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## AIRLINE PASSENGER DISCRIMINATION\*

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### TRAFFIC PROBLEMS

Traffic departments of airlines are continually confronted with questions which, although not always new to the business of transportation, are novel to *air* transportation. Among the many perplexing questions are those which arise when a person applies for carriage, whom, for some reason or another, the carrier does not wish to accept as a passenger.

The question has frequently arisen in other forms of transportation where applicants for passage have been intoxicated, insane, blind, invalids, immoral, aged, very young, or prisoners, etc. There has also been a great deal of difficulty, particularly in southern states, in accommodating colored persons. The problem has been complicated not only by social conditions but also by the "Jim Crow" statutes, requiring the separating of white and colored passengers, and by "Civil Rights" statutes of various states.

There are no reported court decisions concerning airlines which bear upon the problem of passenger discrimination. Consequently, it is necessary to look to cases which have dealt with water-carriers, stage-coaches, railroads and motor-buses. But these cases should not be taken as absolute authority for applying the same rules to airlines. They must be considered as analogous only in view of the practical aspects of airline operation and the physical features of flight.

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## AIRLINES AS COMMON CARRIERS

In the early stages of airline operation the notion prevailed—and still does to some extent—that airlines were private carriers.<sup>1</sup> If they are private carriers, then this subject is not controversial, since a private carrier “can refuse, either for a bad reason or no reason at all, to transport individuals without incurring any liability for such refusal.”<sup>2</sup> But if a carrier, no matter how much it desires to be a private carrier, holds its services out in such a way as to invite the public generally to avail themselves thereof, it becomes a common carrier. Thus, “a common carrier of passengers is one who undertakes 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.”<sup>3</sup>

In deciding upon the liability of aircraft in accident cases, the courts have recently held those whose operations resembled the services of airlines to be common carriers to the extent that they owed the highest degree of care to passengers.<sup>4</sup> As yet few

1. The tickets of some airlines specify that they are private carriers. *John K. Edmunds*, “Aircraft Passenger Ticket Contracts,” 1 JOURNAL OF AIR LAW 321, 322 (1930); *E. A. Harriman*, “Carriage of Passengers by Air,” 1 JOURNAL OF AIR LAW 33, note pp. 36, 37; *Howard Wikoff*, “Uniform Rules for Air Passenger Liability,” 1 JOURNAL OF AIR LAW 512 (1930). However, such a provision is probably ineffectual to relieve the airline of its duty as a common carrier. “Proposed Uniform Passenger Contract” Submitted by the American Air Transport Association, by the Committee on Uniform Ticket Contract and Standard Ticket Forms, 1 JOURNAL OF AIR LAW 228, 229 (1930): “There is hardly a company that has submitted its ticket form to your committee that is not, in the opinion of a majority of the committee a common carrier and would be adjudicated such in any supreme court in the land”. *E. A. Harriman*, loc. cit. p. 49, doubts if ticket provision claiming company not to be a common carrier would have any more effect than as evidence; *John K. Edmunds*, loc. cit. p. 323; *Howard Wikoff*, loc. cit. And it has been so held in *Law v. Transcontinental Air Transport*, (not officially reported) 1931 U. S. Av. R. 205 (U. S. Dist. Court, Eastern Dist. of Pa., June 11, 1931), Note, 3 JOURNAL OF AIR LAW 131 (1932), Note, 3 AIR L. REV. 73 (1932). The reason is that a common carrier’s duty to its passengers is not entirely contractual, but is imposed upon it by the public nature of its employment. *Hannibal Railroad v. Swift*, 12 Wall. 262 (1870).

2. *Armistead M. Dobie*, Bailments and Carriers, p. 519 (1914).

3. *Riggsby v. Tritton*, 129 S. E. 493 (Va., 1925); *Saltonstall v. Stockton*, 21 Fed. Cas. No. 12, 271 (C. D. Md. 1838); *McCoy v. Pacific Spruce Corp.*, 1 Fed. (2d) 853 (1924); *Frick v. City of Gary*, 135 N. E. 346 (Ind., 1922); *Bennett v. Dutton*, 10 N. H. 481 (1839); *N. & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220 (1853); *McGregor v. Gill*, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919; *Gillingham v. Ohio River R. Co.*, 14 L. R. A. 798 (W. Va., 1891); *Armistead M. Dobie*, op. cit., Note 2, p. 518.

4. *Hagymasi v. Colonial Western Airways* (not officially reported) 2 JOURNAL OF AIR LAW 383 (1931); 1931 U. S. Av. R. 73, New Jersey Supreme Court, Essex County, April 10, 1931. At Law; Note, 2 AIR L. REV. 402 (1931); *Smith v. O'Donnell*, 67 Cal. App. Dec. 838, 5 Pac. (2d) 690, (1931); Note, 3 JOURNAL OF AIR LAW 463 (1932); Note, 16 MINN. L. R. 580 (1932), *Dictum*: “There can be no doubt under the general law of

cases have reached the higher courts where an airline has been held to owe the high degree of care required of a common carrier.<sup>5</sup> However, the cases referred to would seem to be authority that they are subject to this duty to passengers.

Likewise, nearly all law review articles on the subject have concluded that airlines are common carriers from the point of view of negligence liability, or have assumed them to be such.<sup>6</sup> In an able discussion of the matter, Professor Zollmann remarks that "a service through the air which runs on schedule, for which tickets can be bought by a proper person who has the price and the inclination and which gets the occupants from one place to another is as much to be classed as a common carrier as is the passenger service maintained by railroads, street-cars, boats and motor-buses."<sup>7</sup>

In considering the question of whether airlines should be legally classed as common carriers, so as to forbid any discrimination in accepting passengers, it is important to review the theory and history from which such duty of common carriers arose.

#### ECONOMIC THEORY AND HISTORY OF COMMON CARRIERS

The economic and social conditions which existed in medieval England represent the historical reason for some carriers being classed as common. The political theory of those times was that

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common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of the utmost care and diligence for their safety."

5. *Allison v. Standard Air Lines, Inc.* (S. D. Cal.) ... Fed. (2d) ..., 1930; U. S. Av. R. 292 (1930); Note, 2 JOURNAL OF AIR LAW 71-79 (1931); Notes, 2 Air L. Rev. 86 and 93 (1931); *Law v. Transcontinental Air Transport, Inc.* supra, Note. 1.

6. *Sam G. Bratton*, "Let the Interstate Commerce Commission Regulate Aeronautics", 4 Public Utilities Fortnightly 779 (1929); *John K. Edmunds*, loc. cit., Note 1; *W. J. Davis*, "State Regulation of Aircraft Common Carriers", 1 Air L. Rev. 47 (1930); *Fred D. Fagg, Jr.*, and *Abraham Fishman*, "Certificates of Convenience for Air Transport", 3 JOURNAL OF AIR LAW 226 (1932); *Rowan A. Greer*, "Civil Liability of an Aviator as Carrier of Goods and Passengers", 1 JOURNAL OF AIR LAW 241 (1930); *E. A. Harriman*, loc. cit., Note 1; Senator Bratton (N. M.) in Congressional Record, Jan. 28, 1930, p. 2587, quoted by *E. A. Harriman* in 1 JOURNAL OF AIR LAW 349 (1930); *Howard C. Knotts*, "Certificates of Convenience and Necessity for Aircraft Carriers", 3 JOURNAL OF AIR LAW 58 (1932); *Arnold D. McNair*, *The Law of the Air*, pp. 126-7 (London, 1932); "Proposed Uniform Passenger Contract", loc. cit., note 1; *Myron W. Watkins*, "Air Transport Rate-Making", 3 Air L. Rev. 127 (1932); *Carl Zollmann*, "Aircraft as Common Carriers", 1 JOURNAL OF AIR LAW 190 (1930).

7. *Carl Zollmann*, loc. cit., p. 196.

the people existed for the government. Certain privileged individuals were granted large land areas in return for their support of the crown. The people in turn extended their efforts in support of the immediate over-lord. In such a situation it was but natural that every man had his place; and a true balance was sought by no one being allowed to interfere with the employment of another. It was desired to benefit everyone fairly and reasonably.<sup>8</sup>

In the towns, certain trades were entirely in the hands of guilds. In the country, the manorial estates were practically self-sustaining communities. In these, as in every community, whether large or small, there were certain businesses which were necessary in order that the community as a whole might function. For one thing, it was necessary for every man to eat. Thus we find that the victualler was obliged to sell food to anyone who presented the price.<sup>9</sup> The purchaser's need was usually immediate and the market was limited—due to economic conditions. He would possibly suffer if refused food. At present, of course, there are so many food stores that it is unnecessary to require them to sell to everyone who wants to buy.

The bake-shops and the mills were also essential in supplying the people with food. These present a much stronger example of a duty to serve all who apply, because in any one community there might be only one of each. They required large investments of capital and were provided by the lord of the manor in many instances. Subsequently, the signorial bans covered these and the lord granted franchises to certain persons to conduct them.<sup>10</sup>

Clothing being another essential of the individual, the medieval tailor also was required to serve all who applied. In those days there were very few tailors—though times have changed a great deal since then—so that the necessary article had to be provided by him. In this he enjoyed a sort of monopoly which placed him among those who by calling held themselves out to serve the public.<sup>11</sup>

Furthermore, there were so few doctors that if the one called upon refused to treat the patient the latter might not be able to obtain any medical aid. Consequently, an early rule required sur-

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8. See *Bruce Wyman*, *Public Service Corporation*, Vol. I (1911), for full discussion of history and theory of businesses holding out to serve the public.

9. *Bruce Wyman*, *op. cit.*, note 8, p. 9.

10. *Ibid*, p. 4.

11. *Ibid*, p. 8.

geons to serve all who applied.<sup>12</sup> There are so many doctors today that there is now no necessity for such a rule.

Since a horse's hoof could be injured by several miles of travel to another smith, those who held themselves out as smiths were required to serve all who applied. The demand was immediate, necessary, and the individual was at the mercy of the smith at hand for service.<sup>13</sup>

Coming a step nearer to the application of the rule to carriers, we find that inns were among those held to profess a public calling.<sup>14</sup> A traveller arriving at an inn in the evening might be too tired to travel on to the next inn, many miles beyond perhaps, if the first inn refused to accept him as a guest. The roads were barely passable, weather conditions might cause him undue exposure and illness, and robbers infested the highways making night travel particularly dangerous. Moreover, the number of inns was restricted by law. Although they were not licensed, it was not only a civil wrong but also an indictable offense for anyone to build an inn so close to an established one that it would compete with it detrimentally.<sup>15</sup>

As already mentioned, the roads were very bad. In most instances they were nothing more than foot-paths over which caravans of horses laden with goods and passengers travelled. Travel was hazardous because of thieves and robber bands. Consequently, it was necessary that well-protected caravans carry goods for merchants who could not individually have afforded the journeys. Few caravans passed over the roads so that the merchant was at the mercy of the carrier in getting his goods transported. It was therefore early decided that the carrier was liable in damages for refusal to accept goods from a merchant.<sup>16</sup>

12. Ibid, p. 7.

13. Ibid, pp. 8, 9; *Jackson v. Rogers*, 2 Show. 327 (1683); *Lane v. Cotton*, 12 Mod. 472 (1701).

14. *Bruce Wyman*, op. cit., note 8, p. 11; *Jackson v. Rogers*, supra; *Lane v. Cotton*, supra; *Bacon's Abridgement*, Vol. 5, p. 230 (1854 ed.); *Bouvier's Institutes*, Vol. I, p. 408 (1854); *Cooley's Blackstone*, Vol. 2, pp. 162, 3, (2nd ed. 1872); *Kent's Commentaries on American Law*, Vol. 2, p. 597, note (12th ed. 1873); *Halsbury, Laws of England*, Vol. 17, p. 306, (1908).

15. *Bacon's Abridgement*, op. cit., Note 14, p. 226.

16. The full report of *Jackson v. Rogers*, supra, Note 13, is as follows: "Action on the case, for that whereas the defendant is a common carrier from London to Lymmington et abinde retrorsum, and setting it forth as the custom of England, that he is bound to carry them, though offered his hire, and held by JEFFRIES, J. C., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same, Note, that it was alleged and proved that he had convenience to carry the same;

The rule in all of the foregoing instances may be summed up thus: where the welfare of the public was dependent upon a certain trade to such an extent that individual suffering (and hence public harm) would result from the refusal of the proprietors of that business to serve all fairly and reasonably then they became so impressed with public interest that they were obliged to devote their services to everyone.

Succeeding periods of history witnessed the partial and complete overthrow of the feudal system and brought about the evolution of the theory of laissez-faire. There was less tendency to have government control over private business, and after the Colonies became free from England they framed the Constitution in such a way as to preserve much greater freedom to individual property rights than had theretofore been enjoyed. The State then came to represent the ancient over-lord, but the theory of government was changed so that the State existed for the people instead of the people for the State. However, it was still found necessary to adhere to certain traditions of the old English law. This adherence provided an exception to, or a burden upon, the rights of individual ownership of property, so that when private property was used for a purpose which became essential to the welfare of the public it was still impressed with the duty to serve the public just as were the industries of the same class in ancient times, the reasons remaining practically the same.

The *welfare* of the public may well include *progress* of the community. All nations are, in a sense, competitors of one another. Most of this competition is economic or, if not economic, the attaining of the desired competitive result depends largely—either in war or in peace—upon the economic advantages possessed by each nation. Consequently, any new enterprise which adapts itself to being a public calling should be held to the same responsibility as any other similar business which serves the public.

Airlines are new to our economic system but, after all, they are merely another form of transportation. Physically, they differ from railroads or water carriers, so that special rules may be necessary for them in some instances. However, the broad general principle that they are public enterprises and must consequently

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and the plaintiff had a verdict." Reported in "Cases on the Law of Carriers", by *Frederick Green*, p. 16 (2nd ed. 1927); *Lane v. Cotton*, supra, Note 13; *Bacon's Abridgement*, op. cit., Note 14, p. 152; *Burn's Justice of the Peace*, Vol. 1, p. 380 (20th ed. 1805); *Kent's Commentaries on American Law*, op. cit., Note 14, p. 602; *Bruce Wyman*, op. cit., note 8, p. 12.

accept all who apply for carriage seems equally applicable to all of them.<sup>17</sup>

Now, what are the characteristics of airlines which place them in the category of common carriers? The fact that an airline operates on regular schedules, charges established fares, provides easy access to airport terminals, and sells tickets through many agencies, indicates that it is holding itself out to serve the public and is therefore a common carrier.<sup>18</sup>

Furthermore, although it cannot be strictly said that any carrier is naturally monopolistic, still it seems that airlines, as well as other carriers, are virtually monopolies.<sup>19</sup> It is true that airlines do not require the large amount of fixed plant required of ordinary natural monopolies. But, where a line already exists, it discourages the establishment of a competing line because such a huge investment is required, not only for airplanes (which become obsolete within three to five years) but for shops, surplus parts and equipment, leases, advertising and traffic development, that the risk is often prohibitive.<sup>20</sup> And when competition does develop it soon becomes so ruinous that mergers or agreements result or one of the lines goes out of business, thus leaving a monopoly. During the winter of 1931-32 there were many instances of airlines dropping out of business or merging, and leaving, in many cases, only one airline operating between important cities.<sup>21</sup>

There is no doubt that an airline in many ways professes to be a common carrier. It advertises in a great variety of ways, including newspapers, posters, radio, pamphlets and personal solicitation; and all airlines have time-tables which are distributed publicly.<sup>22</sup>

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17. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77 (1876): "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use he must submit to the control."

18. *Law v. Transcontinental Air Transport, Inc.*, supra, note 1; *Malter v. Split Rock Cable Rd.*, 128 N. Y. 408, 28 N. E. 506 (1901); *Bruce Wyman*, op. cit., Note 8, pp. 190, 200, 201.

19. *Ibid.*, p. 106.

20. Compare, *Paul T. David*, "Federal Regulation of Airplane Common Carriers", 6 *Journal of Land & Public Utility Economics* 359 (1930); Contra, *Myron W. Watkins*, "Economic Prospects of Air Transport", 4 *Public Utilities Fortnightly* 332 (1929).

21. See *Official Aviation Guide* (published monthly, 608 S. Dearborn St., Chicago, Ill.).

22. *Bruce Wyman*, op. cit., Note 8, pp. 168-172.



Additional proof that airlines are common carriers is afforded in the requirement by several states of certificates of convenience and necessity. A number of airlines have voluntarily applied for these certificates, thus indicating an admission that they are common carriers; for, by requesting the rights and privileges of such, they impliedly recognize that they owe the corresponding duties.<sup>23</sup>

Airlines which carry both passengers and mail under the Watres Act<sup>24</sup> are practically subsidized indirectly by the government, since these contracts are not given out to every airline but are confined to a few; and the Postal Department loses money in maintaining airmail service.<sup>25</sup> According to our constitutional law, public funds can be used only for a public purpose.<sup>26</sup> In order not to assume that these airlines accept the money illegally, they must be considered as serving the public. Many of those airlines which do not have mail contracts have made bids for them, thus, in effect, admitting themselves to be of such a public character as to warrant the lawful award of the subsidy.

Although private flyers can equally well take advantage of the lighted airways, navigation, radio and meteorological services provided by the government, it seems that these facilities were designed primarily for the use of the airlines<sup>27</sup> and, since they take advan-

23. *Fred D. Fagg, Jr.*, and *Abraham Fishman*, loc. cit., Note 6; *Howard C. Knotts*, loc. cit., Note 6, p. 62; *Bruce Wyman*, op. cit., Note 8, p. 180.

24. Act of April 29, 1930, Public—No. 178—71st Congress; 1930 U. S. Av. R. 305.

25. *Paul T. David*, Book Notices, 6 *Journal of Land and Public Utility Economics* 107-109 (1930).

26. *Bruce Wyman*, op. cit., Note 8, p. 185.

27. Legislative History of Air Commerce Act, 1926, 1929 U. S. Av. R. 151-152:

"European countries have found, that unless military aviation is to bear the entire cost of the maintenance of aircraft industries and aviation development generally, that commercial air navigation must be encouraged. This has been done in every practical way, but principally by subsidizing common carriers by air.

"The committee does not believe that direct subsidies are either in accord with the traditional policies of this country or desirable from the economic viewpoint. The committee does believe, however, that air navigation should be furnished navigation aids corresponding to those now furnished by the Government to water navigation."

Section 5b of the Act provides that "The Secretary of Commerce is authorized to designate and establish civil airways and, within the limits of available appropriations hereafter made by Congress, (1) to establish, operate and maintain along such airways all necessary air navigation facilities except airports, and (2) to chart such airways and arrange for publication of maps of such airways, utilizing the facilities and assistance of existing agencies of the Government so far as practicable." The same section proceeds to provide that "The Secretary of Commerce shall grant no exclusive right for the use of any civil airway, airport, emergency landing field, or other air navigation facility under his jurisdiction." Grants of exclusive rights cannot be made to private businesses, and hence Congress

tage of them, they owe the public the duty of service. Private investment is not generally sufficient to establish either the above facilities<sup>28</sup> or airports which, in a great many cases, are maintained by municipalities, and may be established by the exercise of eminent domain.<sup>29</sup>

Historically, the very basis for the rule of common carriers was the necessity that they accept all who applied, for the reason of individual need, as incident to public coördination and the fact that the characteristics of that business were monopolistic. Today we find common carriers subject to the same economic phenomena. We find, too, that an airline, when tested by the characteristics of common carriers in general, is as much to be classed as such as is a railroad or other public transportation system.

Hence, airlines are under the broad general duty to accept everyone for transportation who applies. But at the same time the carrier has certain property rights just as does one engaged in a private enterprise. Also it owes duties of safety, protection, and comfort to those whom it serves.<sup>30</sup> These rights and duties are superior to those owed to the individual traveller and, unless he conforms to them, the carrier should have a right to exclude him. The question of discrimination, therefore, resolves itself into merely a number of legal exceptions to the general rule that all who apply must be carried.

#### RIGHTS AND DUTIES OF AIRLINES IN RELATION TO PASSENGERS

In general it has been said that "a carrier of passengers not only has the power but it is its duty, to adopt such rules and regulations as will enable it to perform its duties to the travelling public with the highest degree of efficiency, and to secure to its passengers all possible convenience, comfort and safety."<sup>31</sup> What

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must have intended that franchises should not be given to carriers holding themselves out to serve the public.

28. Legislative History of Air Commerce Act, 1926, *supra*, p. 152, "The above facilities are of a nature that do not attract private capital because of the impossibility of preventing competitors from making use of the facilities if so established. It is therefore necessary that such facilities be maintained by the Government."

29. Exercise of eminent domain has always been considered conclusive evidence of profession of public employment. See *Bruce Wyman*, *op. cit.*, Note 8, p. 181. Airlines do not exercise this right themselves but they do accept the benefits of it when exercised by a municipality if they make use of such airports.

30. *Brumfield v. Consolidated Coach Corp.*, 40 S. W. (2d) 356 (Ky., 1931); *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420 (1867); *O'Neill v. Lynn & B. R. Co.*, 155 Mass. 371, 29 N. E. 630 (1892).

31. *Brumfield v. Consolidated Coach Corp.*, *supra*, p. 361; *Platt v. Le-*

rules are reasonable depends on the circumstances. Thus, rules for rejecting passengers may be reasonable if the circumstances justify or make them expedient. Moreover, one may be excluded who seeks passage with intent to violate the reasonable regulations of the carrier.<sup>32</sup>

*Comfort* is more essential aboard an airplane in flight than on ground or water carriers, where passengers are more or less free to move about. The quarters in an airplane are necessarily so restricted that passengers must remain in one place during most, if not all, of a flight. Under these conditions a feeling of fright and helplessness may restrain them from travelling again by air and thereby injure the carrier's business.

Any discomfort in travel which would produce confusion among the passengers should be avoided as endangering safety. A steward or stewardess is available on some of the larger airliners to look after the comfort of the travellers. Sputum bags or containers are provided for use in case of air-sickness. Also toilet and lavatory facilities, drinking water, and meals are provided. The trend in design of airliners is as much toward comfort as speed. While these modern accommodations contribute to the convenience of travel, they have a further purpose, namely, to prevent confusion, due to discomfort as well as other causes, in order to eliminate any chance of panic among the passengers which might interfere with the pilot's control of the plane.

An airline, as a common carrier, owes the public the duty of providing *convenient* service. Any condition that might call for an unscheduled landing should, therefore, be avoided, as it would disrupt the time schedule. Thus, conduct which would be obnoxious to other passengers or illness which would render the person unfit for further travel might make continued flight hazardous and demand a forced landing. Any rule, therefore, would be considered reasonable, if promulgated for the purpose of preventing such interference with regular schedules.

*Safety* is the most important requirement. It is the foundation of substantially all Federal and state aviation regulation.<sup>33</sup> Thus, the Federal law provides for the examination and licens-

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*cocq*, 158 Fed. 723, 15 L. R. A. (N. S.) 558; *N. & W. Railroad Co. v. Wyszor*, 82 Va. 250 (1886).

32. See Note 69, *infra*.

33. See Legislative History of Air Commerce Act, 1926, *supra*, Note 27, pp. 134-135; *Fred D. Fagg, Jr.*, and *Abraham Fishman*, *loc cit.*, Note 6, pp. 232, 241, 242; *Mabel Walker Willebrandt*, "Federal and State Control of Air Carriers by Certificates of Convenience and Necessity", 3 JOURNAL OF AIR LAW 159, 165 (1932).

ing of airplane crews<sup>34</sup> and the inspection and licensing of aircraft.<sup>35</sup> Under authority of the Act the Department of Commerce requires certificates of authority for an airline to operate.<sup>36</sup> Since it is expressly prohibited from granting an exclusive franchise,<sup>37</sup> this certificate is issued entirely on the showing that the requirements of safety will be met.<sup>38</sup>

State laws have either incorporated the Federal requirements or have established very similar ones. Even the granting of certificates of convenience and necessity for intrastate airline operations has as its basis the idea of safety, the principal requirement being financial responsibility.<sup>39</sup> It is clear that the underlying purpose is to secure safety.

The reason so much stress is laid on the requirement of safety is obviously the dependence upon the human element in the control of the airplane. Structural failures can be and are avoided by proper construction and inspection on the ground, but the pilot is always subject to making errors. It is commonly suggested that efforts be made to make flying depend 90% on machine and 10% on the pilot, whereas approximately the opposite is now the case. However, the human element will probably always predominate in the control and navigation of heavier-than-air craft. Most mechanical advancements in aerial navigation have enhanced safety but they have not lessened the control demanded of the pilot. Instead, they have greatly increased the skill which he is required to exercise.<sup>40</sup>

We must conclude, therefore, that anything which might interfere with the pilot's *control* of the plane should be avoided whenever possible, and any rules or regulations should be considered

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34. Air Commerce Act, 1926, Sec. 3(c) and (f); 44 Stat. L. 568; 1928 U. S. Av. R. 333.

35. *Supra*, sec. 3(b) and (f).

36. *Supra*, sec. 3(f); Air Commerce Regulations Governing Scheduled Operations of Interstate Passenger Air Transport Service, Effective Midnight, May 15, 1930, 1930 U. S. Av. R. 325, and as Amended Oct. 1, 1931, 1931 U. S. Av. R. 250.

37. Air Commerce Act, 1926, *supra*, Note 32, sec. 5(b).

38. See Procedure for Making Application for Certificate of Authority to Interstate Passenger Air Transport Service, 1930 U. S. Av. R. 328; *Fred D. Fagg, Jr. and Abraham Fishman*, loc. cit., Note 6, note, p. 231.

39. *Ibid.*, p. 241.

40. It is of further interest to observe that a coordination of the *mechanical knowledge* necessary to construct an airplane and the *ability of a human being to glide*, i. e., to handle the mechanical contrivance in the air, was required to produce the first successful power-driven airplane flight. See excellent discussion by C. L. M. Brown, *The Conquest of the Air—An Historical Survey* (1927).

reasonable which contribute to the assurance of non-interference with such control during flight.

### PERSONS WHO MAY BE REFUSED PASSAGE

Since airlines are common carriers, they are bound to observe the general rule that every person has a right to be carried unless he possesses some personal characteristic which legally disqualifies him therefrom. Such disqualifications depend largely upon the circumstances in each case. On ground or water carriers, there is generally not as much physical danger to be encountered as aboard an airplane in flight. In the latter case, convenience and comfort are so essential as to be practically a factor of safety and, of course, the requirement of safety is of extreme importance. Consequently, a person applying for passage on an airline must not only possess the personal qualifications usually necessary to entitle him to ride on surface common carriers, but he must not be likely to interfere in any way with the safe management of the plane.

It is obvious that a person who is disorderly or insulting to passengers or crew may be excluded.<sup>41</sup> This rule is especially applicable to airlines because such conduct tends to confusion likely to endanger the control of the plane.

*Insane persons* may be classed as those who are violent and those who are harmless. Railroads have been required to accept them when attended for the reason that their affliction is pitiable and it is essential that they be transported to asylums by some means.<sup>42</sup> However, those who are violent are usually kept apart from the other passengers. An airline should be able to refuse any person who indicates, even in the slightest degree, that he is

41. *Owens v. Macon & B. R. Co.*, 119 Ga. 230, 63 L. R. A. 946 (1903); *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334 (1888); *Chicago City Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770 (1890); *Pittsburgh, Cincinnati & St. Louis R. W. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68 (1877); *Chesapeake & Ohio R. Co. v. Selsor*, 142 Ky. 163, 134 S. W. 143, 33 L. R. A. (N. S.) 165 (1911); *Vinton v. Middlesex Railroad Co.*, 11 Allen, 304 (1865); *Thayer v. Old Colony St. R. Co.*, 214 Mass. 234, 101 N. E. 368, 44 L. R. A. (N. S.) 1125, Ann. Cas. 1914 B, 865; *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536 (1891); *Story v. Norfolk & S. R. Co.*, 133 N. C. 59, 45 S. E. 349 (1903); *Berry v. Carolina, C. & O. Ry.*, 155 N. C. 287, 71 S. E. 322 (1911); *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558 (1893); *Putnam v. Broadway & Seventh Avenue R. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190 (1873); *Atchison, T. & S. F. Ry. Co. v. Wood*, 77 S. W. 964 (Civ. App. Tex., 1903).

42. *Hines v. Miniard*, 94 S. 302 (Ala., 1922); *Owens v. Macon & B. R. Co.*, supra; *L. & N. R. Co. v. Brewer*, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A. (N. S.) 64 (1911).

demented. The safety factor is too important to run the risk that this type of individual might become violent in the air and produce a panic among the passengers or injure the crew.<sup>43</sup> For the same reasons an airline should be justified in excluding an insane person even though accompanied by an attendant.

*Intoxicated persons* are subject to the same rule as applies to insane persons.<sup>44</sup> Railroads are usually required to accept a person who is only slightly drunk,<sup>45</sup> i. e., who is not disorderly and can take care of himself, but an airline should not be compelled to accept anyone who is even slightly drunk. The Federal Air Commerce Regulations provide that a pilot's license shall be subject to revocation or suspension for "carrying passengers who are obviously under the influence of intoxicating liquor, cocaine, or other habit-forming drugs."<sup>46</sup> This clause should receive a very strict interpretation, in view of the safety requirement, so that an airline may refuse to accept any person who indicates in any way that he is even slightly under the influence of liquor or drugs. There have been instances where passengers, who did not appear intoxicated when boarding a plane, have become embroiled in fights and scuffles in the air and have even attempted to climb out of the plane. Of course, all persons do not react to such extremes

43. *Meyer v. St. Louis, I. M. & S. Ry. Co.*, 54 Fed. 116 (1893): "The law imposes upon a common carrier the duty of exercising a very high degree of care and foresight for the safe transportation of the passengers who intrust themselves to him for that purpose; and in the performance of this duty, which the carrier cannot evade or escape, the carrier certainly has the right to exclude from his vehicle any one whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger. It would cast an unjust burden on the carrier to hold, on the one hand, that he must exercise the highest degree of care and caution for the protection of his passengers, and on the other hand, to hold that he has not the right to exclude from his vehicle one whose condition is such that he may cause danger to other passengers, simply because, at the moment he offers himself as a passenger, he is quiet, well-behaved, or apparently harmless."

44. *Pearson v. Duane*, 71 U. S. 605, 615 (1866); *Price v. St. L., I. M. & S. Ry. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79 (1905); *Hudson v. Lynn & B. R. Co.*, 178 Mass. 64, 59 N. E. 647 (1901); *Freedon v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 306, 48 N. Y. Supp. 584 (1897); *Pittsburgh & Connellsville R. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424 (1874); *Berry v. Carolina, C. & O. Ry.*, supra, Note 41; *Thayer v. Old Colony St. R. Co.*, supra, Note 41; *Chesapeake & Ohio R. Co. v. Selsor*, supra, Note 41; *Vinton v. Middlesex Railroad Co.*, supra, Note 41; *Edgerly v. Union St. R. Co.*, supra, Note 41; *Owens v. Macon & B. R. Co.*, supra, Note 41; *Pittsburgh, Cincinnati & St. Louis R. W. Co. v. Vandyne*, supra, Note 41; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, supra, Note 41.

45. *Milliman v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 642 (1876); *Paris & G. N. Ry. Co. v. Robinson*, 114 S. W. 658 (Civ. App. Tex., 1908); *Pittsburgh, Cincinnati & St. Louis R. W. Co. v. Vandyne*, supra, Note 41; *Price v. St. Louis, I. M. & S. Ry. Co.*, supra.

46. Air Commerce Regulations, 1929, Sec. 62 (H) and Sec. 74 (L).

when under the influence of liquor, but an airline operator cannot be expected to determine in each case whether a man will or will not misbehave under such circumstances.

*Previous misbehavior* will not ordinarily relieve the carrier of its duty to carry where the person presents himself in a sober and orderly condition.<sup>47</sup> It was held, however, in a case involving a steamboat which operated to an island resort and provided the only transportation system back to the mainland that, where the previous acts of misbehavior had been consistent and numerous and there was reason to anticipate such misbehavior again, the carrier could refuse the person as a passenger<sup>48</sup> on its trip to the island. This would seem to apply particularly to an airline which should not be expected to run the risk of danger where circumstances give it reasonable grounds to believe that the person applying for passage will be guilty of disorderly behavior. It would be difficult, and sometimes dangerous, to land the plane to eject him if he did become disorderly, and would inconvenience others by disrupting the schedule. Where the flight is over a large body of water it would be impossible to land the plane for that purpose.

*Diseased persons*, who are likely to be repulsive to passengers, or *persons who may communicate a disease* should, of course, be refused.<sup>49</sup> The carrier owes the duty to its passengers not only to protect them from dangers incident to transportation, but to avoid placing anything among them which might injure them. The quarters are so crowded aboard an airplane that the opportunities for contamination or repulsion are usually more imminent than on board surface carriers.

*A person carrying a dangerous instrumentality*, such as explosives or firearms, should be excluded.<sup>50</sup> Airlines should be

47. *Reasor v. Paducah & Illinois Ferry Co.*, 152 Ky. 220, 253 S. W. 222, 43 L. R. A. (N. S.) 820 (1913); *Ford v. E. Louisiana R. Co.*, 110 La. 414, 34 S. 585; *Atwater v. Delaware, L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803 (1886).

48. *Stevenson v. West Seattle Land & Improvement Co.*, 22 Wash. 84, 60 Pac. 51 (1900); Note, 43 L. R. A. (N. S.) 820.

49. *Pullman Co. v. Krauss*, 145 Ala. 395, 40 S. 398, 4 L. R. A. (N. S.) 103 (1906); *Bogard's Admir. v. Illinois Cent. R. Co.*, 144 Ky. 649, 139 S. W. 855, 36 L. R. A. (N. S.) 337 (1911); *New Orleans, Jackson & Great Northern R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478 (1869); *Davis v. Kirklen*, 253 S. W. 330 (Civ. App. Tex., 1923); *Bruce Wyman*, op. cit., Note 8, p. 491.

50. *Dowd v. Albany Ry.*, 47 App. Div. 202, 62 N. Y. Supp. 179 (1900); *Ray v. United Traction Co.*, 96 N. Y. App. 48, 89 N. Y. Supp. 49 (1904). In *East India Rail Co. v. Kalidas Mukerjee* [1901] A. C. 396, a passenger carrying a small package of fireworks entered a smoking car on railroad. The fire works became ignited resulting in the demolition of the car and

particularly careful of this type of passengers, since any physical disturbance in the air may cause loss of control or possible destruction of the plane, with little or no chance for the passengers or crew to escape.

*Persons carrying small animals* may be excluded.<sup>51</sup> They are refused by some airlines on the grounds that the animals may become sick and, due to the strange and crowded surroundings, may cause discomfort or injuries to passengers. Rules usually prohibit the carriage of reptiles or other dangerous forms of life. However, many airlines permit the carriage of small pets where they are properly caged. Some require that they be carried in separate planes or compartments. But the rule has been held reasonable that allows a railroad to refuse passage to one desiring to bring an animal aboard. The reasons for exclusion are obviously more cogent in the case of airplanes where forced landings would endanger or inconvenience passengers. The carriage of large animals is generally prohibited on account of the limited space and for the reasons already mentioned. However, there are exceptions to this practice due to peculiarities of localities. Thus, in the western states racing dogs are often carried, and in the far north where the traffic depends largely on trappers, hunters, and prospectors, large dogs must necessarily be carried.

*Invalids, sick persons, and cripples* cannot ordinarily be excluded by surface carriers when they are able to care for themselves or when they are attended.<sup>52</sup> But if they are likely to demand medical attention they may be rejected.<sup>53</sup> When the carrier

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the loss of several lives. Air Commerce Regulations, 1929, *supra*, Note 46, Sec. 74(K) provides: "The transporting of any explosives other than that necessary for signalling or fuel for such aircraft while in flight or material for industrial and agricultural spraying (dusting) is prohibited, except upon special authority obtained from the Secretary of Commerce."

51. *Gregory v. C. & N. W. Ry. Co.*, 100 Ia. 385, 69 N. W. 532 (1896); *Barrett v. Malden & M. R. Co.*, 3 Allen. 101; *Daniel v. North Jersey St. Ry. Co.*, 64 N. J. L. 603, 46 Atl. 625 (1900); *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389; *Wescott v. Seattle, R. & S. Ry. Co.*, 41 Wash. 618, 84 Pac. 588, 4 L. R. A. (N. S.) 947 (1906). Rail and steamship companies realized that they were losing considerable revenue by refusing to accept persons carrying small pets. For the same reason airlines are beginning to accept such persons when the animals are under proper control.

52. *Louisville, New Albany & Chicago Ry. Co. v. Falvey*, 104 Ind. 409 (1885); *Connors v. Cunard Steamship Co.*, 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171; *Mathew v. Wabash R. Co.*, 115 Mo. App. 468, 78 N. W. 271, Affirmed in 199 U. S. 605, 50 L. Ed. 329 (1903); *Hogan v. Nashville Interurban Ry. Co.*, 131 Tenn. 244, 174 S. W. 1118, Ann. Cas. 1916 C, 1162 (1915).

53. *Connors v. Cunard Steamship Co.*, *supra*; *Conolly v. Crescent City Ry. Co.*, 41 La. Ann. 57, 5 S. 259, 6 S. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389 (1899).



does not know of the existence of a passenger's ailments it owes no particular care to the passenger more than the general high degree of care that is owed to any other passenger.<sup>54</sup> And, if further injury occurs, the carrier becomes liable only for such injury as is incurred in addition to the injuries already existing.<sup>55</sup> But when the carrier accepts such a person as a passenger, with notice of that person's condition, he is under an even greater duty to use care toward him.<sup>56</sup> There are many opportunities in airplane flights for invalids or cripples to suffer further injuries. Rough air may throw them about in their seats. The ship may bounce when landing—due to errors in judgment of the pilot, a gust of wind, or uneven ground. A forced landing for any reason, particularly when required by law under certain conditions of the weather,<sup>57</sup> gives ample opportunity for injury to one already suffering from some affliction, since the plane may have to be landed on a poor airport or in an ordinary field. In either event the pilot's judgment cannot be expected to be as good as when he lands on an airport with which he is thoroughly familiar. Even when landing at a regular airport, moreover, the plane may nose over after rolling along the ground, due to a blown tire, a rough run-away or a number of other causes. After landing, a seaplane may hit a partly submerged obstacle, such as a log, which would jolt the passengers considerably. In all of the above instances the normal person would ordinarily escape with little or no injury, whereas the person suffering from some affliction might receive irremediable injuries to his health.

54. *Mathew v. Wabash R. Co.*, *supra*, note 52.

55. In *Mathew v. Wabash R. Co.*, *supra*, note 52, the plaintiff was riding in one of defendant's railway cars. The defendant had no notice that she had been and, at the time, was suffering from internal ailments. In coupling cars the one in which plaintiff was riding was severely jolted. This aggravated her condition to such an extent that a serious surgical operation had to be performed resulting in irremediable injury to her. The court held that the railroad company had been negligent in coupling the cars and was, therefore, liable in damages for the increased injuries to plaintiff.

But a predisposition to malarial scrofulous or rheumatic tendencies, with accompanying good health, will not relieve the carrier from liability to the full extent of injuries resulting from its negligence. *Louisville, New Albany & Chicago Ry. Co. v. Falvey*, *supra*, note 52, p. 426.

56. *Denver & R. G. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761 (1910); *Ill. C. R. Co. v. Allen*, 28 Ky. L. Rep. 108, 89 S. W. 150 (1905); *Croom v. C. M. & St. P. Ry. Co.*, 52 Minn. 296, 53 N. W. 1128 (1893); *Yazoo & M. N. R. Co. v. O'Keefe*, 88 S. 1 (Miss., 1921); *Chicago, R. I. & G. Ry. Co. v. Sears*, 210 S. W. 684 (Civ. App. Tex., 1919); *Bogard's Admir. v. Illinois Cent. R. Co.*, *supra*, note 49; *Pearson v. Duane*, *supra*, note 44; *Price v. St. L. I. M. & S. Ry. Co.*, *supra*, note 44.

57. Air Commerce Regulations, 1929, Sec. 74 (b) as amended Sept. 19, 1930, and Sec. 79 as amended Dec. 31, 1930.

There have been many instances in all parts of the country in which invalids, going to hospitals for treatments, especially desire to travel by plane because air travel is less tiring for them than travel aboard ground carriers. There are so many times that an airline can render this highly commendable and humane service that the courts ought to be very lenient in applying the strict rules of common carrier liability in such cases. However, in the absence of changes in the law, the air carrier will be subject to a great legal risk in carrying ailing persons.

*Blind persons* fall within the same category as cripples and invalids, and it has been held that a railroad could exclude them unless attended, because they are incapable of caring for themselves, being dependent on employees of the carrier or chance acquaintances among passengers for assistance.<sup>58</sup> The objections have usually arisen in railroad cases where a change of trains was necessary. However, it has also been held to be a question of fact under the circumstances whether a blind person was able to look after himself without an attendant.<sup>59</sup> Aboard an airplane it might become exceedingly uncomfortable to other passengers if an unattended blind person became ill and unable to locate the facilities supplied for passengers in that condition. Furthermore, in boarding or alighting from the plane there is imposed a greater degree of responsibility on the agents of the carrier to keep a blind person from placing himself in danger of the propellers of the plane or other hazardous situations on the ground. Unless they are accompanied, therefore, it would seem advisable to permit their exclusion as a general rule. But this, of course, is subject to the circumstances attending each particular case, it being a question of fact as to whether the person applying for passage is capable of caring for himself.

*An unaccompanied person, so old as to be incapable of caring for himself*, comes within the rule applicable to invalids and may be excluded if the circumstances justify it.<sup>60</sup> Also *an unattended child of tender years* may be rejected because it places an added responsibility on the carrier.<sup>61</sup> But neither a child nor an old per-

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58. *Denver & R. G. R. Co. v. Derry*, supra, note 56; *Ill. C. R. Co. v. Allen*, supra, note 56.

59. *Zachery v. Mobile & Ohio R. Co.*, 75 Miss. 746, 23 S. 434, 41 L. R. A. 385, 65 Am. St. Rep. 617 (1898); *Ill. C. R. Co. v. Smith*, 85 Miss. 349, 37 S. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293 (1905); *Dowd v. Albany Ry.*, supra, note 50.

60. *Croom v. C. M. & St. P. Ry. Co.*, supra, note 56.

61. *Yazoo & M. N. R. Co. v. O'Keefe*, supra, note 56.

son should be excluded merely because of age.<sup>62</sup> Everyone has a right to be carried and as long as he is otherwise capable of traveling he should be taken. It is practically certain that neither of the above are likely to discommode other passengers or affect the safety element aboard an airplane.

*Immoral persons* cannot be excluded merely for that reason. It has been held that a railroad is not the custodian of the morals of its passengers and unless misbehavior occurs aboard it has no right to exclude a person whom it may believe to be immoral.<sup>63</sup> There seems to be no reason why the same rule should not apply with equal force to airlines.

*Professional gamblers* have been rightfully excluded by railroads because they are not upon lawful and legitimate business.<sup>64</sup> However, a passenger aboard a modern airliner would ordinarily have little opportunity to carry on an extensive gambling operation. As long as the reason does not exist on an airliner the rule against exclusion for previous misconduct operates and he should be carried.

*Officers with prisoners* might be unobjectionable as passengers except that their presence, due to the close quarters, would possibly be repulsive to persons riding in the same plane. Prisoners must be transported and as long as they do not tend to interfere with the safety of the plane or the comfort of the passengers they should not be refused.<sup>65</sup> However, they should be excluded if there is any indication that they might try to escape. It is altogether conceivable that a prisoner might wrest control of the plane from the pilot. In most cases he would probably be afraid to try to make his escape while in the air. However, there is cogent reason to support a rule which refuses the transportation of prisoners in custody. The possibility that the prisoner might obtain possession of the officer's weapon and compel the pilot to navigate the plane to a wrong destination justifies the practice.

*Fugitives from justice* should not be carried. The carrier operates under the law and cannot be required to break it by aiding or abetting a person accused of crime.<sup>66</sup>

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62. *Croom v. C. M. & St. P. Ry. Co.*, supra, note 56; *Yazoo & M. N. R. Co. v. O'Keefe*, supra, note 56.

63. *Brown v. Memphis & C. R. Co.*, 5 Fed. 499 (Tenn., 1880).

64. *Thurston v. Union Pac. R. Co.*, Fed. Cas. No. 14019 (Neb., 1877).

65. *Bruce Wyman*, op. cit., note 8, p. 520. But the carrier owes its passengers the duty to protect them from assault. *Brunswick v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152 (1903).

66. *Thurston v. Union Pacific R. Co.*, supra, note 64.

A *thief* need not be carried.<sup>67</sup> The carrier has a duty to protect its passengers which permits it to exclude those whom it has reason to believe might rob the travellers.

Since the carrier owes a duty to protect its passengers, it should exclude *those going aboard to assault a passenger or a member of the crew*.<sup>68</sup> Similarly, it has a right to exclude *anyone going aboard with the intention of violating a reasonable regulation*<sup>69</sup> since the regulations are made so as to better carry out the carrier's duty to serve the public. In either of these instances the safety or comfort factors will be imperiled.

*Business solicitors* may be refused.<sup>70</sup> Thus, any person may be excluded when his object in boarding the plane of the carrier is to solicit business among passengers or to discourage them from travelling aboard the carrier's planes. The latter has rights of private property of which individuals may not deprive him by such practices.

*Aliens* must generally be carried. The provision of the 14th Amendment requiring equal protection of the laws includes them.<sup>71</sup> They should, of course, be excluded if to accept them would violate an immigration law. Thus, where an expectant mother seeks to take passage in order to be over or upon foreign soil when her child is born, in order to give it a different nationality, a close question arises as to whether the immigration laws will be violated.<sup>72</sup> Of course, if the danger of illness enroute and the need for medical attention is imminent, she could be excluded on that ground.

One other type of individual requires some consideration. The occasions are very few, but sometimes an *abnormally proportioned person* applies for passage on an airline. An airplane is limited by the weight which it can carry and by the number

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67. *Supra*.

68. *Britton v. Atlanta & Charlotte Air-Line Ry Co.*, 88 N. C. 536 (1882); *Norfolk & W. Ry. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 789 (1906); *Brunswick v. Ponder*, *supra*, note 65; *Thurston v. Union Pacific R. Co.*, *supra*, note 64.

69. *Renaud v. N. Y., N. H. & H. R. Co.*, 210 Mass. 553, 97 N. E. 98, 38 L. R. A. (N. S.) 689 (1911); *Brumfield v. Consolidated Coach Corp.*, *supra*, note 30.

70. *Barney v. The D. R. Martin*, Fed. Cas. No. 1030 (N. Y., 1873); *Jencks v. Coleman*, 13 Fed. Cas No. 7258 (R. I., 1835); *Commonwealth v. Power*, 7 Metc. 596 (1844); *Barry v. Oyster Bay & Huntington Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115 (1876).

71. See note 81, *infra*.

72. See *Frank Stewart*, "A Ship's Doctor Talks About His Job", in the *American Magazine*, Aug., 1932, pp. 53, 87-88.

of passengers who can be accommodated. For this reason the seats provided are sufficient to carry an average-sized individual weighing not over 175 or 200 pounds, although larger persons can sit comfortably in them. But where a person weighs 300 pounds or more, or is abnormally tall, he will not only find seating arrangements uncomfortable for himself but will also discommode others in the plane. In some types of planes, where the seats fit close together, he may inconvenience others by having to occupy practically two seats. Or his added weight may require that one less of the number of passengers allowed be accommodated. In one case he may discommode other passengers, and in the other he may deprive the carrier of additional revenue which is a deprivation of property. However, it is questionable whether these reasons would permit the exclusion of this type of individual unless the plane were already so loaded that his additional weight would exceed that permitted by governmental or company regulations for the particular plane. In every case, it would be a question to be determined by the surrounding circumstances. The same would be true of Siamese twins or others so deformed as to require more space than average persons.

*Persons who accompany others who are excluded* may not themselves be rejected unless it is necessary that they remain with the excluded persons.<sup>73</sup> Thus, a parent would be required to remain with an unruly child, as would an attendant with an invalid, insane, or blind person, and a nurse or doctor with a patient.

Obviously, a person may be ejected when circumstances come into existence after his admission which would have justified his exclusion when he applied for passage, had they existed at that time.<sup>74</sup>

Other instances may arise where persons may be lawfully refused, but in all cases the tests for determining whether the right to exclude exists are: Will the carrier be deprived of his property rights without a corresponding benefit to the public? Will it inconvenience or cause discomfort and confusion to the passengers? Will it reduce the safety afforded by the carrier? Will it increase the carrier's duty above that which it owes as a common carrier of passengers? Will it violate a law, or a reasonable regulation of the carrier?

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73. *Braun v. N. P. Ry. Co.*, 79 Minn. 404, 82 N. W. 675, 49 L. R. A. 319, 79 Am. St. Rep. 497 (1900); *Bruce Wyman*, op. cit. note 8, p. 525.

74. *Ibid.*, p. 515.

*Racial Discrimination.*

Prior to the Civil War, the negro's rights were so limited that public service companies were seldom troubled with the problem of discrimination on account of color. Colonial statutes provided that a liberated slave should be bound out by the colony for further service.<sup>75</sup> However, before the Emancipation Proclamation, there were a great many free negroes in both the north and the south.<sup>76</sup> But the courts held that a man of African descent, whether slave or free man, was not and could not become a citizen of a state or of the United States.<sup>77</sup> An individual's rights depended so much upon his being a citizen that these free negroes were subject to being discriminated against without legal redress.

In 1861, a Pennsylvania case held that a city railroad's regulation was reasonable, which prohibited colored persons from entering the body of the cars and which compelled them to ride on the platforms.<sup>78</sup> In 1858, a Michigan case reached a similar result. A steamboat company operating from Detroit to Toledo had a regulation, which the court held to be reasonable, that colored persons could take deck passage but could not take cabin passage, which was reserved for white persons. White passengers were also accepted for deck passage.<sup>79</sup> Although the latter case is often cited, probably neither of them can be accepted as authority since the adoption of the 14th Amendment.

*14th Amendment and Federal Protection of Civil Rights.*

After the Civil War, the 13th Amendment prevented slavery, but the onerous position of the negroes remained unchanged,<sup>80</sup> and

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75. *Hobbs v. Fogg*, 6 Watts (Pa.) 553 (1837).

76. *Corporation Commission v. Interracial Commission*, 198 N. C. 317, 151 S. E. 648 (1930).

77. *Dred Scott v. Sanford*, 19 How. 393; *Amy, a woman of color v. Smith*, 1 Litt. (Ky.) 210 (1832); 11 C. J. 801.

78. *Goines v. M'Candless*, 4 Phila. Rep. 255 (1861).

79. "As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. He may do so if he chooses, but the law does not impose it on him as a duty. It does not require a carrier to make any rules whatever, but if he deems it for his interest to do so, looking to an increase of passengers from the superior accommodations he holds out to the public, to deny him the right would be an interference with a carrier's control over his own property in his own way, not necessary to the performance of his duty to the public as a carrier". *Day v. Owen*, 5 Mich. 520, 527, 72 Am. Dec. 62 (1858).

80. "They were in some states forbidden to appear in towns in any other character than menial servants. They were required to reside on

the effect of the Dred Scott decision was still unremoved. The 14th Amendment was thereafter adopted in 1868. It alleviated the effect of the Dred Scott case by providing that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This clause, of itself, places colored persons in the same position as any other person rightfully claiming to be a citizen. Therefore, the same common law rules heretofore discussed apply to colored persons and to white persons alike. Consequently, for relief against any infringement of his rights as a citizen the negro has his legal remedy.

The 14th Amendment, however, went further. It provided, in the same section, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." This clause is, in a measure, superfluous since it is practically a repetition of the previous clause. However, the word "person" gives it a broader significance since the term includes those who are not citizens. Consequently, an alien is protected and cannot be discriminated against by a common carrier under protection of a state law.<sup>81</sup>

In its endeavor to protect the rights of colored persons, Congress enacted the Civil Rights Act of 1875, which provided:<sup>82</sup>

Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, *public conveyances on land or water*, theatres, and other places of public amusement; subject only to the conditions established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2. That any person who shall violate the foregoing section . . . shall, for every such offense, forfeit and pay the sum of \$500 to the person aggrieved thereby . . . and shall be deemed guilty of a misdemeanor.

The famous *Civil Rights Cases*<sup>83</sup> decided in 1883, however, declared the foregoing sections of the act to be invalid as an exten-

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and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party". *Slaughterhouse Cases*, 16 Wall, 36, 21 L. Ed. 394 (1872).

81. *Wick Yo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1885): An alien is a "person" within meaning of the 14th Amendment and is entitled to the equal protection of the laws. *Prowd v. Gore*, 52 Cal. App. 458, 207 P. 490 (1922): The word "citizen" in Civil Rights statute held to include aliens since it would otherwise violate 14th amendment.

82. 18 Stat. at Large 335-336.

83. 109 U. S. 3 (1883).

sion of power by Congress not authorized by the 14th Amendment, which merely prohibited discriminatory action by the states. It sought to inflict a penalty for violation of a right belonging to a citizen of a state and not for the violation of a right of a citizen of the United States. The right of the Federal government to afford protection under the Amendment exists only after a state has refused this protection.<sup>84</sup> A state may act through its legislature, its administrative officers, or its judiciary.<sup>85</sup> Consequently, if a state court enforces a discriminatory regulation of a carrier the aggrieved party may appeal to the Federal Courts. Or, if the discrimination is by the state legislature or a state administrative body, a federal question arises in the first instance.<sup>86</sup>

Where the requisite conditions exist for suing in the Federal Courts, such as diversity of citizenship, a colored citizen may claim, in such courts, his common law rights not to be discriminated against by a common carrier just as can a white citizen. Although there is no Federal common law, the Federal Courts will adopt and enforce the common law (or civil code) of the state wherein the right claimed is alleged to be violated, the reason being practical necessity and convenience.<sup>87</sup>

Recourse may also be had in the Federal Courts by virtue of a Congressional Act providing a penalty for any one committing an act under authority of a state law which contravenes the intention of the 14th Amendment.<sup>88</sup> The Federal Courts may also enjoin such an act.<sup>89</sup>

### *States Civil Rights Statutes.*

Following the failure of the Federal Civil Rights Act the States were encouraged to take the matter into their own hands.<sup>90</sup>

84. *Supra*; *Ex Parte Virginia*, 100 U. S. 313, 25 L. Ed. 667 (1879); *Cully v. Baltimore & O. R. Co.*, 6 Fed. Cas. No. 3466 (1876); *Thompson v. Baltimore C. P. R. Co.*, 23 Fed. Cas. No. 13,941, reported only by court in 6 Fed. Cas. No. 3466; *Browner v. Irwin*, 169 Fed. 964 (1909); Note, 14 L. R. A. 579.

85. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 33 Sup. Ct. Rep. 312, 57 L. Ed. 510 (1912); *Westel Woodbury Willoughby*, Constitutional Law of the United States, p. 247 (1929).

86. *Raymond v. Chicago Union T. Co.*, 207 U. S. 20, 28 Sup. Ct. Rep. 7, 52 L. Ed. 78 (1907).

87. *Platt v. Lecocq*, *supra*, note 31; *Westel Woodbury Willoughby*, *op. cit.*, note 85, pp. 998-1000.

88. R. S. §5510; Mar. 4, 1909, c. 321, §20; 35 Stat. 1092; 18 U. S. C. A. §52.

89. *Home Teleph. & Teleg. Co.*, *supra*, note 85.

90. *Gilbert Thomas Stephenson*, "Separation of the Races in Public Conveyances", 3 Am. Pol. Sci. Rev. 180 (1909).



New York had already, in 1881, enacted a statute which was practically the same as the Federal Act.<sup>91</sup> Ohio followed in 1884,<sup>92</sup> reducing the penalty to \$100. In 1885, a number of states enacted Civil Rights Statutes with provisions similar to that of the Congressional Act. They were Nebraska,<sup>93</sup> Indiana,<sup>94</sup> Illinois,<sup>95</sup> Rhode Island,<sup>96</sup> Michigan,<sup>97</sup> Pennsylvania<sup>98</sup> and Connecticut.<sup>99</sup>

In all states except in the south, in which there is now an appreciably large negro population, there are Civil Rights statutes of substantially the same context as the Federal Act, except for certain amendments not affecting common carriers.<sup>100</sup> However, they vary somewhat in their terminology so that in the case of many it is very doubtful if they apply to airlines. Thus, the Illinois statute specifies "railroads, omnibuses, stages, street cars, boats, funeral hearses and public conveyances on *land* and *water*, and all other places of public accommodation. . . ." <sup>101</sup> Under the rule of *ejusdem generis* a statute will be construed so that "after an enumeration of certain places of business on which a duty is

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91. New York Law, 1881, vol. i, p. 541.

92. Laws of Ohio, 1884, pp. 15-16.

93. Laws of Nebraska, 1885, p. 393.

94. Acts of Indiana, 1885, p. 76.

95. Laws of Illinois, 1885.

96. Rhode Island Acts and Resolves, 1884-85, p. 171.

97. Acts of Michigan, 1885, p. 131.

98. Laws of Pennsylvania, 1887, pp. 1720-1721.

99. Connecticut Pub. Acts, 1905, p. 323.

100. Civil Code of California, §§51-52, as amended, 1923 (Enacted 1901); Compiled Laws of Colorado 1921, §§ 4128-4129 (Enacted 1895); General Statutes of Connecticut 1930, §§5985 and 6065; Illinois, Smith-Hurd Ch. 38, §§125, 126, as amended, June 5, 1911 (Enacted 1885); Burns Annotated Indiana Statutes 1926, §§4633, 4634; Code of Iowa, 1927, §§13251, 13252 (Enacted 1897); Revised Statutes of Kansas 1923, 21-2424; General Laws of the Commonwealth of Massachusetts 1921, Ch. 272, §98; Michigan, Pub. Acts 1931, No. 328, §§146, 147; Mason's Minnesota Statutes 1927, §7321; Compiled Statutes of Nebraska 1929, 23-101, 102 (Enacted 1893); Cumulative Supplement of the Compiled Statutes of New Jersey 1911-1924, §39-1, 2, P. L. 1884, p. 339; As amended L. 1917, c. 106, p. 220; L. 1921, c. 174, p. 468; Cahill's Consolidated Laws of New York 1930, Ch. 41, §514 (As amended by L. 1918, ch. 380, Sept. 1); Throckmorton's 1930 Annotated Code of Ohio, §12940 (91 v. 17, §2; 81 v. 90, §1); Purdon's Pennsylvania Statutes (1930) §1211 (1887, May 19, P. L. 130, §1); General Laws of Rhode Island, 1923, Ch. 395, §28 (6040) (29 R. I. 33); Remington's Compiled Statutes of Washington (1922) §2686 (L. '09, p. 1027, §434); Wisconsin Statutes 1929, 1895 c. 223; Stats. 1898 s. 4398 c.; 1925 c. 4.

101. Supra, §125. See also the following statutes which probably do not apply to airlines: Compiled Laws of Colorado 1921, supra, §4128; Burns Annotated Indiana Statutes 1926, supra, §4633. Revised Statutes of Kansas 1923, supra; Michigan, supra; Cumulative Supplement of the Compiled Statutes of New Jersey, 1911-1924, supra, §39-1; Throckmorton's 1930 Annotated Code of Ohio, supra; Purdon's Pennsylvania Statutes 1930, supra; General Laws of Rhode Island, 1923, supra, §28; Wisconsin Statutes 1929, supra.

imposed or a license required, and the same statute then employs general terms to embrace other cases, no other cases will be included within the general term except those of the same character or kind as specifically enumerated."<sup>102</sup> An airline is not a public conveyance on "*land and water*," and hence cannot be classed as the same general kind of conveyance. Nor was it within the contemplation of the legislature when the statute was passed, since aviation was practically undreamed of at that time.

However, where the statutes specify merely "public conveyances" or "common carriers," without additional elaboration, airlines would probably be included in their inhibitions.<sup>103</sup>

State Civil Rights statutes have generally been held constitutional as not in contravention of the 14th amendment requiring that no one be deprived of property without due process of law.<sup>104</sup> And there seems to be no reason why they should not be upheld as a valid exercise of a police power when applied to interstate commerce, since they merely penalize that which is already unlawful. However, a statute enacted by the "carpet-bag" legislature in Louisiana, which prohibited, not only any discrimination but also any distinction between accommodations for colored and white persons on common carriers, was held to violate the Commerce clause of the Constitution.

A colored woman boarded a steamboat at a point on the Mississippi River in Louisiana for passage to another point in the same state. The vessel was registered as a United States ship and plied between Vicksburg, Mississippi, and New Orleans, Louisiana. The Supreme Court of the United States based its decision on the holding of the state court which had decided that the statute applied to interstate commerce and held that, since it tended toward a lack of uniformity, it unreasonably burdened commerce

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102. *Cecil v. Green*, 161 Ill. 265, 43 N. W. 1105, 32 L. R. A. 566 (1896) holds that the term "and all other places of accommodation and amusement" in Illinois Statute does not include soda fountain in drug store. But in *Youngstown Str. Ry. v. Tokus*, 4 Ohio App. 276 (1915) a similar provision in the Ohio statute was held to apply to a public dancing pavilion because the court construed it to be the intention of the legislature to include such places.

103. Civil Code of California, *supra*, note 100 §51; General Statutes of Connecticut 1930, *supra*, note 100, §5985; Code of Iowa 1927, *supra*, note 100, §13251; General Laws of the Commonwealth of Massachusetts 1921, *supra*, note 100; Mason's Minnesota Statutes 1927, *supra*, note 100; Compiled Statutes of Nebraska 1929, *supra*, note 100, 23-101; Cahill's Consolidated Laws of New York, 1930, *supra*, note 100; Remington's Compiled Statutes of Washington (1922) *supra*, note 100.

104. *Baylies v. Curry*, 21 N. E. 595 (Ill., 1889); *Donnell v. State*, 48 Miss. 661 (1873); *People v. King*, 18 N. E. 245 (N. Y. 1888).

between the states.<sup>105</sup> The inference drawn from the opinion of the court is that the same construction would be given a state statute which required separate compartments for white and colored persons.<sup>106</sup> Consequently, its main effect has been to deter state action in passing Jim Crow laws applicable to interstate commerce.

### *Jim Crow Statutes.*

The term "Jim Crow" does not refer to the color of negroes and is in no way derogatory to the colored race. It was the name given one of the early popular minstrel songs. About 1841, it was used to designate a negro coach on a railroad in Massachusetts.<sup>107</sup>

Before the enactment of the Jim Crow laws, carriers operating in the south already had regulations requiring the separation of white and colored passengers.<sup>108</sup> The laws, therefore, were not intended strictly to enforce separation but merely legalized an existing custom.<sup>109</sup> The same separation is enforced in public schools<sup>110</sup> even in northern states, prisons, and housing facilities. Most states also prohibit miscegenous marriages. The United States Army finds it advisable to separate the colored from white troops. This separation is for the welfare of both races.

The first Jim Crow laws were enacted by Florida and Mississippi in 1865<sup>111</sup> and by Texas in 1866.<sup>112</sup> In 1870, Georgia enacted a statute requiring equal accommodations.<sup>113</sup> In 1871, Texas repealed the law of 1866 and enacted a statute similar to that of Louisiana declared unconstitutional in *Hall v. DeCuir*.<sup>114</sup> Arkansas required equal accommodations by statute enacted in 1874.<sup>115</sup>

105. *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547 (La., 1877); Acts of Louisiana, 1873, pp. 156-157.

106. *L. N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587 (1890).

107. Century Dictionary & Cyclopedia (1911 ed.).

108. *Hall v. DeCuir*, supra, note 105; *Derry v. Lowry*, 6 Phila. Rep. 30 (1865); *Westchester & Philadelphia Railroad Co. v. Miles*, 55 Penn. State Rep. 209 (1867); *Pleasants v. North Beach & Mission R. Co.*, 34 Calif. 586; *Chicago & Northwestern Railway Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641 (1870); *Coger v. North West Union Packet Co.*, 37 Ia. 145 (1873).

109. *Gilbert Thomas Stephenson*, loc. cit., note 90, p. 189.

110. *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 337, 17 Am. Rep. 738; *Roberts v. City of Boston*, 5 Cush. 198; *State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713; *P. v. Gallagher*, 93 N. Y. 438, 44 Am. R. 232; *Garnes v. McCann*, 21 Ohio 198.

111. Laws of Florida, 1865, p. 25; Laws of Mississippi, 1865, pp. 231-232.

112. Laws of Texas, 1866, p. 67.

113. Georgia Laws, 1870, pp. 427-428.

114. Texas Laws, 1871, 2d session, p. 16.

115. Code of Arkansas, 1874, sec. 764, p. 259.

Other states might have enacted Jim Crow laws earlier, except for the Reconstruction regimes.<sup>116</sup>

The first Jim Crow law, as they exist today, was enacted by Tennessee in 1881.<sup>117</sup> Florida followed in 1887;<sup>118</sup> Mississippi in 1888;<sup>119</sup> Texas in 1889;<sup>120</sup> Louisiana in 1890,<sup>121</sup> and Alabama,<sup>122</sup> Kentucky,<sup>123</sup> Arkansas<sup>124</sup> and Georgia in 1891.<sup>125</sup> After an interval of several years there followed South Carolina in 1898;<sup>126</sup> North Carolina<sup>127</sup> and Virginia in 1899;<sup>128</sup> and Maryland in 1904.<sup>129</sup>

The early Jim Crow Statutes were enacted with particular reference to railroads and did not, in most instances, include city street car lines. In many states, however, city ordinances required separation of passengers on street-cars and after 1900 statutes were passed requiring such segregation.<sup>130</sup> In only one statute were steamboats included.<sup>131</sup>

Jim Crow statutes now exist in all southern states except Missouri. The Alabama statute is fairly typical.<sup>132</sup>

"All railroads carrying passengers in this state, other than street railroads, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by partitions, so as to secure separate accommodations."

Penalties for violation are provided against company, conductor, and passenger generally.

Most such statutes exclude from their operation nurses accompanying persons of opposite race or color, officers in charge of prisoners, and employees of the railroad.

Statutes and ordinances governing the separation of passen-

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116. For entire historical discussion see *Gilbert Thomas Stephenson*, loc. cit., note 90, and same author in 43 Am. Law Rev. 695 (1909), "Race Distinctions in American Law".

117. Laws of Tennessee, 1881, pp. 211-212.

118. Laws of Florida, 1887, p. 116.

119. Laws of Mississippi, 1888, pp. 45, 48.

120. Laws of Texas, 1889, pp. 132-133.

121. Laws of Louisiana, 1890, pp. 152-154.

122. Laws of Alabama, 1891, p. 412.

123. Laws of Kentucky, 1891, pp. 63, 64.

124. Laws of Arkansas, 1891, pp. 15-17.

125. Laws of Georgia, 1891, I, 157-158; 1899, pp. 66-67.

126. Laws of South Carolina, 1898, pp. 778-779.

127. Laws of North Carolina, 1899, pp. 539-540.

128. Laws of Virginia, 1899-1900, pp. 236-237.

129. Laws of Maryland, 1904, pp. 187-188.

130. *Gilbert Thomas Stephenson*, "Separation of the Races in Public Conveyances", 3 Am. Pol. Sci. Rev. 180, 199 (1909).

131. Laws of North Carolina, supra, note 127.

132. Code of Alabama, 1923, Sec. 9968.

gers on street-cars usually permit their separation by assignments to seats in opposite ends of the cars.<sup>133</sup>

Since bus companies do not fall within the statutes,<sup>134</sup> several states have enacted laws which specifically require separation on buses. The Louisiana statute provides:<sup>135</sup>

"All bus companies, corporations, partnerships, persons or associations of persons carrying passengers for hire in their buses, carriages, or vehicles in this state shall provide equal but separate accommodations for the white and colored races designating separate seats or compartments so as to secure separate accommodations for the white and colored races; no person or persons shall be permitted to occupy seats or compartments other than the ones assigned to them on account of the race they belong to."

Georgia has a law framed in the following language:<sup>136</sup>

"Motor common carriers may confine themselves to carrying either white or colored passengers, or they may provide different motor vehicles for carrying white and colored passengers; and they may carry white and colored passengers in the same vehicle but only under such conditions of separation of the races as the Commission may prescribe."

The North Carolina Code contains a provision similar to that in the Georgia statute,<sup>137</sup> exempting bus lines which carry for one race only. It is doubtful, however, if either of these statutes would be upheld as constitutional.<sup>138</sup> The 14th Amendment particularly provides against a state making any discriminatory law, and there can be no question that a carrier, if it meets the requirements of being a common carrier, does discriminate if it carries for one class of persons only.<sup>139</sup>

There are no Jim Crow statutes which apply directly to airlines. However, in a recent case involving a statute which gave the North Carolina Corporation Commission general powers to regulate intrastate bus lines,<sup>140</sup> it was held that the Commission had

133. Laws of Arkansas, Act. Mar. 27, 1903, p. 178, §1; Crawford & Moses, Digest of the Statutes of Arkansas, 1921, §998.

134. *Brumfield v. Consolidated Coach Corp.*, supra, note 30, p. 365; *Patillo v. State*, 47 S. W. (2d) 847 (Crim. App. Tex., 1932).

135. Act 207, 1928, p. 272, Section 1; *Robert H. Marr*, Criminal Statutes of Louisiana (1929), p. 226; see also, Statutes of Oklahoma, 1931, secs. 9332, 9355, and 9336; Virginia Code of 1930, §4097Z.

136. 1931 Code Supplement, Sec. 1770 (60-LLL.).

137. North Carolina Code of 1931, §2613.

138. *A. W. Gholson, Jr.*, "Separate and Equal Accommodations in Motor Busses", 8 N. C. L. Rev. 455 (1929-30).

139. *McCabe v. A. T. & S. F. R. Co.*, 235 U. S. 151, 35 Sup. Ct. Rep. 69, 59 L. Ed. 169 (1914).

140. §7, Ch. 136, P. L. 1927, "The Commission is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this article; to make or approve rates, fares, charges, classifications,

the power to require separation of white and colored passengers on the grounds that the bus line was required to possess a charter to operate, and because the *general* policy of the state required such segregation.<sup>141</sup> Consequently, where a state statute is construed to give an administrative body powers to regulate intrastate airlines, the same result may be reached whereby airlines would be required to separate white and colored passengers.<sup>142</sup>

Jim Crow statutes have been held to be a valid exercise of the police power.<sup>143</sup> They are not in contravention of the 14th Amendment as depriving of the equal protection of the laws, because negroes are not more discriminated against than are white persons. The equality of right secured by the Constitution does not demand identity of rights.

There is no deprivation of property without due process of law, because the right to be carried is a civil right and not a right of property. And the equal rights and privileges clause is not violated, because the law applies to all alike. Some contention has been made that they violate the 13th Amendment but there is no basis for this, since it merely prohibits slavery.

There is some conflict of authority as to whether a Jim Crow law can operate on interstate transportation lines. The greater number of state supreme court and Federal lower court decisions hold that, in the light of *Hall v. DeCuir*,<sup>144</sup> such laws are uncon-

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rules, and regulations for service and safety of operation and checking baggage of each such motor vehicle carrier; to supervise the operation of union passenger stations in any manner necessary to promote harmony among the operators and efficiency of service to the travelling public; . . . to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The Commission shall have the power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers. . . ."

141. *Corporation Commission v. Interracial Commission*, supra, note 76; *A. W. Gholson, Jr.*, loc. cit., note 138.

142. See *Fred D. Fagg, J.* and *Abraham Fishman*, loc. cit., Note 6, App. C.

143. *L. N. O. & T. R. Co. v. Mississippi*, supra, note 106; *Plessy v. Ferguson*, 163 U. S. 537 (La., 1896); *McCabe v. A. T. & S. F. R. Co.*, supra, note 139; *Anderson v. L. & N. R. Co.*, 62 Fed. 46 (C. C. Ky., 1894); *Ohio Val. Ry's. Receiver v. Lander*, 104 Ky. 431, 47 S. W. 344 (1898).

144. Supra, note 105, pp. 497-8. "Mississippi may require the steamer carrying passengers to provide two cabins and tables for passengers, and may make it a penal offense for white and colored persons to be mixed in the same cabin or at the same table. If Louisiana may pass a law forbidding such steamer from having two cabins and two tables—one for white and the other for colored persons—it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table. Should state legislation in that regard conflict, then the

stitutional as placing an undue burden on interstate commerce, and that Congress, not having occupied the field, indicates by its silence that this field should be left unregulated.<sup>145</sup>

The Supreme Court of Tennessee has held that the Jim Crow law of that state<sup>146</sup> applies to interstate passengers.<sup>147</sup> The court distinguished the case from *Hall v. DeCuir* because the facts differed, and contended that nothing in the Federal Constitution was abrogated. However, this case has had a minority following.<sup>148</sup> A New York case, decided three years previous to the Tennessee case, held that the same Tennessee statute was violative of the Constitution insofar as it applied to interstate commerce.<sup>149</sup>

A more recent case has held that the Kentucky Jim Crow law was applicable to an interurban electric line incorporated under the laws of Kentucky and operating under a Kentucky franchise

steamer must cease to navigate between ports of the States having such conflicting legislation, or must be exposed to penalties at every trip.

"Those who framed the Constitution never intended that navigation, whether foreign or among the States, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in Congress."

145. *L. N. O. & T. R. Co. v. Mississippi*, supra, note 106, p. 589; *Chesapeake & Ohio R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. Rep. 101, 45 L. Ed. 244 (1900); *McCabe v. A. T. & S. F. R. Co.*, supra, note 139; *Abbott v. Hicks*, 11 S. 74 (La., 1892); *Hart v. State*, 100 Md. 595, 60 A. 457 (1905); *Carey v. Spencer*, 36 N. Y. Supp. 886 (1895); *Ohio Val. Ry's Receiver v. Lander*, supra, note 143; *Anderson v. L. & N. R. Co.*, supra, note 143; *D. Newton Baker*, "Segregation of White and Colored Passengers on Interstate Trains", 19 Y. L. J. 445 (1909-10); *John C. Doolan*, "Validity of Separate Coach Laws When Applied to Interstate Passengers", 1 Va. L. R. 379, 385 (1914).

146. Acts 1891, c. 52.

147. *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432 (1898).

148. In *Alabama & V. Ry. Co. v. Morris*, 60 S. 11, 14 (Miss., 1912) the court said: "A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all passengers on the train, intrastate and interstate; and we therefore decline to limit the applicability of the statute to intrastate commerce. Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequel to the event described by the record."

"One more observation: If we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned altogether, as the theory upon which its wisdom and justice rests will thus be declared fanciful and without foundation in fact. If the peculiar conditions existing here demanded this legislation to conserve the peace of the state and our lawmakers have so decided, the mere fact that the passenger is going out of the state, coming into the state from without, or travelling across the state, does not alter the complexion of affairs, nor render the danger less, should a negro or white man be required against his will to occupy a car with passengers of another race."

See also, *Southern R. Co. v. Norton*, 112 Miss. 302, 73 S. 1 (1916).

149. *Carey v. Spencer*, supra, note 145.

a line from South Covington to Covington, a distance of five miles, and a total distance of ten miles from South Covington to Cincinnati, Ohio.<sup>150</sup> Eighty per cent of its passengers were interstate. The United States Supreme Court based its decision on the ground that the acceptance of a franchise from the State compelled the carrier to obey the state's laws and said: "An interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the State, under the circumstances presented by this record, by running its coaches beyond state lines." Justice Day dissented on the grounds that such a short distance was traversed in Kentucky and such a small percentage of the business conducted there that the additional expense would unduly burden interstate commerce.

Several cases involving the question of the interstate application of Jim Crow laws have reached the United States Supreme Court. However, the issue has always been evaded, usually because the State courts had previously held the statute to apply only to intrastate travel or because the federal court did not feel disposed to so construe it that it would apply to interstate carriage. The court has been very careful to avoid a direct decision of the question, but, from its frequent comments that the statutes applied only to intrastate travel and, therefore, raised no question of constitutionality, it is fair to surmise that the high court might decide against their validity if squarely confronted by the proposition.<sup>151</sup>

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150. *South Covington & C. St. R. Co. v. Kentucky*, 64 L. Ed. 631.

151. *L. N. O. & T. R. Co. v. Mississippi*, supra, note 106; *Plessy v. Ferguson*, supra, note 143; *Chesapeake & Ohio R. Co. v. Kentucky*, supra, note 145; *McCabe v. A. T. & S. F. R. Co.*, supra, note 139.

In the *Minnesota Rate Cases*, 230 U. S. 352, 398 (1913) the court said: "The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress does act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.

"The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save



On the other hand, if the Supreme Court should follow its decision in the *South Covington* case and extend that doctrine to interstate carriers covering a wider territory, then the state's power to enact interstate Jim Crow laws is very nearly complete, as long as Congress does not intercede.

Where a state, through its administrative body, may compel intrastate airlines to provide separate accommodations for white and colored passengers, it may also require such airlines which extend their lines into other states to separate interstate passengers as well, if the *South Covington* case is accepted as authority. We must consider that an airplane can travel all the way across some states in the same time that it takes an interurban train to travel across one large city.

However, there are other considerations affecting the question, having to do with the design of the planes. The general opinion is that the trend is toward a small plane accommodating from eight to ten passengers and with single lavatory and toilet facilities.<sup>152</sup> The reason is mainly economy. With such small planes, any separation by means of a wall would not only be impracticable but would also probably result in the loss of the Federal license for the plane, since licensed planes are constructed under prescribed specifications which are not usually permitted to be changed to any great extent. Consequently, since many states require a Federal license, such a Jim Crow regulation by a state would be an undue burden upon interstate commerce, and unconstitutional.

An alternative, of course, would be to require the intrastate airline to fly separate planes for the accommodation of colored persons. This would avoid the interstate commerce problem. But it would be highly undesirable from the airline operator's point of view. For the present, at least, airlines are sacrificing a great

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as it is governed in the manner that the national legislature constitutionally ordains."

152. See interesting article by *P. G. Johnson*, "23-Hour Coast-to-Coast Passenger Trips Soon", in the *Chicago Herald-Examiner*, July 24, 1932.

"Report of Committee on Airport Drainage and Surfacing," Aeronautics Branch Department of Commerce, Dec. 1, 1931, p. 7: "What will be the size and weight of the airplane of tomorrow? The limit of size of the airplane is still far from being settled. Operating economics as much as design limitations will probably determine dimensions and capacities. Designers are hesitant about expressing very positive opinions on this whole question but seem to feel that the demands by the public for frequent schedules will limit the maximum gross weight of transport airplanes, for some time to come at least, to a figure ranging somewhere from 20,000 to 30,000 pounds. Present indications are that there is a tendency to sacrifice the pay load of transport airplanes for speed, with the result that in all probability the transport airplanes of the near future will not likely have a much higher gross weight than those now in use."

deal in the hope of future profit. Their work to produce more traffic is no easy matter, with most people inherently afraid of this new mode of travel. Their fares have been reduced abnormally low in view of the greater service rendered by them. Thus, their revenues do not greatly exceed their costs, and in many cases it is opposite. Furthermore, it is not customary to keep reserve airplanes at all stations. A plane carrying one class of passengers might not be able to get through to a station because of bad weather conditions, and yet the plane which was to accommodate the other class might get through. The carrier would then be subject to the charge that it would be contrary to law to carry one race and not the other. In addition, the negro air traffic is extremely light and probably will continue to be. Therefore, it would be an intolerable burden on any airline to have to provide the equipment necessary to operate the extra service.

The only alternative appears to be the requirement of separate seating in different parts of the plane. But even this is not altogether desirable, since an airline should not be compelled to sacrifice any of its seats and leave them empty merely because a white person might not care to sit near a colored individual.

It is far better to leave this perplexing situation for the airlines to handle without state interference. In fact, at present, whether in the north or in the south, where members of both races are assigned to the same plane, colored persons are usually seated in the rear and white persons in the front part of the plane.

### *Carrier's Rules Requiring Separation.*

The right of a common carrier to make reasonable regulations for the conduct of its business permits it to separate white and colored persons aboard its conveyances.<sup>153</sup>

153. *Hall v. DeCuir*, supra, note 105; *Chiles v. C. & O. R. Co.*, 218 U. S. 71 (Ky., 1910); *Green v. The City of Bridgetown*, Fed. Cas. No. 5754 (Ga., 1879); *Logwood v. Memphis & C. R. Co.*, 23 Fed. 318 (Tenn., 1885); *Murphy v. Western & A. R. R.*, 23 Fed. 637 (Tenn., 1885); *The Sue*, 23 Fed. 843 (1885); *McGuinn v. Forbes*, 37 Fed. 639 (Md., 1889); *Hauck v. Southern Pac. Ry. Co.*, 38 Fed. 226 (Tex., 1888); *Bowie v. Birmingham Railway & Electric Co.*, 125 Ala. 397, 27 S. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247 (1900); *Ohio Val. Ry's Receiver v. Lander*, supra, note 143, p. 347; *Brumfield v. Consolidated Coach Corp.*, supra, note 30, p. 365; *Smith v. Chamberlain*, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710 (1893); *Westchester & Philadelphia Railroad Co. v. Miles*, supra, note 108; Note, 11 L. R. A. (N. S.) 268; *Barnes*, Interstate Transportation, pp. 576-7 (1910); *Mitchie*, Carriers, pp. 1944-5; *M. G. Roberts*, Federal Liability of Carriers, p. 561 (2d ed., 1929); Contra: *Coger v. North West Union Packet Co.*, 37 Ia. 145 (1873).

In an early case most often cited for its reasoning the court said:<sup>154</sup>

"The right of carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyances, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his rights of property. The right of the passenger is only that of being carried safely, and with due regard to his personal comfort and convenience which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper, who, if he have room, is bound to receive guests. But a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to compel the passengers black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of Justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public—but not a whit beyond."

A common carrier has an unquestionable right to seat its passengers wherever it desires. The passenger can merely demand that he be carried.<sup>155</sup> For this reason the carrier may segregate its white and colored passengers. But, all passengers must be treated alike. Consequently, all accommodations for which the same fares are charged must be substantially equal.<sup>156</sup>

154. *Westchester & Philadelphia Railroad Co. v. Miles*, supra, note 108.

155. *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468 (1854); *Brumfield v. Consolidated Coach Corp.* supra, note 30; *Day v. Owen*, supra, note 79, p. 525; *Chesapeake Ohio & Southwestern Rd. Co. v. Wells*, 85 Tenn. 613 (1887); *Memphis & Charleston Rd. v. Benson*, 85 Tenn. 627 (1887).

156. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. 683 (Ohio, 1882); *The Sue*, supra, note 153; *C. & N. W. R. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641 (1870); *Chilton v. St. Louis & I. M. R. Co.*, 21 S. W. 457, 19 L. R. A. 269 (Mo., 1893); *St. Louis-San Francisco Ry. Co. v. Loftus*, 234 Pac. 607 (Okla., 1925); *Murphy v. Western & A. R. R.*, supra, note 153; *McGuinn v. Forbes*, supra, note 153; *Logwood v. Memphis & C. R. Co.*, supra, note 153; *Houck v. S. P. Ry. Co.*, supra, note 153; *Green v. The City of Bridgetown*, supra, note 153; *Councill v. Western & Atlantic R. R. Co.*, 1 I. C. C. R. 638 (1887); *Heard v. Georgia R. R. Co.*, 1 I. C. C. R. 719

Congress has preserved this right by allowing carriers falling within the provisions of the Interstate Commerce Act to provide for such segregation when equal accommodations are afforded.<sup>157</sup>

Airlines are not, however, included in the Interstate Commerce Act. Hence, Congress not having acted, it is presumptive that interstate airlines are free to make reasonable regulations separating passengers because of race and color.<sup>158</sup> This presumption is strengthened by the fact that Congress permits those carriers coming within the Act to make such regulations.

In a recent case, a colored woman was refused a seat on a bus. The bus company had a rule that seats could be reserved in advance on a particular bus and that those without seats had to wait for a subsequent bus. The plaintiff bought her ticket and demanded a seat aboard the vehicle in question just before time for it to leave. There were two unoccupied seats, but the carrier refused to let her occupy one of them since both had previously been reserved. The carrier was upheld in its contention that its rule was reasonable as incident to its ownership of property and as an aid in serving the public and that it would be abrogating its contracts with those for whom the two vacant seats were reserved if others were allowed to occupy them.<sup>159</sup> The result in this case is important inasmuch as the facts very closely resemble those existing on most airlines where all seats customarily are reserved.

Not only are the seats on airplanes held subject to reservations, but there is also the safety factor which requires further consideration, where colored and white persons apply for passage on the same plane. The carrier has the right to protect its property from destruction and it owes a duty to protect its passengers from harm. While it also owes a duty to afford equal accommodations for all passengers, still it may separate them, either by providing separate compartments or separate vehicles. At the same time all persons have a right to be carried, *unless they have personal disqualifications which permit the carrier to bar them.*

Consequently, our conclusion is that a rule under which an airline, at its discretion, may refuse to accept a person for passage

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(1888); *Edwards v. N. C. & St. L. R. Co.*, 12 I. C. C. R. 247 (1907); *Cozart v. Southern Ry. Co.*, 16 I. C. C. R. 226 (1909); *Gaines v. Seaboard Air Line R. Co.*, 16 I. C. C. R. 471 (1909); *Barnes*, op. cit., note 153; *Mitchie*, op. cit., note 153; *M. G. Roberts*, op. cit., note 153.

157. See *Council v. Western & Atlantic R. R. Co.*, supra; *Heard v. Georgia R. R. Co.*, supra; *Edwards v. N. C. & St. L. R. Co.*, supra; *Cozart v. Southern Ry. Co.*, supra; *Gaines v. Seaboard Air Line R. Co.*, supra.

158. *Chiles v. C. & O. R. Co.*, supra, note 153.

159. *Brumfield v. Consolidated Coach Corp.*, supra, note 30.

after another person of opposite race and color has reserved a seat on the same plane is reasonable, provided the circumstances justify it on the ground of safety, comfort and convenience. Such circumstances exist in most sections of the south. If a close contact between persons of opposite races might lead to endangering the security of all the passengers and also the plane in which they are riding, the airline has the right to protect its property and it has the duty to protect its passengers by appropriate regulation. Since the rule applies alike to colored and white persons under similar circumstances there is no violation of equality of right. Neither the white nor the colored person is thereby refused passage because of race or color, but because of the personal disqualification which is the result of conflicting racial characteristics likely to endanger property and human life if inter-mixed.

#### SUMMARY

(1) An airline is a common carrier and, as such, at common law and by virtue of the 14th Amendment, must carry all who apply and are not subject to personal disqualifications for which they may be barred.

(2) An airplane in flight is so greatly affected by the safety factor that any person may be rejected who, by reason of personal disqualifications, will materially increase the hazards of travel.

(3) An airline may make and enforce any reasonable regulations intended to promote its duty to serve the public and to protect its passengers and property.

(4) Civil Rights statutes, as a rule, do not apply to airlines.

(5) No Jim Crow laws apply directly to airlines. In any event, it is not likely that they are applicable to interstate carriers.

(6) An airline may separate colored and white passengers irrespective of statutes and whether intrastate or interstate, if they are treated equally.