Florida Law Review

Volume 8 | Issue 1 Article 3

March 1955

Contractual Limitations of Negligence Liability

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NOTES

CONTRACTUAL LIMITATIONS OF NEGLIGENCE LIABILITY

Frequent attempts are made to limit, by contract, liability for a future negligent act or failure to act; these attempts have utilized clauses providing for liquidated damages, maximum liability, or complete elimination of liability. Use of these devices has met with varying degrees of success in the courts. The purpose of this note is to examine the decisions involving contractual attempts to eliminate or to limit future liability in the negligence area.[1]

ELIMINATION OF LIABILITY

It is generally agreed that an attempt to exempt a party from liability for his willful, wanton, or gross negligence is void.[2] Statutes providing criminal penalties for certain acts are said to indicate that such extreme negligence exists in those circumstances.[3] When simple negligence is involved, however, the validity of the limitation clause appears to be determined by the relationship of the parties, despite various dicta that exculpation contracts are void per se.[4] Therefore, in this survey the cases have been classified according to the legal status of the parties involved.

Public and Quasi-Public Utilities

Ostensibly because of their public duty, in the absence of statute public utilities are held unable to contract for exemption from lia-

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[1]For a discussion of liquidated damage clauses in real estate contracts see Note, 4 U. FLA. L. REV. 229 (1951).

[2]*E.g.*, Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945); Columbia Ins. Co. v. Texas & Pac. Ry., 74 F. Supp. 714 (W.D. La. 1947); Memphis & C. R.R. v. Jones, 39 Tenn. 517 (1858); Greenwich Ins. Co. v. Louisville & N. R.R., 112 Ky. 598, 603, 66 S.W. 411, 412 (1902) (dictum).

[3]Keystone Mfg. Co. v. Hines, 85 W. Va. 405, 102 S.E. 106 (1920).

[4]*E.g.*, McNeal v. Greenberg, 251 P.2d 49, 53 (Super. Ct. Cal. 1952) (dictum), *rev'd on other grounds*, 40 Cal.2d 740, 255 P.2d 810 (1953); Freigy v. Gargaro Co., 223 Ind. 342, 353, 60 N.E.2d 288, 292 (1945) (dictum); Papakalos v. Shaka, 91 N.H. 265, 268, 18 A.2d 377, 379 (1941) (dictum); Mainfort v. Giannestras, 111 N.E.2d 692, 694 (C.P. Ohio 1951) (dictum).

bility.[5] In a state in which a telegraph company could limit its liability to situations involving gross negligence, delivery of a message twenty-four hours after it was transmitted was held to be gross negligence under a statute charging telegraph companies with the "utmost diligence."[6] New York held that a rule permitting telegraph companies to limit their liability to acts involving gross negligence did not apply to electric companies because the limitation of the former was printed on the telegraph blank, whereas the only notice of the electric company's limitation was in a schedule filed with the Public Service Commission.[7]

Common Carriers

All American jurisdictions in which the question has arisen agree that a common carrier cannot normally be relieved of its common law duty by a contract,[8] although New York required a statute to reach this conclusion.[9] An exception was made under the federal government's war powers in a case holding that a ship operated by the War Shipping Administration during a period of national emergency could validly exempt itself from liability under the provisions of an executive order.[10] An attempt by a railroad to remove itself from the common carrier category by special contract has been held ineffective;[11] and at least one court has gone so far as to say that the rule that a carrier cannot exempt itself from liability extends beyond liability arising from its actions as a carrier.[12] Sometimes courts seem to strain the term *common carrier* in order to find that a railroad is acting in that capacity.[13]

[5]*E.g.*, Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39 (1903); Emery v. Rochester Tel. Corp., 156 Misc. 562, 282 N.Y. Supp. 280 (Sup. Ct.), *aff'd*, 246 App. Div. 787, 286 N.Y. Supp. 439 (4th Dep't 1935); Oklahoma Natural Gas Co. v. Appel, 266 P.2d 442 (Okla. 1954).

[6]Western Union Tel. Co. v. Jordan Petroleum Co., 205 Okla. 452, 238 P.2d 820 (1951).

[7]Santoro v. Central N. Y. Power Corp., 189 Misc. 567, 72 N.Y.S.2d 12 (Sup. Ct. 1947).

[8]*E.g.*, Santa Fe P. & P. Ry. v. Grant Bros. Constr. Co., 228 U.S. 177, 184 (1913) (dictum); Summerlin v. Seaboard A.L. Ry., 56 Fla. 687, 691, 47 So. 557, 558 (1908) (dictum).

[9]F. A. Straus and Co. v. Canadian Pac. Ry., 254 N.Y. 407, 173 N.E. 564 (1930).

[10]Arnstad v. United States, 68 F. Supp. 823 (W.D. Wash. 1946).

[11]Chicago & N.W. Ry. v. Davenport, 205 F.2d 589 (5th Cir. 1953), *cert. denied*, 346 U.S. 930 (1954).

[12]Johnson's Adm'x v. Richmond & D.R.R., 86 Va. 975, 11 S.E. 829 (1890).

[13]*E.g.*, Gulf, M. & O.R.R. v. Scott, 32 Ala. App. 326, 27 So.2d 150, *cert. denied*, 248 Ala. 250, 27 So.2d 152 (1946).

One area in which it is generally agreed that railroads are not acting as common carriers is in the leasing of a portion of the right of way. Exemption clauses in such contracts often are upheld,[14] even though a statute specifies absolute liability[15] or criminal penalties for negligence.[16] Exemption was upheld in the case of a public grain elevator situated on land leased from a railroad, even though the property could have been secured through a process similar to eminent domain proceedings.[17] Immunity has also been held valid in an agreement under which a railroad built a spur track for industrial purposes,[18] even when the train that caused the damage was on the main track and absolute liability was imposed upon the railroad by statute.[19] Another court, however, held such a contract to apply only to trains actually on the spur.[20] A railroad has been held liable when it retained ownership and control of the siding[21] and also when a fire originated in a caboose that was on the siding solely for purposes of the railroad.[22] A release contract of this type has been held not to apply to damage caused to buildings not on the right of way by a fire that spread from a building on the right of way.[23] Of course such a contract is invalid if contrary to an express statutory prohibition.[24]

The most recent case purporting to interpret Florida law on a railroad release contract, *Thomas v. Atlantic Coast Line R.R.*,[25] was decided by a federal court. It involved a contract of lease for a shed

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[14]*E.g.*, Cacey v. Virginian Ry., 85 F.2d 976 (4th Cir. 1936), *cert. denied*, 300 U.S. 657 (1937); Franklin Fire Ins. Co. v. Chesapeake & Ohio Ry., 140 F.2d 898 (6th Cir. 1944); Checkley v. Illinois Cent. R.R., 257 Ill. 491, 100 N.E. 942 (1913); Niederhaus v. Jackson, 79 Ind. App. 551, 137 N.E. 623 (1923); Greenwich Ins. Co. v. Louisville & N.R.R., 112 Ky. 598, 66 S.W. 411 (1902).

[15]Ordelheide v. Wabash R.R., 175 Mo. 337, 75 S.W. 149 (1903).

[16]Pettit Grain & Potato Co. v. Northern Pac. Ry., 227 Minn. 225, 35 N.W.2d 127 (1948); Osgood v. Central Vt. Ry., 77 Vt. 334, 60 Atl. 137 (1905).

[17]Michigan Millers Mut. Fire Ins. Co. v. Canadian N. Ry., 152 F.2d 292 (8th Cir. 1945).

[18]Minneapolis-Moline Co. v. Chicago, M., St. P. & P.R.R., 199 F.2d 725 (8th Cir. 1952).

[19]Fraser-Patterson Lumber Co. v. Southern Ry., 79 F. Supp. 424 (W.D.S.C. 1948).

[20]Sunlight Carbon Co. v. St. Louis & S.F.R.R., 15 F.2d 802 (8th Cir. 1926).

[21]Stoneboro and Chautauqua Lake Ice Co. v. Lake Shore & M.S. Ry., 238 Pa. 289, 86 Atl. 87 (1913).

[22]William Danzer & Co. v. Western Md. Ry., 164 Md. 448, 165 Atl. 463 (1933).

[23]Kansas City, F.S. & M.R.R. v. B.F. Blaker & Co., 68 Kan. 244, 75 Pac. 71 (1904).

[24]Aetna Ins. Co. v. Chicago G.W.R.R., 190 Iowa 487, 180 N.W. 649 (1920).

[25]201 F.2d 167 (5th Cir. 1953).

on the railroad's right of way. The lease, in addition to providing for a low rental, contained a clause by which the lessee agreed to indemnify the railroad for all damage caused by any fire started by sparks from locomotives or from any other cause. The lessee alleged that a fire built on the tracks by a train crew had spread to the shed. The district court granted a motion to dismiss on the basis of the indemnity clause. This ruling was reversed in part on appeal, on the grounds that the complaint contained sufficient allegation of willful or wanton negligence and that a contract attempting exemption for such negligence is void as against public policy.

The federal court broadly stated that freedom of contract exists in Florida, and in support of this generalization cited another federal decision[26] in which a covenant not to compete was upheld. The *Thomas* court then quoted[27] from a Florida case, *Atlantic Coast Line R.R. v. Beazley*:[28] " 'A contract is not void, as against public policy, unless it is injurious to the interest of the public or contravenes some established interest of society.' " The *Beazley* Court, in turn, had quoted from the majority opinion of an Iowa case[29] sustaining an exemption contract, but similar language also appeared in the dissenting Iowa opinion.[30] Thus it is apparent that the court in the *Thomas* case utilized only the vaguest precedent for its interpretation of Florida law.

The opinion in the *Beazley* case contained an exhaustive review of cases on the point and a dictum[31] to the effect that a contract exempting a person from liability for his own negligence is not void as against public policy, but the case actually involved an arrangement whereby the injured employees of a railroad could choose either to receive the benefits from a relief association or to sue the railroad. The Florida Court treated this choice as a release made after injury occurred and held that there had been no showing that the railroad provided any consideration for the release. The Court might have had a different interpretation of public policy if the case had arisen after 1913, for in that year the Florida Legislature enacted a statute[32] providing that any attempt by employers in certain "dangerous occupa-

[26]Ireland v. Craggs, 56 F.2d 785 (5th Cir. 1932).
[27]201 F.2d 167, 169 (5th Cir. 1953).
[28]54 Fla. 311, 388, 45 So. 761, 785 (1907).
[29]Griswold v. Illinois Cent. Ry., 90 Iowa 265, 269, 57 N.W. 843, 845 (1894).
[30]*Id.* at 278, 57 N.W. at 848.
[31]54 Fla. 311, 391, 45 So. 761, 787 (1907).
[32]FLA. STAT. §§769.01-769.06 (1953).

tions," including railroads, to limit statutory liability to their employees would be void.

Railroad Passes

The cases involving releases in passes issued by a railroad form a category of their own, and the decisions on the validity of such releases are in conflict. The United States Supreme Court, in *Railroad Co. v. Lockwood*,[33] held that a drover traveling on a pass in order to take care of livestock was actually a passenger for hire and the release in his "pass" therefore invalid. Prior to this decision New York upheld such a release[34] and later cited the earlier holding with approval.[35] In a case that arose after enactment of the Hepburn Act,[36] which regulated the issuance of passes by interstate carriers, the United States Supreme Court held the *Lockwood* case to be still controlling.[37]

The United States Supreme Court has upheld the validity of a release in a pass issued to the wife of a railroad employee, on the ground that the pass was a gratuity.[38] This holding has been followed in decisions by other courts,[39] including Florida.[40] A release in a pass issued to an employee was effective when the employee was on a trip that had no connection with his work[41] and ineffective when the employee was riding home from work.[42] New York has held that whether a pass to an employee is a gratuity is a jury question, the release being valid if it is a gratuity.[43] A case in the same state held that a trolley pass issued to an employee as a part of his contract of employment was not a gratuity and that the release contained in it was void.[44] Some states hold that a release in a pass issued to an

[33]84 U.S. (17 Wall.) 357 (1873).

[34]Bissell v. New York Cent. R.R., 25 N.Y. 442 (1862).

[35]Mynard v. Syracuse, B. & N.Y.R.R., 71 N.Y. 180, 185 (1877).

[36]34 STAT. 584 (1906), 49 U.S.C. §1 (7) (1952).

[37]Norfolk Sou. R.R. v. Chatman, 244 U.S. 276 (1917).

[38]Charleston & W.C. Ry. v. Thompson, 234 U.S. 576 (1914).

[39]*E.g.*, Ketchum v. Denver & R.G.W.R.R., 175 F.2d 69 (10th Cir. 1949); Spanable v. New York Cent. R.R., 80 Ohio App. 50, 69 N.E.2d 441 (1946).

[40]O'Brien v. Atlantic C.L.R.R., 99 Fla. 843, 128 So. 9 (1930).

[41]Francis v. Southern Pac. Co., 333 U.S. 445 (1948); Cincinnati, N.O. & T.P. Ry. v. Hansford, 305 Ky. 854, 205 S.W.2d 346 (1947).

[42]Sassaman v. Pennsylvania R.R., 49 F. Supp. 481 (D.N.J. 1943), *aff'd*, 144 F.2d 950 (3d Cir. 1944).

[43]Montalbano v. New York Cent. R.R., 267 App. Div. 617, 47 N.Y.S.2d 877 (4th Dep't 1944).

[44]Kroehling v. City of New York, 270 App. Div. 909, 61 N.Y.S.2d 474 (2d Dep't 1946).

employee is void regardless of how the pass is used.[45] One court construed an employee's wife's pass exempting the railroad by name as not applying to the owner of a bus used to transport passengers from one station to another, even though the bus owner might be an agent or employee of the railroad.[46]

Bailees

The rule invalidating exculpation clauses has also been applied to bailees for hire,[47] and to a bailee for mutual benefit in one case[48] but not in another.[49] Under admiralty law it was stated that a barge tower could not exempt itself by a general release,[50] but a repairer was held able to do so.[51] The presence of insurance, however, was one factor that obviously motivated the court in the latter case. Parking lots have been held bailees for hire and therefore unable to exempt themselves when the key to a car was turned over to an attendant.[52] On the other hand, an attempt to show an implied contract to keep an attendant on duty in a lot when the car owner retained the key has been held ineffective in the face of a limitation clause in the parking check.[53]

Employers

Cases involving contracts purporting to relieve employers from liability to employees for negligence are now unlikely in light of the enactment of workmen's compensation legislation. In the past such

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[45]*E.g.*, Western & A.R.R. v. Fowler, 77 Ga. App. 206, 47 S.E.2d 874 (1948); Turek v. Pennsylvania Ry., 361 Pa. 512, 64 A.2d 779 (1949).

[46]Parker v. Bissonette, 203 S.C. 155, 26 S.E.2d 497 (1943).

[47]Gulf Transit Co. v. United States, 43 Ct. Cl. 183 (1908); Sporsem v. First Nat'l Bank of Poulsbo, 133 Wash. 199, 233 Pac. 641 (1925); Agricultural Ins. Co. v. Constantine, 56 N.E.2d 687, 690 (1943), *aff'd*, 144 Ohio St. 275, 283, 58 N.E.2d 658, 662 (1944) (dictum).

[48]Grove v. Borchers, 80 N.E.2d 208, 210 (Ohio App. 1947) (dictum).

[49]Nichols v. Hitchcock Motor Co., 22 Cal. App.2d 151, 70 P.2d 654 (1937).

[50]Petterson Lighterage & Towing Corp. v. The J. Raymond Russell, 87 F. Supp. 467, 470 (S.D.N.Y. 1949) (dictum).

[51]Hall-Scott Motor Car Co. v. Universal Ins. Co., 122 F.2d 531 (9th Cir.), *cert. denied*, 314 U.S. 690 (1941).

[52]*E.g.*, Millers Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951); Palotto v. Hanna Parking Garage Co., 68 N.E.2d 170 (Ohio App. 1946).

[53]*Ex parte* Mobile Light & R.R., 211 Ala. 525, 101 So. 177 (1924).

contracts have been held void as against public policy,[54] and this rule was cited recently by way of analogy in a suit brought by a civil service examinee.[55] Some jurisdictions, however, have held such contracts valid;[56] and the Florida Supreme Court, despite the "dangerous occupations" statute, upheld an exemption clause in an employment contract releasing a railroad from liability for any injury to an epileptic employee contributed to by the employee's infirmity.[57] Contractual exemption of a railroad from liability by an employee of the Pullman Company has also been upheld,[58] as has indemnification of a railroad company by the Pullman Company in a state where exemption contracts between employer and employee were void.[59]

A contract between the parents of a minor and the minor's employer relieving the latter of liability was held lacking in consideration in one state,[60] but a similar contract was held valid and binding in another jurisdiction[61] despite a statute prohibiting such contracts between master and servant. The argument that an intestate could not contract away the right of his survivor to bring an action under a wrongful death statute has been accepted by one court[62] but rejected by another.[63] One such contract between employer and employee was held void because it attempted to oust a court of jurisdiction — the employee agreed not to appear as a witness or to authorize anyone else to do so.[64]

Independent Contractors

One way to avoid the prohibition against exemption of employers is to establish an independent contractor relationship, since apparently

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[54]*E.g.*, Roesner v. Hermann, 8 Fed. 782 (D. Ind. 1881); Little Rock & F.S. Ry. v. Eubanks, 48 Ark. 460, 3 S.W. 808 (1886); Johnston v. Fargo, 98 App. Div. 436, 90 N.Y. Supp. 725 (4th Dep't 1904), *aff'd*, 184 N.Y. 379, 77 N.E. 388 (1906).

[55]Kearns v. Buffalo, 202 Misc. 619, 621, 111 N.Y.S.2d 778, 781 (Sup. Ct. 1952) (dictum).

[56]*E.g.*, Baltimore & Ohio S.W. Ry. v. Voigt, 176 U.S. 498 (1900); Long v. Lehigh Valley R.R., 130 Fed. 870 (2d Cir. 1904).

[57]Genung v. Loftin, 152 Fla. 759, 13 So.2d 149 (1943).

[58]Eubanks v. Southern Ry., 244 Fed. 891 (S.D. Fla. 1917); Cato v. Southern Ry., 151 Ga. 308, 106 S.E. 272, *aff'd*, 26 Ga. App. 578, 107 S.E. 98 (1921).

[59]San Antonio & A.P. Ry. v. Tracy, 61 Tex. Civ. App. 574, 130 S.W. 639 (1910).

[60]Galveston, H. & S. A. Ry. v. Pigott, 54 Tex. Civ. App. 367, 116 S.W. 841 (1909).

[61]New v. Southern Ry., 116 Ga. 147, 42 S.E. 391 (1902).

[62]*E.g.*, Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 102 N.Y.S.2d 65 (3d Dep't), *aff'd*, 302 N.Y. 545, 99 N.E.2d 882 (1951).

[63]Mehegan v. Boyne City, G. & A. R.R., 178 Mich. 694, 141 N.W. 905 (1913).

[64]Runt v. Herring, 2 Misc. 105, 21 N.Y. Supp. 244 (C.P. 1892).

indemnification by independent contractors will be upheld.[65] Such an arrangement was involved in a federal case interpreting Florida law.[66] The contract was between a circus and a performer who was treated as an independent contractor rather than as an employee. The plaintiff, who had agreed to relieve the circus of all liability for injuries received while performing, was injured in a fall. The case first went to a United States court of appeals on a motion to dismiss. That court held that, while such a contract would exempt the circus from liability for ordinary negligence, it was invalid as against public policy in so far as it might be an attempt to exempt the circus from liability for gross negligence. On a subsequent appeal after trial, the court of appeals held that the failure of a circus employee to move a net a distance of about two feet to a position where it would have caught the falling performer was gross negligence for which the circus was liable.[67]

Landlords

Landlords have been allowed to exonerate themselves from liability to their tenants,[68] except, of course, when a statute renders such a contract invalid.[69] Exoneration of a public housing authority was permitted in one case[70] but not in another.[71] In one case an exemption contract was held not to apply to portions of the property over which the landlord retained control,[72] while in another case such a contract was held to include injury from an elevator under the control of the landlord.[73] A clause by which a landlord purported to indemnify an elevator company was held void as against public policy in a suit by the insurance company of the landlord against the elevator company,

[65]Aluminum Co. of America v. Hully, 200 F.2d 257 (8th Cir. 1952); Mercante v. Hygrade Food Prod. Corp., 258 App. Div. 641, 642, 17 N.Y.S.2d 625, 626 (2d Dep't 1940) (dictum).

[66]Ringling Bros., Barnum & Bailey v. Olvera, 119 F.2d 584 (9th Cir. 1941).

[67]Al G. Barnes Amusement Co. v. Olvera, 154 F.2d 497 (9th Cir. 1946).

[68]*E.g.*, Sinclair Ref. Co. v. Stevens, 123 F.2d 186 (8th Cir. 1941), *cert. denied*, 315 U.S. 804 (1942); Life & Cas. Ins. Co. of Tenn. v. Porterfield, 239 Ala. 148, 194 So. 173 (1940); King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933); Jackson v. First Nat'l Bank of Lake Forest, 415 Ill. 453, 114 N.E.2d 721 (1953); Cobb v. Gulf Ref. Co., 284 Ky. 523, 145 S.W.2d 96 (1940); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929).

[69]Kean v. 34 West 34th St. Corp., 190 Misc. 914, 75 N.Y.S.2d 498 (Sup. Ct. 1947).

[70]Manius v. Housing Authority of Pittsburgh, 350 Pa. 512, 39 A.2d 614 (1944).

[71]Housing Authority of Birmingham v. Morris, 244 Ala. 557, 14 So.2d 527 (1943).

[72]Robinson v. Tate, 34 Tenn. App. 215, 236 S.W.2d 445 (1950).

[73]Clarke v. Ames, 267 Mass. 44, 165 N.E. 696 (1929).

the insurance company suing in the capacity of subrogee.[74] On the other hand, indemnification of a managing agent by a landlord has been upheld.[75]

Miscellaneous

The common clause in banks' stop payment orders relieving the bank from liability if the check is paid by inadvertence or oversight has been held valid in some states[76] but invalid in others as against public policy,[77] or lacking consideration,[78] or both.[79]

Exemption contracts have been upheld when there was no other special legal relationship between the parties. Thus the release of beauty operators,[80] bailors of toboggans[81] and of automobiles,[82] and credit bureaus[83] has been upheld. Of course fraud in obtaining the release will vitiate it.[84]

As might be expected, a contract does not relieve a party of liability to a third person not a party — whether it be one of exemption[85] or indemnity,[86] even though the third party knew of the existence of the contract.[87]

The contract at issue in some of the cases mentioned was one of indemnity rather than exemption. Indemnity contracts are frequently treated as exemption contracts to avoid circuity of action. Most suits

[74]Otis Elevator Co. v. Maryland Cas. Co., 95 Colo. 99, 33 P.2d 974 (1934).

[75]Griffiths v. Henry Broderick, Inc., 27 Wash.2d 901, 182 P.2d 18 (1947).

[76]*E.g.*, Hodnick v. Fidelity Trust Co., 96 Ind. App. 342, 183 N.E. 488 (1932); Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920); Gaita v. Windsor Bank, 251 N.Y. 152, 167 N.E. 203 (1929).

[77]*E.g.*, Thomas v. First Nat'l Bank of Scranton, 376 Pa. 181, 101 A.2d 910 (1954).

[78]Calamita v. Tradesmen's Nat'l Bank, 135 Conn. 326, 64 A.2d 46 (1949).

[79]Speroff v. First-Central Trust Co., 149 Ohio St. 415, 79 N.E.2d 119 (1948).

[80]Barrett v. Conragan, 302 Mass. 33, 34, 18 N.E.2d 369, 370 (1938) (dictum).

[81]Broderson v. Rainier Nat'l Park Co., 187 Wash. 399, 60 P.2d 234 (1936).

[82]Ortolano v. U-Dryvit Auto Rental Co., 296 Mass. 439, 6 N.E.2d 346 (1937).

[83]Globe Home Improv. Co. v. Perth Amboy C. of C. Cred. Rat. Bureau, Inc., 116 N.J.L. 168, 182 Atl. 641 (1936).

[84]Palmquist v. Mercer, 43 Cal. 91, 272 P.2d 26 (1954).

[85]*E.g.*, Kaylor v. Magill, 181 F.2d 179 (6th Cir. 1950); Walker Bros. v. Missouri Pac. R.R., 68 Mo. App. 465 (1897).

[86]*E.g.*, Jacob v. Pennsylvania R.R., 203 F.2d 290 (6th Cir. 1953); Alabama G.S. Ry. v. Demoville, 167 Ala. 292, 52 So. 406 (1910); St. Louis-S.F. Ry. v. Travis Insulation Co., 215 Ark. 868, 223 S.W.2d 765 (1949).

[87]*E.g.*, Kansas City Sou. Ry. v. Keffer, 96 Okla. 63, 220 Pac. 361 (1923); Devlin v. Charleston & W.C. Ry., 79 S.C. 469, 60 S.E. 1123 (1907); McAdams v. Missouri, K. & T. Ry., 19 Tex. Civ. App. 82, 45 S.W. 936 (1898).

on these contracts arise with the indemnitor seeking damages from the indemnitee on the ground that the agreement is invalid, but there have been cases in which the indemnitee was seeking indemnification after having paid damages to third parties. The way in which the case arises seems to have no effect on the decision as to the validity of the contract clause.

Construction

Courts frequently say that, because contracts purporting to relieve one party from liability for his own negligence are not favored, they are strictly construed. Sometimes they are so strictly construed that they might as well be held void. The following clause was held not sufficiently clear to exempt an oil company from liability to a filling station operator for damages arising from defective equipment: " '. . . exonerate the Company and hold it harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station.' "[88] A clause in a tractor lease to the effect that the plaintiff would bear " ' expense of all losses . . . thru . . . collision' " was held not sufficiently clear to show that the parties intended the plaintiff to bear the loss caused by the negligence of an employee of the defendant.[89] A fire caused by sparks from a cooking stove in a railroad car on a siding was held not to be from " 'fire or sparks from locomotive engines . . . or in any respect from the operation of a railway.' "[90]

A contract by which a coal hopper operator agreed to indemnify a railroad for all damage " 'arising, wholly or in part, from . . . operation . . . of said facility' " was held not to include a truck driver who was injured by a train while operating the hopper.[91] In a suit by an electric company to recover a judgment paid to a contractor's workman who was injured in the performance of a contract, the following indemnity provision was held not to apply to the negligence of the electric company:[92]

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[88]Murray v. Texas Co., 172 S.C. 399, 401, 174 S.E. 231 (1934).

[89]Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 706, 71 S.E.2d 133, 134 (1952).

[90]Gladstone Equity Exch. Co. v. Hines, 47 N.D. 454, 461, 182 N.W. 763, 765 (1921).

[91]Chicago & N.W. Ry. v. Chicago Packaged Fuel Co., 195 F.2d 467, 469 (7th Cir.), *cert. denied,* 344 U.S. 832 (1952).

[92]Glens Falls Indemnity Co. v. Reimers, 176 Ore. 47, 48, 155 P.2d 923 (1945).

> " 'The Contractor assumes all responsibility for damage to property or persons and will save and hold harmless the Company . . . from . . . all liability for personal injury, and from costs, charges or expense reasonably incurred by the Company on account of such damages, injury or claim therefor which may arise or result from the performance, nonperformance or malperformance of this contract.' "

In a somewhat similar case an agreement between a roofer and the owner of a building that the roofer would take out insurance and would assume liability for all claims arising from the work was held to be for the benefit of third parties and inapplicable to an injury caused the roofer by the negligence of the owner.[93]

Limitation on Liability

A number of cases have arisen in which a party has attempted to limit his liability rather than to eliminate it entirely. In Florida[94] and elsewhere[95] a carrier is able to limit his liability for damage to goods by providing varying rates. That such limitations are regarded with disfavor, however, has been illustrated in a case holding the limitation ineffective when a carrier sold a ticket and checked baggage to a destination not included on its tariff schedule.[96] And, in Florida, if the limitation is merely included in the tariff schedule there must be proof that knowledge of the limitation was brought to the attention of the shipper.[97]

The foregoing rules on limitation of liability have been applied to bailees as well as to carriers. The maximum claim list published by a laundry was held binding on a customer who knew of the existence of the list,[98] the relationship between the laundry and the customer being treated as a bailment for mutual benefit. Attempts of a bailee for hire to limit his liability by so stating on a claim check[99] or on a claim check and a sign[100] have been held ineffective because

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[93]Gross v. General Inv. Co., 194 Minn. 23, 259 N.W. 557 (1935).

[94]Atlantic C.L.R.R. v. Dexter and Conner, 50 Fla. 180, 39 So. 634 (1905).

[95]*E.g.*, National Blouse Corp. v. Felson, 274 App. Div. 164, 79 N.Y.S.2d 765 (1st Dep't 1948), *aff'd*, 299 N.Y. 612, 86 N.E.2d 177 (1949).

[96]Pennsylvania Greyhound Lines v. Wells, 41 A.2d 837 (D.C. Mun. App. 1945).

[97]Payne v. Bryan, 90 Fla. 174, 105 So. 832 (1925).

[98]Manhattan Co. v. Goldberg, 38 A.2d 172 (D.C. Mun. App. 1944).

[99]Fisk v. Bullard, 205 Okla. 502, 239 P.2d 424 (1951).

[100]Allen v. Southern Pac. Co., 117 Utah 171, 213 P.2d 667 (1950).

the limitation was not brought to the attention of the bailor. On the other hand, limitations in warehouse receipts signed by the bailor have been upheld.[101] When the receipt is not signed by the bailor, the warehouseman has the burden of proving that the terms were actually and freely entered into by the parties.[102] In a case holding that an attempt of a bailee for hire to limit his liability is contrary to public policy and void, the bailor was a departing hotel guest who was not given a choice of rates.[103]

In addition to a maximum limit on liability, a claim by a shipper or a passenger within a specified time is often required as a condition precedent to suit. Limitations of thirty days,[104] forty days,[105] and four months[106] have been upheld; but a ten-day limitation was held unreasonable and therefore void,[107] and one court said that a four-month limitation was void.[108] In the last case a $500 limitation on claims for personal injuries was held void.

A time limitation must be brought to the knowledge of the passenger in order to be effective. Whether such an agreement was actually made has been held to be a question of fact; a reference on the ticket to a time limit contained in a tariff schedule is not sufficient as a matter of law to show an agreement.[109] A limitation in the tariff schedule of an airline that was not shown on the ticket was held ineffective; the court said that such a time limitation on claims was immaterial, inasmuch as the plane crash itself was actual notice that injury had occurred.[110]

Conclusion

The test enunciated by the court in *Thomas v. Atlantic Coast Line R.R.*[111] — will enforcement of exculpatory contracts contravene some interest of the public? — does not seem to be the one used by courts

[101]George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037 (1949).

[102]Voyt v. Bekins Moving & Storage Co., 169 Ore. 30, 119 P.2d 586 (1942).

[103]Oklahoma City Hotel Co. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941).

[104]Gooch v. Oregon S.L.R.R., 258 U.S. 22 (1922).

[105]Keairnes v. Chicago, M. & St. P. Ry., 41 S.D. 409, 171 N.W. 86 (1919).

[106]Murray v. Cunard S.S. Co., 235 N.Y. 162, 139 N.E. 226 (1923).

[107]Blackwell v. Alaska S.S. Co., 1 F.2d 334 (W.D. Wash. 1923).

[108]Gerin v. Chicago, M. & St. P. Ry., 133 Minn. 395, 399, 158 N.W. 630, 631 (1916) (dictum).

[109]Shortley v. Northwest Airlines, 104 F. Supp. 152 (D.D.C. 1952).

[110]Glenn v. Compania Cubana de Aviacion, S.A., 102 F. Supp. 631, 634 (S.D. Fla. 1952) (dictum).

[111]201 F.2d 167 (5th Cir. 1953).