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## Notes, Comments, Digests

Robert Kingsley

Edward C. Sweeney

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## NOTES, COMMENTS, DIGESTS

Department Editors..... {ROBERT KINGSLEY  
EDWARD C. SWEENEY

### COMMENTS

INSURANCE—INJURY WHILE ENGAGED IN OR PARTICIPATING IN AVIATION.—  
[Wisconsin] Plaintiff instituted this action on an insurance policy to recover for disability because of physical injury sustained through being struck by the propellor of an airplane while plaintiff was spinning same for the purpose of starting the motor. The sole question was whether or not plaintiff was entitled to recover under a policy which provided: "The disability benefit herein provided shall not be granted if the disability shall result from \* \* \* engaging or participating as a passenger or otherwise in aviation or aeronautics." *Held*, plaintiff was engaged in performing an act which was so immediately connected with and incidental to the trip, on which he was to embark, that he was engaging in aviation within the meaning and intention of the exemption provision of the policy, and that he was not entitled to recover any benefits. *Blonski v. Bankers' Life Co.*, ... Wis. ..., 243 N. W. 410 (June 20, 1932).

Exemption clauses have always been a legal battleground in insurance cases. Courts from the very beginning have realized that a liberal construction of such clauses in favor of the insurer would reduce the insurance business to a confidence game. The construction which they have placed upon such clauses has therefore been such as to make insurance men wonder whether human ingenuity is capable of devising exemption clauses which will exempt.

Insurance cases arising in connection with the aeronautics are apt illustrations of this general trend. Quite a number of attempted clauses have been before the courts and have mostly been construed against the contention of the insurer. In the course of this litigation a distinction between the word "engage" and "participate" has found general approval. The word "engage" has been confined to one who actually operates the airplane (*Gits v. New York Life Insurance Co.*, 32 Fed. (2d) 7; *Masonic Acc. Ins. Co. v. Jackson*, 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840; *Gibbs v. Equitable Life Assur. Soc. of the United States*, 256 N. Y. 208, 176 N. E. 144) while the word "participate" has been construed to cover a mere passenger (*Bew v. Travelers' Ins. Co.*, 95 N. J. Law 533, 112 Atl. 859, 14 A. L. R. 983; *Tierney v. Occidental Life Ins. Co. of California*, 89 Cal. 779, 265 Pac. 400; *Pittman v. Lamar Life Ins. Co.*, 17 Fed. (2d) 370. Outside of this distinction, however, little has been settled by litigation. The search for a clause which will accomplish the purposes of the insurer therefore has not yet been concluded.

The present case involves an exemption clause which certainly is the most inclusive of all which have come to the attention of the writer. It exempts the insurer if the disability shall result from "engaging or participating as a passenger or otherwise in aviation or aeronautics." There

can be no doubt but that this clause was drafted with a full understanding of the cases decided by the courts in regard to aviation exemption clauses.

The insured was the president of the corporation which owned the airplane and was sufficiently advanced in the art of flying to hold a student's license issued by the Department of Commerce and to do solo flights. He took the airplane out of its hangar and cranked it with the intention of taxiing across the field to a filling station and then going into the air. He was injured while twirling the propeller. The civil court of Milwaukee County held that the exemption clause applied to the situation and denied a recovery. A fee for entering judgment was paid by the attorney for the insurer but through some mistake the judgment was not actually entered.

While the matter was in this condition the Wisconsin Supreme Court decided *Charette v. Prudential Ins. Co. of America*, 202 Wis. 470, 232 N. W. 848, in which extensive parsing of the exemption clause there involved was done by the court which reached the conclusion that the construction of such clause was not free from doubt and that therefore it must be construed against the insurer. This decision gave new hope to the insured who utilized the fact that the judgment had not been entered to appeal the case to the Circuit Court of Milwaukee County which affirmed the decision of the civil court. The appeal to the Supreme Court was a further consequence of the error of not entering judgment in the civil court.

The decision of the court is contained in the following words: Plaintiff in starting the motor incidental to beginning a trip was engaged in performing an act which was so immediately connected with and incidental to the trip, on which he was about to embark, that he was then engaging in aviation or aeronautics, within the meaning and intention of the exemption provision of the policy. Consequently, his disability resulted from a hazard which was expressly exempted from the policy, and he was not entitled to recover any benefits."

No fault can be found with this decision. The clause is not ambiguous and evinces a clear intent to exclude aviation risks. The insurer certainly has the right to exclude such risks if he sees fit to do so. The premium collected is based on the risk assumed and therefore the risk should not be extended beyond what the contract stipulates. From the point of view of the insurer the clause is nearly if not wholly perfect. The only possible improvement which has suggested itself to the writer is the addition of the words "aeronautical activity" or "aeronautical operations." Insurance companies which wish to exclude aviation risks may well ponder this clause and adopt it with or without the addition suggested.

CARL ZOLLMANN.

NEGLIGENCE—RES IPSA LOQUITUR—FAILURE OF AIRPLANE MOTOR.—  
[Mass.] This is an action to recover the value of clothing and personal effects worn by and on the person of the plaintiff at the time of the accident hereinafter described. The plaintiff testified that while the plane taxied on the ground prior to taking off, the right wing motor backfired and emitted clouds of smoke; that it was apparent to him that the right wing motor did not revolve at the same speed as the others; that a few seconds after leaving the ground the right wing motor went dead and the right side of the plane tipped and that the pilot steering the plane made a nose dive

into the water. The trial judge also received the testimony of the pilot and that of a bystander who had a pilot's license and who testified to the dip referred to in the plaintiff's testimony. The pilot testified to his handling of the machine, that he had made a previous trip that day, that on arriving at the airport he turned the machine over to inspectors and received it back a few moments before he took off. He did not testify that it was inspected but did testify that it was the custom of the inspectors to inspect. The inspectors did not testify. The pilot further testified that on leaving the ground both motors were "revving" at the same rate, that he tested each engine and found them both in good running order at the time of the take-off. This was all the material evidence relating to liability. The plaintiff requested among others the following charge: "5. That the plaintiff has established a *res ipsa loquitur* case, and the defendant must explain the cause of the accident in order to rebut the presumption of negligence." The judge denied the request in question but allowed the following: "4. The evidence of the defendant did not explain why one of the motors failed to function within a few seconds after leaving the ground." In finding for the defendant, the judge found the following facts: (1) That the defendant was not negligent in the management or operation of the airship, and (2) that prior to the flight the defendant's pilot tested the plane and found it in good working order. *Held*, on appeal from the decision of the appellate division of the municipal court of Boston dismissing the report (1931 U. S. Av. R. 109) the decision was affirmed. The principle of *res ipsa loquitur* only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendant, and it will not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all. *Wilson v. Colonial Air Transport, Inc.* (Mass. 1932), 180 N. E. 212.

The doctrine of *res ipsa loquitur* bids fair to become, in the absence of controlling statutes, one of the most important factors applying to aviation litigation. The question of whether or not the doctrine should be invoked in case of damage by aircraft to persons or property carried is one with which the courts will be called upon in the future to deal, in more instances than perhaps any other type of airplane accident case. No set rule or formula can be laid down to cover this doubtful situation in the abstract.

In Massachusetts at present there is no statute specifically applicable to the issue of negligence in the operation of aircraft, and the ordinary rules of negligence and due care obtain. See General Laws of Massachusetts (1921), Chapter 90, Section 35 et seq. See further St. 1922, c. 534, as amended by St. 1928, c. 388; St. 1930, c. 33; and St. 1931, c. 303.

The expression *res ipsa loquitur* is a shorthand method of saying that the circumstances attendant upon an accident are themselves of such a character as to permit an inference of culpability on the part of the defendant, make out the plaintiff's *prima facie* case, and present a question of fact for the defendant to meet with an explanation: *Plum v. Richmond Light & R. Co.*, 233 N. Y. 285, 135 N. E. 504, 25 A. L. R. 685 (1922); *Sand Springs Park v. Schrader*, 82 Okla. 244, 198 Pac. 983, 22 A. L. R. 593 (1921); *Mayer v. Kansas City Power & Light Co.*, 121 Kan. 648, 249 Pac. 599 (1926). The mere fact of injury raises no presumption of negligence: *Ash v. Childs*

*Dining Hall Co.*, 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1556 (1918); *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107 (1915); *Wardo v. Valley Smokeless Coal Co.*, 279 Pa. 209, 123 Atl. 779 (1924); the inference of negligence being deducible from the attendant circumstances: *Marceau v. Rutland Ry. Co.*, 211 N. Y. 203, 105 N. E. 206 (1914); 3 *Cooley on Torts* (4th ed.), sec. 480; and vanishing when evidence appears to the contrary: *Cohen v. Farmers' Loan & Invest. Co.*, 127 N. Y. S. 561, 70 Misc. Rep. 551 (1911). The doctrine applies whenever the thing which produced the injury is shown to have been under the control of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised: *Donohue v. U. S. Hoffman Mach. Corp.*, 218 N. Y. S. 558, 128 Misc. Rep. 521 (1926); *Bolienbach v. Bloemenihal*, 341 Ill. 539, 173 N. E. 670 (1930).

Acutely analyzed, the doctrine of *res ipsa loquitur* merely connotes a principle of evidence relating primarily to the probative force of evidence: *Atlas Powder Co. v. Benson* (C. C. A. 3rd cir.) 287 F. 797 (1923); *Rost v. Kee & Chappell Dairy Co.*, 216 Ill. App. 497 (1920); and it does not relieve the plaintiff of the burden of proving negligence: *Arkansas Light & Power Co. v. Jackson*, 166 Ark. 633, 267 S. W. 359 (1924); but operates only to make out a *prima facie* case of evidence of negligence: *Lyon v. Chi. M. & St. P. Ry. Co. of Montana*, 50 Mont. 532, 148 Pac. 386 (1915). The doctrine has been termed "demonstrative evidence of negligence": 1 *Thompson's Commentaries on the Law of Negligence* (2nd ed.) sec. 15. However, the expressions *res ipsa loquitur* and *prima facie* evidence are often used interchangeably, each expression signifying nothing more than evidence to be considered by the jury: *White v. Hines*, 182 N. C. 275, 109 S. E. 31 (1921); cf. *Cooper v. Agee*, 222 Ala. 334, 132 So. 173 (1930).

Pleading specific acts of negligence, indicating that the plaintiff had the sources of knowledge of the causes of the accident, has led to a division of authorities as to whether the plaintiff, by so pleading, has elected not to rely at the trial upon the abstract doctrine of presumptive negligence, and must prove affirmative negligence as pleaded. A number of jurisdictions follow the rule that allegation of specific acts of negligence bars the plaintiff from relying upon the presumption of *res ipsa loquitur*: *White v. Chi. G. W. R. Co.* (U. S. C. C. A. Ia.), 246 F. 427 (1917); *Pate v. Dumbauld*, 298 Mo. 435, 250 S. W. 49 (1923); *Wichita Valley Ry. Co. v. Helms*, 261 S. W. 225 (Tex. Civ. App. 1924). But the majority of adjudications and the better rule are to the effect that the doctrine is not excluded by the fact that the plaintiff alleges specific acts of negligence: *Rosenzweig v. Hines* (U. S. D. C. N. Y.) 280 F. 247 (1922); *Union Gas & Electric Co. v. Waldsmith*, 31 Ohio App. 118, 166 N. E. 588 (1929); *Stewart v. Barre & M. T. & P. Co.*, 94 Vt. 39, 111 Atl. 526 (1920); *Firszt v. Capital Park Realty Co.*, 98 Conn. 627, 120 Atl. 300 (1923); 3 *Cooley on Torts* (4th ed.) sec. 480. On the general subject see *Niles*, "Pleading Res Ipsa Loquitur," 7 N. Y. L. Quart. Rev. 415 (1929).

If the vehicle is a common carrier it would seem that proof of the facts and surrounding circumstances need only be slight in order to set the presumptive rule of negligence in motion and call upon the defendant for an explanation: see 10 C. J. sec. 1 and sec. 1063. Yet in consideration of the hazards incident to the more modern modes of travel, the present

tendency is to hold that the carrier of passengers is bound to provide for their safe conveyance as far as human care and foresight will go, or as some courts have expressed it, "to exercise the highest or utmost degree of care and diligence which human prudence and foresight will suggest in view of the character and mode of conveyance employed." 2 *Hutchinson on Carriers* (2nd ed.) sec. 893.

The "raison d'être" of the rule points to three considerations: (1) the contractual relation between carrier and passenger under which the passenger passively trusts himself to the safety of the carrier's means of transportation; hence the burden of explaining failure of performance should be on the carrier; (2) the cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain; (3) injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care, hence, the fact of injury affords a presumption that such care is wanting: *Steele v. Southern R. Co.*, 55 S. C. 389, 33 S. E. 509 (1899); *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901).

Thus while a sound application of analogous existing principles of the common law will, so far as possible, furnish the basis for the ultimate solution of many aeronautical problems, the ultimate result will be achieved without much help from it in this instance because of its failure to have envisaged the possibilities of human flight or that it would evolve into an established vocation of man: see *Osterhout*, "The Doctrine of Res Ipsa Loquitur as Applied to Aviation," 2 *Air L. Rev.* 15 (1931). In applying the doctrine of *res ipsa loquitur* to travel by air, consideration should be given to the extent of development and resultant safety of this mode of travel as compared to others. With aviation still in its formative stage the liability of the carrier should hardly be measured by the same rules of law governing transportation by land or water; see *Davis*, *Aeronautical Law*, p. 393.

It would seem that a more rational thought process would employ legal theory to articulate rather than compel judgment. The ultimate question appears to be the more important one of responsibility. In England, by virtue of the Air Navigation Act of 1920, damages are recoverable without proof of negligence, or intention, or other cause of action except where the loss was caused by the plaintiff: see *Nokes and Bridges*, *The Law of Aviation*, Ch. 7, p. 109. A similar provision is found in section 5 of the Uniform State Law of Aeronautics. Thus the statutory rule of absolute liability provided for in the Uniform State Law of Aeronautics automatically eliminates from those states which have adopted it any possible issue of negligence, and the *res ipsa loquitur* rule would not apply where there has been no contributory negligence. So far as is known, the French have never adopted the doctrine of *res ipsa loquitur* as such: see *Osterhout*, *supra*; nor does the doctrine prevail in Michigan: *Kerr v. City of Detroit*, 225 Mich. 446, 238 N. W. 190; *Sampson v. Veenboer*, 252 Mich. 660, 234 N. W. 170.

The doctrine of *res ipsa loquitur*, from the aviation standpoint, not only gives rise to a *prima facie* inference of negligence but likewise is so patent that the facts and surrounding circumstances literally "speak for themselves." It is properly defined as a rule of evidence, an inference of fact,

always rebuttable and never shifting the burden of proof, an inference which weighs down the scales slightly for the plaintiff to begin with, but but which may be accepted or rejected by the jury: see *Osterhout*, "The Doctrine of Res Ipsa Loquitur as Applied to Aviation," supra. Such a rule would not impose an absolute liability but rather fix an intermediate point between the rule of absolute liability and the ordinary rules of negligence.

With reference to aviation cases, the doctrine has been exemplified in the following instances. In *Sollak v. State of New York* (State N. Y. C. C.), 1929 U. S. Av. R. 42 (where the airplane struck a standing car and injured the plaintiff who was a passenger therein) the doctrine of *res ipsa loquitur* was said to have raised a presumption of negligence on the part of the airplane. This result seems to be in accord with the general principle that an operator of aircraft descending on persons or property on the ground beneath should be held to the strictest accountability: *Guille v. Swan*, 19 Johns (N. Y.) 381 (1822); see *Baldwin*, "Liability for Accidents in Aerial Navigation," 9 Mich. Law Rev. 20 (1910); *Bogert*, "Problems in Aviation Law," 6 Corn. L. Quart. 29 (1921). However, the view has been taken that in the case of injuries to persons or property on the ground, due to the fall of an airplane, there is either absolute liability or total lack of liability, on the basis of contributory negligence or the fact that it was an excusable trespass, and in neither event is the defendant's negligence properly an issue: see *Osterhout*, supra. For a different view, see note, *Harper*, "Res Ipsa Loquitur in Air Law," 1 Air Law Rev. 478 (1930). In *Seaman v. Curtiss Flying Service*, 231 App. Div. 867, 247 N. Y. S. 251, 1931 U. S. Av. R. 227 (reversing 1929 U. S. Av. R. 48); see note, 2 Air L. Rev. 248 (1931) (where an airplane in perfect condition crashed shortly after taking off, there being no evidence as to the cause), the jury was instructed as to the doctrine of *res ipsa loquitur* but nevertheless held for the defendant. In *Stoll v. Curtiss Flying Service* (State N. Y.) 1930 U. S. Av. R. 148 (growing out of the same accident which was the subject matter of the *Seaman* case, supra), although an instruction covering the doctrine was given, the court was emphatic in its admonition to the jury that the action was one of negligence.

Obviously, if the defendant is a private carrier a greater degree of fact proof of the surrounding circumstances would be required before invoking the rule: *Greunke v. North American Airways Co.*, 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. R. 126; commented upon: 1 JOURNAL OF AIR LAW 363. Reasonable care in the case of a common carrier by air means a high degree of care: *Haqymasi v. Colonial Western* (State N. J.) 1931 U. S. Av. R. 73; thus, the highest degree of care consistent with the practical operation of the airplane: *Foot v. Northwest Airways* (U. S. D. C. Minn.) 1931 U. S. Av. R. 66; see comment, 2 Air L. Rev. 402 (1931). The obverse side of this picture is the principle that a passenger in a common carrier assumes the usual and ordinary perils incident to air transportation over and above the perils against which the common carrier must guard: *Allison, Adm'r. v. Standard Air Lines, Inc.* (S. D. Cal. 1930) 1930 U. S. Av. R. 292. See also, note: 2 JOURNAL OF AIR LAW 71.

Certain considerations militate against the application of the rule: (1) accident causative statistics are as yet lacking in sufficient scientific com-

pletteness to supply reliable information as to the reasons for such accidents, (2) the cause of so many airplane disasters, to wit, the weather (thus the assumption of risk) and, (3) the fact that aviation is as yet an infant and that liability should not be imposed for accidents arising from defects when every effort has been made to guard against such defects: see *Allen*, "Transportation by Air and Res Ipsa Loquitur Doctrine," 16 Am. Bar Assoc. Jour. 455. Yet it frequently happens that evidence of aircraft disasters is practically unobtainable and for that singular but important reason the view has been taken that the doctrine should be applied: see *Bogert*, "Problems in Aviation Law," supra.

As there does not appear to have been any autopsy on the engine which figured in this "Icarian flight," it would seem rather premature to say, until the cause of the accident be known, that only lack of ordinary care could have caused it. The plaintiff ought then recover, if at all, on the theory of negligence. Such apparently was also the opinion of the appellate court.

DAVID AXELROD.

### DIGESTS

AIRPORTS—NUISANCES.—[California] Plaintiff, the owner of suburban property on the outskirts of the city of Los Angeles, sues the owner of an adjoining airport, alleging that the defendant had leased its property to persons engaged in commercial aviation and that as a result of the latter's activities planes are flying over her property at altitudes of as low as 100 feet and that she is being annoyed by noise, dust and refuse, by parachute jumps and forced landings on her property and by the entrance upon her property of persons attracted to the airport. Defendant demurred. *Held*: Demurrer sustained. The complaint does not allege that any of the conduct complained of is committed by the defendant directly, but only that it is committed by defendant's tenants. A landlord is not liable for a nuisance committed by his tenant, unless either: (a) he has ratified or authorized the nuisance, or (b) the nuisance is a *necessary*, not merely a *possible*, result of the letting. Neither of these is alleged here. *Meloy v. City of Santa Monica* 70 Cal. App. Dec. 179 (July 5, 1932).

It is to be noticed that the case does not hold the conduct complained of to be unactionable but merely that plaintiff had failed to allege responsibility for the conduct in the defendant airport *owner*. She had, in short, not alleged that such activities were an essential and necessary consequence of the mere operation of an airport—and such an allegation is requisite in order to charge the *owner* (as distinguished from *operator*) of an airport.

ROBERT KINGSLEY.

BAILMENTS—LIABILITY OF BAILEE FOR INJURIES TO BAILED PROPERTY—CONTRACTS—LIMITATIONS OF LIABILITY.—[California] Plaintiff conducted a flying school, in which defendant was a student. While flying one of plaintiff's planes, defendant had two accidents which caused injuries to the plane. Thereafter he signed an agreement to pay "all cost of repairs and/or all damage." He had a third accident necessitating repairs, as a result of which plaintiffs lost the use of the plane for thirty-five days. Plaintiff, alleging the agreement, sued for the cost of repairs on all three occasions and for damages for loss of use on the last occasion. From a judgment for plaintiff, defendant appeals. *Held*: (1) defendant, being a bailee of the airplane, was liable without an agreement for injuries caused by his fault. The injuries having been caused by his acts, and he not having excused them, plaintiff was entitled to recover for them apart from the contract, and the fact that his theory of action was erroneously based

on the contract executed after two accidents had taken place will not justify a reversal where his recovery was not increased by the mistake in theory. (2) As to the third accident, defendant admits liability for the repairs. Since the parties to a bailment may lawfully contract to limit liability, plaintiff is entitled only to that amount of damages fixed in the contract—which did not cover damages for loss of use. Therefore so much of the judgment as gave a recovery for such loss of use must be reversed. *Ambassador Airways, Inc. v. Frank*, 69 Cal. App. Dec. 1007, 12 P. (2d) 127 (June 2, 1932).

ROBERT KINGSLEY.

**INSURANCE—REFUND OF PREMIUM—EFFECT ON AGENT'S COMMISSION.**—[New York] The plaintiff insurance company issued through the defendant, its general agent under a written contract, certain policies covering aviation hazards, and paid the defendant his commissions pursuant to the agency contract. After the policies were placed, the assured corporation merged and the new company negotiated with the plaintiff to cancel the aforementioned policies. As a result, the plaintiff repaid to the new company the unearned premium on the policies and brought this action to compel the defendant to repay his commission by virtue of the terms of the agency contract. Attached to the policies was a stamped rider entitled "Minimum Earned Premium" which read, ". . . no return premium shall be due under Coverage 'B' in the event of the Insured requesting cancellation of the policy, notwithstanding any policy conditions to the contrary. In the event of cancellation \* \* \* a pro rata return premium shall be allowed the Insured." There being no obligation on the part of the plaintiff to return unearned premiums, the plaintiff however choosing to return such, the question then is whether the exercise of that option is binding on the defendant.

The defendant is entitled to judgment. There being no basis for a suit under the contract of agency, the complaint should be dismissed. The only reference in the agency contract to the return of commission reads as follows: "In the event of cancellation of any contract of insurance, or if a refund premium is found due the assured on any policy after the termination of the agency, it is understood and agreed that the General Agent shall return to the Company a pro rata portion of commission on that part of the premium on which it may be necessary for the Company to refund to the assured. \* \* \*" Therefore, the plaintiff by voluntarily making a refund, which it was under no obligation to do under the policies, cannot be deemed to have done that which was necessary within the meaning of the agency contract. *Aero Ins. Co. v. Rand*, 258 N. Y. S. 381 (July 1, 1932).

DAVID AXELROD.

**NEGLIGENCE—COLLISION OF AIRCRAFT—INSTRUCTIONS.**—[California] The case of *Ebrite v. Crawford*, 67 Cal. App. Dec. 832, 5 P. (2d) 686 (Nov. 20, 1931) was transferred, upon petition of the appellants, to the Supreme Court, which court approved and adopted the opinion of the District Court of Appeal per Thompson, J. *Ebrite v. Crawford*, . . . Cal. . . ., 12 P. (2d) 937 (June 30, 1932).

For a digest, stating the facts of the case, see 3 JOURNAL OF AIR LAW 462.

F. D. F.

**NEGLIGENCE—COMMON CARRIERS—RES IPSA LOQUITUR.**—[California] The case of *Smith v. O'Donnell*, 67 Cal. App. Dec. 838, 5 P. (2d) 690 (Nov. 20, 1931) was transferred, upon petition of the appellant, to the Supreme Court, which court approved and adopted the opinion of the District Court of Appeal per Thompson, J. *Smith v. O'Donnell*, . . . Cal. . . ., 12 P. (2d) 933 (June 30, 1932).

For a digest, stating the facts of this case, see 3 JOURNAL OF AIR LAW 463.

F. D. F.

**NEGLIGENCE—LIABILITY FOR LOW FLIGHT OVER FOX FARM.**—[Federal] This was an action for damages, arising from the death of a number of foxes and the premature birth of others, alleged to have resulted from the negligent operation of the defendant's airplane which was flown over the plaintiff's fox-breeding farm in violation of the regulations establishing a minimum altitude of five hundred feet. It was claimed that the foxes were frightened and terrorized, and that the resulting damage of \$40,000 was a consequence of the fright attributable to the operation of the defendant's airplane.

*Held*, motion to direct a verdict for the defendant sustained. The court indicated that, notwithstanding the rule of the Nebraska Supreme Court, supported by a long line of cases, which permits recovery for fright although there be no immediate physical injury—and many authorities to the effect that where a wrong or negligent act causes an animal to be frightened and coincident therewith a person to be hurt in a tangible way—in such cases where negligence is shown and the result is a direct and proximate result of the negligence, recovery can be had, such appears to be contrary to sound reasoning and in conflict with another long line of cases. The infinite variety of frights, except in the case of concrete happenings, that are endured by human beings are beyond any feasible system of compensation. The abstract notion that mere fright is compensable is unsound public policy and rightfully declared to be so by the early courts of England and the federal courts since then. The law ought to be the same on reasoning and principle as to animals. The law is absolutely settled in this jurisdiction [*Chicago, B. & Q. R. Co. v. Gelvin*, 238 F. 14 (1917)] that an action for damages could not be predicated on mere fright. Furthermore there is insufficient evidence to justify the jury in finding as a fact any substantial damage to the foxes occasioned by the fright, even if the wrongs claimed were actual and damages were allowable. Also, the regulations concerning the altitude at which airplanes should be flown have the force and effect of law, and if actionable wrong and injury could be shown from the operation of the plane below that altitude, there would be prima facie evidence of negligence and actionable wrong. *Nebraska Silver Fox Corporation v. Boeing Air Transport, Inc.*, U. S. Dist. Ct. Neb. (Feb. 24, 1931—unreported).\*

DAVID AXELROD.

**WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT.**—[Wisconsin] Deceased worked for one Peterson in the latter's garage. One Boland was engaged in the distribution of circulars from an airplane—an enterprise in which neither Peterson nor the deceased had any interest. As Boland required the presence of a passenger to throw out the circulars, it had been arranged that Peterson should take a ride and perform this service. Peterson being unable to go, suggested the deceased—it being testified that this was done because of a fear that deceased would feel slighted if he were not offered the ride. *Held*, the evidence is sufficient to support the finding of fact by the Commission that deceased's presence in the plane was for the purpose of his own pleasure and was not connected with his employment by Peterson. Findings of fact by the Commission, if supported by evidence, are conclusive. *Indrehbo v. Industrial Commission*, ... Wis. ... 243 N. W. 464 (June 20, 1932).

ROBERT KINGSLEY.

**WORKMEN'S COMPENSATION—INFANTS—MINOR AS EMPLOYER—JOINT LIABILITY.**—[New York] Defendant Bethel, an infant, and one Kay, an adult, were engaged in the business of carrying passengers for hire in an airplane. Claimant was a pilot employed by them. After the accident, on coming

\*The decision of the court, by Woodrough, J., was furnished the AIR LAW INSTITUTE through the courtesy of Brogan, Ellick & Van Dusen of Omaha, counsel for defendant, and Rosewater, Mecham, Burton, Hasselquist & Chew of Omaha, counsel for plaintiff.

of age, Bethel sought to disaffirm the contract of employment and now claims exemption from liability under the workmen's compensation act. *Held*, as the contract of employment by the infant was not void but voidable, and as the liability under the Act applies automatically if there is a contract of employment, the infant cannot avoid liability for an accident which occurs prior to his disaffirmance. (The court then discusses the respective liabilities of Bethel and Kay.) *Rahman v. Bethel*, 236 App. Div 182, 258 N. Y. S. 286 (July 1, 1932).

ROBERT KINGSLEY.