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Aeroplane as Common Carrier of Passengers-- Limitations of Liability--Notice (Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244 (1935))

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RECENT DECISIONS

AEROPLANE AS COMMON CARRIER OF PASSENGERS—LIMITATION OF LIABILITY—NOTICE.—Plaintiff's intestate obtained passage on defendant's plane which had regularly scheduled trips from Albany, N. Y. to Newark, N. J. The plane ran into fog at Poughkeepsie, which thickened at Newark. In attempting to land, the pilot crashed, destroying the plane and causing the death of the intestate. Defendant furnished its agent at Albany with three kinds of contracts, "A," "B," and "C," which limited its liability to \$5,000, minimum rate, \$10,000, double rate, and \$15,000, triple rate respectively. Plaintiff's intestate bought a class "A" contract ticket. Defendant offered for sale no unlimited liability tickets. The negligence of the defendant was not disputed. Defendant urged that it was relieved from liability in excess of \$5,000 for negligence causing intestate's death. Judgment in favor of the plaintiff was affirmed on the ground that no voluntary choice was left to the deceased passenger of obtaining full or limited liability. *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N. Y. 244, 194 N. E. 692 (1935).

A common carrier is one who holds himself out as ready and willing to carry for hire all persons who apply for passage.¹ The rules governing the business of a common carrier by airship or flying machine may be readily assimilated to those applied to other common carriers.² It is lawful for a common carrier in the pursuit of its business to limit its liability for negligence.³ A contract between a carrier and a passenger that limits the carrier's liability for negligence must be in consideration of an abatement of a part or the

¹ RICHARDSON, BAILMENTS (1st ed. 1930) 121; Terminal Taxicab Co., Inc. v. Kurtz *etc.*, 241 U. S. 252, 36 Sup. Ct. 583; The Propeller Niagara v. Cordes, 62 U. S. 7 (1858); McCoy v. Pacific Spruce Corp., 1 F. (2d) 853 (C. C. A. 9th, 1924); Sanger v. Lukens, 24 F. (2d) 226 (D. C. Idaho 1927); Simmons v. Oregon R. & Nav. Co., 41 Ore. 151, 69 Pac. 1022 (1902); Jackson Architectural Iron Works v. Hurbut, 158 N. Y. 34, 52 N. E. 665 (1899); Anderson v. Fidelity & C. Co., 228 N. Y. 475, 127 N. E. 584 (1920); 4 R. C. L. 546 (§2), 1,000 (§468).

² C. J. 305; North Amer. Accident Ins. Co. v. Pitts, 213 Ala. 102, 104 So. 21 (1925); Curtiss-Wright Flying Service, Inc. v. Glose, 66 F. (2d) 710 (C. C. A. 3d, 1933); Anderson v. Fidelity & C. Co., 228 N. Y. 475, 127 N. E. 584 (1920); Smith v. O'Donnell, 5 P. (2d) 690 (1932), *aff'd*, 215 Cal. 714, 12 P. (2d) 933 (1932); McCusker v. Curtiss-Wright, 269 Ill. App. 502 (1st Dept. 1933), 1933 U. S. Av. R. 105; Law v. Transcontinental Air Transport, Inc., 1931 U. S. Av. R. 205. An air transport company selling tickets generally to the public and advertising regular times of operating its planes is a common carrier in spite of a provision in the ticket denying that it is a common carrier.

³ Bissel v. N. Y. C. R. Co., 25 N. Y. 422 (1862); Wells v. N. Y. C. R. Co., 24 N. Y. 181 (1862); Murray v. Cunard S.S. Co., Ltd., 200 App. Div. 466, 193 N. Y. Supp. 220 (1st Dept. 1922), *rev'd on other grounds*, 235 N. Y. 162, 139 N. E. 226 (1923); Hodge v. Rutland R. Co., 112 App. Div. 142, 97 N. Y. Supp. 1107 (3d Dept. 1906), *aff'd*, 194 N. Y. 570, 88 N. E. 1118 (1909); Smith v. N. Y. C. R. Co., 24 N. Y. 222 (1862); 4 R. C. L. 3337 (§565); Anderson v. Erie R. Co., 223 N. Y. 277, 119 N. E. 557 (1918).

whole of the fare to be legal.⁴ A carrier cannot by special agreement secure immunity from its negligence or that of its servants unless such intent is specifically and expressly stated in the agreement.⁵ The parties may agree that recovery shall be limited to an agreed valuation which forms the basis of the charges fixed by the carrier, but if the limitation is imposed without choice of rates between limited and unlimited liability it is not valid.⁶ From the instant case it would appear that an aeroplane fulfilling the conditions of a common carrier may limit its liability for negligence, but such limitation must be in consideration of a reduced fare or other benefit to the passenger, and notice of such limitation and different rates must be expressly made to the passenger.

S. W. R.

AGENCY—BROKER'S COMMISSIONS—CONTRACT.—By the terms of a brokerage contract, the defendant corporation engaged the plaintiff to procure a lessee of certain premises for a twenty-one year period. It was further stipulated that no commissions would be earned by the plaintiff until the final execution of the lease. The broker produced a prospective tenant of doubtful financial ability, whereupon the defendant corporation refused to execute the lease until the broker agreed to take a portion of his commissions as the lessee paid its rents. Without waiting for his commissions to accrue, the broker brought an action for the full amount of his unpaid commissions on the theory that the second agreement lacked consideration. *Held*, the subsequent contract was valid and subsisting and a complete bar to the broker's action. *Saum v. Capital Realty Development Corp.*, 268 N. Y. 341, 197 N. E. 303 (1935).

It is a hornbook rule that a broker's commissions are earned when he produces a customer ready, willing and able to comply with

⁴ *Pendergast v. Union R. Co.*, 10 App. Div. 207, 41 N. Y. Supp. 927 (1st Dept. 1896); *Murray v. Cunard S.S. Co., Ltd.*, 200 App. Div. 466, 193 N. Y. Supp. 220 (1st Dept. 1922), *rev'd on other grounds*, 235 N. Y. 162, 139 N. E. 226 (1923); *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 422 (1862); *Hodge v. Rutland R. Co.*, 112 App. Div. 142, 97 N. Y. Supp. 1107 (3d Dept. 1906), *aff'd*, 194 N. Y. 570, 88 N. E. 1118 (1909); *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562 (1884); *Smith v. N. Y. C. R. Co.*, 24 N. Y. 222 (1862); *Mynard v. Syracuse, Binghamton & N. Y. R. Co.*, 71 N. Y. 180 (1877); *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196 (1862).

⁵ *Holsapple v. Rome, Watertown etc. R. Co.*, 86 N. Y. 275 (1881); *Blair v. Erie R. Co.*, 66 N. Y. 313 (1876); *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196 (1862); *Kenny v. N. Y. C. R. Co.*, 125 N. Y. 422, 26 N. E. 626 (1891); *Mynard v. Syracuse, Binghamton & N. Y. R. Co.*, 71 N. Y. 180 (1877).

⁶ *Kiltow v. Internat. Mer. Mar. Co.*, 245 N. Y. 361, 157 N. E. 267 (1927); *Burke v. Union Pac. R. Co.*, 226 N. Y. 534, 124 N. E. 119 (1919).