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GROWTH OF THE POWER OF CONTRACT IN THE HISTORY OF THE LIABILITY OF COMMON CARRIERS.

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Change, movement, progress! This is the almost universal order in this as in every other age, and law is no exception to it. Rather it is a strange proof of the truth. For, in spite of its rule of stare decisis and its boasted permanency, even law falls into line with the general tendency and changes. This fact finds a peculiar illustration in the law of the liability of common carriers, another modification in which has recently been made by our Supreme Court.

Whether derived from the Roman law or not, it is certain that like the Roman law early in English history there grew up classes of occupations to which attached peculiar liability. These were the so-called common employments. At first, like other persons so engaged, common carriers of goods were evidently liable only for negligence; and later on perhaps liable absolutely only for loss by robbery on the road. But apparently by the time of Lord Holt, in Coggs v. Bernard, and certainly in the time of Lord Mansfield, in Forward v. Pittard, it was firmly established that a common carrier of goods was an absolute insurer of the safety

1 Dillon, '01.
2 Ld. Ray. 909.
3 L. T. R. 27.
of the same, when entrusted to its possession, except for the act of God or of the public enemy. The reason for this rule was the possibility of collusion on the part of the common carrier. This is what is known as its common law liability. It rested by law upon every carrier, holding himself out to carry as a public employment.

Common carriers of passengers also pursued a public employment, but the duty resting by law upon them was never to insure the safety of the passenger, but to exercise the highest degree of diligence. There was here no possibility of collusion on the part of the carrier, and it was likewise impossible for the carrier to have such control over a passenger as over inanimate goods. Hence if the carrier exercised this degree of diligence he was not liable for injury resulting from the act of God, or the public enemy, or inevitable accident, or where the passenger was guilty of contributory negligence, or in any other event.

These were the early common law liabilities of common carriers of goods and common carriers of passengers. The object of this article is to trace briefly the modifications which the years have wrought.

The carriage of freight and the carriage of baggage were bailments, but of course the carriage of passengers could not be. Yet, the similarity of the liabilities of the carriers in each case, the fact that all were exercising public callings, together with the fact that the same persons were generally engaged in the carriage of goods and of passengers justifies a treatment of their liability together.

The greatest changes have occurred in the case of the liability of the carriers of passengers; but there has been no inconsiderable amount of modification in the matter of the liability of carriers of goods. In the beginning, common carriers of goods were liable as absolute insurers for the safety of goods placed in their possession for transportation, except for the act of God, or of the public enemy. An act of God was considered to be a casualty which resulted directly from natural causes and to which human agency in no way contributed. A public enemy was an enemy with whom the carrier's nation was at war, and included pirates on the high seas. Since the time when these
doctrines were announced, little by little, other exceptions have been allowed, until now they have the prestige of the old. These new exceptions are those exempting the common carriers from liability, in case it is free from negligence, where loss results from some act of the shipper—the reason for this being found in the fact that the carrier is denied the entire control and possession of the property, which even in the theory of the old law he was supposed to have—where the loss results from the inherent nature of the goods, or where non-delivery occurs by reason of a valid seizure of the property by public authority. These added limitations upon the absolute liability of the common carrier of goods seem so natural and just that the wonder is they should not always have been permitted.

But the greatest change in the law of common carriers of goods was made by the intrusion into this domain of the power of private contract. History shows that progress has ever been from status to contract; and as the power of contract grew stronger and stronger it succeeded in bringing more and more of the law of common carriers under its sway. But, as far as the conquest of the law of contracts has gone, it has not entirely destroyed the old common law liability of common carriers of goods. A shipper still has the right, if he chooses, to insist upon having his goods carried by the common carrier as an insurer, under his public duty. But, if he is willing to enter with the common carrier into a contract, which is founded upon some new consideration, the parties may make an agreement establishing and controlling their rights and liabilities in every way, so long as it does not excuse the common carrier from liability for his own negligence. This is as far as the development has thus far gone. Thus, a contract may determine the time of delivery, or route of transportation, or make a carrier liable for an act of God, or any of the other common law exceptions. It may also exempt a common carrier from loss by fire, breakage, leakage, or dangers of navigation, so long as the carrier is not negligent. In the same way the time to present claims may be limited, and the weight of authority holds that the amount recoverable in case of loss may be settled in advance.

The changes in the law of common carriers of passengers
have also been accomplished through the conquests of the power of contract. Here it is that the real strength of the force is displayed. Where the passenger is one for hire, there has not been so much change in the possibility of decreasing the common carrier's liability; but by giving a reduced rate of fare certain conditions and restrictions, like requiring the stamping of a ticket before return passage, may be imposed upon the passenger, but the common carrier can not limit its liability for the negligence of itself or its servants. A passenger has been held to be one for hire, when the common carrier gets any incidental benefit from the trip. The case of Railroad v. Lockwood,\(^1\) held that a drover riding on a pass, issued because of shipment of cattle, is a passenger for hire. The same rule governs railroad mail clerks. In the case of all such persons the common carrier can not relieve itself from liability for negligence.

Where the person is a gratuitous passenger, the common carrier receiving no advantage, if the person carried gratuitously is willing to relinquish his common law privileges, it seems by the weight of authority to be allowed him to take all the risks of transportation. Upon this question there is a variety of holdings by the various state courts, but the Supreme Tribunal of the United States has recently decided in favor of the contract creating an exemption from liability.

In the Federal courts, the entering wedge seems to have been driven into the wall of liability for negligence in the case of Baltimore v. Voigt,\(^2\) where the court permitted a railway company to exempt itself from liability to express messengers traveling on its train, when the messenger assents to the agreement. After taking this position is was easy for the court to take the next step and hold in the recent case of the Northern Pacific Railway Co. v. Adams,\(^3\) that a railway can by contract exempt itself from liability for negligence to a person riding on a free pass. In this case the court refused to pass upon the question whether a railway could under such circumstances exempt itself from liability for wanton or wilful acts, but just what it meant

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\(^1\) 17 Wall. 357.
\(^3\) 192 U. S. 440.
by this language it did not tell us. Perhaps it is not presumptuous to infer that the court intended not "gross" negligence but acts which would amount to criminal acts. In the still more recent case of Boering v. The Railway the court simply reiterated the doctrines of the above case, and in addition decided that the stipulation exempting the carrier from liability may be binding although notice of such stipulation is not brought home to the person riding on the free pass. This is the last word in this country upon the subject of the possibility of a common carrier to exempt itself from liability for negligence.

On the one side it may be argued that, if the carriage of passengers were a branch of the law of bailments, it would be difficult to find a reason for allowing the exemption, as it has been held all along to be against public policy to allow a man to stipulate against his negligence in the carriage of goods. However, it is not a bailment relation, and other principles must be applied. But it is hard to understand how negligence in the handling of freight and live stock can be against public policy, and negligence in the transportation of human beings not be. Independent of the question of bailment it would seem that negligence of any kind ought to be unlawful and wrong, and any agreement relieving a person or company from liability for acts of negligence ought to be wrong and against public policy. If exemption from liability for negligence is against public policy when the passenger pays his fare, why is it not against public policy when he is carried free? Where is there any distinction between the two cases, so far as this question is concerned?

The argument of those who maintain that the right of exemption should be allowed is that there is no duty resting upon railroads to carry persons gratuitously, but rather its duty is not to carry them without compensation; and therefore if a person wants to take a free pass from the carrier the latter may impose any conditions and stipulations it pleases; that the person carried is in no way constrained to accept the gratuity of the defendant; and that the number of passes issued is so small there is no temptation offered to carelessness in the management of trains, or to an increase in fares. Or, as stated by Mr. Justice Brewer

in the case of Northern Pacific Railway Co. v. Adams, mentioned above:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privileges of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligation to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege can not repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contracts controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

In answer to this argument it is said that it is possible and even probable that passes might be issued to such an extent as to increase fares and conduce to carelessness in the operation of trains. A train, carrying the members of a legislature, or a newspaper convention, every person in which was riding on a free pass, might be run. The fact that a carrier is not obliged to issue passes ought to be an argument against its privilege of limiting its liability in case of negligence instead of constituting an argument for it. The state has an interest in all of its citizens apart from the interest which the citizen has in himself, and has the right to protect his life and limbs. That rule is the best which will discourage acts of negligence, and forbidding a carrier to limit his liability to gratuitous passengers would certainly have this effect.

But, in spite of these objections, the Supreme Court has adopted the other view. Already the majority of the state courts had taken that position, and after the promulgation of the opinion of the Federal tribunal doubtless the rest of the state courts will fall into line, and we shall have throughout the land one uniform rule permitting exemption from liability. Whether the theory will gradually encroach into the territory of the carriage of passengers for hire, and into the territory of the carriage of goods
and live stock, of course it is impossible to prophesy. It is enough to say that these are among the possibilities, and that they are in the line of the progress of the law of contracts. If this should be the course of the law, it would probably first embrace employees traveling on free passes, employees of sleeping car companies, and newsboys and other vendors, as there is no common law duty resting upon the common carrier to carry any of these parties.

Thus from the time of the beginning of the business of common carriers, when their duties were fixed entirely by law, to the present time, when their duties are so largely fixed by contract, we have an epitome of the development of the law of contracts in the domain of common carriers.

Hugh E. Willis.