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Validity of Contracts Limiting Liability for Negligence as Between Private Individuals

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It is for these reasons that incontrovertible physical facts should be supported by some means of credible evidence as pointed out in (3) above.

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VALIDITY OF CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE AS BETWEEN PRIVATE INDIVIDUALS

The decisions of Pennsylvania as to contracts generally which limit liability for negligence are apparently much in conflict. The law is well settled that carriers and innkeepers cannot so contract.[1] The reason is sound. These are businesses so affected with a public interest that the protection of public safety and of public property demand this safeguard. The individual does not deal with them on a basis of equality. Use of them is oftentimes a necessity. Consequently, he cannot afford to haggle. He prefers rather to accept any terms, often indeed (especially where the contract is created by notice) without knowing what contract he does make.

Where railroads have contracted, however, not in their character as common carriers but as individuals, a different conclusion has been reached. Thus, contracts by a railroad not to be held liable for fires negligently caused on premises leased to individuals along the right of way or along purely private sidings, have been upheld,[2] on the ground that "the railroad owes no duty to the public in connection therewith".[3]

A similar result was reached where mining companies contracted not to be held liable for collapse of surface sup-

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[1]Grogan v. Express Co., 114 Pa. 523 (1887); Express Co. v. Sands, 55 Pa. 140 (1867); Hoyt v. Clinton Hotel Co., 35 Pa. Super Ct. 97 (1907).

[2]Rundall & Co. v. R. R. Co., 254 Pa. 529 (1916); Stoneboro v. R. R. Co., 238 Pa. 289 (1912).

[3]Stoneboro v. R. R. Co., 238 Pa. 289 (1912).

port, though due to the company's negligence.[4] And the same result was reached in landlord and tenant cases, where the lessee agreed he would not hold the lessor liable "for loss of property however occurring" from lessor's occupancy above him.[5] In *Rose v. Finance Co.*,[6] Magill, J. said:

> "We have been referred to no case and in our examination have found none, in which it has been held that such a contract between persons conducting a strictly private business and relating to their personal and private affairs, is opposed to public policy".

Moreover, by implication, several times it has been laid down that in a purely private transaction, individuals could release themselves from liability for their own negligence.[7] In these cases, the courts have construed the contracts as not covering the situation involved, but have intimated strongly that the contracts were valid. The statement of Justice Sadler in *Schroeder v. Gulf Refining Co.*,[8] is typical of this line of cases:—

> "A party may contract for indemnity against the results flowing from his own acts, but the intent of both parties must be clear; precise and unequivocal".

Were these the sum total of Pennsylvania decisions, the conclusion would be irrefutable that, except when made by common carriers and innkeepers, contracts limiting liability for negligence are valid. However, in *Lancaster*

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[4]Atherton v. Coal Co., 267 Pa. 433 (1920); Mahon v. Pa. Coal Co., 274 Pa. 489 (1922); Jordan v. Coal Co., 270 Pa. 216 (1921), and cases there cited.

[5]Lerner v. Heickler, 89 Pa. Super Ct. 234 (1926); Rose v. Finance Co., 21 Dist. Ct. 490 (1912); for same conclusion where provision was against "any and all" damage for water, see Cannon v. Bresch, 160 Atl. 595, (1932), (Pa.), and cases there cited.

[6]21 Dist. Ct. 490 (1912).

[7]Schroeder v. Gulf Refining Co., 300 Pa. 406 (1930); Camden Co. v. Eavenson, 295 Pa. 357 (1928); Perry v. Payne, 217 Pa. 252 (1907); Crew v. Bradstreet, 134 Pa. 161 (1890); Duncan v. Dun, 7 W. N. C. 246 (1879); see Cannon v. Bresch, 160 Atl. 595, (1932), (Pa.).

[8]300 Pa. 406 (1930).

Bank v. Smith,[9] in a suit against the bank for negligently handing over the contents of a safe deposit box to the wrong person, the court, first deciding that there was no evidence of a contract limiting liability for negligence, added "We have more than once held that a bailee cannot stipulate against liability for his own negligence".

This broad dictum was repeated in several carrier and innkeeper cases.[10] Also, in *Balone v. Heavey*,[11] in which a garage-keeper set up a contract limiting liability as a defense to a suit charging negligence in permitting an automobile to be stolen, Glass, J., held that "the law in this state is well-settled that a bailee cannot stipulate against liability for his own negligence".

RECONCILING THE DECISIONS

The question thus arises whether these latter decisions can be reconciled with the right-of-way, the mining, the landlord and tenant, and the implication of the other cases, supra. One distinction is that in those cases where the contract has been upheld, there is a passage of property from the indemnitee. Simplified, the situation is this: X passes his property to Y for Y's use with the proviso that subsequent acts of X in connection therewith shall not expose X to liability for negligence. This, it might be suggested, justifies a different rule than where X passes his property to Y for some services to be rendered thereon by Y and Y contracts not to be liable in rendering these services. But such a distinction has no application here. There is no basic difference as regards the validity of contracts between leasing one's property with the proviso that the lessor shall not be liable for his negligence in connection therewith; and the leasing of one's services with the same provision.

The ground upon which contracts limiting liability for

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[9]62 Pa. 55 (1869).

[10]Hoyt v. Clinton Hotel Co., supra; Farnham v. Camden R. R. Co., 55 Pa. 53 (1867).

[11]15 D. & C. 437 (1931); affirmed in 103 Pa. Super Ct. 529 (1932).

negligence have been declared invalid is public policy;[12] to maintain a legal deterrent to negligence that might otherwise become widespread. Applying that test, for example, to the case of the garage-keeper[13] and the railroad right of way[14] we find the following:

The garage-man has ample reason to be careful aside from his legal liability. He is selling his services to the community. Negligence costs him further business from the particular customer and probably from others also. Few men speak as convincingly and as frequently as an injured one. Moreover, the garageman's negligence in permitting the car to be stolen will, at the utmost, result in damage to property only; no life will be endangered. On the other hand, where a railroad leases property along its right of way to an individual, there is no incentive for the railroad to be careful once its legal liability is released. It has nothing to lose. Its business will not be harmed by damage caused the lessee. In addition, fire endangers not only property but lives also. Thus, there is much more reason for insisting upon the legal liability in the case of the railroad than of the garage.

There is, however, a valid distinction between the cases where contracts limiting liability for negligence have been upheld and those where such contracts have been held invalid. It is the difference that exists where a business of quasi-public character deals with considerable members of the public as contrasted with a transaction between two individuals. Where the contracts have been held invalid, it will be noticed first, that invariably the business is one dealing with a large number of persons; and second, that non-liability for negligence really constituted not a particular contract but the condition on which the services were offered to the public. In such a case the public is not dealing on an equal basis; there is little or no opportunity for choice; and the situation closely approximates

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[12]Cases cited in notes 1, 9, 10.

[13]Balone v. Heavey, supra.

[14]Rundall & Co. v. R. R. Co., supra; Stoneboro v. R. R. Co., supra.

that of carriers, innkeepers and warehousemen. Conversely, where two individuals deal at arms' length, there is equality. A clear-cut contract is entered into by both with their eyes open, the lesser liability probably being compensated with a lesser price. For that reason, the freedom to contract should not be unnecessarily narrowed.

ON PRINCIPLE

The question remains whether, apart from the decisions, all contracts limiting liability for negligence should not be invalid.

The freedom of contract is a constitutional right limited in some instances by public policy, the right of the State to protect the Common Weal. Thomson, J., in *Payne v. National Transit Co.*,[15] points out:

> "Many cases have held, in substance, that the power to declare a contract void as being in contravention of public policy is a very delicate power and should be exercised only in cases free from doubt."

Decisions relative to contracts limiting liability for negligence are very sparse in their discussions. For the most part, there is a bald statement that such an agreement is contrary to public policy. Evidently, they proceed on the assumption that once legal liability is released, negligence will be tremendously increased. But that conclusion is based on two false premises: first, that the one releasing the other from negligent liability is unable to make a different contract and preserve the legal safeguard; and second, that those thus released will become negligent, as a matter of course. But, in the first place, the parties are free to contract otherwise. A party not wishing to assume the risk is free to refuse it. Secondly, at least an equal incentive to the exercise of care is the demands of good business. Damaged goods mean a dissatisfied customer resulting in loss of business to the negligent party. It is incumbent upon him as much from the business viewpoint as from the legal viewpoint to exercise due care of

[15] 300 Fed. 415 (1921).

others' property. Also it is fair to assume that those who would take undue advantage of such a contract would avail little satisfaction in a suit.

But why should a party wish to contract away his liability for negligence? There is ample reason. It may be the honest desire to save himself the trouble and litigation of flimsy or trumped-up charges of negligence. The individual may generally exercise due care since it is good business to do so, but there is always the possibility of a finical or dishonest customer making unwarranted complaints. It is against these instances that such a contract is useful. Because of this such contracts do not necessarily tinge of fraud.

Consequently, contracts limiting liability for negligence as between individuals are valid because as in the words of Bradly, J., in *Railroad Co. v. Lockwood*:[16]

> "If the customer had any real freedom of choice, if he had any reasonable and practicable alternative, and if the employment were not a public one, it could with reason be said to be his private affair, and no concern of the public."

A concluding word of warning might not be amiss. The Courts of Pennsylvania have more than once held that contracts which limit liability that would otherwise be imposed are regarded with disfavor and will be construed strictly.[17] Therefore, those who contemplate releasing negligent liability would do well to examine closely the cases where such contracts have been upheld, in addition to particularizing, as far as possible in the contract the situations sought to be covered.

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[16]17 Wallace 368 (1873).

[17]Cases cited in note 7.