CARRIERS—LIABILITY TO GRATUITOUS PASSENGER—DUTY OF CARE—[Federal].—Libelant asked for and received a free pass on the libelee's steamship. On this pass was printed a contract which provided that the carrier should not be liable for its own negligence or its agents' negligence. *Held:* it was not against the public policy for a common carrier in interstate commerce or commerce with foreign nations to exempt itself from liability for acts of negligence of itself or its agents to gratuitous passengers.[1]

The weight of authority upholds the validity of such contracts.[2] The reason given for this rule is that as no duty exists making it necessary to carry gratuitous passengers, the carrier may refuse to carry them save on its own terms.[3] The New York courts hold to the majority rule with great perseverance because of the aforementioned reason, yet the courts of that state held a railroad liable, although it owed no duty to transport a paying passenger who was violating a statute by travelling on Sunday, because the ". . . law raises the duty (of care) out of regard for human life, and for purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands."[4] Some courts recognize a distinction between the negligence of the carrier's agents and employes and the carrier's personal negligence, holding that such a stipulation for exemption from liability will protect the carrier against the negligence of any of its employees and agents, but not its managing officers and directors who are considered as being identical with the corporation itself.[5] Many states which uphold the majority rule will not allow the contract to relieve the defendant from liability for gross, wilful, or wanton negligence.[6] The

1. Stevens v. Colombian Mail S. S. Corp. et al., 15 Fed. Supp. 534 (D. C. S. D. N. Y., May 19, 1936).

2. Goddard, *Outlines of the Law of Bailments and Carriers* (2nd ed. by Cullen, 1928) sec. 372, fn. 236.

3. *Ibid.*, fn. 237. The court in Payne v. Terre Haute, etc. R. Co., 157 Ind. 616, 620, 62 N. E. 472, 56 L. R. A. 472 (1902) declared that pass users increase the burden of fare passengers or at least postpone the arrival of cheaper rates. If these pass users could also get compensation for injuries received through the negligence of the railways, the court believed that they would create "a positive increase of disbursements, to be borne ultimately by the general public." The New Jersey court in Kinney et al. v. The Central R. Co. of N. J., 34 N. J. L. 513 (1869) felt still stronger on the matter when it asserted that it was a breach of good faith for a gratuitous passenger to hold the carrier liable for his injuries. The court went on to say that non-liability for damage to an occasional free passenger would not induce the slightest want of vigilance as any such carelessness would result in untold loss to the carrier.

4. Carroll v. Railroad, 58 N. Y. 126, 17 Am. Rep. 221 (1874).

5. Cooley, *A Treatise on the Law of Torts* (Student's ed. by John Lewis, 1907) 727; Wells v. N. Y. Cent. R., 24 N. Y. 181 (1862); Perkins v. N. Y. Cent. R., 24 N. Y. 196, 82 Am. Dec. 281 (1862); Smith v. N. Y. Cent. R., 24 N. Y. 222 (1862). In the New Jersey cases of Kinney v. Cent. R. Co., 32 N. J. L. 402 (1868), and S. C., 34 N. J. L. 513, 3 Am. Rep. 265 (1869) the issue as to the existence of such a distinction was mentioned, but the court decided that there was no necessity of answering it.

6. Atchison, T. & S. F. Ry. Co. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C 620 and note (1913); Okla. Stat. 1931, secs. 65, 66, & 9255; Ill. Central R. Co. v. Read, 37 Ill. 484 (1865); and see Ill. Cent. R. R. Co. v.

courts of almost all states will, if they possibly can, find some consideration for the pass in order that they can declare the passenger a paying passenger instead of a gratuitous one, and thereby make the contract exempting the carrier from liability invalid.[7]

In the state courts we find a variety of rulings and even a looseness and conflict of rationale within certain jurisdictions. The Oklahoma courts, like the federal courts, follow the majority rule.[8] A line of Illinois decisions also follows the strict federal ruling in regard to free passengers.[9] In the case of *Pennsylvania Co. v. Purvis*[10] the court in general terms said that the defendant company could not free itself by contract from its duty of care. Little emphasis was put on the fact that the plaintiff was riding on a free pass. These general statements lost much of their force when the court determined the case on the ground that the infant passenger could disaffirm the contract. The court further stated that the evidence warranted a finding of gross negligence which would, in Illinois, have allowed a recovery despite the contract exempting defendant from liability.[11] In the early case of *Arnold v. I. C. R. R. Co.*[12] the court used the same manner of reasoning as it did in the cases dealing with free passengers holding that as the railroad was not obliged to take a paying passenger on its freight cars a contract exempting a railroad from liability for negligence would be valid in that situation. But in a later case[13] the Illinois court held that a carrier will be held to the same degree of care in the case of a paying passenger on a freight train as in the case of one on a passenger train. The court, however, failed to mention the *Arnold* case. It remained for *Illinois Central R. R. Co. v. Beebe*[14] to say that the *Arnold* case was no longer law in Illinois. In view of the *Beebe* case and the dicta in the *Purvis* case it

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Beebe, 174 Ill. 13, 66 Am. St. Rep. 258, 43 L. R. A. 213, 50 N. E. 1022 (1898); but see Pennsylvania Co. v. Purvis, 128 Ill. App. 367 (1906) in which court cited authorities to effect that all negligent acts of railways were gross when the passenger was not at fault; and Bryan v. Mo. Pac. Ry. Co., 32 Mo. App. 228 (1888).

7. Binder v. Union Pac. R. Co., 108 Kans. 47, 194 Pac. 314 (1920); Little Rock, etc. R. Co. v. Miles, 40 Ark. 320, 48 Am. Rep. 11 (1883); N. Y. C. & L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809 (1895); Carroll v. Mo. Pac. Ry. Co., 88 Mo. 239, 57 Am. Rep. 382 (1885); St. Louis & S. F. R. Co. v. Kerns, 41 Okla. 167, 136 Pac. 169 (1913); Powell v. Union Pacific R. Co., 255 Mo. 420, 164 S. W. 628 (1914); and Del. etc. R. Co. v. Ashley, 67 F. 212 (C. C. A. 3rd, 1895); contra, Smith v. N. Y. C. R. Co., 24 N. Y. 222 (1862).

8. Atchinson, T. & S. F. Ry. Co. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C 620 and note; and M. K. T. Ry. Co. v. Zuber, 76 Okla. 146, 184 Pac. 452, 7 A. L. R. 840 (1919), appeal dismissed, 41 S. Ct. 322, 255 U. S. 561, 65 L. ed. 786, and writ of error dismissed, 41 S. Ct. 449, 256 U. S. 681, 65 L. ed. 1169 (1921). Okla. Stat., 1931, sec. 9255.

9. Leading case is Ill. Cent. R. Co. v. Read, 37 Ill. 484 (1865).

10. 128 Ill. App. 367 (1906).

11. Supra, note 6.

12. 83 Ill. 273, 25 Am. Rep. 383 (1876).

13. N. Y., C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809 (1895).

14. 174 Ill. 13, 66 Am. St. Rep. 258, 43 L. R. A. 213, 50 N. E. 1022.

seems that the Illinois courts may in future cases adopt the minority ruling.

The Missouri and Arkansas holdings, the latter being based on constitutional and statutory provisions,[15] follow the minority rule and hold that it is against public policy to limit the common law liability of common carriers even in the case of gratuitous passengers.[16] In Kansas there have been no cases which deal with gratuitous passengers. But the supreme court of that state refused to allow a railroad to exempt itself from liability for negligence in the case of a passenger riding on a reduced fare unless the railroad could obtain the permission of the Board of Railroad Commissioners in accordance with a statute.[17] Nor will the courts of that state allow railroads to limit their common law duties in the case of paying passengers who ride in cabooses beyond that limitation designated by statute.[18] By analogy it would seem that the Kansas courts would adhere to the minority rule for in all these cases the railroad was not duty bound to transport the passenger.

Although the courts which follow the majority view make much of the fact that the carrier is not obligated to transport the gratuitous passenger, it seems that that fact is immaterial. The fact is that the carrier does carry him. While it is true that the addition of a gratuitous passenger will not make the carrier less careful than it would ordinarily be, this should be no valid reason for exempting the carrier from liability to the free passenger. "The state has an interest of the highest degree in the preservation of its citizens' lives . . ."[19] and this interest is not lessened because some citizens may choose to ride on a free pass. If diligence was to be graduated to the amount paid for passage it is conceivable that the carrier could be reckless in regard to a pass using traveler.[20] But as most of these cases fall under the federal jurisdiction because they involve interstate travel,[21] it is doubtful whether the majority rule will soon be abolished, for the federal courts hold very tenaciously to the illiberal view. W. B. M.

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15. Const. of Ark., art. 17, sec. 12 and Kirby's Digest, sec. 6773.

16. Bryan v. Mo. Pac. Ry. Co., 32 Mo. App. 228 (1888); R. S. Mo. 1929, sec. 3278; St. L. etc. R. Co. v. Pitcock, 82 Ark. 411, 101 S. W. 725, 118 Am. R. 84, 12 Ann. Cas. 582 and note (1907); Memphis, etc., R. Co. v. Steel, 108 Ark. 14, 156 S. W. 182, Am. Cas. 1915B 198; Dodson v. Clark County Lumber Co., 122 Ark. 612, 184 S. W. 417 (1916) distinguished from Pitcock case as this did not involve a common carrier. In Alexander v. St. Louis-San Francisco Ry. Co., 221 Mo. App. 271, 2 S. W. (2d) 165 (1928) the court held in case falling under Hepburn Act, 34 Stat. 584, 49 U. S. C. A. secs. 1, 6, 11, 15, 16, 16 (a), 18, 20, 41 (1906) that the carrier could not purchase immunity from liability by reducing the fare. This is in accordance with the Missouri holdings. But the dicta followed the rule in the federal courts, stating that it was only where a carrier takes a gratuitous passenger that the carrier is competent to exempt itself by contract from liability.

17. Chicago, etc. Ry. Co. v. Posten, 59 Kans. 449, 53 Pac. 465 (1898); General Statutes of 1897, ch. 69, sec. 17.

18. Davis v. Atchison, T. & S. F. Ry. Co., 81 Kans. 505, 106 Pac. 288 (1910).

19. Sherman & Redfield, *Law of Negligence*, 1367.

20. Wharton, *Law of Negligence*, 517-8.

21. Kansas City Southern Ry. Co. v. Van Zant, 260 U. S. 459, 43 S. Ct. 176, 67 L. ed. 348 (1923) interpreting Hepburn Act, 34 Stat. 584, 49 U. S. C. A. secs. 1, 6, 11, 15, 16, 16 (a), 18, 20, 41 (1906).