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JUDICIAL AND REGULATORY DECISIONS

Department Editor: Frank Winter*

EXCULPATORY PROVISIONS IN AIR CARRIER TARIFFS AND PRIMARY JURISDICTION

The recent case of *Lichten v. Eastern Airlines, Inc.*[1] raised the problem of whether a court may decide an action involving an air carrier tariff provision under which the carrier exempted itself from liability for any loss or damage to certain kinds of baggage regardless of negligence.[2] The court of appeals of the second circuit decided that the CAB has "primary jurisdiction" in this case despite the fact that the Board has power only to approve or eliminate such a provision from the tariff, and has no power to grant money damages to persons whose baggage has been lost as a result of the carrier's negligence. Thus such a person cannot get any practical relief.

The facts of the principal case may be summarized as follows: Mrs. Lichten boarded defendant's plane in Miami, receiving at that time claim checks for two small pieces of luggage. When she arrived at her Philadelphia destination, however, only one parcel was returned to her, while the other piece was carried to Newark and there apparently given to a person without a claim check. A week later the bag was returned to the airline, which then returned it to Mrs. Lichten. She discovered a loss of over three thousand dollars worth of jewelry, and thereupon instituted this suit. Defendant obtained summary judgment in the United States district court which was affirmed by the court of appeals. The case was disposed of by characterizing the issue to be the reasonableness of the disputed tariff provision,[3] and therefore within the primary jurisdiction of the Civil Aeronautics Board.[4]

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[1] 189 F. 2d 939, 1951 U.S.Av. R. 310 (2nd Cir. 1951).

[2] The provisions in the tariff filed with the Board were: Rule 10;

Par. II. ". . . Money, jewelry, silverware, samples, negotiable paper, securities and similar valuables, or business documents will be carried at the risk of the passenger."

Par. III. (A) ". . . no participating carrier shall be liable for the loss of, or any damage to, or any delay in the delivery of any property of the following types which is included in a passenger's baggage, whether with or without the knowledge of the carrier: fragile or perishable articles, money, jewelry, silverware, negotiable paper, securities, or other valuables, samples, or business documents; or any other loss or damage of whatever nature resulting from any such loss, damage, or delay." 189 F. 2d at 940, 1951 U.S.Av. R. at 311.

[3] For a discussion of the desirability, etc. of the tariff provisions involved in the principal case, see 65 HARV. L. REV. 341 (1951).

[4] Those statutory provisions pertinent to the decision are: CAA §404(a), 49 U.S.C. §484(a) (1946): "It shall be the duty of every air carrier . . . to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classification, rules, regulations, and practices relating to such air transportation. . . . "

CAA §1002(a), 49 U.S.C. §642(a) (1946): "Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. . . ."

CAA §1002(d), 49 U.S.C. §642(d) (1946): "Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential, or unduly prejudical, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be

The doctrine of primary jurisdiction was first enunciated in *Texas & Pacific Ry. v. Abiline Cotton Oil Co.*[5] There the Court said that Congress cast upon the Interstate Commerce Commission the job of seeing to the uniformity and equality of rates. Therefore in a case where a shipper seeks reparation from a carrier predicated on the reasonableness of an established rate the federal commission must act primarily. The reason for this was the fear that if the courts had the power along with the ICC to determine the reasonableness of rates, a serious blow would be dealt to the purpose of the Interstate Commerce Act of insuring uniformity of treatment to all. A determination by a court that an individual shipper may recover part of the charges he has paid would result in an abhorrent non-uniformity with respect to other shippers who have paid the rates.

Applying this doctrine of primary jurisdiction the court in the principal case told Mrs. Lichten to exhaust her administrative remedies as to the reasonableness of the tariff provision before resorting to a judicial tribunal. The plaintiff argued that this was not a question of the reasonableness of a tariff provision, but rather a question of an unlawful tariff provision to which the CAB could not give approval in the first place — an issue that the court should properly handle. To this the court replied that since there was no provision in the Civil Aeronautics Act similar to the Carmack Amendment of the Interstate Commerce Act,[6] which prohibits the contract-

demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective. . . ."

CAA §1002(g), 49 U.S.C. §642(g) (1946): "Whenever any air carrier shall file with the Authority a tariff stating a new individual or joint [between air carriers] rate, fare, charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice . . .; the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation or practice had become effective. . . ."

[5] 204 U.S. 426 (1907). The Oil Co. sued the Railway to recover charges paid in excess of "just and reasonable" charges, alleging the rates to be discriminatory, preferential, and in violation of the long and short haul provisions of the Interstate Commerce Act. The common law right to an action in the courts in this sort of case was held to be superseded by the requirement for uniformity of results under the Interstate Commerce Act.

[6] ICA §20 (11); 49 U.S.C. §20(11) (1946): "Any common carrier, railroad, or transportation company subject to the provision of this chapter receiving property for [interstate or foreign] transportation . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered . . . when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation . . . or . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading . . . for the full actual loss, damage or injury to such property caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and such limitation without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void. . . ."

ing way of liability by the carrier, there is no question of illegality present, but only one of reasonableness. As a result air carriers are free to contract away their liability regardless of negligence to the extent that the Board does not disapprove of such provision.

In a long, able dissent, Judge Frank disagrees with the majority on the point of whether this case involves illegality or reasonableness of a tariff provision. He concludes that the CAB is without authority to approve an exculpatory clause. His argument is that the mere absence of a Carmack Amendment type of provision in the CAA does not mean that exculpatory clauses are not also prohibited to air carriers. The Carmack Amendment was enacted to nullify state legislative and decisional rules on this subject, and thus to make the law on the subject uniform for interstate transportation by substituting for them the federal common law, which already prohibited carriers from contracting away their liability.[7] Thus the argument of the majority that a Carmack Amendment type of provision is required in the Civil Aeronautics Act to render exculpatory clauses illegal is unsound.[8] It follows, Judge Frank says, that Congress could not have intended, by mere silence, to let the CAB approve tariffs contrary to hitherto uniform federal policy.[9]

Since this case involves a clause illegal under the Civil Aeronautics Act, Judge Frank next reasons, the CAB does not have primary jurisdiction, and the district court should not have dismissed Mrs. Lichten's suit. This result would be based on the rule that the doctrine of primary jurisdiction is to be applied only to cases raising the issue of the *reasonableness* of a tariff provision, carrier action, etc., and not to cases raising the issue of the *legality* of such a provision, action, etc. (Note that the *Lichten* majority has no quarrel with this rule — it merely decided that there was no question as to the legality of the exculpatory clause.)

This test for the determination of the instances in which primary jurisdiction should or should not be applied was first announced by the United States Supreme Court in *Boston & Maine Ry. v. Piper*,[10] and has since

[7] Hart v. Pennsylvania Ry. Co., 112 U.S. 331 (1884).

[8] The basic point of divergence between the majority and dissenting opinions comes in the analysis by each of Adams Express Co. v. Croninger, 226 U.S. 491 (1913). The majority used this case to support the view that without the Carmack Amendment a carrier coming within the scope of the Interstate Commerce Act could contract away its liability. An examination of the case, however, leads to the conclusion that the dissenting opinion reached an essentially sounder view in concluding that the *Croninger* case stands for the proposition that the Carmack Amendment merely put into statutory form the federal common law, mainly for the purpose of attaining uniformity by nullifying state rules. The action was one against the express company, brought in a Kentucky court, and involved the loss, during an interstate shipment, of a small package containing a diamond. The defense was based on a clause in the contract limiting the liability of the carrier to the *declared* value of the shipment. (That, of course, is different from the exculpatory clause of the *Lichten* case.) Such a limitation clause was legal under federal common law, but illegal under Kentucky law. The court held that since the enactment of the Carmack Amendment, federal law must control exclusively.

[9] Adams Express Co. v. Croninger, *supra* note 8; Kansas City & Southern Ry. Co. v. Carl, 227 U.S. 639 (1918); Boston & Maine Ry. v. Piper, 246 U.S. 439 (1918) (railroads); The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494 (1935) (water carrier); 46 U.S.C. §§190, 191 (1946) (water carriers); the Carmack Amendment, *supra* note 6.

[10] 246 U.S. 439 (1918). The contract limited the liability of the carrier because of unusual delay or detention because of its negligence to the amount expended for food and water (hence not for damages resulting from the delay) of the livestock shipped. The shipper recovered on the ground that an attempt to limit liability leaving no recovery for damages was unlawful and void. The reasonableness-legality test was announcced *Id.* at 445.

been applied by lower courts in the field of air law.[11] The existence of the test represents a recognition by the courts of two truths: (1) the doctrine of primary jurisdiction has in many if not most cases produced such satisfactory results, and has such strong policy reasons behind it,[12] that it should continue to receive judicial support; (2) there are some instances, however, when an application of the doctrine leads to results that are most unfortunate and undesirable. The *Lichten* case is an excellent example of an instance of the latter type — the plaintiff is told to go to the CAB, even though the Civil Aeronautics Act gives the Board no power to grant such a plaintiff money damages, the only practical relief she could get.

A test by which the doctrine of primary jurisdiction may be avoided in some cases seems definitely called for. It is submitted, however, that the rather mechanical reasonableness-validity test of the *Boston & Maine* case[13] is unsatisfactory. It is not a necessary result of the test that the administrative body gets cases which, for various reasons of policy,[14] it should be required to handle exclusively or primarily. Nor is it a necessary result of the test that persons like Mrs. Lichten, who can get adequate relief only in the courts, will have their day in court.[15]

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[11] In Pacific Northern Airlines, Inc. v. Alaska Airlines, Inc., 80 F. Supp. 592, 1948 U.S.Av.R. 542 (D. Alaska (1948), an irregular carrier whose certificate allowed flights only within Alaska had been operating flights between Alaska and the United States. Under CAB Regulations the carrier had been exempted from the operation of CAA §401, 49 U.S.C. §481 (1946), which regulates common carriers, and required, *inter alia*, CAB certificates to engage in air transport between any two points. The court decided that it had jurisdiction here to enjoin the carrier's Alaska-United States flights, saying that the CAB-granted exemption from the operation of §401 protected the carrier only while it remained within the boundaries of its exemption (Alaska), and not outside its boundaries. In CAB v. Modern Air Transport, Inc., 179 F. 2d 622 (2nd Cir. 1950), the defendant admitted it was no longer an irregular carrier, but denied the jurisdiction of the court to enjoin its operations as an irregular carrier until the CAB revoked its letter of registration. The court said it had original jurisdiction to interpret tariffs, rules and practices where the issue is one of violation rather than reasonableness. (Note that in both cases the CAB expressed the view that the court's jurisdiction was properly invoked.)

[12] For a discussion of the policy considerations, see Note, 51 HARV. L. REV. 1251, 1253 (1938), as well as the discussion in this comment *infra*.

[13] *Supra* note 10.

[14] See note 12 *supra*.

[15] The cases in the air law field involving anti-trust law show a tendency, resulting from an extreme application of the doctrine of primary jurisdiction, to confuse the scope of the "anti-trust" sections of the CAA with the general anti-trust law of the Sherman Act. In Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F. 2d 63, 1949 U.S.Av.R. 196 (9th Cir. 1949), the court said its injunctive relief must await determination by the Board whether the matter was within the Board's scope of authority; after an economic decision the court would rule on the applicable law. But since the Board had no authority to enjoin and could only order the defendant to cease and desist from its practice, if found to be discriminatory, the court's reluctance seems strange. The Civil Aeronautics Act explicitly gave the court authority to decide the case since a conspiracy in restraint of trade was alleged and the Board had no sanctions over such act. The case of S.S.W., Inc. v. Air Transportation Ass'n of America, 191 F. 2d 658, 1951 U.S.Av.R 289 (D.C. Cir. 1951), illustrates the extent to which the doctrine is applied. This was a prayer for injunction and treble damages by an independent non-scheduled airline under the anti-trust laws. The court held, after saying that the anti-trust laws are effective outside the scope of the Board's power to give a remedy, that the anti-trust laws and the CAA provisions are alike. Thus the Board must first give relief. A conspiracy had been alleged; yet in line with the "fundamental policy" the Board must render an opinion even though it has power only to approve mergers, etc., and no power to approve a conspiracy in restraint of trade, or to give a civil remedy like an injunction or damages. The court did hold, however, that it will award damages and grant injunctions if the Board finds a violation of the CAA provisions. See Comment, 18 J. AIR L. & COM. 238 (1951). For a case involving substantially similar facts, but

A more desirable test would be one by which the court would look at the type of case before it and determine whether the various policy reasons which call for an application of the doctrine of primary jurisdiction — desirability of uniform treatment,[16] need of skilled administrative officers to deal with technical problems,[17] etc.[18] — are present. If they are present the doctrine should be applied, but if they are not present, the courts should hear the cases, especially when, as in the principal case, the plaintiff cannot get adequate relief otherwise.[19]

This test would be applied to the *Lichten* case in the following manner. The general policy reasons for primary jurisdiction, especially the uniformity-of-treatment-for-air-carriers-and-users-of-air-facilities argument, could be met by the counter argument that here the plaintiff is not a member of a large class of persons similarly affected (like the plaintiff in the *Abiline* case[20] was) for which uniformity of treatment is essential to carry out the policy of the act establishing the administrative body. She is, rather, a member of a small class, whose rights, justice demands, ought to be similar to those of an ordinary litigant confronted with an illegal contract term.[21]

Then a further argument in favor of applying the doctrine of primary jurisdiction in the principal case might be one which relates specially to the field of air law. It might be argued that since the CAB has the duty not only of regulating, but also of encouraging and promoting air transportation,[22] it should have primary jurisdiction over the problem of the *Lichten* case, since the fear of incurring vast liabilities may be a factor discouraging the expansion of air transportation. A counter argument to this would be that railroads, motor carriers, and water carriers have not

reaching a result diametrically opposite to that of the *S.S.W.* case on the primary jurisdiction question, see Slick Airways, Inc. v. American Airlines, Inc., ——F. Supp. ——, 1951 U.S.Av.R. 300 (D.N.J. 1951).

[16] See Texas & Pacific Ry. v. Abiline Cotton Oil Co., *supra* note 5.

[17] See CAB v. Modern Air Transport, Inc., 179 F. 2d 622, 624 (2nd Cir. 1950); Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F. 2d 63, 66, 1949 U.S.Av.R. 196, 200-1 (9th Cir. 1949).

[18] See Note cited in note 12 *supra*.

[19] One other factor that might be considered by the courts here is the condition of the court dockets and the administrative board's dockets. See McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 143, 147 (1940).

[20] *Supra* note 5.

[21] This is substantially the argument used in King, *The Effects of Tariff Provisions: Some Further Observations*, 16 J. AIR L. & COM. 174, 177-78, 181-83 (1949).

[22] CAA §2, 49 U.S.C. §402 (1946): "Declaration of Policy.

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense;

"(e) The regulation of air commerce in such a manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

been permitted to relieve themselves of liability[23]; yet they have not become subject to ruinous claims on the part of injured users.[24] The very remote chance that a different result would obtain in the field of air transportation seems to be of little weight when balanced against the injustice of having a person in Mrs. Lichten's position become a remediless victim of an air carrier's negligence.[25]

DIGEST OF RECENT CASES

ADMINISTRATIVE LAW — CAB ORDER GRANTING ONE OF TWO MUTUALLY EXCLUSIVE ROUTE APPLICATIONS — HEARINGS FOR BOTH APPLICANTS IN ADVANCE OF ORDER

Northwest Airlines, Inc. v. CAB,
F. 2d, 20 L.W. 2313, D.C. Cir. (January 18, 1952).

The CAB said that the orders were not mutually exclusive because the award of the route to one airline does not preclude a subsequent grant of the other application. The court of appeals reversed, relying on *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945), thus requiring the Board to give all applicants a hearing prior to the Order. In this way it held that the test for mutual exclusiveness because of economic conditions should be as of the time the applications are considered and an award is being made.

EVIDENCE — PRIVILEGE — JUDICIAL POWER — MILITARY PLANE CRASH — PRODUCTION OF REPORT OF OFFICIAL CRASH INVESTIGATION

Reynolds v. United States; 192 F. 2d 987, 3rd Cir. (December 11, 1951).

This is an action under the Federal Tort Claims Act arising out of a military plane crash in which several civilian observers were killed. The government refused to produce the report of the official crash investigation for inspection by the district court to ascertain whether such report was of a privileged character. The ground for refusal was that under 5 U.S.C. §22 (1946) it is within the sole province of the Secretary of the Air Force to determine whether there is privileged material in such report, and that the Secretary has determined that the policy of insuring collection of all pertinent information regarding aircraft accidents in order to maximize the promotion of flying safety, requires that such reports should not be released for use in litigation. The court, however, held that the claim of privilege against disclosing evidence involves a justiciable question, determinable by the court *in camera.* It further held that such crash investigation reports should not be privileged *per se,* saying that whatever public interest there may be in avoiding disclosure of such reports to promote accident prevention must yield to what Congress, in passing the Federal Tort Claims Act, evidently regarded as the greater public interest of seeing justice done to those injured by governmental operations. The court found that the plaintiffs here had good cause in asking the United States to pro-

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[23] See note 9 *supra.*

[24] *See* Lichten v. Eastern Airlines, Inc., 189 F. 2d 939, 945, 1951 U.S.Av.R. 310, 319 (2nd Cir. 1951) (dissenting opinion). Judge Frank suggests that defendant might have provided in the tariff, with CAB approval, that its liability for items contained in a passenger's baggage would be limited to a certain reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation.

[25] *See* Judge Frank *supra* at 947-48, 1951 U.S.Av.R. at 322-24.

duce the reports, since all knowledge obtainable was in the hands of the United States. The court therefore decided that the refusal to produce the documents justified the district court's order under Federal Rule of Civil Procedure 37(b)(2) that certain facts relating to the issue of negligence be taken as established against the United States.

NEGLIGENCE — BURDEN OF PROOF — EVIDENCE — CAB INVESTIGATOR'S REPORT — AIR CARRIER ACCIDENT — INJURIES TO PASSENGER

Lobel v. American Airlines, Inc.,
192 F. 2d 217, 1951 USAvR 428, 2nd Cir. (October 30, 1951), *cert. denied,* 72 S. Ct. 558 (1952).

Plaintiff was injured in Indiana when defendant's plane, in which he was a passenger, crashed. The trial took place in a federal district court in New York, where there was a verdict and judgment for the plaintiff. The court of appeals found error in the trial judge's charge to the jury that proof of happening of the accident gives rise to the presumption that the accident occurred because of the negligence of the air carrier. Under New York law (which governs because New York law is that burden of proof is procedural, not substantive) the rule of *res ipsa loquitur* is a matter of inference which the jury may draw from the evidence, but is not required to draw. The burden of proof remains in the plaintiff.

The court of appeals found no error in the admission of the CAB investigator's report despite §701(e) of the CAA which apparently prohibits the use of such report as evidence in any suit growing out of the matter mentioned in the report. The court based its view on the fact that this particular report contained only the investigator's personal observations of the condition of the plane after the accident, and contained no hearsay, or agency views on matters which properly courts and juries should decide. Thus, the court said, in this case the policy reasons for §701(e) did not arise.

TORTS — INJURY TO AIRPLANE PASSENGER — LIABILITY OF OWNER FOR PILOT'S NEGLIGENCE

Grain Dealers National Mutual Fire Ins. Co. v. Harrison, Jr.,
190 F. 2d 726, 1951 USAv R 515, 5th Cir. (June 30, 1951).

A passenger was injured when the insurance company's airplane bounced on the runway in landing at Leesburg, Florida. The court found that the pilot, the company's special agent, was negligent in not using ordinary care in operating the airplane. It then held that since, under Florida law, an airplane may be classified as "a dangerous agency while in operation," its owner is responsible for the manner in which it is used, and his liability extends to its use by anyone with his knowledge or consent.

REAL PROPERTY — THREAT OF CONDEMNATION — PROPERTY ADJACENT TO AIRPORT — LOW FLYING AIRPLANES

Hepstead Warehouse Corp. v. United States,
98 F. Supp. 572, Ct. Cl. (July 9, 1951).

(1) The mere threat to condemn land for an airport is not a taking, and there can be no liability thereon by the United States, even though as a result of the threat plaintiff's land was less marketable. (2) The mere fact that airplanes fly low over plaintiff's land is not enough under *United*

States v. Causby, 328 U.S. 256 (1946), to make the United States liable in damages. Plaintiff must show that the low flying actually injured him, or prevented him from using his land as he wished to.

WRONGFUL DEATH ACTION — INTERNATIONAL FLIGHT — WARSAW CONVENTION

Salamon v. Koninklijke Luchtvaart Maatschappij, N. V., Misc., 107 N.Y.S. 2d 768, 1951 USAv R 378 (September 28, 1951).

This is a wrongful death action arising out of defendant Dutch Airline's operation of an airplane in which decedent was a passenger from the Netherlands to New York. Defendant's alleged misconduct took place over the high seas and over New York. The court held that the plaintiff had a good cause of action under the provisions of the Warsaw Convention of 1929, 49 STAT. 3000 (1934) (to which both the United States and the Netherlands are signatories), which regulates and limits the liability of air carriers engaged in international transportation. The plaintiff's cause of action arose, it was held, under Articles 17 and 27. The law to be applied is that set forth by the Convention, even if inconsistent with the law of the place. For this reason it was held that the plaintiff need not plead the law of the Netherlands, and had no cause of action under the local law of New York.

TORTS — MANUFACTURER'S LIABILITY — LATENT DEFECT IN AIRPLANE ENGINE

Livesley v. Continental Motors Corp., —— Mich. ——, 49 N.W. 2d 365 (October 2, 1951).

An airplane crash was caused by a breakdown of the engine due to a latent defect in a connecting rod. The pilot brought suit against the manufacturer of the engine. There was a verdict and judgment for the defendant, affirmed by the supreme court, because (a) plaintiff was unable to prove that the defendant could have discovered the latent defect by reasonable diligence, thus not meeting the test for manufacturer's liability of *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); and (b) defendant proved his method of inspection conformed to CAA standards.

REAL PROPERTY — FEDERAL POWER OF EMINENT DOMAIN — CONSTRUCTION OF PUBLIC AIRPORT

Jasper v. Sawyer, 100 F. Supp. 421, 1951 USAvR 516, D.D.C. (October 3, 1951).

A property owner applied for the convening of a three judge statutory court in an action to enjoin the Secretary of Commerce from taking his property by eminent domain for airport purposes. The application was based on the ground that the federal statute authorizing the taking of land for airport purposes was unconstitutional. The application was denied on the ground that there was clearly no question but that this federal power was constitutional as an exercise of the power over interstate and foreign commerce.

EVIDENCE — RES IPSA LOQUITUR — DISAPPEARANCE OF PASSENGER AIRPLANE WITHOUT TRACE

Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1, 1951 USAvR 479, D. Alaska (October 5, 1951).

Plaintiffs are personal representatives of passengers on defendant's airplane which disappeared without a trace on a flight from Yakutat, Alaska

to Seattle, Washington. Defendant contends that the doctrine of *res ipsa loquitur* is inapplicable to this case because it had no knowledge of the cause of loss of the airplane greater than that possessed by the plaintiffs. The court, however, held the doctrine of *res ipsa loquitur* applicable, saying that the rule precluding application of the doctrine where the plaintiff's knowledge is equal to that of the defendant is applied to cases where plaintiff actually has equal knowledge or where knowledge is equally accessible to plaintiff, and not where, as here, there is an equality of ignorance between plaintiff and defendant.

SOVEREIGNTY — APPLICATION OF CAA SAFETY REGULATIONS TO OPERATIONS OF PRIVATE PLANES OUTSIDE UNITED STATES

Hansen v. Arabian American Oil Co.,
100 F. Supp. 183, 1951 USAvR 76, E.D.N.Y. (October 10, 1951).

A pilot who contracted to fly private airplanes for the oil company outside the United States alleged breach on contract on the part of the oil company for ordering him to disregard safety regulations of the CAA. There was no provision in the written contract that airplanes should be flown in conformity with CAA regulations. It was held that the CAA regulations were not part of the contract by implication, because the Civil Aeronautics Act applies only to operations which involve commerce within or with the United States. Summary judgment for the defendant.

TORTS — MUNICIPAL LIABILITY — AIRPORT — INVITEES — UNMARKED HAZARDS

Behnke v. City of Moberly, Missouri,
—— Mo. App. ——, 243 S.W. 2d 549, 1951 USAvR 510 (November 5, 1951).

A municipality which owns and operates an airport was held by the court to be exercising a proprietary function, and was therefore liable for torts, citing *Dysart v. City of St. Louis,* 321 Mo. 514, 11 S.W. 2d 1045 (1928). A pilot using the field is an invitee, not a mere licensee, and therefore the municipality had a duty to exercise reasonable care for his safety, and warn him of an unmarked hazard.

INSURANCE — AVIATION LIABILITY EXCLUSION CLAUSE — DETERMINATION OF CAUSE OF DEATH

Massachusetts Mutual Life Insurance Co. v. Smith,
—— F. 2d. ——, 5th Cir. (November 23, 1951).

Insured, when last seen was starting on a plane trip from Puerto Rico to Trinidad, in a land based plane. The plane, when last seen, was entering a storm front in the open seas. There were no life preservers on the plane. The life insurance policy here sued on had an aviation liability exclusion clause. In the lower court the jury found that there was insufficient evidence to show that the insured's death resulted from riding in an airplane. The court of appeals reversed and granted the defendant its motion for a judgment n.o.v., holding that, though the burden of proof is on the insurer to establish that the insured's death resulted from a cause within the exclusionary clause of the policy, here the jury's finding is not supported by any substantial evidence or reasonable inference therefrom. The insurer's burden of proof does not include the exclusion of every conceivable remote cause of death.

CONTRACTS — WARSAW CONVENTION — NATIONAL OF NON-SIGNATORY POWER — EFFECT OF TARIFF PROVISION REQUIRING NOTICE OF DAMAGE CLAIMS

Glenn v. Compania Cubanna de Aviacion,
—— F. Supp. ——, 20 L.W. 2337, S.D. Fla. (February 1, 1952).

(1) A Cuban airline's liability for damages resulting from the crash death of passengers on a Miami-Havana flight is governed by the Warsaw Convention of 1929, 49 STAT. 3000 (1934), even though Cuba is not a party thereto. Article I. of the Convention bases applicability of the Convention entirely on the international character of the transportation, making no reference to the nationality of the carrier or the passengers.

(2) Failure to comply with the airline's tariff provision requiring 30 days' notice of damage claims as a prerequisite to suit thereon does not bar the wrongful death action under the principle of *Gootch v. Oregon Short Line R. Co.*, 258 U.S. 22 (1922), because here, unlike the *Gootch* case, the tariff provision did not appear on the face of the plane tickets of the deceased.

DESTRUCTION OF AIRPLANE — NEGLIGENCE OF REPAIR CO.

Lewis V. Jensent Et Al
— Wash. — 235 P 2d 312 (September 5, 1951)

A plane which was left overnight at an airport for servicing was taken out of the hangar and flown without permission and destroyed in a crash. The court found that failure to remove the keys as requested by the owner was a breach of contract and, therefore, the repair company is liable for any damages resulting thereafter.

NONCERTIFIED AIR FREIGHT CARRIERS — POWER OF CIVIL AERONAUTICS BOARD TO ISSUE TEMPORARY CERTIFICATES — DEVELOPMENT AND PROMOTION OF AIR TRANSPORTATION

American Airlines Inc. Et Al V. CAB
F. 2d (D.C. Cir. Sept. 27, 1951)

An order of the Civil Aeronautics Board which provided that temporary certificates would be issued to certain non-certified freight carriers authorizing them to engage in regularly scheduled transportation of property was affirmed upon judicial review. The court found that the Board was acting within its statutory function in basing its decision not so much upon past and current acts, as upon a consideration of the future of air freight transportation.