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# Comments

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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

# Comments

## AMENDMENT OF THE PLEADINGS AFTER THE STATUTE OF LIMITATIONS HAS RUN

If it were possible, for purposes of expediency, it would be fitting to attempt to determine just what constitutes a "cause of action" for present purposes. What is meant by this term in the various ramifications of its application has been one of the most vexing problems of pleading. There have

been varied attempts to define "cause of action,"[1] none of which have been particularly successful when an attempt is made to apply the definition to the different situations arising. The reason for this apparent failure at definition is that the concept differs with the several problems that might arise in this connection. A different degree of liberality is seemingly employed in testing the sufficiency of the statement under a demurrer, than in determining the possibility of joinder of causes, the propriety of a counterclaim, the right to a more specific statement, and the right to amend after the running of the Statutes of Limitations. In this latter situation, the problem is to determine whether or not the litigation presented by the amendment was commenced before the statute has barred the plaintiff's right to recover.

The problem of when such amendment relates back to the commencement of the action so that the bar of the statute will not attach, is one upon which the general rules are well established in the decisions. Where an amendment of the declaration, petition or complaint states no new claim or cause of action, and makes no new demand, it relates back to the commencement of the action, and the running of the Statute of Limitations against said cause of action or claim, is tolled at that point.[2] But where the amendment sets up a new cause, claim, or makes a new demand, it does not relate back and the statute continues to run until the filing of the amended complaint.[3] The application of these general principles presents great difficulty as is shown by the inharmonious decisions of the courts. At least a part of this lack of harmony in the decisions is caused by the variance in the provisions of the statutes of the different states. To enunciate the rules applicable is a simple matter, but

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1. BLISS, CODE PLEADING (2d ed. 1887) § 117; CLARK, CODE PLEADING (1928) § 19; PHILLIPS, CODE PLEADING (2d ed. 1932) § 187; POMEROY, CODE REMEDIES (5th ed. 1929) § 347.

2. Fidelity Title and Trust Co. v. Dubois Elec. Co., 253 U. S. 212 (1922); Haynes v. Phillips, 211 Ala. 37, 99 So. 356 (1924); Connell v. Crosby, 210 Ill. 380, 71 N. E. 350 (1904); Emeny v. Farmers' Elevator Co., 194 Iowa 282, 189 N. W. 720 (1922); Lilly v. Tobein, 103 Mo. 477, 15 S. W. 618 (1890); Bricken v. Cross, 163 Mo. 449, 64 S. W. 99 (1901); Gail v. Philadelphia, 273 Pa. 275, 117 Atl. 69 (1922); Love v. Southern Ry., 108 Tenn. 104, 65 S. W. 475 (1901). In Buel v. St. Louis Transfer Co., 45 Mo. 562 (1870), the law was thus stated: "Where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action—the running of the statute continuing down to the time the amendment is filed." See 17 R. C. L. 815.

3. Union Pacific R. R. v. Wyler, 158 U. S. 285 (1895); Allis-Chalmers Mfg. Co. v. City of Chicago, 297 Ill. 444, 130 N. E. 736 (1921); Matthys v. Donelson, 179 Iowa, 1111, 160 N. W. 944 (1917); Goldberg v. Friedrich, 279 Pa. 572, 124 Atl. 186 (1924); Irvine v. Barrett, 119 Va. 587, 89 S. E. 904 (1916). See 2 WOOD, LIMITATIONS OF ACTIONS (4th ed. 1916) 1526, stating the usual theory that where an amended complaint sets up a new cause of action, the Statute of Limitations continues to run until the amendment is filed.

when an attempt is made to apply them to the various factual situations arising, a different and more perplexing problem arises.

In a recent decision by the United States Supreme Court,[4] it was held that an amendment in a personal injury action broadening the description of the place where the injury occurred to include another building more than five hundred feet away, did not state a new cause of action and hence was not barred by the running of the Statute of Limitations. The court speaking through Mr. Justice Black, said: "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."

This decision illustrates the tendency in many recent decisions toward a liberal view point. It seems that such a situation is indeed the proper place for liberality, because the importance of the pleadings ought to lie solely in their effectiveness as a means to reach a just result. Thus it seems that a too technical approach could do nothing other than obstruct justice.

Many tests have been used in a futile attempt to pigeon-hole a solution to the problem of identity of causes of action in the original and amended pleadings. A few of those most frequently applied are: Will the new allegations deprive the other party of some substantive defense which he had to the other pleading?[5] Is the measure of damages the same in each case?[6] Will the same evidence support both the original and amended pleadings?[7] Would a judgment upon the original pleading bar an action on the amendment, or vice versa?[8]

Although all of these tests have been applied by the courts, it would be better to determine the question on each factual situation as it arises, rather than on the legal theory of the action. The question for determination in each instance should be, whether or not the pleading still seeks redress on account of the same transaction, or sets out substantially the same defense, as the original pleading did.

Very frequently the question is presented as to whether an amendment which supplies an essential allegation to the pleading states a new cause of action so as to be barred by the Statute of Limitations. Where there is merely a defective statement, it seems well established that the amended pleading will relate back to the time of filing the original and will be unaffected by the statute.[9] But where no cause of action is stated in the pleading, through a de-

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4. Maty v. Grasselli Chemical Co., 58 Sup. Ct. 507 (1938).
5. Card v. Stower's Pork Packing & Provision Co., 253 Pa. 575, 98 Atl. 728 (1916); Phoenix Lumber Co. v. Houston Water Co., 94 Tex. 456, 61 S. W. 707 (1901).
6. Hurst v. Detroit City Ry., 84 Mich. 539, 48 N. W. 44 (1891).
7. Carlin v. Chicago, 262 Ill. 564, 104 N. E. 905 (1914).
8. Burkhart v. Millikan, 76 Ind. App. 480, 130 N. E. 837 (1921); Van Patten v. Waugh, 122 Iowa 302, 98 N. W. 119 (1904). For a complete statement of these tests, see Whalen v. Gordon, 95 Fed. 305 (C. C. A. 8th, 1899); also Wisconsin Chair Co. v. I. G. Ely Co., 91 S. W. (2d) 913 (Tex. Civ. App. 1936).
9. Mobile Light & R. R. v. Ellis, 209 Ala. 580, 96 So. 773 (1923); Arizona

fect of substance, there is a division in the cases as to the effect of an amendment. One line of authority says that if there is an omission of an essential allegation, the pleading fails to state a cause of action and the statute is not arrested by the filing of such.[10] This view seems to be entirely too technical and the courts that follow it seem to lose sight of the fundamental purpose of pleadings, that of notice giving. Up until recent times this doctrine was rigidly applied in Illinois,[11] but with the passing of the Civil Practice Act in that state, it was obviously the intention of the legislature to be less technical, and the courts have so construed the act.[12] There is a substantial body of authority that has followed the more liberal approach and has held that, where an amendment supplies an essential allegation to the original pleading, it relates back to the filing of the original pleading and is unaffected by the expiration of the period of limitations before the amendment.[13]

While it is impossible to anticipate all the possible changes that might be made in an amended pleading, in order to get a better understanding of the approach of the courts it is helpful to examine the rulings on some of the more common amendments. When there is an amendment of a petition, declaration, or complaint, changing the capacity in which the plaintiff is prosecuting the action, it is generally held that such an amendment does not change the cause of action so as to let in the defense of the Statute of Limitations.[14] The reasoning back of these decisions seems to be that while the amendment causes the action to be brought in form by another person, yet actually it is the same individual in whose name the original pleading was filed. Missouri seems to be in accord with this view.[15] However, there are a few jurisdictions which use the

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Eastern R. R. v. Old Dominion Copper Mining & Smelting Co., 14 Ariz. 209, 127 Pac. 713 (1912); Lichtenstein v. Fish Furniture Co., 272 Ill. 191, 111 N. E. 729 (1916).

10. Allis-Chalmers Mfg. Co. v. City of Chicago, 297 Ill. 444, 130 N. E. 736 (1921); Burke v. Unger, 88 Okla. 226, 212 Pac. 993 (1923); Bender v. Penfield, 235 Pa. 58, 83 Atl. 585 (1912). In Missouri, K. & T. Ry. v. Bagley, 65 Kan. 188, 69 Pac. 189 (1902), the court held an amendment supplying the consideration for the promise sued on, to be barred by the Statute of Limitations. Doster, C. J., and Ellis, J., dissented saying that the defect in the original pleading was merely formal and the majority was entirely too technical in its decision.

11. Walters v. City of Ottowa, 240 Ill. 259, 88 N. E. 651 (1909); Edmunds v. City of Chicago, 203 Ill. App. 327 (1917).

12. Randall Dairy Co. v. Pevely Dairy Co., 278 Ill. App. 350 (1935). See note in (1935) 13 CHICAGO-KENT REV. 299.

13. Mohn v. Tingley, 191 Cal. 470, 217 Pac. 733 (1923); Tallapoosa v. Brock, 28 Ga. App. 384, 111 S. E. 88 (1922); Richard v. American Union Bank, 225 App. Div. 634, 234 N. Y. Supp. 177 (1st Dep't 1929), *aff'd* in 253 N. Y. 166, 170 N. E. 532 (1930); Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881 (1901); Salisbury v. Poulson, 51 Utah 552, 172 Pac. 315 (1918); Bent v. Read, 82 W. Va. 680, 97 S. E. 286 (1918); Siever v. Klots Throwing Co., 101 W. Va. 457, 132 S. E. 882 (1926).

14. Missouri, K. & T. Ry. v. Wulf, 226 U. S. 570 (1913); Bryan v. Inspiration Consol. Copper Co., 23 Ariz. 541, 205 Pac. 904 (1922); Herbert v. Byron Jackson Iron Works, 39 Cal. App. 209, 178 Pac. 550 (1918); Bremer v. Chicago & E. I. Ry., 247 Ill. App. 406 (1927); Williams v. Mo. Valley Bridge & Iron Co., 111 Kan. 34, 206 Pac. 327 (1922); Ghilain v. Couture, 146 Atl. 395 (N. H. 1929); Whitson v. Tennessee C. Ry., 40 S. W. (2d) 396 (Tenn. 1931).

15. In Drakopulos v. Biddle, 288 Mo. 424, 231 S. W. 924 (1921), it was held

more technical approach.[16] The theory of these courts is that there is really no attempt to amend the pleading but rather to substitute a new action for the one already pending.

At common law where the forms of action were strictly adhered to, and under the earlier rules in code jurisdictions,[17] it was generally held that where there is a change of theory in the amendment, it may be barred by the period of limitations. The view in the majority of modern decisions is that where there is an amendment changing the theory upon which it is sought to hold a defendant, it is proper unless it presents an entirely new cause of action.[18] It is often difficult to draw the line between cases where the change in theory does, or does not, amount to a different cause of action. Consequently some cases, while distinguishable because of a slight difference in the factual situation, are clearly contrary to the aforementioned liberal view.[19]

When the amendment of the plaintiff's initial pleading changes allegations as to the capacity in which the defendant is sued, we again find the general statement that such amendment is proper if a new cause of action is not stated, and again the chief difficulty lies in determining just when such new cause is stated. Theoretically, when there is a change in legal capacity in which a defendant is sued, it seems there is a new cause of action, because a change in capacity constitutes a change in persons in strict legal theory. Actually, it is not true that there is a change in persons, and it should be held that there is no new cause of action, because the cause of action is based on the invasion of the same substantive right and by the same physical being. In an early Mis-

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that no new cause of action was presented so as to let in the defense of limitations where an action was brought by the administrator, founded on a statute giving the personal representative a right of action, and amendment was made substituting the widow and setting out that, under another statute, she was entitled to bring the action. See, also, Pyle v. University City, 279 S. W. 217 (Mo. App. 1926), where an action for death was brought by the deceased's parents, and amendment was made substituting the personal representative, who was not appointed until after the running of the Statute of Limitations. In this case this question was not necessary to the decision of the case, but the court said: "However, if the point were here, we should be disposed to rule, under the doctrine of liberal allowance of amendments, and amendments which expressly save a cause of action from the statute of limitations, that this amendment could be made."

16. La Bar v. New York, S. & W. R. R., 218 Pa. 261, 67 Atl. 413 (1907); Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931). In Bennett v. North Carolina R. R., 159 N. C. 345, 74 S. E. 883 (1912), the court said: "While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment." (citing cases.)

17. See CLARK, CODE PLEADING (1928) 515, setting out various instances where changes in theory were and were not permitted.

18. Clinchfield R. R. v. Dunn, 40 F. (2d) 586 (C. C. A. 6th, 1930); Skala v. Lehon, 343 Ill. 602, 175 N. E. 832 (1931); Scott v. Schisler, 153 Atl. 395 (N. J. 1931).

19. Merchants Nat. Bank v. Bentel, 166 Cal. 473, 137 Pac. 25 (1913); Henger v. Owens Lumber & Loan Co., 17 S. W. (2d) 137 (Tex. Civ. App. 1929).

souri case[20] it was held that an amendment in a suit against the estate of a deceased maker of a promissory note to recover upon such note, which only changes the characterization of the defendant from administratrix to executrix, does not introduce a new cause of action so as to let in the defense of limitations. While this case does not come within the group of borderline decisions, its theory should be extended to those cases.[21]

In cases where the amendment of the pleadings after the period of limitations consists of substituting a new defendant, it appears reasonably clear that the action would be barred against the new defendant because it states an entirely new cause of action against him.[22] This should not, however, be taken as an arbitrary rule, and if the substitution only constitutes a formal change, and the notice given by the amended pleading is for all practical purposes the same, then the amendment should be permitted.[23] The cases are not entirely in harmony, due to differences in the opinion of the courts as to when a new cause of action is stated.[24]

It is well settled that, where the only change made by the amendment is in the prayer for relief or in the remedy sought, the running of the statute before the amendment is filed will not be a bar to the action, because there is a mere continuance of the original action with a claim for a different remedy. The uniform holding of the courts is that the prayer is no part of the cause of action but is merely the pleader's idea of the relief to which he is entitled.[25]

The courts have consistently attempted to apply the cause of action test, in determining whether an amendment is barred by the statute, and, as a result, we find the decisions so conflicting it is impossible to tell just how a court will decide a particular case. Whatever decision is reached can be supported by a substantial number of cases, and, on the other hand, criticized as being in

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20. Gewe v. Hanszen, 85 Mo. App. 136 (1900).

21. Evans v. Richardson, 76 Ala. 329 (1884); Boyd v. U. S. Mortg. & T. Co., 187 N. Y. 262, 79 N. E. 999 (1907); Kopperl v. Sterling, 241 S. W. 553 (Tex. Civ. App. 1922). But see Bender v. Penfield, 235 Pa. 58, 83 Atl. 585 (1912); Stine v. Herr, 78 Pa. Super. 226 (1922).

22. Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890 (1895); Smith v. Barrett, 41 Mo. App. 460 (1890); St. Joseph *ex rel.* Forsee v. Baker, 86 Mo. App. 310 (1900); Wigton v. Smith, 57 Neb. 299, 77 N. W. 772 (1899); Mitchell v. Hines, 101 Okla. 38, 223 Pac. 182 (1924); Girardi v. Laquin Lbr. Co., 232 Pa. 1, 81 Atl. 63 (1911); McGee v. Ferguson Seed Farms, 34 S. W. (2d) 338 (Tex. Civ. App. 1931).

23. Manistee Mill Co. v. Hobdy, 165 Ala. 411, 51 So. 871 (1909); Moody v. Wickersham, 111 Kan. 770, 207 Pac. 847 (1922); Johnson v. Carroll, 172 N. E. 85 (Mass. 1930); Texas and P. Ry. v. Comstock, 83 Tex. 537, 18 S. W. 946 (1892); Ft. Worth and R. G. Ry. v. Sellers, 242 S. W. 275 (Tex. Civ. App. 1922).

24. See cases in notes 22 and 23, *supra.*

25. Friederichsen v. Renart, 247 U. S. 207 (1918), a case arising in Nebraska where two Nebraska cases are cited as illustrative of the rule: McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614 (1886), and Butler v. Smith, 84 Neb. 78, 120 N. W. 1106 (1909); Case v. Blood, 71 Iowa 632, 33 N. W. 144 (1887); Eagan v. Murray, 102 Kan. 193, 170 Pac. 389 (1918); Finzer v. Peters, 232 N. W. 762 (Neb. 1930); Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881 (1901); Truman v. Lester, 71 App. Div. 612, 75 N. Y. Supp. 548 (1st Dep't 1902); see 21 R. C. L. 586; R. C. L. PERM. SUPP. 5078.

conflict with a goodly array of authority. It seems that the courts which follow this technical viewpoint have become so absorbed in theory that they have lost sight of the real object of the pleadings. The logical method to avoid having these conflicting decisions would be to abandon the cause of action test entirely, and consider whether the notice given by the original and amended pleadings is substantially the same. Is the notice given by the original pleading fair notice to the opposing party of what is contained in the amendment? This is what has, in effect, been done by the liberal courts which purport to apply the cause of action test. The new Federal Rules of Civil Procedure[26] provide: Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Since this provision does not mention "cause of action," the federal courts are free to adopt the more practical test of notice-giving.

DAVID R. HARDY

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### CONTRACTING AGAINST LIABILITY FOR NEGLIGENT CONDUCT

When considering a contract by which one party agrees to free the other from any liability for damages which the former may suffer due to the negligent act of the latter, certain considerations of social policy play a very large and important part in determining its validity. There is the social interest in the utmost freedom to contract, and in the security of transactions when entered into, to be weighed against the social effect of such a contract.

A contract that is not freely and voluntarily entered into and which works a hardship on one party should be invalid. It becomes necessary, therefore, to look into the circumstances under which the contract was made to determine if the parties did freely and voluntarily enter into the agreement. One of the principal aids in so determining is to look at the comparative positions of the parties. Illustrative are the situations where it is necessary for the one party to enter into the contract to obtain something that is vital to him or to his family, a form of economic duress, or where the superior knowledge of facts (not amounting to fraud) gives the one in the superior position the power to insert any provisions which are favorable to him, which the other must accept regardless of his realization of possible detrimental effects. There is strong reason to distinguish between contracts relieving a person from the consequences of his own negligent act when made under these circumstances, and contracts made by two persons in equal positions, entered into without coercion of any kind, in which the one party for a good consideration voluntarily assumes the risk of any injury. In this case the social interests in freedom of contract and in the security of transactions are dominant.

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26. Rule 15 (c).

There is an additional situation, closely related to the one where the parties contracting are not in equal positions, where the courts have a cogent reason for placing limitations against contracting away responsibility for negligence out of fear that the public welfare will be detrimentally affected. That case is where one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.[1] Due to the social interest in the general welfare, it was early held that, although ordinary bailees may make their own terms with their customers, it is not so with common carriers and inn-keepers. Arising from their public employment, public policy demands that they should not be discharged from their duties and responsibilities, and that consequently they limit their common law liability by express agreement.[2] Courts constantly analyze the public servants' contracts to determine if they are an attempt to contract away the consequences of a breach of a legal duty or responsibility in such a manner as to be against the public interests.[3] The exemption contract is no bar, for the action which is subsequently brought is based upon the common law responsibility of the carrier (or possibly statutory responsibility) for negligence from which no special contract can relieve him. The liability of the public servant does not arise from a special contract, expressed or implied, but upon a neglect of public duty.[4]

Another argument strongly advanced as a reason for declaring the type of contract under discussion invalid is the possibility that the one who has received the promise will become lax due to his position of security, thus enhancing the possibility of injuries.[5] This argument is based on the theory that it is the possibility of loss, usually pecuniary, which causes one to be more careful with his dealings with fellow men. Where we have a contract that is freely entered into, with none of the first two objections applicable, it seems then, if the contract is to be invalidated because it contravenes social policy, it must be

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1. RESTATEMENT, CONTRACTS (1932) § 575. For a thorough treatment of these types of bailments, see ELLIOTT, BAILMENTS (2d ed. 1929) §§ 115, 180 *et seq.*; GODDARD, BAILMENTS AND CARRIERS (2d ed. 1928) §§ 186, 250 *et seq.*; Willis, *The Right of Bailees to Contract Against Liability for Negligence* (1907) 20 HARV. L. REV. 297.

2. Cole v. Goodwin, 19 Wend. 251 (N. Y. 1838).

3. Judge Lamm, of the Missouri Supreme Court, referring to the rule that those owing a duty of public service cannot relieve themselves from the consequences of their negligent act, says: "The reason underlying the rule is, that while, ordinarily, the courts will enforce contracts made by persons who are *sui juris*, still the public has an interest in contracts for carriage of passengers, and the law will require them to be just and reasonable, even if the passenger had not so required or had otherwise expressly agreed." Powell v. Union Pac. R. R., 255 Mo. 420, 164 S. W. 628 (1914).

4. Clark v. St. Louis, K. C. & N. Ry., 64 Mo. 440 (1877).

5. "Undoubtedly contracts exempting persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause." 6 R. C. L. 727, citing Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752 (1906).

so done on the force of this last objection. As cases involving contracts of the above type are recurring in the reports, it is well to examine the merits of a theory which is the sole force by which contracts entered into by competent parties are to be rendered unenforceable. Following the reasoning, namely, when one is relieved from the consequences of his negligent act, a want of due care is thereby induced and thus the contract is invalid, it would seem to follow that any agreement, by which one would be relieved from this possibility of loss from his own negligent conduct, would likewise be invalid as a matter of social policy. In either case the result would seem to be the same, namely, a failure to use due care. But in the law we find many instances where the one party has by contract freed himself entirely from the consequences of his negligent conduct. One would search long and fruitlessly to find any recent decision holding an insurance policy, insuring a driver against any damage which may result even from his own negligent driving, void for any reason.[6] Some states require drivers to insure before a license is issued.[7] Yet is not "the highest incentive to use due care," as advanced by those who would invalidate these contracts, as fully destroyed here as in a contract between the two parties effecting the same result?

In contracts providing for indemnification for any loss that one may suffer by having to respond in damages for the result of his negligence, the same objection would appear to be present. But these contracts are not against public policy. Where it was argued that, if a railroad company be reimbursed for its negligent act in the maintenance of a crossing, it would have a tendency to cause the company to omit the performance of the duties imposed by statute, which required railroad companies to keep certain public crossings in proper condition for the use of the traveling public, the reply of the court in disposing of the contention was merely that "the contract does not undertake to relieve the railroad company from the duties imposed by the article, nor free it from liability for damages occasioned to others as the result of its failure to perform those duties." The court said "we cannot assume that because the agreement was made the railroad company will violate the statute."[8] Between the case where one contracts for indemnification from a third person and where the

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6. "Most automobile owners insure themselves against claims which may be asserted against them even for their own negligence. . . . It plainly contravenes no public policy of this state." Gorman Coal Co. v. Louisville & N. R. R., 213 Ky. 551, 281 S. W. 487 (1926). Because temptation to negligence may probably result from the insurance policy, it cannot be said the policy necessarily begets negligence, so as to be against public policy. Fidelity & Deposit Co. of Maryland v. Moore, 3 F. (2d) 652 (D. Ore. 1925), *appeal dismissed*, 272 U. S. 317 (1926).

7. Here there is a larger public good to be served, namely, an assurance to the one injured that he may recover even if the driver is financially irresponsible. Also, there is still the danger of criminal liability facing the negligent driver.

8. Houston & Tex. Cent. R. R. v. Diamond Press Brick Co., 111 Tex. 18, 222 S. W. 204 (1920). Accord: Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N. E. 739 (1923).

two parties themselves agree that the one is not to be liable for the consequences of his negligent act, it seems that social policy would more readily invalidate the contract of the first type. In both, the incentive to use due care is equally destroyed and according to the reasoning, an individual is more likely to be injured. In the former, the one injured is not necessarily, and not even likely to be, the one who contracted to indemnify, while in the latter case the very party to the contract is the one who is assuming the risk and the one who brought on this laxness in the negligent person, if we are to assume that negligence is the logical result of these contracts. In the one case the injured party himself freely made the situation possible. In the other case, where a member of the public is injured, because of this laxness caused by this position of security from pecuniary loss, created by a third party's contract to indemnify the negligent person, the one injured had nothing to do with creating the situation. In brief, the same reason for being negligent is present in both, while in the contract for indemnification the one injured has no control over the cause. If either has force for being against public policy, it would clearly seem to be the latter. But contracts permitting indemnification for loss suffered even from the negligent act of the indemnified party are generally not held to be against public policy.[9]

The validity of contracts relieving one from liability for negligence cannot be stated in comprehensive terms. The cases actually involving contracts relieving the one party from the consequences of his negligent act can best be understood by an individual treatment of the different capacities in which one so contracts.

The courts are agreed in holding that a person contracting in the capacity of a common carrier cannot contract away his liability for negligence with the person who is carried or whose goods is transported.[10] A contract of this type

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9. Payne v. National Transit Co., 300 Fed. 411 (W. D. Pa. 1921), *aff'd*, National Transit Co. v. Davis, 6 F. (2d) 729 (C. C. A. 3d, 1925), *cert. den.* 269 U. S. 579 (1925). Here the transit company wanted to run pipes under the tracks of the railroad company and agreed to indemnify the latter for any loss suffered "in any manner or arising out of the laying of the pipes." The railroad company had a train with a faulty spark arrester and a fire resulted. The railroad was permitted a recovery, and the contract was not against public policy. Chesapeake Beach Ry. v. Hupp Automatic Exch. Co., 48 App. D. C. 123 (1918); Gorman Coal Co. v. Louisville and N. R. R., 213 Ky. 551, 281 S. W. 487 (1926). It was held here that a contract holding carrier harmless from claims for failure to keep spur track clear was not against public policy, as relieving carrier from common law liability for negligence. Bay State St. Ry. v. North Shore News Co., 224 Mass. 323, 112 N. E. 1007 (1916); Kansas City, M. & B. R. R. v. Southern Ry. News Co., 151 Mo. 373, 52 S. W. 205 (1899) (holding that a contract entered into by a news company, wherein it agrees to indemnify a railroad company for and save it harmless from all damages it may have to pay by reason of any injury to the news company's employees, whether caused by the negligence of the railroad's employees or otherwise, does not violate any rule of public policy); Cavanaugh v. Boland Co., Inc., 149 Misc. 576, 268 N. Y. Supp. 390 (Sup. Ct. 1933).

10. York Co. v. Central R. R., 3 Wall. 107 (U. S. 1865); Pierce v. So. Pac. Co., 120 Cal. 156, 47 Pac. 874 (1898), 52 Pac. 302 (1868); Shellabarger Elevator

is confronted with all the objections already considered. The common carrier owes a duty to the public[11] arising from the public character of his employment and the extensive control he exercises over the property of others. The obligation is imposed by law, and does not arise out of contract. Any breach of this duty is a violation of the law which imposes the duty. Therefore, a contract which exempts the carrier from damages resulting from negligence in the discharge of these duties is void, because it relieves him of an absolute duty which the law imposes upon it.[12] The objection that the parties are not in equal position is also applicable. The traveler is often obliged to employ the services of the carrier, and every time he must do so he cannot stop to settle the terms and negotiate an agreement. The carrier, with its monopoly of transportation facilities, has the power to exact the contract that is most favorable to it, and the traveler or shipper is faced with the dilemma of either refusing to agree, with great inconvenience resulting, or of agreeing, thereby throwing the risk of the negligence of persons employed by the carrier upon himself.[13] The inequality in the situation of the parties would, if permitted, enable the company to obtain unfair contracts.[14]

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Co. v. Illinois Central R. R., 278 Ill. 333, 116 N. E. 170 (1917); Ins. Co. v. Lake Erie & W. R. R., 152 Ind. 333, 53 N. E. 382 (1899); Cox v. Cent. Vt. R. R., 170 Mass. 129, 49 N. E. 97 (1898); Powell v. Union Pac. R. R., 255 Mo. 420, 164 S. W. 628 (1914); Gulf, C. & S. F. Ry. v. Anderson, 120 Okla. 60, 250 Pac. 500 (1926); Texas & Pac. Ry. v. Richmond, 94 Tex. 571, 63 S. W. 619 (1901). 4 WILLISTON, CONTRACTS (1936) § 1109. *Cf.* Zimmer v. N. Y. Cent. & H. R. R. R., 137 N. Y. 460, 33 N. W. 642 (1893). But now New York seems to follow the majority view by virtue of a statute, as a matter of public policy in regard to common carriage of goods (Murray v. Cunard S. S. Co., 235 N. Y. 162, 139 N. E. 226 (1923) *dictum*), but it still follows the minority view as to passengers.

11. York Co. v. Central R. R., 3 Wall. 107 (U. S. 1865).

12. Quirk Milling Co. v. Minneapolis & St. Louis R. R., 98 Minn. 22, 107 N. W. 742 (1906).

13. York Co. v. Central R. R., 3 Wall. 107 (U. S. 1865); Quirk Milling Co. v. Minneapolis & St. Louis R. R., 98 Minn. 22, 107 N. W. 742 (1906).

14. While the great majority of the courts agree that the common carrier cannot by contract with the shipper or the traveler relieve himself from the consequences of his negligent conduct, there are other contracts which he can enter into and which the courts have not found to be against public policy. If the passenger is carried gratuitously, some courts hold that a provision relieving the carrier from liability is valid, on the theory that the carrier is not obliged to transport such a person at all, and therefore may prescribe such terms as he sees fit. Northern Pacific Ry. v. Adams, 192 U. S. 440 (1904); Payne v. Terre Haute & Ind. Ry., 157 Ind. 616, 62 N. E. 472 (1902); Quimby v. Boston & Me. R. R., 150 Mass. 365, 23 N. E. 205 (1890); Ulrich v. N. Y. Cent. & H. R. R. R., 108 N. Y. 80, 15 N. E. 60 (1888). Other courts reasoning that the public is as greatly concerned in the safe transportation of one who rides gratuitously as one who pays, refuse to allow the provision to bar a recovery. Some cases so holding are: Mobile & Ohio R. R. v. Hopkins, 41 Ala. 486 (1868); Rose v. Des Moines Valley R. R., 39 Iowa 246 (1874); Pennsylvania R. R. v. Butler, 57 Pa. 335 (1868); Gulf, C. & S. F. Ry. v. McGown, 65 Tex. 640 (1886). In Pinnell v. St. Louis-San Francisco Ry., 263 S. W. 182 (Mo. 1924), it was held that stipulations on back of interstate free railway pass, relieving carrier from liability for injury, were valid and complete defense to action for user's death under Hepburn Act of June 29, 1906.

The carrier may contract with an insurer for indemnity for any loss sustained because of his liability as a common carrier. California Ins. Co. v. Union

A telegraph company with its limited competition and its duty owed to the public is in much the same situation as a common carrier in respect to contracting against the consequences of the negligence of its employees. The same reasons and objections are applicable. Their business intimately concerns the public. The great majority of courts hold that any type of limitation on their liability is invalid and against public policy.[15] Some attempts by the telegraph companies to limit their liability to the cost of the sending, in cases where the message is not repeated, have been upheld,[16] but other courts fear that the dangers are too great to justify any encroachment upon the general rule.

Where a person contracts in the capacity of a bailee against the results of a negligent discharge of that duty, there is much confusion as to the validity of such an agreement.[17] Most of the cases indicating the negative were utter-

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Compress Co., 133 U. S. 387 (1890); Trenton Passenger Ry. v. Guarantors Liability Indemnity Co., 60 N. J. L. 246, 37 Atl. 609 (1897). This would seem to demonstrate that it is the objection of unequal position, or because there is a duty owed the public, rather than the idea that the carrier will become careless.

The parties (shipper and carrier) may limit the extent of the carrier's liability. Courts look upon this as an agreement for a liquidation of the damage. "If this sum represents a reasonable attempt of the parties to fix a fair value of the property in question, the agreement is in effect one for liquidating damages and is unquestionably valid." 4 WILLISTON, CONTRACTS (1936) § 1110, citing authorities.

The carrier, however, may contract for exoneration from liability for the negligent performance of duties which he is not bound to make. Here he is not contracting as a common carrier. Where he is contracting in another capacity, see note 28, *infra.*

15. Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 25 So. 232 (1898); Western Union Tel. Co. v. Adams, 87 Ind. 598 (1882); Sweatland v. Ill. & M. Tel. Co., 27 Iowa 433 (1869); Reed v. Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904 (1896); Telegraph Co. v. Griswold, 37 Ohio St. 301 (1881); Thompson v. Western Union Tel. Co., 64 Wis. 531, 25 N. W. 789 (1885).

16. Primrose v. Western Union Tel. Co., 154 U. S. 1 (1894); Camp v. Western Union Tel. Co., 1 Metc., 164 (Ky. 1858); Grinnell v. Western Union Tel. Co., 113 Mass. 299 (1873); Birkett v. Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645 (1894); Poor v. Western Union Tel. Co., 196 Mo. App. 557, 196 S. W. 28 (1917). The above courts reason that the sender is given notice and if the message is important it should be repeated. They find nothing unreasonable in giving to sender the option of having it sent twice with the company being responsible, or only once with the sender himself taking the risk. Considering the accidents to which the business is liable, these courts think this provision is just and reasonable. It does not exempt the company from liability but only fixes the price of that responsibility. The only question, really, is that the price the sender has to pay to send the message with the liability attached is a reasonable one, and if it is, the fact that parties are in unequal position is not all controlling.

17. COOLEY, TORTS (Student's ed. 1930) 672 (". . . the better reason supported by the weight of authority is that a bailee for hire may not exempt himself from liability even for his ordinary negligence, or that of his servants or agents"); 2 PAGE, CONTRACTS (2d ed. 1920) 1345 (this question "is a question upon which there is, apparently at least, a conflict of authority. . . . In cases in which the question is actually involved, it seems to be held by the weight of authority that such provision is valid. . . .") This note does not purport to treat of the usual devices by which bailees have sought to limit their liabilities as, for example, the posting of large sums, or provisions on receipts. In this problem see Note (1938) 86 U. OF PA. L. REV. 772 (containing an excellent collection of the authorities).

ing mere *obiter*,[18] while the weight of authority of the square holdings are that he can so relieve himself.[19] With the situation thus, it is well to consider the objections that have been previously advanced. Because of the public or semi-public nature of many bailees, the argument is advanced that such a contract is an attempt to relieve the bailee of duties imposed by law.[20] But the only duty the bailee owes the bailor, in the absence of special contract increasing the bailee's liability, is to use ordinary care in the handling and keeping of the goods,[21] the same duty that the entire doctrine of negligence is based upon. There is no special duty, but only the same duty that everyone owes to everyone else in any dealings with that person. Here the parties are not in such an unequal position as they are in the case of the common carrier. It is likely that there are situations where the bailee has a monopoly of storage facilities, but certainly not to a large extent. A difference in the case of a shipper who must get goods at a distant town within a short time and a bailor who must store his goods in some place can be seen. Generally the bailor is in such a position that he can negotiate a contract containing more favorable conditions than can a shipper. Places of storage are more available than systems of railroads, especially in smaller centers. While the necessity to store is likely to be as great as the necessity to ship, the greater facilities for the former militates against the argument that the parties are not in equal position. It is more difficult to see how this business is so essential to the commercial life of the nation as to prevent the bailor for a valid consideration, usually a reduced storage fee, from agreeing to run the risk of the bailee's servants exercising due care. The incentive to maintain business good-will by the bailee is a factor which tends to guarantee the safe storage of the goods. The courts are in harmony in holding that a contract which would relieve the bailee of the consequences of his own fraud or gross negligence (usually considered as amounting to fraud) is against public policy,[22] but, with all the considerations balanced, it seems that the bailor should be permitted to assume the risk of ordinary negligence.[23]

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18. *Ex parte* Mobile Light and R. R., 211 Ala. 525, 101 So. 177 (1924); Denver Union Terminal Ry. v. Cullinan, 72 Colo. 248, 210 Pac. 602 (1922); Gesford v. Star Van & Storage Co., 104 Neb. 453, 177 N. W. 794 (1920); Marlow v. Conway Iron Works, 130 S. C. 256, 125 S. E. 569 (1924); Sporsem v. First Nat. Bank, 133 Wash. 199, 233 Pac. 641 (1925).

19. World's Columbian Exposition Co. v. Republic of France, 96 Fed. 687 (C. C. A. 7th, 1899); Interstate Compress Co. v. Agnew, 255 Fed. 508 (C. C. A. 8th, 1919), 276 Fed. 882 (C. C. A. 8th, 1921); Missouri Pac. R. R. v. Fuqua, 150 Ark. 145, 233 S. W. 926 (1921); Gashweiler v. Wab., St. L. & Pac. Ry., 83 Mo. 112 (1884); Goslant v. Town of Calais, 96 Atl. 751 (Vt. 1916). *Contra*: Pilson v. Tip-Top Auto Co., 67 Ore. 528, 136 Pac. 642 (1913); Downs v. Sley System Garage, 194 Atl. 772 (Pa. Super. 1937).

20. Inland Compress Co. v. Simmons, 59 Okla. 287, 159 Pac. 262 (1916).

21. Mulvaney v. King Paint Mfg. Co., 256 Fed. 612 (C. C. A. 2d, 1919).

22. Cussen v. Southern Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099 (1901); Smith v. Library Bd. of Minneapolis, 58 Minn. 108, 59 N. W. 979 (1894); Gashweiler v. Wabash, St. L. & Pac. Ry., 83 Mo. 112 (1884); Grady v. Schweinler, 16 N. D. 452, 113 N. W. 1031 (1907).

23. A contract limiting liability is not made by the delivery of a check which contained a printed stipulation limiting such a liability, in the absence

Today, under existing economic conditions, with the supply of workers far exceeding the demand, the courts have taken notice of the fact that the employer and employee do not stand upon an equal footing when entering into a contract of employment.[24] Where this objection is present, it follows that contracts relieving the employer from the consequences of his negligent act, or those for whose acts he is held responsible by law, are void.[25] In *Shohoney v. Quincy, Omaha, & K. C. R. R.*,[26] Justice Lamm says that employers should not be "at liberty to play upon the necessities and ignorance of their employees." On this matter the states and Congress have passed legislation prohibiting the contracts here involved. Under the Federal Employers' Liability Act such an exemption contract is rendered void.[27] And the states under their Workman Compensation Statutes have provided that such contracts are likewise unenforceable.

When the social considerations are not applicable, the result is different. This is clearly shown when a carrier contracts against the consequences of his negligent act, not as a carrier contracting with a passenger or shipper, but as a lessor contracting with his tenant. Here, where there is no attempt to contract against the consequences of a breach of a duty owed the public and the parties are in equal position, the contract by the carrier as lessor is valid.[28]

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of any proof that such provision was called to the attention of the owner of the parcel and assented to by him: Brown v. Hines, 213 Mo. App. 298, 249 S. W. 683 (1923). Many times these stipulations are printed for the psychological effect or protection in staving off suits. For a treatment of the problem as to what will constitute a contract in these cases, see (1938) 86 U. OF PA. L. REV. 772. The distinction between ordinary and gross negligence common to the bailment cases, especially those concerning the liabilities of a gratuitous bailee, has been attempted to be drawn in cases involving contracts relieving from the consequence of negligence. The Restatement of the Law of Contracts, § 574, allows exemption from negligence "not falling greatly below the standard established by law." In Ill. Central R. R. v. Morrison, 19 Ill. 135 (1857), the court permitted a carrier to restrict its liability, but still remain liable for gross negligence or wilful misfeasance. This distinction was again recognized by the same court in Chicago & N. W. Ry. v. Chapman, 133 Ill. 96, 24 N. E. 417 (1890). However, the distinction, while easy to state, becomes difficult in its application to facts. It may become difficult to draw the line between conduct that is below the standard and that which is greatly below the standard required by law. In Missouri, the distinction has been rejected as regards negligence generally, and the reason behind the rejection would seem equally forceful in the situation under discussion: ". . . there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet." McPheeters v. Hannibal & St. J. R. R., 45 Mo. 22 (1869), quoted with approval in Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904 (1896).

24. West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

25. Chicago, W. & V. Coal Co. v. Peterson, 39 Ill. App. 114 (1890); Palmer v. Boston & M. R. R., 227 Mass. 493, 116 N. E. 899 (1917); Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149 (1891); Johnston v. Fargo, 184 N. Y. 379, 77 N. E. 388 (1906); Pittsburgh, C. C. & St. L. Ry. v. Kinney, 95 Ohio St. 52, 115 N. E. 505 (1916).

26. 223 Mo. 649, 122 S. W. 1025 (1909).

27. 35 STAT. 66 (1908), 45 U. S. C. § 55 (1928).

28. Cacey v. Virginian Ry., 85 F. (2d) 976 (C. C. A. 4th, 1936); Niederhaus v. Jackson, 79 Ind. App. 551, 137 N. E. 623 (1922); Quirk Milling Co. v. Minnea-

As between the lessor and the lessee, the court ordinarily has no concern as to who shall assume the risk of negligence. Both are free to enter into the agreement or refuse to do so. Public policy does not condemn the immunity clause voluntarily agreed upon by the parties.[29]

Likewise, where persons are upon the land of another, it is not held to be wrong for the owner to contract against the negligent acts of his servants.[30]

It would seem then, in future cases, after the contract is construed strictly against the party relying thereon, and where the exempting clause is direct and unambiguous, and the facts do not bring into operation either of the two major objections (unequal position of the parties or contracting against the consequences of a breach of duty of public service) for avoiding such contract, this exemption clause should be upheld until time and experience give necessary strength to the speculative argument that such exemption clause would foster negligence.

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polis & St. L. R. R., 98 Minn. 22, 107 N. W. 742 (1906). Where some privilege or concession is granted by a railroad company which it would not otherwise be bound to extend, a contract exempting it from liability for the destruction even of buildings not on its right of way is valid. See annotation (1927) 48 A. L. R. 1003.

29. Kirshenbaum v. Gen. Outdoor Adv. Co., 258 N. Y. 489, 180 N. E. 245 (1932), 84 A. L. R. 654 (1933).

30. Chesapeake Beach Ry. v. Hupp Automatic Mail Exch. Co., 48 App. D. C. 123 (1918); Checkley v. Ill. Cent. R. R., 257 Ill. 491, 100 N. E. 942 (1913); Post & McCord, Inc. v. N. Y. Mun. Ry., 187 App. Div. 167, 175 N. Y. Supp. 392 (1st Dep't 1919).