# CONTRACTUAL LIMITATION OF SERVANTS' LIABILITY IN AIR CARRIAGE

by

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DEDICATION

1. To my parents for whose encouragement
   I shall always be grateful.

2. To Lord Denning, a bald spirit.

"Today we study the day before yesterday,
in order that yesterday may not paralyse
today and today may not paralyse tomorrow."

Maitland, Collected Papers, Cambridge,
1911, Vol. 3, p. 438.

# PREFACE

This thesis was prepared and written at McGill University in the academic year 1961/62. The material used is available at the Institute of Air and Space Law and the Library of the Law Faculty, apart from the Lloyd's Law Reports for which recourse had to be made to the library of the Superior Court of Justice in Montreal.

My sojourn in Canada has proved to be an enjoyable and profitable experience. Thanks are therefore due to those who made it possible: my former Professor and lecturers at the University of Nottingham and the Commonwealth Scholarship and Fellowship Committee who provided me with the necessary financial assistance. Thanks are also due to those who have made me feel very much at home in what is, for me, a foreign country. Special thanks in this regard, are due to the Director of the Institute, Professor A.B. Rosevear, who is very far from being just a Director of Studies. He is a friend.

In accordance with requirement, I must now state that this thesis was written without assistance or guidance from anyone. Helpful comments from Professor J.C. Smith of Nottingham University as to an earlier term paper of mine, have influenced one of the chapters to some extent, but that is all.

Montreal, April 1962. Geoffrey N. Pratt.

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# INTRODUCTION

## 1. The Problem Stated

All contracts of air carriage nowadays contain provisions limiting or excluding the liability of the carrier in the event of the negligence or otherwise of himself or his servants and agents. Since, in the vast majority of cases, the carrier employs servants and agents for the purpose of carrying out his obligations under his contracts to carry, the injury or damage complained of will invariably be the result of the acts of these servants or agents.[1] The injured party will then have a choice of actions. He may sue the carrier whose vicarious liability is limited by the contract or he may sue the servant or agent who actually caused the damage. If the damage caused to him is in excess of the limitation amount in the contract, he will sue the servant or agent in the hope of obtaining full reparation. To prevent the avoidance of the limitation provisions in this way, attempts have been made to extend them to cover both the servants and agents as well as the carrier. These attempts have taken two forms:-

1. It has been argued that the provisions extend by necessary implication to the servants and agents.
2. Clauses have been added to the contracts of carriage expressly extending

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1 cf. as to carriage by sea, remarks of Owen J. in the Australian case of GILBERT STOKES & KERR PROP. LTD. v. DALGETY & CO. LTD. (1948) 81 Ll. L. R. 337 at p. 338 (S.C. of New South Wales).

the carrier's limitation or exclusion of liability to his servants and agents.

It is the purpose of this thesis to discuss how far and to what extent these attempts have been or may be successful in the fields of both international and domestic air carriage. This will necessitate a discussion of the position under the Warsaw Convention which covers the greater part of international carriage and of the position under national laws which apply to all domestic and non-Warsaw international carriage. The national laws considered will be those of England and the United States. The problem of the law which should be applied to cases involving non-Warsaw international carriage is omitted because this field of enquiry is complex and deserves separate treatment. The same applies to the problem of who is a servant or an agent.

## 2. The Problem's Importance

The problem is considered important for the reason that unless the carrier's servants and agents are protected by the limitation provisions in the contracts of carriage, their purpose will be clearly defeated. It is intended to show briefly that the purposes behind and the reasons for limitation of liability apply to the servants and agents just as much as to the carrier and that if they are not covered by them, the effect as far as the carrier is concerned, is to deprive the limitation of his liability of all

efficacy unless he is the actual wrongdoer, a comparatively rare occurrence nowadays.

The most extensive discussion of the reasons for limitation of liability is to be found in Drion's book on Limitation of Liabilities in International Air Law.[2] Following an exhaustive and critical consideration of eight reasons which have been put forward from time to time, he comes to the conclusion that only three of them have any substance.[3] In the case of limitation of liability for death or injury to passengers, the reasons are (1) the better position of the passenger in insuring the risk of his death or injury in excess of the average passenger accident risk[4] and (2) reduction of litigation by fixing the incidence of liability in advance and so offering an easy basis for settlement. With respect to damage to goods, the reasons are (1) the better position of the shipper in insuring the excess value of his goods[4] and (3) the quid pro quo argument to the effect that limitation of liability is a counterpart of the aggravated system of liability imposed upon the carrier. This is only valid in the case of international carriage to which the Warsaw Convention applies, since under domestic laws, the same system

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2 Drion, Limitation of Liabilities in International Air Law, The Hague, 1954, nos. 14-42, pp. 12-44. cf. Report on the Warsaw Convention as amended by the Hague Protocol (1959) 26 J. Air L. & Com. 255, prepared by the Association of the Bar of the City of New York.

3 Ibid., no. 42, p. 42.

4 cf. Reyntens J. in the Belgian case of PAUWELS v. SABENA [1950] U.S. Av. R. 367 at p. 380; 4 Rev. Fr. de Dr. aérien 411 at p. 425, Pas. 1950, III 96:-

"...a man who accepts a clause, limiting the amount of the indemnity which he can recover in the event of damage agrees to act as his own insurer for the balance of the risk (or if he prefers to do so, he can insure the balance of the risk, which can be done quite easily in the case of air travel). The advantage which he gains by accepting a part of the risk for his own account, lies in the lower cost which he pays for the services rendered."

of liability is imposed upon the carrier, whether or not his liability is limited.

In a letter to the President of the United States sending a copy of the Warsaw Convention to him, the then Secretary of State Hull wrote that not only would limitation of liability afford a more definite basis of recovery and tend to lessen litigation but would also:

> "...afford a more definite and equitable basis on which to obtain insurance rates with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travellers and shippers in the way of reduced transportation charges."[5]

These are a selection of the main justifications for limiting liability. Whether one or all of them are accepted as sound, it is clear that taken together, they influenced the introduction of the principle into air law. It is equally clear that, apart from the quid pro quo argument, the same justifications apply when the liability of servants and agents is under discussion. The passenger and shipper remain in a better position to insure themselves against catastrophic occurrences and there remains a more definite basis for recovery resulting in a reduction in litigation. In fact, if the liability of the servants and agents is not limited, the effectiveness of the carrier's limitation will be impaired. Because of the possibility that the servants will be sued for an unlimited amount, an occurrence which will

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5 Senate Doc., executive G, 73rd Cong., 2d Sess., p. 3 cited in ROSS v. PAN AMERICAN AIRWAYS, 85 N.E. (2d) 880 at p. 885, [1949] U.S. Av. R. 168 at p. 177 per Desmond J. (N.Y.C.A.) cf. PAUWELS v. SABENA, supra note 4.

have grave financial consequences for them since they are invariably in a far weaker position than the carrier economically, their representatives and, in some instances, Governments have urged or required the carrier to sign hold harmless agreements[6] and to insure the liability of the servants.[7] Even if they are not bound by hold harmless agreements or statutory provisions, many carriers feel morally obliged to indemnify their servants and, in any event, the possibility of unlimited claims against any one engaged in aviation, must eventually affect aviation costs in general.[8]

The result is that the carrier himself is burdened with the unlimited claims against the servants and agents. He will have to insure against this risk of unlimited liability and the costs of operation of aircraft will be affected. Thus, litigation will tend to increase, since, as has been mentioned, the majority of complaints concern damage caused by servants and agents, insurance rates will go up and this will most likely result in an increase not a reduction in transportation charges, an effect completely contrary to that anticipated by the protagonists of limitation of liability in favour of the carrier. It is, therefore, not surprising that attempts have been made to extend the limitation of liability provisions to

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6 cf. attitude of the International Federation of Airline Pilots Associations: ICAO Doc. A4-WP/154.

7 cf. Swiss Federal Air Navigation Act, 1948, art. 70 (2) which provides that the carrier must cover by insurance the liability of persons charged with the navigation of the aircraft or with any service on board it, for damages caused in the course of their employment to third parties. See also resolution of IFALPA, 5th conf., Brussels, 1950.

8 cf. Drion, op. cit., supra note 2, no. 134, p. 154; Selvig, Unit Limitation of Carrier's Liability, Oslo, 1960, no. 6.23, p. 145.

the carrier's servants and agents and it is this situation which justifies a detailed examination of how far these attempts have been or can be expected to be successful.[9]

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9 For an excellent discussion of the social and economic implications of the problem, see "The Protection of Transport Workers against Civil Law Claims arising out of their Employment," (1959) 26 J. Air L. & Com. 90, reprinted from the International Labour Review, vol. LXXVIII, no. 2, a publication of the International Labour Organisation. See also Minutes of the ninth session of the ICAO Legal Committee at Rio de Janeiro, 1953, Doc. 7450-LC/136, p. 143 ff. Cf. dissenting judgment of Lord Denning in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD., [1962] 1 ALL E.R. 1 at p. 22 (H.L.).

# CHAPTER I

## THE WARSAW CONVENTION

### 1. Introduction

The Convention for the Unification of certain rules relating to International Carriage[10] by air signed at Warsaw on the 12th October, 1929, contains provisions limiting the liability of an air carrier for damage sustained both in the event of the death or injury of a passenger and in the event of damage to registered baggage, handbaggage or goods.[11] This Convention has been ratified by the two States under discussion and, in the case of one of them, it has been made applicable, with modifications,

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10 Article 1(2) defines "international carriage" as "any carriage in which according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transhipment are situated, either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory... of another Power, even though that Power is not a party to this Convention." See Article 2(3) for carriage performed by several successive air carriers. For interpretation of article, see Shawcross & Beaumont on Air Law, 2d ed., London, 1951, no. 359, p. 339 ff. with Second Cumulative Supplement to 2d. ed., 1955, p. B.44 and cases and materials cited therein. See also, Guinchard, La notion du "Transport international" d'après la Convention de Varsovie, (1956) 10 Rev. Fr. de Dr. aérien 14.

11 The carrier is also liable for damage occasioned by delay: Article 19. Article 22 states the limits. Articles 17 and 18 state the circumstances in which the carrier is liable.

to all carriage by air as well as to international carriage.[12] It is clear, therefore, that most air carriage is subject to the legal regime created by the Warsaw Convention and a consideration of its applicability to servants and agents is of primary importance.

## 2. The Relevance of the Law of Contract

Since the Warsaw Convention is of a contractual nature, it is most likely that principles of the law of contract will be called in aid when its interpretation is in issue. A preliminary comment on this possibility is required.

It is submitted that, although "the contract...is...the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not,"[13] the contract or contractual rules of liability have little or no relevance once this is determined. The

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12 United Kingdom: The Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952 (S.I. 1952, No. 158) made under the Carriage by Air Act, 1932 (22 & 23 Geo. V, c.36) s.4. This Act made the Warsaw Convention applicable to Britain. Cf. the new law in France: The law of 2nd March 1957. See Garnault, La loi française du 2 mars 1957, (1959) 11 Rev. Fr. de Dr. aérien 289; de la Pradelle, La loi du 2 mars 1957 sur la responsabilité du transporteur par air, (1957) 20 Rev. Gen. de l'air 227.

13 GREIN v. IMPERIAL AIRWAYS [1936] U.S. Av. R. 211; [1937] 1 K.B. 50 at p. 77, per Greene L.J. See also GREY v. AMERICAN AIRLINES 98 Fed. Supp. 756; [1950] U.S. Av. R. 507 at p. 509. (DC-N.Y. 1950).

Convention is a legal one and applies on its own terms and not because the parties have so agreed.[14] Thus, the contractual rule, prevalent in most systems, that reasonable notice must be given of exclusion or limitation clauses is irrelevant when the applicability of the Warsaw Convention is under discussion.[15] The point of this remark is that, in deciding whether servants and agents are protected by the limitation of liability provisions of the Convention, too much attention should not be paid to arguments based on the fact that they are not parties to the contract of carriage. This fact would be irrelevant once it is agreed that the convention applies the provisions to them. It should also be irrelevant or at least considered with caution in deciding whether in fact the convention extends to them. It is conceded that contractual principles may be of value as an analogy, but, as has been shown, they are not obligatory and should not be mechanically applied if to do so would be to frustrate the purposes of the Convention. An application of the rule that a contractual clause has no effect except as between the parties would have this result and should

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14 ROSS v. PAN AMERICAN AIRWAYS [1949] U.S. Av. R. 168 at p. 176; 299 N.Y. 88; 85 N.E. (2d) 880; 13 A.L.R. (2d) 319. (N.Y. Ct. App. 1949). Cf. Drion, op. cit., footnote 2, no. 140, p. 162.

15 ROSS v. PAN AMERICAN AIRWAYS, loc. cit.

be rejected.[16] It is hoped that the distinction between clauses having contractual effect and those having statutory effect will be kept in mind when the arguments discussed in the following pages are being considered.

3. Juristic Opinion

Most arguments both for and against an interpretation of the Convention extending the limitation provisions to servants and agents, have been based on the language of the Convention itself. Obvious reasons of justice have also been used, notably by the French jurist, Lemoine, but even he realises that arguments based on the nebulous concept of justice and on what the law ought to be have very little legal significance. Lemoine thinks that the servants' liability is limited by the Convention and puts forward the following argument which bases itself on the principle of identifi-

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16 In France, the Convention is regarded as having established a cause of action in contract: HENNESSY v. C^ie AIR FRANCE, Cour d'appel de Paris, 25 Feb. 1954, (1954) 17 Rev. Gen. de l'air 80; 80 Rev. Fr. de Dr. aérien 45. See also Georgiadès, Quelques refléxions sur l'affrètement des aéronefs et le projet de convention de Tokyo, (1959) 13 Rev. Fr. de Dr. aérien 113 at p. 124. The contractual analogy will, therefore, be more compelling in that State than in the United States where courts have held that the cause of action is created by the lex loci delicti and not by the Convention: KOMLOS v. C^ie AIR FRANCE, 111 F. Supp. 393 at p. 401 (DC-N.Y., 1952); NOEL v. LINEA AEROPOSTAL VENEZOLANA, 247 F. 2d. 667 (C.A.-2, 1951). See Calkins, The Cause of Action under the Warsaw Convention, (1959) 26 J. Air L. & Com. 217. Moreover, the rule above referred to, hereinafter called the privity of contract doctrine, is not so deep-rooted in the United States as it is in France. In England, where the Carriage by Air Act, supra footnote 12, creates the cause of action, the privity of contract doctrine is a "brooding omnipresence in the sky" and may well influence the Act's interpretation. The privity of contract doctrine will be fully considered in Chapter II.

cation of the carrier with his servants.[17]

Throughout the convention, the acts of the servants and of the carrier are assimilated. They have the same effects, liability is limited or excluded. There is, therefore, a distinction between the Warsaw Convention and the French law of 1924 which does not allow the carrier to exclude liability for his own faults but does allow him to exclude his vicarious liability in certain circumstances. If there is no distinction drawn between his acts and those of his servants as there is in the French Act, how can it be argued that, in his case, liability is limited, but in the case of his servants, liability is unlimited? He goes on to emphasize the point by reference to Article 20(2) which declares the carrier not liable where damage to goods and baggage is concerned, if he proves that the damage was occasioned by negligent pilotage. This applies even if the carrier, himself is the pilot. Can it really be maintained that faulty pilotage does not engage the liability of the carrier if he is the pilot at fault, but does engage the liability of the servant if the latter is pilot?

With respect, this argument seems to be based on justice and not on any legal rule and there is certainly a non sequitur involved. It may be put in the form of a syllogism.

Major premiss: The acts of the carrier and the acts of his servants have the same effect.

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17 Lemoine, Traité de Droit aérien, Paris, 1947, nos. 840, 841 at p. 558. To the same effect, Litvine, Précis élémentaire de Droit aérien, Brussels, 1953, nos. 234, 235, at p. 158.

Minor premiss: The effect in the case of the carrier's acts is limitation of the carrier's liability.

Conclusion: Therefore, the effect in the case of his servants' acts is limitation of the servants' liability.

This is inaccurate since the effect of the servants' acts as stated in the conclusion is not the same as the effect of the carrier's acts as stated in the minor premiss. Since the major premiss requires the same effect in both cases, the conclusion should be: Therefore, the effect in the case of his servants' acts is limitation of the carrier's liability and no one would quarrel with that'.

A more convincing argument suggested by Lemoine and fully developed by Drion[18] lays stress on article 24 which reads:

> "...any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention..."

Drion believes that a sound interpretation based on the spirit of article 24 which was to prevent the provisions of the convention from being avoided by claiming outside the Convention, leads to the conclusion that any action brought against the carrier's enterprise or against the members of it, are to be brought subject to the limits of article 22. The difficulties with this

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18 Drion, op. cit., footnote 2, nos. 133-140, p. 152 et s. See also Shawcross & Beaumont, op. cit., footnote 10, s. 362, note a, p. 343 and Jara, Spanish delegate at the Hague conference on Private Air Law, 1955, ICAO Doc. 7686-LC/140, p. 219.

argument are twofold. First, articles 17, 18 and 19 to which article 24 expressly refers, only state that 'the carrier is liable' and secondly, it would appear that article 24 only deals with the nature of the action and not with the parties to it. It is true that the logic of the convention may be overestimated [19] but an assumption that the convention is logical must be made unless the result of doing so is to produce an absurdity. The fact that the servants may not be covered by the convention if it is logically interpreted may make the convention unjust in this respect but it does not make it nonsensical.

Two other jurists have expressed the opinion that the limitation of liability in favour of the carrier is extended to his servants and agents. They give no additional reasons. [20]

The majority of authors hold a contrary opinion. [21] It is said that no attempt was made at the Warsaw conference to cover the liability of servants or agents for their individual tortious acts. [22] They can be sued separately and are not protected by the limitation of liability

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19 Drion, op. cit., footnote 2, no. 64, p. 71. His example is article 22(3) which limits the carrier's liability for damage caused to handbaggage. This limit would have no significance if article 24 is construed to allow claims beyond the limits with respect to liability not mentioned in articles 17, 18 and 19, since liability for damage caused to handbaggage is not referred to in these articles.

20 Gay de Montella, Principios de Derecho Aeronautico, Buenos Aires, 1950, p. 560; Ambrosini, Italian delegate at the Hague Conference, supra footnote 18, p. 220.

21 Maschino, La condition juridique du personnel aérien, Paris, 1930, p. 125; Koffka-Bodenstein-Koffka, Luftverkehrsgeset z und Warschauer Abkommen, Berlin, 1937, p. 269; Riese, Luftrecht, Stuttgart, 1949, p. 440; Bucher, Le statut juridique du personnel navigant de l'aéronautique civile, Lausanne, 1949, p. 36.

22 Calkins, Grand Canyon, Warsaw and the Hague Protocol, (1956) 23 J. Air L. & Com. 253 at p. 267 citing Henry de Vos, CITEJA draft text, Minutes of the Warsaw Conference, ICAO Doc. 7838, p. 160.

provided in the convention.[23] The main arguments are as follows. There is nothing in the history or preamble of the Warsaw Convention to indicate that the rules were also intended to apply to the carrier's servants.[24] This observation is fortified by the fact that articles 17, 18, 19 and 22 only speak of the carrier whereas the carrier's servants are mentioned in articles 20 and 25. For example, article 25(1) deals with the effect of the carrier's willful misconduct on his liability. Article 25(2) deals with the effect of the willful misconduct of servants and agents on the carrier's liability. If the term "carrier" was intended to include servants and agents, why was article 25(2) thought to be necessary? Its existence contradicts the assertion that servants are covered by the word 'carrier' elsewhere in the convention.[25]

4. Judicial Decisions

It is now necessary to turn to the few judicial decisions on the subject or analogous to it. The courts of the United States have

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23 See Beaumont, Need for Revision and Amplification of the Warsaw Convention, (1949) 16 J. Air L. & Com. 395 at p. 401 and authors cited in footnote 21, supra.

24 Preamble: "Having recognized the advantage of regulating in a uniform manner the conditions of international carriage by air in respect of ... the liability of the carrier..."

25 Kamminga, The Aircraft Commander in Commercial Air Transportation, The Hague, 1953, p. 90. For an uncommitted discussion of these opinions, see Beaubois, Le statut juridique du Commandant d'aéronef, (1955) 9 Rev. Fr. de Dr. aérien, 221 at p. 252 ff.

been confronted with the problem on more than one occasion and have reached differing conclusions.

In WANDERER v. SABENA and PAN AMERICAN AIRWAYS,[26] the plaintiff was injured at Gander while on a flight from Brussels to New York. More than two years after the accident, an amended complaint was served on P.A.A. naming the airline an additional defendant in the action. P.A.A. moved to dismiss the complaint against itself on the ground that the cause of action did not accrue within the time for commencement of suit as provided in article 29 of the Warsaw Convention. The plaintiff contended that the two year time limit was inapplicable as inter alia, the defendant was not the carrier under the contract of carriage. The court held that the Warsaw Convention applies not only to the carrier but to the agencies employed to perform the carriage and dismissed the action. This case has been severely criticized but mainly on the ground that, in the particular circumstances, P.A.A. should not have been considered as the agent of SABENA.[27]

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26 [1949] U.S. Av. R. 25 (N.Y. Sup. 1949).

27 See Shawcross & Beaumont, op. cit., footnote 10 supra, S.362, note a, p. 343; Lacombe, (1949) 12 Rev. Gen. de l'air 821; Abraham, (1953) 2 Zeitschriftfür Luftrecht 90, Le Goff, La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie, (1957) 20 Rev. Gen. de l'air 352 at p. 354. But see Calkins, op. cit., supra footnote 23, p. 267, note 7 where he criticizes the WANDERER & CHUTTER decisions, on the ground that they require an interpretation of the Convention which was not intended by its framers.

The case was cited with approval in CHUTTER v. K.L.M. and ALLIED AVIATION SERVICE CORPORATION[28] where, more than two years after the date of the accident, the plaintiff brought an action against the two defendants for injuries caused to her when she stepped out of an aircraft into thin air. The ramp had been removed by the second defendants in preparation for the aircraft's take off. The court held that the flight was governed by the Warsaw Convention whose conditions and limitations inured to the second defendants who were acting as agents for K.L.M. at the time of the accident. Thus, suit was barred. In support of his views the judge cited two maritime cases which had held that the limitation provisions in article 4(5) of the U.S. Carriage of Goods by Sea Act, 1936[29] applied to stevedores independently contracted for by the carrier.[30]

> "...the stevedore is engaged by the carrier to perform a part of the contract of carriage and it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity."[31]

He thought the analogy of C.O.G.S.A. quite persuasive "because C.O.G.S.A. merely refers to the liability of the carrier while the Warsaw Convention

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28 132 F. Supp. 611, [1955] U.S. & C. Av. R. 250 (DC-N.Y. 1955).

29 46 U.S.C. 1300-1310. Gives effect to the Convention for the Unification of certain rules relating to bills of lading signed at Brussels on 25 Aug. 1924.

30 COLLINS v. PANAMA R. CO., 197 F. (2d) 893 (CA-5, 1952); U.S. v. SOUTH STAR, 210 F. (2d) 44 (C.A.-2, 1954).

31 132 F. Supp. at p. 613.

in article 24 refers to an action for damages...'however founded.'"[32]

The authority of the WANDERER and CHUTTER cases has since been considerably weakened by the decision of the U.S. Supreme Court in KRAWILL MACHINERY CORP. v. HERD[33] where it was held, inter alia, that the limitation provisions in C.O.G.S.A. do not extend to stevedores or agents. The court expressly overruled COLLINS v. PANAMA R. CO.,[34] one of the decisions relied upon by the court in the CHUTTER case, and said:

> "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms and in the absence of a clear Congressional policy to that end we cannot go so far."[35]

In INTERNATIONAL MILLING CO. v. PERSEUS,[36] the U.S. District Court of Michigan held that the limitation provisions of C.O.G.S.A. did not apply to servants of the carrier either. It is difficult to see, therefore, how the U.S. Supreme Court could come to a different conclusion in the case of the Warsaw Convention which most certainly does not limit the

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32 Ibid. For comments approving the decision, see Le Goff, La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie, (1956) 19 Rev. Gen. de l'air 336 at p. 346; de Juglart (1955) 18 Rev. Gen. de l'air 429 at p. 430.

33 359 U.S. 297; 3 L. ed. (2d) 820; [1959] 1 Lloyd's Rep. 305.

34 197 F. (2d) 893.

35 [1959] 1 Lloyd's Rep. at p. 308 citing BRADY v. ROOSEVELT S.S. CO., 317 U.S. 575 at p. 581 and p. 584.

36 [1958] 2 Lloyd's Rep. 272. (DC-Mich. 1958).

liability of servants and agents in unambiguous terms.[37] In fact, the U.S. District Court of New Jersey in PIERRE v. EASTERN AIRLINES and FOXWORTH,[38] a personal injury case, expressly held that the limitation of liability provisions of the convention do not extend to nor protect the servants and agents of the carrier. No reasons were given.[39]

In England, there is only one reference to the problem. In the maritime case of ADLER v. DICKSON,[40] Denning, L.J. as he then was, referred to the United Kingdom Carriage by Air Act, 1932[41]

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37 It might be contended that there is a distinction between the Warsaw Convention and the U.S. C.O.G.S.A. in that the latter defines 'carrier' whereas the Warsaw Convention does not. S 1 (a) of C.O.G.S.A. provides that: "The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper." This is hardly a definition or at least, it is not exhaustive since the word 'includes' is used and not the word 'means'.

38 152 F. Supp. 486; [1957] U.S. & C. Av. R. 431 (DC-N.J. 1957). cf. SCARF v. T.W.A. and ALLIED SERVICE CORPORATION [1956] U.S. & C. Av. R. 28 (DC-N.Y. 1956) where the second defendants, agents of T.W.A. were not allowed the benefits of the convention which applied in the case of T.W.A. The case is distinguishable, however, on the ground that it was not alleged that T.W.A. were liable for the negligence of the Service Corporation. "The tort of the Service Corporation was not the tort of the air carrier." Therefore, the Warsaw Convention did not apply to them. See Gazdik, (1956) 23 J. Air L. & Com. 232.

39 In a note on Transporting Goods by Air, (1960) 69 Yale L.J. 993 at p. 1006, the air law cases mentioned are discussed and it is said that the CHUTTER result seems the correct one in the context of carriage of goods since the tariff on file with the Civil Aeronautics Board extends the carrier's defences to its servants and agents. PIERRE and SCARF are considered inapposite since they dealt with personal injuries to which the tariff system has not applied since 1954. See Fed. Reg. 509 (1954) 14 C.F.R. 221.38 (h) (1956). The tariff system will be discussed in Chapter III on American Law. It is only necessary to point out here that CHUTTER, a personal injury case, was not decided on the ground that a tariff expressly extended the carrier's defences to his servants and agents, a different point entirely. It was founded on the fact that the Warsaw Convention, by necessary implication, extended the conditions and limitations therein to the carrier's servants and agents.

40 [1955] 1 QB 158.

41 supra footnote 12.

and stated:

> "The provisions under that Act contain certain exemptions and limitations in favour of the 'carrier'. The pilot of the aircraft is not expressly given the benefit of them but Parliament must have intended that he should have the same protection as the carrier." [42]

This is only an obiter dictum and is of doubtful value since the learned judge used it in support of his views on the privity of contract doctrine. These views have since been rejected by the English Court of Appeal [43] and very recently by the House of Lords itself in SCRUTTONS, LTD., v. MIDLAND SILICONES, LTD., [44] where the court held, referring to the American KRAWILL case, [45] that a stevedore's liability was not limited by article 4(5) of the U.S. C.O.G.S.A. since he does not come within the term 'carrier' as used in that Act. [46]

In an Australian case, GILBERT STOKES & KERR PROP. v. DALGETY & CO. LTD., [47] the Australian C.O.G.S.A., article 4(5), was extended in favour of stevedores. Owen J. said at one point:

> "In modern times, shipowners do not personally command their vessels or load or discharge cargo; they employ masters and other servants and, as a matter of common knowledge, independent stevedoring contractors for the purpose of performing their obligations under their contracts to carry. Yet, if the plaintiff be right, whenever

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42 [1955] 1 QB at p. 183.
43 GREEN v. RUSSELL, [1959] 2 QB 226.
44 [1962] 1 ALL E.R. 1 at p. 7, per Viscount Simonds.
45 supra, note 33.
46 See infra p. 54 et. s. for discussion of the main point decided in the case.
47 (1948) 81 Ll. L.R. 337 (Sup. Ct. of N.S.W.).

> cargo is damaged during the course of the contractual voyage by the negligence of some person, whether a servant of the carrier or an independent contractor to whose possession the goods have been entrusted for the purpose of carrying out the contract of carriage, the cargo-owner may avoid the exceptions and limitations contained in the bill of lading under which he has delivered the goods for carriage by bringing an action in tort against the servant or agent whose negligent act in the course of performing the contract has resulted in damage to the goods. If I am wrong in regarding this as surprising, at least I err in good company."[48]

But the High Court of Australia in WILSON v. DARLING ISLAND STEVEDORING CO., [49] by a majority of three to two, expressly rejected the reasoning of the GILBERT case despite the fact that it was distinguishable on the ground that they were concerned with the scope of a negligence clause in a bill of lading and not with the extent of a section in an Act of Parliament. It did not occur to them that different considerations might apply. Fullager J. said, inter alia, that while giving effect to clauses excluding or limiting liability, courts had always frowned upon them and insisted on construing them strictly and that since the stevedores were not parties to the bill of lading, its provisions could not apply to them. [50]

It has been said that "the jurisprudence of Canada... is

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48 Ibid at p. 338.

49 (1955) 95 C.L.R. 43, [1956] 1 Lloyd's Rep. 346.

50 [1956] 1 Lloyd's Rep. at p. 359. Kitto J. founded his conclusions on different reasoning; See infra Ch. II. Since this case deals mainly with contract law, it will be more fully considered in the next chapter.

against those who contend that the provisions of the Carriage by Air Act[51] apply to servants and agents of an air carrier."[52] Three cases are cited: STRATTON v. TRANS CANADA AIRLINES,[53] VANCOUVER v. RHODES[54] and LITWYN v. VINCENT.[55]

In the former case, Manson J. said, obiter since he had just decided that the Carriage by Air Act did not apply to the case:

> "There is nothing in the Act that even remotely suggests that the word 'carrier' is to be interpreted as including employees of carriers."[56]

He cited PIERRE and KRAWILL in support of this statement.[57]

In VANCOUVER v. RHODES,[54] the master of a ship was held liable when his ship struck and damaged a bridge. He argued that the limitation provisions in the Canada Shipping Act[58] applied to him as the servant of the shipowner. Clyne J., at first instance, rejected this contention and said:

> "...the limitation legislation...was designed to limit the owners vicarious liability arising from the wrongdoing of the master and was never intended to protect the actual wrongdoer."[59]

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51 R.S.C., 1952, c.45 making the Warsaw Convention applicable to Canada.
52 Rosevear, Federal Acts relating to Fatal Accidents in Canada, Papers Presented at the Annual Meeting of the Can. Bar Assoc., Winnipeg, 1961, p. 182.
53 [1961] 27 D.L.R. (2d) 670; 34 W.W.R. 183 (B.C.S.C.).
54 [1955] 1 D.L.R. 139; aff'd. 1955 3 D.L.R. 550 (BCCA).
55 [1954] 3 D.L.R. 104 (C.A. Man.).
56 [1961] 27 D.L.R. (2d) at p. 674. On appeal, this point was not considered.
57 supra footnotes 33 and 38.
58 R.S.C. 1952, c.29, s.657.
59 [1955] 1 D.L.R. at p. 140.

This reasoning is not conclusive in the case of the Warsaw Convention since the carrier's liability is limited and sometimes excluded even if he is the actual wrongdoer and the liability provisions of the convention are not confined to his vicarious liability.[60]

In LITWYN v. VINCENT,[55] it was held by the Manitoba Court of Appeal that a person injured by an employer within the scope of the Workmen's Compensation Act,[61] although deprived of his action against the employer by S.5 of the Act, is not, on that account deprived of his cause of action against the negligent employee.[62] As recognized by Rosevear, this case may be distinguished since the Workmen's Compensation Acts define the term 'employer' whereas the Carriage by Air Act does not contain a definition of the term 'carrier'. It does, however, supply an analogy if only because the court stressed a well-established principle of statutory interpretation, namely, that:

> "...no statute operates to repeal or modify the existing law whether common or statutory or to take away any rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied. (Halsbury, vol.27, p. 168)"[63]

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60 The Act to amend the Canada Shipping Act, 1961 (9 & 10 Eliz.II, c.32) amends s.659 of the Canada Shipping Act to include servants and agents among those whose liability is limited by s.657.

61 R.S.M. 1940, c.239.

62 Subsequently, all employees of employers covered by the Act were included in the prohibition: S.M. 1945, (1st Sess.) c.70, s.3.

63 Cited also in LAMONTAGNE v. QUEBEC RAILWAY, LIGHT, HEAT & POWER CO.; [1914] 22 D.L.R. 222; 50 S.C.R. 423 at p. 427 per Fitzpatrick C.J. This principle was also largely responsible for the decision in KRAWILL, supra footnote 33.

There is one decision in France where an air carrier was held to be partly exonerated from liability while his servant, a pilot, was held liable without any limit.[64] The carrier relied on article 42 of the French law of 31st May, 1924 which allowed carriers to exclude their liability in certain circumstances, for faults committed by persons employed on board aircraft.[65] The law added, however, that all clauses purporting to exclude the carrier's personal liability are void. There was no doubt, therefore, that the pilot who was personally responsible for the accident, could not rely on the exclusion clause in favour of the carrier and was subject to unlimited liability as a consequence.[66]

There are a few pertinent decisions in French maritime law concerning the applicability to "acconiers"[67] of the limitation provisions contained in the law of 2nd April 1936 and in the Hague rules.

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64 BRUTSCHY et Soc. CAUDRON-RENAULT c/ MOURIER, MATHON et NIGAY, Cour de Cassation, (Ch. Crim.) 12 Jan. 1938, (1938) 7 Rev. Gen. de Dr. aérien 91; Cour d'appel de Lyon (4e Ch. corr.) 14 Jan. 1937, (1937) 6 Rev. Gen. de Dr. aérien 148.

65 Article 42 reads "Le transporteur peut, par une clause expresse, s'exonérer de la responsabilité qui lui incombe, à raison des risques de l'air et des fautes commises par toute personne employée à bord dans la conduite de l'appareil qu'il s'agisse des voyageurs ou des marchandises." This law has been replaced by the law of 2nd March 1957. see supra footnote 12.

66 This is the same situation as that in VANCOUVER v. RHODES, supra note 54.

67 Roughly translated 'acconiers' means 'stevedores'.

The courts have uniformly held that the provisions do not apply to them mainly because their services precede the maritime transport and hence fall outside the Act. At the same time, it has been emphasized that the privileges of the Hague rules are granted exclusively to the "transporteur maritime" and so it would seem that in France, any liability on the part of his servants or agents is not subject to limitation according to the Hague rules, article 4(5).

> "...que la loi de 1936, comme la convention de Bruxelles ne concernent que les rapports entre les transporteurs maritimes et les chargeurs où réceptionnaires..."[68]

5. Conclusion

From the foregoing discussion, it is clear that the weight of judicial authority and juristic opinion is against an interpretation of the Warsaw Convention which would allow the servants and agents of the carrier to take advantage of the limitation provisions therein. Judicial dicta which have urged a reasonable construction of the Warsaw Convention "so as to

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68 C^ie FRANCAISE DE CONSIGNATION ET DE TRANSIT, Sté TRAMATER et C^ie HELVETIA c/ Sté MARSEILLE, ENTREPRISE FRANCIOSA et C^ie la PROVIDENCE, Trib. de Comm. de Marseille, 1 Feb. 1957, (1958) 10 D.M.F. 100; See also CHAMBRE de COMMERCE de MARSEILLE et ENTREPRISE MARITIME et COMMERCIALE c/ C^ie GENERALE TRANSATLANTIQUE, Cour d'appel d'Aix, 18 March 1958, (1959)11D.M.F. 587 at p. 588; Fraikin Traité de la responsabilité du transporteur maritime, Paris, 1957, p. 96: "Ces textes sont de droit étroite et ne peuvent étre étendues à d'autres bénéficiaires que ceux qu'ils désignent expressément."

accomplish its obvious purposes"[69] have been ignored in favour of the view that the convention should be strictly construed so as not to alter the existing law further than its words import.[70] The school of thought which requires a strict interpretation of the convention is, therefore, in the ascendancy. And it is likely to remain so, since a protocol to amend the Warsaw Convention signed at the Hague on 28 September 1955 contains an article expressly allowing the servants and agents to avail themselves of the limitation of liability of the carrier. It reads:

> "After Article 25 of the Convention, the following article shall be inserted:
>
> 'Article 25A
>
> 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.' "[71]

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69 eg. ROSS v. PAN AMERICAN AIRWAYS, 85 N.E.(2d) 880 at p. 885; AMERICAN SMELTING & REFINING CO. v. PHILIPPINEAIRLINES [1954] U.S. & C. Av. R. 221 at p. 223 (N.Y. Sup. 1954); GREIN v. IMPERIAL AIRWAYS [1937] 1 KB 50 at p. 74. CHUTTER and WANDERER supra notes 26 & 28 may have been influenced by this consideration. COLLINS and GILBERT supra notes 30 and 47 were most certainly influenced by it when considering a maritime statute.

70 eg. KRAWILL, supra note 33; LITWYN, supra note 55; STRATTON, supra note 53.

71 Article XIV. The Convention supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 contains a similar provision: Article V. So do many of the most recent maritime conventions. See eg. International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships signed in Brussels on 10 October 1954; International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea signed at Brussels on 29 March 1961, article 12. See (1961) 13 D.M.F. 387.

Although the argument might be advanced that this article was inserted ex abundante cautela, it is a very weak one since the majority of delegates were clearly under the impression that they were filling a gap in the Warsaw Convention.[72] A citation of this Protocol alone, therefore, may suffice to persuade a court that the Convention does not protect the carrier's servants and agents.

The Protocol will come into force when thirty signatory States have deposited instruments of ratification.[73] Until then, it would seem that servants and agents will have to rely on clauses in contracts of carriage expressly extending limitation provisions to them. Even following its entry into force, these clauses will be relied upon where carriage not covered by the Protocol is concerned and so the question of their validity will remain of great importance. In the next two chapters, therefore, a discussion of the position in England and the United States will be undertaken. It is hoped to provide some interesting conclusions!

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72 See eg. Minutes of the 9th session of ICAO Legal Committee at Rio de Janeiro, 1953. ICAO Doc. 7450-LC/136, p. 143 ff; Minutes of the International Conference on Private Air Law, the Hague, 1955, ICAO Doc. 7686-LC/140, p. 214 ff.

73 Article XXII. Up to 1st January, 1962, 22 States had ratified the Protocol including the United Kingdom.
On September 22, 1961, the Federal Aviation Agency released a document inviting comments on the relationship of the United States to the Hague Protocol amending the Warsaw Convention. Two questions were posed: 1) whether or not the State Department should recommend that the President withdraw the request to the Senate for advice and consent to the Hague Protocol; 2) whether or not the United States should withdraw from participation in the Warsaw Convention by giving the required six months notice. Since the United States represents over 50% of the world's air transport, such a horrendous move would be a serious blow to air transportation the world over and would seriously affect the unifying value of the Warsaw Convention.

# CHAPTER II

## ENGLISH LAW

### 1. Introduction

In the United Kingdom, the regime of the Warsaw Convention applies both to international carriage[74] and, with modifications, to all other air carriage not defined as international by the Convention.[75] Because of the probability that this regime does not apply in any way to their servants and agents, air carriers have introduced into their contracts of carriage, a condition which purports expressly to extend the benefit of the exclusion and limitation of liability provisions to them.[76] Since any action brought against servants and agents will be in tort, there is some doubt as to whether they can rely on this condition which is contained in a contract to which they are apparently not parties. When they

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74 Carriage by Air Act, 1932 (22 & 23 Geo. V, c. 36).

75 Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952 (S.I. 1952 no. 158).

76 Article 18, para. 12 of the B.O.A.C. General Conditions of Carriage for Passengers and Baggage effective from 1st June 1960 reads:

"Any exclusion or limitation of liability of Carrier under these conditions shall apply to agents, servants or representatives of the Carrier acting within the scope of their employment and also to any person whose aircraft is used by Carrier for carriage and his agents, servants or representatives acting within the scope of their employment."

Article 14, para. 12 of B.O.A.C.'s General Conditions of Carriage for Cargo effective from 1st June, 1960 and Article 13, para. 10 of B.O.A.C.'s General Conditions of Carriage for Passengers and Baggage-Charter Flights-effective from 1st January, 1959, are identical.

are sued by the personal representatives of a deceased passenger on behalf of the latter's dependants, the difficulties increase still further. The Hague Protocol is not yet in force in England although the new Carriage by Air Act, 1961,[77] makes provision for it to come into effect from a day to be certified by Order in Council.[78] Once this occurs, the problem will cease to have importance as far as international carriage is concerned since there will then be a statutory rule limiting the liability of servants and agents. There is also power under S. 10 of the Act to extend its provisions to other types of carriage by air by Order in Council. If this occurs, as no doubt it will, the problem will become one of the past in air carriage. A discussion of the problem is still thought to be useful, however, on three grounds. First, the problem will remain very much alive in other types of carriage. Secondly, it will be some time before the 1961 Act is fully implemented and thirdly, other States with legal systems strongly influenced by English law, are unlikely to extend the Warsaw Convention as amended by the Hague Protocol to all air carriage. In the discussion which follows, limitation of liability for the death of a passenger will be treated separately.

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77 9 & 10 Eliz. II, c.27.
78 s.1 (1).

## 2. Personal Injury and Damage to Goods

### (i) The Privity of Contract Doctrine

> "In no development of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the question whether a right of action accrues to a third person from a contract made by others for his benefit? Nor is the strife ended..."[79]

Quoted by Williston in 1902[80] to show that the question was not necessarily peculiar to common law systems, this statement could have been made today in a discussion of it in English law. That there is now a general rule preventing third persons from relying on contracts for their benefit cannot be denied but there are exceptions to it and it is the scope and extent of these exceptions which continues to be the subject of controversy. But first the general rule must be stated.

Its early history is in dispute.[81] Cases may be found which support the proposition that a third person may enforce a contract or a provision in it for his benefit and cases may be found which lean in the opposite direction.[82] Any controversy as to the predominent rule in

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79 Busch, Doctrin und Praxis uber die Gultigkeit von Vertragen zu Gunsten Dritter, Heidelberg, 1860.

80 Williston, Contracts for the Benefit of a Third Person, (1902) 15 Harv. L.R. 767.

81 cf. Denning L.J. in SMITH & SNIPES HALL FARM LTD. v. RIVER DOUGLAS CATCHMENT BOARD, [1949] 2 K.B. 500 at p. 514 and in DRIVE YOURSELF HIRE CO. v. STRUTT, [1954] 1 Q.B. 250 at p. 272 with E.J.P. (1954) 70 L.Q.R. 467 and Scammell, Privity of Contract, (1955) 8 Current Legal Problems 131 at p. 135; also Romer L.J. in GREEN v. RUSSELL [1959] 2 Q.B. 226 at p. 240.

82 See Corbin, Contracts for the Benefit of Third Persons, (1930) 46 L.Q.R. 12 at p. 17, note 11, for an exhaustive list of such cases.

existence in those days, however, is of academic interest only since the celebrated cases of TWEDDLE v. ATKINSON[83] and DUNLOP PNEUMATIC TYRE CO. LTD. v. SELFRIDGE & CO. LTD.,[84] which finally and conclusively laid down the principle known to English law as the doctrine of privity of contract.

> "No stranger to the consideration can take advantage of a contract although made for his benefit."[85]

So said Wightman J. in the earlier case which was confirmed by the House of Lords in DUNLOP v. SELFRIDGE. The classic statement of the principle was made by Lord Haldane:

> "In the law of England, certain principles are fundamental One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a ius quaesitum tertio arising by way of contract. Such a right may be conferred by way of property as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."[86]

The principle has been described as inconvenient and unjust,[87] as out of step with the requirements of everyday life[88] and as uncivilized.[89] A Law Revision Committee recommended its abolition as long ago

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83 (1861) 1 B. & S. 393; 121 E.R. 762.
84 [1915] A.C. 847.
85 (1861) 1 B. & S. at p. 397.
86 [1915] A.C. at p. 853.
87 Cheshire and Fifoot, Law of Contract, 5th Edit., London, 1960, p. 368.
88 R.S.T.C. (1933) 49 L.Q.R. 474 at p. 476.
89 per Denning L.J. in SMITH & SNIPES HALL FARM v. RIVER DOUGLAS CATCHMENT BOARD [1949] 2 K.B. 500 at p. 514.

as 1937.[90] Nevertheless, it remains the law of England and has been reaffirmed as recently as 1961 by the House of Lords in SCRUTTONS LTD., v. MIDLAND SILICONES, LTD.,[91] where it was said:

> "Although I may regret it I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him."[92]

At first sight, then, a servant's reliance on limitation of liability provisions contained in a contract of carriage between his master, the carrier and the plaintiff will be objected to on the ground that he is not a party to the contract and has furnished no consideration. There are few rules of law without exceptions, however, and so a discussion of the exceptions which may possibly have relevance, is required.

(ii) The Trust Approach

While the common law courts were arriving at the principle that a third party cannot enforce "or, by clear inference, use...in defence", a contract made for his benefit, the courts of equity, from

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90 Law Revision Committee, Sixth Interim Report, 1937. (Cmd. 5449).

91 [1962] 1 ALL E.R. 1.

92 Ibid., at p. 10 per Lord Read. Cf. Pearce L.J. in the Court of Appeal: "DUNLOP v. SELFRIDGE firmly laid down the rule that a person cannot sue on a contract (or, by clear inference, use it as a defence) unless he is a party to it and has given consideration." MIDLAND SILICONES, LTD. v. SCRUTTONS, LTD. [1961] 1 Q.B. 106 at p. 126.

TOMLINSON v. GILL[93] onwards gave a remedy to the third party by providing that, in certain circumstances, the promisee can be regarded as trustee for the third party. Two of the leading cases are a decision of the Court of Appeal in LLOYDS v. HARPER[94] and a decision of the House of Lords in LES AFFRETEURS REUNIS v. WALFORD.[95] In neither of these cases was the word trust used in the contract, nor were they concerned with property held by the promisor for the benefit of the third person. The subject matter of the trust was the contractual promise made by the promisor to the promisee. Since, to establish a trust, nothing more seemed necessary than to show an intention to benefit a third party, it seemed that equity had found a way of avoiding the common law rule altogether. This was the view of Professor Corbin in an article written in 1930,[96] but, since then, the courts have shown increasing reluctance to infer a trust, until now, in the view of one learned commentator, the occasions on which they will do so "have diminished almost to vanishing point."[97] Originally, no doubt, "the trust conception was largely a fiction designed as the only available expedient to temper the harshness of the common law."[98] Now, however, it is no longer employed as a fiction. A trust must be established as an existing fact.

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93 (1756) Ambler 330; 27 E.R. 221.
94 (1880) 16 Ch.D. 290.
95 [1919] A.C. 801.
96 Corbin, op. cit., footnote 82.
97 Furmston, Return to Dunlop v. Selfridge? (1960) 23 Mod. L.R. 373 at p. 374.
98 Finlay, Third Party Contracts, London, 1939, p. 123.

Thus, "the intention to constitute the trust must be affirmatively proved."[99] This pronouncement was confirmed by the Court of Appeal in re SCHEBSMAN dec'd.[100] where it was said:

> "It is true that, by the use of possibly unguarded language, a person may create a trust, as Monsieur Jourdain talked prose without knowing it, but unless an intention to create a trust is clearly to be collected from the language used in the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention."[101]

It is, therefore, very unlikely that courts would infer an intention to create a trust from the language used in the contracts of carriage extending the benefits of limitation of liability to servants and agents. Moreover, in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD.,[102] where the defendant stevedores were trying to rely on limitation of liability provisions contained in a contract for the carriage of goods between the plaintiffs and carriers, it was said by Diplock J., at first instance, that the trust approach did not apply because it is assimilated to proprietary rights.[103] Similarly,

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99 VANDEPITTE v. PREFERRED ACCIDENT & INSURANCE CORP. of NEW YORK, [1933] A.C. 70 at p. 80 per Lord Wright. (P.C.).

100 [1944] Ch. 83. cf. re FLAVELL [1955] Ch. D. 89 (C.A.). It is difficult to see why a trust was inferred in the latter case and not in re SCHEBSman. cf. remark of Winfield, Province of the Law of Tort, Cambridge, 1931, p. 107: "when the Courts wish to enable the beneficiary to sue, they make the promisor a trustee, and when they wish to prevent him from so doing they fall back on the shibboleth of privity of contract."

101 [1944] Ch. at p. 104 per du Parcq L.J.

102 [1962] 1 ALL E.R. 1 (H.L.).

103 [1959] 2 Q.B. at p. 185.

in the Court of Appeal, it was said that the trust approach was irrelevant.[104] The main difficulty, apart from the obvious lack of intention to create a trust, seems to be the fundamental inconsistency between the concepts of Trust and Contract. A trust, once created, is irrevocable without the beneficiary's consent whereas a contract may be altered or discharged by the parties with or without the agreement of the beneficiary.[105] "Care must be taken not to treat a fiction as a fact."[106] This warning has clearly not been heeded by the courts when dealing with the machinery of a trust to assist third parties and thus, it would appear that the trust exception has no application to the present problem.

(iii) The Vicarious Immunity, Express and Implied Contract Theories

Shortly stated, the "vicarious immunity" theory[107] is to the effect that, where a contract between A and B contains an exemption clause, the servants or agents who act under the contract, have the benefit of that clause. Stated in this way, the principle not only covers cases where the servants or agents are expressly exempted from liability in the

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104 [1961] 1 Q.B. at p. 122 per Hodson L.J. See, however, remark of Fullager J. in the Australian case of WILSON v. DARLING ISLAND STEVEDORING & LIGHTERAGE CO. LTD., (1956) 95 C.L.R. 43 at p. 67, a situation very similar to that in the MIDLAND SILICONES Case: "It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases."

105 GREEN v. RUSSELL [1959] 2 ALL E.R. 525 at p. 531.

106 KEIGHLEY, MAXTED & CO. v. DURANT [1901] A.C. 240 at p. 262 per Lord Lindley.

107 So-called by Holmes J. while dissenting in A.M. COLLINS & CO. v. PANAMA RLY. CO., 1952 A.M.C. 2054; 197 F. 2d. 893 (U.S. C.A.-5 1952).

contract, but also covers cases where the exemption clause is only expressed as excluding the liability of A or B, the contracting parties. In considering the cases, it is recommended that the distinction be kept clearly in mind. The "express contract" theory requires an inference to be drawn that the servant or agent is in fact a party to the contract containing the exemption clause. The "implied contract" theory requires an inference to be drawn that a separate agreement has arisen between A's servant or agent, and B, by which B agrees that the exemption clause contained in his contract with A applies to that servant or agent. It is realised that, since the 'express contract' theory requires an inference to be drawn, it is really an 'implied contract' theory but it is necessary to draw a distinction between the two theories since one adds another party to the two already expressed to be parties to the contract containing the exemption clause whereas the other implies a contract quite independent of the contract containing the exemption clause.

The question first arose in the nineteenth century when railways in the United Kingdom were not nationalised and a consignor of goods or a passenger would have to use the services of several railway companies although contract directly with only one. If the contract contained an exemption clause, could the other companies over whose railway the goods or passenger passed, take the benefit of it? The first case to decide the point was BRISTOL & EXETER RLY. CO. v. COLLINS[108] where

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108 (1859) 7 H.L.C. 194; 11 E.R. 78.

the respondent contracted with the Great Western Railway Company for the carriage of goods from Bath to Torquay subject to certain conditions, one of which exempted them from liability for loss by fire. The goods were destroyed in this way while being transported over the appellant's railway. Sued in contract, the appellants pleaded the exemption clause and it was held by the House of Lords that:

> "the defendants are...either not liable at all as no agreement was entered into with them or that, if the contract in any way attaches to them, the exception as to loss by fire accompanies it, and exonerates them from liability."[109]

To understand the significance of this case, it is important to realise why the plaintiff sued in contract. At that time negligence had not emerged as an independent tort. There was no general duty to take care, in fact, until the classic case of M'ALISTER (or DONOGHUE) v. STEVENSON[110] in 1932. Before this, in order to establish a duty to take care on the part of the defendant, a plaintiff had to show other special circumstances such as a contract or a bailment which gave rise to this duty. If he could not do that, he failed. And so, in cases like the above, it was held that the plaintiff had no remedy against the second carrier for the simple reason that he had no contract with him.[111] Subsequently, however, a number

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109 11 E.R. at p. 93 per Lord Chelmsford who did not state a preference for either of the two alternatives.

110 [1932] A.C. 562 (H.L.).

111 See eg. MYTTON v. MIDLAND RLY. CO., (1859), 4 H. & N. 615, 157 E.R. 982; COXON v. GREAT WESTERN RLY. CO., (1860), 5 H. & N. 274, 157 E.R. 1186.

of cases decided that railway companies could be held liable in tort for their negligence[112] but not because there was an independent tort of negligence. The duty to take care arose because the goods or passengers were lawfully on the premises of the second carrier.[113] It now became necessary to decide whether an exclusion or limitation clause in a contract with the first carrier could attach to subsequent carriers if they were sued in tort.

In HALL v. NORTH EASTERN RLY. CO.,[114] the plaintiff travelled from Angerton to Scotland free of charge, on condition that he exonerated the company from all liability however caused to him. The journey took place over the railways of two companies, and while on the railway of the second company, he was injured in a collision due to the negligence of that company's servants. Sued in tort, the second company relied on the exemption clause in the contract with the first company. It was held that the ticket under which the plaintiff travelled meant that he should be at his own risk during the whole of the journey, and it extended to protect the defendants. Blackburn J. said:

> "It seems to me that the plaintiff did authorise the North British Co. to contract for him with the North Eastern Co. and what he authorised was that he should travel at his own risk."[115]

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112 See Treitel, Exemption Clauses and Third Parties, (1955) 18 Mod. L.R. 172, for list of such cases.

113 See FOULKES v. METROPOLITAN DISTRICT RLY. CO., (1880) 5 C.P.D. 157 (passenger); HOOPER v. LONDON & NORTH WESTERN RLY. CO., (1880) 50 L.J. Q.B. 103 (goods).

114 (1875) L.R. 10 Q.B. 437; 44 L.J. Q.B. 164.

115 (1875) L.R. 10 Q.B. at p. 442.

He thought, then, that the first company was the agent of the plaintiff to contract with the defendants. Lush J. thought that the first company was the agent of the defendants to contract with the plaintiffs. He said:

> "...it must be taken that the North British Co. have authority from the North Eastern Co. to make one contract for the whole journey."[116]

The view of Lush J. was preferred in BARRATT v. GREAT NORTHERN RLY. CO.,[117] where the plaintiff's agents entered into a contract with the North Eastern Railway Co. in which it was agreed that all goods should be delivered at a lower rate in consideration of that firm relieving the company, and all companies over whose lines the goods might pass, from all liability for loss or damage. While being carried on the defendant's railway, the goods were destroyed by fire. The defendant's pleaded that they were protected by the terms of the special contract. It was held on appeal that they were parties to the contract and were therefore so protected since the North Eastern Co. were their agents in making any contract with respect to goods which were to be carried over the railways of both companies.

Two principles have been drawn from these cases. The first and predominant one is that the second company is a party to the contract, the "express contract" theory. The second, deduced from Blackburn J's phraseology, is that a distinct contract arose between the second

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116 Ibid., at p. 443.
117 (1904) 20 T.L.R. 175; 52 W.R. 479.

company and the plaintiff under which the plaintiff travelled over their railway line subject to the same terms as were contained in his contract with the first company. This is the "implied contract" theory. These two rationalisations, however, have been objected to on the ground that they cannot stand with the decision of the House of Lords in BRISTOL & EXETER RLY. CO. v. COLLINS[118] where it was clearly held that there was only one contract with the goods owner, namely, his contract with the first carrier, and none by him with the second carrier and that, therefore, the only possible explanation is that the second carrier falls within the ambit of the 'vicarious immunity' theory.[119] However telling this objection appears to be, the majority view remains in favour of explaining the railway cases in terms of contract. In any event, for the courts to decide that the second carrier could be held liable at all, was a rejection of the House of Lords decision in the COLLINS case, although the action there was in contract and not in tort. The House 'clearly held' that the defendants were 'not liable at all'. The truth is that the doctrine of precedent was avoided in these cases. It was not in fact fully developed at this time. Were this not the case, it could be argued that DONOGHUE v. STEVENSON,[120] itself, was wrongly decided. Is it not also in conflict with the COLLINS case? Even if it

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118 See supra, note 108.

119 Lord Denning, dissenting, in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD., [1962] 1 ALL E.R. 1 at p. 18.

120 supra, note 110.

does mean accepting the fact that HALL and BARRATT were wrongly decided, is it possible to ignore the above cited passages and declare that they were not decided in terms of contract? Subsequent developments would indicate a negative answer.

It is now necessary to consider the controversial and very "distinguished" case of ELDER DEMPSTER & CO. LTD. v. PATERSON, ZOCHONIS, LTD. [121] The plaintiffs entered into a contract with the defendants, the charterers, for the carriage of palm oil from West Africa to Hull. The charterers, who usually used their own ships, on this occasion chartered a vessel from the second defendants, the shipowners. The bill of lading exempted the charterers from liability for damage caused through bad stowage. During the voyage, the palm oil casks were crushed by a large number of bags of kernels which were placed on top of them. The main argument and the greater part of the judgments in the House of Lords centred on whether the damage was caused through bad stowage or the vessel's unseaworthiness. Their Lordships, by a majority, held that the damage was caused through bad stowage and that, therefore, the exemption clause protected the charterer. The question then arose, were the shipowners entitled to the same protection since they were not parties to the bill of lading? Their Lordships, for differing reasons, briefly held that they were so entitled.

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121 [1924] A.C. 522 (H.L.).

Scrutton L.J. in his dissenting judgment in the Court of Appeal, a judgment which was referred to by their Lordships without disapproval, had this to say:

> "The real answer to the claim is, in my view, that the shipowner is...in possession...as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability and that the owner, as servant or agent of the charterer, can claim the same protection as the charterer." [122]

This clearly is an exposition of the "vicarious immunity" principle and as such was an innovation at the time unless the railway cases are regarded as examples of it. Subsequent controversy has centred on whether the House of Lords accepted Scrutton L.J.'s view. Lord Cave said:

> "It was stipulated in the bills of lading that the 'shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bill of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike." [123]

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122 PATERSON, ZOCHONIS v. ELDER DEMPSTER [1923] 1 K.B. 420 at p. 441. Scrutton L.J. went on: "Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship; and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on these terms and the owner had only received the goods as agents for the charterer."

123 [1924] A.C. 522 at p. 534.

This is the reasoning adopted in the railway cases. It is in fact, the "express contract" theory. The shipowners were parties to the bill of lading. Lord Cave went on, however:

> "It may be that the owners were not directly parties to the contract, but they took possession of the goods (as Scrutton L.J. says) on behalf of and as agents of the charterers and so can claim the same protection as their principals."[124]

Here, then, is an affirmation of the 'vicarious immunity' principle. Lord Carson agreed with Lord Cave. Lord Finlay was not so clear:

> "...when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach whatever the form of the action and whether owner or charterer be sued."[125]

This is most likely a statement of the 'vicarious immunity principle'[126] although it has been contended that it means that when the goods came into the possession of the shipowners, a contract was thereby made between the plaintiffs and the shipowners that the latter should carry the goods on

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124 Ibid.

125 Ibid., at p. 548. Lord Finlay continued: "It would be absurd that the owner of goods could get rid of the protective clause of the bill of lading in respect of all stowage by suing the carrier of the ship in tort. The Court of Appeal was right in rejecting this contention which would lead to results as extraordinary as those referred to by Scrutton L.J. in his judgment."

126 This is the view of Treitel, op. cit., supra note 112, at p. 174 and Lord Denning, dissenting, in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD. [1962] 1 ALL E.R. 1 at p. 19.

the terms of the bill of lading.[127] There would be no new principle involved if this was the case, since it is the "implied contract" theory as deduced from the railway cases. Lord Sumner preferred one of two views:

> "It may be that in the circumstances of this case, the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms which include the exception and limitation of liability stipulated in the known and contemplated form of bill of lading. It may be that the vessel being placed in the Elder, Dempster and Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ships possessory lien for hire. The former I regard as the preferable view..."[128]

Lord Sumner's preferred reason is in effect the 'implied contract' theory. Alternatively his view was that the master of the ship was not acting as agent of the shipowners in signing the bill of lading so as to make them vicariously liable for his negligence. This alternative view has also been expressed to be the vicarious immunity theory,[129] for Lord Sumner accepted that the 'charterers and their agents' were not liable.[130] Both Lord Dunedin and Lord Carson agreed with Lord Sumner.

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127 Diplock J. in MIDLAND SILICONES LTD., v. SCRUTTONS LTD., [1959] 2 Q.B. 171 at p. 186.

128 [1924] A.C. at p. 564.

129 Lord Denning, dissenting, in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD., [1962] 1 ALL E.R. 1 at p. 19.

130 [1924] A.C. at p. 564, line 3 from top, and line 5 from bottom.

From this analysis of the case, four lines of reasoning may be detected in the judgments: the "implied contract" theory approved by three, maybe four, of their Lordships,[131] the "master not the servant of the shipowner" theory, preferred as second choice by three of their Lordships,[132] the "express contract" theory adopted by two of the Lords[133] and the "vicarious immunity", theory adopted by two, possibly three of the Lords.[134]

The decision certainly presents a very difficult problem of precedent. What is the ratio decidendi of a court of five judges where differing reasons are given for coming to the same conclusion although no judge expresses disagreement with another? Two approaches to this and similar problems have been suggested.[135] First, a ratio decidendi to be binding on a later court, must be concurred in by a majority of judges. If there isn't one, the case has no binding ratio decidendi.[136] On this view, both the "implied contract" theory and

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131 Lord Sumner, Lord Dunedin, Lord Carson and perhaps Lord Finlay.

132 Lord Sumner, Lord Dunedin, Lord Carson, but see Lord Denning in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD. [1962] 1 ALL E.R. at p. 19.

133 Lord Cave, Lord Carson.

134 Lord Cave, Lord Carson and maybe Lord Finlay.

135 See illuminating discussion by Honoré, Ratio Decidendi:Judge and Court, (1955) 71 L.Q.R. 196.

136 see FELLNER v. MINISTER of the INTERIOR, 1954 (4) S.A. 523 at pp. 532 and 550. (S.C.S.A.) **WALSH v. CURRY [1955] N.I. 112 at p. 124 (C.A. N.I.)** If there is no ratio, then a later court may chose any reasons it wishes but they must be reasons which, if applied to the facts of the earlier decision, would have achieved the same result: per Lord Dunedin in GREAT WESTERN RLY.CO. v. S.S. MOSTYN [1928] A.C. 57 at p. 74. cf. Paton & Sawer, Ratio Decidendi and Obiter Dictum in Appellate Courts (1947) 63 L.Q.R. 461. On this view, the opinions of dissenting judges are to be taken into account.

the "vicarious immunity" theory form part of the binding ratio decidendi of the House of Lords since three out of five judges supported them assuming that Lord Finlay was in favour of the latter theory, and, if a court rests its decision squarely on two or more grounds, both are rationes decidendi of that court.[137] If Lord Finlay was not stating the "vicarious immunity" theory, that theory is not a ratio of the court since "no ratio decidendi of two judges only of a five judge court can ever be a ratio decidendi of that court."[138] The objection to this approach is stated as being that a ratio decidendi is entitled to authority not as the opinion of one or more judges but as the reason for a judicial order.[139] The second approach follows from this objection. Since the ratio decidendi means the reason for the order that the court makes, the majority ratio decidendi is not necessarily the only one. If the opinion of another judge is necessary for the order to be made, his ratio is also a ratio decidendi of the case.[140] Thus if four judges supplied the "implied contract" theory in the ELDER, DEMPSTER case, the other reasons put forward were strictly unnecessary for the decision and are not binding rationes decidendi. It all depends then on the

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137 JACOBS v. L.C.C. [1950] A.C. 361; see Montrose, Ratio Decidendi and the House of Lords, (1957) 20 Mod. L.R. 124.

138 FELLNER v. MINISTER of the INTERIOR, 1954(4) S.A. at p. 551 per Hoexter J.A. of Diplock J. in MIDLAND SILICONES v. SCRUTTONS [1959] 2 Q.B. at p. 186.

139 Honoré, op. cit., supra note 135, at p. 198.

140 FELLNER v. MINISTER of the INTERIOR, 1954 (4) S.A. at p. 538, per Greenberg J.A. On this view, the opinions of dissenting judgments are not taken into account.

interpretation put upon Lord Finlay's judgment. If he supported the "vicarious immunity" theory, then under both approaches, that theory would be a binding ratio decidendi since, it is submitted, the rule in JACOBS v. L.C.C. would apply.[137]

In the MOSTYN case, Viscount Dunedin said:

> "I do not think it is a part of a tribunals duty to spell out with great difficulty a ratio decidendi in order to be bound by it."[141]

This statement has been approved very recently in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD.,[142] where the House of Lords considered the ELDER, DEMPSTER case in detail. Two of their Lordships made important comments on the precedent doctrine:

> "I would cast no doubt on the doctrine of stare decisis, without which law is at hazard. But I do reserve the right at least to say of any decision of this House that it does not depart from a long-established principle and particularly does not do so without even mentioning it, unless that is made abundantly clear by the majority of the noble Lords who took part in it."[143]

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141 [1928] A.C. at p. 73. Tribunals are still bound by the judgment, however, see supra, note 136. There is an apparent confusion of terminology in the discussions on this subject. Definitions of "ratio decidendi", "decision" "judgment" etc., are confused and differ from judge to judge, author to author.

142 [1962] 1 ALL E.R. 1.

143 Ibid. at p. 7 per Viscount Simonds.

Lord Reid went further:

> "I would certainly not lightly disregard or depart from any ratio decidendi of the House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision." [144]

The two judges then applied their views to the ELDER, DEMPSTER case and finally settled a long controversy as to its effect.[145] But before discussing this decision in detail and relating it to the problem in hand, earlier relevant cases have to be considered.

In the Court of Appeal in 1925,[146] two judges took opposing views of the ELDER, DEMPSTER case. Scrutton L.J. thought the judgments showed that:

> "Where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They

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144 Ibid. at p. 12.

145 As an example of the chequered career of the vicarious immunity principle, cf. Salmond on Torts, 10th Edit. (1945) by W.T. Stallybrass, p. 9 and 11th Edit. (1953) by R.V. Heuston, p. 9 with 12th Edit. (1957) by R.V. Heuston, p. 11. In the 10th & 11th editions, the "vicarious immunity" principle is stated as the law. "Any other rule would lead to absurd results." In the 12th edition, there is the sweeping statement: "An exemption clause cannot be relied upon by one who is not a party to the contract at all."

146 MERSEY SHIPPING & TRANSPORT CO. LTD. v. REA (1925) 21 Ll. L.R. 375.

> cannot be sued in tort as independent people, but they can claim the benefit of the contract made with their employer on whose behalf they were acting."[147]

His Lordship is here reiterating the "vicarious immunity" principle which he first put forward in the ELDER, DEMPSTER, case.[148] Bankes L.J. took a different view of their Lordships' judgments:

> "The Court there held that under the circumstances of the vessel being chartered to form one of the owner's regular line, the proper inference to draw was that the goods were shipped under conditions which could cover both charterer and shipowner."[149]

In effect, such a view of the court's ratio restricts the case entirely to its facts, since both "implied" and "express" contract theories with both of which Bankes L.J.'s view is consistent, require inferences of fact. Thus in any case where the factual situation is only slightly different, the court may say it is not prepared to infer a contract in the circumstances.

This is the way that the case of COSGROVE v. HORSFALL[150] may be distinguished. In that case, the London Passenger Transport Board (L.P.T.B.) issued to the plaintiff, a free pass which allowed him to travel on the company's buses, subject to the condition that neither the company nor its servants would be liable for injury or damage to the plaintiff, however caused. He was injured in a collision and sued the driver of

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147 Ibid. at p. 378.
148 see supra, note 117.
149 (1925) 21 Ll. L.R. at. p. 377.
150 (1946/47) 62 T.L.R. 140; 175 L.T. 334.

one of the omnibuses concerned in negligence.

It was held by the Court of Appeal that the condition subject to which the pass was granted to the plaintiff could not avail the defendant as a defence, since he was not a party to the contract between the plaintiff and the L.P.T.B., nor were the L.P.T.B. in making the contract, acting as agent for the defendant.

This is a very strong case, since the contract expressly purported to exempt the servants from liability. The ELDER, DEMPSTER case, however, was not cited before the court and clearly, if the "vicarious immunity" principle was established by the House of Lords in that case, COSGROVE v. HORSFALL was wrongly decided and is of no authority.[151] If the "vicarious immunity" principle was not established by the House of Lords, then one learned jurist has said the case is distinguishable.[152] He argues in this way. The inference required to support the "implied contract" line of reasoning was so unrealistic that it was not urged upon the court.[153] The inference required to support the "express contract" line of reasoning was expressly repudiated by the court. This is consistent with the ELDER, DEMPSTER case, since that case only decided what was the legal consequence of the inference; it did not lay down when the inference should be drawn.

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151 see YOUNG v. BRISTOL AEROPLANE CO. [1944] K.B. 718 (C.A.).
152 Treitel, op. cit., supra note 112, at p. 174 note 8.
153 But see following section on 'volenti non fit iniuria'.

The argument that COSGROVE v. HORSFALL was wrongly decided because the ELDER, DEMPSTER case was not cited before the court, was mooted before the Court of Appeal in ADLER v. DICKSON.[154] A sailing ticket issued to the plaintiff by a shipping company, contained a condition excluding the company from all liability in respect of any injury whatsoever caused to the passenger by the negligence of the company's servants. The plaintiff, who was injured when mounting the gangway of the ship at a port of call, brought an action in negligence against the master and boatswain of the ship. On the preliminary question whether the defendants were entitled to the protection admittedly afforded to the company by the conditions on the ticket, the Court of Appeal held that since the contract neither expressly nor by necessary implication deprived the plaintiff of his right to sue the defendant in tort, she was entitled to pursue her claim against them. Only one of the three judges was prepared to hold that COSGROVE v. HORSFALL was wrongly decided, although it was not necessary to decide either way since they were not concerned with an exemption clause which expressly exempted the defendants. Jenkins L.J. said non-committally at one point:

> "Even if these provisions had contained words purporting to exclude the liability of the company's

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154 [1955] 1 Q.B. 158.

> servants, non constat that the company's servants could successfully rely on that exclusion...for the company's servants are not parties to the contract."[155]

Morris L.J. was perhaps more definite:

> "Even had there been such a contract, then, unless the company contracted as agents for their servants, the latter could not claim immunity for their personal torts if the decision of this court in COSGROVE v. HORSFALL is of binding validity."[156]

While their remarks may be said to be obiter - they are at any rate not wholly conclusive -, their answers to the contention that the ELDER, DEMPSTER case established the "vicarious immunity" principle, were necessary to their decision and form a part of their ratio. Counsel for the defendants cited Scrutton L.J.'s dictum in the MERSEY SHIPPING case[157] as being a correct statement of their Lordships' judgments. Jenkins L.J. was very definite:

> "To my mind these passages from their Lordships' speeches fall far short of establishing the general proposition contended for by the defendants in the present case."[158]

Later he said:

> "The ELDER, DEMPSTER case can well be explained by reference to its own facts without ascribing to

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155 Ibid. at p. 186.
156 Ibid. at p. 196.
157 supra, note 137.
158 [1955] 1 Q.B. at p. 194.

> their Lordships any intention to lay down such a general principle."[159]

He preferred the view of Bankes L.J. to that of Scrutton L.J. in the MERSEY SHIPPING case. Morris L.J. was of the same opinion:

> "I do not read the decision in the ELDER, DEMPSTER case as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for the tort of his servant C, that C is thereby automatically given immunity if he commits a tort against A."[160]

Denning L.J. alone regarded the "vicarious immunity" principle as good law. He thought that the cases on carriage of goods:

> "undoubtedly show that when a carrier issues a bill of lading for goods, the exception clauses therein enure for the benefit not only of the carrier himself, but also for the benefit of the shipowner, the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract."[161]

He related these cases to his own general view on third party contracts that any person with a 'sufficient interest' in a contract which was made for his benefit is entitled to enforce that contract although he is not a party to it.[162] He said:

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159 Ibid. at p. 195.

160 Ibid. at pp. 199-200.

161 Ibid. at p. 181

162 See e.g., SMITH & SNIPES HALL FARM, LTD. v. RIVER DOUGLAS CATCHMENT BOARD, [1949] 2 K.B. 500 at p. 514; WHITE v. JOHN WARWICK [1953] 1 W.L.R. 1285 at p. 1294. See Dowrick, A Jus Quaesitum Tertio by way of Contract in English Law, (1956) 19 Mod. L.R. 374 for analysis of Denning L.J.'s view.

> "The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication which is just as good; and they have sufficient interest to entitle them to enforce it. Their interest lies in this: They participated in it in so far as it affected them and can take those benefits of it which appertain to their interest." [163]

He then argued that the same principle applied in the case of passengers. In support of this contention he cited HALL v. NORTH EASTERN RLY. CO. [164] and referred to the Carriage by Air Act, 1932. [165] He went on, however, to add an important qualification. The injured party must have assented either expressly or by necessary implication to the exemption from liability of these third persons. He explained COSGROVE v. HORSFALL by saying that the plaintiff did not assent to the exemption in that case even though the clause there purported expressly to exempt the servants. Assent was given in HALL v. NORTH EASTERN RLY. CO. In the present case, there was no such assent even if the clause impliedly exempted the servants as well as the company from liability which he did not accept. Thus, Denning L.J. accepts the 'vicarious immunity' principle as established in the case of carriage of goods and as applicable to the carriage of passengers but with a modification. This modification, the "consent" theory, will be considered in the next section on "volenti non fit iniuria".

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163 [1955] 1 Q.B. at p. 183.
164 supra, note 114.
165 supra, note 42.

Denning L.J.'s general view as to third party contracts was expressly rejected by the Court of Appeal in GREEN v. RUSSELL[166] and by the House of Lords in SCRUTTONS LTD. v. MIDLAND SILICONES, LTD.[167] In the latter case, a drum containing chemicals was shipped from the U.S.A. to London by a bill of lading which incorporated the U.S. Carriage of Goods by Sea Act, 1936 and limited to $500 per package the liability of the carrier in the event of loss, damage or delay. The defendants, who were stevedores engaged by the carriers, while lowering the drum from an upper floor of a dock transit shed to a truck, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing damage to the tune of £593. The stevedores, being sued in tort, relied on the bill of lading and claimed that their liability was limited to $500. (£179 1s.)

At first instance, Diplock J. fully analysed the ELDER, DEMPSTER case, counted their Lordships' heads, and finding that two only had adopted the 'vicarious immunity' theory, respectfully agreed with "Jenkins and Morris L.JJ.[168] and with Fullager and Kitto JJ." in WILSON v DARLING ISLAND STEVEDORING & LIGHTERAGE CO.[169] in the High Court of Australia, "and with the U.S. Supreme Court[170] that the ELDER,

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166 [1959] 2 Q.B. 226.
167 [1962] 1 ALL E.R. 1. See, particularly, Viscount Simonds, at p. 7.
168 in ADLER v. DICKSON [1955] 1 Q.B. 158. Supra, notes 158, 159 and 160.
169 (1955) 95 C.L.R. 43. See also note 49 supra.
170 in KRAWILL MACHINERY CORP. v. HERD & CO. 359 U.S. 297; [1959] 1 Lloyd's Rep. 305. See also, supra, note 33.

DEMPSTER case is no authority for the principle of vicarious immunity and that Scrutton L.J.[171] incorrectly stated its effect."[172] He went on to conclude:

> "I myself think that the present case is governed by the simple, fundamental, though no doubt old fashioned principles laid down by Lord Haldane and approved by the House of Lords in DUNLOP v. SELFRIDGE[173] that the defendants cannot limit their liability to the plaintiffs by relying upon a contract between the plaintiffs and a third party to which they were not parties and for which they gave no consideration to the plaintiffs."[174]

It is evident that Diplock J. would have come to the same conclusion if the clause had been expressed to be for the benefit of the stevedores as well as for the carriers. As will be seen, his reliance on the High Court of Australia and the U.S. Supreme Courts decisions was not quite apposite, since although supporting the result at which he arrived, they do not necessarily support all his reasoning.

On appeal, Diplock J.'s decision was upheld. The Court of Appeal held, inter alia, that the bill of lading did not purport to provide any limitation of liability for the stevedores, that there was no general principle of law that where a contract contained an exemption clause, the servants or agents who acted under that contract had the

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171 In MERSEY SHIPPING & TRANSPORT CO. LTD. v. REA, supra, note 147.
172 [1959] 2 Q.B. at p. 192.
173 [1915] A.C. 847. See supra, note 84.
174 [1959] 2 Q.B. at p. 193.

benefit of it and that accordingly, the general principle applied that the defendants could not limit their liability to the plaintiffs in tort by relying on a contract between the plaintiffs and a third party to which they themselves were not parties.

Although they were not dealing with a clause which expressly or impliedly purported to exempt the stevedores, the judges all referred to COSGROVE v. HORSFALL without disapproval. As to the effect of the ELDER, DEMPSTER case, they all agreed with Jenkins and Morris L.JJ. in ADLER v. DICKSON and rejected Scrutton L.J.'s views:

> "The ELDER, DEMPSTER case... must be taken to have depended on the special circumstances there being considered."[175]

Both Pearce and Upjohn L.JJ. agreed in rejecting the distinction counsel attempted to draw between the carriage of goods and the carriage of passengers, a distinction which has often been discussed by jurists.[176] All referred to the fact that both the High Court of Australia and the U.S. Supreme Court had recently arrived at the same conclusions and:

> "it is desirable that great common law jurisdictions should not lightly differ more particularly on so universal a matter as commercial law"[177]

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175 [1961] 1 Q.B. at p. 124 per Hodson L.J.

176 See e.g. Guest, Bills of Lading and a Jus Quaesitum Tertio, (1959) 75 L.Q.R. 315; Dowrick, op. cit., supra, note 162; Anson, Law of Contract, 21st Edit., Oxford, 1959, p. 355; Shawcross & Beaumont, op. cit., supra, note 10, para. 351.

177 [1961] 1 Q.B. at p. 128, per Pearce L.J.

This noble sentiment was reiterated in the House of Lords by Viscount Simonds[178] who, in an uncompromising judgment, rejected completely the idea that the ELDER, DEMPSTER case had established the 'vicarious immunity' principle and criticised the doubt which from time to time had been cast upon that 'fundamental' and 'elementary' privity of contract doctrine. Such doubt amounted to "heterodoxy or, as some might say, heresy" which "is not the more attractive because it is dignified by the name of reform".[179] In any event, it is the task of Parliament and not of the courts of law to abrogate old, established principles.[180] The only possible explanation of the ELDER, DEMPSTER case was that the shipowner received the goods on the terms of the bill of lading since the master of the ship had signed that bill. Also, there was a bailment in that case and the appellants in the present case were not bailees "whether sub, bald, or simple."[181] The appellants failed, in his view, because they could not show a contract between the cargo owners and themselves granting them immunity and because there was no principle of law which entitled them to rely on a contract made by another. It followed from this that COSGROVE v. HORSFALL was correctly decided. Lord Reid was a little more contrite. He expressed regret but found it impossible to deny the existence of the privity of contract doctrine. He agreed that he was bound by former decisions of the House, a fact that

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178 [1962] 1 ALL E.R. 1 at p. 9.
179 Ibid. at p. 7.
180 Ibid.
181 Ibid. at p. 9 citing Diplock J., at first instance. [1959] 2 Q.B. at p. 189.

he was not too pleased about either, but considered that the facts of the ELDER, DEMPSTER case were very different from those before him. In any event, the ratio decidendi was obscure and, as interpreted by some judges, notably Scrutton L.J., out of line with established principles. This justified his treating it as an anomalous and unexplained exception to the doctrine of privity. He would not dissent from the proposition that the 'vicarious immunity' principle or something of the kind, ought to be the law "if that was plainly the intention of the contract" but, of course, only Parliament could make it the law. "It seems to me much too late to do that judicially."[182]

Lords Keith and Morris, in shorter judgments, agreed that the decision of the lower courts should be affirmed. Lord Keith's view of the ELDER, DEMPSTER case was the same as that of Viscount Simonds. The controlling factor influencing Lord Morris was that the speeches in the ELDER, DEMPSTER case did not express any qualifications or modifications of the basic rule which was clearly stated in DUNLOP v. SELFRIDGE. "For better or worse that rule was then firmly built into the structure of English law."[183]

Thus, these four Law Lords firmly based their decision on the fact that the stevedores could not take advantage of limitation provisions in a contract to which they were not a party. They need not have

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182 Ibid. at p. 13.
183 Ibid. at p. 24.

considered the scope of the privity of contract doctrine since, on the facts, the limitation provision was not intended to benefit the stevedores. But they did and their ratio is sufficiently wide to cover situations where there is a clause in a contract which expressly extends the limitation provisions therein to third persons.

The views of the four Lords did not go unchallenged, however. Lord Denning, in perhaps his most brilliant dissent since his classic judgment in CANDLER v. CRANE, CHRISTMAS & CO.,[184] jibed the "timorous souls" for looking at the ELDER, DEMPSTER case "through the spectacles of 1961 and not those of 1924"[185] and gave their Lordships a lecture to remind them of the fundamentals of English law in the nineteenth and early twentieth centuries. He thought the ELDER, DEMPSTER case was clear authority for the "vicarious immunity" principle which had evolved naturally via the railway cases, once a tort action had been allowed for a breach of duty to take care. Negligence was not an independent tort even in 1924 so that the only way in which the consignor could show that the shipowner owed him a duty of care was by pointing to the contract or the bailment. But the contract excluded liability and, as Lord Sumner said, the bailment included this exclusion of liability as well. And so the House held that no duty of care could arise from them. Thus, the consignor failed even though or perhaps because the shipowner was not a party to the bill of lading.

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184 [1951] 2 K.B. 164.
185 [1962] 1 ALL E.R. at p. 19.

To hold otherwise would mean that an easy way around the conditions of the contract of carriage had been found. Lord Denning considered that there was good ground for the House to hold itself bound by the ELDER, DEMPSTER case. As he was not unduly attached to the doctrine of precedent, he admitted that he would have done his best to distinguish it, had he thought that it was wrong but he was not satisfied of this. He supposed he was wrong about all this, however, since their Lordships had taken a different view. But they had not considered another material fact and it was this which prompted his dissent. The fact was the existence of a contract between the stevedores and the carrier by which the stevedores were to have "such protection as is afforded by the terms, conditions and exceptions of the bills of lading." The carrier is a bailee of the goods and "One special feature of the law of bailments is that a bailee can make a contract in regard to the goods which will bind the owner."[186] This contract, however, must be impliedly authorised by the true owner of the goods. The carrier in the present case was without doubt impliedly authorised to enter into a contract for the handling and removal of the goods from the ship. But was he authorised to employ the stevedores on the terms that their liability should be limited for $500.? Lord Denning thought so since the cargo owners had not declared a higher value in their contract of carriage with the carrier. It followed that the cargo owners

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186 Ibid. at p. 21.

were bound by this contract even though they were not parties to it and so the learned Law Lord would have allowed the appeal.[186]

It is submitted that the principle employed by Lord Denning may well be used in future appropriate cases. Although his was a dissenting judgment, the other Law Lords did not consider the point at all. In fact, it may not even have been argued by counsel for ought that appears in the report of the case. Following the rule that a case is not an authority for a principle or the negation of a principle which was not decided in it, it is thought that an air carrier in his contracts of employment could include a provision extending to his servants and agents "such protection as is afforded by the terms, conditions and exceptions" of the air waybills, thereby effectively protecting them, the SCRUTTONS case notwithstanding. The principle, of course, is confined to the carriage of goods.

Some of the judges in the SCRUTTONS case were pleased at the result at which they had arrived because the American Supreme Court and the Australian High Court had recently reached similar decisions and because "great common law jurisdictions should not lightly differ."[187] A comment on these two decisions is called for since it is submitted, with due respect, that common law jurisdictions are likely to differ if COSGROVE v. HORSFALL is considered correctly decided.

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186 Lord Denning cited two cases in illustration of the principle: THE KITE, [1933] P. 154 and PYRENE CO. LTD. v. SCINDIA NAVIGATION CO. LTD., [1954] 2 Q.B. 402.

187 See supra, note 177.

Most of the judges in the SCRUTTONS case, appear to be of the opinion that a servant or agent can only protect himself from the consequences of a wrongful act, if he can show that he has made or can claim to be party to a contract by which he is given immunity, COSGROVE v. HORSFALL precluding any other opinion. This does not appear to be the view of the U.S. Supreme Court, as expressed in KRAWILL MACHINERY CORP. v. HERD.[188] The point at issue in that case was whether the provisions of section 4(5) of the U.S. Carriage of Goods by Sea Act (C.O.G.S.A.) 1936 or the parallel provisions of an ocean bill of lading limiting the liability of an ocean 'carrier' to a shipper to $500 per package of cargo, also applied to and likewise limited the liability of a negligent stevedore.

It was held that neither the C.O.G.S.A. provision nor the provisions in the bill of lading extended the limitation of liability to stevedores or agents and that all agents of the carrier who perform any part of the work undertaken by the carrier in the contract of carriage, evidenced by the bill of lading, are not, by reason of that fact alone protected by the provisions of the contract limiting the liability of the carrier, as such agents are not parties to, nor express beneficiaries of, the contract. The court overruled an earlier decision[189] approving the vicarious immunity principle, a decision to which Denning L.J. had referred to as supporting his views in ADLER v. DICKSON.

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188 359 U.S. 297; [1959] 1 Lloyd's Rep. 305. See supra, note 33 also.

189 COLLINS v. PANAMA R. CO. 197 Fed. 2d 893 (C.A.-5 1952) See supra, note 30.

Three passages in Whittaker J.'s judgment, delivered on behalf of the whole Court, are pertinent:

> "From its early history, this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or valid contract binding upon the person damaged." [190]

It will be noticed that he does not say the "valid contract" has to be between the person suffering damage and the agent.

> "Contracts purporting to grant immunity from or limitation of liability must be strictly construed and limited to intended beneficiaries for they are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties." [191]

It is submitted with confidence that a contract expressly purporting to protect a servant or agent has sufficient clarity for the purpose of altering "familiar rules". Finally, referring to the ELDER, DEMPSTER case, Whittaker J. said:

> "The question whether a provision in the bill of lading limiting the liability of the carrier, likewise limits the liability of its negligent agent, though the agent is neither party to, nor the express beneficiary of the bill of lading, was not involved in or decided by that case." [192]

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190 3 L. ed. (2d.) at p. 824.

191 Ibid. at p. 825 quoting BOSTON METALS CO. v. THE WINDING GULF, 349 U.S. 122.

192 Ibid. at p. 826.

Again, it would appear that if the bill of lading had expressly limited the liability of the stevedores, Whittaker J. would have decided the case in their favour. Thus COSGROVE v. HORSFALL would most likely be decided differently before the U.S. Supreme Court and Pearce L.J.'s desire that "great common law jurisdictions should not lightly differ" would thereby be frustrated.

The facts of WILSON v. DARLING ISLAND STEVEDORING & LIGHTERAGE CO. LTD.[193] were similar. Goods were shipped to the plaintiff under a bill of lading which provided, inter alia, that the carriage of the goods was at the sole risk of the owners and that the carriers were not to be liable for loss or damage arising or resulting from any cause whatsoever. The goods were damaged by the negligence of the defendant stevedores who, when sued by the plaintiffs, contended that they were entitled to the benefit of the exemption clause. The High Court of Australia held that they were not so entitled by a majority of three to two, overruling two earlier and contrary decisions[194] to which Denning L.J. had referred in ADLER v. DICKSON as supporting the 'vicarious immunity' principle.

Like ELDER, DEMPSTER, the case presents a very difficult problem of precedent although here the position is more complicated since the court was divided and the majority differed as to the

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193 (1955) 95 C.L.R. 43. See also note 49 supra.

194 GILBERT STOKES & KERR v. DALGETY & CO. (1948) 81 Ll. L.R. 337; WATERS TRADING CO. v DALGETY & CO. [1951] 2 Lloyd's Rep. 385.

reasons for arriving at their decision.

The minority (Williams and Taylor JJ.) held that the ELDER, DEMPSTER case had established the 'vicarious immunity' principle and applied it to the facts before them.

The late Fullager J.'s judgment, with which Dixon C.J. concurred, and for which Viscount Simonds expressed the profoundest admiration,[195] fully supports the widest conclusions reached in the SCRUTTONS case. Even if the stevedores could show that the exemption clause was intended to be extended to them, the privity of contract doctrine would prevent them from relying upon it. Kitto J., while agreeing that the ELDER, DEMPSTER case did not establish the vicarious immunity principle, did not think an invocation of the privity of contract doctrine resolved the matter. He thought the contract was only relevant as evidence of consent. Since the contract in this case did not establish that the plaintiffs had consented to the exclusion of liability of the stevedores, their action succeeded.[196]

What is the ratio decidendi of the court in these circumstances? If the dissenting judgments are taken into account, then, under the first approach mentioned above,[197] the case has no ratio since there is not a majority of judges in favour of any one reason.

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195 In SCRUTTONS LTD. v. MIDLAND SILICONES, [1962] 1 ALL E.R. at p. 9.

196 Cf. also Lord Denning in SCRUTTONS LTD. v. MIDLAND SILICONES, LTD. [1962] 1 ALL E.R. at p. 20. The consent argument is considered in the next section on 'volenti non fit iniuria'.

197 Supra, note 135 etc. See articles and authorities there cited.

If the view of the majority is taken to be the ratio of the court, then the ratio decidendi is the argument that the privity of contract doctrine applies. But Kitto J. is quite clearly in disagreement with this view and it has been held in Northern Ireland that, in such an event, a case can have no binding ratio decidendi.[198] Under the second approach, both Kitto J.'s ratio and Fullager J.'s ratio are **rationes** decidendi of the court, since both were necessary before the order in favour of the plaintiff could be made, although it seems strange that a court can have two inconsistent rationes decidendi. How are they to be reconciled by a later court which is bound by the decision?

It is submitted that the only conclusion that can be safely drawn from the case in view of these difficulties is that, where an exemption clause is not for the benefit of a servant or agent, he cannot rely upon it because there is no principle of vicarious immunity. Three of the five judges certainly agreed as to this point. They did not all agree, however, with the proposition approved in the SCRUTTONS case that even where an exemption clause is for the benefit of a servant or agent, he cannot avail himself of it. The question is, therefore, still open to argument in Australia.

From the foregoing analysis of the cases, it is submitted that the following conclusions may be drawn.

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198 WALSH v. CURRY [1955] N.I. 112 at p. 124 per MacDermott L.C.J. (C.A.N.I.)

First, there is no principle of vicarious immunity in English law.

Secondly, strong dicta support the one case, COSGROVE v. HORSFALL, expressly deciding that an exemption clause contained in a contract which expressly or by clear implication purports to exclude the liability of a third person, cannot be relied upon by him, because he is not a party to the contract and has furnished no consideration.

Finally, the only way in which a supposed third person can rely on such an exemption clause is by showing that he has made or can claim to be party to the contract containing the exemption clause.

Thus, it would seem that a servant or agent of an airline cannot rely on the clause in contracts of carriage limiting his liability either on the ground of vicarious immunity or on the ground that he is an express beneficiary of these provisions. A contention that he is a party to the contract containing the exemption clause or that there is a distinct contract to be implied between the plaintiff and himself containing the limitation provisions, also seems doomed to failure since it is open to the objection that he has supplied no consideration. The services provided by him to the passenger or consignor do not arise from an arrangement between him and the passenger/consignor but from his contract of employment with the carrier.

(iv) Volenti non fit Iniuria

It has recently been contended with some force that, since an action against a servant or agent must necessarily be in tort, the only relevance of an exemption clause contained in a contract to which he is not a party is to enable him to set up the defence of 'volenti non fit inuiria'. The absence of privity of contract between the servant or agent and the plaintiff is immaterial, since the basis of the defence is consent not contract.[199]

Although the defence has been much restricted in application in recent years,[200] it is conceived that an accurate statement of its scope was given as long ago as 1888, a statement which was approved by the Privy Council in 1926:

> "...if the defendants desire to succeed on the ground that the maxim volenti non fit iniuria is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."[201]

Before examining this definition in detail, a general observation is required. It has been said on more than one occasion that volenti non fit iniuria is not really a defence at all; it is in fact a denial that the

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199 Furmston, Return to Dunlop v. Selfridge? (1960) 23 Mod. L.R. 373 at p. 386 ff.

200 See, generally, Glanville Williams, Joint Torts and Contributory Negligence, London, 1951, Ch. 12.

201 OSBORNE v. L.N.W.R. (1888) 21 Q.B.D. 220 at p. 224 per Wills J. cited with approval in LETANG v. OTTAWA ELECTRIC RLY. CO. [1926] A.C. 721 at p. 731 per Lord Shaw.

defendant owed any duty of care to the plaintiff, the duty being negatived by the latter's consent.[202] If this is the case, a first objection becomes apparent. If the plaintiff agrees that liability should be limited, he does not thereby take himself outside the class of persons to whom the defendant owes a duty of care. All he has done is to affect the legal consequences following upon a breach of the defendant's duty towards him. In any event, a plea of consent, if successful, results in no liability at all. This is not the case when the defendant is relying upon a limitation of liability clause. While a successful reliance on an exclusion clause does have the same effect as a plea of consent, the same objection may be thought valid. The defendant is not denying that he owes the plaintiff a duty of care. He admits this but, by relying on the contract, he denies that the normal consequences of a breach of his duty to take care follow. But the argument is that an exclusion clause provides evidence only that the plaintiff consented, and as such may have validity.

However this may be, it is open to more serious objections which will appear from the following analysis of the definition quoted above.

First, there must be a finding of fact. There is no fiction here designed to temper the harshness of a common law principle. Each case, depends upon its facts and only guidance can be obtained from

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202 eg. Street, The Law of Torts, 2nd Ed., London, 1959, p. 162 citing DANN v. HAMILTON, [1939] 1 K.B. 509 at p. 512 per Asquith J. Cf. Kitto J. in WILSON v. DARLING ISLAND STEVEDORING & LIGHTERAGE CO. (1955) 95 C.L.R. at p. 81. See infra, note 221.

earlier cases. Although the facts in COSGROVE v. HORSFALL[203] are materially identical with the facts of the present problem, it is not conclusive, since the plea of consent was not argued and it can, therefore, be no authority on the point.

Since the plaintiff must have "full knowledge of the scope and extent of the risk "before he can" freely and voluntarily" consent to incur it, that part of the definition deserves prior consideration. There is no difficulty where it can be shown that the plaintiff is fully aware of the condition limiting the servants' liability, but what if he is not? Can it be argued on an analogy with the so-called ticket cases that he must be taken to know of the conditions contained in the contract of carriage provided he has been given reasonable notice of those conditions.?[204] It is submitted that it may not be so argued. There is a distinction between knowledge and notice. In the ticket cases which were contractual actions and in one case concerning a license,[205] it was held that the plaintiff need only have notice of exemption clauses in order to be bound by them. He need not know of them.[206] This cannot be the position with regard to the plea of consent, since, in order to consent, the plaintiff must know to what he is consenting.[207]

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203 See supra, note 150.

204 See, eg. PARKER v. SOUTH EASTERN RLY. CO., (1877) 2 C.P.D. 416, the leading case on the subject.

205 ASHDOWN v. WILLIAMS [1957] 1 Q.B. 409 (C.A.) For criticism of this decision, see L.C.B.G. in (1956) 19 Mod. L.R. 532 and (1957) 20 Mod. L.R. 181.

206 See harsh case of THOMPSON v. L.M.S. [1930] 1 K.B. 41 (Illiterate passenger held to be bound by exemption clause).

207 cf. eg. A-G v. CORY BROS. & CO. [1921] 1 A.C. 521 at pp. 549-550 (H.L.); LETANG v OTTAWA ELECTRIC RLY. CO. [1926] A.C. 721; BOWATER v ROWLEY REGIS CORP. [1944] 1 K.B. 476 (C.A.).

Even if the plaintiff is aware of the clause limiting the servants' liability, it does not automatically follow that he has freely and voluntarily consented to it. Thus in BOWATER v. ROWLEY REGIS CORP.,[208] it was said:

> "For the purpose of the rule...a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will."

It is submitted that there is a feeling of constraint felt by the passenger/consignor and that he has no freedom of choice as understood in the above statement. He must accept the conditions laid down by the airlines in their standard form contracts or go without the benefit of their services. Since there is no real freedom to reject or not to reject any of the conditions in the contract of carriage the passenger/consignor has not consented "freely and voluntarily" to the provisions limiting the liability of the servants and agents. One can sympathise with Mr. Furmston's dissatisfaction with the result that the liability of the carrier and not of his servants will be effectively excluded or limited by the contract, thereby fixing liability on the person least able to bear it and that such a result would seem illogical and unsatisfactory.[209] But the fact that the courts are not prepared to relax the conditions necessary before a plea of volenti non fit

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208 [1944] 1 K.B. at p. 479 per Scott L.J.
209 Furmston, op. cit., supra note 199, at p. 389.

iniuria can succeed,[210] would indicate that he will have to look elsewhere to alleviate this dissatisfaction.

There is some support for the argument to be derived from the authorities, however, and these concern the final condition necessary before the plea of consent will be successful. The plaintiff must "impliedly agree" to incur the risk. The questions immediately arise whether this agreement must be an enforceable contract and whether it must be an agreement between the plaintiff and the defendants or will an agreement between the plaintiff and a third person suffice?

The answer to the first question is probably no. There are many dicta which refer to the necessity of agreement[211] but only a few refer to the agreement as a contract.[212] In fact, such a view was expressly negatived by Lord Goddard C.J. in the BOWATER case:[213]

> "It must be shown that he agreed that what risk there was should be on him. I do not mean that it must

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210 See eg. SLATER v. CLAY CROSS CO. LTD., [1956] 2 ALL E.R. 625 (C.A.).

211 See eg. SMITH v. BAKER [1891] A.C. 325 at pp. 344 and 355; YARMOUTH v. FRANCE (1887) 19 Q.B.D. 647 at p. 654; MONAGHAN v. RHODES, [1920] 1 K.B. 487 at p. 498; OSBORNE v. L.N.W.R. (1888), 21 Q.B.D. 220 at p. 224; LETANG v. OTTAWA ELECTRIC RLY. CO. [1926] A.C. 721 at p. 731.

212 eg. BAKER v. JAMES, [1921] 2 K.B. 674 at p. 683 per McArdie J.: "The question is ever one of fact - namely, whether the plaintiff has voluntarily undertaken and contracted to accept the risk for himself."

213 [1944] 1 K.B. at p. 481.

> necessarily be shown that he contracted to take the risk, as that would involve consideration..."

Dr. Glanville Williams is also inclined to think no enforceable contract is necessary. He writes:

> "Thus a rule is conceivable that consent may be given by an infant, at any rate, if he is nearly of age, although a contract to this effect might not be binding on him as a contract, on account of his infancy. It seems that there is no need to inquire into the existence of consideration for the agreement."[214]

The case of OLSEN v. CORRY[215] is slightly against this inclination of Dr. Williams who criticises it accordingly. The plaintiff at the age of 17 entered into a deed of apprenticeship with the defendant who agreed to teach him the profession of ground engineering. The deed exempted the defendants from all liability in respect of any injury caused to the apprentice for any reason whatsoever. When taking part in the starting of an aircraft engine, the engine was started earlier than expected owing to a misunderstanding and the plaintiff's arm was severed. Greaves-Lord J. held, inter alia, that the accident was due to the imperfect method of teaching adopted by the company; that insofar as the deed exempted the company from liability for negligence, it was not for the benefit of the infant and therefore void, and that, since the infant

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214 Williams, op. cit., supra note 200, p. 312. Cf. MURRAY v. HARRINGAY ARENA, LTD., [1951] 2 K.B. 529 (C.A.) (Six year old boy hit by puck during ice-hockey game. Claim in negligence failed).

215 [1936] 3 ALL E.R. 241.

plaintiff was a mere pupil and had no knowledge and appreciation of the risk of swinging the propeller in such circumstances, the doctrine of volenti non fit iniuria did not apply. Dr. William's criticism is that the question of volens was dealt with without reference to the deed as though it were a totally independent question of fact. Although the deed was void as a contract, the question should have been considered whether the deed did not give the defence of assumption of risk. If that did not, no other facts in the case could raise it.

In any event, the Privy Council in VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO.[216] took the view that where goods are transported under a contract containing an exemption clause and that contract for some reason is held to be illegal, the exemption clause may still not be ignored even in an action in tort. The contract in that case was held not to be illegal in the circumstances and so the following remarks of Lord Wright are obiter only, although, of course, entitled to the greatest respect:

> "The actual transaction between the parties cannot be ignored even in an action in tort. The transaction includes as an essential part the bills of lading whether regarded from the point of view of the contractual exception or of illegality. To apply the language of Lord Sumner in the ELDER, DEMPSTER case, there is not here a bald bailment with unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact.

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216 [1939] A.C. 277.

> Hence, even on that footing, the respondent would fail, either because it was party to an illegality avoiding the contract, or alternatively because the contractual exemptions could not be ignored."[217]

It will be noticed that he does not give a legal basis for this proposition, that is, he does not mention volenti non fit iniuria, and yet it has been relied upon in support of the conclusion that "what is ineffectual as a contract, may still operate by way of consent."[218] While in agreement with the conclusion, it is doubtful whether the VITA FOOD case supports it. Lord Wright quotes Lord Sumner in the ELDER, DEMPSTER case and it is not suggested even by Mr. Furmston, that Lord Sumner was talking in terms of consent in that case. Both judges are distinguishing between the contract under which the goods are bailed and the bailment itself and the bailment is considered by them to be subject to the same terms as the contract. The exemption clause is being relied upon as a condition of the bailment and it matters not that the contract is unenforceable because of illegality or because the defendant is not a party to it. The main reason why their Lordships thought the exemption clause binding, therefore, was because it was a condition of the bailment and not because it evidenced the undertaking of a risk on the plaintiff's part.

The second question as to whether the defendant can rely on an agreement between the plaintiff and a third person in which

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217 Ibid. at p. 301.

218 Furmston, op. cit., supra note 199, p. 388.

the plaintiff assumes a risk vis-à-vis the defendant, now has to be considered. After reviewing the authorities on the volenti principle, Dr. Williams comes to this conclusion:

> "To constitute the defence of volenti non fit iniuria, there must be some sort of intercourse or communication between the plaintiff and the defendant from which it can reasonably be inferred that the plaintiff has given an assurance to the defendant that he waives any right of action that he may have in regard to the conduct of the defendant." [219]

He is therefore, of the opinion that the agreement must be between the plaintiff and the defendant. In fact, he later refers to COSGROVE v. HORSFALL as precluding the application of the defence in the case of an agreement with a third person. [220] But as has been pointed out, the question of consent was not raised in that case. There are two authorities which indicate that an exemption clause in a contract between the plaintiff and a third person is effective to show that the plaintiff has voluntarily assumed the risk vis-à-vis the defendant. In the decision of the High Court of Australia in WILSON v. DARLING ISLAND STEVEDORING & LIGHTERAGE CO. one of the majority judges, Kitto J., came out strongly in favour of such a view. [221] He said:

> "I do not think...that the main difficulty in this class

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219 Williams, op. cit., supra note 200, p. 314.
220 Ibid. at pp. 315-316.
221 (1955) 95 C.L.R. at p. 81.

> of case arises in regard to the rule that the benefit and the burden of contracts are, generally speaking, confined to the contracting parties...It is with an action of tort that we are here concerned, and a provision found in a document to which A and B are the only parties may well, either alone or with other circumstances, provide a stranger C, with a defense to such an action...A defence of volenti non fit iniuria may be perfectly good, it seems to me, notwithstanding that the plaintiff's consent to accept the risk of injury for which he sues is expressed in a contract to which the defendant was not a party. Such a defence amounts to a denial that the defendant was under the duty of care which he is charged with having omitted to observe, the duty being negatived by the plaintiff's consent...It is not necessary to the defence that the consent should have been given by a contract between the plaintiff and the defendant...Hence if A in his contract with B agrees expressly or impliedly that C need take no care to avoid injuring A in carrying out particular work which - as he knows - involves danger to A and that B may so inform C and B does so inform C who then proceeds with the work and in the course of it, injures A, the defense of volenti is as clearly made out as it would have been if A had himself told C that he accepted, in exoneration of C, the whole risk of injury from C's activities. The absence of privity of contract between A and C would be irrelevant. It is all a question of consent or no consent."

Lord Denning, dissenting in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD.,[222] also thought that the volenti non fit iniuria doctrine could be used in appropriate circumstances, although not in the case before him, even where the plaintiff had only agreed to a limitation of liability.

> "...consent need not be embodied in a contract. Nor does it need consideration to support it. Suffice it that he consented to take the risk of injury on himself...if the bill of lading were expressed in terms

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222 [1962] 1 ALL E.R. 1.

> by which the owner of the goods consented to take on himself the risk of loss in excess of 500 dollars, whether due to the negligence of the carrier or the stevedores, I know of no good reason why his consent, if freely given, should not be binding upon him." [223]

Although COSGROVE v. HORSFALL suggested the contrary, that was a contract for the carriage of passengers and "it is not so easy to find an assent by a passenger to take the risk of personal injury on himself. The mere issue of a ticket or a pass will not suffice." [224]

While it is thought that an exemption clause might, in some cases, indicate that a defendant has consented to take a risk upon himself, it is submitted that a limitation clause could rarely, if ever, do this since...the plaintiff is not agreeing that the defendant need take no care to avoid injuring him. All he is doing is to limit the amount of damages he will be able to recover in the event of a breach of the defendant's duty towards him.

The conclusion is, therefore, that the plea of volenti non fit iniuria will not avail the servant or agent because

1) a limitation of liability clause cannot show that he was not under the duty of care which he is charged with having omitted to observe;

2) it is unlikely that the plaintiff has "full knowledge" of the limitation provision, and even if he had

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223 Ibid. at p. 20.
224 Ibid.

3) it cannot be said that he has "freely and voluntarily" accepted a clause in a standard form contract.

In arriving at this conclusion, no reliance has been placed on the fact that the courts have insisted on construing exemption and limitation provisions strictly, the underlying sentiment appearing to be that they are "sociologically undesirable".[225] Where a contract like the contract of air carriage contains provisions limiting the liability of both carrier and his servants, there might be good policy reasons for striking the clause down in toto but to allow it affect as regards the carrier but not his servants could not possibly have any policy reason in its favour. In fact, it works an obvious injustice by fixing liability on the person least able to bear it.[226]

However this may be, it is clear that there would have to be a relaxation of both the privity of contract and the volenti doctrines before servants and agents could take advantage of the limitation provisions.

It might be suggested that some hope of such a relaxation may be derived from the line of reasoning hitherto referred to as the "implied contract" theory. Of the two cases which apply the theory only Blackburn J. in HALL v. NORTH EASTERN RLY. talks in terms of contract and his words on this aspect of the case, are not

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225 Hanbury, Modern Equity, 7th Ed., London, 1957, p. 69.
226 cf. Furmston, op. cit., supra note 199, p. 389.

contained in the Law Journal Reports. At one point in fact, he said that the plaintiff

> "must be taken to have assented that the ticket should protect the North Eastern Company, just as well as the North British."[227]

Again, the judges in the ELDER, DEMPSTER case whose arguments support the "implied contract" theory, did not in fact spell out a contract between the plaintiffs and shipowners. Taken together with Lord Denning's judgements in ADLER v. DICKSON,[228] and SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD.,[229] the argument might be advanced that a passenger/consignor must be taken to have assented that the limitation clauses should protect the servants and agents. The objection to this would be that other judges have referred to the "implied contract" theory as requiring a contract between the parties concerned,[230] and even Lord Denning did not think that exemption clauses even expressly in favour of servants and agents would necessarily show that the plaintiff had consented to them.[231]

Thus, this section must end with the reluctant conclusion that no argument based on consent can avail the servant or agent.

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227 (1875) L.R. 10 Q.B. at p. 442. See supra, note 114 for facts.

228 See supra, note 161 ff.

229 See supra, note 222 ff.

230 See eg. ADLER v. DICKSON [1955] 1 Q.B. 158 at pp. 198 & 201 per Morris L.J.; MIDLAND SILICONES LTD. v. SCRUTTONS LTD. [1959] 2 Q.B. 171 at p. 186 per Diplock J.

231 See his remarks re COSGROVE v. HORSFALL, supra note 163 ff. and note 224.

(v) Breach of Contract

It is suggested that there is one argument which the servant or agent may use with some opportunity of success. This is that no court will allow the assertion of a claim, the enforcement of which involves a breach of contract, "in itself a legal wrong",[232] even though that contract is one to which the defendants are not parties. It is clear that, by bringing an action under circumstances in which he has agreed that liability should be excluded or limited, the passenger or consignor is committing a breach of contract and, accordingly, this principle ought to apply. It is true that the Court of Appeal in COSGROVE v. HORSFALL expressly rejected this argument, but it did not refer to an earlier decision of its own and, therefore, the case may be said to have been decided per incuriam. The decision is re SCHEBSMAN, Dec'd[233] where the deceased entered into a contract with his employer by which the company agreed to pay him compensation for his loss of employment in instalments. If he died, the instalments would be paid to his wife, and then, on her death, to his daughter, the payments to cease on the death of the survivor. Schebsman went bankrupt and later died. The trustee in bankruptcy, then asked for a declaration that all sums payable under the agreement to the widow formed part of the estate of the deceased, since, although the sums were to be paid to

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232 ALLEN v. FLOOD [1898] A.C. 1 at p. 96 per Lord Watson
233 [1944] Ch. 83.

the widow the debtor always had a right to intercept them, a right which was now in the trustee. It was held, inter alia, that the debtor, Schebsman, could not by unilateral action have required the company to make the payments to anyone other than the widow and the daughter, and that any attempt by him to divert the payments from him would have involved a breach of contract. Lord Greene M.R. said at one point:

> "It cannot be that as between himself and the payees the debtor can be heard to assert in a court of equity a claim, the enforcement of which involves a breach of contract, even when that contract is one to which Mrs. Schebsman and her daughter are not parties."[234]

Du Parcq L.J. was more forceful:

> "To put the matter bluntly and, if my view of the common law is right, fairly, equity which mends no man's contracts, will not assist any man to commit a breach of contract and so to do an illegal act."[235]

And again:

> "The breach of a valid agreement would be regarded by the courts as an 'unlawful' act and a 'legal wrong'."[236]

It is true that there are distinctions between the facts of re SCHEBSMAN and those of the situation under discussion. For example, the widow in

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234 Ibid. at p. 94.

235 Ibid. at p. 105.

236 Ibid. at p. 101 borrowing the expressions from Lord Lindley in SOUTH WALES' MINES FEDERATION v. GLAMORGAN COAL CO., [1905] A.C. 239 at p. 253.

re SCHEBSMAN had not committed any tort or wrong against the plaintiff and the deceased was a completely free agent in entering into the contract in that case - it wasn't a standard form contract. It is thought, however, that none of these distinctions are material and that it may be argued, therefore, that, since a passenger/consignor has agreed that the servants' and agents' liability shall be limited, any claim by him in excess of the limitation will constitute a breach of contract, a "legal wrong" and will not be allowed. COSGROVE v. HORSFALL was wrongly decided because re SCHEBSMAN which should have been followed as a binding authority, was not referred to.

(vi) The Supreme Court of Judicature Act, 1925, s.41(b)

In the course of his judgment in COSGROVE v. HORSFALL, du Parcq L.J. said that "the L.P.T.B. may well be entitled to some redress against the plaintiff... They may be entitled to recover damages."[237] He also referred, although expressed no opinion upon the question whether the Board could have appealed successfully to stay the action under s.41(b) of the Supreme Court of Judicature Act, 1925.[238] s.41(b) is as follows:

> "Any person whether a party or not to any such cause or matter who would formerly have been entitled to apply to any court to restrain the prosecution thereof ... may apply to the High Court or Court of Appeal,

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237 (1946) 62 T.L.R. 140 at p.141.

238 15 & 16 GEO.5, c.49. This section replaced s.24(5) of the Supreme Court of Judicature Act, 1873; 36 & 37 VICT. c.66.

> as the case may be, by motion in a summary way for a stay of proceedings in the cause or matter either generally or so far as may be necessary for the purposes of justice and the court shall thereupon make such order as shall be just."

Before 1873, when the first Supreme Court of Judicature Act was passed, the Court of Chancery would restrain by injunction the prosecution of proceedings at law where their continuance was inequitable. By s.24 of the Act,[239] all divisions of the High Court were empowered to give effect to equitable principles and, thus, the jurisdiction to restrain proceedings by injunction became unnecessary and was replaced by a jurisdiction to stay actions. As has been seen by re SCHEBSMAN[240] to bring an action in breach of contract is inequitable, and it is therefore submitted that an airline could apply to the High Court under s.41(b) to restrain the prosecution of an action against its servants and agents in excess of the limits agreed to in the contract of carriage. In addition, it could itself obtain damages for breach of contract against the passenger or consignor, but whether these would be substantial as opposed to nominal, is open to doubt.[241]

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239 Now ss. 36-43 of the 1925 Act.

240 [1944] Ch. 83 (C.A.).

241 See WEST v. HOUGHTON (1879), L.P. 4 C.P.D. 197 where plaintiff recovered nominal damages only. In re SCHEBSMAN [1943] Ch. 366, Uthwatt J., at first instance, expressly reserved the question arising out of WEST's case, as to whether a promisee could obtain more than nominal damages.

(vii) Conclusions

From the foregoing discussion it is submitted that the following conclusions may be drawn where injury to passengers and damage to goods are concerned:

1. In attempting to rely on the limitation provisions expressed to be in his favour by the contract of carriage, the servant or agent of an airline will be met with the objection that he is not a party to the contract and has given no consideration.
2. The following defences will not apply:

    a) Any argument based on the machinery of a trust to assist third parties.
    b) Any argument based on the vicarious immunity, express or implied contract theories. The vicarious immunity theory is not law in England and the other theories are inapplicable because there can be no consideration between the servant/agent and the passenger/consignor.
    c) Any argument based on the doctrine of 'volenti non fit iniuria'.

3. The following defence may apply:

    The passenger or consignor cannot assert a claim,

the enforcement of which involves a breach of contract, even though that contract is one to which the servants or agents are not parties.

4. The carrier may itself prevent the prosecution of the action by applying for a stay of proceedings under s.41(b) of the Supreme Court of Judicature Act, 1925. If the action is completed, the carrier may itself bring an action in contract against the passenger or consignor, but whether the damages obtainable would be more than nominal, is questionable.

3. Death

(i) The Cause of Action

At common law, no cause of action in tort survived the death of either party[242] and no action in tort could be brought by a person who had suffered loss as the result of another's death.[243] This state of affairs was remedied by legislation. The Law Reform (Miscellaneous Provisions) Act, 1934[244] provides that on the death of any person, all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate, and the Fatal Accidents

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242 ROSE v. FORD [1937] A.C. 826.
243 BAKER v. BOLTON (1808) 1 Camp. 493, 170 E.R. 1033.
244 24 & 25 GEO. 5, c.41.

Act, 1846,[245] generally known as Lord Campbell's Act, provides that, on the death of any person, certain of his dependents suffering loss as a result of the death, may recover damages from the person responsible. It is said that this latter Act and the subsequent modifying and supplementing Acts no longer apply to carriage by air[246] since the Carriage by Air Act 1932[247] provides in s.1(4) that any liability imposed by the terms of the Warsaw Convention "...in respect of the death of a passenger shall be in substitution for any liability...either under any statute or at common law,"[248] and the Carriage by Air (Non-International Carriage) Order, 1952[249] extends the same provision to all carriage by air which is not defined as international in the Act. Where the carrier's servants and agents are sued, however, the action will have to be brought under the Fatal Accidents Acts, since the Carriage by Air

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245 9 & 10 VICT., c.93.

246 Street, Law of Torts, 2nd Edit., London, 1959, p. 426.

247 22 & 23 GEO. 5, c.36.

248 s.1(5) of the Law Reform (Miscellaneous Provisions) Act provides: "The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by...the Carriage by Air Act, 1932." It would appear that personal representatives may therefore recover damages in addition to 125,000 francs recoverable by the dependents on their own cause of action under the Carriage by Air Act despite Article 22(1) of the first schedule of that Act which provides that "...the liability of the carrier for each passenger is limited to the sum of 125,000 francs." (Emphasis supplied).

249 S.I. 1952, no. 158.

Act does not provide for a cause of action against them. The problem is then to discover whether the servant or agent may rely on the limitation provisions contained in the contract of carriage between the carrier and the deceased in an action brought against him by the deceased's personal representative either on behalf of the dependents under the Fatal Accidents Acts or on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act. In the following discussion, it is assumed that the conclusions in the last section are correct and that the passenger, if alive, would not be able to recover damages above the limits agreed to in the contract of carriage.

(ii) The Fatal Accidents Acts

S.1 of Lord Campbell's Act provides:

> "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

The important point to notice is that if the deceased could not, at the moment of his death, have maintained an action, no right of action arises under the Act. Thus no action is maintainable

if the deceased had debarred himself from claiming by an exclusion clause in a contract.[250] The question whether an agreement by a deceased passenger to a limitation of the amount of damages recoverable in the event of his injury or death, affected an action under the Fatal Accidents Acts was considered by the Court of Appeal in NUNAN v. SOUTHERN RLY. CO.[251] where the plaintiff's husband was killed through the negligence of the defendant's servants while travelling under a workman's ticket. The ticket contained a condition limiting the liability of the company to £100. The plaintiff argued that her claim under the Acts was not limited by the agreement which her defunct husband had made with the railway company. The Court accepted this argument citing the oft-quoted dictum of Lord Blackburn that the cause of action is "new in its species, new in its quality, new in its principle, in every way new,"[252] a cause of action "in respect of which the damages are estimated on an entirely different basis"[253] and concluding that, since the limitation provision affected the assessment of damages and not the deceased's right of action as an exclusion clause would have done, it could not affect the action of the dependents

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250 See e.g. GRIFFITHS v. EARL of DUDLEY, (1882), 9 Q.B.D. 357. Cf. McKAY & CRAIGIE v. SCOTTISH AIRWAYS LTD. [1948] S.C. 254, U.S.Av.R. 76, 79, where an exclusion clause was held to have the same effect under the Scottish common law. It was also said that the English Lord Campbell's Act was "an echo of the common law of Scotland": [1948] U.S. Av.R. at p. 87, per Lord Mackintosh.

251 [1924] 1 K.B. 223.

252 SEWARD v. The VERA CRUZ, (1884) 10 App. Cas. 59 at pp. 70-71 (H.L.)

253 [1924] 1 K.B. at p. 227.

who were therefore entitled to unlimited damages.

To avoid the effects of this case, a new and notorious condition was added to contracts of air carriage. It disallowed, inter alia, all claims for compensation for injury, fatal or otherwise, however caused.[254] This condition was later withdrawn from the B.E.A. conditions of carriage following the application of the Warsaw Convention to all carriage by air in Britain but was retained for some time by B.O.A.C. who flew over British territory to which the Warsaw Convention had not been extended in this way.[255]

During the continuance in operation of this provision,

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254 "If Carrier's principal place of business is in territory of the British Empire or British Commonwealth of Nations, or in Ireland, or if the law applicable to the contract of carriage is the law of any such territory or any part thereof, it is a condition of the contract of carriage that passengers and baggage are accepted for carriage only upon condition that Carrier shall be under no liability in respect of or arising out of the carriage, and that passengers renounce for themselves, their representatives and dependents all claims for compensation for injury (fatal or otherwise), loss, damage, or delay, howsoever caused, sustained on board the aircraft, or in the course of any of the operations of flight, embarking or disembarking, caused directly or indirectly to passengers or their belongings or to persons who, but for this condition might have been entitled to claim, and whether caused or occasioned by the act, neglect or default of the Carrier, or otherwise howsoever, and that passengers for themselves and their estates will indemnify Carrier against any such claim."

255 See note in [1957] J.B.L. 211 and Australian case of MARTIN v. QUEENSLAND AIRLINES PROPRIETARY, LTD., (1956) Q.L.R. XLIX, nos. 7 & 8 (Sup. Ct. of Queensland) cited there in illustration of necessity for retention of clause by B.O.A.C. See also LUDDITT v. GINGER COOTE AIRWAYS [1947] A.C. 233 (P.C.).

it is submitted, the dependents action against the servant or agent would have been barred because, following the conclusion of the last section, the deceased could not have maintained an action against them if death had not ensued. However, where, as is now the case, the contracts of carriage only limit their liability, the dependents' action against the servants or agents will not be affected and they can recover to the full extent of their pecuniary loss.[256]

(iii) The Law Reform (Miscellaneous Provisions) Act, 1934

s.1(1) of this Act provides, inter alia:

> "Subject to the provisions of this section, on the death of any person after the commencement of the Act, all causes of action...vested in him shall survive...for the benefit of his estate."

The personal representative is, under the Act, considered to be in the same position in which the deceased would have been had he lived. Thus, the defendant may rely on any defence available to him, had an action been brought against him by the deceased during the latter's lifetime.[257]

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256 In PRESTON v. HUNTING AIR TRANSPORT [1956] 1 Q.B. 454, a case under the Carriage by Air Act, the judge awarded to the two infant plaintiffs, damages for the loss sustained by the death of their mother at an age when they needed her care the most. For a criticism of this decision in view of the long line of cases under the Fatal Accidents Acts in which no sum over and above financial loss has been awarded, see Neil, International Air Carriage - Limitation of Liability, (1956) 19 Mod. L.R. 548.

257 See ROSE v. FORD [1937] A.C. at p. 843.

It is therefore submitted that the reasoning of the NUNAN case has no application here, since the action is not "in every way new" and the assessment of damages is not conducted on a completely different basis. The servant or agent may rely upon the limitation of his liability as against the personal representative.

(iv) Conclusions

The conclusions are simple and have already been stated. The NUNAN case prevents a servant or agent from relying upon the limitation provisions in an action brought by the personal representatives on behalf of the dependents under the Fatal Accidents Acts. It does not prevent them from relying upon the provisions in an action brought by the personal representatives on behalf of the estate under the Law Reform Act, the assumption being that the conclusions in the last section are correct. If not, of course, both actions are unaffected by the limitation clauses.

4. Conclusion

The servants and agents are in a very uncertain position when attempting to rely upon the provisions in contracts of carriage by air purporting to limit their liability. This is the main conclusion of this chapter since only one argument seems to have any substance, the

breach of contract argument, and this has been expressly dissented from by the Court of Appeal in COSGROVE v. HORSFALL.[258] If the latter case is correct, then, in English Law, the servant or agent when sued for the death or injury of a passenger or for damage to goods or baggage will be subject to unlimited liability, a result which defeats the purpose of limiting liability and places a burden on the person least able to bear it. Whether for or against the principle of limiting liability, no one can be satisfied with a situation in which the economically stronger is protected while the weaker remains subject to the full rigours of the law. Either both the carrier and his servants and agents should be protected or neither should be protected at all. Both solutions would ensure that any litigation will be directed against the carrier and not, as at present, against the servants and agents.

Since the United Kingdom has ratified the Warsaw Convention as amended by the Hague Protocol, it is clear that the Government feels that there is no policy reason against limitation of liability. Once the necessary number of States have ratified it, therefore, it is to be hoped that its provisions will be rapidly implemented in England and extended to all air carriage. Until then, two interim solutions may be suggested, first the drafting of a clause in the contract of carriage entitling the carrier to the excess of damages received from the servant

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258 (1946) 62 T.L.R. 140; 175 L.T. 334. See supra, note 150.

or agent in contravention of the limitation clause. The carrier would then, under well-established principles of commercial law, be liable to hold the payment so received by him as trustee for his servant or agent.[259] This clause, of course, could not affect the action brought on behalf of the dependents under the Fatal Accidents Acts but it would affect an action brought on behalf of the estate. The second interim solution is only effective where the carriage of goods is concerned. A clause may be drafted in the contracts of employment entitling the servants and agents to the protection afforded by the limitation provisions in air waybills. The goods owner would then be bound by this clause under an established principle of the law of bailments.[260] The carrier should, in the meantime, try and prevent any actions against his servants or agents in excess of the limits by applying for a stay of proceedings under S. 41(b) of the Supreme Court of Judicature Act, 1925.[261]

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259 Solution suggested by R. P. C., The Stevedore Cases: Getting Round the Result, [1959] J.B.L. 290.

260 See Lord Denning in SCRUTTONS, LTD., v. MIDLAND SILICONES, LTD., supra, p. 60

261 15 & 16 GEO. 5, Ch. 49. See supra, note 238.

# CHAPTER III

## AMERICAN LAW

### 1. Introduction

In the chapter on English law, it was all along assumed correctly that a carrier may lawfully limit his personal and vicarious liability by contract.[262] In American common law, this assumption cannot be made since it is not necessarily so. A regulatory system set up by the Civil Aeronautics Act, 1938, and substantially reenacted in the Federal Aviation Act, 1958 raises the question of how far and to what extent the common law has been superceded or adopted in the field of interstate air carriage. The main part of this chapter will therefore consider whether the carrier can limit his own liability, first under the law before the passing of the 1938 Act and secondly under the tariff system created by that Act. Following the conclusion to this section, there will be a consideration of whether any limitation allowed on the carrier's liability may be extended to his servants and agents. In considering the common law position, the discussion will be confined to common carriage.[263]

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262 See eg., aviation cases of FOSBROOKE HOBBES v. AIRWORK, LTD., [1937] 1 ALL E.R. 108; [1938] U.S.Av. R. 194 and LUDDITT v. GINGER COOTE AIRWAYS, [1947] A.C. 233, [1947] U.S.Av. R. 1. (P.C.)

263 For the distinction between common and private carriers in air carriage and the degree of care required of them, see Rhyne, Aviation Accident Law, Washington, 1947, p. 45 et seq.

2. The Common Law

(i) Surface Carriers

The general rule in most of the United States is that a common carrier of goods and passengers can only limit and exclude its liability when that limitation or exclusion is just and reasonable. It is not just and reasonable for a common carrier to limit or exclude its responsibility for the negligence of itself or its servants. The leading case on the subject is N.Y. CENTRAL RAILROAD CO. v. LOCKWOOD[264] where a drover was negligently injured while travelling with his cattle under a general contract exempting the carrier from all responsibility. The Supreme Court held that the drover was a passenger for hire[265] and that a common carrier cannot exempt himself from

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264 17 Wall 357, 21 L.ed. 627 (1873). Cf. earlier cases of N.J. STEAM NAVIGATION CO. v. MERCHANTS BANK, 6 Howard 344, 12 L.ed. 465 (1848) (Agreement that goods were at all times exclusively at the risk of the shipper held not to affect carrier's liability for the gross negligence of his servants & agents); YORK MFG. CO. v. ILL. CENT. R.R. CO., 3 Wall 107, 18 L.ed. 170 (1866) (Carrier may restrict or diminish its common law liability by contract so long as it does not attempt to cover losses by negligence or misconduct).

265 Carrier may stipulate in a free railway pass that he will not be liable for the negligence of himself or his servants. See NORTHERN PACIFIC R. CO. v. ADAMS, 192 U.S. 440, 48 L.ed. 513 (1904); BOERING v. CHESAPEAKE BEACH R. CO., 193 U.S. 442, 48 L.ed. 742 (1904); KANSAS CITY R. CO. v. VAN ZANT, 260 U.S. 459, 67 L.ed. 348 (1923); FRANCIS v. SOUTHERN PACIFIC CO., 333 U.S. 445, 92 L.ed. 798 (1948). These four cases were cited in BRAUGHTON v. UNITED AIR LINES, INC., 189 F.Supp. 137, 7 Avi. 17, 264 (DC-Kan. 1960) (Condition in deceased's free pass relieving carrier from all liability arising out of common law negligence held valid.).

responsibility for the negligence of himself or his servants, a rule which the court said applied both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Two fundamental reasons were given for the principle. They were stated with clarity in BANK of KENTUCKY v. ADAMS EXPRESS CO.[266] where a stipulation by the defendant that it would not be liable for the loss of goods by fire was under consideration.

> "The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed, extreme vigilance and caution, more probable, takes away the security of the consignors and makes common carriage more unreliable."[267]

The reason that the courts cannot allow a condition which might result in an exercise of less care, is not convincing. It forgets that the carrier and his servants have other, perhaps more compelling reasons for exercising the greatest amount of care possible. Accidents, particularly in aviation, invariably cause grave injuries and often death to the employees of the carrier together with extensive damage to equipment. This consideration alone would make any carrier or servant think twice before

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266 93 U.S. 174, 23 L.ed. 872 (1876).

267 Cf. LIVERPOOL STEAM CO. v. PHENIX INS. CO., 129 U.S. 397, 32 L.ed. 788 at p. 792 (1889). "A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment." "The carrier and his customers do not stand upon a footing of equality."

taking any undue risk. Again, competition with other forms of transport ensures a high degree of care on the part of the carrier; more accidents, less public confidence and fewer passengers and consignors. The second reason, namely that the law should prevent the carrier from taking advantage of its superior bargaining position is perhaps less convincing today since rates and tariffs are now under Government supervision and a condition will not be imposed upon a defenceless passenger/shipper unless filed with and thus subject to the approval or otherwise of the competent agency. Also, that some conditions which limit liability for negligence are not unreasonable, is accepted by the Government since it has adhered to the Warsaw Convention.[268]

However this may be, it is clear that the common law rule is still very much the law. In fact, the Supreme Court said in 1952 that, although the general rule was fashioned by the courts, more than a century's use had conferred upon it "the force and precision of a legislative enactment."[269]

There is, however, one so-called exception to it. In HART v. PENNSYLVANIA R.R. CO.,[270] the plaintiff signed a contract agreeing on a valuation of horses shipped and the freight rate was based on the condition that the carrier assumed liability only to the extent of the agreed valuation even for loss by his own negligence. In a suit

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268 But see supra, note 73.

269 UNITED STATES v. ATLANTIC MUT. INS. CO., 343 U.S. 236 at p. 239, 96 L.ed. 907 (1952).

270 112 U.S. 331, 28 L.ed. 717 (1884).

brought because of injuries negligently caused to the horses, the Supreme Court refused to allow evidence that these were race horses of far greater value than that agreed upon in the contract of carriage. The Court agreed with the general rule that a carrier cannot stipulate for exemption from the consequences of his own negligence or that of his servants but said:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater."[271]

There is a qualification in that the shipper must have a freedom of choice as to whether he will enter into such an agreement and some consideration such as a lower rate must be given him for so doing.[272] If this condition is satisfied, then the shipper will be bound, even if there is a gross disproportion between the actual value of the goods and the value stated in

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271 28 L.ed. at p. 721.

272 See e.g. UNION PACIFIC R. CO. v. BURKE, 255 U.S. 317, 65 L.ed. 656 (1921). "...valuation agreements have been sustained only on principles of estoppel, and in carefully restricted cases where choice of rates was given." (255 U.S. at p. 321) "This valuation rule...is...an exception to the common law rule of liability of common carriers and the latter rule remains in full effect as to all cases not falling within the scope of such exception." (255 U.S. at p. 322). See generally Williston on Contracts, revised edition, New York, 1936, 1110 and cases there cited.

the contract of carriage.[273]

(ii) Air Carriers

Despite a number of pleas that the common law rule should not be automatically applied to air carriage just because they happen to be common carriers,[274] four cases concerning wrongful death applied the rule before 1938 and it is clear from two subsequent cases under the tariff system that the rule would have been applied equally to the carriage of goods and baggage.

In ALLISON v. STANDARD AIR LINES, INC.,[275] a passenger had been killed in a plane crash. In an action brought by the administrator of the deceased's estate, the carrier pleaded, inter alia, a provision of the ticket which had been signed by the decedent. By it, the aircraft company was to be held liable only for proven negligence. The court said that the defendant was a common carrier and could not contract out of his liability as such. That is, a common

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273 See GEORGE N. PIERCE CO. v. WELLS FARGO & CO., 236 U.S. 278, 59 L.ed. 576 (1915). (Plaintiff recovered $50 for lost automobiles whose actual value was $20,000).

274 See e.g. Allen, Limitations of Liability to Passengers by Air Carriers, (1931) 2 J. Air L. 325 disagreeing with Greer, Civil Liability of an Aviator as Carrier of Goods and Passengers, (1930) 1 J. Air L. 241; Edmunds, Aircraft Passenger Ticket Contracts, (1930) 1 J. Air. L. 321. Cf. Rittenberg, Limitation of Airline Passenger Liability, (1935) 6 J. Air L. 365 and Buhler, Limitation of Air Carrier's Tort Liability and Related Insurance Coverage - A Proposed Federal Air Passenger Act, (1940) 11 Air L.R. 262. See also Patrinelis, Limitation of Liability for Personal Injury by Air Carrier, 13 A.L.R. (2d) 337.

275 [1930] U.S. Av.R. 292 (DC-Calif. 1930); aff'd 65 F.(2d) 668, 1 Avi. 462, [1931] U.S. Av. R. 92 (CA-9 1931) withoutreference to problem in question.

carrier cannot, by a clause in a ticket, reduce the amount of care required of him. This is not reasonable since it has the effect of cutting down his liability for negligence.

> "The issuance of a ticket with provisions printed thereon such as have been placed in evidence here does not change the relations of the parties to this action."[276]

Despite this, however, the jury found in favour of the defendant.

In LAW v. TRANSCONTINENTAL AIR TRANSPORT, INC.,[277] the plaintiff's husband was killed in an aircraft crash while travelling with a ticket with a clause in it stating that the defendant was not a common carrier and an agreement by the passenger, exempting the defendant from any liability for injury to or death of the passenger, whether caused by the negligence of the defendant or otherwise. In his charge to the jury, Kirkpatrick, D.J. said at one point that:

> "No common carrier has a right to ask its passengers to relieve it of failure on its part to perform the duty of care which the law requires of it."[278]

Nor could the carrier escape liability by calling itself a private carrier.

In CURTISS-WRIGHT FLYING SERVICE, INC. v. GLOSE,[279] the clause in the ticket of the deceased passenger provided

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276 [1930] U.S. Av. R. at p. 297.
277 [1931] U.S. Av. R. 205 (ED-Penn. 1931) (Not officially reported).
278 Ibid. at p. 213.
279 66 F. (2d) 710, [1933] U.S. Av. R. 26, 1 Avi. 466 (CA-3, 1933); cert. denied, 290 U.S. 696, [1934] U.S. Av. R. 20.

'that in the event of the death or injury of the holder due to any cause for which the Company is legally liable, the Company's liability is limited to $10,000.' The Court citing, inter alia, BANK of KENTUCKY v. ADAMS EXP. CO.[280] said that:

> "the policy of the law is settled that common carriers, in dealing with passengers, cannot compel them to so release their legal liability for their own negligence."[281]

The judge could see no reason "why the same principles applicable to land and water should not also be applied to air transportation."[282]

Finally, in CONKLIN v. CANADIAN-COLONIAL AIRWAYS, INC.,[283] the ticket of the defunct traveller contained terms and conditions signed by the passenger, limiting the liability of the carrier according to the price paid. The passenger was given no choice between full and limited liability, however, and the New York Court of Appeal held this to be fatal to its validity since while exemption or limitation provisions are allowed by the New York courts, a material element in the decisions had always been that the passenger could choose between full or limited liability. There was no question in the court's mind that the common law rule and its New York modification applied to air carriage.

The two cases which indicate that the rule would be

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280 See supra note 266. The clause in this carriage of goods case excluded liability altogether.

281 1 Avi. at p. 468.

282 Ibid.

283 266 N.Y. 244, 194 N.E. 692, [1935] U.S. Av. R. 97, 1 Avi. 571 (CA-N.Y. 1935). Noted in (1935) 20 Corn. L.Q. 495.

applied to the carriage of baggage and goods by air are SIWALK v. PENNSYLVANIA-CENTRAL AIRLINE CORP.[284] and RANDOLPH v. AMERICAN AIRLINES, INC.[285] In the former case, the action was for damages to the baggage of an intra-state passenger caused by the breaking of a bottle of toilet water through the negligence of the defendant airline. The Court held that the enumeration in the interstate tariff on file with the Civil Aeronautics Authority of articles not acceptable as baggage, did not include a reasonable amount of toilet water. In the alternative, it was held that if the intrastate passenger was not subject to the interstate tariffs, she was entitled to recover under the rule that a common carrier may not stipulate against liability for its own negligence.

In RANDOLPH v. AMERICAN AIRLINES,[285] considered more fully below, Fess J. referred to the general rule of law that 'common carriers cannot stipulate for immunity from their own or their agents' negligence' and to the distinction made at common law 'between a contract immunizing a carrier from liability for negligence and a contract limiting liability upon an agreed valuation at a higher charge or rate.' It is clear that he regarded both rules as applicable to air carriers.

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284 [1941] U.S. Av. R. 66, 1 Avi. 900 (Cir. Ct. Wayne County, 1940).

285 144 N.E.(2d) 878, 5 Avi. 17, 160 (Ohio Ct. of App. 1956). Discussions of the common law rule and personal injuries can be found in BERNARD v. U.S. AIRCOACH, 117 F. Supp. 134, 4 Avi. 17, 200 (DC-Calif. 1953) and CROWELL v. EASTERN AIR LINES, INC., 81 S.E. (2d) 178, 4 Avi. 17,314 (N.C. Sup. 1954).

At common law, then, an air carrier transporting goods and passengers for hire, cannot exclude or limit his liability for the negligence of himself or of his servants and agents. In a contract for the carriage of goods or baggage, however, he can limit his liability to a fixed valuation provided the passenger or consignor has the choice of declaring a higher value and paying an additional charge. How far and to what extent this common law has been superceded or adopted in interstate carriage by the tariff system has now to be considered.

## 3. The Tariff System

### (i) The Civil Aeronautics Act, 1938,[286] as reenacted in the Federal Aviation Act, 1958,[287] and the Economic Regulations of the Civil Aeronautics Board

The Civil Aeronautics Act was passed for substantially the same reasons as the Interstate Commerce Act, 1887.[288] It is influenced considerably by the experience obtained under that Act which, with its subsequent amendments, will accordingly be referred to from time to time for comparative purposes. The 1887 Act regulated interstate railroad commerce and set up the Interstate Commerce Commission to

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286 52 Stat. 973, as amended 49 U.S.C. 401-722 (1952).
287 Public Law 726, 85th Cong., 2d. Sess.
288 24 Stat. 379, 49 U.S.C.A. 1 etc. (Supp. 1947).

supervise this regulation. Subsequently, shipping[289] and road[290] transportation were added to the Commission's field of jurisdiction. Congress thought, however, that a separate agency was required to supervise the regulation of air commerce and so it established the Civil Aeronautics Board (C.A.B.)[291] by passing the Civil Aeronautics Act in 1938. The main purposes of this legislation were to prevent discrimination and to ensure uniformity in the treatment of passengers and shippers, thus putting them more on a footing of equality with the carriers whose superior bargaining power had hitherto been imperfectly controlled by common law rules and statutes which varied from state to state. The tariff system was to be the means by which these purposes were to be effected.

The principal requirement of the Act is the filing, posting and publishing of tariffs.[292] These tariffs are to be filed with

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289 Shipping Act, 1916, as amended, 46 U.S.C.A. 801-842.

290 Motor Carrier Act, 1935, 49 Stat. 543, 49 U.S.C.A. 301-327.

291 A complete statement of C.A.B.'s organization and functions may be found in Public Notice No. 10 of the C.A.B. issued January 1st, 1956. Printed in full in Speiser, Preparation Manual for Aviation Negligence Cases, New York, 1958. ch. 4.

292 s. 403(a). 'Every carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void...'

the Civil Aeronautics Board and are to show all rates, fares, and charges for air transportation and, to the extent required by regulations, practices and services in connection with such air transportation.[292] Strict observance of its tariffs is required of the carrier,[293] and departure from the filed tariffs is made a criminal offence.[294] The tariffs may be changed only after thirty days notice although the Board in the public interest, may allow a change upon shorter notice.[295] It is the carrier's duty to establish just and reasonable tariffs[296] and

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293 s.403(b). 'No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or lessor different compensation for air transportation or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein...'

294 s.902(a), (d)

295 s.403(c).

296 s.404(a). 'It shall be the duty of every carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

discrimination resulting from their application is prohibited.[297] The Board is given limited judicial powers. It can suspend a new tariff provision from going into effect if it believes the provision departs from the requirements of the Act. This power is not applicable to initial tariffs, however.[298] Once a tariff provision has gone into effect, the Board can, upon complaint or upon its own initiative, determine whether it is or will be unjust, unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial and it can

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297 s.404(b). 'No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

298 s.1002(g) 'Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice;...after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective...Provided, that this subsection shall not apply to any initial tariff filed by any air carrier.'

prescribe a lawful provision to take its place if need be.[299] The Board can also conduct investigations upon complaint or upon its own initiative, into any suspected violation of the Act[300] and can compel any offender to comply therewith.[301] One other important and relevant section is s.1006 which accounts for some of the confusion concerning the legal effect of the Act:

> "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

The C.A.B. has made many regulations pursuant to the Act and those which concern tariffs are contained in Parts 221-227 of the Economic Regulations. Tariffs are to apply to persons or property but not to both[302] and the only contents allowed in tariffs are those prescribed by Parts 221.33 - 221.41. Part 221.38(a)

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299 s.1002(d). 'Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare or charge (or the maximum or minimum, or the maximum and minimum thereof), thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective...'

300 s.1002(a), (b).

301 s.1002(c).

302 Part 221.21(i).

prescribes the contents of the rules tariffs.[303] It will be noticed that the provisions allowed are not defined specifically but they must affect the rates, fares or charges for air transportation or govern the terminal services or other services which the carrier performs in connection with air transportation. As will be seen, the ambiguity inherent in this part has given rise to conflicting court decisions. However in the sphere of personal liability, there can be no ambiguity since Part 221.38(h), provides that tariff rules limiting or conditioning the carrier's liability for personal injury or death will not be accepted from March 2, 1954.[304] Later in that year, the C.A.B. issued an

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303 'Rules & regulations (a) Contents. Except as otherwise provided in this part, the rules and regulations of each tariff shall contain:
(1) Such explanatory statements regarding the fares, rates, rules or other provisions contained in the tariffs as may be necessary to remove doubt as to their application,
(2) All the terms, conditions or other provisions which affect the rates, fares or charges for air transportation named in the tariff,
(3) All of the rates or charges for and the provisions governing terminal services and all other services which the carrier undertakes or holds out to perform on, for, or in connection with air transportation,
(4) All other provisions and charges which in any way increase or decrease the amount to be paid on any shipment or by any passenger or by any charterer or which in any way increase or decrease the value of the services rendered to the shipment or passenger or charterer.

304 (h) Personal liability rules. No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on or after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms.'

order requiring carriers to cancel from their tariffs on or before January 1, 1955, all rules, regulations or provisions stating any limitation on, or condition relating to, carrier liability for personal injury or death.[305]

Thus, a filed limitation of liability provision to be valid must first be statutorily authorized. To satisfy this requirement, it must be a rule in connection with air transportation and its filing must be required by the Board's regulations. To satisfy these regulations, it must be a rule which affects rates, fares or charges or which governs terminal services or other services provided by the carrier. Limitation of liability for personal injuries or death is expressly disallowed. If it can be shown that a limitation provision is statutorily authorized, it then has to face the test of reasonableness. Several problems arise when the validity of a tariff is being tested in this way but, before considering them, the legal effect of properly filed tariffs will be briefly stated.

(ii) The Effect of Properly Filed Tariffs

Valid tariffs become a part of the contract of carriage and, as such, are binding on all parties irrespective of actual knowledge. Any contractual provisions or agreements

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305 Order Serial No. E-8756, issued Nov. 10, 1954, 19 Fed. Reg. 7387.

inconsistent with them, are void.[306] These principles were established by the Supreme Court when called upon to construe the effect of tariffs filed, posted and published pursuant to the Interstate Commerce Act. They have been applied without dissent as the effect of tariffs on file with the C.A.B., most reliance being placed upon the Supreme Court decisions in BOSTON & M.R. CO. v. HOOKER[307] and WESTERN UNION TELEGRAPH CO. v. ESTEVE BROS. & CO.[308]

In the former case, the tariff in question contained a limitation as to baggage liability based upon the requirement to declare its value when more than $100 and pay an excess charge. The passenger had no actual notice of the tariff and no inquiry was made as to the value of his baggage upon acceptance. Nevertheless, the Supreme Court held him bound by it, a Massachusetts common law rule to the contrary, notwithstanding.

> "...the effect of filing schedules and rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act, to have but one rate, open to all alike and from which there could be no departure."[309]

The reasons why the defendant is bound by the tariff whether or not he had knowledge of it, were clearly stated in the ESTEVE case where a

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306 For a detailed discussion of the evolution of these principles, see Markham & Blair, The Effect of Tariff Provisions Filed under the Civil Aeronautics Act, (1948) 15 J. Air L. & Com. 251, pp. 259-273.

307 233 U.S. 97, 58 L.ed. 869 (1914).

308 256 U.S. 566, 65 L.ed. 1094 (1921).

309 233 U.S. at p. 112. Actual value of baggage was $2,000.

tariff limited the telegraph company's liability for mistake in the transmission of unrepeated cablegrams to the amount of the company's share of the tolls collected. The tariff offered alternative rates for repeated and unrepeated cable messages. It was said:

> "The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in § 3 of the Interstate Commerce Act. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not."[310]

For the same reasons, any agreement which is inconsistent with the tariffs, is void. Thus, in one case, a lower rate than that filed with the Interstate Commerce Commission was quoted to a consignor who shipped goods under that lower rate. The Supreme Court held that the consignor must pay the full rate as stated in the tariffs.[311] Similarly, it was held that a shipper could not recover damages for the breach of an agreement by which the carrier had agreed to expedite a shipment of horses over its own lines so that it would reach the point of connection with the next carrier in time to

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310 256 U.S. at p. 573. See also AMERICAN EXPRESS CO. v. U.S. HORSESHOE CO., 244 U.S. 58, 61 L.ed. 990 (1917) (Contract may not be avoided, where it is valid from the point of view of the established rate sheets on file with the I.C.C. by the suggestion that by neglect or inattention, the contract was not read by the shipper); AMERICAN RLY. EXP. CO. v. DANIEL, 269 U.S. 40, 70 L.ed. 154 (1925) (Carrier knew that a servant of the plaintiff was unaware of a package's value and did not know that lower values secure lower rates. Nevertheless carrier's liability was limited).

311 TEXAS & P.R. CO. v. MUGG & DRYDEN, 202 U.S. 242, 50 L.ed. 1011 (1906).

be carried by a special, fast, stock train the next morning. This was an undue and unreasonable preference forbidden by the Interstate Commerce Act since the shipper was only charged the regular established joint through rates, which made no provision for such service. The shipper did not know this.[312]

The courts have found no difficulty in applying these rules to tariffs filed under the Civil Aeronautics Act. In JONES v. NORTHWEST AIRLINES,[313] the applicable tariff permitted the carrier to cancel any flight at any time it deemed necessary and declared the carrier not responsible for failure of the aircraft to depart or arrive on the scheduled time. The plaintiff contended that he had a special contract with the carrier in which the limited time he had for making the trip, was provided for. The Washington Supreme Court held, inter alia, that his ticket was sold subject to tariff regulations with which he was charged with notice and that since the alleged specific contract was inconsistent with the terms of the tariff schedules, it was void.

> "In buying this ticket, the appellant bought it subject to the regulations. The respondent could not sell it on any other basis without violating the law, for s. 403 of the Civil Aeronautics Act... requires the filing of these rules and regulations

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312 CHICAGO & A.R. CO. v. KIRBY, 225 U.S. 155, 56 L.ed. 1033 (1912). Cf. SOUTHERN R. Co. v. PRESCOTT, 240 U.S. 632, 60 L.ed. 836 (1916). "It is...clear that with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations." See also DAVIS v. CORNWALL, 264 U.S. 560, 68 L.ed. 848 (1924).

313 22 Wash. (2d) 863, 157 P. (2d) 728, 1 Avi. 1272 (Wash. S.C. 1945).

and forbids a carrier from departing therefrom."[314]

This case together with the District Court decision in MACK v. EASTERN AIR LINES[315] where it was held, inter alia, that the plaintiff was bound by the conditions specified in a similar tariff whose rules had become a part of the contract between the carrier and the passenger, has been followed on numerous occasions as indicating the legal effect of tariffs properly filed with the Civil Aeronautics Board.[316]

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314 1 Avi. at p. 1273.

315 87 F. Supp. 113, 2 Avi. 15,002 (DC-Mass. 1949).

316 See and cf. WILHELMY v. NORTHWEST AIR LINES, INC., 86 F. Supp. 565, 2 Avi. 15,023 (DC-Wash. 1949); Lichten v. EASTERN AIR LINES, INC., 189 F.(2d) 939, 3 Avi. 17,612 (CA-2 1951). ("To the extent that these rules are valid, they become a part of the contract under which the appellant and her baggage were carried:" Chase C.J. Frank C.J., who dissented, did not disagree with this proposition); FURROW & CO. v. AMERICAN AIR LINES, INC., 102 F. Supp. 808, 3 Avi. 17,915 (DC-Okla. 1952); WITTENBERG v. EASTERN AIR LINES, Inc., 126 F. Supp. 459, 4 Avi. 17,560 (DC-S.C. 1954) (Promise by ticket agent to plaintiff that a connection would be made in time, held invalid and unenforceable since it was inconsistent with tariff rule providing that carrier is not liable for failure to operate a flight on schedule); WADEL v. AMERICAN AIR LINES, INC., 269 S.W. (2d) 855, 4 Avi. 17,421 (Tex. Ct. of Civ. App. 1954); S. TOEPFER, INC. v. BRANIFF AIRWAYS, INC., 135 F. Supp. 671, 4 Avi. 17,900 (DC-Okla. 1955); WILKES v. BRANIFF AIRWAYS, INC., 288 P. (2d) 377, 4 Avi. 17,808 (Okla. Sup. 1955); TRAMMELL v. EASTERN AIR LINES, INC., 136 F. Supp. 75, 4 Avi. 18,105 (DC-S.C. 1955); ROSCH v. UNITED AIR LINES, INC., 146 F. Supp. 266, 5 Avi. 17,448 (DC-N.Y. 1956); CLINICAL SUPPLY CORP'N. v. BRANIFF AIRWAYS, INC., 4 Avi. 18,139 (N.Y. Sup. 1956); RANDOLPH v. AMERICAN AIRLINES,INC., 144 N.E. (2d) 878, 5 Avi. 17,160 (Ohio Ct. of App. 1956); N.Y. & HONDURAS ROSARIO MINING CO. v, RIDDLE AIRLINES, INC., 3 A.D.

Continued...

(iii) The Validity of Tariffs

It is intended to discuss many of the cases which have had something to say about a tariff's validity. These cases will be grouped according to the tariff rule under consideration. To prevent confusion, however, it is proposed to declare now instead of in conclusion, the method by which it is thought a tariff's validity is to be tested by the courts. Any modifications to or deviations from this method will be noted in the course of the discussion.

There are two questions to be kept in mind. First, who has jurisdiction to determine the validity of a tariff on file with the Civil Aeronautics Board? Secondly, what law applies to determine the validity of a tariff on file with the C.A.B.?

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316 (Cont) (2d) 457, 5 Avi. 17,397 (N.Y. Sup., App. Div. 1957), aff'd., 4 N.Y. (2d) 755, 149 N.E. (2d) 93 (1958); KILLIAN v. FRONTIER AIRLINES, INC., 150 F. Supp. 17, 5 Avi. 17,450 (DC-Wyo. 1957); RIDDLE AIR LINES, INC. v. FAMOUS COTTONS, INC., 5 Avi. 18,049 (N.Y. Sup. 1958) (Alleged agreement to deliver goods within two days of arrival held illegal since it conflicted with tariff stating that carrier is not liable for delay unless caused by it's negligence); MUSTARD v. EASTERN AIR LINES, INC., 156 N.E. (2d) 696, 6 Avi. 17,323 (Mass. Sup. Jud. Ct. 1959); UNITED AIR LINES, INC. v. KROTKE, 363 P. (2d) 94, 7 Avi. 17,465 (Nev. Sup. 1961) (Failure to introduce tariff regulations in evidence held fatal to passengers claim, since it precluded a determination by the court of the terms and conditions of the contract of carriage of which they formed a part); SLICK AIRWAYS, INC. v. U.S., 292 F.(2d) 515, 7 Avi. 17,515 (U.S. Ct. of Claims 1961) (Air carrier was entitled to an increased rate after it had filed a new tariff and although it continued to receive the old rate due to a clerical error in billing); ROSEN CHEIN v. TRANS WORLD AIRLINES, INC., 349 S.W. (2d) 483, 7 Avi. 17,604 (St. Louis Mo. Ct. App. 1961).

It is clear that the courts of law have jurisdiction to decide whether a filed tariff is authorized or required to be filed by the Civil Aeronautics Act and the C.A.B. regulations and whether that tariff has been violated. A more difficult question is whether the courts have jurisdiction to declare a tariff invalid if it is statutorily authorized. Despite some judicial and juristic opinion to the contrary, it will be submitted that the primary jurisdiction doctrine as explained below and as interpreted by the majority judicial opinion to date, gives primary jurisdiction to the Civil Aeronautics Board to decide whether or not a tariff has been, is, or will be unreasonable, unjust, unjustly discriminatory, unduly preferential or unduly prejudicial and that these are the only grounds upon which the validity of a tariff may be attacked once it is shown to be statutorily authorized. Until the C.A.B. has declared a tariff invalid on one of the above grounds, its approval of the tariff is presumed.

Federal law, that is, the Civil Aeronautics Act & regulations made pursuant thereto by the C.A.B., has been applied by the courts to determine the validity of a tariff. If the Act or the C.A.B. regulations do not require the filing of a particular tariff, state law applies.

These will be the conclusions. There now follows a discussion of the authorities from which these conclusions are drawn.

A - Cancellation of Flights

In ADLER v. CHICAGO & SOUTHERN AIR LINES,[317] the plaintiff sought to recover damages suffered by him as a result of the defendant's cancellation of a flight and for its failure to make other arrangements for his transportation to St. Louis. The defendant moved to dismiss the action on the ground that the plaintiff had not exhausted all of his remedies before the C.A.B. The Court briefly discussed the primary jurisdiction doctrine as it had been applied under the Interstate Commerce Act and the Shipping Act, 1916 and finding that the Civil Aeronautics Act was not dissimilar in its purpose and scope from these two Acts, applied the doctrine to the case before them. Since it was apparent that the practice of cancelling scheduled flights was a 'practice' within the meaning of the Act, it following that the reasonableness or lawfulness of such practice could only be determined by the C.A.B. and,

> "this court is without jurisdiction to grant any relief to the plaintiff in the absence of a finding by that Board that the practice complained of is unlawful or unreasonable, and until the plaintiff is able to allege in a complaint that he has exhausted all of his remedies before that Board."[318]

The application of the primary jurisdiction doctrine to the tariff system under the Civil Aeronautics Act was severely criticized at the time,[319]

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317 41 F. Supp. 366, 1 Avi. 995 (DC-Miss. 1941). 318 1 Avi. at p. 998.

319 See e.g. Barnhard, Primary Jurisdiction and Administrative Remedies, (1942) 30 Georgetown L.R. 545; Markham & Blair, op. cit., supra note 306, at p. 281; King, The Effect of Tariff Provisions: Some Further Observations, (1949) 16 J. Air L. & Com. 174 at p. 183.

but although this criticism has been approved judicially once or twice, it has had little effect in practice. The doctrine[320] was first enunciated by the Supreme Court in TEXAS & P.R. CO. v. ABILENE COTTON OIL CO.[321] where the plaintiff was attempting to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment. The Court held that no relief could be obtained without reference to any previous action by the Interstate Commerce Commission. A major factor in the decision was the power granted to the Commission by the Interstate Commerce Act to hear legal complaints of and award reparations to individuals for wrongs unlawfully suffered from the past application of an unreasonable rate. The continued existence of a similar power in the courts would be absolutely inconsistent with these provisions of the statute, notwithstanding article 22 which provides that nothing contained in the Act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of the Act are in addition to such remedies.[322]

The court also argued that

> "if without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that...a uniform standard of rates in the future would be impossible."[323]

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320 See, generally, Note, (1938) 51 Harv. L.R. 1251.
321 204 U.S. 426, 51 L.ed. 553 (1907).
322 Cf. Civil Aeronautics Act, s.1106.
323 204 U.S. at p. 440.

Later, the Supreme Court held in ROBINSON v. BALTIMORE & O.R. CO.[324] that the doctrine applied to cases involving rates attacked for being unjustly discriminatory. If the courts were to take jurisdiction in the absence of an investigation and order by the I.C.C., this

> "would be in derogation of the power expressly delegated to the Commission and would be destructive of the uniformity and equality which the act was designed to secure.[325]

In NORTHERN P.R. CO. v. SOLUM[326] the doctrine was held to apply to "any practice of the carrier which gives rise to the application of a rate."[327]

Impressed with the similarity between the Interstate Commerce Act and the Shipping Act of 1916, the Supreme Court had no difficulty in applying the doctrine to the practices of steamship companies in U.S. NAVIGATION CO. v. CUNARD S.S. CO.[328]

The main criticism of the application of the doctrine to interstate aviation is that unlike the I.C.C., the C.A.B. has no power to grant reparations for the past application of an unreasonable tariff. Indeed, it has no power to pass upon the validity of a tariff retroactively

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324 222 U.S. 506, 56 L.ed. 288 (1912).
325 222 U.S. at p. 510.
326 247 U.S. 477, 62 L.ed. 1221 (1918).
327 247 U.S. at p. 483. See also DIRECTOR GENERAL OF RAILROADS v. VISCOSE CO., 254 U.S. 498, 65 L.ed. 372 (1921). (I.C.C. had initial jurisdiction over contention that an amendment to a freight rate by which silk was included among the articles that would not be accepted for freight, was invalid.).
328 284 U.S. 474, 76 L.ed. 408 (1932).

at all. It can only determine whether a tariff "is or will be unjust..."[329] Thus, an agency which has no jurisdiction to make retroactive declarations of validity, cannot have primary jurisdiction to do so.

Another criticism admits the application of the doctrine to aviation but attempts to limit it to rates and technical regulations with which the C.A.B. has the know-how and competence to deal. The validity of legal regulations relating to, for example, limitations on liability, should be a question for the courts whose judges have the experience of centuries to call upon.

Following the ADLER decision, the C.A.B. held that the tariff concerned was not unreasonable, thus clearly implying that they did have the power to make retrospective declarations of validity and on matters which might be thought peculiarly within the cognisance of the judiciary.[330] The subsequent history of the doctrine and the C.A.B. will show that, regrettable as it may seem to some writers, this is the present situation.

In the JONES case, discussed above,[331] the court agreed with the ADLER decision that where a party attempts to show the unreasonableness of a regulation, he must do so before the C.A.B., rather than before the state or federal courts, because, otherwise uniformity of practices would be impossible but, where the carrier is in

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329 s.1002(d). Supra, note 299.

330 ADLER v. CHICAGO & SOUTHERN AIR LINES, INC., 4 C.A.B. 113 (1943).

331 supra, note 313.

breach of its contract of carriage by violating its own rates, rules, etc., on file with the C.A.B., it is not necessary to refer the matter to the C.A.B. "because there is no technical fact to be determined." A state or federal court has jurisdiction in such cases.

This distinction helps to explain SCHWARTZMAN v. UNITED AIR LINES,[232] where the plaintiff sued to recover alleged damages for the failure and refusal of the defendant to transport him as passenger by aircraft and to secure the return of the price paid by him for the ticket. A motion to strike the first count was filed by the defendant, the main ground being the statutory vesting of primary jurisdiction in the C.A.B. The District Court held that the sole object of the count was the recommendation of a sum of money for breach of contract and that, since the petition did not assail or question the validity of any administrative regulation, the C.A.B. had no primary jurisdiction over the plaintiff's claim. The decision was based on the distinction clearly expressed by the Supreme Court in MITCHELL COAL & COKE CO. v. PENNSYLVANIA R. CO.[333]

> "...for doing an act prohibited by the statute, the injured party must sue the carrier without preliminary action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases...the Commission and not the courts should pass upon that administrative question."

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332 6 F.R.D. 517 (DC-Neb. 1947). Cf. C.A.B. v. MODERN AIR TRANSPORT, 179 F. 2d 622, (CA-2 1950).

333 230 U.S. 247, 57 L.ed. 1472 (1914).

In MACK v. EASTERN AIR LINES, INC.,[334] the plaintiff was a passenger in a plane from Boston to Washington but his flight was cancelled on arrival in New York because of bad weather conditions. He based his suit on three causes of action: (1) in tort, in that the defendant had negligently failed to warn him that the flight might not be completed; (2) in tort again, in that the plaintiff negligently failed to complete the flight to Washington; and (3) in contract alleging breach of contract to fly him to Washington. The relevant tariffs declared that the carrier would not be liable for failing to operate any flight according to schedule or for changing schedule with or without notice to the passenger and also provided for no liability for the removal of a passenger by reason of weather or other conditions beyond the carrier's control. The tariff itself specified that its rules were included as terms and conditions of the contract of carriage.

The District Court of Massachusetts thought there could be "no question that these rules were within the authority conferred by the Civil Aeronautics Act 1938 and became a part of the contract between the carrier and passenger."[335] s. 1106 of the Act was cited by the plaintiff but the court said that this section only preserved pre-existing common law remedies and not pre-existing obligations or contractual arrangements.

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334 supra, note 315.

335 2 Avi. at p. 15,004.

> "Contractual arrangements and obligations are governed by the Civil Aeronautics Act and not by common law or some other statute."[336]

Then the court said that if the SCHWARTZMAN case was to the contrary, they declined to follow it. It is thought that there is no conflict between the two cases, however, since the court in SCHWARTZMAN was concerned with the question of jurisdiction whereas, in the MACK case, the court concerned itself with the problem of the law applicable. Another way of putting it is that the problem in SCHWARTZMAN was, did the court have jurisdiction to determine whether or not there had been a breach of contractual obligations? The problem in MACK was, what law is applicable to determine the effect of a breach of contractual obligations?

SCHWARTZMAN was again mentioned in WITTENBERG v. EASTERN AIR LINES, INC.[337] where it was held, inter alia, that tariff rules providing that an air carrier is not liable for failure to operate a flight according to schedule are a complete bar to a passenger suing for damages for the failure of the carrier to provide flight connections. Since he alleged a tort on the part of the defendant, the plaintiff had argued that the tariffs and contract conditions were not applicable. The court thought that, on the facts, he had established no tortious conduct and distinguished SCHWARTZMAN on its facts by saying that there

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336 Ibid.

337 126 F. Supp. 459, 4 Avi. 17, 560 (DC-S.C. 1954). See also supra, note 316.

the plaintiff could conceivably within the scope of the petition, have adduced evidence establishing a cause of action.

This interpretation would indicate that common law is still applicable when actions are brought which do not conflict with the Civil Aeronautics Act and the rules established by the Courts to ensure the effectiveness of the tariff system as established by that Act. Thus, if a tariff does not cover the problem in issue as, for example, where tortious conduct is shown which is independent of any tariff or about which the tariff says nothing, then common law will be applied to determine it. MACK is not inconsistent with this principle although it was there said that s.1106 does not preserve pre-existing common law obligations. This must be understood to mean that preexisting obligations in conflict with those established under the Act, are not preserved. If MACK is understood in this way, it is submitted that whichever way it is interpreted, SCHWARTZMAN is not out of line with either MACK or WITTENBERG.

In TRAMMELL v. EASTERN AIR LINES, INC.,[338] an attack was made on the validity of a tariff allowing a carrier to cancel reservations for failure on the passenger's part to reconfirm a reservation. Citing, inter alia, JONES and MACK, the District Court had no difficulty in declaring it was authorized and that its reasonableness could only be raised in court after exhaustion of administrative remedies before the C.A.B.

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338 136 F. Supp. 75, 4 Avi. 18,1005 (DC-S.C. 1955).

These are the cases which deal with the validity of cancellation of flight and similar provisions in airline tariffs on file with the C.A.B. They hold that the provisions are statutorily authorized and the C.A.B. has held them not unreasonable. They imply that the courts have jurisdiction to determine whether a tariff is statutorily authorized and whether a tariff has been violated. They hold that the C.A.B. has primary jurisdiction as to whether or not the tariffs are reasonable. They hold that the law governing contractual arrangements to which the tariffs refer, is federal law, ie., the Civil Aeronautics Act and not the federal common law. They imply that common law applies to matters not within the scope of the Civil Aeronautics Act.

B - Time of Delivery of Freight

In FURROW & CO. v. AMERICAN AIRLINES, INC.,[339] a cargo of flowers was damaged due to the time involved in shipment. They were damaged to such an extent as to be unmarketable at the time of delivery. The court found that the flowers had been delivered without unreasonable delay and in compliance with the contract of carriage, pointing to the carrier's freight tariffs which provided that the carrier had no obligation to commence or complete transportation within a certain

339 102 F. Supp. 808, 3 Avi. 17,915 (DC-Okla. 1952).

time or according to schedule. "Such rules are within the authority conferred by the Civil Aeronautics Act and the tariffs involved become a part of the contract of transportation." The Court added that, under the 'primary jurisdiction' doctrine, an attack upon the alleged unreasonableness of the provisions of any tariff filed with the C.A.B., must be made to the Board in the first instance.

The same tariff provision was construed by the New York City court in GOLDSAMT v. SLICK AIRWAYS, INC.[340] not to mean that the defendant was free of liability for failure to perform its contractual obligation to deliver the merchandise within a reasonable time. The court thought that the tariff did not exempt the defendant from liability for negligence since there was no specific reference made in it to non-liability for negligence.

> "...and the language of the tariff will not be broadened by implication to include an exemption not covered by specific stipulation."

The motions of the parties for summary judgment were denied because the question of the reasonableness of the time to make delivery was a question of fact which required investigation and evaluation of testimony. It will be noted that there is no conflict with the primary jurisdiction doctrine in this case, since the court took jurisdiction to consider the scope and extent and not the reasonableness of the tariff in question.

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340 131 N.Y.L.J. 100, 4 Avi. 17,386 (N.Y. City Ct. 1954).

The tariff was considered again in KILLIAN v. FRONTIER AIRLINES, INC.,[341] where the plaintiff sued to recover the money he had expended in making alternative arrangements for the shipment of a cargo of flowers which had been off-loaded en route in order to bring the plane within prescribed weight limits. The tariff also provided that the cargo was subject to delay or embargo by reason of any governmental rules, regulations or orders or other conditions beyond the control of the carrier. The court held that the rules are within the authority conferred by the Civil Aeronautics Act and that, in view of the primary jurisdiction doctrine, they are deemed to be approved by the C.A.B. and not in conflict with any provisions of the Act. The judge also said that he was not here dealing with the common law rule that a common carrier cannot contract itself out of liability for its own negligence but with special rules authorized by Congress when it created the C.A.B. and empowered it to issue rules, regulations and tariffs and apply them to this type of common carrier.

It is thought that the two latter cases, clearly presuppose the possibility of a valid tariff provision limiting or excluding liability for negligence.

In RIDDLE AIRLINES, INC. v. FAMOUS COTTONS, INC.,[342] it was held, inter alia, that an air carrier is not liable to

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341 150 F. Supp. 17, 5 Avi. 17,450 (DC-Wyo. 1957).

342 5 Avi. 18,049 (N.Y. Sup. Queen's County, 1958). See also supra, note 316.

a shipper where cargo is delayed and the carrier's tariff states that it will not be liable for loss or delay unless caused by the carrier's negligence.

A similar tariff provision was considered in MODERN WHOLESALE FLORIST v. BRANIFF INTERNATIONAL AIRWAYS, INC.,[343] where an action was brought for a damaged shipment of flowers. The tariff excluded the carrier's liability "for loss, damage, deterioration, destruction, theft, delay, default, misdelivery, non-delivery or any other result not caused by the actual negligence of itself, its agent, servant or representative..." The court reversed a summary judgment in favour of the carrier and held that this tariff did not operate to prevent the plaintiff from relying upon the common law presumption that the damage was caused while the shipment was in the custody of the carrier, the burden of proof being upon him to disprove negligence. There was no conflict here between the tariff and the common law rule of adjective law which relates to the manner and method of proof.

> "We would be loath to say that the presumption did not obtain in the absence of a clear and unequivocal statement to that effect contained in a tariff rule adopted in accordance with statutory authority."[344]

Here, then, is another example of the interrelationship between the common law and the federal law, as laid down in the Civil Aeronautics Act. Where the Act or regulations made under the Act, are silent or

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343 7 Avi. 17,622 (Tex. Sup. 1961).

not in conflict with the common law, common law applies.

Thus these cases hold that the tariffs therein concerned are statutorily authorized. They hold that the C.A.B. has primary jurisdiction to consider their reasonableness which will be presumed until it does so. They hold that the courts have jurisdiction to consider the scope and extent of a tariff provision. They imply that common law applies if the Civil Aeronautics Act or regulations made thereunder are silent or are not in conflict with the common law.

C - Disclaimer of Liability for the Loss of Certain Types of Baggage

Perhaps the most important case yet decided on the question of a tariff's validity is the decision of the federal court of appeals for the second circuit in LICHTEN v. EASTERN AIR LINES, INC.[345] The appellant had checked two pieces of baggage before boarding the aircraft which took her from Miami to Philadelphia. On arrival, one of the bags was delivered to her but the other was mistakenly carried on to Newark where it was handed to an unknown person without the surrender of a baggage check. Later the bag was returned to the carrier but, on examination by the appellant, three articles of jewelry valued at over $3,000 were found to be missing. The appellant sued. In defence, the carrier relied upon rules contained in a tariff on file with the C.A.B.

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344 7 Avi. at p. 17,624.
345 189 F.(2d) 939, 3 Avi. 17,612 (CA-2 1951).

They provided that jewelry "will be carried only at the risk of the passenger" and that the carrier will not be liable for the loss of jewelry.

It was clear to the court that "to the extent that these rules are valid, they become a part of the contract under which the appellant and her baggage were carried." The question then was one of validity. Commenting, that under the Civil Aeronautics Act and the 'primary jurisdiction' doctrine, the provisions of a tariff properly filed with the C.A.B. and within its authority are deemed valid until rejected by it, the court said that, if the Act was to be interpreted as investing the Board with power to approve and accept the tariff in issue, the reasonableness of the rule could be raised in court only after the exhaustion of administrative remedies.

The appellant had argued that the Act should not be construed to allow the Board to modify the common law rule that a common carrier may not by contract relieve itself from liability for the consequences of its own negligence and that accordingly the common law rule still applied and invalidated these exculpatory provisions. The court could not agree. Bearing in mind the primary purpose of the Civil Aeronautics Act to assure uniformity of rates and services to all persons, the court said that the broad regulatory scheme set up by the Act and not the common law must govern the contract of the parties. The court noted that, although the Interstate Commerce Act is similar

to the Civil Aeronautics Act, a later amendment to it contains an express provision prohibiting exemption from liability for any loss or damage to baggage caused by the carrier.[346] It followed, therefore, that:

> "The absence of a similar provision in the Civil Aeronautics Act compels the conclusion that such an exemption is not forbidden to air carriers and that the Board could properly accept the appellee's tariff."[347]

This decision is somewhat surprising in view of the principle many times referred to and approved by the Supreme Court that

> "No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."[348]

In fact, Frank C.J., in a forceful dissenting judgment, disagreed entirely with the proposition that because the Civil Aeronautics Act did

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346 The Carmack Amendment, 1906. 34 Stat. 593.

347 3 Avi. at p. 17,614.

348 SHAW v. MERCHANTS' NATIONAL BANK OF ST. LOUIS, 101 U.S. 557 at p. 565, 25 L.ed. 892 (1879). Cf. TEXAS & P.R. CO. v. ABILENE COTTON OIL CO., 204 U.S. 426 at p. 437, 51 L.ed. 553 (1907): "a statute will not be construed as taking away a common law right existing at the date of its enactment unless that result is imperatively required, that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provisions nugatory." See also KRAWILL MACHINERY CORP. v. HERD, 359 U.S. 297, 3 L.ed: (2d) 820 (1959). Supra note 33.

not expressly disallow tariffs excluding liability for negligence, such a tariff was authorized. Where the Act is silent, then federal common law or state law, as the case may be, applies and since the federal common law declares invalid any disclaimer of liability for negligence, the tariff in question is invalid and the Board had no authority to approve it. He cited the Supreme Court decision in ADAMS EXPRESS CO. v. CRONINGER[349] in support of his argument.

In that case, the court considered the validity of a tariff on file with the Interstate Commerce Commission which limited the liability of the carrier for loss or damage of goods to an agreed or declared value. The defendant argued that the provisions of a Kentucky state law nullified such a condition in a contract of carriage. The Court held, however, that the Carmack Amendment of 1906 which allowed a limitation of liability according to value but disallowed a complete exclusion of liability, and not the state law governed interstate commerce contracts of carriage. However, the Supreme Court pointed out that where a similar case arose in a state court after the enactment of the Interstate Commerce Act but before the Carmack Amendment, state law would be applied because there was no federal legislation on the subject of exculpatory provisions.

> "Prior to amendment the rule of carrier's liability for an interstate shipment of property, as enforced

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349 226 U.S. 491, 57 L.ed. 314 (1913).

> in both Federal and State courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, HART v. PENNSYLVANIA R. CO.;[350] or that determined by the public policy of a particular State, PENNSYLVANIA R. CO. v. HUGHES;[351] or that prescribed by statute law of a particular State, CHICAGO, M. & ST. P.R. CO. v. SOLAN.[352] Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject."[353]

But now Congress had dealt with the subject and

> "The exemption forbidden is...'a statutory declaration that a contract of exemption from liability for **negligence** is against public policy and void'. This is no more than this court as well as other courts administering the same general common law, have many times declared."[354]

Frank C.J. argued that the CRONINGER case clearly showed the purpose of the amendment to be the substitution of the general Federal common

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350 112 U.S. 331, 28 L.ed. 717 (1884). See supra, note 270.

351 191 U.S. 477, 48 L.ed. 268 (1903). (Common law of Pennsylvania invalidating limitations of liability to an agreed value applied. This law was not "an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability, when contracts such as the one now before us are made in relation to interstate carriage").

352 169 U.S. 128, 42 L.ed. 687 (1898). (Iowa statute operated to make void a contract of carriage of cattle which limited liability of carrier to $500 in any event. Held that State laws regulating exemptions from liability do not violate commerce power. "So long as Congress has not legislated upon the subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.").

353 226 U.S. at p. 504.

354 Ibid. at p. 511.

law rule for the series of State statutes and decisions on the subject. Thus even before the Carmack amendment, the I.C.C. could not have legalized a tariff provision exempting a carrier from liability for its own negligence. He then said the position under the Civil Aeronautics Act must be the same as the position before the enactment of the Carmack amendment, since

> "it is inconceivable that Congress intended, merely by remaining silent, to authorize the Board to adopt a policy flatly at odds with the hitherto uniform Federal policy."[355]

He conceded, however, that the defendant "with the Board's acquiescence, might have provided in its tariff (a) perhaps that it would not carry jewelry at all or (b) possibly, that its liability for any and all items contained in passengers' baggage would be limited to a certain, reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation."[356]

Since he had decided that the tariff was not statutorily authorized, and that, therefore, the Board had exceeded its statutory power by accepting it, it followed that the 'primary jurisdiction' doctrine had no application. The plaintiff could proceed directly in court. In support of this proposition he cited, inter alia, the Supreme Court

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355 3 Avi. at p. 17,616.
356 Ibid. at p. 17,617.

case of BOSTON & M.R. CO. v. PIPER[357] where it was said of a tariff rule which limited liability for negligence without a corresponding choice of rates:

> "While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body; but not so of conditions and limitations which are, as this one, illegal, and consequently void."[358]

He then went even further by suggesting that, even if the case involved only the reasonableness of the tariff provision, it might not be a proper one for advance administrative determination. For the C.A.B. has no power to grant reparations and were the plaintiff to complain, the Board could do no more than order the defendant to discontinue the use of the exemption provision. His suggestion seemed to him particularly justified where, as in this case, no administrative skill or wisdom is needed to ascertain the reasonableness of the exculpatory provision. Also an application of the doctrine would result in the "exhaustion of litigants", a 'delaying formalism' and 'idle form' which is contrary to the ancient principle that every citizen ought to obtain "justice promptly and without delay".

Apart from these doubts, the basic difference between

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357 246 U.S. 439, 62 L.ed. 820 (1918).
358 246 U.S. at p. 445.

the majority and Frank C.J. was as to the law applicable to determine the validity of tariffs. The majority said, as did the Court in MACK v. EASTERN AIR LINES,[359] that obligations and arrangements arising from the contract of carriage must be governed by the broad, regulatory scheme set up by the Civil Aeronautics Act. It will be noted that this is a far wider proposition than was actually necessary for the decision since it means that federal common law and state law have no place not only in actions attacking the validity of tariffs but also in any action based on a contract of interstate air carriage. In view of some of the decisions already discussed,[360] others to be discussed, and more particularly in view of the Supreme Court decisions cited in Frank C.J.'s judgment, it is submitted that the principle must be narrowed to mean that the common law or state law do not govern the contract only if they are inconsistent with the rules and regulations prescribed by the provisions of the Act.[361] The majority view can be explained, therefore, by saying that the common law rule invalidating disclaimers of liability for negligence was inconsistent with the statute whereas Frank C.J. was of an opposing opinion.

D - Requirement of Notice of Claim and Commencement of Action Within a Certain Time

Perhaps the most controversial tariff provision to

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359 See supra, note 336.

360 Cf. SCHWARTZMAN & WITTENBERG, supra notes 332 and 337 respectively, and MODERN WHOLESALE FLORIST v. BRANIFF, supra, note 343. These cases were not concerned with the validity of the tariffs in evidence.

361 Cf. ADAMS EXPRESS CO. v. CRONINGER, 226 U.S. 491 at p. 507.

date has been the one which typically provides that no action can be maintained for death, personal injury, loss of or damage to baggage or goods unless written notice of the claim is presented to the carrier within a specified period, usually from thirty to ninety days and unless an action is commenced within a certain time, usually one year, following the event giving rise to the claim and action.[362]

Two decisions considering the validity of similar provisions filed with the Interstate Commerce Commission have been regularly cited in the aviation cases on the subject.

In GOOCH v. OREGON SHORT LINE R. CO.,[363] a clause in a drover's pass required a would-be claimant for personal injuries to give notice of his claim in writing to the general manager of the carrier within thirty days of the injury. The Supreme Court, by a majority had little doubt that this was valid. Although such a clause is just as effective to exclude the carrier's liability for his own negligence as a clause expressly excluding liability for negligence, the court said the two stipulations stand on a different footing, the one being 'regulation', the other being 'exoneration'. The real issue for

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362 There is an abundance of literature dealing with tariffs of this nature. See e.g. Kahn, Limitation of Passenger Liability through Air Tariffs, (1949) 16 J. Air L. & Com. 482; McKay, Airline Tariff Provisions as a Bar to Actions for Personal Injuries, (1950) 18 George Washington L.R. 160; Plunket, Validity of Provisions in Airline Rules Tariffs, (1953) 7 Southwestern L.J. 258 at p. 268 et s.; Saks, Air Carriers - Tariff Limitations as a Bar to Personal Injury Suits, (1955) 9 Miami L.Q. 326.

363 258 U.S. 22, 66 L.ed. 443 (1922).

which they had granted the writ of certiorari was whether the Cummins Amendment of March 4, 1915[364] which prohibited railway carriers from fixing less than ninety days for giving notice of claims in respect of goods, had established a public policy that would invalidate the stipulation in issue.

> "The decisions we have cited show that the time would have been sufficient but for the statute in respect of damage to goods and the reasons are stronger to uphold it as adequate for personal injuries. A record is kept of goods yet, even as to them, reasonably prompt notice is necessary as a check upon fraud. There is no record of passengers, and the practice of fraud is too common to be ignored. Less time reasonably may be allowed for notice of claims for personal injuries than is deemed proper for goods, although very probably an exception might be implied if the accident made notice within the time impracticable."[365]

The statute could not be taken to indicate a different view. On the contrary, the Court said, Congress must have thought of claims for personal injuries and, as it passed them by, "we must suppose that it was satisfied to leave them to the Interstate Commerce Commission and the common law."

It is of interest to compare this Supreme Court decision with PACIFIC S.S. CO. v. CACKETTE[366] where the Court of Appeal for the Ninth Circuit held that a passenger was not bound by a provision in a tariff, published under the Shipping Act, requiring passenger's claims

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364 38 Stat. 1196.
365 258 U.S. at p. 25.
366 8 F. (2d) 259 (CA-9 1925); cert. denied 269 U.S. 586.

for loss or damage during voyage to be filed within ten days of completion of the voyage. The plaintiff had been assaulted by an employee of the defendants while travelling as a passenger on one of the defendants' ships. She had signed a ticket which was given up immediately upon her embarkation and which contained a clause stating that it was sold subject to the conditions of the carrier's lawfully published tariff. The plaintiff did not file a claim within ten days and had no knowledge of the tariff provision requiring her to do this.

The court, citing BOSTON & M.R. CO. v. HOOKER[367] conceded that every passenger is chargeable with notice of everything contained in a lawfully published tariff and that its provisions become a part of the contract of transportation. But:

> "The clear purport of the decision is that a passenger or shipper is not chargeable with notice of any regulation filed and published which is not contemplated or required by the Interstate Commerce Act or amendments thereto."[368]

The court then held that the Act did not require or contemplate the filing of tariffs which relate to rights of action against carriers for damage or injuries from negligence or assault, notice of claims for such damages having no perceptible relation to rates and charges for transportation It followed that since the plaintiff had no knowledge of the notice requirement, she was not bound by it, following the common law principle as

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367 See supra, note 307.
368 8 F. (2d) at p. 261.

stated in THE MAJESTIC.[369]

> "...when a company desires to impose special and most stringent terms upon its customers in exoneration of its liability, there is nothing unreasonable in requiring that these terms should be distinctly declared and deliberately accepted."

The court added that while this was conclusive of the problem, it should be noted that such a limitation of time for presentation of a claim for injury to a passenger, had been held void as unreasonable although printed upon the face of the ticket. Other decisions have held longer periods valid as reasonable, including, of course, the GOOCH case.[370] There is no conflict with the primary jurisdiction doctrine in either case, however, because both courts must have considered that the common law applied to determine the validity of the tariff, Congress not having chosen to deal with notice of claims for personal injuries.

The first case to deal specifically with the validity of notice of claim provisions in tariffs on file with the C.A.B. was

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369 166 U.S. 375 at p. 386, 41 L.ed. 1039 (1897).

370 Cf. THE FINLAND, 35 F. (2d) 47 (DC-N.Y. 1929) (Provision of ticket requiring notice of claim in writing within 30 days after passenger disembarks from steamer held valid, 30 day period not being unreasonably short). See also two cases under the Warsaw Convention: INDEMNITY INSURANCE CO. v. PAN-AMERICAN AIRWAYS, INC., 58 F. Supp. 338, 1 Avi. 1247 (DC-N.Y. 1944). (Provision in contract of carriage conditioning liability upon notice of claim within 30 days after origin of the claim, held valid); SHELDON v. PAN-AMERICAN AIRWAYS, INC., 74 N.Y.S. (2d) 2 Avi. 14,566 (N.Y. Sup., N.Y. County 1947), aff'd. 74 N.Y.S. (2d) 267 (N.Y. Sup., App. Div. 1947). (30 day notice of claim requirement held not inconsistent with terms of Warsaw Convention requiring action to be commenced within two years).

WILHELMY v. NORTHWEST AIRLINES, INC.[371] where the plaintiff brought an action against the defendant air carrier alleging that because of the negligent operation of the aircraft on which she was travelling as a passenger, the aircraft had descended at a too rapid rate resulting in injury to her inner ear and throat. The defendant pleaded that her ticket contained the statement 'Sold subject to tariff regulations' and its tariff provided that no action should be maintained for personal injury unless written notice of claim had been presented within thirty days after the injury was sustained and unless action had been commenced within one year of the injury. No notice had been given and the action was not timely. The plaintiff naturally contended that the tariff provisions were invalid.

The District Court held that the provisions were both reasonable and valid. Beginning by pointing out that 30 day notice of claim requirements had been held valid in airplane passenger and other transportation,[372] the court went on to say it was governed by the rule in JONES v. NORTHWEST AIRLINES, INC.[373] The ticket was sold subject to tariff regulations with which the plaintiff was charged

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371 86 F. Supp. 565, 2 Avi. 15,023 (DC-Wash. 1949). See also STATE OF MARYLAND for use of BRANDT v. EASTERN AIR LINES, INC., 83 F. Supp. 909, 2 Avi. 14,806 (DC-N.Y. 1948). (Motion to strike a defence that plaintiff failed to file notice of claim within 90 days as required by carrier's tariff, denied but court gave no reasons).

372 See supra, note 370 and the GOOCH case, supra note 363.

373 See supra, note 313.

with notice. The court then held that the tariff had been effectively filed and must be presumed to have been and remained in effect at all times material to the action. The CACKETTE case was avoided by the statement that the ten day notice of claim was, in accordance with other decided cases, unreasonable and invalid. The court was anxious to point out that all contract time limits for giving notice of claim or for commencement of suit are not to be regarded as valid merely because they are stated in the contract of transportation. The test of reasonableness had to be met. Here the Court held that the thirty day notice of claim and one year commencement of suit requirements were reasonable and valid.

The court must have assumed that, contrary to the Interstate Commerce Act, the Civil Aeronautics Act required the filing of the provisions, otherwise the decision is clearly contrary to the CACKETTE case which decided much more than the court was prepared to concede. It held that passengers are not charged as a matter of law, with notice of tariffs which are not required to be filed with the relevant agency and the courts' remarks with respect to the reasonableness of the tariff were obiter.

If the court in the WILHELMY case, did make the assumption that the provisions were statutorily authorized, it is difficult to see why they thought it necessary to determine the provision's reasonableness in view of the primary jurisdiction doctrine. It is

interesting to compare the case with GOLDSAMT v. SLICK AIRWAYS, INC.,[374] where, it will be remembered, a tariff provision concerning non-liability for delay was construed not to mean that the defendant was free of liability to deliver the merchandise within a reasonable time. Here, the court was defining the limits of the tariff and was not determining its reasonableness. In the WILHELMY case, on the other hand, the court did determine the reasonableness of the tariff and this would appear to be inconsistent with both the ADLER and JONES cases[375] which introduced the primary jurisdiction doctrine into the field of aviation.

In MEREDITH v. UNITED AIR LINES,[376] the District Court allowed a motion to dismiss an action for personal injuries on the ground that written notice of the claim for the injury had not been presented in writing to the general offices of the defendant within 90 days of the alleged injury as required by the carrier's tariffs. The court gave one reason. It was following the JONES, WILHELMY and LICHTEN cases!

There followed a series of District Court decisions which refused to follow the WILHELMY case and declared the tariff invalid.

In GLENN v. COMPANIA CUBANA DE AVIACION,[377]

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374 See supra, note 340.
375 See supra, notes 317 and 313 respectively.
376 [1951] U.S. Av. R. 103 (DC-Cal. 1950).
377 102 F. Supp. 631, 3 Avi. 17,836 (DC-Fla. 1952).

the court considered, inter alia, whether a person could maintain an action for injuries against a carrier where he had not given the thirty days notice of the claim as required by the tariffs. The fact that the requirement was not set out on the face of the passenger ticket served, in the opinion of the court to distinguish the case from GOOCH and other cases[378] where the requirement had been held binding upon the passenger. Even had there been adequate notice, the court would have held, contrary to the clear holding in the GOOCH case,[379] that since the defendants had actual notice of the occurrence, they were not prejudiced by failure to give such notice and the defence as to failure to give notice would not be good under such circumstances.

The only way to reconcile this case with the authorities dealing with the legal effect of a properly filed tariff is to assume either that this particular tariff provision requires an exception to the general rule of constructive notice or that the court felt the tariff was not properly filed under the Civil Aeronautics Act. In view of the next few cases to be discussed, the latter explanation would appear to be the correct one.

In SHORTLEY v. NORTHWESTERN AIRLINES, INC.,[380] the plaintiff who was suing for personal injuries, had failed to give notice of his claim within ninety days of the accident as required by the carrier's

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378 See supra, note 370.

379 See 258 U.S. at p. 24. "Of course, too, actual knowledge on the part of employees of the company was not an excuse for omitting the notice in writing."

380 104 F. Supp. 152, 3 Avi. 17,923 (DC-D.C. 1952).

tariff on file with the C.A.B. He had no actual knowledge of the tariff requirement. The defendant pleaded that his failure to give notice constituted a bar to the action. The court held that nowhere in the Civil Aeronautics Act or the regulations of the C.A.B.

> "...is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitation upon notice of claim or upon the time for commencement of actions thereon."[381]

Then, citing the CACKETTE case, the court said that where a tariff provision was gratuitously inserted with respect to a matter other than that required by an Act of Congress, a passenger or shipper is not chargeable as a matter of law with notice of it. The reference to filed tariffs on the ticket was not sufficient notice of the requirements at common law which required them to be 'distinctly declared' and 'deliberately accepted' and, therefore, the defence did not succeed.

A similar result was arrived at in THOMAS v. AMERICAN AIR LINES, INC.,[382] and TOMAN v. MID-CONTINENT AIRLINES, INC.[383] Both held that the Civil Aeronautics Act does not require or authorize by implication the filing of tariffs limiting the period for giving notice of and bringing actions for personal injuries. In the latter case, the court also questioned whether the C.A.B.

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381 3 Avi. at p. 17,925.
382 104 F. Supp. 650, 3 Avi. 17,953 (DC-Ark. 1952).
383 107 F. Supp. 345, 3 Avi. 17,987 (DC-Mo. 1952).

had the power to approve such a provision unless specifically authorized to do so by statute.[384] The judgments in the last three cases were quoted extensively in BERNARD v. U.S. AIRCOACH[385] where it was accordingly held that a tariff provision containing a ninety day notice of claim requirement was not statutorily authorized and thus the plaintiff was not bound by it as a matter of law.

In the same year as the latter case, 1953, the C.A.B. itself had occasion to determine the validity of a tariff rule which barred claims and suits for personal injury to, or death of passengers unless written notice of the complaint was presented to the carrier within thirty days after the alleged occurrence of the event giving rise to the claim and unless suit was commenced within one year.[386]

Under the doctrine of primary jurisdiction, a District Court of Florida had postponed hearings in an action for personal injuries, to give the plaintiffs an opportunity of seeking a finding from the Board as to the lawfulness of the rule, thus implying, contrary to the last four cited District Court cases, that the Civil Aeronautics Act authorized the filing of the rules.

The Board felt that there were two issues involved:

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384 Cf. BOSTON & M.R. CO. v. PIPER, supra, note 357 and accompanying text.

385 117 F. Supp. 134, 4 Avi. 17,200 (DC-Calif. 1953).

386 CONTINENTAL CHARTERS, INC., COMPLAINT OF MARY BATTISTA, et. al., 16 C.A.B. 772 (1953). See also OPINION and ORDER DENYING RECONSIDERATION, 17 C.A.B. 292 (1953).

"(1) whether the rule in question was properly included in the respondent's tariff as required or authorized by section 403 of the Act and the Board's regulations thereunder; and (2) if so, was the rule reasonable?" In view of the conclusion they reached with regard to the reasonableness of the rule, the Board thought it unnecessary to determine the first issue.

They held that the rule "is and always has been unjust and unreasonable and therefore unlawful"[387] because of the general absence of such notice rules from the tariffs of carriers in other forms of transportation, the fact that it is inconceivable that an air carrier would not know of a major accident to one of its planes, the presence of stewardesses and their duty and practice of noting all injuries making it probable that the carrier would have actual notice of even minor injuries, the maintenance of passenger lists by all air carriers and because the rule had been used to trap litigants and defeat the normal liability of a common carrier.

The complainants, however, had challenged the Board's authority to find that the rule was unlawful in the past, s. 1002 (d) and (e) of the Civil Aeronautics Act contemplating decisions rendering such rules inoperative in the future only. The Board was satisfied that it did have the requisite authority to make a finding of past unlawfulness.

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387 16 C.A.B. at p. 774.

It gave two reasons for its satisfaction! s.404(a) requires the carrier to establish just and reasonable tariffs. s.1002(c) requires the Board to issue an appropriate order if it finds that any person has failed to comply with the Act. This section does not limit the Board's corrective action to the future. Holding as it did that the tariff rule had always been unreasonable, it followed that the carrier had 'failed to comply' with s.404(a) and any order, to have an effect in this case, had to contain a finding of past unlawfulness.

The second and subsidiary reason was the existence of the primary jurisdiction doctrine. The issue in the Court to which the doctrine applies is whether the tariff rule in question was reasonable at the time of the plane crash. Were the Board to decide only whether or not the rule was reasonable as to the present time or as to the future, that would be avoiding the very issue which had been deferred to it for its jurisdiction and consideration. In support of this reasoning, the Board noted that its staff was not of sufficient size to examine each and every rule when filed, that the result at which they had arrived was implicit in the earlier ADLER case[388] where they had decided that the tariff in issue "was not unjust or unreasonable" and that the Interstate Commerce Commission had for many years interpreted the Motor Carrier Act as empowering them to make findings of past unlawfulness although they had no power to award reparations as they did have under the Interstate Commerce Act.

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388 4 C.A.B. 113 (1943). See supra, note 330.

It is thought that this decision was a necessary one in view of the courts' application of the primary jurisdiction doctrine to tariffs on file with the C.A.B. and because more litigants will be encouraged to test tariffs in this way in the hope eventually of being awarded reparations by the courts. After all, it was a little too much to expect complainants to proceed with lengthy and expensive litigation which could only result in "the dubious satisfaction of seeing that no one else was aggrieved by the rule in the future."[389]

In other respects, the decision was unfortunate or perhaps it is the application of the primary jurisdiction doctrine which is unfortunate. As Frank C.J. said in the LICHTEN case,[390] it results in very lengthy litigation indeed since the Board itself has no power to award reparations. Another point is that a finding of past unlawfulness discriminates against the many passengers and shippers whose contracts containing the offending rule, have already been fully performed. The decision also renders almost nugatory, the provisions in the Act which give the Board power only to determine whether the tariff is or will be unreasonable etc. But such presumably is the price of uniformity and, might one say it, justice: uniformity, because one agency has the power to declare whether tariffs have been, are, or will be reasonable and justice, because a sanction, albeit indirect,

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389 Plunket, op. cit., supra note 362, at p. 275.
390 See supra, p. 88.

is provided against a carrier who might otherwise take advantage of his superior bargaining power to file burdensome tariffs which are not, at first, subject to review.

Following this decision of the C.A.B., four other court cases considered the validity of passenger tariffs containing notice of claim and commencement of action provisions.

In CROWELL v. EASTERN AIR LINES, INC.,[391] the Supreme Court of North Carolina considered most painstakingly whether a ninety day notice of claim requirement was authorized by the Civil Aeronautics Act and the C.A.B. regulations. The CACKETTE case had decided the rule was not authorized by the Interstate Commerce Act because it had no relation to rates and charges, but the C.A.B. allows rules and regulations to be filed which govern the service provided under the rates as well. The court held that this made no difference.

> "The term 'service' carries with it the concept of performance and supplying some general demand. The regulation as to time limitation to file notice of claim and to commence action requires the carrier to do nothing. The burden of this regulation rests entirely upon the passenger and does not seem to be related to the transportation activities of the carrier or to the services it performs."[392]

Following the CACKETTE case and other Supreme Court decisions,[393] the

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391 81 S.E.(2d) 178, 4 Avi. 17,314 (N.C. Sup. 1954).

392 4 Avi. at p. 17,318.

393 SOUTHERN P. CO. v. UNITED STATES, 272 U.S. 445, 71 L.ed. 343 (1926). (Government officials held not chargeable as a matter of law with knowledge of a tariff governing the transportation of military impedimenta, since it was not required to be filed); NEW YORK, N.H. & H.R. CO. v. NOTHNAGLE, 346 U.S. 128, 97 L.ed. 1500 (1953).

court then held that the plaintiff was not chargeable as a matter of law with notice of the rule which was not authorized by the Civil Aeronautics Act or C.A.B. regulations. Since Congress had not occupied the field of liability for personal injuries, the tariff limitation must yield to a conflicting State law which required more than constructive notice of the tariff rule for it to be binding upon the plaintiff.

An identical result was reached in TUROFF v. EASTERN AIR LINES, INC.,[394] where it was thought quite obvious that the statute does not authorize or require the inclusion in a tariff of any provisions relating to limitations in personal injury actions. Since the plaintiff is not chargeable with notice of such provisions, it had to be shown that he had 'deliberately accepted' the provision and that the provision had been 'distinctly declared'. A clause in the ticket stating that it was 'sold subject to tariff regulations' was held not sufficient to satisfy these two conditions.

There followed a complete 'volte face'. The Court of Appeal for the Second Circuit in HERMAN v. NORTHWEST AIRLINES, INC.,[395] held that a passenger can not bring suit for personal injuries after the time limitation of one year stated in the carrier's properly filed tariff. Since the tariff was properly filed, the primary jurisdiction doctrine prevented any further consideration of the tariff's validity by

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394 129 F. Supp. 319, 4 Avi. 17,649 (DC-Ill. 1955).

395 222 F. (2d) 326, 4 Avi. 17,670 (CA-2 1955); cert. denied 76 S. Ct. 84 (1955).

the court.

The plaintiff had contended that the Board's jurisdiction only extended to regulations which had to be filed and that this one was not authorized since it did not affect the service the carrier provides under the prescribed rates and tariffs. The Court said that the Board's jurisdiction was not dependent upon the carrier's duty to file the regulation with the Board and, in any event, the Civil Aeronautics Act did require the filing of the regulation in issue. As to the contention that the regulation did not affect 'the value of the service' the carrier performed under the rates and charges the court said:

> "A passenger's action to recover damages for personal injuries, is based upon a claim for the carrier's failure to render the agreed service, and involves 'the value of the service', a part of which is the passenger's safe delivery at the agreed destination. The measure of the recovery is the difference between the safe delivery of the passenger and the actual delivery; and a regulation that limits the time within which that claim may be asserted certainly 'affects' the value of the recovery; the substitute for the service."[396]

Since the rule affected the service under prescribed rates, it followed that it had to be filed under the Act and the C.A.B. regulations. The Court, then, following LICHTEN, applied the primary jurisdiction doctrine to the case. The regulation must be deemed valid until the C.A.B.

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396 4 Avi. at p. 17,671.

declares otherwise. But then they added a qualification. The rule as to time of suit will only be deemed valid if the period involved is not unreasonably short, a qualification which would appear to infringe upon the primary jurisdiction doctrine as it now stands. The Civil Aeronautics Act imposes a duty upon the carrier to file just and reasonable tariffs. Thus, any unreasonable tariff is not statutorily authorized. However, in obedience to an excessive desire for uniformity, the courts have held, in effect, that the C.A.B. has prior jurisdiction to decide whether or not a tariff has been, is, or will be unreasonable. The appeal courts suggestion that it could declare a time of suit limitation unreasonable is in conflict with these holdings.

The HERMAN case was followed in KENNEY v. NORTHEAST AIRLINES[397] where the Court preferred to follow an appellate court decision to the many contrary District Court cases. The time of suit regulation was held valid until the Board decreed otherwise.

Before the last two cases were heard, the C.A.B. had issued an order which provided that the filing of tariff rules stating limitations on or conditions to a carrier's liability for personal injury or death was no longer to be required.[398] Both courts held, however,

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397 152 N.Y.S. (2d) 966, 4 Avi. 18,091 (N.Y. Sup., N.Y. County, 1956).
398 See supra, note 304.

that this order was irrelevant since the cause of action in both cases had arisen prior to the ruling by the C.A.B. Also, they were not affected by the Board's decision in the CONTINENTAL CHARTERS case because, there, the C.A.B. had passed upon the validity of a notice of claim and not a commencement of suit requirement.

A later order of the C.A.B. required carriers to cancel from their tariffs all provisions stating any limitation or condition relating to carrier liability for personal injury or death.[399] Notice of claim and commencement of suit provisions are still filed with respect to baggage and goods, however.

Earlier in MIGOSKI v. EASTERN AIR LINES, INC.,[400] the Florida Supreme Court had held that, in order to recover damages for loss of baggage, a passenger must comply with a tariff which required that actions for loss of baggage be commenced within one year. No attack was made on the validity of the tariff, however. The baggage had been lost after passengers on an aircraft had been transferred to a bus for completion of the journey because of inclement weather and the plaintiff had argued that the transportation on the bus was a completely new undertaking quite divorced from the original contract of carriage with the terms of which he did not have to comply as a consequence. The court held otherwise!

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399 See supra, note 305.

400 63 So. (2d) 634, 3 Avi. 18, 139 (Fla. Sup. 1953).

The validity of a notice of claim requirement in a goods tariff was challenged in ALCO-GRAVURE DIVISION etc. v. AMERICAN AIRLINES, INC.,[401] where the plaintiff had shipped a large glass screen on the defendant's airline and twenty four days later, when the box was opened by the consignee, the screen was found to be in a damaged condition. The defendant's tariff rules required notice of claim for concealed loss or damage to be made within fifteen days after delivery of shipment.

The District Court cited s.403 of the Act and the Board's regulations made pursuant thereto[402] and pointed out that the same general subject matter had been considered, inter alia, by the appellate court of the second circuit in LICHTEN and in HERMAN. The principle was well established:

> "The carrier is obliged by the statute and regulations to file these schedules in the first place. The Board may at once reject them as improper or unreasonable; but if not so rejected they continue to be valid and enforceable until the question of their alleged invalidity for unreasonableness or otherwise is challenged by the Board or by interested parties before the Board, and held by the Board to be invalid. In a suit against a carrier the tariff schedules must be accepted and applied by the courts unless and until the Board has otherwise ruled."[403]

The court then distinguished the CONTINENTAL CHARTERS decision

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401 173 F. Supp. 752, 6 Avi. 17,619 (DC-Md. 1959).
402 See supra, note 303.
403 6 Avi. at p. 17,622.

on the ground that it only applied to personal injuries and death. Also, all the other contrary District court cases were decided prior to HERMAN and, in any event, related only to claims by passengers, none of them involving provisions as to timely notice of damage to cargo shipments. Then the court decided, following HERMAN, that the tariff rule was within the scope of the statute and the revised regulations of the C.A.B. and gave judgment for the defendant.

It is thought that apart from the confusing suggestion in HERMAN and the decision in WILHELMY implying that the courts could question the reasonableness of a notice of claim requirement, the decisions on the tariff rules under consideration are consistent in the methods used to determine the validity of tariffs in general. The conflict between them turned upon the question whether the Civil Aeronautics Act and the C.A.B. regulations require and authorize the filing of notice of claim and commencement of action provisions. Now, of course, the C.A.B. regulations expressly disallow them with respect to claims and actions for personal injuries and death.

The CACKETTE case may be thought inconsistent with the decisions holding that the provisions are authorized with respect to claims and actions for loss or damage to goods. It is submitted, however, that this is not so since the latter decisions take account of the difference in wording between the Interstate Commerce Act and the Civil Aeronautics Act.

s6(1) of the former Act requires the filing of a "schedule of rates, fares and charges" and the CACKETTE case held that notice of claim and time of suit provisions are not matters directly related to such rates, fares and charges.

s.403(a) of the Civil Aeronautics Act, on the other hand, requires in addition to the above, and to the extent required by the regulations of the Board, the filing of "all classifications, rules, regulations, practices and services in connection with such air transportation." The ALGO-GRAVURE and HERMAN cases held that notice of claim and time of suit rules are matters affecting the services in connection with air transportation, a different holding entirely from that in CACKETTE.

However, it is thought that the rules as to the effect of properly filed tariffs should be relaxed in the case of notice of claim and time of suit requirements. Since the burden of complying with the rules is on the shipper, the principle of constructive notice is far too prejudicial and rigid. The carrier should be made to bring the rules to the shipper's attention. Secondly, the shipper may not learn of the damage until after the time for giving notice of his claim is passed. Therefore, the rule should only be given effect if he knows of the damage at the time of delivery. Finally, the rule should not be applied if the carrier is already aware of the damage to the goods. The reason for the requirements, namely the prevention of fraud, ceases to apply in that event.

E - Limitation of Liability for the Loss or Damage to Baggage and Goods

The tariff rule now to be considered invariably provides that the liability, if any, for loss or damage to baggage (goods) or for delay in the delivery thereof, is limited to its value and, unless the passenger (shipper) pays an additional charge therefor, the valuation shall be conclusively deemed not to exceed a specified sum, usually $100.

It will be noted that this type of limitation is valid at common law[404] generally, although some States have declared it invalid.[405] The situation that arose in the LICHTEN case[406] is therefore, unlikely to arise and there has been little conflict in the decisions as a consequence.

The first case to consider the validity of a tariff provision of this nature on file with the C.A.B. was HARRIS TRUST and SAVINGS BANK v. UNITED AIR LINES, INC.[407] The court gave no reasons for declaring valid a tariff limiting liability for baggage to an agreed valuation.

In the LICHTEN case,[406] it will be remembered, even the dissenting judge, Frank C.J., conceded that such a tariff rule was "doubtless valid".

In RADINSKY v. WESTERN AIR LINES, INC.,[408]

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404 See supra, note 270 and accompanying text.
405 See, eg., supra, note 351.
406 See, supra, note 345.
407 [1951] U.S. Av. R. 33 (Calif. Sup. Ct. 1951).
408 242 P. (2d) 815, 3 Avi. 17,854 (Colo. Sup. 1952).

a travelling bag and its contents which included valuable jewelry and business documents, were lost after transportation had taken place but while still in the possession of the defendant air carrier. There was no dispute that the tariff both limited liability to $100, no greater value having been declared, and provided that jewelry and business documents were carried at the owner's risk.

> "When plaintiff's baggage was transported from Salt Lake City to Los Angeles it was carried subject to these tariff regulations, and defendants' limited liability for loss of, or damage to plaintiff's property thus transported."[409]

The court went on to say that on arrival at Los Angeles, the carrier became a bailee for the accommodation of the plaintiff and in the absence of a special contract, assumed no greater liability for loss of the baggage than it had assumed when it transported the baggage. While not actually saying so, the court must have assumed that the tariff rules were properly filed with the C.A.B. and therefore valid.

A provision in a tariff limiting the carrier's liability for loss or destruction of baggage in the absence of an excess value declaration was held applicable to personal property such as jewels and furs whether or not checked as baggage, in WADEL v. AMERICAN AIRLINES, INC.[410] The plaintiff had argued that the tariff, even if

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409 3 Avi. at p. 17,855.

410 269 S.W.(2d) 855, 4 Avi. 17,421 (Tex. Ct. of Cw. App. 1954).

applicable, was invalid because it was an attempt to limit liability for negligence. The court held that it was valid.

> "As this case involves the interstate transportation of property, federal law, not state law and policies, must govern our decision as to the validity of tariffs or contracts limiting the carrier's liability for its negligence."[411]

While federal law did not allow a carrier to exempt itself from liability for its own negligence, it did allow a carrier to limit its loss to an amount not greater than a fixed valuation as a factor in determining the transportation rate which increases as the amount of the property risk increases. The unusual part about this was that the court relied on the Carmack Amendment as a declaration of the federal law generally and not just a declaration of the federal law as applicable to railroads. As such, of course, the case is in conflict with LICHTEN where the majority held that a carrier could exclude its liability for negligence under the Civil Aeronautics Act.

LICHTEN was expressly followed in WILKES v. BRANIFF AIRWAYS, INC.,[412] where it was held that the defendant was only liable for the loss of a passenger's baggage in the amount declared in its tariffs properly on file with the C.A.B. unless a declaration of higher value had been made and an additional charge paid.

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411 4 Avi. at p. 17,423.
412 288 P. (2d) 377, 4 Avi. 17,808 (Okla. Sup. 1955).

The court cited numerous cases holding valid similar tariffs on file with the Interstate Commerce Commission. The court further held, citing LICHTEN, that "the C.A.B. has exclusive authority to pass upon tariff rules filed by Interstate Carriers by Air", a statement which is a little too wide as a description of the primary jurisdiction doctrine. It is clear, however, that the court understood that it could declare whether or not the tariff was authorized to be filed by the Civil Aeronautics Act.

In S. TOEPFER, INC. v. BRANIFF AIRWAYS, INC.,[413] two cases of sample jewelry were lost while in possession of the defendant airline. Since the plaintiff had declared no value, the court held he could recover no more than the $100 provided in the tariff and added that this "...would be true even if the loss of the cases were occasioned by the negligence of the carrier".

In all the above cases, the validity of the tariff in question was either assumed or not considered by the courts. The Ohio Court of Appeal in RANDOLPH v. AMERICAN AIRLINES, INC.,[414] was the first court to fully consider whether a tariff limiting liability on baggage to $100 unless excess value had been declared and an extra charge paid, was authorized to be filed under the provisions of the Civil Aeronautics Act and the regulations of the C.A.B. Following an extensive review of the position at common law and under the Interstate

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413 135 F. Supp. 671, 4 Avi. 17,900 (DC-Okla. 1955).
414 144 N.E. (2d) 878, 5 Avi. 17,160 (Ohio Ct. of App. 1956).

Commerce Act, the court concluded:

> "...the right to so limit liability arises at common law independent of federal statute, except as provision is made requiring the filing of tariff rates and schedules, which, if reasonable, become binding alike upon the carrier and its patron."[415]

The court agreed that there must be statutory authority for filing a particular clause in a tariff before persons are charged with notice of it or bound by its terms. It then held that this tariff was so authorized. In considering the LICHTEN case, the court said it could well go along with the vigorous dissenting opinion of Frank C.J. but the clause there involved was entirely different from the limitation clause in the instant case and even Judge Frank had recognized the distinction between such a clause and the one exempting the carrier from all liability. Thus, this tariff rule was to be deemed valid until the C.A.B. declared otherwise.

A similar rule in a cargo tariff was held valid in ROSCH v. UNITED AIR LINES, INC.[416] A valuable greyhound dog was shipped by air to a certain point and then transferred to surface transportation because of an embargo on air cargo shipments due to a pilots' strike. It became sick and died as a result of the delay. The plaintiff recovered $50 instead of the actual value of the dog which was $2,000.

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415 5 Avi. at p. 17,163.
416 146 F. Supp. 266, 5 Avi. 17,448 (DC-N.Y. 1956).

It was briefly held in TANNENBAUM v. NATIONAL AIRLINES, INC.,[417] that provisions in air carrier tariffs which limit liability for loss of baggage are valid when such tariffs are filed with the C.A.B. pursuant to the Civil Aeronautics Act and that it is not necessary that a passenger's attention be called to excess valuation provisions appearing in the ticket.

In MUSTARD v. EASTERN AIR LINES, INC.,[418] a fur coat was lost from a coat rack on a plane. A tariff provision limiting liability for the loss of baggage to $100 was held valid and applicable to personal property kept in the custody of the passenger. The court, in accordance with many authorities, had said that the tariff rules became a part of the contract of carriage, that their validity must be determined by federal law and that they were binding on the passenger regardless of her lack of knowledge or of assent to the regulation. Then the court said that there remained the question whether the passenger had had "a fair opportunity to choose between higher and lower liability by paying a correspondingly greater or lesser charge" so that the carrier could lawfully limit recovery to an amount less than the actual loss sustained. The court held that she had had that opportunity. It will be noted that this requirement of fair opportunity appears to be in conflict with the rule of constructive notice of tariff provisions earlier referred to by the court. The

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417 176 N.Y.S. (2d) 400, 5 Avi. 18,136 (N.Y. Supp., App. Term 1958).
418 N.E. (2d) 696, 6 Avi. 17,323 (Mass. Sup. Jud. Ct. 1959).

court cited NEW YORK, N.H. & H.R. CO. v. NOTHNAGLE[419] in support of the requirement. This case is thought not to be applicable since it turned upon a construction of the Carmack Amendment which has no application to air commerce. The Supreme Court had decided that the tariff provision limiting liability to an agreed amount was statutorily authorized. But, under the Carmack Amendment, the amount to which liability is to be limited, must be declared in writing by the shipper and agreed upon in writing as the released value of the property. On the facts, these conditions had not been complied with and, of course, compliance with the conditions necessarily required a knowledge of the tariff rules on the part of the plaintiff. This explains the following remarks of the Supreme Court and distinguishes it from the HOOKER and ESTEVE decisions,[420] which were not controlled by the Carmack Amendment.

> "But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge, can a carrier lawfully limit recovery to an amount less than the actual loss sustained Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts."[421]

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419 346 U.S. 128, 97 L.ed. 1500 (1953).
420 See supra, notes 307, 308 and 310.
421 346 U.S. at pp. 135-136.

In MELNICK v. NATIONAL AIR LINES,[422] a passenger had failed to declare a higher valuation on his baggage and pay an excess charge. In an action for loss of the baggage, the passenger argued that the tariff which limited the carrier's liability to $100, had no effect because the loss here was the result of the carrier's negligence. The court cited the LICHTEN case as holding that the common law rule that a common carrier may not by contract relieve itself from liability for the consequences of its own negligence was no longer good law and that the C.A.B. had primary responsibility for supervising rates and services.

> "Accordingly, this broad regulatory scheme and not the common law, must govern the contract of the parties."[423]

The court therefore held the tariff valid, one of the reasons being that the common law did not apply and yet at common law, such limitations upon liability are valid, not being considered as clauses limiting the carrier's liability for his own negligence.

The District Court of Michigan in MILHIZER v. RIDDLE AIRLINES[424] considered whether a shipment of human remains fell into the same category as the shipment of any other cargo or whether

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422 189 Pa. Super. 316, 150 A. (2d) 566, 6 Avi. 17,380 (Pa. Super. 1959).
423 6 Avi. at p. 17,382.
424 185 F. Supp. 110, 6 Avi. 18,209 (DC-Mich. 1960), aff'd 289 F. (2d) 218, 7 Avi. 17,379 (CA-6 1961).

the negligence law as applied to personal injuries or death applied. The corpse had been mutilated in a plane crash. The court granted a motion for summary judgment in favour of the air carrier deciding that the law with respect to loss of or damage to freight applied. This law was federal law and under it, pursuant to the relevant sections of the Federal Aviation Act, air carriers may limit their liability for negligence.

In ROSENCHEIN v. TRANS WORLD AIRLINES, INC.,[425] the court had no difficulty in finding that a tariff provision limiting liability for the loss of baggage to $250 was valid and binding upon the passenger. Since this was an action involving an interstate shipment of baggage, the rights and liabilities of the parties are determined by federal law, namely the Federal Aviation Act. Such provisions had many times been held a part of the contract of carriage and valid and binding regardless of the passenger's lack of knowledge or assent thereto and although the loss occurs through the negligence of the carrier. Finally, the court said that the cases draw a distinction between a contract immunizing a carrier from negligence and a contract limiting liability upon an agreed valuation, the latter not offending the policy of law forbidding one from contracting against his own negligence. Such a remark would seem quite irrelevant since the LICHTEN case held that under the Civil Aeronautics Act, a carrier can limit his liability for negligence. Still it is quite

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425 349 S.W. (2d) 483, 7 Avi. 17,604 (St. Louis, Mo. Ct. App. 1961).

clear that the last word has not been said on the subject in view of the many judicial comments casting doubt upon the LICHTEN case.

In VOGELSANG v. DELTA AIR LINES, INC.,[426] however, the court denied a request by the plaintiff to reject LICHTEN, "this controlling decision, since reiterated by the Court of Appeal for this circuit" in HERMAN v. NORTHWEST AIRLINES.[427] The passenger's baggage containing valuable sample jewelry, was lost while in the possession of the carrier. The court allowed the passenger to recover $100 only since he had not declared a higher value and paid for such in accordance with the carrier's tariff provisions. The carrier had attempted to exclude his liability altogether on the ground that its tariff also provided that it would only accept "as baggage such personal property as is necessary or appropriate for the wear, use, comfort or convenience of the passenger." Since the plaintiff was a jewelry salesman, the court held that the jewelry he was carrying was 'necessary' and 'appropriate'.

Thus, the above cases decide that the tariff rule under discussion is authorized by the Federal Aviation Act, formerly the Civil Aviation Act, that it must be presumed valid until the C.A.B. declares otherwise and that federal law applies to determine its validity. In addition a number of cases differ as to the majority ruling in the LICHTEN case, many of them casting doubt upon it.

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426 193 F. Supp. 613, 7 Avi. 17,336 (DC-N.Y. 1961).
427 Supra, note 395.

F - Disclaimer of Liability for the Negligence of Connecting Carriers

In WEEKS v. THE FLYING TIGER LINE, INC.,[428] a dog was transported from Burbank to Chicago by the defendant air line and then transferred to a railway express agency for completion of the shipment to Miami. The dog died of heat prostration suffered as a result of the negligence of the express agency. The air carrier's tariff provided that it would not be liable for the negligence of any other carrier or transportation organization. The court cited numerous authorities which established the validity of regulations adopted pursuant to the Civil Aeronautics Act and held the provision valid.

This case concludes the consideration of the validity of tariff provisions excluding or limiting the liability of air carriers. The conclusions stated at the beginning of this section as to the methods used to determine the validity of tariffs, are thought to have been substantiated. It is only necessary to point out, therefore, that, according to the decided cases, a carrier can exclude his liability for the cancellation of flights, for changing schedules, for delay in the delivery of freight and for the loss of certain types of baggage even where he has been negligent. He may also disclaim any liability he may have with respect to goods and baggage if notice of claim and time of suit requirements have not been complied with by the plaintiff. Finally a carrier can exclude

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428 4 Avi. 17,679 (Calif. Mun. Ct. 1955). Cf. RAILWAY EXPRESS AGENCY, INC. v. MILLER, 346 S.W. (2d) 905, 7 Avi. 17,344 (Tex. Ct. Civ. App. 1961).

his liability for the negligence of connecting carriers and limit his liability to a fixed sum for the loss of or damage to goods or baggage unless a higher valuation is declared and an additional charge paid. It seems from the LICHTEN case that the common law forbidding a common carrier to exempt himself from or to limit his liability for his own negligence has no place in actions attacking the validity of tariffs on file with the C.A.B. unless it is shown that the tariff is not required to be filed by the Federal Aviation Act or the C.A.B. regulations made pursuant thereto.

It is now necessary to discuss whether the carrier by a valid tariff provision, can apply these tariff rules limiting and excluding his liability, to his servants and agents.

## 4. Tariffs and the Liability of Servants and Agents

Two typical tariff provisions which purport to affect the liability of servants and agents and which are on file with the C.A.B. provide as follows:

> "Whenever the liability of Carrier is excluded or limited under these conditions, such exclusion or limitation shall apply to agents, servants or representatives of the Carrier and also any Carrier whose aircraft is used for carriage and its agents, or representatives." 429

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429 Local & Joint Air Cargo Tariff, No. CR-3, rule 15(L) issued by R.C. Lounsbury, Agent: September 20, 1960.

and again:

> "The Airbill and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carriers by whom transportation is undertaken between the origin and destination on reconsignment or return of the shipment; and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up, delivery or ground services in connection with the shipment." [430]

Similar tariffs pertaining to air transportation, have been the subject of litigation on three occasions.

In NEW YORK AND HONDURAS ROSARIO MINING CO. v. RIDDLE AIRLINES, INC., [431] a shipment of twelve bars of dore bullion, a mixture of gold and silver produced at the plaintiff's mines in Central America, was delivered to T.A.N., a foreign air carrier, in San Salvador, Honduras. T.A.N., the initial carrier, transported the bullion to Miami where the defendant connecting and terminal carrier picked it up for transportation to New York. Somewhere between Miami and New York half the shipment was lost. In its contract with the initial carrier, the plaintiff had declared the value of the whole shipment to be

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430 Official Air Freight Rules Tariff, No. 1-A, rule no. 3.1 issued by B.H. Smith, Agent: March 2, 1961. Cf. International Airfreight Rate Tariff No. 1-D, rule no. 40 (4) issued by James J. McNulty: August 31, 1961: "Whenever the liability of Forwarder is excluded or limited under these conditions, such exclusion or limitation shall apply to agents, servants, or representatives of the Forwarder."

431 152 N.Y.S. (2d) 753, 4 Avi. 18,069 (N.Y. Sup., N.Y. County, 1956).

$100 instead of its actual value of $15,000. According to the terms of the contract also, its provisions inured to the benefit of the defendant as connecting and terminal air carrier. The defendants tariffs, however, declared that dore bullion "will be accepted only if the actual value is declared on the airway bill at the time of acceptance." The trial court declared this to be irrelevant since the defendant was acting as agent of the initial carrier whose contract with the plaintiff governed.

> "The controlling factor...was the contract with the initial carrier, T.A.N., that its provisions covered Riddle, as connecting carrier, and that a carrier may effectively limit its liability on the basis of a reduced rate although the shipper could have secured full protection by paying a higher rate."[432]

On appeal, this decision was reversed and judgment entered for the plaintiff in the full amount.[433] It was said that, while the trial court had properly found that the defendant deviated from its tariff provision which provided that dore bullion would not be accepted unless its actual value was declared and a corresponding rate paid, it erred when it went on to find that, notwithstanding this fact, the released value fixed in the airway bill inured to the benefit of the defendant as an agent of the original carrier or as a connecting carrier. The main reason was that Riddle was prohibited by s.403(b) of the Civil Aeronautics Act from

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432 4 Avi. at p. 18,069.

433 3 A.D. (2d) 457, 5 Avi. 17,397 (N.Y. Sup., App. Div. 1957); aff'd. 4 N.Y. (2d) 755, 149 N.E. (2d) 93 (1958).

accepting a lower rate than that specified in its currently effective tariffs. The court added that T.A.N.'s tariff could inure to Riddle only if an interline agreement, properly filed with the C.A.B. under s.412(a) of the Act, was in existence between the two carriers.

It is clear from this case, however, that it is possible for the conditions and limitations in a contract with one carrier to inure to the benefit of connecting carriers. This is no more than the Supreme Court has itself decided on several occasions and it is evident from CLEVELAND, C.C. & ST. L.R. CO. v. DETTLEBACH[434] why it has been so decided.

Goods were lost after their transportation by the connecting carrier but while in his possession as warehouseman. The problem was whether the limitation of liability to an agreed value in the contract with the initial carrier inured to the benefit of the defendant as warehouseman, not as connecting carrier. The state court had decided in the negative since there was no consideration supplied for the limitation of liability in the way of reduced charges for storage of the goods. In its capacity as connecting carrier, there was consideration since the transportation rates had been reduced. The Supreme Court regarded this reason as cogent thus indicating that there is a contractual relationship between connecting carrier and shipper. Nevertheless,

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434 239 U.S. 588, 60 L.ed. 453 (1916). Cf. KANSAS CITY S.R. CO. v. CARL, 227 U.S. 639, 57 L.ed. 683 (1913) and GEORGIA, F. & A.R. CO. v. BLISH MINING CO., 241 U.S. 190, 60 L.ed. 948 (1916).

the Court said the question was Federal in nature and that Congress in the Interstate Commerce Act and especially in the amendment of June 29, 1906,[435] had made it clear that the term "transportation" was to include a variety of services that, according to the common law, were separable from carrier's service as carrier. Thus the services provided by the carrier as warehouseman were subject to the same conditions and limitations in his contract of carriage with the shipper, as the services provided by him as carrier, and the valuation placed upon the property applied to his responsibility as warehouseman.

It is evident that the theory upon which a connecting carrier is allowed to take the benefit of conditions and limitations in the shippers' contract with the initial carrier is that the initial carrier is contracting on behalf of all connecting carriers who are, as a consequence, parties to the contract of carriage. Thus, in the HONDURAS case, the carrier was forbidden to enter into the contract because the Civil Aeronautics Act declares unlawful any agreement which is inconsistent with filed tariffs. There was no question of agency. In fact the appeal court said that the trial court had erred in suggesting that Riddle was an agent of T.A.N. Similarly, in the DETTLEBACH case, the State court had held that the carrier as warehouseman could

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435 The Hepburn Act, 34 Stat. 584.

not be considered a party to the contract which limited his liability, since he had supplied no consideration in return for such limitation. The Supreme Court held, on the other hand, that the services provided by carrier were to be considered among the services he contracted to provide in the contract of transportation for which there was consideration. This result was necessitated by the policy of Congress.

In TWENTIETH CENTURY DELIVERY SERVICE, INC. v. ST. PAUL FIRE & MARINE INSURANCE, CO.,[436] a delivery service was held entitled to the benefits of the limitation of liability expressly extended to it in the tariffs and, therefore, in the contract of carriage between the shipper and air carrier. A coffee machine was negligently damaged by the appellants while delivering it pursuant to a transportation contract between Trans World Airlines and the insured consignor. The air waybill contained a provision declaring that the shipment was subject to governing classifications and tariffs filed in accordance with law. One tariff provision provided for a limitation of liability to an assumed value unless a higher value was declared and applicable charges paid thereon. Another declared that these tariff provisions inured to the benefit of, or applied to "any other person performing for the carrier, such pick-up, delivery or ground service in connection with the shipment". The appellants argued that this provision enabled

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436 242 F. (2d) 292, 5 Avi. 17,230 (CA-9, 1957); op. mod., 5 Avi. 17,310 (CA-9, 1957).

them to take advantage of the limitation of liability since they had a contract with T.W.A. whereby they undertook to perform the ground delivery services referred to in the tariff.

Citing s.403(a) of the Civil Aeronautics Act,[437] the court said that the extension of the tariff to persons performing delivery services "is an exercise of the authority thus granted to classify and regulate 'services in connection with such air transportation'."[438] Also the C.A.B. regulations required the filing of all "...provisions governing terminal services and all other services... in connection with air transportation."[439] It followed that these tariffs were statutorily authorized:

> "...the Board was expressly authorized by Congress to permit and approve the filing of such tariffs"[440]

And the primary jurisdiction doctrine prevented any further consideration of the validity of the tariffs, since properly filed tariffs are deemed valid until rejected by the C.A.B.

The court was encouraged by the fact that analagous situations had arisen in respect to other carriers and similar results had been reached. It quoted extensively from COLLINS & CO. v. PANAMA R. CO. and UNITED STATES v. THE SOUTH STAR,[441] both of which

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437 See supra, note 292.
438 5 Avi. at p. 17,232.
439 See supra, note 303.
440 5 Avi. at p. 17,233.
441 See supra, note

have since been overruled by the Supreme Court in KRAWILL MACHINERY CORP. v. HERD.[442] However, this case can be distinguished on the ground that the bills of lading, unlike the air waybill and the tariffs in the present case, did not expressly extend to the defendants, the benefit of the limitation of liability upon which they were attempting to rely. That this was considered a relevant and important fact by the Supreme Court can be seen from the passages from the judgment cited above.[443]

More in point was NORTHERN FUR CO. v. MINNEAPOLIS, ST. PAUL & S.S.M.R. CO.,[444] where furs were delivered to a Railway Express company for delivery to New York. The receipt contained an express provision that its terms should inure to the benefit of "all carriers handling the shipment". One of its terms limited recovery for loss to the value declared. The furs were lost as a result of the negligence of the defendant railway company over whose lines the shipment was passing under an arrangement between the defendants and the Express Company. The Court held that the defendant railway company was entitled to the benefit of the limitation of liability clause notwithstanding that it had no direct dealings with the shipper. The court also decided that it made no difference whether the company was an independent contractor or an agent of the Express Company. The following

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442 See supra, notes 33 and 188 and accompanying text.
443 Supra, p. 63
444 224 F. (2d) 181 (CA-7, 1955).

passage in the judgment of the TWENTIETH CENTURY case includes a verification of this fact:

> "The body of law governing all liabilities arising out of the arrangement represented by this air-bill, and the shipment there called for, was within the power of Congress to enact. Here the legislative scheme has provided through statute and the regulations there authorized the extent of Twentieth Century's liability. Hence, here,...it does not matter that Twentieth Century is not a formal party to the bill of lading. For this reason, it is of no importance whether as between Trans World and Twentieth Century the latter was an independent contractor, an agent, or an employee of Trans World...the whole matter is beside the point for the reason that the tariff rules and regulations expressly applied to Twentieth Century, whatever its capacity may have been."[445]

This is probably the most important passage in the judgment and indicates that, under federal law, servants and agents can rely on tariff provisions which extend to them the benefits of all conditions and limitations on the carrier's liability.

In GLOBE & RUTGERS FIRE INSURANCE CO. v. AIRBORNE FLOWER & FREIGHT TRAFFIC, INC.,[446] a California Court held that a similar intrastate tariff provision did not apply to an independent contractor. A shipment of furs, valued in the airbill at $50, was shipped by United Air Lines from Los Angeles to San Francisco. The defendant trucking firm then collected the furs for delivery to the insured

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445 5 Avi. at p. 17,235.
446 314 P. (2d) 741, 5 Avi. 17,562 (Cal. Sup. 1957).

consignee. One carton of furs valued at $11.755 was then lost by them. The sole issue was whether the defendant could rely on the provisions of the airbill limiting liability to the declared value of $50 and providing that this limitation inured to the benefit of any other person performing for the carrier delivery service in connection with the shipment. These rules were contained in United Air Lines Intrastate Tariffs on file with the California Public Utilities Commission. The court thought that to "bring itself within the terms of the tariff, the defendant must show that it performed the delivery service for United." They then held that, on the evidence, the defendant was not an agent of United and was handling the shipment as carrier for hire on its own account as an independent contractor. The case was to be distinguished from the TWENTIETH CENTURY decision, said the court, but it is not clear why. Perhaps the difference lies in the fact that, in the TWENTIETH CENTURY case,

> "the airbill executed between the shipper and the carrier included charges for the delivery of the shipment and the tariff was construed to include the defendant within its coverage" [447]

No delivery charges were stated on the airbill in the present case and the defendant billed the shipper directly for its services. In other words, there was a distinct contract between the shipper and defendant which was quite unconnected with the air transportation and in which no limitation

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447 5 Avi. at p. 17, 564.

of liability according to declared value, was provided for. This is all very reminiscent of the State court decision, subsequently reversed by the Supreme Court, in the DETTLEBACH case.[448] The case was, of course, governed by California law and largely turned upon a question of fact: was the delivery service performed for the carrier? In any event, had the defendant been an agent or servant of United, it is clear that the court would have held that the limitation of liability inured to its benefit.

Thus, it can be concluded that the tariffs on file with the C.A.B. are statutorily authorized and any conditions and limitations on liability therein inure to the benefit of the servants and agents of the carrier.

5. Conclusion

There is Federal Court of Appeal authority for the proposition that tariffs extending the benefit of conditions and limitations on the carrier's liability to his servants and agents are statutorily authorized and as such valid until the C.A.B. declares otherwise. The only consideration necessary then, is whether any given tariff limiting or conditioning the liability of the carrier is valid. Since rules affecting the liability of carriers for personal injury or death are disallowed,

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448 See supra, note 434.

limitations on liability are only found with respect to the carriage of baggage and goods. A careful reading of domestic tariffs will show that none of them expressly limits or excludes liability for negligence. However, a few, such as the notice of claim and commencement of action provisions, have the effect of doing so. Until and unless the LICHTEN and HERMAN cases are overruled, there is Federal Court of Appeal authority for the proposition that such tariffs are statutorily authorized and therefore valid, any common or State law rule to the contrary notwithstanding.

## CONCLUSIONS

In the introduction, it was said that two attempts have been made to ensure that limitation and exclusion of liability provisions in favour of the carrier inure to the benefit of his servants and agents, first by arguing that they extend by necessary implication to the servants and agents and secondly, by the inclusion of a provision in the contract of carriage expressly extending them to the servants and agents.

It has been seen that the first attempt failed. The most recent juristic opinions and judicial decisions hold that the limitation and exclusion of liability provisions in the Warsaw Convention do not apply by necessary implication to a carrier's servants and agents. The recent House of Lords decision in SCRUTTONS, LTD. v. MIDLAND SILICONES, LTD., indicates that the privity of contract doctrine would prevent the attempt from succeeding in English Law and, in American Law, the Supreme Court decision in KRAWILL MACHINERY CORP. v. HERD suggests the same thing although not necessarily because of the privity of contract doctrine.

The second attempt has had more success. It is clear that when the Hague Protocol comes into force, the protection of servants and agents will be ensured with respect to international

air carriage as defined therein. There is little doubt also, that, in American law, the provisions of a carrier's filed tariffs expressly extending any limitations and conditions on liability to the carriers' servants and agents, are valid and, as such, became a part of the contract of carriage. However, in English law, where there is no tariff system, the privity of contract doctrine would seem to prevent a servant and agent from relying upon a provision limiting his liability in a contract of carriage to which he is not a party. There is one Court of Appeal decision, namely, re SCHEBSMAN, which suggests a possible evasion of the pernicious doctrine but the argument there used has not been considered in any action against the servant or agent of an air or surface carrier. Moreover, the Court of Appeal decision in COSGROVE v. HORSFALL, which has been approved recently, by the House of Lords, expressly holds that a servant cannot rely on a provision excluding his liability in a contract between the plaintiff and his master. It is to be hoped that this situation will eventually be remedied in England by an extension of the Hague Protocol to all domestic and non-Warsaw international carriage.

# I - TABLES OF CASES*



* Cases in capital letters are referred to in the text. Cases in capital letters and underlined are discussed in the text with a statement of the facts.

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Abraham, (1953) 2 Zeitschrift fur Luftrecht, 90.

Allen, Limitations of Liability to Passengers by Air Carriers, (1931) 2 J. Air L. 325.

Anson, Law of Contract, 21st Ed., Oxford, 1959.

Barnhard, Primary Jurisdiction and Administrative Remedies, (1942) Georgetown L.R. 545.

Beaubois, Le statut juridique du Commandant d'aéronef, (1955) 9 Rev. Fr. de Dr. aérien 221.

Beaumont, Need for Revision and Amplification of the Warsaw Convention, (1949) 16 J. Air L. & Com. 395.

Bucher, Le statut juridique du personnel navigant de l'aéronautique civile, Lausanne, 1949.

Buhler, Limitation of Air Carrier's Tort Liability and Related Insurance Coverage - A Proposed Federal Air Passenger Act, (1940) 11 Air L.R. 262.

Busch, Doctrin und Praxis uber die Gultigkeit von Vertragen zu Gunsten Dritter, Heidelberg, 1860.

Calkins, Grand Canyon, Warsaw and the Hague Protocol, (1956) 23 J. Air L. & Com. 253.

Calkins, The Cause of Action under the Warsaw Convention, (1959) 26 J. Air L. & Com. 217.

Cheshire & Fifoot, Law of Contract, 5th Ed., London, 1960.

Corbin, Contracts for the Benefit of Third Persons, (1930) 46 L.Q.R. 12.

De Juglart, (1955) 18 Rev. Gen. de l'air, 429.

De la Pradelle, La loi du 2 mars 1957 sur la responsabilité du transporteur par air, (1957) 20 Rev. Gen. de l'air, 227.

Dowrick, A Jus Quaesitum Tertio by way of Contract in English Law, (1956) 19 Mod. L.R. 374.

Drion, Limitation of Liabilities in International Air Law, The Hague, 1954.

Edmunds, Aircraft Passenger Ticket Contracts, (1930) 1 J. Air L. 321.

Finlay, Third Party Contracts, London, 1939.

Fraikin, Traité de la responsabilité du transporteur maritime, Paris, 1957.

Furmston, Return to Dunlop v. Selfridge? (1960) 23 Mod. L.R. 373.

Garnault, La loi française du 2 mars 1957, (1957) 11 Rev. Fr. de Droit aérien, 289.

Gay de Montella, Principios de Derecho Aeronautico, Buenos Aires, 1950.

Gazdik, (1956) 23 J. Air L. & Com. 232.

Georgiadès, Quelques refléxions sur l'affrètement des aéronefs et le projet de convention de Tokyo, (1959) 13 Rev. Fr. de Dr. aérien, 113.

Glanville Williams, Joint Torts and Contributory Negligence, London, 1951.

Greer, Civil Liability of an Aviator as Carrier of Goods and Passengers, (1930) 1 J. Air L. 241.

Guest, Bills of Lading and a Jus Quaesitum Tertio, (1959) 75 L.Q.R. 315.

Guinchard, La notion du "Transport international" d'après la Convention de Varsovie, (1956) 10 Rev. Fr. de Dr. aérien, 14.

Hanbury, Modern Equity, 7th Ed., London, 1957.

Honoré, Ratio Decidendi: Judge and Court, (1955) 71 L.Q.R. 196.

I.C.A.O. Doc. A4-WP/154.
I.C.A.O. Doc. 7450-LC/136.
I.C.A.O. Doc. 7686-LC/140.
I.C.A.O. Doc. 7838.

Kahn, Limitation of Passenger Liability through Air Tariffs, (1949) 16 J. Air L. & Com. 482.

Kamminga, The Aircraft Commander in Commercial Air Transportation, The Hague, 1953.

King, The Effect of Tariff Provisions: Some Further Observations, (1949) 16 J. Air L. & Com. 174.

Koffka-Bodenstein-Koffka, Luftverkehrsgesetz und Warschauer Abkommen, Berlin, 1937.

L.C.B.G., (1956) 19 Mod. L.R. 532; (1957) 20 Mod. L.R. 181.

Lacombe, (1949) 12 Rev. Gen. de l'air, 821.

Law Revision Committee, Sixth Interim Report, 1937 (Cmd. 5449).

Le Goff, La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie, (1956) 19 Rev. Gen. de l'air, 352.

Lemoine, Traité de Droit aérien, Paris, 1947.

Litvine, Précis élémentaire de Droit aérien, Brussels, 1953.

Markham & Blair, The Effect of Tariff Provisions Filed under the Civil Aeronautics Act, (1948) 15 J. Air L. & Com. 251.

Maschino, La condition juridique du personnel aérien, Paris, 1930.

McKay, Airline Tariff Provisions as a Bar to Actions for Personal Injuries, (1950) 18 George Washington L.R. 160.

Montrose, Ratio Decidendi and the House of Lords, (1957) 20 Mod. L.R. 124.

Neil, International Air Carriage - Limitation of Liability, (1956) 19 Mod. L.R. 548.

Note, (1938) 51 Harv. L.R. 1251.

Note, [1957] J.B.L. 211.

Note, Air Carrier Tariff Provisions Limiting Liability for Negligence, (1957) 70 Harv. L.R. 1282.

Note, Transporting Goods by Air, (1960) 69 Yale L.J. 993.

Paton & Sawer, Ratio Decidendi and Obiter Dictum in Appellate Courts, (1947) 63 L.Q.R. 461.

Patrinelis, Limitation of Liability for Personal Injury by Air Carrier, 13 A.L.R. (2d) 337.

Plunkett, Validity of Provisions in Airline Rules Tariffs, (1953) 7 Southwestern L.J. 258.

Protection of Transport Workers against Civil Law Claims arising out of their Employment, (1959) 26 J. Air L. & Com. 90, reprinted from the International Labour Review, vol. LXXVIII, no. 2.

R.P.C., The Stevedore Cases: Getting Round the Result, [1959] J.B.L. 290.

R.S.T.C., (1933) 49 L.Q.R. 474.

Report on the Warsaw Convention as amended by the Hague Protocol prepared by the Association of the Bar of the City of New York, (1959) 26 J. Air L. & Com. 255.

Rhyne, Aviation Accident Law, Washington, 1947.

Riese, Luftrecht, Stuttgart, 1949.

Rittenberg, Limitation of Airline Passenger Liability, (1935) 6 J. Air L. 365.

Rosevear, Federal Acts Relating to Fatal Accidents in Canada, Papers Presented at the Annual Meeting of the Canadian Bar Association, Winnipeg, 1961, p. 182.

Saks, Air Carriers - Tariff Limitations as a Bar to Personal Injury Suits, (1955) 9 Miami L.Q. 326.

Salmond on Torts, 10th Ed., 1945 by W.T. Stallybrass; 11th Ed. 1953 and 12th Ed. 1957 by R.V. Heuston.

Scammell, Privity of Contract, (1955) 8 Current Legal Problems 131.

Selvig, Unit Limitation of Carrier's Liability, Oslo, 1960.

Shawcross & Beaumont on Air Law, 2nd Ed., London, 1951.

Speiser, Preparation Manual for Aviation Negligence Cases, New York, 1958.

Street, Law of Torts, 2nd Ed., London, 1959.

Treitel, Exemption Clauses and Third Parties, (1955) 18 Mod. L.R. 172.

United States Senate Doc., exec. G., 73rd Cong., 2d Sess.

Williston, Contracts for the Benefit of a Third Person, (1902) 15 Harv. L.R. 767.

Williston on Contracts, revised edition, New York, 1936.

Winfield, Province of the Law of Tort, Cambridge, 1931.