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## CARRIAGE OF PASSENGERS BY AIR

E. A. HARRIMAN\*

Scientific discoveries sometimes result in legal problems that are absolutely new. In other cases the problem is merely as to the application of well-settled principles to new conditions. The law of carriers is old and well established. Hitherto its doctrines have applied to carriage by land or to carriage by water. How far the method of carriage by air, recently discovered as the result of scientific invention, is governed by existing rules, and how far, if at all, new rules are to be applied, is therefore a question of greatest importance.

From a lawyer's standpoint, law is the product of legislation on the one hand, and of litigation on the other, and litigants have been called involuntary legislators. Without a statute or a direct precedent, many lawyers are at sea. In the law of the air, comparatively few points are covered by statute, and, of course, there are, as yet, very few precedents. The extraordinary development of air traffic is creating new legal situations in regard to which legal questions arise, upon which counsel must give advice. Ancient precedents regarding *nautae caupones et stabularii* are important, but not conclusive, when dealing with the law of railroads, hotel syndicates, and garages. For the same reason, precedents in the law of carriage by land and by sea, are important, but not conclusive, in the law of carriage by air. The task of the courts is to apply the principles of the existing law to the new situation created by the inventions which have made air traffic possible; and the task of the lawyer is to advise his client as best he can, what will be the probable attitude of the courts on the new questions thus arising. A treatise on the law of carriers fills several volumes. Within the limits of this article, it is possible, therefore, only to mention a number of the more important questions that arise with reference to the carriage of passengers by air, and to make suggestions with regard to the probable answers to those questions. The general rules of the law of carriers are to be found in any treatise on the subject, or in any encyclopedia. It is assumed that those rules are generally familiar to the profession, and no attempt is made, therefore, to

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cite authorities in their support. The discussion will, therefore, be confined to a consideration of the application of some of the more important rules to the carriage of passengers by air.

## I.

### THE KINDS OF CARRIERS

Carriers are of two kinds, common and private. They may carry either persons or property. The persons carried may be passengers, or non-passengers. The carriage may be either interstate, or intrastate. How do these distinctions apply to carriers by air?

There seems to be no question that the classification of carriers into common and private applies to carriers by air. "Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing." A common carrier of property is "one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him."<sup>1</sup> The distinction between private and common carriers above stated has been applied by the courts in the case of *Brown v. Pacific Mutual Life Insurance Co.*<sup>2</sup> and in *North American Accident Insurance Co. v. Pitts*.<sup>3</sup>

Transportation by air in this country has hitherto been largely in the hands of private carriers. The number of common carriers is rapidly increasing, however, and it therefore becomes important to determine under just what circumstances a carrier by air becomes a common carrier. The test seems to be a matter of holding out. Any carrier becomes a common carrier by holding himself out to the public in that capacity, and just to the extent that he holds himself out. He may hold himself out as a common carrier of passengers, or of goods, or of both, or of a particular kind of goods. The holding out is not a formal matter, but consists of conduct naturally inducing a belief in the minds of the public.

The holding out may be for carriage between certain points, or for carriage generally. Advertising, regular routes, time tables and tariffs would seem to be a sufficient holding out. It seems more doubtful whether the advertising that passengers will be taken up in the air for short trips at certain rates is a sufficient holding out as a common carrier. In the case of *Brown v. Pacific Mutual Life*

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1. Bouvier's Law Dictionary, Rawles' Third Revision, vol. 1, p. 561.

2. 8 F. (2nd) 996 1928 Aviation Reports, 186.

3. 213 Ala. 102.

*Insurance Co.*,<sup>4</sup> the pilot took passengers on pleasure trips of about ten minutes. He would not go up with less than three passengers, and carried only white people. He operated on such days and at such hours and under such conditions as pleased him, and did not pretend to maintain regular schedules. He did not advertise his business, unless keeping his plane anchored at the resort and having his helper in the vicinity of his landing place to give information, could be so called. It is very clear that the pilot in that case was not a common carrier. It is equally clear that the transportation companies which carry passengers with regular routes, time-tables and tariffs are common carriers, unless they expressly deny such status, and such denial is valid. Between these two cases a variety of gradations is possible, but the test of holding out is after all a fairly simple one, and in general there should be no great difficulty in determining whether a particular carrier holds himself out as a common carrier for the carriage in question.

Whether there are at present any common carriers of passengers by air is uncertain. A complete system of transportation by land and air across the continent has been developed by the combined enterprise of the railroads and the air transportation companies.<sup>5</sup>

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4. *Supra*.

5. MR. BRATTON. Mr. President, the resolution calls on the committee to report the legislation necessary to carry out the suggestion, namely, that the entire industry be transferred to the Interstate Commerce Commission for regulatory purposes.

I was saying, at the time the Senator from Oregon interrupted, that some of the air companies have established a close relationship with railway companies. I read from an article which appeared in the August issue of *Air Travel News*, written by Major C. E. McCullough, general passenger agent for the Pennsylvania Railroad Co., in which he said:

"Linking rail and air transport," an expression now commonly in use as indicating the coordination of rail lines with commercial airways, is more than a mere term. It expresses in a few words the progressive action of the railroads in forging a new link in the chain of ever-improving transportation throughout the United States. It is most appropriate that the railroads of the United States should enter the commercial aviation field. They were the chief factors in the development of this country, through providing and constantly improving our transportation facilities."

Later in the same article he continued:

"The airplane, as a new means of speedier commercial transportation, is definitely with us. Its possibilities are being recognized, and its aid in our future progress is firing the imagination. Progress cannot be stopped; we must keep abreast of it, or forfeit our place to others in the race. Hence the plane is being harnessed to the iron horse, and the Pennsylvania Railroad, leading the way for other railroads, has taken the first steps toward linking rail and air transport. These first steps are through the means of coordinated rail and air service, in connection with Transcontinental Air Transport (Inc.) for an ocean to ocean service which will make possible the trip across the continent in 48 hours, instead of 4½ days or 24 days.

"Transcontinental Air Transport (Inc.) will be organized along lines similar to the organization plans of the larger railroads. For example, in addition to the executive officers, such as president, vice-president, and gen-

Through tickets are not issued, but through schedules are advertised, including the regular train schedules and the regular air schedules in the time-tables. Railways are obviously common carriers. Air transportation companies which connect with railways have refused to admit that they are common carriers, by express limitations in their advertising and their tickets.<sup>6</sup>

Nothing is clearer under the provisions of these tickets than that the carrier has done two things. (1) It has advertised its air transportation in connection with the railroads as part of a time-saving arrangement for crossing the continent with regular stops and on regular schedules. (2) It has done everything that counsel could suggest to carry on this transportation business without assuming the responsibility of a common carrier. The air transportation company clearly does not come within the accepted definition of a common carrier, and yet, from the standpoint of the travelling public, there is no perceptible difference between the part played by the air carrier and by the railroad carrier on this transcontinental route. Stranger things have happened than the adjustment by the courts of old definitions to new facts, and it will require not one decision but a series of decisions to insure the success of the air carrier in its attempt to form part of a transcontinental route

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eral manager, there will be a general superintendent and division superintendents, constituting the operating department. The pilots will receive their orders from the division superintendent. The field managers can be likened, in railroad comparison, to a combination of master mechanic and station master. The traffic department will be in charge of a general traffic manager, and for purposes of convenient administration, the country has been divided into three regions, with a traffic manager in charge of each. As for example, the eastern traffic manager will be located in New York City, the central traffic manager in St. Louis, Mo., and the western traffic manager in Los Angeles, Calif. These traffic managers will have under their jurisdiction certain prescribed territories, and men in charge of certain specific traffic work, with the titles of division traffic agents, traffic agents, and passenger representatives, whose duties will be the sale of this new and more rapid mode of transportation to the traveling and shipping public."—*Congressional Record*, Monday, September 30, 1929, p. 4254.

#### 6. TRANSCONTINENTAL AIR TRANSPORT, INC.

St. Louis, Mo.

Non-Transferable  
When officially stamped  
Good for one passage  
(Interstate only)  
As shown below

NOT A COMMON CARRIER. This company is not a common carrier for hire and does not hold itself out to the public as a common carrier for hire, and reserves the right to reject any and/or all applicants for transportation; and to accept applicants for transportation upon such terms and conditions as it may deem fit, irrespective of the terms and condi-

in this manner, and at the same time to escape by contract any liability as a common carrier.

## II.

### RESPONSIBILITY OF CARRIERS

The person carried may be (1) a paying passenger; (2) a free passenger; (3) a licensee; (4) a trespasser; or (5) an employee of the carrier. In general it would seem that the rules as to responsibility as to these different classes of persons should be the same as in the case of other carriers of persons. These rules, however, may be subject to modification by statute, and to some extent by contract,

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tions accorded others who may be accepted for transportation. Reservation must be made and space assigned before ticket is good for passage.

Trip must begin on date shown on coupon below.

Transcontinental Air Transport, Inc.

(Signed)

T. B. Clement,

General Traffic Manager.

As a part of the consideration for the issuance of this ticket and of the acceptance of me for transportation I hereby agree to the rules and conditions printed on the reverse side of this ticket all of which are understood by me, and are made a part of the contract of transportation evidenced by this ticket.

.....  
Signature of Purchaser.

### CONDITIONS OF PASSAGE

1. The holder of this ticket agrees that this ticket represents merely a personal license and is revocable at the will of the Company, upon refund of the purchase price therefor, without further liability to the Company.

2. The user of this ticket agrees to observe the rules and regulations of the Company and to obey the instructions of its agents and employees.

3. The user of this ticket agrees that the Company, in the performance of the transportation covered by this ticket, is not a common carrier for hire and/or liable as such, but is a private carrier; and that the Company shall not be liable for injury or death to the person or loss or damage to the property of the said user caused in any manner whatsoever, whether attributable to negligence or not, occurring during and/or arising out of the performance, or failure of performance, of the transportation for which this ticket is issued.

4. The user of this ticket agrees that the Company shall not be liable for any loss or damage caused by the delay or failure of aircraft to depart from any point or arrive at any point, according to any schedule, agreement, or otherwise.

5. The user of this ticket agrees that the Company may cancel the trip or any part thereof and land and discharge him or her whenever and wherever it deems fit, upon refund of that part of the fare equal to the unused portion of this ticket, without further liability to the Company.

6. Any and all authorized sellers of this ticket act as the agent or agents of this Company only and not as the agent of any railroad company.

7. The above rules and conditions are binding, also, upon the heirs, and/or personal representatives, and/or anyone claiming through, the user of this ticket.

and of course in their application the nature of the transportation must be taken into account.

The status of a passenger is the result of agreement, sometimes called contract, between the passenger and the carrier. This agreement is the result of acts by both parties. The act of the carrier is the offer—by holding himself out to the public as ready and willing to act as a common carrier of passengers in any particular manner. The entry upon the premises or accommodations of the carrier by a person in the customary manner for the purpose of accepting the carrier's offer constitutes such person a passenger. Applying this doctrine to travel by air, a person entering an airport in the usual place and in the usual manner for the purpose of accepting the offer of transportation by a common carrier by air, becomes a passenger. On the other hand, merely attempting to cross the field at an airport, even for the purpose of taking passage, by any other than the usual approach for passengers would not make the person a passenger.

Two things must combine to make a person a passenger. The intention to accept the carrier's offer, and an act constituting such acceptance. A person who enters a vehicle or premises of the carrier for some other purpose than that of accepting the offer of carriage, is not a passenger, nor is he a passenger unless the act which he does is of such a character as to indicate his acceptance of the carrier's offer. Thus, if a railroad company and an aviation company have a joint station, a person entering the premises for the purpose of taking a train would be a passenger of the railroad company, while if he entered the same premises for the purpose of travelling by air, he would be a passenger of the air carrier.

There appears to be no distinction between the common law duty of the carrier to a passenger who travels free and the duty to one who pays his fare. Such distinctions have been drawn with reference to the validity of limitations of the carrier's liability by contract. It must be noted, however, that no one can be a free passenger unless the carrier offers to accept him as such, and in the absence of such offer, entry upon the carrier's premises for the purpose of securing free transportation will not make the person so entering a passenger. On the other hand, unless payment is required before entry upon the premises, which is quite unusual, the purchase of a ticket before entry is not necessary, and a person who enters such premises in the usual manner with the intention of buying a ticket, or paying his fare, thereby becomes a passenger.

A new definition of passenger is given by the Uniform State Law<sup>7</sup> and on that date, said to be in force in Delaware, Hawaii, Idaho, Maryland, Michigan, Nevada, North Dakota, South Dakota, Tennessee, Utah, and Vermont. By the terms of this statute, "passenger" includes any person riding in an aircraft but having no part in its operation. It is doubtful if this definition is to be taken literally, for, as it stands, it would include the stowaway. It is suggested, therefore, that to the definition the courts may add the words "with the consent of the carrier." To treat the stowaway who spoiled the flight of the French aviators and endangered their lives, as a passenger, would seem absurd.

#### THE DUTY OF THE CARRIER TO THE PASSENGER

The carrier owes to the passenger the highest degree of care and diligence. "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from all possible peril, nor such as would drive the carrier from his business."<sup>8</sup> This general rule states the liability of carriers by air, but in the application of that rule to an entirely new means of transportation by equally new machinery, difficult questions as to its application are certain to arise. It is clear that for any omission to comply with any law governing the construction or operation of aircraft, the carrier is responsible to the passenger for any injury caused by such non-compliance. It would seem also that in any case of injury where the carrier has failed to comply with the law, the burden should be on the carrier to show that the injury was not due to such non-compliance.

Responsibility for negligence is based on the doctrine of proximate cause, and no violation of law renders the defendant responsible unless the injury to the plaintiff was in some way caused by such violation. There is bound to be an interesting controversy as to the application of the doctrine of *res ipsa loquitur* to aircraft accidents. In very many cases the cause of such accidents is unknown. As a matter of fact the art of aerial navigation is so new that in spite of what is supposed to be the exercise of utmost care, accidents frequently happen. It is therefore doubtful in fact whether these accidents are due in general to negligence or not. As a matter of public policy, however, the doctrine of *res ipsa loquitur* will probably be applied, and the carrier held responsible for any accident to a

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7. Cited in Aeronautics Bulletin, Department of Commerce, No. 18, p. 3.

8. Indianapolis and St. Louis Rd. Co. v. Horst, 93 U. S. 291, 296.

passenger which he cannot show affirmatively was due to a cause beyond his control.

The doctrine of *res ipsa loquitur* is purely a doctrine of evidence. It raises a presumption of culpability on the part of the owner or manager of the apparatus. This is a presumption of fact, and like other presumptions of fact, may be overcome by evidence. Assuming that the doctrine of *res ipsa loquitur* applies against a carrier in case of an airplane accident to a passenger, is that presumption overcome by evidence on the part of the carrier that every possible care was taken in the construction and inspection of the machine and in the selection of a competent pilot? Probably not. The mere fact of an accident to a passenger will probably be held to impose upon the carrier by air the burden of proving affirmatively that the cause of the accident was beyond his control, so that if that cause remains doubtful the carrier will be liable.

In speaking of accidents hitherto we have been referring only to crashes. What is to be the rule in cases of collision? An aircraft may collide either with a fixed object, like a tree, or with another aircraft. The responsibility for such collision rests on negligence. What constitutes negligence in such cases, and does the doctrine of *res ipsa loquitur* apply? As regards any collision, responsibility for the collision must rest on negligence in the operation of the aircraft. As to what constitutes negligence the rules laid down by any legal authority concerning aerial navigation in the particular locality must constitute the standard of due care. Here, again, however, a distinction must be drawn with reference to proximate cause and illegality. Operation of the aircraft in disregard of the law of the road may be the proximate cause of a collision, whereas operation of such aircraft without a license, although illegal, is not in itself the cause of any collision.

Does the doctrine of *res ipsa loquitur* apply in case of collisions? In case of a collision with a fixed object, it would seem that the rule should ordinarily apply. Should there be an exception in case the fixed object is actually invisible by reason either of darkness, or of fog? So far as the darkness is concerned, it would seem that no exception should be made, because there is no inherent impossibility in having the aircraft equipped with sufficient light to find its way. There is no common law duty on anyone to keep any structure lighted for the benefit of aircraft. If such duty is imposed, either by law or by contract in a particular case on a particular person, that person may be liable to the carrier for a collision caused by the

neglect of that duty, but such liability does not relieve the carrier from responsibility to his passengers.

In the case of collision between two aircraft, the responsibility of either to the other is based on negligence. The Air Commerce Act of 1926 excludes aircraft from the navigation and shipping laws of the United States. Rules of negligence are therefore to be governed by the law of the land, and not by the law of admiralty, and therefore in most jurisdictions the land doctrine of contributory negligence, as contrasted with the sea doctrine of comparative negligence and apportionment of damages, would be applied. As between the carrier and the passenger a different situation arises. As between the owners of the aircraft, in case of collision, either must prove negligence to hold the other. As between the carrier and the passenger, on the other hand, the mere fact of collision would seem to impose on the carrier the burden of showing that that collision was not due in any way to his negligence, but if a collision is caused, not by the negligence of the carrier, but by negligence in the operation of another aircraft, the carrier is clearly not responsible to the passenger in the absence of a statute making the carrier an insurer.

The general rule in regard to carriers is that they are bound to provide safe ingress to the carrier's vehicle, and safe egress therefrom. Generally the places of ingress and egress are under the control of the carrier. In the case of aircraft, however, the airport is quite commonly under the control of some other person. This fact seems insufficient to relieve the carrier from responsibility. If he chooses to use an airport not under his own control for taking off or landing, it is he who must assume the responsibility for the safety of ingress to and egress from the aircraft by the passenger, regardless of what recourse he may have against the owner of the airport for any injury to the passenger in such ingress or egress.

The aircraft may or may not have a Federal license, and the owner may or may not be a common carrier. If the aircraft has a Federal license, compliance with all Federal regulations as to inspection and operation is required by law. If a passenger is injured by non-compliance with any such regulation, the owner in a Federal court would unquestionably be held liable for the injury, whether or not the owner of the aircraft was acting as a common or as an ordinary carrier.

In a State court the owner would be held liable for such injury when the injury was caused by any violation of any State law or regulation. In the absence of any State law or regulation, the owner would in all probability be held liable for any injury caused by non-

compliance with the Federal law and regulations. In a State court, the State law as to standards of care necessarily govern, but in the absence of any legislative standard, the court would naturally adopt the Federal regulations as the standard of care in that State.

If the aircraft does not have a Federal license, its operation without such license may be legal, or illegal. If its operation without such license is legal, its non-compliance with the Federal regulations is not a violation of law. Nevertheless, in a Federal court the Federal regulations would undoubtedly be accepted as setting a standard of care to be exercised by the owner. In a State court State regulations would set the standard, and in the absence of such State regulations, the court would naturally follow the Federal regulations as setting a proper standard of care.

If the operation of the plane without a Federal license is illegal, the violation of the law will not make the owner responsible to the passenger unless such violation was an efficient cause of the injury. It is difficult to find a case where the mere lack of a license could be said to be the cause of any injury. The injury was obviously due to some defect in the equipment or operation of the aircraft.

It is conceivable, however, that the lack of marking required by law might induce the belief on the part of the police that the plane was an outlaw, and that as a result of pursuit by the police an injury to a passenger might occur.

The owner of the aircraft is also responsible to the passenger for the negligence of the pilot. The degree of care required depends theoretically upon whether the owner is acting as a common carrier or not. The inherent danger in flying, however, is such that it is difficult practically to draw a line between degrees of care in flying, for almost any lack of care may prove disastrous.

Unless the pilot employed by the owner is legally authorized to make the particular flight, the employment by the owner of such pilot is illegal. An illegal act is not necessarily a negligent act, but the employment of a pilot to make an illegal flight should be regarded as negligence in case of any injury due to any act of the pilot. The same rule would apply in case of any doubt as to the cause of the accident. It may be doubted, however, whether the illegal employment of a pilot would make the owner responsible as an insurer for an accident caused, not by the act of the illegal pilot, but by some cause for which the owner would not otherwise be responsible. The owner's responsibility rests on two facts; first, the neglect of a legal duty to the passenger; and, second, injury to the passenger of which

such neglect is the proximate cause; but even the illegal employment of a pilot is not necessarily the cause of an accident, though in such case all presumptions should be against the owner of the aircraft. The illegal employment of a mechanic by the owner does not make the owner an insurer, but merely renders him responsible for the negligence of such mechanic. Here again, however, the act of the illegal employment must raise all presumptions against the owner on the ground of negligence. Practically, however, it would be difficult to find any case in which the unlawful employment of a pilot or mechanic would not be sufficient evidence of negligence to make the owner responsible. In the case of a common carrier, such evidence would probably be held conclusive, and in the case of a private carrier, it would be very nearly conclusive.

There is a general duty of carriers of passengers to keep pace with science and art and modern improvement in their appliances and methods. The extraordinary danger in travel by air and the extraordinary rapid advance in the science and art of aviation, are bound to make the application of this general rule a matter of importance and of difficulty. A carrier is not bound to adopt every new and untried invention. The question then is, what amount of trial of new inventions in aviation is necessary to require the carrier to adopt them. The tendency will probably be to impose rather strict obligations on the carrier in this respect, and to require a very short period of trial as sufficient to require the carrier to adopt any new safety device.

A carrier's obligation to adopt improvements is limited by the expense and difficulty of their adoption and application with reference to this particular business. The continued use of an aircraft after a new appliance which can be added to that aircraft has been shown to be conducive to safety, would probably render the air carrier liable. On the other hand, the continued operation of an aircraft after the invention of a new type of aircraft with a greater factor of safety, would not seem to be a violation of the carrier's duty to the passenger. There is no principle of law which would require a railroad company to furnish new cars or which makes it liable for using old ones. If the old plane is still airworthy, the carrier is not bound to provide one of the newer type simply because the newer plane is safer.

In some jurisdictions, where, with knowledge of the incompetency of a servant, a carrier employs him or retains him in the management of any portion of his business upon which the safety of his passenger may depend, the passenger is not confined, in case of

accident, to merely compensatory damages against the carrier. In such jurisdictions, if the passenger claims that an injury to him was caused by the negligence of an incompetent airman employed by the carrier, with knowledge of such incompetency, the matter of the airman's license becomes important. Proof of the license should be *prima facie* evidence of competency in behalf of the carrier, but not conclusive evidence, because it is perfectly possible that the airman may be incompetent for some reason like habits of intoxication, in spite of his license. On the other hand, proof that the airman whose negligence caused the injury had no license would be evidence of incompetence, and might be held conclusive, but is not necessarily so. Thus, for example, a foreign pilot might be a perfectly competent airman although flying in this country without a license, and it may be questioned, in such case, whether the court would treat the illegality of his act as barring evidence by the carrier to prove his competency in fact.

The general doctrine as to the right of the carrier to refuse to accept unsuitable passengers must apply in the highest degree to carriage by air. The court should be very reluctant to interfere with any regulation excluding any passenger from an aircraft.

Many aircraft accidents are due to defect in the construction of the aircraft or its equipment. If such defect could have been discovered by the carrier by the exercise of the highest degree of care, there is no question as to his liability. If the defect is one which could have been discovered by the manufacturer, but not by the carrier, the authorities are not in harmony as to the responsibility of the carrier. The better opinion, however, is that the carrier is to be held responsible to the passenger, because the carrier has a remedy against the manufacturer in such case.

The Secretary of Commerce shall by regulation<sup>9</sup> "(b) Provide for the rating of aircraft of the United States as to their airworthiness. As a basis for rating, the Secretary of Commerce (1) may require, before the granting of registration for any aircraft first applying therefor more than eight months after the passage of this Act, full particulars of the design and of the calculations upon which the design is based and of the materials and methods used in the construction; and (2) may in his discretion accept in whole or in part the reports of properly qualified persons employed by the manufacturers or owners of aircraft; and (3) may require the periodic examination of aircraft in service and reports upon such examina-

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9. Air Commerce Act of 1926, Section 3.

tion by officers or employees of the Department of Commerce or by properly qualified private persons. The Secretary may accept any such examination and report by such qualified persons in lieu of examination by the employees of the Department of Commerce. The qualifications of any person for the purposes of this section shall be demonstrated in a manner specified by and satisfactory to the Secretary. The Secretary may, from time to time, re-rate aircraft as to their airworthiness upon the basis of information obtained under this subdivision."

When an aircraft is rated airworthy by the Secretary of Commerce, two questions arise: (1) Is the Secretary's certificate evidence in favor of the carrier; and (2) is such certificate conclusive in favor of the carrier to show that the injury to the passenger was not due to any defect in the construction or equipment of the aircraft. It would seem, from a practical standpoint, that the Secretary's rating of the aircraft as airworthy should be admissible in favor of the carrier as evidence of the condition of the aircraft at the time the rating was made. On the other hand, such evidence should not be treated as conclusive, and, of course, the weight of evidence as to the condition of the craft on one date to prove its condition at a later date depends on all the circumstances of the case. In short, if the rating of the Secretary is admitted in favor of the carrier, it can only be for the particular purpose of showing that the aircraft was airworthy on the particular date of the rating.

The Secretary of Commerce is also to "Provide for the periodic examination and rating of airmen serving in connection with aircraft of the United States as to their qualifications for such service."<sup>10</sup> Here, the license of the pilot or mechanic by the Secretary of Commerce is admissible, provided the fact of such license is in itself relevant to the case. Such license would seem to be relevant only if the real cause of the injury to the passenger is uncertain. If the cause of the injury is clear the fact that the pilot and mechanic are licensed, is of no consequence. In any case, however, where the carrier claims as a defense to have used the highest possible degree of care in the matter of the carriage of the passenger, the licenses of the pilot and mechanic would not merely be admissible evidence, but would be important evidence to support the carrier's defense.

The Air Commerce Act of 1926 further provides that the Secretary shall "Provide for the examination and rating of air navigation facilities available for the use of aircraft of the United States as

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10. Ibid. Par. (c).

to their suitability for such use."<sup>11</sup> The Air Commerce Regulations of June 1, 1928, do not refer to the matter of air navigation facilities. The effect of the provision is not entirely clear. There is no provision for the licensing of airports, nor is there any penalty imposed for using an airport not rated as suitable by the Secretary. The authority of the Secretary to establish air traffic rules says nothing about airports, nor do the air traffic rules in the regulations mention the subject. Nevertheless, if the Secretary should rate an airport as unsuitable, it would be practically impossible for any carrier using such airport to escape responsibility for any accident in taking off therefrom, or in landing thereon.

### III.

#### LIMITATION OF CARRIER'S LIABILITY

There seems to be no reason why the general rules with reference to the limitation of a carrier's liability should not apply to a carrier by air. In a State court the right of the carrier to stipulate for exemption from liability for his own negligence, depends upon the local law of the State, whereas in a Federal court the question is one of general mercantile law. The prevailing American doctrine is that a carrier cannot stipulate for exemption from responsibility to a passenger for the negligence of himself or his servants.

In some cases a distinction has been drawn between the negligence of the carrier himself and negligence of his servants. This distinction is generally repudiated, but, where it exists, it would seem to apply as well to carriers by air as to the other carriers. Distinctions have been drawn between different classes of passengers as to the right of the carrier to limit its responsibility for their carriage. In some cases such limitation has been upheld in contracts with gratuitous passengers; also as to persons not passengers, but lawfully receiving carriage, as, for instance, express messengers, sleeping car porters, and news agents. Without considering the soundness of any of these distinctions, there seems to be no reason why they should not in general apply as well to limitation of liability of a carrier by air as of other carriers. One exception, however, may be due to the Uniform State Law.<sup>12</sup> In Section 1 of this act, "passenger" includes any person riding in an aircraft, but having no part in its operation. Section 8 provides that "All contractual and other legal relations entered into by aeronauts or passengers

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11. *Ibid.* Par. (d).

12. *Aeronautics Bulletin* No. 18 of the Department of Commerce, p. 3.

while in flight over this State shall have the same effect as if entered into on the land or water beneath." It is quite possible that the statutory definition of passengers may be held to confer on gratuitous passengers by air all the rights of passengers for hire, and therefore to invalidate in that jurisdiction a contract for exemption from liability to a gratuitous passenger or to an express messenger, which might otherwise be upheld. Sections 6, 7, and 8, of the statute are as follows:

"The liability of the owner of one aircraft, to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land.

"All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner or such aircraft shall be determined by the law of this State.

"All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath."

It is therefore a close question whether the validity of a contract for exemption from liability to a particular individual is to be governed by the rules governing exemption from liability to the same class of individuals in case of carriage by land or water, or whether the definition of passengers in the statute gives that individual rights as a passenger when travelling by air, of which he cannot be deprived by contract, although if he were travelling in the same capacity on land, a contract of exemption would be sustained in favor of the carrier.

As to the method by which the carrier is to obtain exemption from liability, where such exemption is permitted, the rules seem to be the same for carriers by air as for carriers by land or water. An express contract is required, and therefore a notice by the carrier is insufficient when not actually seen by the passenger. With reference to tickets, it may be assumed that tickets issued by air carriers will be in the nature of special contracts rather than mere vouchers.

With reference to the validity of contracts for exemption, questions arise as to conflict of laws. One doctrine is that the validity of a contract for exemption is to be governed by the law of the place where the contract of carriage is entered into. If the liability of the carrier rested solely on contract, the general rule in regard to the validity of contracts would unquestionably apply. As a matter of

fact, however, the earlier form of action against a carrier was an action of trespass on the case, and where common law pleading, or distinctions between contract and tort in pleading, still survive, the passenger has the option to sue in contract or in tort. If, then, a passenger taking passage in New York for a journey across the country, is injured in some other State by the negligence of the carrier, it by no means follows that it is the duty of the courts of the State where the injury occurs to enforce a contract for exemption from liability for that injury, which would be invalid under the laws of that State, simply because such contract was made in New York.

Is the foregoing question affected by Section 7 of the Uniform State Law? That section provides that "All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State." It may be argued that, if in such State a contract for exemption from liability to a passenger would be invalid, the fact that such contract was made in another State where such exemption is valid, would not relieve the carrier from liability for an injury occurring in a State governed by the statute above quoted. This argument, however, is not conclusive, because "the laws of this State" include not simply the law of torts but the law relating to conflict of laws. If, therefore, the courts of such State hold that in case of carriage by land, the liability of a carrier to a passenger, if a tort in that State, is barred by reason of the contract for exemption made in another State where such exemption is valid, the statute above quoted does not seem to impose a different rule of liability in case the contract in question is for carriage by air instead of by land or water.

Certain provisions in tickets issued by air carriers require consideration.

One of such provisions is as follows:

"The holder of this ticket agrees that this ticket represents merely a personal license and is revocable at the will of the Company, upon refund of the purchase price therefor, without further liability to the Company."

This is an attempt to place the passenger in the same position as the holder of a theatre ticket, which is often held to be merely a personal license. Revocation by the company might cause the passenger serious inconvenience, but it is doubtful if there is any public policy sufficient to invalidate this provision.

Another ticket provision is as follows:

"The user of this ticket agrees to observe the rules and regulations of the Company and to obey the instructions of its agents and employees."

This provision seems entirely sound, although there may be a requirement that the instructions of the agents and employees should be reasonable.

Another ticket provision is as follows:

"The user of this ticket agrees that the Company, in the performance of the transportation covered by this ticket, is not a common carrier for hire and/or liable as such, but is a private carrier; and that the Company shall not be liable for injury or death to the person or loss or damage to the property of the said user caused in any manner whatsoever, whether attributable to negligence or not, occurring during and/or arising out of the performance, or failure of performance, of the transportation for which this ticket is issued."

With reference to the first part of this provision, that the company is not a common carrier, it is doubtful if the provision has any other effect than that of evidence. If, as a matter of fact, under all the circumstances, the court finds that the company is actually a common carrier, it will not be likely to give any effect to the agreement exacted of the passenger for the purpose of relieving the carrier from responsibility imposed by law. On the other hand, if there is any doubt whether or not the company is a common carrier, the admission by the passenger that it is not is strong evidence in favor of the company on that issue. How much weight the courts will give to the company's denial that it is a common carrier, when its line forms a part of a through route on regular schedules, remains to be seen. If such denial is sufficient to relieve the company, it is, of course, made effective by the passenger's signature to the contract in taking the ticket. If, on the other hand, the carrier's denial is not sufficient in itself to relieve it of responsibility as a common carrier, the acceptance of that denial by the passenger in signing the ticket is not likely to increase the legal effect which the court will give to such denial.

As regards the latter clause relieving the company from all responsibility, there is no reason to suppose that this will receive any general approval by the courts. In *Baltimore & Ohio Southwestern Railway Company v. Voight*,<sup>13</sup> the court held that an express messenger was not a passenger and "was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him." It is clear that a passenger who wishes to

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13. 176 U. S., 498, 520.

travel by air is constrained to sign such contract as the carrier demands. If the company is a common carrier, the agreement freeing such carrier from all responsibility is clearly against public policy. If the carrier is a private carrier, while a less degree of care may be required, and a charge of negligence may therefore require stronger evidence to sustain it, it may be doubted that public policy will permit a carrier to accept money for transportation and then disclaim all responsibility for any negligence whatever.

Another ticket provision is as follows:

"The user of this ticket agrees that the Company shall not be liable for any loss or damage caused by the delay or failure of aircraft to depart from any point or arrive at any point, according to any schedule, agreement, or otherwise."

This provision seems a reasonable one under the existing conditions of air traffic.

Another ticket provision is as follows:

"The user of this ticket agrees that the Company may cancel the trip or any part thereof and land and discharge him or her whenever and wherever it deems fit, upon refund of that part of the fare equal to the unused portion of this ticket, without further liability to the Company."

This provision is open to serious question. The discharge of a passenger at a suitable place enroute under this provision, at least for any good reason, might well be permitted, but the discharge of such passenger in the Mojave Desert might cause fatal injuries. It is only fair to assume, therefore, that in the exercise of its rights under this provision, the carrier would be required by the courts to act reasonably.

Another ticket provision is as follows:

"Any and all authorized sellers of this ticket act as the agent or agents of this Company only and not as the agent of any railroad company."

This is a very extraordinary provision. There is no allusion anywhere in the ticket to the existence of any railway company. The reason for the insertion of this provision must be found outside the ticket itself. It is due to the fact that the railway companies and the air carriers have formed various through routes all over the country. On these through routes tickets are sold by the railway companies for the rail journey and by the air carriers for the air journey. While these through routes are arranged for the con-

venience of the travelling public, there is desire on the part of carriers, both by rail and air, to avoid anything in the nature of a legal contract for through transportation. Inasmuch as the same person might be an agent of the rail companies and of the air companies, this provision is inserted in the ticket to avoid any claim that the agent was acting jointly for both companies.

Another provision in the ticket is as follows:

"The above rules and conditions are binding, also, upon the heirs, and/or personal representatives, and/or anyone claiming through, the user of this ticket."

The object of this provision is to protect the carrier from claims for injuries causing death, which under various statutes may be made, not directly as a personal claim of the deceased but on behalf of his dependents, either in their own names or in the name of the executor for their benefit. The provision may also be intended to bar any claim of subrogation on the part of an insurance company.