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1941 Annual Aeronautical Law Report

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1941 ANNUAL AERONAUTICAL LAW REPORT*

BY GEORGE B. LOGAN

Because of the importance, in my opinion, of two proposals concerning aviation, legally, these proposals will be first discussed, and if time permits, court rulings will be taken up last.

It is earnestly requested that, if you cannot lend me your ears, you at least bend them my way until you hear of these proposals.

There is a proposal that there should be a Federal Aviation Liability Act. There is also a proposal that the American Bar Association withdraw its support of the Uniform Regulatory Act.

With the genius I have at getting things backward, I will discuss the last one first.

You will recall that this Association worked assiduously in connection with the Aeronautical Law Committee of the American Bar Association in the preparation of the Uniform Regulatory Act. The work began, as far as the American Bar Association is concerned, in 1929; as far as the National Association of State Aviation Officials is concerned, it began with the formation of the Association in 1930. This Uniform Regulatory Act was finally approved at our National Convention at Cheyenne, in 1934. It was approved by the American Bar Association and by the Commissioners of Uniform State Laws at the Annual Meeting of the American Bar Association in San Francisco in 1935.

That law, or those exceedingly similar to it, has had the backing of our Association, and having had the support of the American Bar Association, as activated through the Commissioners of Uniform State Laws, has been enacted, and is now in force in many states.

The present Aeronautical Law Committee of the American Bar Association, at least four out of five members, has, in the past year, conceived the idea that this Uniform Regulatory Act is unwise, should not have been approved, and should no longer be encouraged by the American Bar Association. In short, the Committee has taken

* This Report is made each year to the National Association of State Aviation Officials by Mr. Logan, its Counsel, and is officially published by the Journal of Air Law and Commerce.

the view that, in the future, all regulations of aeronautics shall be by the Federal Government and that there should be no further encouragement of regulation by the several states.

Whether this is a part of the current philosophy which has recently seized so large a portion of our population, so that most of our citizens now-a-days are prone to say, "Let the Government do it," is difficult to determine.

The queer thing about the position of the Aeronautical Law Committee of the American Bar Association is that there is no criticism whatsoever of the terms of the Uniform Regulatory Act. The terms of the Act were not discussed or considered. No one has pointed out any of its short-comings; no one has levelled a finger at any defects; no one has indicated that it does not work.

The arguments made to date have been purely legalistic and run something like this:

"By the passage of the Civil Aeronautics Act in 1938, Congress evidenced an intention to regulate interstate commerce by air. The whole field of aeronautics is per se interstate commerce or potentially interstate commerce. Hence, it falls within the commerce powers of the Constitution. Congress, therefore, has the right to regulate all aviation. Such a bill would undoubtedly be held constitutional by the Supreme Court. Therefore, we should have a federal law; therefore, we should cease to recommend the passage of the Uniform State Regulatory Act."

With the first five sentences of the foregoing, no one can quarrel. Congress has evidenced an intention to go farther in the regulation of aeronautics than it did under the Air Commerce Act of 1926. Most aviation is either interstate commerce or potentially such. Congress has, probably, the power to regulate all of it. The Supreme Court probably would hold such a law constitutional, but it is an absolute non sequitur to say that it thereupon follows as a necessity that there *must be* a federal regulatory act and *should not* be state acts.

Who has been the complainant? For one, I have heard none outside the sessions of the Aeronautical Law Committee—and one or more suggestions by members of the Civil Aeronautics Board that it should be the *sole* regulation body.

If there is any one thing clear in the relation between the Federal Government and the several states in the regulation of aero-

navitics, it is that there be uniformity. The Uniform Regulatory Act makes uniformity with federal regulations absolutely essential. Uniformity has been achieved by the very terms of the act. If the states are to be elbowed out of the aviation picture, it is certainly not because their regulations conflicted with those of the Federal Government.

It is true that there are one or two states which have been unwise in some of their regulations—but these states do not operate under the Uniform Regulatory Act, and hence, all the more reason why all states should be urged to enact the Uniform Regulatory Act.

It is true also that there have been one or two brushes between the Federal Authority and the State authorities, but, irrespective of who was right in these touch-and-go disputes, it certainly does not follow either that all State officials should be abolished or that all Federal officials are dumb. It is safe to say that, where these brushes have occurred, they did not occur in states where the Regulatory Act was in effect.

Under the rules of the American Bar Association, recommendations of committees are submitted, first, to the House of Delegates of the Association. The recommendation that the American Bar Association withdraw its support (given since 1935) of the Uniform Regulatory Act, was adopted in the Aeronautical Law Committee by a vote of four to one, and was accordingly submitted to the House of Delegates at its meeting in Chicago last December.

The writer prepared a minority report, urging that the House of Delegates do not accept or approve the recommendation. The House of Delegates, after hearing the Committee report, and after reading the minority report, voted to table the recommendation of the Aeronautical Law Committee.

In the final analysis, my disagreement with the Aeronautical Law Committee is not one based on law. My disagreement, I believe, rests upon more fundamental grounds. The creed in which all of us believe with respect to aviation is that the development of civil aviation is, in view of today's world status, of the utmost importance to the safety of the future of this country.

The development of military aviation alone is not sufficient. We cannot rely forever on airplanes owned and manned by the Army and Navy for our complete and future salvation. We must rely

upon the fullest possible use of this new and unequalled method of transportation—a method of transportation which transcends all barriers, whether rivers, oceans, or steel and concrete lines. It is purely a question of transportation and not a question alone of fire-power or bomb-carrying capacity. This was proven at Crete—when all the British Navy could not stop Germany from transporting troops and supplies enough to capture this island.

From the standpoint of transportation, the future of this country requires not that we have thousands of military planes, but that we have millions of civil planes and millions of civilians who know how to fly them.

To attain this requires the concerted effort of every agency in the United States which knows anything at all about aviation. To attain this requires the active, moving, educational and financial aid of every governmental body in the United States—not only the Federal Government, but each State Government, and as many municipal and county governments as may be enlisted in the cause.

Above all things, the attainment of this end does not call for the rebuff, cold shoulder, and curt dismissal of the forty-eight states, which are, in effect, being told by the Aeronautical Law Committee: "We do not need you nor your State Aviation Officials, nor anybody else. The Federal Government is alone sufficient and we want no more State Regulatory Acts."

But just what does a regulatory act have to do with this picture? Regulating aviation as such does not help it, except in the sense that keeping the industry within bounds of reasonable safety and reasonable responsibility, gives it some intangible aid. What really helps aviation is the financial *encouragement*, the educational and guiding help that is given to the cause of civil aviation by every forward-looking public official. I know of no state official who has not performed the functions of his office in that manner. But when you have eliminated the regulatory features, you have eliminated the possibility of creating state aid. You have made it politically impossible to secure appropriations for the payment of salaries and expenses to men who are unselfishly devoting their lives to the cause of civil aviation, and in fact, to the cause of future salvation of this country.

Legislators love to "regulate"—so do government officials. Legislators are slow to "encourage"—so is the Government. But the Uniform Regulatory Act has been acceptable to the state; regula-

tion was at the ideal balance—enough to make the act appeal to non air-minded legislators—and not enough to hamper aviation.

The statesmanship of aviation calls for united support. It does not call for a jealous division of official functions. It cries out for cooperation, not for elimination of help. Above all, what is *not* needed is the churlish attitude of, "We can do this without you."

One look at the personnel of the Civil Aeronautics Board, and at the number of its highly competent officials who are now in Federal positions, is sufficient to demonstrate that the training ground and the laboratory of aviation experience, which has been responsible for the production of these key men, has been in the fields of *state regulation*. Without the state regulation of the past ten years, it is safe to assume that the Civil Aeronautics Board would be as helpless as a major league baseball team today if playing on the sand lots had been prohibited by law ten years ago.

Eliminate the state regulatory acts and you eliminate state aviation officials. Eliminate state aviation officials and you abolish the "training camp" for Federal officials.

THE PROPOSED FEDERAL LIABILITY ACT

Some of the same philosophy of the Aeronautical Law Committee has unfortunately cropped out in the proposal for a Federal Liability Act.

This has been brought to our attention by the report of the Civil Aeronautics Board, through a study of proposed aviation liability legislation. This report has been given rather general distribution and comments are invited to be presented to the Civil Aeronautics Board. The report was prepared by Mr. Edw. C. Sweeney, with the advice and assistance of Mr. Samuel E. Gates, International Counsellor, and Mr. Edw. M. Weld, of the Board's Legal Staff.

There is some history back of this which we should understand. Prior to 1921, studies of aeronautical legislation were begun by a Committee of the American Bar Association in conjunction with the National Conference of Commissioners on Uniform State Laws. The so-called Uniform State Law of 1921 was adopted as a result of these studies and passed by fourteen states. Among other things, this law provided that the operators of aircraft should be absolutely liable for all damage done to persons and property on

the ground, but that other liabilities, such as injuries to persons not on the ground, passengers, collisions, liabilities, etc. should be controlled by the ordinary rules of negligence. I will not go into a discussion of the merits or demerits of this particular law. Insofar as absolute liability to persons and property on the ground is concerned, the decisions of our courts have almost universally held that this is true, without any statute, and the law is unmistakably developing along this line. The other liability rules are being steadily established by court decisions.

However, several years ago, the Conference of Commissioners on Uniform State Laws instructed its committee on aviation to undertake the study of a Uniform Liability Act (very different from the Uniform Regulatory Act approved in 1935), and for a time, the Chairman of this committee was likewise the chairman of the Aeronautical Law Committee of the American Bar Association. These committees held meetings and conducted hearings as to what should be contained in such a Uniform Aviation Liability Act. There was never any agreement on the terms of such an act, nor on the question as to whether or not such an act was needed or desirable.

The proposed act was never presented to the American Bar Association, and in 1938, that Association withdrew its sponsorship and participation. Nevertheless, the Commissioners on Uniform State Laws, at their meeting in Cleveland in 1938, approved and adopted this act over the protests of aviation interests. The provisions of the act were opposed by the Air Transport Association of America, by various private pilot associations, and by aviation insurance underwriters.

The Commissioners did not go so far as to recommend the adoption of the act to the legislatures of the several states, and in December, 1938, the Commissioners held a meeting with representatives of the Air Transport Association of America to determine whether or not it would, at that time, recommend the passage of the act by the several states.

The Civil Aeronautics Authority was invited to participate in the meeting and advised the Commissioners on Uniform State Laws that it had entered an order for a study to be made of the subject. As a result, the Conference of Commissioners decided to withhold promulgating the act to the legislatures until the Authority had a reasonable time to complete the study.

This study has been completed.

Let me say, first, that the study evidences a tremendous amount of painstaking and careful work. Mr. Sweeney and his associates are to be highly complimented for the industry shown and also for the judicial attitude adopted in summarizing the pros and cons, or perhaps I should say the positions of the proponents and the opponents of the various phases of the act.

They have studied and given us adequate and detailed reports on such related questions as (a) the need of such legislation; the measure of liability (b) to persons and property on the ground; (c) to passengers and guests of common carriers; (d) to passengers and guests of private carriers; (e) liability with respect to baggage and personal effects of passengers; (f) liabilities to owners, and operators and passengers of other aircraft in collisions; (g) extent of permissible recovery in cases of death and personal injury; (h) provisions for enforcing recovery, i.e., collecting the damages; and (i) the legality of a federal statute on the subject.

Let me say, in the first place, that I have no fault to find with the conclusions of these gentlemen as to the legality or constitutionality of the law they propose. Having said this, I should probably sit down. Perhaps my only justifiable reason for discussing any of these subjects before this body at any time is that my profession as a lawyer permits me to discuss the legal phases of proposed aviation legislation. But obstinately enough, that is not what I propose to discuss.

I propose to discuss the very first point that I mentioned; item (a), the need for such legislation; and propose to disagree with the recommendation of the authors of the report that there should be a Federal Aviation Liability Act.

At one point in the report, the statement is made that there is no public demand for the act. I do not take technical advantage of this statement, as an admission against interest, but I do stand on the fact. Unless we keep close hold of this fact, we might, as we read the four hundred odd pages of the report, become convinced that there is a crying need for the Government to do something about the persons who are killed and injured by airplanes, to the end that they be duly compensated for these injuries. Likewise, if we read only the headlines in the newspapers, we might think there was a crying need. But please keep fast hold of the fact that, during the six years beginning with the year 1934 and ending with the year 1939, less than 1,000 people have been killed in airplane accidents

and approximately only 400 severely injured and approximately 700 with minor injuries. In other words, in the whole United States, in all of the six years, with all of the millions and millions of miles which have been flown, this is the sum total of the accident record of all flying operations of all types. No wonder there is neither public demand, nor need, for this legislation.

In the year in which the largest number of planes in the history of aviation was being operated, namely, 1939, with 12,704 planes in operation, there were 144 people killed. Although more people were killed in 1940, the number of accidents per passenger mile flown greatly decreased.

The sole justification for urging federal legislation, of the sweeping and revolutionary type that is urged, is apparently based upon several classroom conceptions.

These appear to be, (a) that aviation is an inherently dangerous business; (b) that injured persons are at a disadvantage in presenting and proving claims due to lack of available evidence and competent counsel; (c) that aviation operators alone (and not any of the general public) shall carry the burden of developing this industry—so essential for national welfare and national defense.

To support the statement that aviation is a dangerous business are figures that "accident frequency" is greater in aviation than in automobile transportation or railroad transportation—but look—upon the basis of passenger fatal accidents per vehicle miles travelled, the airlines surpassed the safety record of the railroads in 1939 and have surpassed that of the inter-city busses from 1934 to date. When you take into consideration the non-fatal injuries, as well as the fatal, the air carriers were twelve times safer than the railroads, and infinitely safer than the bus lines.

The assertion that the injured person, whether he be a passenger or on the ground, is at a great disadvantage in proving his case, is based, I fear, upon the opinion of lawyers who have a too thorough understanding of evidence and a too skimpy understanding of aviation.

Discuss this problem with any lawyer who is a pilot (which I am not) and I believe he will agree with the statement often expressed by aviation lawyers, and that is, "show me an accident where there was negligence and I can produce competent evidence to prove the negligence."

No showing is made in the report that plaintiffs bringing suits for aviation accidents have been badly treated by the courts. In fact, it is quite evident that the courts have been just as quick, through judges and juries, to render verdicts for injured plaintiffs as they have in any other field of negligence actions. This is made clear in the report, but for some reason, which it is difficult to understand, the fact that the common law is progressing satisfactorily with respect to this new form of transportation does not seem to be sufficient. In spite of this fact, and in spite of the fact that there is no public demand, a new system of liability by federal law is recommended.

The scope of this paper, designed as it is to lighten the tedium and the dullness of your Convention, and to bring many a quip of gay laughter, does not permit of a detailed discussion of the proposed law.

I wish to point out one thing, though, which will probably come as a shock to most of you; and that is that it is recommended that this law which will apply to interstate commerce, commerce which is potentially interstate, and to all flying on a "designated civil airway," *requires liability insurance*. This is not revolutionary with respect to the air carriers, but it is revolutionary with respect to the vast majority of non-scheduled commercial operators and is distinctly original with respect to private flying.

It would be just as revolutionary as if the Federal Government should propose that all interstate bus lines, all interstate truck lines, and all pleasure automobiles which operate on a United States Highway should be required to carry liability insurance. How much such a law would have pushed back the development of the automobile industry, if passed twenty-five years ago, is beyond calculation; how much it would injure the automobile industry, if passed today, is likewise beyond calculation. But the report shows that it would add between \$1,500,000 and \$1,750,000 *per year* to the cost of non-scheduled and private flying aviation!

In support of this unique proposal, it is suggested that the proposed legislation is based upon the same philosophy as workmen's compensation, namely, that the injured persons should themselves not be required to bear the burden of injuries arising from the conduct of a necessary business. In urging this comparison, the fact which is overlooked is that the two things are not even alike. The injuries to coal miners, arising out of the necessary operation of coal

mines, is shifted from the injured persons to the employer, because the employer can, in turn, shift this loss to the entire coal-consuming public, and is further shifted by industrial coal consumers to the whole public. The employees of air line operators are already covered by workmen's compensation and the cost is shifted in transportation charges to the general public.

But when you attempt to impose the same thing on persons operating automobiles for pleasure, or aircraft for pleasure, you overlook the fact that the loss is simply shifted from one small group to another small group, and cannot be shifted to the public at all. The comparison is as surprising as it is inadequate.

Perhaps the recommenders of the legislation do not realize how far-reaching their proposed Federal Liability Act will be when they say it is limited to those persons traversing the designated civil airways. It is true that not every airport in the United States is on a civil airway, but it is likewise true that it is practically impossible to get out of any state in the union without crossing a civil airway. You cannot go over a civil airway—you cannot go under a civil airway—unless you burrow under the ground. This is not good for airplanes. Hence, the proposed liability act, though it makes a fine show of not covering intrastate pleasure flying, actually does cover *all* flying.

It does seem that in this day and age when every possible encouragement should be given to civilian use and acceptance of planes (subject to the present emergency of producing them) that the time is not ripe to pass such far-reaching, crippling, legislation.

Nor, indeed, is the time going to be ripe when this war is over, because, when the war is over, with manufacturing facilities ten times what they were before the war began, either the public must accept and use airplanes or nine-tenths of the factories will remain closed.

There could be no greater harm done, not only to the future of aviation, but to the future of the United States, than to add the width of a single brick to the height of the financial wall which has heretofore been the chief obstacle to public acceptance of the airplane.

The difficulty with all of us, I fear, including legal theorists, is that we permit our theories to take possession of and overpower our sense of realism.

Airplanes are startling, but not mysterious. The automobile was originally quite startling and appeared to be mysterious, but is no longer so. It was, of course, a mystifying sight to see a buggy or a wagon careering down the street without horses, and it is a mystifying sight to see a vehicle like an automobile careering through the air without touching the ground. But after all, aviation is simply another method of transportation—amazingly simple and amazingly beneficial.

The Federal Government followed a wise policy with respect to the automobile. There was no federal liability regulation of automobiles until there were approximately thirty-two million of them, and then the regulations applied only to a small fraction of those, namely, the interstate busses and trucks.

In the meantime, rules of liability governing automobiles developed sanely and satisfactorily. The new instrumentality had not been hindered by theoretic regulations. The same course should be followed by the Federal Government with respect to airplanes.

In a recent speech, Mr. Robert H. Hinckley, formerly chairman of the Civil Aeronautics Authority, and now Assistant Secretary of Commerce, propounded a question and gave an answer:

“What will we do with this unparalleled productive power when the flow of military orders dries up? Will we condemn the hundreds of thousands who are going so hopefully into aviation skills to a return to relief?”

“I don't believe we will. I believe that as a nation we will sprout wings, just as we sprouted wheels. All first-class mail will go by air. There will be feeder air lines to smaller cities and pick-up service to the villages. Our air lines carried three million passengers last year. Two years after peace returns to the world they will carry twenty million, and half a million Americans will be flying their own planes.”

I say to Mr. Hinckley, your answer was right, but it will not remain right, nor will your prediction come true, if we eliminate state aid and the aid of state officials by withdrawing support from the Uniform Regulatory Act; and your answer will not remain right, nor will your prediction come true, if the Civil Aeronautics Board supports or urges Congress to pass the proposed Federal Liability Act, which will do more to discourage private flying than any other possible step which the Federal Government could take.

SAFETY REGULATION—RELEASE NO. 71

Another matter to which your attention should be called is the very unusual release, dated October 18, 1941, which was issued by the Bureau of Safety, Civil Aeronautics Administration, as to a change in safety regulations effective September 25, 1941. This is called "Part 525—Notice of Construction or Alteration of Structure on or Near Civil Airways." It is a new regulation by the Administrator of Civil Aeronautics to supersede a former one promulgated by the Civil Aeronautics Board.

It is not necessary to quote this regulation in full. Suffice it to say, that it is now required of any person who engages in the construction of a structure within twenty miles of a civil airway (in other than congested parts of cities, towns or settlements) to give notice in advance to the Administrator of Civil Aeronautics, if any part of said structure is to or may become greater than 150 feet above ground level, or greater than five feet above ground level for each five hundred feet or fraction thereof of the distance from the nearest boundary of any landing area. For the full text of the regulation, see page 72, *infra*.

We shall first stop and consider the area that the first half of this notice considers. A civil airway is twenty miles wide, being ten miles on either side of its center line. Therefore, the term "within twenty miles of a civil airway" means within thirty miles of either side of this center line, or a belt sixty miles wide. To put it another way, and considering our American counties as an average, it means that no one in a strip approximately two counties wide can build such a structure without first notifying the Administrator of Civil Aeronautics. There is a penalty of \$500.00 for failing to notify.

The first thought which comes to the reader of this new regulation is how and by what means is a reasonable notice of this requirement to reach the affected public so that they may be warned of the existence of this regulation in order to avoid its infractions and its penalties.

The writer is quite well aware of the fact that everyone is "presumed to know the law," but even in these days of the multiplications of administrative bureaus and the super-multiplication of bureaucratic regulations, the regulations are usually mailed to an enormously large class of persons presumably affected, so that there is at present at least a chance of the knowledge of the existence of

the regulations before time for compliance. Even publication in the Federal Register (known to but few of our citizens) is scarcely a practical answer.

This regulation, it seems, was adopted on September 25, 1941; the date of the release was October 18, 1941; but the date of actual mailing must have been about November 25th, for it was received in St. Louis on November 27th. Is it at all likely that it has reached even a fraction of the persons concerned? What is more, there is a fifteen day deadline for offending structures under construction on the effective date of the regulation.

Another thought occurs as one reads this regulation. Apparently, the purpose of the notice is to warn the users of the air space, to-wit, pilots. A structure 150 feet high is not built over night. It does not suddenly appear as a threatening menace to air navigation. It is erected slowly and foot by foot and reaches the law violating height—but only after there must have been ample evidence of its beginning, its progress, and its approaching maturity.

During all of this time, the pilots using the particular civil airway must have observed it and must, in pursuance of the regulations, have reported it. And if it was so far out of the airway that pilots didn't see it, it couldn't possibly be a menace, and why report it?

And by what authority are the civil airways suddenly increased in width, by inference, at least, from twenty miles wide to sixty miles wide? And why would a person presumably using a civil airway get more than ten miles away from the imaginary center line—in other words, what is the reason for enlarging, inferentially, the civil airway to a belt sixty miles wide?

And then another thought which goes through the writer's mind is, how likely is there to be a structure 150 feet high outside of a "congested area"? Office buildings, church steeples, cathedral spires, etc., etc., are usually built in cities and towns and the regulation does not apply to congested areas in cities and towns.

And, finally, why this first half of the regulation at all, as long as the existing civil air regulations require planes to fly at least 500 feet high, even in uncongested areas?

Now the second half of the regulation is something different. This required notice of any structure higher than five feet for each 500 feet distance from a landing field has some sense to it, because this is in the area of permitted low flying. With a 500 foot gliding

angle, pilots should be protected, if possible, against unnecessary hazards, but, again, how is effective notice to be given to the thousands and thousands of people who live within five hundred feet to five thousand feet of a landing field? These persons are likely to build fifteen foot high bungalows or thirty foot high two-story houses, or forty foot high two and one-half story houses; and would violate this regulation by failing to notify the Administrator of Civil Aeronautics if the bungalow happens to be within fifteen hundred feet of the edge of an airport, or if the two-story house happens to be within two thousand feet of the edge of an airport, or if the two and one-half story house happens to be within four thousand feet of an airport.

Roughly speaking, this subjects to possible penalties the builders of residences within a mile wide belt surrounding all landing fields in every city, town, and village of the United States which has a landing field; or putting it another way, subjects to possible penalties the builders of homes on an incalculable number of square miles of subdivision property surrounding the landing fields of the United States. And how are they going to hear about it?

Bear in mind that there is no penalty for building these structures—indeed, there is no law of which I am informed by which either the Civil Aeronautics Board, or any other authority, can prevent the building of these structures at any of the locations described, without a violation of a zoning law. Nothing can be done about it. It's only the failure to give the notice that is punishable.

Would it not seem a great deal simpler and more effective to impose the duty of giving such notice on the proprietors of landing fields, who can very easily be informed of the requirement of the regulation, and who can likewise very easily give notice to the Administrator of the building of any structure within a mile of the airport? It is certainly simpler to obtain the desired information by requiring it of the several hundred known airport proprietors who can be reached by letter, than by requiring it of the many thousands of unknown possible builders of houses who cannot be reached by any method at all.

The writer is in sympathy with any move to give timely notice of obstructions in the airspace, but neither part of this regulation seems to be well-considered, or likely to accomplish such a result, and seems much more likely to impose useless penalties on innocent citizens.

1941 DECISIONS

Wm. J. Knipe v. Skelgas Co., Iowa Sup. Ct., Dec. 10, 1940.

In a case involving the Workmen's Compensation Law of Iowa, a rather stinging rebuke was administered by a progressive and forward-looking Supreme Court to a company which itself was engaged in one of the newest of businesses and was itself pioneering a new field.

Billy Knipe had been employed by the Skelgas Company to sell stoves which would burn butane (designed for off-the-line gas consumers) and also to sell Skelgas (the so-called bottle gas) to like users of stoves in the surrounding territory. When employed, he signed a written application. On the application were some very interesting statements which remind one of the pep talks given by insurance general agents to their solicitors. Among the phrases used in this pep talk were: "We need hustlers; men and women who are aggressive—Skelgas employees must be wide awake, alive to every opportunity, progressive. Our employees must be able to develop new ideas, they must possess initiative."

Young Mr. Knipe evidently took these instructions seriously and in good faith. He went out to an airport to interview a prospective customer who was wide awake enough to own an airplane. While there, he met a former official of the Skelgas Company, who was also wide awake enough to own a plane. This latter plane owner was about to depart from the field and asked Mr. Knipe where he was going, and when told that he was going to a town about forty miles away and to another town about twenty-five miles away, the owner offered to take him by plane and return him to his home. The trip was made to both towns without incident, and in both Knipe saw and talked with prospects for Skelgas outfits. Upon the return trip, something went wrong with the engine, the plane fell and young Knipe was severely injured, suffering a fractured skull and a broken leg.

He naturally claimed his workmen's compensation from his employer, whereupon the employer claimed that his injuries did not arise "out of and in the course of his employment." The company further amplified its position by saying that they did not contemplate that he would attempt to seek customers by the airplane method.

The Supreme Court disposed of this argument in very short order, saying:

"In 1926, the first year of scheduled flying, in this country, 5,782 brave souls travelled in small, single-engine planes.

"In 1940, giant multi-motored airplanes will carry more than two and one-half million men, women and children.

"Air travel today is a commonplace mode of transportation, and the appellee cannot be said to be guilty of a rash act, in furthering the appellant's business in travelling by airplane to call upon customers. Knipe's injury arose out of and in course of his employment. He was entitled to the benefits of the Workmen's Compensation Act and the lower court was right in so holding."

Peavey v. City of Miami, Florida Sup. Ct., April 15, 1941.

Abbott v. City of Des Moines, Iowa Sup. Ct., June 17, 1941.

We have heretofore discussed in several annual reports the question as to whether or not a city, in operating a municipal airport, is functioning in its governmental capacity, and hence not subject to the liabilities of a private corporation, or whether it is functioning in its proprietary capacity and, therefore, subject to the same liabilities as private corporations.

This past year has given us some very doubtful help. Two cases have been submitted to courts of last resort and one decided that the city was acting in a proprietary capacity, hence liable; and the other decided that it was acting in a governmental capacity and hence not liable.

The first case, *Peavy v. City of Miami*, was a suit by a pilot against the City of Miami, for injuries received when landing on the field while a runway was being repaired or rebuilt. The pilot sustained serious personal injuries. There was a companion suit by the corporation owning the plane, which was seriously damaged.

The allegations of negligence were that the City had failed to properly light the obstructions on the airport, had failed to properly warn, etc. The case was, in the final analysis, really decided against the plaintiffs on the ground of their own contributory negligence, but also raised in the case was the question of the extent of the liability of the municipal corporation in the operation of the airport. The Court held:

"The weight of judicial authority seems to hold the operation of an airdrome by a municipality to be a 'proprietary' function, as distinguished from a 'governmental' function."

The Court cited, among other cases, the case of *Pignet, et al v. City of Santa Monica, et al.* (29 Cal. App. 2d 286) and *Mollencop v. Salem* (139 Ore. 137) which have previously been discussed by me in reports heretofore made.

The other case above referred to is that of *Abbott v. City of Des Moines*. This was a case in which the owner of an airplane brought suit against the City of Des Moines as proprietor of the airport, for damages resulting from fire which destroyed a stored airplane, and which fire was claimed to be due to the negligence of the City. The Supreme Court of Iowa did not refer in its decision to any of the other cases concerning airports, but based its decision chiefly upon the Iowa decisions relating to operations of public parks, bathing beaches, and other similar properties.

There was also in Iowa a statute which was practically controlling of the situation. This statute gives certain cities in Iowa the right to acquire, establish, improve, maintain, and operate airports. A section in the same chapter of the statutes provides that any property so acquired, owned, or controlled, for the purposes enumerated in the chapter is declared to be controlled and operated as a "public purpose," and the liability of the City should be no greater than that imposed upon municipalities in the operation of *public parks*.

It having been many times decided by the high courts of Iowa (as well as by many other states) that, in the operation of a public park, the City is operating in a governmental capacity and not liable, it was but a simple step to conclude that the operation of an airport was in a governmental capacity; hence the city was not liable. This is clearly a case of applying a proper statutory construction—not an authority for changing what appears to be the majority common law rule.

Osa Johnson v. Western Air Express Corp., Calif. District Court of Appeals, 2nd District, Div. No. 1, June 30, 1941.

Our old friend, and by now it should also be your old friend, *res ipsa loquitur*, bobbed up again "in absentia" in one of the more famous airplane accidents of the past.

You will all recall that, on the morning of January 12, 1937, Martin Johnson, the famous African explorer, was killed, and his wife, Osa Johnson, very seriously injured in the crash of a Boeing near Burbank, California.

Not only were the law points which were decided in this case rather unusual, but the facts involved in the accident were quite unusual. This is one of the few instances in which a plane has crashed after the pilot, flying by instrument, had located the field, being within sixteen minutes of the field, flying at an elevation of 7,000 feet, and having the fact verified by communication from the field where the announcement of his arrival within a few minutes was made. This was a foggy morning, the pilot having been held at the airport of Daggett, California, on the last leg of a trip from Salt Lake City to Los Angeles, and was finally directed to proceed from Daggett less than an hour away, by air, to Burbank, by way of Saugus. He passed directly over the Saugus "cone of silence," as he predicted at exactly 10:50 A. M., and radioed that he would make a right turn, would come back over the "cone of silence" at Saugus at 10:57 and arrive in Burbank at 11:06. He passed over the Saugus "cone of silence" again at 10:57, exactly as predicted. He was then seventeen miles from Burbank Airport and 5,500 feet high.

In proceeding from Saugus to Burbank, letting down through the fog, he unaccountably went three miles off his course to the left or east, and in attempting to regain his position crashed in the San Gabriel Mountains, at an elevation of approximately 3,500 feet. The pilot survived and testified at the trial. No explanation was given except that in coming down below 5,500 feet, the plane encountered great turbulence of air and icing conditions. He testified that he instructed the co-pilot to turn on the wing de-icer and the carburetor de-icer, but for some unaccountable reason, the co-pilot failed to do so. The ship, therefore, thereupon became unmanageable. Not enough power could be maintained in the engines to give the plane speed enough to maintain its elevation, nor could the pilot control the direction of the plane due to the icing of the wings. The result was that the plane crashed.

The case was submitted to the jury on the specifications of negligence of failure to use the de-icer, failure to maintain proper flying speed, and failure to follow the radio beam, the pilot having testified that when he got down to 5,500 feet, he cut off the radio beam to use what the pilot called "average compass reading."

The jury found a verdict for the defendant, and the Court refused to disturb this verdict on the ground that such a verdict was an implied finding that the failures in the particulars above described were not negligence and that this was a question solely for the jury.

The plaintiff then contended that the court, as a matter of law, should have instructed the jury that this was a "res ipsa loquitur case" and that negligence was established by the very facts of the crash, and that the Court should have so instructed the jury. The answer to this, as we now all know, was that the case was not pleaded originally as a res ipsa loquitur case, but was pleaded originally on the specific acts of negligence, and when specific acts of negligence are pleaded, res ipsa loquitur goes out of the window, and is, therefore, "in absentia."

One of the interesting side lights of this case, and one which the writer feels must have had something to do with the result, was the fact that there was combined in the same suit a suit by the Administrator of Mr. Martin Johnson's estate, for the damages resulting from his death, and a suit by Mrs. Osa Johnson for her personal injuries.

It is, of course, the law in California, as in many other states, that the earning capacity and the pecuniary conditions of the survivors of a decedent is not to be put in evidence in a death case, but only the loss to them by reason of the death of the decedent; whereas, in a suit for personal injuries, the earning capacity of the injured plaintiff is a matter for consideration by the jury.

The earning capacity of Mrs. Osa Johnson, even after her own severe injuries, was very great, and it must have been obvious, therefore, to the jury that she had not suffered severely financially either by the death of her husband or by her own injuries. One cannot help but feel that this factor was of considerable influence on the minds of the jury in finding that the pilot was not negligent. It is fair to assume that in a death case, at least, there might have been a verdict for the plaintiff for the death of Mr. Martin Johnson, and the loss of his earnings, had it not been so evident that the financial independence of the survivor was assured.