couraging comments by judges in various states who used the pre-trial conference in criminal cases manifest the desirability of such a procedure.[89] Concern as to the constitutionality of a mental examination in conjunction with the conference is unwarranted since the tests could do no harm to a defendant who has already confessed.[90] Moreover, the conference and examination could clear him of the charge, thus avoiding the expense and time inherent in the ordinary criminal trial.

By nature the frequency of false confessions is indeterminable. That untrue admissions of guilt do occur is demonstrable, however. The significant effects upon the individual and upon society emphasize the necessity for re-examination of the present haphazard means utilized to prevent injustice. Substantial efforts should be undertaken to acquaint those intimately concerned with the criminal processes that voluntary, untrue confessions do take place and that available measures should be used to avoid the dangers of convicting the innocent. Similar endeavors should be made to enhance the efficacy of the judicial process in detecting the psychopathic individual who is prone to self-accusation. Although increased psychiatric knowledge is needed, measures designed to incorporate presently available techniques, as well as such advances in diagnosis and treatment as occur in the future, constitute an important prerequisite to progress in the administration of criminal justice.

PROTECTION OF THIRD PARTIES UNDER CONTRACTUAL LIMITATIONS OF LIABILITY

If one were to store a fur coat, or to leave his car in a parking lot, the chances are good that the contract governing the transaction would contain a stipulation limiting the liability resulting from any damage

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MICH. L. REV. 353, 364 (1943); Dession, *The Proposed Federal Rules of Criminal Procedure,* 18 CONN. BAR J. 58, 67 (1944); HOLTZOFF, *Reform of Federal Criminal Procedure,* 12 GEO. WASH. L. REV. 119 (1944); for discussion against adoption of the rule see Balter, *Federal Rules of Criminal Procedure,* 20 CALIF. STATE B.J. 91 (1945); Stewart, *Comments on Federal Rules of Criminal Procedure,* 8 JOHN MARSHALL L.J. 296, 299 (1943).

Generally on the advisability of this procedure in cases involving mental incapacity see Cohen, *supra* note 60, at 356.

89. "Experience with pretrial in criminal cases has not been common, but where tried, it has yielded results of great value." Note, 26 J. AM. JUD. SOC'Y 106, 107 (1942); see also Way, *New Technique Facilitates Criminal Trials,* 25 J. AM. JUD. SOC'Y 120 (1941).

90. FED. R. CIV. P. 35 provides for this examination in civil cases. This provision was upheld in Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

to the goods to a sum relatively small in relation to their value.[1] Such stipulations, commonly termed limitations of liability, have received varied treatment by the courts.[2] In many situations courts have held them void as against public policy.[3] Some courts have refused to give them effect on the theory that the customer had no notice of the condition and did not consent thereto.[4] A significant number of jurisdictions, however, have upheld this type of limitation as being a permissible area of contract.[5] A debate on the merits of these differing positions is not essential to consideration of a question which arises in those jurisdictions which give effect to the limitations of liability. Who, other than the contracting party, is entitled to the protection afforded by the stipulations in question?

The Ohio case of *Employers' Fire Ins. Co. v. United Parcel Service*[6] illustrates this problem. A Mrs. Oberhelman contracted with Jenny, Inc. to store her fur coat for the summer. For purposes of limiting liability for possible damage to the coat, the value thereof was set at $100.00.[7] The defendant, United Parcel Service, was instructed by Jenny, Inc. to pick up the coat and deliver it to them. During delivery, the coat was damaged.

Since Ohio gives effect to contractual limitations of liability, it is obvious that Jenny, Inc. could be held liable only to the extent of

1. *E.g.,* liability for damage to a mink coat was limited to $100.00, hardly market value. Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 477, 99 N.E.2d 794 (1950).

2. See generally, Pierre Dessaulles, *Clauses of Non-Liability,* 7 Rev. du B. 147 (1947); R. J. Guglielmino, *Contracts; Legality; Exemptions from Liability for Negligence,* 20 CORNELL L. Q. 352 (1935); McClain, *Contractual Limitations of Liability for Negligence,* 28 HARV. L. REV. 550 (1915); C. H. Rehm, *Contracting Against Liability for Negligent Conduct,* 4 Mo. L. REV. 55 (1939); Notes, 37 COL. L. REV. 248 (1937); 35 MINN. L. REV. 197 (1951); 25 TULANE L. REV. 268 (1951); 4 VAND. L. REV. 346 (1951).

3. *E.g.,* Kaylor v. Magill, 181 F.2d 179 (6th Cir. 1950); Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So.2d 527 (1943); Apache Ry. Co. v. Shumway, 62 Ariz. 359, 158 P.2d 142 (1945); Freigy v. Gargaro Co., 223 Ind. 342, 60 N.E.2d 288 (1945); Wessman v. Boston & M. Ry. Co., 84 N.H. 475, 152 Atl. 476 (1930); Tankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936).

4. The leading case on the requirement of notice is The Majestic, 166 U.S. 375 (1897); see also, Jones v. Great Northern Ry. Co., 68 Mont. 231, 217 Pac. 673 (1923); Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949).

5. *E.g.,* Golden v. National Life & Accideut Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939); Globe Home Improvement Co. v. Perth Amboy Chamber of Commerce Credit Rating Bureau, 116 N.J.L. 168, 182 Atl. 641 (1936); Paddle v. Atlantic Basin Iron Works, 91 N.Y.S.2d 336 (1950); Barrett v. Couragon, 302 Mass. 33, 18 N.E.2d 369 (1939); Monsanto Chemical Co. v. American Bitumuls, 249 S.W.2d 428 (Mo. 1953).

6. 89 Ohio App. 447, 99 N.E.2d 794 (1950).

7. The coat was purchased by Mrs. Oberhelman in 1943 for $2,028.35 and was appraised in 1945 at $3,500.

$100.00.[8] It is similarly clear that if the damage had been negligently caused by a complete stranger to the transaction, *e.g.*, the driver of another vehicle, full recovery could be obtained. The extent to which the delivery company, or its negligent driver is pecuniarily liable seems to present a more difficult question. To the Ohio court, however, the answer seemed easy—"[W]hen it [Jenny, Inc.,] engaged the defendant to get the coat for it, it clothed the defendant with all the authority and rights which it, the principal, had against the owner, including the right to have liability limited to $100.00."[9] Thus, the delivery company successfully invoked the liability limitation embodied in a contract to which it was not a party.

If it is assumed that limitations of liability are valid, it logically follows that this could be a proper result. Any doctrinal objections which might arise, can be met by considering the third party a donee beneficiary of the contract. Contemporary legal theory widely allows such parties to assert rights under the contract.[10] Such a result would be manifestly correct if the governing contract expressly provided that the stipulation was intended to protect employees, agents and independent contractors handling the goods under the contract. However, the contract in question, as is undoubtedly true in the great majority of similar agreements, did not explicitly or even impliedly refer to the rights of third parties under such stipulations. The contracts are silent or at best vague with respect to the scope of protection intended. In lieu of express categorization of the parties to be benefitted thereby, the question arises as to what factors should be considered in determining who may take advantage of liability limitations.

In the *United Parcel Service* case,[11] the only authority or rationalization advanced was Section 347 of the Restatement of Agency which states that "[a]n agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." Use of the Restatement of Agency suggests that the solution to the problem will be determined on agency principles. There is at least a negative implica-

8. It seems to be generally accepted, however, that the limitation would have no effect if the damage was inflicted intentionally. Arizona Storage & Distributing Co. v. Rynning, 37 Ariz. 232, 293 Pac. 16 (1930); Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 Pac. 242 (1912); Page v. Allison, 173 Okla. 205, 47 P.2d 134 (1935).

9. Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 456, 99 N.E.2d 794, 799 (1950).

10. Baurer v. Devenis, 99 Conn. 203, 121 Atl. 566 (1923); RESTATEMENT, CONTRACTS § 135 (1932); Corbin, *Contracts; For the Benefit of Third Parties*, 46 L. Q. REV. 12 (1930); Notes, 27 N.D.L. REV. 347 (1950); 1 SYRACUSE L. REV. 334 (1949).

11. 89 Ohio App. 447, 99 N.E.2d 794 (1950).

tion that independent contractors might be treated differently.[12] Paradoxically, the defendant in each of the recent cases in point which cite the Restatement of Agency appears to have been an independent contractor, although the issue is not discussed in either opinion.[13] Even assuming that the third party is an agent or that the rationale of Section 347 applies also to independent contractors, it is doubtful that the section has been properly applied to this type situation, for its application must be predicated on the theory that limitations of liability are "immunities" and on the supposition that they are non-personal.

That limitations of liability are "immunities" seems debatable. The term, immunity, defies precise definition.[14] Little attempt is made by the Restatement to give it fuller meaning,[15] and judicial use of the term has been anything but consistent. An immunity has been held synonomous with[16] and distinguished from[17] a privilege"; it has been said to be equivalent to an "exemption"[18] and a "franchise";[19] and it has been further confused by judicial interpretation of the privileges and immunities clause of the federal constitution.[20] Essentially, an immunity operates to

12. *E.g.*, the doctrine of respondeat superior applies generally when an agent commits a harm, but not when an independent contractor is responsible. Divines v. Dickenson, 189 Iowa 194, 174 N.W. 9 (1919); Picket v. Waldarf System, 241 Mass. 569, 136 N.E. 64 (1922); Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

13. Although the opinions give little information, it is a reasonable assumption that both third parties involved were separate corporations of considerable size. It does not seem that the tasks they performed were under any great degree of control by the contracting parties. A. M. Collins & Co. v. Panama R.R. Co., 197 F.2d 893 (5th Cir. 1952); Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 99 N.E.2d 794 (1950).

14. See Hohfield, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), 26 YALE L.J. 710 (1917); Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

15. The Restatement does give several examples of accepted immunities: (1) Municipality not liable for harms caused by a fire truck; (2) Parent not liable for punishment of child; (3) Landowner not liable for injury to unknown trespasser. The Restatement indicates that only the latter of these is applicable to an agent. See Comments, RESTATEMENT, AGENCY § 347 (1933).

16. *Ex parte* Levy, 43 Ark. 42, 54 (1884); Van Valkenburg v. Brown, 43 Cal. 43, 48 (1872).

17. Phoenix F. & M. Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

18. Buchanan v. Knoxville & O.R.R., 71 Fed. 324, 334 (6th Cir. 1895); State v. Smith, 158 Ind. 543, 63 N.E. 25 (1902).

19. Lake Drummond Canal & Water Co. v. Commonwealth, 103 Va. 337, 49 S.E. 506 (1905); Lawrence v. Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166, 169 (1900).

20. The privileges and immunities guaranteed by the fourteenth amendment seem to be of a nature independent of common law or statutory immunities. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), holding that the right to use public streets is a "privilege and immunity"; Douglas v. City of Jeannette, 130 F.2d 652, 655 (3rd Cir. 1942), saying that freedoms of speech, press, worship, and assembly are not "privileges and immunities"; United States v. Sutherland, 37 F. Supp. 344, 345 (N.D. Ga. 1940), saying that the right to due process of law is a "privilege and immunity." See also, State v. Griffen, 226 Ind. 279, 79 N.E.2d 537 (1948).

absolve one who has inflicted a harm from liability.[21] This does not mean that a harm was not committed, but only that there may be no recovery therefor.[22] While limitations of liability also possess this attribute of non-liability, there seem to be important differences between recognized immunities[23] and limitations of liability, both in the manner and purposes of their creation. The usual immunity is a result of public policy as articulated by a statute or by the common law.[24] It originates in the machinery of government and in theory is an expression of the will of the body politic. The immunity exists because the legislatures or the courts have determined that the general public will be better served if a certain class of persons in a particular situation be free from liability for harms which result from their acts. Thus, a benefit has been conferred which is contrary to the general principles of law;[25] or it might be said that the class of persons is relieved from a burden which the general public bears.[26] It seems reasonable, therefore, that the courts, when giving effect to an "immunity," should consider the public interest which engendered its creation and extend the scope of protection thereof only if it is manifest that the public interest will be better served thereby. Contractual limitations of liability are not, however, within the purview of this type of immunity. Rather they are a product of private negotiation, representing expressions of private interests to which the contracting parties have agreed. No social evil is corrected by the limitation of liability nor is any public purpose effectuated which might importune broad application of the limited liability. These distinctions at least raise a doubt as to the validity of characterizing limitations of liability as "immunities" within the meaning of the Restatement of Agency.

Even if contractual limitations of liability are considered to be within a broad definition of the term "immunity," it still seems questionable that the Restatement rule is immediate authority for extending the benefits of such clauses to third persons.[27] Granted that limitations of liability

21. Leatherwood v. Hill, 10 Ariz. 243, 89 Pac. 521 (1906).
22. U.S. v. Swift, 186 F. Supp. 1002, 1017 (N.D. Ill. 1911).
23. See note 14 *supra*.
24. For example, the immunity granted to hosts by automobile guest statutes expresses a policy against collusive claims against insurance companies and a policy that one who is gratuitously rendering a service should not be liable for ordinary negligence. Kriezie v. Sanders, 23 Cal.2d 237, 143 P.2d 704 (1944); Robb v. Ramey Associates, 1 Terry 520, 14 A.2d 394 (Del. 1940); Russel v. Pilges, 113 Vt. 537, 37 A.2d 403 (1944). As these policies apply to agents also, the immunity has generally been extended to them. Herzog v. Mittleman, 155 Ore. 624, 65 P.2d 384 (1937); Richard v. Parks, 19 Tenn. App. 615, 93 S.W.2d 639 (1935).
25. *Ex parte* Levy, 43 Ark. 54 (1884).
26. Lonas v. State, 3 Heisk, 287, 306 (Tenn. 1871).
27. It seems that the same arguments advanced for not terming limitations of liability "immunities" might also serve as arguments for a rule that such agreements

may be either personal or non-personal, the establishment of this attribute should be determined by what the parties to the contract intended.[28] Courts which have relied upon the Restatement, however, have rather summarily assumed that limitations of liability are non-personal.[29] In effect, this manner of application becomes a means of supplying, rather than ascertaining, the parties' intent.

As is true with respect to other contract problems, the court's function in this area should be to ascertain the intention of the contracting parties. Whether this is accomplished by utilization of the Restatement's personal-non-personal dichotomy or by initial examination of the contract seems irrelevant. Resolution of the issue in this manner would be more equitable than having the result turn on nebulous and arbitrary distinctions between agents and independent contractors,[30] although in certain situations, such a distinction might be one helpful factor in determining contractual intent.[31] Certainly there are other objective criteria which the courts might seize upon in ascertaining intent. For example, the customer may agree to the liability limitation only because he had faith in the skill and prudence of the individual with whom he contracts.[32] If the work is then delegated, it would be harsh to deny the customer full recovery from the careless third party. The significance of this factor would often depend upon the purpose for which the contract is made. It should be of greater importance, for example, where the contract is for the repair of a watch than where it is for parking space for an automobile.

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are "personal" rather than non-personal. That is, an immunity would be personal unless there is an underlying public policy which would be served by permitting third parties, as well as the contracting party, to benefit. There is, however, no apparent public policy underlying a limitation of liability.

28. The notion that some contracts are personal is not new. For example, it is a familiar rule of law that personal contracts are non-assignable. Rochester R.R. v. Rochester, 205 U.S. 237 (1906); Paige v. Faure, 229 N.Y. 114, 127 N.E. 898 (1920). The determination of whether the contract is personal and non-assignable is dependent upon the intention of the parties to the contract as expressed or implied from the circumstances. Crana Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 128 Atl. 280 (1925).

29. A. M. Collins & Co. v. Panama R.R., 197 F.2d 893 (5th Cir. 1952); Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 99 N.E.2d 794 (1950).

30. To have liability turn on whether the defendant is an agent or an independent contractor is to encourage litigation. Further, there is no apparent reason why a limitation of liability should be granted to an agent and denied to an independent contractor.

31. *E.g.*, if the contract states the limitation is to apply to those under control of the contracting party, it would be a fair inference that agents, but not independent contractors, were included.

32. Paige v. Faure, 229 N.Y. 114, 115, 127 N.E. 898, 899 (1920) (Held that a contract granting an automobile agency was non-assignable since it involved a personal relationship between the promisee and promisor).

A criterion deemed significant by one court was whether the parties to the contract foresaw that various employees, agents and independent contractors would be handling the goods.[33] The theory behind this is that the parties, knowing that others would necessarily be involved in performing the contract, must have intended the limitation to apply to them as well as to the contracting party. One could as well argue, however, that if the parties knew others were to handle the goods, they would have explicitly stated any exceptions intended to apply to the ordinary liabilities of such parties.

Perhaps the most significant factor is that of insurance, for in many contracts here in question the customer is offered alternative rates.[34] The lower charge provides for limited liability, while the higher rate allows full recovery. The difference in rates is thus in the nature of an insurance premium. If the customer has already insured the goods or if he considers himself self-insured, he will contract at the lower rate. Certainly this is some indication that he intends the stipulation to have broad coverage and to rely upon his insurance for indemnification in case of injury to his property.

Although other criteria may appear convincing in individual cases, it is apparent that in a large percentage of the cases the circumstances surrounding the contract will not provide any degree of certainty as to the intent of the parties. It is quite likely that the parties had no particular intent; in such situations the decision will be little else than a calculated guess as to what their intentions might have been. At this point, solution of the problem involves a policy question as to whether the courts should freely extend or narrowly restrict the scope of the limitations. Recent cases seem to have adopted an attitude of liberally extending the protection of the stipulation. A stricter interpretation seems more desirable. In view of the general principle that one should be answerable for his tortious conduct,[35] it would be better to resolve any doubt as to the intent of the parties against the third person who attempts to set up the limitation of liability as a defense.

The courts have employed a similar approach in analogous situations arising under workmen's compensation laws. In this area also an exon-

33. "That the carrier would engage such services [those performed by the defendant] must have been contemplated by the parties." A. M. Collins & Co. v. Panama R.R., 197 F.2d 893, 896 (1952).

34. ". . . [T]he undersigned hereby agrees to have effected for the benefit of the depositor insurance on the articles listed in this receipt . . . for the value set opposite each item, which value shall represent respectively the limit of liability for loss or damage to the same." Consideration for the storage is then established in line with the value of the items stored. Storage receipt from Kisters' Furs, Bloomington, Ind.

35. Second National Bank v. Samuel & Sons, 12 F.2d 963, 968 (2d Cir. 1926).

eration from liability is involved. The employee, by agreeing[36] to recover from the workmen's compensation fund in the event of personal injuries, relinquishes the common law cause of action which he might otherwise have against his employer.[37] The problem has arisen as to whether the employee has also relinquished his common law actions against various classes of third persons who actually caused his injury.[38] Most workmen's compensation statutes have provisions which purport to define the rights of injured employees to sue negligent third persons;[39] such provisions, however, do not clearly delineate the classes of third persons which are to benefit by the freedom from suit which the employer enjoys;[40] consequently, the rights of injured employees to sue third persons are, to a great extent, dependent upon the manner in which the provisions have been interpreted by the courts. In general, the statutes have been strictly construed, preserving whenever possible the injured employee's right to sue.[41] Some courts have said that only classes of persons expressly exempted from suit by the terms of the statute can claim

36. Though statutory in the sense that legislatures have drafted the statutes, the courts have, for the most part, said that workmen's compensation rights and obligations are contractual. The theory is that the employee must agree to the provisions of the statute before such provisions become binding upon him. Beausoleil's Case, 321 Mass. 344, 73 N.E.2d 461 (1948); Fauver v. Bell, 192 Va. 518, 65 S.E.2d 575 (1951).

37. For discussions of the development of compensation as a remedy for injured workmen see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 1-26 (1936); HOROVITZ, WORKMEN'S COMPENSATION, 7-10 (1944).

38. Employees frequently attempt to recover in common law actions rather than accept awards from compensation funds in view of the fact that the measure of damages may be substantially different. The schedules for statutory compensation are based upon a loss in earning power. See Indiana State Housing Ass'n v. Clack, 110 Ind. App. 504, 39 N.E.2d 451 (1942); Miller v. James McGraw Co., 184 Md. 529, 42 A.2d 237 (1943); Branham v. Denny Roll & Panel Co., 223 N. C. 233, 25 S.E.2d 865 (1943). In a common law action, however, such factors as pain, suffering, mental anguish, and disfigurement, as well as loss in earning power, are factors in determining damages. MCCORMICK, DAMAGES, 299-322 (1935).

39. *E.g.*, 44 STAT. 1440 (1927), 33 U.S.C. § 933 (1946) (Longshoremen's and Harbor Workers' Compensation Act); IND. ANN. STAT. § 40-1213 (Burns 1952); MASS. ANN. LAWS c. 152, § 15 (1950); N.Y. WORKMEN'S COMPENSATION LAW § 29; Va. Code § 65 (1950). West Virginia seems to be the only state which does not have a third party provision in its Workmen's Compensation Law.

40. The statutes commonly provide that the injured employee may maintain a common law action against persons "other than the insured." 44 STAT. 1440 (1927), 33 U.S.C. § 933 (1946).

41. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1945); Wells v. Lavitt, 115 Conn. 117, 160 Atl. 617 (1932); Albert v. Hudson, 49 Ga. App. 636, 176 S.E. 659 (1934); Labuff v. Worcester Consol. R.R., 231 Mass. 170, 120 N.E. 381 (1918); Reynolds v. Grain Belt Mills Co., 229 Mo. App. 380, 78 S.W.2d 124 (1934); Hall v. Hill, 158 Misc. 341, 285 N.Y. Supp. 815 (Sup. Ct. 1936) (although the statute said that workmen's compensation was to be the "exclusive remedy"); Shelter v. Grobsmith, 143 Misc. 380, 257 N.Y. Supp. 353 (Sup. Ct. 1932).

freedom from liability, with the consequence that an employee can usually maintain an action against any person other than his employer.[42]

The principle of strict construction has also found expression in judicial interpretation of statutes in derogation of the common law.[43] Statutes of this sort are seldom given effect beyond their clear and unequivocal terms,[44] with the result that persons not plainly within the statute's protective scope have not been allowed to benefit.[45] Limitations of liability are in derogation of the common law, and it seems that such contracts should likewise be strictly construed.[46] The courts would be hypocritical in adopting other than a policy of restricting the scope of protection of such stipulations. Limitations of liability are not favored by the law;[47] they are said to promote negligence;[48] they are often imposed upon the customer by the superior bargaining power of the other party.[49] Such clauses are upheld only when the courts feel that the interest in preserving and promoting freedom of contract outweighs their disposition to void such agreements.[50] To liberally extend protection of liability limitations to third persons would be anomalous in light of judicial imposition of strict requirements for creation of a valid limitation of liability between the contracting parties.

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42. McGann v. Moss, 50 F. Supp. 573 (W.D. Va. 1943); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929).

43. Thompson v. Thompson, 218 U.S. 611 (1910); Mulford v. Davey, 64 Nev. 506, 186 P.2d 360 (1947); Crayton v. Larabee, 220 N.Y. 493, 116 N.E. 355 (1917); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

44. Kidd v. Bates, 120 Ala. 79, 23 So. 735 (1898); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932). The courts seem unwilling to search for the intent of the legislature in such statutes, saying that ". . . no statute is to be construed as altering the rules of the common law farther than its words plainly import." McCarthy v. McCarthy, 20 D.C. App. 195 (1902).

45. Howe v. Meyers, 94 Wash. 563, 162 Pac. 1000 (1917); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

46. "The right of the ship or carrier to limit its liability for negligence to an amount not exceeding $500.00 is in derogation of the common law and must be strictly construed." Holmes, A. M. Collins & Co. v. Panama R.R., 197 F.2d 893, 898 (5th Cir. 1952) (dissenting opinion).

47. Luedke v. Chicago & N.W. R.R., 120 Neb. 124, 231 N.W. 695 (1930); Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500 (1890); see note 2 *supra*.

48. "It seems to us that such contracts [limitations of liability] do 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." Southern Exp. Co. v. Owens, 146 Ala. 412, 422, 41 So. 752, 754 (1906).

49. If the disparity in bargaining power is marked, the limitation of liability will be declared invalid. Baltimore & Ohio S.W. R.R. v. Voight, 176 U.S. 498 (1900); Cato v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203 (1925). But inequality of bargaining power can be present, and yet not be so great as to invalidate the limitation of liability. Manhattan Co. v. Goldberg, 38 A.2d 172 (Mun. Ct. App. Dist. Col. 1944).

50. Manhatten Co. v. Goldberg, *supra* note 49; California & Hawaiian Sugar Refining Corp. v. Harris County, 27 F.2d 392 (S.D. Tex. 1928).

In the absence of express contractual terms to the contrary, there should be a presumption that third persons were not intended to be freed from liability. Such an approach, if adopted, would generally add certainty to the law in this area without being unduly harsh. It is a simple matter for the businessman to expressly provide for liability limitation of third parties if he so desires. This is particularly true when it is realized that this problem usually emanates from use of a standardized contract. It would seem, also, that such a presumption best fits the tenor of the law which expects an individual to be responsible for his negligent conduct.

RELIGIOUS FACTORS IN ADOPTION

Adoption agencies have long endeavored to place a child for adoption with parents having the same religion as that of the child. However, in a survey of nine states,[1] in which nearly one-half of the population was Catholic, only one-fifth of all children turned over for adoption were placed with Catholic adoptive parents. Assuming that approximately one-half of the children available for adoption were Catholic, the necessary conclusion is that there were more available Catholic children for adoption than there were eligible Catholic adopters.[2] This situation may be even more pronounced with regard to smaller denominational groups which are in the minority everywhere since their membership is geographically scattered.[3] The consequences of a shortage of adopters of the same religion as the child sought to be placed are obvious. In such a situation, the adoption agency is offered two alternatives: it may recommend adoption by an adopter of a different faith, or the agency may

1. This study, made by the Children's Bureau of the Federal Security Agency, of 1508 children adopted in 1936 shows that only 318 of the children were adopted by Catholics, while 1,031 went to Protestants, the remainder being adopted by persons of other religions. COLBY, PROBLEMS AND PROCEDURES IN ADOPTION 38-39 (Children's Bureau Publication No. 262, 1941).

2. "Indeed, representatives of both Catholic and nonsectarian child-placing agencies reported difficulties in finding enough Catholic adoptive homes to meet the needs of Catholic children available for adoption."

"It is possible that the relatively small proportion of adoptions by Catholics can be explained by the fact that the number of childless Catholic families is known to be small." *Id.* at 39.

3. *E.g.*, "Placement of children in some of the denominational groups such as Mormons, Seventh Day Adventists, etc., do create problems for staff, since there are few such families." Communication to the INDIANA LAW JOURNAL from Mr. Roman L. Haremski, Superintendent, Child Welfare, Illinois Department of Public Welfare.