.

NEW YORK
A. The rules in New York were first formulated in four cases: Wells v. N. Y. C. Rd., 24 N. Y. 181 (1862); Perkins v. N. Y. C. Rd., 24 N. Y. 196 (1862); Smith v. N. Y. C. Rd., 24 N. Y. 222 (1862); and Bissell v. N. Y. C. Rd., 25 N. Y. 442 (1862). The first two of these were free pass cases, the last two, drover's pass cases. The court at that time was composed of eight judges, and most of them wrote opinions in these cases. There resulted a confusion that is difficult to order; none of the decisions is clear cut. But they may be summarized thus: (1) As to passenger for hire, four judges thought that no exemption whatever was allowable (Denio, Davies, Sutherland and Wright); four more agreed that no exemption from the results of one's own (that is, in the case of a corporation, its major officers) willful wrong-doing would be valid (Gould, Allen, Smith and Selden (who included negligence of such extreme degree as to be almost wilful)); but three of these maintained that the railroad could exempt itself from its own ordinary negligence (Selden, Allen and Gould; Sutherland, Wright, Denio, Davies and Smith contra); two of these three also argued that the corporation could exempt itself from the negligence of whatever degree, of its servants (Allen and Gould), but five judges disagreed (Smith not expressing himself on this point). (2) As to free pass cases, two upheld the view that no exemption whatever was allowable (Sutherland and Wright); all the rest agreed that exemption from one's own willful misfeasance was void, but six
thought that exemption from liability for one's own ordinary negligence was good (Denio, Davies, E. Smith, Allen, Gould and Selden, which last excluded negligence of such degree as to be almost wilful); the same six were agreed that exemption from liability for negligence of whatever degree of one's servants was allowable. To sum up, if actual count means anything, no exemptions, either from liability for fault of one's self or one's servants are valid as against paying passengers; as to free passengers, exemption from liability for one's servants' negligence of any degree is allowable, as is exemption from liability for one's own ordinary negligence, but not for one's own wilful tort. (3) Four judges held that a drover is a free passenger (Gould, Smith, Davies, Allen); three thought he is not (Wright, Denio, Sutherland), and one was non-committal (Selden). (4) It is also interesting to note that two judges were of the opinion that an exemption would be valid if given in consideration of reduced rates (Gould, Selden); with this thought no judges disagreed, though Sutherland (with whom Wright concurred) in making a point in his dissent in the Wells case seemed tacitly to assume that such exemption would be invalid. But many years later, in Anderson v. Erie Rd., 223 N. Y. 277, 119 N. E. 557 (1918), the court (three judges dissenting), following the reasoning of Gould and Selden, settled the rule in New York that not only free passengers, but also passengers for a reduced rate, may be carried without risk on the part of the carrier. It should be noted that in Conklin v. Canadian-Colonial Airways, 242 App. Div. 625 (1935), the rule was qualified to this extent: a choice must be offered the passenger between full fare and no risk, or part fare, assuming the risk.

C. 1. Article I, §18: “The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations.

2. Consolidated Laws (Cahill, 1930), Ch. 13, §§130, 132.

3. Such damages as may be deemed fair and just for injury resulting to the beneficiaries.

NORTH CAROLINA

B. North Carolina Code Ann. (1931), §191(o): The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.


3. Such damages as may be fair and just for the pecuniary injury resulting from the death.

NORTH DAKOTA

A. Compiled Laws of N. D. (1913), §§6240, 6241: Provide that common carriers may limit their obligations by special contract, but not as to negligence, fraud, or other wrongful act of themselves or their servants.

B. Comp. Laws of N. D. (1913), §2971c6: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.

2. Compiled Laws (1913), §§8321, 8322.
3. Such damages as may be proportionate to the injury resulting to the beneficiaries.

OHIO

A. In a drover's pass case, the court held that an exemption would be void as to a passenger for consideration: Cleveland, P. & A. Rd. v. Curran, 19 Ohio St. 1. (1869). There is broad language in another case that might be interpreted as covering the rule as to free passage: Knowlton v. Erie Rd. Co., 19 Ohio St. 260 (1869—free pass). It was said: "It has been repeatedly held by this court, that a common carrier cannot, in this State, even by express contract, relieve himself from liability for injuries caused by his own negligence or that of his servants, in the discharge of the duties incident to his employment." But the court was probably referring to carriage of property cases, which would not be authority for this type of situation. The particular controversy was decided under New York law.

B. Article I, §19a: “The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect or default of another shall not be limited by law.”


3. Such damages as may be proportionate to the pecuniary injuries resulting to the beneficiaries.

OKLAHOMA

A. Oklahoma Statutes (1931), §§9254, 9255: Provide that a common carrier can limit its obligations by special contract except as to gross negligence, fraud or wilful wrong.

These statutes were applied in Missouri, K. & T. v. Zuber, 76 Okla. 146, 184 P. 452 (1919), holding an exemption in a free pass valid except as to gross, wilful or wanton negligence.

C. 1. None.

2. Okla, Statutes (1931), §570.

OREGON

A. Richmond v. Southern Pac. Ry., 41 Ore. 54, 67 P. 947 (1902): exemption invalid as to passenger for hire, even though a reduced fare is paid. There is an intimation that if privileges special to the particular passenger were given (for example the privilege of riding on a part of the train not designed or ordinarily used for passengers) the exemption would be valid. The court also cited favorably cases allowing exemptions in express messenger and circus employee situations.

C. 1. None.


3. No statement.

4. Not to exceed ten thousand dollars.

PENNSYLVANIA

A. Pennsylvania has gone far in forbidding exemptions. Though the first case was limited expressly to invalidating exemptions from liability for gross negligence as to passengers for consideration (Penn. Rd. v. McClosky's Admr., 23 Pa. St. 526 (1854—drover's pass)), the rule was soon extended to prohibit exemptions as to ordinary negligence (Penn. Rd. v. Henderson, 51 Pa. St. 313 (1865).
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-drover's pass; criticizing the New York rule). A further extension to free pass cases soon followed: Penn. Rd. v. Butler, 55 Pa. St. 335 (1868). There was an intimation in Forepaugh v. Del. etc. Rd. Co., 128 Pa. St. 217 (1889) that the exemption might be valid in a circus employee case, but the statement was dictum, because the controversy was decided under New York law. And whatever lingering doubt there was must have been settled in Coleman v. Penn. Rd., 242 Pa. St. 304, 89 A. 87 (1913), a Pullman porter case, where, in sweeping language, the exemption was invalidated. Furthermore, exemption in consideration of reduced fares was held void in Crary v. Lehigh Valley Rd., 203 Pa. St. 525, 53 A. 363 (1902).

B. Penn. Statutes Ann. (Purdon, 1930), Title 2, §§1472, 1473: Provide that the liability of owners or pilots of aircraft for injury or death to passengers shall be determined by rules of law applicable to torts on lands or waters of the state.

C. 1. Article 3, §21: [Provides first for workmen's compensation acts]; "but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries. the right of action shall survive."


3. Damages now usually recovered in such actions, and in addition, expenses incurred for medical and surgical care, and nursing of decedent, and other expenses for which the deceased could have recovered had he sued; also reasonable funeral expenses, if plaintiff had paid or incurred such expenses.

RHODE ISLAND

B. Laws of 1929, Ch. 1435, §6: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.

2. General Laws (1923), §4862.

SOUTH CAROLINA

A. Constitution of South Carolina, Art. 9, §3: All railroad, express, canal and other corporations engaged in transportation for hire . . . are common carriers in their respective lines of business, and are subject to liability . . . as such. It shall be unlawful for any such corporation to make any contract relieving it of its common law liability or limiting the same, in reference to the carriage of passengers.

The question is still open whether this constitutional provision applies to free pass cases. In Nickles v. Seaboard Air Line Ry., the ticket purported to be a free pass; the trial court instructed that defendant could not contract with a free passenger to escape liability for more than ordinary negligence. The decision for plaintiff was affirmed, but on the ground that this was not a free pass case. In Carter v. So. Ry., 100 S. C. 403, 84 S. E. 999 (1914), a Pullman porter case, the exemption was held void, but on the ground that the situation was indistinguishable from the drover's cases, in which cases most courts hold that the passage is for consideration.

B. Code of Laws of S. C. (1932), §7105: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on
land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
3. Such damages, including exemplary damages if the wrongful act was reckless, wilful or malicious, as may be proportioned to the injury resulting to the beneficiaries.

**SOUTH DAKOTA**

A. *Compiled Laws of S. D.* (1929), §§1162-1163: Provide that a common carrier can limit its obligations by special contract, except as to gross negligence, fraud, or wilful wrong.

The statutes were applied in *Meuer v. Chicago, M. & St. P. Rd.*, 55 S. D. 568, 59 N. W. 945 (1894), a drover's pass case, in which the exemption was held valid.

B. *Comp. Laws of S. D.* (1929), §8666-Q: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
3. Such damages as may be proportionate to the pecuniary injuries resulting to the beneficiaries.
4. Not to exceed ten thousand dollars.

**TENNESSEE**

B. *Tenn. Code Ann.* (Williams, 1934), §2721: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
3. Damages for the mental and physical suffering, loss of time, and necessary expenses resulting to the decedent from his personal injuries, and also the damages resulting to the beneficiaries.

**TEXAS**

A. *Revised Civil Statutes*, art. 4671: Provides that no contract between the owner of any vehicle for transporting persons and the person or company operating the same shall release either of the contracting parties from liability for death of any person.

Same, Art, 4671(2): Provides for an action for death of any person by the wrongful act of the owner or operator or its servants of any vehicle for the conveyance of passengers.

In *Gulf, C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640 (1886), an exemption in a free pass was held void, and it was indicated that in no case could a carrier absolve itself of the duties imposed on it by law as a common carrier.

C. 1. Article XVI, §26: “Every person, corporation or company, that may commit a homicide, through wilful act or omission, or gross neglect, shall be responsible, in exemplary damages, [to certain named persons].”
3. Such damages as may be proportionate to the injury resulting from the death; and if the death was caused by wilful wrong or gross negligence, exemplary damages may also be recovered.

UTAH


B. Revised Statutes of Utah (1933), 4-0-6: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. Article XVI, §5: “The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation [except in workmen’s compensation acts]."

2. Revised Statutes (1933), 104-3-10, 11.

3. Such damages as under all the circumstances of the case may be just.

VERMONT

A. Sprigg’s Admr. v. Rutland Rd., 77 Vt. 347, 60 A. 143 (1904): exemption invalid as to passengers for hire, such as, here, a drover. But exemption is valid in an express messenger case: Robinson v. St. Johnsbury & L. C. Rd., 80 Vt. 129, 66 A. 814 (1905).

B. Public Laws (1933) §5227: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.

2. Public Laws (1933), §§2859, 2860.

3. Such damages as are just, with reference to the pecuniary injuries resulting to the beneficiaries.

VIRGINIA

A. Virginia Code of 1930, §3930: No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid.

Under this statute, an exemption in a free pass case was held void: Norfolk & W. Ry. v. Tanner, 100 Va. 379, 41 S. E. 721 (1902). Whether the statute would be extended to the ordinary express messenger case was not decided in Shannon’s Admr. v. Chesapeake & O. Rd., 104 Va. 645, 52 S. E. 376 (1905), because the contract there was bipartite, being merely between the express company and its employee; the court distinguished it on that ground from Baltimore & O. S. W. Ry. v. Voight (q. v. infra in “Federal), in refusing to give effect to the exemption.

C. 1. None.


3. Such damages as may be fair and just.

4. Not to exceed ten thousand dollars.
WASHINGTON

A. Muldoon v. Seattle City Ry., 7 Wash. 528, 35 P. 422 (1893): exemption invalid as to paying passenger, but valid as to free passenger.

C. 1. None.
   2. Revised Statutes Ann. (Remington, 1932), Ch. 4, §183.
   3. Such damages as under all the circumstances of the case may seem just.

WEST VIRGINIA

C. 1. None.
   3. Such damages as may be deemed fair and just.
   4. Not to exceed ten thousand dollars.

WISCONSIN

A. Wisconsin Statutes (1933), 192-43: Voids any contract, receipt, rule or regulation exempting a carrier of persons for hire from liability.
   Feldschneider v. Chicago, M. & St. P. Ry., 122 Wis. 423, 99 N. W. 1034 (1904): both complete exemption and limited liability provisions in a contract with a passenger for hire are void (drover's pass case).

B. Wisc. Statutes (1933), 114.06: The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

C. 1. None.
   2. Wisconsin Statutes (1933), 331-03, 04(1) (2).
   3. Such damages as may be deemed fair and just in reference to the pecuniary injury resulting from the death.
   4. Not to exceed twelve thousand five hundred dollars; an additional sum, not to exceed two thousand five hundred dollars, may be given for loss of society and companionship to the parent or parents, or husband or wife of deceased.

WYOMING

C. 1. Article 10, §4: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."
   2. Revised Statutes (1931), 89-403, 404.
   3. Such damages as may seem fair and just.

FEDERAL

A. United States Code, Title 46, §183: Provides that the liability of a ship-owner for injury incurred without his privity or knowledge be limited to the amount or value of his interest in the vessel and her freight then pending.
   Same, Title 46, §491: Provides that if a passenger of a vessel is injured by neglect or failure to comply with the provisions of certain acts (Ch. 14 & 15, and §§214 and 215), or through any known defects in the ship or its apparatus, the master and owner shall be liable for the full amount of damage, and if through the wrongful act of an employee, that employee shall be so liable.
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Section 183, supra, applies to passengers as well as goods: Butler v. Boston & S. S. Co., 130 U. S. 527, 9 S. Ct. 612 (1889); Craig v. Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97 (1891). But §183 does not conflict with §491. The former allows limitation where the owner was without "privity or knowledge" of the wrongful act; the latter excepts from §183 the case where precautions prescribed in the Act are not taken, or where the defect is known; then, the fault would be that of the owner: Butler case, supra. And even then, the court said, if the non-compliance with the Act were without the owner's fault, privity, or knowledge, §183 might govern.

The question of the right of a railroad to contract for exemptions from liability is a question of general law, on which Federal courts will follow their own judgment (Chicago, M. & St. P. Rd. v. Solan, 169 U. S. 133, 18 S. Ct. 289 (1898); Railroad Co. v. Lockwood, 84 U. S. 357 (1873)). But as to intrastate transportation, the local rule will be followed (New York Cent. Ry. v. Mohney, 252 U. S. 152, 40 S. Ct. 287 (1920)). In absence of Federal legislation, the states can legislate on this subject, even as to interstate transportation, as far as accidents happening within their own territory are concerned, and Federal courts will apply the state statutes (Chicago, M. & St. P. Ry. v. Solan, supra). But Congress has legislated on the subject of free passes, and also drover's passes, in interstate commerce, prohibiting their issue except in specified cases (Hepburn Act, 34 Stat. 584, §1); and although that act says nothing about limitation of liability, Congress has, by its passage, assumed Federal jurisdiction over the whole subject of free passes, and the Federal rule applies, notwithstanding state statutes (Charleston & West. Car Ry. Co. v. Thompson, 234 U. S. 576, 34 S. Ct. 964 (1914); Kansas City So. Ry. v. VanZant, 260 U. S. 459, 43 S. Ct. 776 (1923), rev'd. 289 Mo. 163, 232 S. W. 696 (1921)).

Exemptions from liability in cases of passengers for consideration are invalid (Railway Co. v. Stevens, 95 U. S. 655 (1877)). Stock drovers are considered to be passengers for consideration, so that no exemption as to them is valid (Railroad Co. v. Lockwood, supra). Nor has the Hepburn Act, by including drovers among the list of those to whom "free" passes can be issued changed the rule, for "free" must be taken in its historical sense, and in the case of drovers, though their passes were spoken of as being "free," they never were so in fact (Norfolk So. Rd. Co. v. Chatman, 244 U. S. 276, 37 S. Ct. 499 (1917)). (An apparently inconsistent case should be noted. In Charleston & West. Car Ry. Co. v. Thompson, supra, a free pass containing an exemption clause, was issued, under §1 of the Hepburn Act, to the wife of a railroad employee. The Court of Appeals held the pass to be in reality not free, but issued as part of the consideration for the employee's services, and the stipulation therefore to be not binding. This was reversed on appeal; Justice Holmes, writing the opinion of the court, admitted that in absence of statute, the pass would not have been gratuitous, but being included in §1 of the Hepburn Act, must be considered free.) Exemptions in express messenger transportation contracts are valid (Baltimore & O. S. W. Ry. v. Voigt, 176 U. S. 498, 20 S. Ct. 385 (1900)), as they are in Pullman porter cases (Robinson v. Baltimore & Ohio Rd., 237 U. S. 84, 35 S. Ct. 491 (1915)). Furthermore, exemptions are valid in cases where plaintiff is riding on a free pass (Northern Pac. Ry. v. Adams, 192 U. S. 440, 24 S. Ct. 408 (1904)). But it seems that even in a free pass case, the exemption will not be extended to wilful or wanton misconduct (New York Cent. Ry. v. Mohney, supra (gross negligence alleged); the transportation was held by the majority to be intrastate, and thus local law applied, but Justice Clarke went on to mention the rule just stated; Justices Day and Van Devanter concurred in the
statement of the rule, but thought that interstate transportation was involved. It is to be noted that no Ohio case speaks of any distinction in the rules applicable to ordinary and wilful negligence. And the Lockwood case repudiated the degrees of negligence formula).

Exemptions are also valid in circus employee cases: Clough v. Grand Trunk W. Ry. Co., 155 Fed. 81 (C. C. A.—6, 1907). Contra: Sager v. No. Pac. Ry., 166 Fed. 526 (C. C. Minn., 1908). (The court emphasized the fact that this was a bipartite contract, between the railroad and circus companies. This was true also in the Clough case. It also construed a statute of North Dakota, where the injury occurred (providing that railroads be liable for all damage done to any of its employees, or "by the mismanagement of its engineers or other employees, to any person," no exemption contract to be valid), as applying only to defendant's employees. The quoted clause was disregarded in the opinion.) The exemption in a circus employee case will not be extended to wilful and wanton negligence: McCree v. Davis, 280 Fed. 959 (C. C. A.—6, 1922—relying on New York Cent. Ry. v. Mohney, supra).

B. Warsaw Convention (ratified June 15, 1934), Art. 22(1): "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.”

Same, Art. 23: “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void.”

Same, Art. 25(1), (2): Provide that article 22(1) shall not apply as to wilful misconduct of the carrier or its agents.

C. 1. None.
2. U. S. Code (1926), Title 46, §§761, 762 (death occurring on the high seas).
3. Fair and just compensation for the pecuniary loss sustained by the beneficiaries.
4. It is possible that §183 of Title 46 (See A) may limit liability to the value of the interest of the owner in the vessel. There is no direct holding to this effect, but in Matter of the Petition of East River Towing Co., 266 U. S. 368, 45 S. Ct. 115 (1924), it was held that §183 applied to actions for death of a seaman, under Title 46, §688, a section stating no limitation on the amount of recovery.