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Digest of Recent Cases

had knowledge or apprehension of any risk associated with the design, material, workmanship or tests of the aircraft, the question of assumption of risk should not have been submitted to the jury. On the third plea the Court held, again with one dissension, that the question of contributory negligence should not have been submitted to the jury as there was no evidence to support it, finding that it is not contributory negligence to fail to look out for danger when there is no reason to apprehend any. (p. 17687.) The Court was similarly divided with respect to the furnishing of radar, the majority holding that the failure to do so by Northwest was not evidence of negligence under the circumstances prevailing at the time. The case was then remanded to the District Court for a new trial.

Although the facts surrounding this case will be the criterion by which liability will be ultimately determined at the re-trial, the Appeal Court made two findings of interest to the aviation industry. The first was that to find an assumption of risk by Northwest it would have to be shown that the airline "had voluntarily, knowingly and intelligently, assumed the risk of that danger, or that the danger was so obvious that Northwest must be taken to have done so." (p. 17686) and that the mere presence of Northwest employees at the manufacturer's plant did not establish such a condition by inference. The second was with respect to Martin's contention, no doubt advanced after careful consideration, that at least one of the members of the airline at Martin's plant should have seen and appreciated the danger "in the exercise of ordinary care." To this plea the Court replied: "It is not contributory negligence to fail to look out for danger where there is no reason to apprehend any." (p. 17687) and further found that Martin had not acted or refrained from acting in any way as a result of the opportunity Northwest had had to inspect the construction. The said Court apparently did not consider that prudence would dictate an apprehension of danger being inherent in a newly designed aircraft.

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DIGEST OF RECENT CASES

JURISDICTION OVER FOREIGN AIR CARRIER— SALE OF PASSENGER TICKETS

Kenny v. Alaska Airlines, Inc.
132 F. Supp. 838 (S.D. Cal. June 13, 1955).

The plaintiff, a stockholder of the defendant air carrier, brought suit in a federal court in California to protect and enforce his personal rights incident to stock ownership. As the defendant did not have an office or an agent for the service of process in California, the plaintiff served the Secretary of State as provided by statute. The defendant moved to quash the service of summons and to dismiss the action for lack of jurisdiction over its person; it demonstrated that it was incorporated in the Territory of Alaska and had terminals in Alaska, Washington, and Oregon only. The plaintiff conceded these facts, but supported its claim of jurisdiction on the ground that the defendant was doing business in the state solely because its passenger tickets were sold in California by other air lines and independent ticket agencies. The court, in deciding the ultimate issue of whether this sale of tickets amounted to "doing business" in California and so rendered the defendant amenable to suit there, passed upon several collateral issues which it considered necessary to a proper determination of the case.

As this case was commenced in a federal court under its diversity jurisdiction, the court first faced the problem of whether state or federal law should be applied in determining whether the air line was doing business within the state. The court relied on cases interpreting the Federal Rules of Civil Procedure and the doctrine of *Erie v. Tompkins* in concluding that California law should be followed in determining the question of jurisdiction. The court further held that *for the purposes of this action* the defendant, a foreign corporation, was not doing business in California merely because some of its tickets were sold there by independent contractors and connecting carriers. It added that even though the activity of ticket sales was continuous and systematic, it was nevertheless insubstantial where the action sought a regulation of the internal affairs of the defendant.

WRONGFUL DEATH ACTION — LIMIT OF LIABILITY UNDER WARSAW CONVENTION

Da Costa v. Caribbean International Airways, Inc.
2 CCH Aviation L. Rep. 17,792 (S.D. Fla. June 30, 1955).

In an action for wrongful death resulting from the crash of defendant's airplane, defendant sought to limit its liability to the extent provided in its contract with the deceased. This limitation was the same as that expressed in the Warsaw Convention, and the contract was executed in Jamaica. In a motion to strike this defense, the plaintiff maintained that these contract limitations should not be enforced in a federal court because they were contrary to the public policy of Florida, where the suit was brought. The parties had assumed that the contract limitations were valid in Jamaica. In denying the motion to strike this defense the court stated that the limitation clause as contained in the Warsaw Convention was not contrary to the public policy of Florida because the Convention, as a federal treaty, was incorporated into the law of Florida. The public policy of Florida was not affected because the rights of the parties were created in Jamaica and would be decided according to the law of that forum. The court further stated that although a Florida statute prohibited such a defense, application of this statute would violate the "due process" clause of the Federal Constitution by depriving the defendant of a property right under a contract which was valid where made and where it was to be performed.

CONDEMNATION OF LAND FOR AIRPORT — FEE SIMPLE TITLE — EFFECT OF ABANDONMENT

Jackson v. City of Abilene

281 S.W. 2d 767 (Texas Court of Civil Appeals, June 3, 1955).

Appellant Jackson was the owner in fee of certain lands located near the City of Abilene, Texas. In 1929 the City instituted and successfully concluded condemnation proceedings against this land for the purpose of constructing and maintaining an airport thereon. After a period of active use by the City, the airport was abandoned; the appellant reasserted a claim to these lands, and the City sued to quiet title. The appellant proceeded upon the theory that the City had only acquired an easement in the land, notwithstanding the fact that the court in the condemnation proceeding had decreed a fee simple title in the City. In affirming the decision of the trial court quieting title in favor of the City, the Court of Civil Appeals held that the City had the power under a Texas statute to acquire a fee simple title to these lands. It pointed out that even though the City had not asked for a fee simple title in the condemnation proceedings and the decree in that case had granted such a title, there had been no appeal from this decree. At any rate, the court refused to permit the judgment in the con-

demnation case to be collaterally attacked on the grounds of an insufficiency of the pleadings thereof.

DISCRIMINATION BY AIR CARRIER — LIABILITY FOR DAMAGES UNDER CIVIL AERONAUTICS ACT

Fitzgerald v. Pan American World Airways, Inc.
132 F. Supp. 787 (S.D.N.Y. July 8, 1955).

Plaintiffs sued for damages allegedly sustained when defendant airline denied them permission to travel as passengers on a flight from Honolulu to Sidney, Australia. The complaint stated that the action arose under the Civil Aeronautics Act (§ 404 b prohibiting discrimination); the defendant moved to dismiss this complaint on the theory that relief could not be granted under the Civil Aeronautics Act, and, as diversity of citizenship was absent, the court did not have jurisdiction over the suit. In considering this defense the court pointed out that because the complaint stated a claim under a federal statute, it presented a case within the jurisdiction of a federal court. Although the Civil Aeronautics Act admittedly prohibited discrimination, the court held that the complaint failed to state a claim upon which relief could be granted because the Act had not expressly created a civil liability on the part of the airline. The court agreed with the defendant's contention that the plaintiff's remedy lay in a state court action based on common law tort principles. It was only where common law duties conflicted with federally created rights that the latter took precedence and would permit such an action. No such conflict was found in this case.

WARSAW CONVENTION — VENUE IN DAMAGE SUIT FOR INJURIES CAUSED BY AIRLINE EMPLOYEES NOT CONNECTED WITH PLAINTIFF'S FLIGHT

Scarf v. Trans World Airlines
2 CCH Aviation L. Rep. 17,795 (S.D.N.Y. Sept. 2, 1955).

A TWA passenger was injured in Newfoundland when the ramp upon which he was standing while boarding his refueled plane was moved by the propeller blast from a nearby TWA plane. He brought action in New York; the carrier moved to dismiss the case because of improper venue under the Warsaw Convention. The Warsaw Convention permits an action for damages against a carrier to be brought in one of four places: (1) the domicile of the carrier, (2) its principal place of business, (3) the place of destination, and (4) the place of business where the contract was made. The plaintiff contended that he was not bound by the Convention because the gravamen of his complaint was not the defendant's failure to perform its duty to him as a passenger, but merely its commission of a negligent act. The court interpreted Article 24 of the Convention (action for damages "however founded" can only be brought subject to conditions set out in the Convention) to include the plaintiff's claim and therefore dismissed the suit for failure to comply with venue requirements. The court was not impressed by the fact that the plaintiff would have had a valid claim against TWA had the offending plane been operated by another carrier.

DEATH OF SEAMAN IN AIRPLANE CRASH — RETURN FROM VOYAGE — COURSE OF EMPLOYMENT

McCall v. Overseas Tankship Corporation; Northwest Airlines, Inc.
222 F. 2d 421 (2nd Cir. May 10, 1955).

The widow of a deceased seaman brought action against the defendant employer under the Jones Act, alleging that her husband was killed in the course of his employment by the negligence of the agents or employees of

the defendant. The defendant admitted employing the deceased and other seamen under a contract which furnished transportation back to the port of origin on the completion of a voyage to a foreign port. The seamen were also paid wages for the return travel time. Pursuant to this contractual arrangement the defendant had selected Northwest Airlines as the carrier which would furnish the return transportation. The deceased was killed when his plane crashed on a return flight from Shanghai where he had sailed on one of defendant's ships. The Court affirmed the directed verdict granted by the district judge, stating that the deceased was not in the employ of the defendant when the accident occurred. He had terminated his arrangements with the shipping company when he left the ship; he was under no obligation to accept the proffered transportation home. At any rate, the court noted that the airline was a competent independent contractor and therefore the defendant was not liable for the carrier's negligence.

REVOCATION OF REGISTRATION OF LARGE IRREGULAR AIR CARRIERS — WILFUL VIOLATION OF CIVIL AERONAUTICS ACT

Twentieth Century Airlines, Inc.

CAB Docket No. 6000 1A CCH Aviation L. Rep. 21,848 (CAB July 1, 1955).

The Office of Compliance of the Civil Aeronautics Board instituted compliance proceedings against four large irregular air carriers and certain named individuals alleging wilful violation of the Civil Aeronautics Act and the Board's Economic Regulations. The complaint stated that the named individuals had operated the irregular carriers through various corporations pursuant to a plan to evade the law; the air carriers were organized so as to provide a "regular and frequent air transportation service"; the carriers had accepted tickets which did not comply with the Board's regulations; and they had accepted passengers from ticket agents with whom they had no contractual arrangement. The Board found that the four carriers were in fact managed in such a way as to operate a single regularly scheduled air transportation company. It stated that the carriers had ample notice of the Board's dissatisfaction with their operations, and as they were directly engaged in air transportation, their letters of registration would be revoked under Section 408 e of the Act. The Board rejected the carriers' claim that these violations should be condoned because of the public service they rendered. The fact that the carriers had applications for certification pending did not affect the decision in this case.

IRREGULAR AIR CARRIERS

Large Irregular Air Carrier Investigation

CAB Docket No. 5132, 1 ACCH Aviation L. Rep. 21,879 (CAB Nov. 15, 1955).

A new policy defining the role of irregular air carriers in the air transport system has been adopted by the Civil Aeronautics Board. The new policy has designated these carriers as "supplemental air carriers" and has delineated the activities in which they may engage. These activities include: (1) unlimited charter operations on a plane-load basis for the carriage of passengers and cargo in domestic, overseas, and territorial operations, (2) unlimited charter operations for the carriage of cargo in international operations, (3) limited charter operations for the carriage of passengers in international operations, and (4) individually-ticketed or waybilled operations not to exceed ten trips per month in the same direction between any single pair of points. The Board found that certificated carriers would not

be injured by the new policy and that the public need for specialized service and the needs of national defense warranted the favorable policy which they adopted. Provisions for the termination of authority in cases of insufficient operation were adopted, but the present carriers were given authority to operate pending a determination of the qualifications of individual carriers. The Board concluded by providing for new certificated carriers in the event that the volume of traffic carried by the supplemental carriers exceeded fifteen per cent of the traffic carried by certificated carriers.

FINAL MAIL RATES — "DEFERRED TAX" RESERVE ACCOUNT

Reopened Transatlantic Final Mail Rate Case

CAB Docket No. 1706, 1A CCH Aviation L. Rep. 21,856 (CAB July 28, 1955).

In a proceeding to determine the final mail rates for transatlantic services performed by TWA, the Civil Aeronautics Board held that the cutoff date between the past and future rate periods that had been set was conclusive. The Post Office had maintained that the date should be moved forward in order to permit an offset of TWA's domestic division profits against its international division subsidy. The Board also held that TWA could not accrue "emergency facility" depreciation amounts on its books as an expense because to permit this would in effect amount to a granting of a subsidy for the future—an act inconsistent with the determination that the carrier had reached self-sufficiency. TWA had listed these depreciation amounts as expenses on the theory that they were not tax savings but only deferrals, as the savings would be paid in the future when the emergency equipment was fully depreciated. The Board stated that the government should not be required to subsidize a legal obligation to be incurred at a time when the carrier did not require subsidy.

MOTION TO DISQUALIFY BOARD MEMBER SUBSEQUENT TO DECISION ADVERSE TO PETITIONER

Reopened Transatlantic Final Mail Rate Case

CAB Docket No. 1706, 1 ACCH Aviation L. Rep. 21,875 (CAB Sept. 28, 1955).

Following a decision of the Civil Aeronautics Board adverse to the interests of TWA, the carrier moved to dismiss Chairman Rizley from any participation in the case and also to reverse its former holding. The basis for these motions was the fact that Chairman Rizley was the Solicitor of the Post Office at a time when the case in question was pending before the Board and the Post Office Department was actively participating therein. TWA concluded that the Chairman wrongly participated in a case in which he was previously of counsel. The Board denied both these motions, stating that at the time Chairman Rizley was the Solicitor of the Post Office there was no consideration nor even a notation of the issue which was finally determined in the case. The Board thought that the mere fact that the Chairman was the Solicitor of the Post Office in a case where the issue in question *could have been* raised was not sufficient grounds for disqualification. It further held that TWA had objected to the Chairman's qualifications too late. TWA was not permitted to "gamble" on the outcome of the former case.