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Robert Kingsley

Sam E. Gates

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# LIABILITY TO PERSONS AND PROPERTY ON THE GROUND

ROBERT KINGSLEY\* and SAM E. GATES†

The liability problems which face the owner or the operator of aircraft may be classified roughly under two main heads, each with two sub-divisions:

A. *Liability to other persons engaged in aviation:*

1. Liability to other aircraft, their passengers, their crew, and/or their cargo;<sup>1</sup>
2. Liability to his own passengers, cargo and/or crew;<sup>2</sup>

B. *Liability to persons not engaged in aviation:*

1. Liability to the owner (and/or occupier) of over-flown property (the so-called "trespass-nuisance" problem);<sup>3</sup> and
2. Liability to persons and property on the ground, for damage other than that caused by the mere passage of the aircraft.

Courts, writers and legislators are attempting to establish the solution of these questions. While all have certain common elements, yet, since the interests of the parties seeking redress differ widely, it by no means follows that the arguments and principles applicable to one of these situations can be utilized in the others.

Aviation is no longer a novelty, but is recognized by the courts as a commercial and public enterprise<sup>4</sup> of such scope that judicial

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\*Professor of Law, University of Southern California School of Law; Associate Editor, THE JOURNAL OF AIR LAW.

†Carnegie Fellow in International Law, 1930-1931; Comment Editor, Southern California Law Review.

1. Consult: *Ebrite v. Crawford*, 215 Cal. 724, 12 P. (2d) 937, 1932 U. S. Av. R. 9 (1932), adopting 67 Cal. App. Dec. 832, 5 P. (2d) 686 (1931); *Gruenke v. North American Airways Co.*, 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. R. 126 (1930); *Herrick, Olsen et al. v. Curtiss Flying Service Inc. and Byrnes*, 1932 U. S. Av. R. 110 (Sup. Ct. N. Y. 1932), discussed in: Note, 4 JOURNAL OF AIR LAW 103 (1933).

2. Consult: *Smith v. O'Donnell*, 215 Cal. 714, 12 P. (2d) 933, 1932 U. S. Av. R. 145 (1932), adopting 67 Cal. App. Dec. 838, 5 P. (2d) 690 (1931); Note, 4 JOURNAL OF AIR LAW 429 (1933), and cases there cited.

3. Consult: *Kingsley and Mangham*, "The Correlative Interests of the Landowner and the Airman," 3 JOURNAL OF AIR LAW 374 (1932).

4. *Hesse v. Rath*, 224 App. Div. 344, 230 N. Y. S. 676, 1928 U. S. Av. R. 315 (1928): "We may take judicial notice of the fact that aviation is no longer an experiment. Large sums of money have been expended and are being expended by municipalities in providing suitable airports. Commercial and passenger lines have been established for the transportation of passengers, mail and express. Railroads have established schedules in connection with

notice will be taken of the characteristics of an airplane.<sup>5</sup> Whereas the aviator who voluntarily or involuntarily brought his craft to earth on the land of another formerly was welcomed with enthusiasm and interest engendered by curiosity, his act in so doing now is the object of indignant protest and the subject of litigation.<sup>6</sup> Where the sole relation of aviator and landsman is that involved in the passage of aircraft in flight, public necessity and convenience may require the modification of the maxim *cujus est solum* to the limit of "possible effective possession";<sup>7</sup> but as an incident to the general welfare is it desirable that flyers be permitted to *alight* upon private premises or to drop objects thereon for mere pleasure or convenience or even for their own safety? Should aviation be perfected at the expense of those engaging in it, or should a public only passively interested pay a share of the cost price of this new industry? These are questions now pressing for answer and for which it is the purpose of this article to suggest a solution.

Several rules for fixing the liability for damage caused by aircraft might be suggested: first, a rule of absolute liability, wherein the owner or operator of the aircraft causing the damage will be excused only if the negligence of the injured party has been a contributing factor;<sup>8</sup> second, a rule of absolute liability, but with the defense of "act of God," or *vis major*, available;<sup>9</sup> or third, the ordinary rules of negligence—of torts on land—with liability dependent upon the cause of the fall.<sup>10</sup> The choice of one as preferred to another possibly may be determined best by a practical consideration of existing social and economic conditions. And this concept, expressed by Professor Hirschberg in one of the early articles in this field of law,<sup>11</sup> seems to have been employed

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air transportation companies for the more rapid transportation of passengers and valuable express, and the Government has availed itself of air transportation in carrying mail."

5. *Platt v. Erie Co. Agric. Soc.*, 164 App. Div. 99, 149 N. Y. S. 520, 1928 U. S. Av. R. 116 (1914); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 1930 U. S. Av. R. 1 (1930).

6. *Zollmann*, Law of the Air (1927), 74.

7. Consult: *Kingsley and Mangham*, "The Correlative Interests of the Landowner and the Airman," 3 JOURNAL OF AIR LAW 374 (1932).

8. This position has been upheld in *Baldwin*, "Liability for Accidents in Aerial Navigation," 9 Mich. L. Rev. 20 (1910); *Bogert*, "Problems in Aviation Law," 6 Corn. L. Quar. 217 (1921); *Hazeltine*, The Law of the Air (1911), 86; *Logan*, Aircraft Law (1928), 111; *Myers*, "The Air and the Earth Beneath," 26 Green Bag 363 (1914); *Newman*, "Damage Liability in Aircraft Cases," 29 Col. L. Rev. 1039 (1929); *Spaight*, Aircraft in Peace and the Law (1919), 78.

9. This rule is advocated in: *MacCracken*, "Air Law," 57 Am. L. Rev. 97 (1923); and *Zollmann*, Law of the Air (1927), c. 3.

10. *Hearne*, "The Liability of an Aviator for Damage to Persons and Property on the Ground," 37 W. Va. L. Quar. 269 (1930); *Spaight*, Aircraft in Peace and the Law (1919), 82, citing writers advocating this principle; *Tell*, Comment, 1 JOURNAL OF AIR LAW 363 (1930), discussing *Gruenke v. North American Airways, Inc.*, 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. R. 126 (1930).

11. *Hirschberg*, "Liability of the Aviator," 2 So. Cal. L. Rev. 405, 423 (1929) quoting: *Bohlen*, Studies in the Law of Torts (1926), 368: "The

by the court in the recent case of *Livingston v. Flaherty*,<sup>12</sup> which case is the genesis of this article.

Text writers apparently feel that the public weal will be served best by a rule of absolute liability, and the principle has been incorporated in Section 5 of the Uniform State Law of Aeronautics,<sup>13</sup> which to date has been enacted in twenty-one States, and the Territory of Hawaii.<sup>14</sup> The British Air Navigation Act of 1920, Section 9, contains a similar provision,<sup>15</sup> and absolute liability is the basis of the laws of most of the nations of continental Europe.<sup>16</sup> Some States accomplished the result by resorting to the general laws, and others have enacted specific statutes. After lengthy debate, the "principles of special and abnormal danger" connected with flying led the Commission Internationale Technique des Experts Juridiques Aériens (C. I. T. E. J. A.) to propose in its first Draft Convention Relative to Liability for Damages Caused to Third Parties on the Surface:

"Article I. (1) Any damage caused by an aircraft in maneuvers or in flight to persons or property on the surface shall give a right to compensation by the mere fact that the damage exists and that it has been caused by the aircraft.

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solution must depend on the existing social, political and economic conditions and conceptions prevailing at the particular time and in the particular places, the traditional attitude of mind and habit of thought, even the prejudices, of the class then and there dominating public thought."

12. Superior Court of the State of California, in and for the County of Los Angeles, No. 329013. Decided Nov. 15, 1932, by Minor Moore, J.

13. Section 5 provides: "The owner of every craft which is operated over lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or the owner or bailee of the property injured. If the aircraft is leased at time of the injury to person or property, both owner or lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately . . ."

It is to be noted that the sole defense available is that of the contributory negligence of the party injured.

14. Ariz. Laws (1929), c. 38; Del. Laws (1923), c. 199; Idaho Code (1932), §§21-101-21-110; Ind. Burn's Stat. (1929 supp.), §§3843.1-3843.12; Md. Bagby's Code (1929 supp.), Art. 1-A; Mich. Comp. Laws (1929), §§4811-4821; Minn. Mason's Stats. (1931 supp.), §§5494-7-5494-21; Mo. Rev. Stat. (1929), §§13905-13915; Mont. Laws (1929), c. 17; Nev. Comp. Laws (1929), §§275-288; N. J. Com. Stat. (1930 supp.), §§15-21-15-34; N. C. Code (1931), §§191(j)-191(w); N. D. Comp. Laws (1925 supp.), §§2971c1-2971c12; Penn. Stat. (1929), §§1421-1429; R. I. Laws (1929), c. 145; S. C. Code (1932), §§7100-7111; S. D. Comp. Laws (1929), §§8666L-8666W; Tenn. Code (1932), §§2716-2726; Utah Laws (1923), c. 24; Vt. Laws (1923), Act #155; Wis. Stat. (1931), §§114.01-114.10; Hawaii Rev. Laws (1925), §§3891-3905.

15. 10 & 11 Geo. V, c. 80, sec. 9 ([1920] L. R. Stat. 540, 544). Section 9 provides: ". . . where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered . . ."

16. Bulgaria, Finland, Sweden, Switzerland, Hungary, Germany, Austria, Italy, Danzig, Czechoslovakia, Belgium, France, Denmark, Norway and Russia. Algeria and Venezuela have adopted similar statutes. Consult: *Hirschberg*, "Liability of the Aviator," 2 So. Cal. L. Rev. 405, 410, 422 & 426 (1926); Note, 4 JOURNAL OF AIR LAW 411 (1933).

"(2) This liability may be reduced or avoided only in case the injured person is at fault and in accordance with the provisions of the law of the court before which the case is brought."<sup>17</sup>

The objections of several of the nations involved led the Commission, in its 1932 draft, to restrict the *amount* of this liability to the original value of the aircraft involved (but not less than two and one-half million gold francs)<sup>18</sup>—but the absolute character of the liability was left unchanged.<sup>19</sup>

In 1931 the Committee on Aeronautical Law of the American Bar Association presented for the consideration of that body a new "Uniform Aeronautical Code," designed to supersede the older Uniform State Law of Aeronautics. The proposed new code squarely rejected the doctrine of liability without fault and placed liability solely on the basis of negligence, with, however, the important practical qualification that the happening of the injury should be *prima facie* evidence of such negligence.<sup>20</sup> The proposed new code differed from the older laws in other particulars<sup>21</sup> and in 1932 the Committee announced that, as a result of a compromise<sup>22</sup> with the Commissioners on Uniform State Laws, it had receded from its position on liability—suggesting a revised code which, once more, imposed a liability without fault, but which materially restricted the cases in which the legal "owner"—as distinguished from the "operator"—of the craft was subject to such liability.<sup>23</sup> No final approval of either of these proposals was asked,

17. The Draft Convention in its proposed form will be found in 4 JOURNAL OF AIR LAW 97 (1933).

18. Article 4. The proposed draft contains, also, provisions providing for the giving of security by the persons responsible and imposing an *unlimited* liability in cases of fault or of failure to post the required security. For a discussion of the history of the draft, consult: *Muller*, "The C. I. T. E. J. A. and Liability Toward Third Persons on the Surface," 4 JOURNAL OF AIR LAW 235 (1933).

19. This convention was revised at a meeting in Rome, May 29, 1933, which made some changes in phraseology but did not change the essential character of the provisions discussed in the text. For a translation of the convention adopted, see page 567 of this issue.

20. "Section 6. *Damage to Persons and Property on the Ground*. Proof of injury inflicted to persons or property on the ground by the operation of any aircraft, or by objects falling or thrown therefrom, shall be *prima facie* evidence of negligence on the part of the operator of such aircraft in reference to such injury." 56 Rep. Am. Bar Assn. 329 (1931).

21. Principally with reference to the "right of flight."

22. "The section referred to, . . . in which absolute liability is imposed in some instances, was a matter of, if you please, political expediency, a compromise, to get a bill agreed upon." *George B. Logan*, in 57 Rep. Am. Bar Assn. 142 (1932).

23. "Section 5. *Damage to Persons and Property on the Ground*. The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner, lessee, or bailee of the property damaged.

"As used in this section, 'owner' shall include a person having full title to aircraft and operating it through servants, and shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire, but 'owner,' as used in this section, shall not include a bona fide bailor or lessor of such aircraft, whether gratuitously or for hire, or a mortgagee, conditional

the Committee merely reporting its actions. In 1933 the Committee once more declared that some progress with respect to its work on the Code had been accomplished, but asked leave to defer its final conclusion thereon until after it had had an opportunity further to consider the actions of the C. I. T. E. J. A. at its meeting in Rome in 1933.<sup>24</sup>

While all of these attempts to settle the problem of third party liability seem to indicate a definite trend toward the invocation of a rule of absolute liability, still the persistence of activity relative to the topic, the absence of any general definitive adoption of the modern proposals,<sup>25</sup> and the tendency of the courts, as shown by the cases discussed later, to ground their decisions in general rules of negligence, make a new examination on the basis of principle and practicality particularly pertinent.

As a preliminary matter, it should be pointed out that the form in which the absolute liability doctrine was enunciated in the old Uniform State Law of Aeronautics<sup>26</sup> did not afford a complete solution in consonance with established principles of justice for all cases in which third persons on the surface might be injured by aircraft.<sup>27</sup> Under that statement of the rule, the liability for injury was imposed upon the "owner" in every instance, even though the plane at the time of the accident were in the possession of a thief. The more modern statements, in the current drafts of the C. I. T. E. J. A. convention<sup>28</sup> and the new Aeronautical Code<sup>29</sup> have removed this inequality, placing the liability on the person for whose economic advantage the aircraft was being operated. But this correction of an obvious inequity does not affect the major and fundamental question of whether or not an absolute liability (whether limited or unlimited as to the *amount* recoverable) should be imposed on *anyone*. There still remains the consideration of those instances in which the act complained of was the result of a force wrongfully set in motion by the act or omission

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seller, trustee for creditors, of such aircraft, or other persons having a security title only; nor shall the owner of such aircraft be liable when the operator thereof is in possession as a result of theft or felonious conversion."

24. Adv. Program, 56th Annual Meeting, Am. Bar Assn., 39.

25. But note that Georgia has adopted the "Aeronautical Code" in the form in which it was first proposed in 1931. Ga. Laws (1933), Act. 206, p. 99.

26. *Supra*, footnote No. 13.

27. Consult: *Hearne*, "The Liability of an Aviator for Damage to Persons and Property on the Ground," 37 W. Va. L. Quar. 269 (1930).

28. Article 3 provides: "(1) The liability contemplated in the preceding articles shall attach to the *operator* of the aircraft, subject to his recourse against the author of the damage; (2) Any person who makes use of the aircraft on his own account shall be considered operator of the aircraft; (3) In case the name of the operator is not inscribed on the aeronautical register or any other official document, the owner shall be considered to be the operator until proof to the contrary is submitted." 4 JOURNAL OF AIR LAW 97-98 (1933) (italics added).

29. *Supra*, footnote No. 23.

of a third party, *e. g.*, a collision in mid-air due to the negligence of another aviator; the case where the aviator wilfully lands on private premises to avoid collision with another plane; those cases where natural forces, or other causes not based on negligence, *viz.*, "act of God," *vis major*, or latent defects which cannot be discovered by reasonable inspection, cause the plane to come crashing to earth; and cases of injuries attributable to a "forced landing" or the overthrowing of ballast, where no element of negligence on the part of the aviator is involved.<sup>30</sup> If the proximate cause of the act complained of is the wrongful act or omission of a third party, an "act of God" or *vis major*, it is submitted that the aviator should no more be held to absolute liability than should the operator of any other mechanical device. Where, however, latent defects are responsible, or where the aviator makes a "forced landing" on the premises of another, since the aviator has made the accident possible it would seem reasonable to impose liability upon him through the application of the maxim *sic utero tuo* in the first classification and a rule of "incomplete privilege" in the latter.<sup>31</sup>

Logically, there would seem to be more reason for applying a rule of absolute liability to the owners and operators of balloons than to the pilots of airplanes, for, as noted by the court in the early case of *Guille v. Swan*,<sup>32</sup> "the aeronaut had no control over its [the balloon's] motion horizontally; he is at the sport of the winds, and is to descend where and how he can; his reaching the earth is a matter of hazard." Accordingly, Guille was held to the same liability for damages incidental in his descent in Swan's garden and the consequent trampling of the crops by curiosity seekers who rushed to the balloonist's assistance, as though the balloon had been under his control, and he had guided it into Swan's garden.<sup>33</sup> In fact, as pointed out below, when dealing with airplanes the courts have almost invariably resorted to the rules of torts on land, and a number of states by legislative enactment have made the rules of torts on land applicable to aircraft.<sup>34</sup>

30. Consult: *Hearne*, "Liability of an Aviator for Damage to Persons and Property on the Ground," 37 W. Va. L. Quar. 269, 274-275 & 278 (1930).

31. *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188, 20 L. R. A. [n. s.] 152, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151 (1908); *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N. W. 221, 27 L. R. A. [n. s.] 312 (1910); *Bohlen*, "Incomplete Privilege," 39 Harv. L. Rev. 307 (1926).

32. 19 Johns. 381, 383, 10 Am. Dec. 234, 1928 U. S. Av. R. 53 (N. Y. 1822).

33. Consult, on this point: *Pollock*, Torts (8th ed.), 39.

34. Penn. Laws (1929), Act. 317, and Idaho Laws (1931), c. 41, apply the rule of torts on land to aircraft; Ariz. Laws (1929), c. 38, and Conn. Public Acts (1929), c. 253, impose absolute liability in cases where the pilot is negligent; R. I. Laws (1929), c. 1435, establishes absolute liability of the owner unless the plane is in the possession of a lessee, and in such case the owner is only liable for negligence; under S. C. Laws (1929), Act. 189, and Wis. Laws (1929), c. 348, the owner and lessee are jointly liable but only to the extent of their own negligence.

The principle of absolute liability finds its roots in the opinion of Lord Blackburn in *Rylands v. Fletcher*.<sup>35</sup>

"The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it there at his peril, and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default or perhaps that the escape was the consequence of *vis major*, or the act of God . . . ."

Absolute liability is an outgrowth of the concept of the absolute protection of private property, whereby one who trespassed on the lands of another was liable irrespective of intent, negligence or accident.<sup>36</sup> Modern jurisprudence, however, has tended to require the intent or fault element before liability can be established and to deny recovery to anyone who has been the victim of a "pure" accident. If, in arriving at the conclusion of the court in *Rylands v. Fletcher*, there was a consideration of any fault element, the fault must have been one occurring prior to the actual accident, *i. e.*, the negligent act must have been that of the *accumulation* of the potentially dangerous thing on the land and not its *escape* therefrom.<sup>37</sup> It is submitted that an airplane does not "escape" onto the land of another unless it is, or was at the time of leaving the ground on its flight, under human control; no more than an automobile does it have the *inherent* power of doing harm, for so long as it remains stationary it is harmless.<sup>38</sup> Since the mere ownership or operation of an airplane or of an automobile cannot be construed within themselves to constitute wrongful conduct, to fix liability for damage sustained by virtue of such ownership or operation there must be something more—some act or omission comparable to the *accumulation* of a thing "likely to do mischief if it escapes" found to be present in *Rylands v. Fletcher*.

It has been argued with some force that the doctrine espoused in *Rylands v. Fletcher* is not applicable in the case of movable chattels.<sup>39</sup> Lord Blackburn, in writing his opinion, distinguished

35. L. R. 3 H. L. 330 (1868).

36. Consult: *Hirschberg*, "Liability of the Aviator," 2 So. Cal. L. Rev. 405, 407-408 (1929).

37. Consult: *McNair*, *The Law of the Air* (1932), 54.

38. *McNair*, *The Law of the Air* (1932), 63.

39. *McNair*, *The Law of the Air* (1932), 55, citing Baron Parke in *Quorman v. Barnett*, 6 M. & W. 510 (1840). Butt, J., in *The European*, 10 P. D. 99 (1885), citing *Tarry v. Ashton*, 1 Q. B. Div. 314 (1876), said: "Those [where defendants were bound to manage their property so as not to injure other persons, negligence or no negligence] are cases where the defendants were persons in possession of real property, and with reference to them the rule of law seems to be that they must take care that their property is so used or managed that other persons are not injured, and that, whether their property be managed by themselves or their servants. The same rule does not apply to the use or management of moveable chattels."

between cases where one collected a potentially dangerous instrumentality upon his property and those where damage was done to the person or property by collision on land or sea, in which latter case the proof of negligence is essential, by stating:

"Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so those who go upon the highway, or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. . . . In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident . . . ."

As pointed out by Lord Justice Fletcher Moulton in *Wing v. London General Omnibus Company*,<sup>40</sup> before the rule of absolute liability might be applied in fixing the responsibility of a motor transit company for injuries inflicted upon one of its passengers, it was incumbent upon the plaintiff

"to prove that this particular motor omnibus was or that motor omnibuses generally were unmanageable, or dangerous, to such an extent as to constitute a nuisance in the eye of the law, or to call into play the doctrine of *Rylands v. Fletcher*. For the reason I have already given, the mere occurrence of the accident is not evidence of negligence much less of the more difficult issue of nuisance, and beyond this there was no relevant evidence of any kind . . . ."

The reasons advanced in favor of applying the doctrine of absolute liability in cases involving injury by aircraft to third persons and property on the ground are: (a) the helplessness of persons on land to avoid injury;<sup>41</sup> (b) the dangerous character of aviation—that an airplane is inherently dangerous and that the safety of flight is dependent upon factors beyond human control;<sup>42</sup> and (c) the practical impossibility of the injured party's proving

40. [1909] 2 K. B. 652, 666.

41. A Report of the British Aerial Transport Committee, 146 L. T. 106 (1918), stated: "Persons on land are practically powerless to insure their own safety by precautionary measures against damage caused by the fall of aircraft or objects carried therein."

In discussing the first proposed Aeronautical Code, at the meeting of the American Bar Association in 1931, General Nathan W. MacChesney placed his preference for the absolute liability doctrine on the following basis: "The fact of the case is that the man upon whose head something is dropped from an airplane, in his office or upon his front porch or lawn, has not sought out that contact, has not been a party to it in any way, and the person who has been the cause of it, regardless of fault, might well be held to a higher degree of responsibility than where the person injured has gotten on some conveyance, for instance." 56 Rep. Am. Bar Assn. 88-89 (1931).

42. *Baldwin*, "Liability for Accidents in Aerial Navigation," 9 Mich. L. Rev. 20, 22 (1910); *Myers*, "The Air and The Earth Beneath," 26 Green Bag 363, 365 (1914); *Zollmann*, *Law of the Air* (1927), c. 3, p. 71. An illustrative expression is that taken from *Baldwin*, "Liability for Damages in Aerial Navigation," 9 Mich. L. Rev. 20, 22: "The thing [an airplane which has fallen on the house of a third party] was, while in the air, inherently and continually a menace to the security of everything beneath it. It was a danger to all men as well as to the property of all men."

what has caused the accident.<sup>43</sup> Examined in the light of a highly mechanized society, these arguments lose much of their force, and it is believed that existing rules of law afford an adequate remedy to the injured landsman. As noted above, the rule of *Rylands v. Fletcher* is inapplicable to movable chattels, and the inability of a person on the ground to avoid injury from an airplane differs only in degree from the ability of a pedestrian to avoid injury from an uncontrolled automobile. In either instance, it must be assumed that the operator no longer has control of the instrumentality. The question as to whether the airplane is an inherently dangerous instrumentality is purely factual and the argument lacks merit when it is discovered that during the period from July to December, 1932, there was only one accident to every 547,178 miles flown in scheduled air transport service.<sup>44</sup> Nor can the writers agree with those who contend that the safety of aviation is subject to the whims of nature, *i. e.*, wind, fog, electrical and snow storms, *et cetera*, and that a multitudinous number of undetermined causes may bring a plane crashing to earth or compel a "forced landing." Detailed statistics as to the causes of accidents are not available, nor would they necessarily be conclusive. Government meteorological stations provide frequent weather reports forecasting, with reasonable accuracy, flying and atmospheric conditions; "two-way" radio communication furnishes a means for constant checking of advance weather conditions and other needed data; radio controlled beacons and beam landing devices remove other dangers attributed to the forces of nature. Furthermore, it is believed that careful inspection of the aircraft before each flight would eliminate most of the accidents now attributed to the so-called structural and mechanical defects. As to the third reason—the practical impossibility of showing the cause of the accident—the doctrine of *res ipsa loquitur* would seem to be a complete answer. If these conclusions be correct, then the principles of law applicable to torts on land—the rules of negligence and proximate cause—might well be employed in the field of aviation.

Indeed, a consideration of the cases involving this problem of law indicates that, almost universally, they have been determined by the application of these principles. The case of *Livingston v. Flaherty*,<sup>45</sup> recently decided in the Superior Court of the State of California for Los Angeles County, serves as an illustration of

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43. *Newman*, "Damage Liability in Aircraft Cases," 29 Col. L. Rev. 1039, 1041 (1929), and authorities there cited.

44. 4 Air Comm. Bul. 418 (March 1, 1933).

45. *Supra*, footnote No. 12.

the result to be obtained when a court adheres to the aforementioned tenets—a result consonant with the principles of equity and justice. Couched in rhetoric worthy of Milton or Carlisle, the conclusion of the court appears both logical and sound. Briefly, the facts were these:

Defendant Flaherty, a licensed air pilot, left a Los Angeles suburban airport late in the afternoon for the purpose of flying to a desert ranch some ninety miles to the east, there to engage in a deer hunting expedition. He had pre-arranged with his host to have a lighted landing field to guide him in alighting. Due either to inattention or to obscurity caused by haze, the defendant flew too far to the left, missed the entrance to San Gorgonio Pass and found himself in Morongo Valley in total darkness. Flaherty circled the valley a number of times at an elevation of one thousand feet. From this height he observed plaintiff's husband (Livingston) leave his home with a light and proceed out on to the desert. When the light finally remained stationary, the defendant interpreted it as an invitation to land. While the plane was in the process of landing and about three hundred feet from the ground, the plaintiff's husband suddenly started to run towards the course of the plane. As the plane touched the ground, Livingston was struck by the left wing and killed. The plaintiff (widow of deceased) brought an action for wrongful death, and the defendant contended that the deceased invited him to land, and that he (deceased) voluntarily assumed the risk by placing himself in a position of danger. The court held the defendant to be liable. Apparently it applied the rules of torts on land, and took into consideration the cause of the descent, in declaring: that the defendant was engaged in a dangerous undertaking; that under the circumstances he had not exercised the care of the ordinary prudent man in attempting to make such a landing; that it was not a "forced landing"; that one's life and property are not to be endangered by another's use of a dangerous device; and that the defendant had the last clear chance to avoid the injury.<sup>46</sup>

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46. The following are a few illustrative excerpts from the opinion:

"Any instrument which can be carried into the air and which if not guided by intelligence, may drop from the air upon the person or the property of another, is itself too dangerous to undertake to land upon private premises without prearrangement and without every precaution to avoid destruction of property or of life."

"Every operator of an airplane knows the likelihood of loss of control of his plane; the hazards in landing; the loss of wings in flight, and a myriad of other accidents which may happen from the moment of taking off to the moment of successful descent."

"The defendant here was bent upon a pleasure-seeking excursion into a desert community. He arrived in the night-time where no landing-place was provided. Instead of leaving the valley and returning to some equipped air-

That the general rules governing torts on land will be applied in aviation cases was the effect, likewise, of the recent case of *Gruenke v. North American Airways, Inc.*,<sup>47</sup> where the court had before it the problem of the degree of caution to be exercised by an aviator in landing a plane so as to exempt him from liability for damages to a second plane stalled on a runway. The upper court held that the trial judge had committed prejudicial error in instructing the jury that "West [the pilot] was to use the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct and operation of an airplane and making a landing," and declared that West was required to exercise only ordinary care.<sup>48</sup> In short, the court held that the rules applicable to torts on land were controlling.

Ordinary care has been defined as that degree of care which people of ordinarily prudent habits—people in general—reasonably could be expected to exercise under any particular given circumstances.<sup>49</sup> Reasonable or ordinary care is always a relative term, varying according to the circumstances of a particular case;<sup>50</sup> and the nature of the undertaking in which the party sought to be charged was engaged,<sup>51</sup> as well as the nature and characteristics of the instrumentality used,<sup>52</sup> must be considered. More vigilance and caution are required in the doing of acts at a place where injury may be anticipated,<sup>53</sup> and a person engaging in an act which the circumstances indicate may be dangerous must take all the care which prudence would suggest to avoid injury.<sup>54</sup> Care must be proportioned to the danger to be avoided

port, he beguiled himself into the delusion that the solitary homesteader with his lantern by his side would be a facility sufficient to direct him to a safe landing. He had confidence in his power of control, but he lacked knowledge of the terrain."

"To land with a plane of fifty or sixty feet in width, within the radius of the rays from a lantern on such land and under such circumstances, was an undertaking that was foolhardy and the fruit of a thoughtless enterprise. He did not guard against the destruction of life or property with such care as that ordinarily exercised by a prudent person."

"Upon the principle that one's life and property are not to be imperiled by another's use, of his own dangerous device by direct injury, then the defendant must be liable for taking the life of the deceased under the circumstances revealed by this case."

"When defendant saw deceased at the distance of more than three hundred feet away, running toward the course of the plane, he knew the deceased was in a position of danger and if he was conscious of such danger, he knew that it was imprudent to land under such circumstances."

47. 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. R. 126 (1930).

48. Consult: *Tell*, 1 JOURNAL OF AIR LAW 363 (1930), for a comment on this case.

49. *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53 (1910); *Chicago, Milw. & St. P. Ry. v. Moore*, 166 F. 663, 23 L. R. A. [n. s.] 962 (C. C. A. 8th 1909).

50. *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 P. 976 (1907); *Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 A. 285 (1904).

51. *Brand v. Schnectady, etc., T. R. R.*, 8 Barb. 368 (N. Y. 1850).

52. *Weihe v. Rathjen Mercantile Co.*, 34 Cal. App. 302, 167 P. 287 (1917).

53. *Indianapolis Union Ry. v. Boettcher*, 131 Ind. 82, 28 N. E. 551 (1891).

54. *McGrew v. Stone*, 53 Pa. 436 (1866).

and the consequences reasonably to be anticipated from such conduct,<sup>55</sup> and where death may be caused by an agency lawfully in use, ordinary care requires that every known means be used to prevent it.<sup>56</sup> "The ultimate and controlling test of the exercise of reasonable care is, not what has been the practice of others in like situations, but what a reasonably prudent person would ordinarily have done in such a situation."<sup>57</sup>

To be specific, the amount of caution required to meet the measure of "ordinary care" demanded of an owner or operator of an aircraft will necessarily be greater than that required of the owner or operator of an automobile or of a locomotive. "You will have to remember that in dealing with travel by airplane you are dealing with a kind of transportation which is navigating a new element. There are many more factors which are unknown, unforeseeable and not preventable arising in connection with an airplane journey than with a railroad journey. As an example, the weather is a most vital and important consideration in the piloting and management of airplanes, and whereas it may play some part in connection with the running of railroad trains, it certainly plays a very minor role."<sup>58</sup> However, it must also be remembered that those who utilize aircraft as a means of transportation have at their disposal the latest and most complete scientific developments to guard against these "factors." "Ordinary care" requires the use of these facilities, and one who does use them has satisfied its demands.

By virtue of the application of the foregoing well-established rules of law, a fair association which neglected to provide adequate safeguards for the spectators around the landing field was held liable for injuries received by a child who was struck by the wing of an airplane,<sup>59</sup> and an agricultural society was held responsible to a patron who was caught by the rope of an ascending balloon when it was shown that the society had failed to erect barriers around the balloon.<sup>60</sup> Likewise, an amusement company has been held liable for injuries caused by the breaking of a cleat used

55. *Fairbairn v. American River Elec. Co.*, 170 Cal. 115, 148 P. 788 (1915).

56. *White v. Red Mountain Fruit Co.*, 186 Cal. 335, 199 P. 318 (1921).

57. *Chicago, Milw. & St. P. Ry. v. Moore*, 166 F. 663, 668, 23 L. R. A. [N. S.] 962 (C. C. A. 8th, 1909). For a discussion of degrees of care, consult: *Elliott*, "Degrees of Negligence," 6 So. Cal. L. Rev. 91 (1933).

58. *Kirkpatrick, J.*, in *Law v. Transcontinental Air Transport, Inc.*, 1931 U. S. Av. R. 205, 209 (D. C. Pa. 1931).

59. *Platt v. Erie County Agric. Soc.*, 164 App. Div. 99, 149 N. Y. S. 520, 1928 U. S. Av. R. 116 (1914).

60. *Roper v. Ulster County Agric. Soc.*, 136 App. Div. 97, 120 N. Y. S. 644, 1928 U. S. Av. R. 102 (1909).

to anchor a balloon,<sup>61</sup> and a street railway company which engaged a balloonist for advertising purposes has been held responsible for the death of a boy resulting from the fall of one of the poles used to steady the balloon.<sup>62</sup> Still another case was one in which the plaintiff sought to recover from the Wisconsin State Board of Agriculture for injuries received in an accident caused by an airplane which had been engaged by the Board for public exhibition purposes. There it was decided that, in the absence of any showing of negligence on the part of the members of the Board, there was no individual liability; and further, that there could be no liability because the State Board was a governmental agency engaged in the pursuit of a governmental function.<sup>63</sup>

In at least two cases, courts have refused to permit recovery by a plaintiff on the grounds that there was evidence that the injured party was guilty of contributory negligence. In *Burns v. Herman*,<sup>64</sup> a fair association was excused from liability for the death of a spectator who had left his seat in the grand stand after the scheduled balloon races had been called off by the manager, and who, after urging the balloonist to ascend, assisted in the preparations for flight and was struck by a falling pole used to support the balloon. In a suit to recover for injuries sustained by a plaintiff when his foot was caught in the dangling ropes of a balloon, the lower North Carolina court granted a nonsuit on the theory that the plaintiff had been guilty of contributory negligence in responding to the call of an attendant to "help hold this balloon" without heeding the public warning of danger.<sup>65</sup>

The problem of the liability of the owner of an airplane for damage caused by the fall of his plane upon the property of another seems to have been presented in only a few American cases. In *Kirschner v. Jones and White*,<sup>66</sup> judgment was entered against the defendants for damages sustained when their plane crashed into the plaintiff's house. However, in two other cases, *Sysack v.*

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61. *Peckett v. Bergen Beach Co.*, 44 App. Div. 559, 60 N. Y. S. 966, 1928 U. S. Av. R. 99 (1899).

62. *Richmond & M. Ry. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258, 2 Am. Neg. Rep. 473, 1928 U. S. Av. R. 86 (1897).

63. *Morrison v. MacLaren*, 160 Wis. 621, 152 N. W. 475, L. R. A. 1915 E, 469, 1928 U. S. Av. R. 126 (1915).

64. 48 Colo. 359, 113 P. 310, 1928 U. S. Av. R. 108 (1910). In an unreported New York case, *Read v. N. Y. City Airport, Inc.*, decided in the N. Y. Municipal court, August 29, 1932, and commented on in 4 Air Law Rev. 92 (1933), and in 4 JOURNAL OF AIR LAW 276 (1933), the negligence of plaintiff's agent was held to be a bar to recovery. The court stated, "The rules of law applicable to torts generally govern in this type of cases."

65. *Smith v. Cumberland County Agric. Soc.*, 163 N. C. 346, 79 S. E. 632, Ann. Cas. 1915B, 544, 1928 U. S. Av. R. 112 (1913). (The supreme court reversed the order on the ground that the question of the existence of contributory negligence should have gone to the jury.)

66. 1932 U. S. Av. R. 278 (Sup. Ct. N. J. 1932).

*De Lisser Air Service Corporation*,<sup>67</sup> where the plaintiff's house was struck by one of the defendant's planes, and *Johnson v. Curtiss N. W. Airplane Co.*,<sup>68</sup> where the defendant's airplane became unmanageable and fell on the plaintiff's lawn, the exact problem was not presented before the court, for in each case the plaintiff sought to enjoin the defendant from operating planes over his premises in the future. In the New York case, the complaint was dismissed, and in the latter case, the Minnesota court refused the injunctive relief on the ground that public interest justified the use of the upper air spaces in the absence of any showing of a substantial injury to the private property owner.<sup>69</sup> Much the same conclusion was reached in *Smith v. New England Aircraft Company, Inc.*,<sup>70</sup> where the court felt that the damage proved was insufficient to justify injunctive relief on the ground of nuisance. At the same time, in a somewhat similar case, a federal court held that the causing of dust in substantial and annoying quantities and the dropping of circulars which fell upon and littered plaintiff's land were nuisances, and could properly be enjoined.<sup>71</sup>

If an airplane is so negligently operated as to collide with an automobile travelling along the public highway, the owner should be held responsible for injuries sustained by the occupants of the motor vehicle, even though the airplane should chance to be under control of a state officer engaged in state business.<sup>72</sup> Upon the same theory, a traveller along the highway is entitled to recover for injuries received when an abandoned balloon used for exhibition purposes fell upon the plaintiff,<sup>73</sup> for a reasonably prudent man can foresee the probability of just such an accident under the circumstances.

The rulings of the American courts on this problem seem to accord with the decisions of the continental tribunals. The case of *Borch v. A/S Fredrikstad Forende Teglwerker*<sup>74</sup> involved a factual situation comparable to *Guille v. Swan*, and the Norwegian court,

67. 1931 U. S. Av. R. 7 (Sup. Ct. N. Y. 1931).

68. 1928 U. S. Av. R. 42 (Dist. Ct. Minn. 1923).

69. The court said, "True, there is some danger from this source [falling airplanes] but such accidents are infrequent, and this hazard is infinitely less than is constantly encountered in every walk of life from various other causes. An occasional accident has never been considered a sufficient reason for suppressing a useful industry, but may justify reasonable legislative regulation."

70. 270 Mass. 511, 170 N. E. 385, 1930 U. S. Av. R. 1 (1930).

71. *Sweetland v. Curtiss Airports Corp.*, 65 F. (2d) 201, 1932 U. S. Av. R. 1 (C. C. A. 6th 1931), modifying 41 F. (2d) 929, 1930 U. S. Av. R. 21 (D. C. Ohio, 1930).

72. *Sollack v. State of New York*, 1929 U. S. Av. R. 42 (Ct. Cl. N. Y. 1927).

73. *Canney v. Rochester Agric. & Mech. Assn.*, 76 N. H. 603, 79 A. 517, 1928 U. S. Av. R. 105 (1911).

74. *Norsk Retstidende for 1925* (Norway), translated and reported in 2 JOURNAL OF AIR LAW 433 (1931). A similar case is reported in Scotland: *Scott's Trustees v. Moss*, 17 Ct. of Sessions (4th series) 32 (1899).

after finding that the defendants' agent had been negligent permitted the plaintiff to recover for damage caused to its factory by the fall of the defendants' plane and the assembling of crowds after the crash. In keeping with this decision is the decision of a French court holding the owner of an airdome liable for damage done adjoining fields by his airplanes.<sup>75</sup>

Closely akin to these problems of liability for damage resulting from actual contact with the airplane is that relative to damage resulting from the fright occasioned animals, and the consequent injury to person or property. In *Neiswonger v. Goodyear Tire and Rubber Company*,<sup>76</sup> a federal court held that flight below five hundred feet, which caused plaintiff's team to become frightened and run away, thereby injuring plaintiff, was actionable negligence. On the other hand, a Nebraska court refused to permit recovery for fright to foxes resulting in the abortion and destruction of their young, alleged to have been caused by the defendant's negligently flying close to the fox farm,<sup>77</sup> and the United States Comptroller General has rendered an opinion to the effect that where an army plane, flying low over a pasture field and landing on adjacent property, causes cattle to stampede with a resultant shrinkage in weight, there can be no recovery, for it is an "accidental happening for which there is no liability in damages."<sup>78</sup>

It is submitted that the present rules of negligence and proximate cause applicable to torts on land have given the injured party an adequate remedy in all cases in the field of aviation as yet presented to the courts. Until more valid reasons are suggested, to impose a rule of absolute liability on the owners and operators of aircraft for damage to third persons and property on the ground would work an unnecessary hardship on the aviation industry. The aviator, as much as any other alleged tortfeasor, should have available the pleas of "act of God," *vis major*, or the wrongful act or omission of a third party. Undoubtedly, there will continue to be, as there have been in the past, cases where the defendant should be required to go forward with the evidence through the invocation of the doctrine of *res ipsa loquitur*. Then, if there be those cases where the aviator wilfully lands on the property of an-

75. *Bertrand, Brinquant, Mauge. et al. v. Sociétés Farman*, 3 *Revue Juridique Int. de la Locomotion Aérienne*, 282 (*Tribune civil de la Seine*, 1912), discussed in: 24 *Juridical Rev.* 321 (1913).

76. 35 F. (2d) 761, 1929 U. S. Av. R. 96 (D. C. Ohio 1929).

77. *Nebraska Silver Fox Corp. v. Boeing Air Transport, Inc.*, 1932 U. S. Av. R. 164 (D. C. Neb. 1931). The court held that there was insufficient evidence to justify the finding of any substantial damage to the foxes occasioned by fright.

78. *Cattle Frightened by Airplane*, 3 *Comp. Gen.* 234, 1928 U. S. Av. R. 46 (1923).

other, either because of a "forced landing," or for reasons of pleasure or convenience, as in *Livingston v. Flaherty*,<sup>79</sup> the aviator should be liable in damages for all of the natural and proximate consequences of his act. Necessity may justify an entry upon the land of another in order to save human life,<sup>80</sup> property rights may be suspended by forces beyond human control, but where one deliberately chooses to invade the rights of another in order to save his own life or property, just compensation should be made.<sup>81</sup> Society has an interest in saving human life and property from destruction, but its only concern with the cost of salvage is that it should be put upon him who, as between individuals concerned, should bear it. As between the individuals concerned, it is obviously just that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose upon one who derives no benefit from the act.

As stated by Professor Bohlen, in his article on "Incomplete Privilege":<sup>82</sup>

" . . . For the purpose of saving life or property from destruction, an act may be so far privileged as to deprive the person whose interest is invaded or threatened with invasion of the privilege which he would otherwise have to terminate or prevent the invasion and to preclude liability for the mere harmless invasion of the right of the owner to the exclusive possession of his property, but that it is not so far privileged as to relieve him from liability to pay for any material harm that he does thereby. This privilege may be described as incomplete. . . . An act intended to invade another's legally protected interests is privileged only if done to protect or advance some public interest or an interest of the actor. If the act done is only for the protection of one of the actor's interests, it must be an interest of value greater than, or at least equal to, that of the interest invaded, or if the interests are similar, the harm which the act is appropriate to prevent must be substantially equal to or greater than that which it is intended or likely to cause."

The imposition of such principles of liability, it is believed, would afford the most equitable and the fairest solution to our problem, affording to both landowner and aviator equal rights and remedies.

79. *Supra*, footnote No. 12.

80. *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188, 20 L. R. A. [n. s.] 152, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151 (1908)

81. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N. W. 221, 27 L. R. A. [n. s.] 312 (1910).

82. *Bohlen*, "Incomplete Privilege," 39 Harv. L. Rev. 307 (1926).