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Limitations on Liability in Aircraft Crash Cases: Some Reflections on Aviation Litigation Trends and Inequality

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LIMITATIONS ON LIABILITY IN AIRCRAFT CRASH CASES: SOME REFLECTIONS ON AVIATION LITIGATION TRENDS AND INEQUALITY*

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I. THE INEQUALITY OF INTERNATIONAL LIMITATIONS— NO LONGER JUST A "PLAINTIFF'S VIEW"

VARIOUS ATTEMPTS have been made to justify, explain or rationalize the principal of limitation of liability in international private air law, and these attempts have been made on numerous grounds.[1] The fact remains, however, that none of these reasons provide a sufficient basis for placing an artificial limitation on damages in aircraft crash cases. For many years it has been the representatives of the plaintiff's bar who have advised representatives of this fact. The paper presented by Mr. Tompkins,[2] a distinguished member of the *defense* bar, has in many ways echoed the presentation of the true facts concerning air crash litigation. Mr. Tompkins' remarks have particular significance because it is certain that members of the Department of State, the Civil Aeronautics Board, the Federal Aviation Administration and the Department of Transportation, who are presently meeting to discuss issues raised at this symposium, will be looking to this platform for views and comments in an attempt to solve the questions. Thus, while it is clear in my mind that the principal of limitations on liability in air crash litigation is unsound, the added agreement of a distinguished aviation defense lawyer lends new weight to the position that limitations are substantially unjustified. I therefore consider it a privilege to re-emphasize a few of the points that Mr. Tompkins has made.

First, the position of the United States at the recent meetings of the

* Editor's Note: Mr. Kreindler's presentation in addition to his topic expounds on the preceding presentation given by Mr. Tompkins.

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[1] See, e.g., H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 32 (1954). Mr. Drion considers international private air law "unthinkable without a limitation of the carrier's or operator's liability." *Id.* As justification, eight grounds are listed:

(1) analogy with maritime law with its global limitation of limitation of the shipowner's liability;

(2) necessary protection of a financially weak industry;

(3) catastrophic risks should not be borne by aviation alone;

(4) necessity of the carrier or operator being able to insure against these risks;

(5) possibility for the potential claimants to take insurance themselves;

(6) limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator (quid pro quo);

(7) avoidance of litigation by facilitating quick settlements;

(8) unification of the law with respect to the amount of damages to be paid. *Id.*

For an answer to these arguments, see 1 L. KREINDLER, AVIATION ACCIDENT LAW 346-47 (1961).

[2] See pages 421-51 *supra.*

Legal Committee of the International Civil Aviation Organization (ICAO) in Montreal[3] is based on the proposition that a limitation of $100,000 would satisfy 80 percent of the claimants in airline crash cases.[4] Supposedly, this figure was provided to the government by the airlines, defendants in most air crash litigation. If an attorney representing the defendant airlines now repudiates the $100,000 limitation by pointing out that the *average* recovery in cases of this type approaches $250,000, how can it be said that the figure which is the basis of the government's position is accurate? It is therefore evident that the United States "credibility gap" with respect to its liability limitation proposal has widened noticeably.

Second, the imposition of a maximum limitation of damages represents a departure from ordinary American tort principles. The very essence of our tort law, based as it is on fault, lies in the concept of the tortfeasor bearing the responsibility and cost of the damage. Moreover, within the framework of our fault system, plaintiffs almost always recover in airline crash cases. This is so for several reasons: (1) the general applicability of the doctrine of res ipsa loquitur;[5] (2) the increasing number of lawyers who are knowledgeable in the field of air law; and (3) the advanced investigative techniques of the National Safety Transportation Board (NTSB).[6] The result leads to the proposition that even before the cause of the accident is known adequate recoveries are available to plaintiffs, at least in domestic airline transportation.[7] Therefore, the argument advanced that absolute or presumptive liability, as a quid pro quo for a limitation on liability, affords a protection to the American traveling public[8] is groundless. As Mr. Tompkins points out, plaintiffs recover within the framework of the fault system in unlimited amounts without presumptive or absolute liability.

Third, the argument is often advanced by governmental representatives that individual states already have statutes on the books that have maximum limitations of damages, and therefore there is precedent in this country for the imposition of an artificial limitation. This argument fails to recognize certain controlling facts, however. For example, the number of states that have such limitations has rapidly decreased.[9] It is also true

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[3] *See* ICAO Doc. 8865 LC/159 (16 March 1970).

[4] For an account of the evolution of the United States position of the Warsaw liability limits, see Stephen, *The Adequate Award in International Aviation Accidents*, 1966 INS. L.J. 711, 721. See also, Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Stephen, *The Montreal Conference and International Aviation Liability Limitations*, 33 J. AIR L. & COM. 554 (1967); Air Coordinating Committee, ACC 51/22.28 (Revised), as amended, ACC 51/22.28A, June 20, 1957, *Exec. H.*, 86th Cong., 1st Sess. 5,8; *cf.* 1965 *Senate Hague Hearings* 19.

[5] *See, e.g.*, Critrola v. Eastern Airlines, 264 F.2d 815 (2d Cir. 1959); Capitol Airlines v. Barger, 47 Tenn. App. 636, 341 S.W.2d 579 (1960).

[6] For a discussion of this function and some of its problems, see pages 401-08 *infra*.

[7] *Contra*, of course, where the flight is international and thus comes under the provisions of the Warsaw Convention.

[8] Department of State Press Release No. 110 (May 13, 1966). This document is reprinted in 32 J. AIR L. & COM. 247 (1966).

[9] As of this writing, the number of states with limitations of damages for wrongful death has diminished to eight: Kansas, $35,000; Massachusetts, $50,000; Minnesota, $35,000; Missouri, $50,000; New Hampshire, $60,000; Virginia, $75,000; West Virginia, $110,000; and Wisconsin, $35,000.

that the limitations themselves have increased.[10] In addition, although there are some cases to the contrary,[11] most courts now refuse to apply statutory limitations. For example, in the famous break through case of *Kilberg v. Northeast Airlines*[12] these limitations were termed "unfair," "anachronistic," "absurd" and "unjust" by the highest court of the state of New York, so that New York courts, as a matter of public policy, will not enforce them.[13] The New York courts, under *Kilberg*, will enforce all parts of wrongful death statutes of other states except for limitations of damages, at least as to New York domiciliaries. Since *Kilberg*, New York has led the nation in revolutionizing its choice of law rules, so that now the public policy question is rarely used in striking down limitations. Mr. Tompkins is quite correct in noticing that governmental representatives who advance the state precedent argument have very little knownledge of the practical workings of these cases.

Fourth, there is no economic justification for a limit of $100,000 per passenger. The United States airline industry is economically the world's soundest industry without ever having had the benefit of an artificial limitation of damages. Yet, it is argued that the economic well-being of airlines is dependent on the general applicability of some kind of limitation.[14] The argument is well refuted by Mr. Tompkins' observation that it cost less for a passenger to fly from Honolulu to New York, even though the distance is twice as far, as it costs to fly from New York to London. The transportation from Honolulu to New York is non-Warsaw; i.e., non-limited. The flight from New York to London, however, usually has the benefit of limitation on liability. The conclusion is clear.

Fifth, there is no justification for forcing the high risk loss to pay for the low risk loss—a very salient point. Lawyers and governmental representatives throughout the world maintain that the passenger should not, through increased costs of their tickets, pay for the high risk passenger. It must be remembered, however, that aviation is not the only field where the possibility for catastrophic risks exists. These risks can best be insured against the point of the risk-creating activity—the airline. Liability insurance is readily available to airlines and its cost, as shown above, has not

[10] E.g., in West Virginia, the amount has increased from $20,000 in 1961 to $110,000 in 1969.

[11] See, e.g., Wiener v. United Airlines, Inc., 237 F. Supp. 90 (S.D. Cal. 1964), where actions for wrongful death arose out of a mid-air collision in Nevada. Cases were tried and judgments were entered in California pursuant to the Nevada wrongful death statute. The public policy of California, as expressed in its constitution, statutes and decisions, was not contrary to the distribution provisions of the Nevada wrongful death statute, nor were those provisions contrary "to abstract justice or pure morals, or injurious to the welfare of the people of the State of forum." *Id.* at 93. The court noted further that earlier California cases upheld the limitations of liability in wrongful death actions as to the time and amount, where the cause of action was based on the statute of another state. Accordingly, the wrongful death statute of Nevada was applied in determining the division and distribution of the funds deposited to satisfy the judgments entered in the actions. *See also*, Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967).

[12] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[13] *Kilberg* has been followed in Riley v. Capital Airlines, 13 A.D.2d 889, 215 N.Y.S.2d 295 (1961); Pearson v. Northeast Airlines, 199 F. Supp. 539 (S.D.N.Y. 1961). *But see* Campbell v. Trans World Airlines, Inc., 9 Avi. Cas. 18, 223 (S.D.N.Y. 1965), *aff'd* (2d Cir. 1966), *cert. denied*, 87 Sup. Ct. 57 (1966). For further aspects of this case, see notes 25-31 and accompanying text.

[14] See DRION, note 1 at 32.

deterred the growth of domestic companies. As for potential claimants insuring themselves, it is true that the possibility of death lends itself to predictable losses which a passenger can insure against. However, the cost of this insurance would be far less, if obtained by the airlines. Furthermore, it is simply impossible to insure against serious personal injuries. The very person whose wrongful death might result in no damages to beneficiaries may be severely injured in an airplane crash. To cite an example, in one of my cases[15] the injured passenger was 48 years old, unmarried and earning a very small salary. She had no dependents. Thus, had she been killed in the crash, the recovery for her wrongful death would have been small. In the trial of her action for personal injuries, however, the jury awarded her a total of $186,000. It is interesting to note that this plaintiff would not have collected one nickel on the kind of air trip insurance that was available at the airport. Nor can it be said that the aviation insurance market is not capable of handling the risk in a situation similar to the one just described. A great volume of premium dollars is generated on a 747 flight from New York to London. The insurance market is happy to handle these risks;[16] it is a profitable business.

Sixth, the existence of limitations does not speed up recoveries and even adds to the time and complexity of the litigation. This conclusion voiced by Mr. Tompkins pointsout the fallacy in the recently expressed United States policy which seeks: (1) speed of recovery; (2) certainty of recovery; and (3) sufficiency of recovery. While limitations of liability undoubtedly produce quick settlements, they do so at a huge cost to society and to the individual claimants concerned.[17] Furthermore, the easiest way to achieve speed of recovery and certainty of recovery, to carry the argument to its logical conclusion, is to eliminate recoveries completely. It can readily be seen that the object of any recovery is sufficiency; i.e., to try to restore the family, in so far as it is possible, to where it was before the accident. If an artificial limitation is impossible, adequacy of recovery will usually be impossible.

Finally, Mr. Tompkins assumes that because of the international considerations—the fact that the United States has a genuine interest in working with other countries of the world—compromise is needed. Mr. Tompkins therefore recommends a system of "per accident limitations" as opposed to "individual limitations." It is my belief, however, that limitation of damages are, by definition, wrong. If there is damage, the person harmed should be fairly compensated. If the amount is limited, the compensation is not fair. A compromise cannot mitigate the fact of loss. Even if there is more flexibility in "per accident" limitations, *any* limitation is ineffective when the losses suffered are greater than the limitation. To this

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[15] Scotti v. National Airlines, No. (E.D.N.Y. filed, 1954).

[16] *See* Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the Montreal Agreement, and Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 633 (1967).

[17] For example, it is difficult to imagine how a widow and children can survive financially and thus not be a burden to society when the cost of injury and subsequent death of her husband is twice that of the limitation imposed on her.

extent, "per accident" limitations are no different than individual limitations, and I oppose them.

II. "SIGNIFICANT RELATIONSHIP" AND ARTIFICIAL LIMITATIONS IN DOMESTIC CRASH CASES—MUTUALLY EXCLUSIVE TRENDS

Closely related in many ways to the problem of limitations on liability in international aircraft crash cases is the domestic matter of *lex loci delecti*, for both concepts involve varying degrees of generalized misunderstanding, confusion and inequality. Furthermore, in view of the fact that the recent conflicts revolution arose from aviation cases where the courts refused to enforce limitations on wrongful death damages,[18] reflecting a nation-wide interest in imposing higher duties of care, and based on the proposition that there is the same interest in providing adequate recoveries in air craft accident cases, the principle of artificial limitations on damages is rendered at least paradoxical.

It has long been the general rule that the law of the place of the accident governs all substantive phases of torts, including such matters as negligence, contributory negligence and damages.[19] In practice this rule has meant that there are fifty different sources of law, involving fifty different states. In many substantive areas of the law involving aviation litigation, there has been significant differences among the laws of these states. As noted above, for example, some states impose limitations on damages, at least in theory.[20] Other states apply guest statutes to private aircraft cases.[21] Still others impose vicarious liability on the owners of aircraft.[22] The number of jurisdictions applying the rigid *lex loci delicti*

[18] See, e.g., Fornaro v. Jill Bros., 22 A.D.2d 695 (N.Y. 1965), *aff'd* 15 N.Y.2d 819 (1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 742 (1963).

[19] Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 749 (Fla. 1967), *aff'd sub nom* Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968); Riley v. Capital Airlines, Inc., 8 Avi. Cas. 17, 889 (Sup. Ct. Monroe City, N.Y. 1964); Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

[20] See note 9, *supra.*

[21] Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952); United States v. Alexander, 234 F.2d 861 (4th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956). *See* IND. ANN. STAT. § 47-1021 (1956). In determining whether or not a particular guest statute applies to a given fact situation involving aviation, the decisions under the comparable automobile guest statutes must be carefully considered. For example, in California, business visitors, very liberally interpreted, are not considered "guests." Whittemore v. Lockheed Aircraft Corp., 51 Cal. App. 2d 605, 125 P.2d 531 (1942); *see also* Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953); Coffman v. Bodsoe, 142 Colo. 575, 351 P.2d 808 (1960); *and see* Lightenburger v. Gordon, 407 P.2d 728 (Nev. 1965), involving an action for wrongful death of an airplane occupant arising out of a crash of an airplane in California after a flight from Nevada. With reference to the status of the occupant as a passenger or guest, the California rule is that when a person provides transportation to another with the anticipation that a benefit will follow, the person transported has the status of a passenger and is not a guest. *See* Whittemore v. Lockheed Aircraft Corp. *supra.* The Nevada court saw no justification in adopting a different rule in Nevada, where in fact the transaction resulting in the furnishing of transportation occurred. However, instruction to the jury which emphasized the actual receipt of benefits by the pilot providing the transportation in determining the status of the occupant, but which did not encompass the pilot's expectation of future benefit from the transportation, was not erroneous where no evidence of such future benefit of value was proven.

[22] Leary & Worcester Mutual Fire Ins. Co. v. United States, 186 F. Supp. 953 (D.N.H. 1960); Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1953). For a discussion of various aspects of the legal liability of the owners and operators of private aircraft, see Whitehead, *Legal Liability of Owners and Operators of Aircraft in General Aviation for Damages to Third Parties*, 15 SYRACUSE L. REV. 1 (1963).

rule, however, has, over the past few years, steadily diminished to the point where one court has stated that "[n]o conflict of law authority in America today agrees the old rule should be retained."[23] Thus, *lex loci* is rapidly being supplanted by a more flexible approach which first identifies the issue to be decided, then considers the policies and the interests of the conflicting states in that particular issue, and then applies the law that has the predominant interest in the outcome as to that issue.[24] The conclusion logically follows that in predicting the result in any aircraft crash case; i.e., whether to consider as controlling a state law applying the old rule of *lex loci* or a state law applying the new approach, given the basic fact of an innocent victim on the one hand and a defendant airline who made the decision to incur the risks on the other, courts will apply the higher standard of care and ignore any state limitation on damages.[25] The realization of this fact will considerably simplify the understanding of the recent cases.

The cases establishing the "significant relationship" test are *Kilberg v. Northeast Airlines*,[26] followed by *Babcock v. Jackson*.[27] In *Kilberg* the New York Supreme Court refused to enforce the limitation on wrongful death damages of Massachusetts (the place of the accident) on the ground that the enforcement of the statute was against New York public policy.[28] In *Babcock* the parties were New York residents who journeyed to Ontario in the defendant's automobile. The defendant lost control of his car, causing the plaintiff personal injuries. Although an Ontario statute prohibited recovery of damages by a guest from a host, the New York Court of Appeals abandoned the *lex loci decicti* rule and, on the basis of the "significant relationship" theory, held that the New York rather than Ontario law was applicable, thus permitting recovery for negligence. The court said that it would give:

> . . . [c]ontrolling effect to the law of the jurisdiction which, because of its relationship or contract with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.[29]
>
> . . . [T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction.[30]

Babcock was followed in Pennsylvania by *Griffith v. United Air Lines*,[31] which, like *Kilberg*, was an action for wrongful death and survival damages arising out of an airplane crash. *Griffith* involved a Pennsylvania de-

[23] Clark v. Clark, 107 N.H. 351 at 353, 222 A.2d 205 at 207 (1966).

[24] *See* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 752 (1963).

[25] *See, e.g.*, Fabricus v. Horgen, 132 N.W.2d 410 (Iowa 1965).

[26] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[27] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 752 (1963). For a discussion of the lex loci delicti doctrine as it has been applied in the past see Wolens, *A Thaw in the Reign of Lex Loci Delicti*, 32 J. AIR L. & COM. 408 (1966). The application of different law to different plaintiffs or different decedents is not unconstitutional so long as the state law applied has a legitimate interest in its application. Brocks v. Eastern Air Lines, 253 F. Supp. 119 (N.D. Ga. 1966).

[28] While this case was, strictly speaking a public policy decision, rather than a choice of law decision, it provided the foundation for a fundamental change in the choice of law itself.

[29] 191 N.E.2d at 283.

[30] *Id.* at 285.

[31] 416 Pa. 1, 203 A.2d 796 (1964).

cedent who had bought his ticket in Pennsylvania from a scheduled airline which did business there. The action was brought in assumpsit, pleading Pennsylvania as the place of the making of the contract and also the state with the most significant interest in the controversy and the greatest relationship to it. The Pennsylvania Supreme Court decided that:

> . . . [t]he strict *lex loci delicti* rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of policies and interests underlying the particular issue before this court.[32]

More recent cases have further emphasized the interest of the state involved. For example, *Reich v. Purcell*[33] involved a two-car collision in Missouri, where one of the automobiles was owned by a California defendant on his way to an Illinois vacation and the other was owned by the wife of an Ohio plaintiff whose family was on its way to California where the family contemplated settling. The California Supreme Court held that Ohio's rule of no limitation for recoveries in wrongful death actions would control. The court held that California had no interest in applying its rule of no limitation of damages to plaintiffs who were non-residents at the time of the accident and that, inasmuch as it had no limitation of damages, it had no interest in applying its law on behalf of the defendants. Missouri's interest in limiting damages was held to apply only to Missouri defendants. In the words of the California court, "Under these circumstances giving effect to Ohio's interest does not conflict with any substantial interest of Missouri."[34]

Long v. Pan American World Airways[35] was the first "disinterest third state" situation presented to the courts where the forum was not trying to decide between its own law and the law of a sister state, but rather between the respective laws of sister states. The decedents in *Long*, Pennsylvanians, bought their round trip tickets in Pennsylvania for flights to Puerto Rico and back. Although the crash occurred in Maryland, the New York Court of Appeals first identified the issue as the applicable death damages law and then, as to that issue, considered the respective interests of the states and applied the law of Pennsylvania as the state with the dominant interest.

The common thread running throughout all of these cases is the courts' dissatisfaction with the principle of artificial limitations on damages, as the problem created for the beneficiaries of an airline passenger killed in one of the states with limited damages is extreme. As the court pointed out in *Kilberg*, ". . . [m]odern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other states through and over which they move."[36] Furthermore, in refusing to apply the principle the court will substitute its preference for what it considers to be the sounder rule of law, as between the competing ones.[37]

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[32] *Id.* at 805.
[33] 63 Cal. Rptr. 31, 432 P.2d 727 (1967).
[34] *Id.* at 731.
[35] 16 N.Y.2d 337 (1965).
[36] 172 N.E.2d at 529.
[37] Of course not all jurisdictions have departed from the doctrine of lex loci delicti. For a

Thus, the court in *Clark v. Clark*[38] recognized the principle that each court should, and will, determine what it considers to be the law that should govern a particular case and not merely which jurisdiction is best suited to decide it. If the law of some other state is antiquated, then the court should apply its own law instead. If it is its own law which is obsolte, then another state's law might be applicable. This sort of determination was not relevant under the automatic lex loci-vested interests test. *Clark* and other recent cases indicate that the courts no longer feel constrained to adhere to *lex loci delicti;* consequently, there is no longer a need ". . . [t]o stretch the loopholes of the system to achieve a just result in particular cases."[39]

Choice of law considerations are fundamental to the plaintiff's determination of a forum in an aviation accident, such as a mid-air collision case. An understanding of these considerations therefore has considerable significance in resolving the question of "who to sue" and "where to sue." Limitations of damages, however, are disappearing, both in the number of states which have them and the number of states which will enforce them. *Kilberg, Babcock, Griffith* and *Clark* demonstate the breaking down of limitations which no longer have a place in a rational society. Representatives of our government, vested with the responsibility of making law in the international area, would do well to study the record of the courts on the enforcement of artificial restrictions of damages.

compilation of the jurisdictions that still apply the lex loci rule, see Annot., 95 A.L.R. 2d 12 (1964). For articles discussing the relative merits of lex loci delicti and that of the significant relationship test, see, e.g., Wolens, *supra* note 27; Webb and Brownlie, *Survival of Actions in Tort and the Conflict of Laws,* 14 INT'L & COMP. L.Q. 1 (1965); and Ker, *New York and the Conflict of Laws: A Retreat,* 18 STAN. L. REV. 699 (1965). See generally Cheatham and Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952); Currie, *Comments on Babcock v. Jackson, A Recent Development in the Conflict of Laws,* 63 COLUM. L. REV. 1212, 1233 (1963); Keeffe, *Peircing Pearson,* 29 J. AIR L. & COM. 95 (1963); and Note, 33 J. AIR L. & COM. 349 (1967).

[38] 107 N.H. 351, 222 A.2d 205 (1966).

[39] Wolens, *supra* note 27, at 413.