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Notes, Comments, Digests

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NOTES, COMMENTS, DIGESTS

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COMMENTS

CUSTOMS—CRIMES—LIENS—PRIORITY OF CHATTEL MORTGAGE OVER LIEN FOR VIOLATION OF AIR COMMERCE REGULATIONS.—[Federal] The owner of an airplane flew it from Mexico to an airport in the United States without giving prior notice to the appropriate Collector of Customs and without making his first landing at an official airport of entry—all in violation of the Air Commerce Act and the Regulations thereunder.[1] The plane was subject to a valid chattel mortgage in favor of the intervenor (Batre), who had no notice of this breach of the law and regulations. The United States filed a libel against the plane to enforce the statutory lien for the penalty provided for such violations. The District Court for Arizona held that the intervenor's mortgage-lien was prior to the statutory penalty-lien.[2] On appeal to the Circuit Court of Appeals, it was *held,* that the statutory lien was prior to that of the mortgage. *United States* v. *Batre,* 69 F. (2d) 673 (C. C. A. 9th, March 12, 1934).

The Circuit Court reasoned that the usual rule of construction against penalties was subject to an exception in favor of revenue laws[3] and that to permit the mortgage to obtain a priority would result in evasions of the law, since an owner could mortgage his plane beyond its sale value and thus escape the infliction of any penalty.[4] The result reached is that which obtains under the general admiralty laws in similar cases[5] and under the revenue provisions of the liquor laws[6]—it having taken express legislation[7] to protect the mortgagees against forfeiture under the Prohibition Laws.

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1. Act of May 20, 1926, c. 344, §§7(b) and 11(b), 44 Stat. at L. 568, 572 and 574, 49 U. S. C. §§177(b) and 181(b); Foreign Air Commerce Reg. of Nov. 5, 1930, 1930 U. S. Av. Rep. 378; Aircraft Customs Reg. of Jan. 3, 1929, 1929 U. S. Av. Rep. 267; Airports of Entry Reg. of Nov. 1, 1931, 1932 U. S. Av. Rep. 295.

2. *United States* v. *One Waco Bi-plane,* 1933 U. S. Av. Rep. 159 (D. C. Ariz. 1932), discussed in 5 JOURNAL OF AIR LAW, 153 (1934).

3. Citing: *United States* v. *Stowell,* 133 U. S. 1, 12, 10 Sup. Ct. 244, 246, 33 L. Ed. 555, 558 (1890).

4. "If the penalty is incapable of enforcement, which is the result if the decision of the lower court is affirmed, then this provision affords no aid in preventing violation of the law. It can readily be seen that if a lien created by a chattel mortgage is held superior to this penalty lien those so disposed can always evade it by mortgaging the airplane up to or beyond its actual value, with the result that the government could never collect the penalty and the law would be without force. Its object would not be accomplished." 69 F. (2d) 673, 675.

5. *Harmony* v. *United States,* 2 How. 210, 11 L. Ed. 239 (U. S. 1844); *United States* v. *The Schooner Little Charles,* Fed. Cas. No. 15,612 (D. C. N. Y. 1818); *Boggs* v. *Commonwealth,* 76 Va. 993 (1882).

6. *Lindsley* v. *Werner,* 86 Colo. 545, 283 P. 534 (1929); consult an exhaustive collection of the cases on this point in, Note, 47 A. L. R. 1055 (1926). The Supreme Court upheld the constitutionality of a statute resulting in forfeiture of an innocent owner's interest in *Van Oster* v. *Kansas,* 272 U. S. 465, 47 Sup. Ct. 133, 71 L. Ed. 354, 47 A. L. R. 1044 (1926).

7. Act of Oct 28, 1919, c 85, 41 Stat at L. 305, 315, 27 U. S. C. §40; for a collection of the state statutes consult Note. 47 A. L. R. 1055, 1064 (1926).

NEGLIGENCE—AIRPORT COLLISION—RES IPSA LOQUITUR.—[Washington] The defendant, wishing to start the motor of his plane, made the necessary adjustments in the cockpit, then went forward to crank the motor. He failed, however, to put chocks under the wheels. Upon turning the propeller, the motor started, idling slowly, then, through some unexplained cause, the throttle opened—causing the engine to speed up. Before the defendant could board the plane it got away and, with no one at the controls, struck the plaintiff's hangar, bursting into flames which destroyed both the hangar and the plane. Plaintiff relied on the rule of *res ipsa loquitur*. The trial court was of the opinion that the rule was inapplicable, because, at all events, while an inference of negligence might arise from the circumstances, the defendant was entitled to rebut it, and the evidence showed that he used such care as a careful pilot would have used under similar circumstances. Accordingly, judgment was for the defendant, from which this appeal is taken. *Held,* that the judgment should be affirmed. Although the court spoke favorably of the applicability of the doctrine of *res ipsa,* it was of the opinion that a reversal was unwarranted under the evidence. *Genero* v. *Ewing,* 28 P. (2d) 116 (Wash. 1934).

In the United States, there are said to be three rules of liability applicable to damages caused by aircraft on the surface.[1] Section 5 of the Uniform State Law of Aeronautics provides, in effect, for absolute liability in every case of injury to person or property, the only available defense being that of contributory negligence.[2] In some jurisdictions a similar rule of absolute liability has been adopted, but with the defense of *vis major* available.[3] Still other jurisdictions apply the ordinary rules of negligence as applied generally to torts on land.[4]

The following principal arguments are advanced as a justification for the rule of absolute liability: (1) That in most cases, persons on land are helpless to avoid injury from aircraft; (2) that the airplane is inherently dangerous; (3) that, as a practical matter, it is impossible for the injured person to prove the cause of the accident.[5] With respect to the inability of a person to avoid injury from an airplane, it may well be asked whether it is greater, to any marked degree, than his inability to avoid injury from an uncontrolled automobile? The injury appears to be just as unavoidable in the case of an automobile which is out of control by reason of a defective steering gear or brakes, as it is from an airplane. With the modern developments in landing facilities, beacons and radio beams, in-

1. *Kingsley, Robert,* and *Gates, Sam E.,* "Liability to Persons and Property on the Ground," 4 JOURNAL OF AIR LAW 515 (1933); *Kaftal, Andre,* "The Problem of Liability for Damages Caused by Aircraft on the Surface," 5 JOURNAL OF AIR LAW 179 (1934).

2. This rule has been adopted by more than one-third of the States. The principle of absolute liability is based upon the doctrine of *Rylands* v. *Fletcher,* L. R., 3 H. L. 330 (1868). *Newman, Arthur L., II,* "Damage Liability in Aircraft Cases," 29 Col. L. Rev. 1039 (1929); Note, 47 Harv. L Rev. 345 (1933).

3. *MacCracken, Wm. P., Jr.,* "Air Law," 57 Am. L. Rev. 97 (1923); *Zollmann, Carl,* "Law of the Air" (1927), c. 3.

4. *Greunke* v. *North American Airways Co.,* 201 Wis. 565, 230 N. W. 618, 69 A. L. R. 295, 1930 U. S. Av. R. 126 (1930), discussed in 1 JOURNAL OF AIR LAW 363 (1930); *Wilson* v. *Colonial Air Transport,* 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329, 1932 U. S. Av. R. 139 (1932); *Read* v. *N. Y. City Airport,* 145 Misc. 294, 259 N. Y. S. 245, 1933 U. S. Av. R. 31 (1932); *Hearne,* "Liability of Aviator for Damage to Persons and Property," 37 W. Va. L. Quar. 269 (1931).

5. *Baldwin, S. E.,* "Liability for Accidents in Aerial Navigation," 9 Mich. L. Rev. 20 (1910); *Newman, Arthur L., II,* "Damage Liability in Aircraft Cases," 29 Col. L. Rev. 1039 (1929); 56 Rep. Am. Bar Assn. 88-89 (1931).

juries occasioned by aircraft generally will be confined to cases where the airplane is out of control by reason of some defective mechanism. The radio beam has successfully demonstrated that a plane may be kept on its course and landed safely, even though the pilot's vision is totally obscured.[6] It cannot be said that an airplane is inherently more dangerous than an automobile or train. In either case, assuming due care in operation, the danger is negligible so long as the mechanisms function properly. As to the practical inability of the injured person to show the cause of the accident, it has been suggested that the doctrine of *res ipsa loquitur* is a complete answer.[7]

The theory of *res ipsa loquitur* has been well stated in the case of *Smith* v. *O'Donnell*,[8] wherein the court said: "The foundation or reason for the doctrine of *res ipsa loquitur* is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there was no negligence the defendant can then most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence." The essential elements appear to be: (1) That the accident is such as does not ordinarily happen in the absence of negligence; (2) that the instrument was under the exclusive control of the party sought to be charged.[9] It is apparent that the doctrine was applicable to the facts of the principal case.

In the principal case, the trial court apparently gave such weight to the inference of negligence arising from the unexplained failure of the mechanism as it thought was warranted, and reached the conclusion that the defendant was not negligent. Assuming that the plaintiff had been able to prove that this particular defect in the throttle mechanism was commonly found in all other planes of the same manufacture then, clearly, the evidence would have been insufficient to rebut the presumption of negligence arising from the circumstances, *i. e.*, the failure of the defendant to place chocks under the wheels or to have someone in the cockpit to control the plane after the motor started; since, in such case, the defendant would be chargeable with constructive, if not actual notice[10] of this particular defective

6. *Doolittle, James H.*, "Recent Developments in Air Transportation," 5 JOURNAL OF AIR LAW 240 (1934).

7. *Schneider, Joseph*, "Negligence in the Law of Aviation," 12 Boston U. L. Rev. 17 (1932); *Kingsley, Robert*, and *Gates, Sam E.*, "Liability to Persons and Property on the Ground," 4 JOURNAL OF AIR LAW 515 (1933).

8. 67 Cal. App. Dec. 838, 842, 5 P. (2d) 690, 695 (1931), opinion adopted in 215 Cal. 714, 12 P. (2d) 933 (1932), discussed in 3 JOURNAL OF AIR LAW 463 (1932), and 4 JOURNAL OF AIR LAW 429 (1933).

9. *Stoll* v. *Curtiss Flying Service, Inc.*, 1930 U. S. Av. R. 148, affd., 236 App. Div. 664, 257 N. Y. S. 1010, 1932 U. S. Av. R. 163 (1932); *Seaman* v. *Curtiss Flying Service, Inc.*, 231 App. Div. 867, 247 N. Y. S. 251, 1931 U. S. Av. R. 227 (1930); see *Sollak* v. *State*, 1929 U. S. Av. R. 42, 43 (N. Y. 1927); *cf. Wilson* v. *Colonial Air Transport, Inc.*, 1931 U. S. Av. R. 109 (1931), affd., 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329, 1932 U. S. Av. R. 139 (1932); *Carpenter, Charles E.*, "The Doctrine of Res Ipsa Loquitur," 1 Univ. of Chi. L. Rev. 519, 520 (1934).

10. *Cf. Martin* v. *Maxwell-Brisco Motor Vehicle Co.*, 158 Mo. App. 188, 138 S. W. 65 (1911), where the plaintiff, being unaware of the danger involved, was permitted to recover for injuries received in cranking defendant's car. After a showing of the danger involved in cranking the car, the court held that defendant was chargeable with notice of such danger, and in the exercise of due care, should have notified plaintiff thereof; *Allen* v. *Schultz*, 107 Wash. 393, 181 P. 916, 6 A. L. R. 676 (1919), in which an accident resulted from defective brakes and the court stated: "One who operates on the

mechanism and should, therefore, have taken added precautions. Had such common defect been susceptible of proof, then, under the doctrine of judicial notice,[11] it would have been a proper matter to be noticed by the court. The same result would have been reached if the court, in lieu of proof, had taken notice of said common defect. In this respect, it is suggested that, in the past, certain types of planes were known to have common defects.[12]

Thus far, the courts have been willing to take judicial notice of the general,[13] but not the particular,[14] characteristics of aircraft. Undoubtedly, judicial notice will come to play as important a part in the field of aeronautics as it has in relation to automobiles and other common mechanisms.[15]

CHARLES T. SMITH.

NEGLIGENCE—MID-AIR COLLISION—DEGREE OF CARE—MASTER AND SERVANT.—[Illinois] Plaintiff, in an action on the case, sought to recover damages of ten thousand dollars for the death of his wife following a mid-air collision between defendant's plane in which his wife was riding and another plane. The facts of the case were stipulated and show that plaintiff and defendant were brothers-in-law and that, for a considerable period, an arrangement had existed whereby plaintiff might use defendant's plane (a Stearman plane, duly licensed) on condition that said plane should

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streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible." Thus, it is seen that the operator of an instrumentality having a known defect is chargeable with knowledge thereof and, therefore, must take additional precautions.

11. Scientific facts of common recognition among the people with whose affairs the court is dealing are frequently the subject of judicial notice. "In the exercise of the function of judicial notice, the courts simply reflect the state of the times, and progress with the progress of the people." *McKelvey*, on Evidence (4th ed. 1932), 46 and 47, §30; 5 *Wigmore*, on Evidence (2nd ed. 1923), 579 §2571.

12. For example: The old army training planes (J. N. 4 D.) apparently had defective throttles, which were apt to slip open unless someone was in the cockpit to guard against such contingency; the Thomas-More scout planes of the past were known to have very weak and defective wing structures; during the World War, it was common knowledge that the Nieuport combat planes were apt to catch fire at any time because of defective carburetion systems.

13. *Platt* v. *Erie County Agric. Soc.*, 164 App. Div. 99, 149 N. Y. S. 520, 1928 U. S. Av. R. 116 (1914); *Hesse* v. *Rath*, 224 App. Div. 344, 230 N. Y. S. 676, affd., 249 N. Y. 436, 164 N. E. 342, 1928 U. S. Av. R. 315 (1928); *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 1930 U. S. Av. R. 1 (1930); Note, 69 A. L. R. 338 (1930).

14. *Wilson* v. *Colonial Air Transport*, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329, 1932 U. S. Av. R. 139 (1932), in which the court was of the opinion that aviation had not yet reached the stage where the court would take judicial notice of facts relating to the mechanics thereof because there was no common knowledge and experience upon which such an inference could be based. Such particular facts in relation to automobiles and other common mechanisms are constantly being noticed by the courts. *Cf. Seligman* v. *Hammond*, 205 Wis. 199, 236 N. W. 115 (1931), in which the court judicially noticed that a blow-out on the left front wheel would cause the car to swerve to the left; *Wener* v. *Pope*, 209 Ky. 553, 273 S. W. 92 (1925), in which the court took judicial notice of the speed at which an automobile must be operated in order to stop within a specified distance; *Cook* v. *Missouri Pac. R. Co.*, 51 S. W. (2d) 171 Mo. App. (1932), in which the court took judicial notice that the angle spread of good headlights on a car extend laterally.

15. Courts will take judicial notice of whatever is common and current knowledge concerning automobiles, such as their particular characteristics; their mode of operation; their increasing numbers and the consequent danger therefrom; their capacity for speed; their ease of control; and the effect of traffic and weather conditions on the safety of operation. 15-16 *Huddy*, Encyclopedia of Automobile Law (9th ed. 1931), 272, §152, and cases cited therein; 2 *Blashfield*, Cyclopedia of Automobile Law (1927), 1595, and cases cited therein.

be piloted by one Walter Meyer (a licensed pilot of 3600 hours experience) employed by the defendant to fly the plane for him. On the day in question, the plane was flown by Meyer and collided with an unlicensed plane in the vicinity of Sky Harbor Airport. The trial court, without a jury, found for the defendant. Upon appeal, affirmed. *Bird* v. *Louer,* 272 Ill. App. 522.

The basis on which plaintiff rested his case was that Meyer, the pilot of defendant's plane, had conducted himself so carelessly, negligently, and unskillfully that the collision took place and plaintiff's wife was killed. The collision occurred at about 6 P. M. on a clear day at an altitude of between 600-1000 feet. The following stipulated facts are of particular interest: "The Louer plane (defendant's) was visible to the pilot (unlicensed) of the Standard (also unlicensed), who apparently seemed to make a turn to avoid the collision but made a flat turn so that he skidded and the right wing of the Standard hit the right wing of the Louer plane. . . . The visibility in the Stearman plane is better than in most ships, probably as good as any, but there is a blind spot directly ahead so that when the airplane is in normal flight the pilot cannot see a ship which is close in front of him, if it is exactly at the same altitude of his ship. *The ship however could be maneuvered to give visibility in any direction.*"[1] While it was agreed that Mrs. Bird, the deceased, had never taken flying lessons, it was stipulated that it was not known who was actually operating the Stearman plane (possessing dual controls) at the time of the collision.

The decision of the court was based on the following controlling questions: (1) Was Meyer when flying the airplane the agent or servant of the defendant, and acting within the scope of his employment, or, as defendant contended, the agent and servant of Bird, in which latter case the rule of respondeat superior would not be applicable and defendant as a matter of law not liable? The situation inferred from the facts in the present case was that defendant loaned his servant to plaintiff for a special service subject to the direction of plaintiff, who however did not have either the power or the right to discharge Meyer. The court held that the right to discharge being essential to the relationship of master and servant, Meyer was not the servant of Bird but at the time was still the servant of defendant Louer and the rule of respondeat superior was therefore applicable. The court did not specifically decide whether or not Meyer was acting within the scope of his employment at the time the accident occurred. (2) Was defendant or his pilot Meyer guilty of negligence which was the proximate cause of the collision? Since the trial court found for the defendant on this issue, and that finding was entitled to the same weight as a verdict of a jury, the ultimate question for the determination of the court was whether that finding was clearly and manifestly against the weight of the evidence. In view of the court's holding on question (1) that Meyer was the servant or agent of defendant, then (a) Mrs. Bird was in defendant's plane either as an invitee or a passenger for hire and (b) defendant owed a duty to transport her with reasonable care. The court discarded plaintiff's contention that, since Meyer was an extraordinarily skillful and experienced pilot flying a maneuverable ship of latest design and in good condition on a clear day with perfect visibility over a public airport where other ships were likely to be maneuvering and where he had unlimited

1. Italics ours.

area for his own maneuvers, and, since, if he had been looking, he could have seen the other plane for a distance of miles and could have at any time for a period of minutes rather than seconds changed his line of flight so that it would have been impossible for the other plane to approach him, much less collide with his plane, it was therefore extreme negligence on Meyer's part to permit his plane to collide with the other, thereby causing the death of Mrs. Bird. The court indulged the presumption that it was Meyer who was at the controls at the time of impact, but refused to "indulge the presumption that because Meyer was extraordinarily capable he therefore must have been entirely negligent." In the absence of direct evidence, the court presumed the contrary, and indulged the presumption that "the planes may have come into an air pocket or may have experienced sudden gusts of wind or may have suffered motor defects at that moment." Finally, the court leaned on the reputed ignorance and inefficiency of the other pilot, his failure to bank on the turn thereby causing him to skid into defendant's plane, and on the fact that defendant's plane had a blind spot directly ahead in horizontal flight and held that "from the undisputed facts the proximate and immediate cause of the collision . . . was the negligence and inefficiency of the pilot of the Standard plane, and that there is no evidence from which an inference may be reasonably drawn that Meyer was negligent."

The foregoing statement of facts and opinion demonstrates that if we are to have any symmetrical development of air law, it is hopeless to thrust on a court the duty of fixing responsibility for an accident of this kind—particularly where the evidence is so sketchy. On the basis of the facts as they were stipulated, the court's use of legal doctrine is probably unassailable. The court correctly held that Meyer was the servant of the defendant but might well have decided on the merits of the case that Meyer was acting within the scope of his employment at the time of the accident. The court, however, found it unnecessary to specifically decide this point since its decision was based on the lack of negligence on the part of Meyer.

Likewise, the court did not specifically define the status of defendant's plane as a private carrier, nor the status of Mrs. Bird as an invitee or passenger for hire—holding that, even were she carried gratuitously, defendant was obliged (as in automobile cases) to use reasonable care. The distinction between degrees of care was thus avoided. The court might easily have admitted the tenuity of these distinctions relative to aviation cases since any lack of care in flying is likely to be disastrous, and there is scant opportunity to determine what degree of care was, or was not, employed in a given situation.

In its handling of the instant case, the court maintained a safe balance in its use of legal doctrine. It must also be conceded that, from the facts stipulated, plaintiff fell short in proving that defendant's pilot was negligent and that such negligence was the proximate cause of the collision. It is submitted, however, that the facts as stipulated were so warped by their reduction from highly technical combinations of fact into terms suitable for consideration by what must be termed in this case a lay agency (the court) that the court seems to have been led into going too far afield from the facts for its ultimate conclusions, that (1) Meyer was not negligent in failing to see the other plane; (2) the planes may have (a) come into an

air pocket or (b) experienced sudden gusts of wind or (c) encountered some defect in the motor; (3) the "skidding" of the Standard plane was the cause of the accident. The court was undoubtedly misled into placing undue emphasis on the fact that Meyer was unable to see the other plane because of a "blind spot" in the Stearman at the moment of collision. The guilelessness of the court is hardly to be wondered at, since the facts were stipulated by experts. It is submitted that had the testimony of the witnesses and various technical data on the collision been subjected to the scrutiny and consideration of a body of experts, the results of at least these above stated conclusions would have been far different.

The judgment of experts would have recognized the "air pocket" myth at once. And while "a sudden gust of wind" may throw together planes flying in close formation, such has never been known to cause a collision between planes flying according to the federal air traffic rules—with a minimum of 300 feet between them. The "blind spot" idea is plausible, but anyone familiar with aircraft knows full well that there are possibly more "blind spots" than "visible spots" and that every pilot is fully aware of the visibility limitations of his craft.[2] The controls of an aircraft are not difficult to manipulate and "blind spots" can be made visible with very little effort. Thus, while it is fully admitted that the court here had a most unsatisfactory case to deal with, from the standpoint of the evidence available, it is to be hoped that no one will read into this decision an idea that, because of "blind spots" a pilot need never maneuver his ship a little bit just to look.

LORRAINE ARNOLD.

2. "Anyone reasonably informed on aeronautical history can recollect several instances of airplane collisions that resulted disastrously despite the very small number of ships in the air at those times. Pilots well known for their experience, capabilities, and conservatism have frequently figured in these collisions. With these facts in mind, together with the probability that we shall presently witness very rapid increases in the number of light planes—piloted by inexperienced and often careless pleasure seekers—the dangers due to inadequate visibility may be seen in their true magnitude. . . . It must be conceded that visibility from the pilot's seats of practically all ships that have been flown has been adequate so long as their pilots have been alert and on the job. The narrative of an air collision usually is the story of two pilots momentarily 'caught napping.' . . . Let us first of all renounce . . . [a] theory, nursed by many, that all airplane collisions are the result of inadequate visibility in the participating planes. There are, in fact, three distinct possibilities in this connection. Two ships may meet within the ranges of vision of the two pilots, both temporarily distracted from their directions of travel. Or the pilot of the approaching plane may be 'blinded' and the second pilot unobservant. In the third instance, the two ships may collide within their respective blind angle ranges while their pilots are fully covering their individual flight paths, yet without thought of the possibilities of blind angle approaches. The first type of accident can never be eliminated entirely. Even roller skates are 'blind' to the user who prefers to look in a direction other than the one in which he is traveling. In all probabilities, however, the large majority of air collisions thus far fall within the two latter classifications. Taking into consideration the many varied types of ships and the multiplicity of air maneuvers, together with important variables such as relative speeds and directions of both planes and air currents, the large number of possible collision combinations with present day planes, becomes apparent": *Huntington, Dwight*, "Adequate Visibility for Planes," 18 Aero Dig. 52 (June, 1931).

The same writer finds that there are two classes of responsibility: (1) Where the pilot of one or the other ship *maneuvers* into the other ship (that is, where he could have seen had he been looking). (2) Where the pilot fails to notice the approach of the other ship (that is, where he was prevented from seeing because of a blind spot at that particular angle).

The suggestion is made by the same writer that in the instance of planes approaching from the opposite direction, the honors may well be divided evenly. That appears to have been the situation in the present case and the conclusion follows inevitably that it is futile to set a court the duty of determining the negligence of two pilots involved in a mid-air collision.

DIGESTS

AIRPORTS—CONTRACT OF LEASE FOR MUNICIPAL PORT.—[Ohio] The City of Toledo entered into a written lease in 1927 with the National Supply Company by which the city acquired certain premises to be used as an airport for a term of three years at a fixed annual rental, payable in quarterly installments, the lease to expire June 30, 1930, but lessee to have the option of renewing upon like terms and condition for an additional period of one year provided written notice be given the lessor at least ninety days prior to the expiration of the original term. Upon expiration there was no renewal of the lease, but the City of Toledo continued to use the premises for airport purpose for exactly three months after the expiration of the term of the written lease. The City paid all of the rental during the three-year period and tendered payment of the rental for the three-month period at the rate of one-fourth of the annual rental. Tender was refused by the National Supply Company which brought suit to recover the sum of a whole year's rental plus taxes and penalty which became due and payable during said yearly period. Judgment in the lower court was for the full amount claimed, which the City of Toledo sought to reverse, on the grounds that there was no express contract for the rental of the premises in question and that the law will not imply a contract. Plaintiff in error contended further that the original written lease was absolutely void because the provisions of the statute were not complied with, in that no certificate was placed on file, and that there is no implied municipal liability in matters *ex contractu*. *Held*, the doctrine that a contract will not be implied against a city applies to a contract of lease as well as any other contract, and the City of Toledo was therefore not liable for either the amount claimed or the amount tendered. However, as the City of Toledo was willing to make good its tender for the three-month period, the court entered judgment in favor of the National Supply Company for that amount, with the proviso that plaintiff was to pay all costs, the tender having been made before suit was instituted. Judgment modified accordingly and as modified affirmed. *City of Toledo* v. *National Supply Co.*, Ohio Court of Appeals, January 22, 1934. 234 C.C.H. 3027.

LORRAINE ARNOLD.

AIRPORTS—RIGHT OF COUNTY TO LEASE LAND FOR MUNICIPAL AIRPORT—COUNTY COMMISSIONERS—EXPENDITURE OF PUBLIC FUNDS.—[Ohio] The commissioners of a county desired authority to expend public funds for the leasing of land near village A to be used as an aviation landing field and to be improved through the use of CWA funds. A board of county commissioners, being purely a creature of statute has only such powers as are expressly conferred upon it by statute, and such implied powers as are necessary to carry into effect such express powers. The Constitution of Ohio provides that no money shall be withdrawn from any county or township treasury, except by authority of law. In a previous opinion of the Attorney General, it was therefore held that a board of county commissioners, not being authorized by statute so to do, may not lawfully *purchase* land to be used as an airport and may not issue bonds for such purpose; and this was held to be decisive of the present case involving the *lease* of land. In addition, the General Code of Ohio has a specific provision for the purchase or condemnation of land necessary for landing fields for aircraft and transportation terminals, and it was held to follow that, since the legislature has not expressly given the county commissioners authority to purchase or lease lands for landing fields for aircraft, such authority does not exist. It is therefore held that a board of county commissioners has no authority to expend public funds for the leasing of a landing field. *Opinion of the Attorney General of Ohio*, January 29, 1934, 234 C.C.H. 3028.

LORRAINE ARNOLD.

COMMISSIONS—APPROPRIATION FOR AIR SERVICE BUILDING COMMISSION.—[Alabama] "The legislature of Alabama passed an act which was approved on July 2, 1931, General Acts of Alabama, Regular Session 1931, page 402, providing for the creation of a commission to be known as Alabama Air Service Building Commission. The act authorizes the Commission to construct certain buildings and improvements. The act makes an appropriation to pay for said buildings. Section 19 of the Act provides that the Commission shall have power and authority to borrow money in anticipation of the amount of the appropriation becoming available, and to pledge the appropriation as security for the payment of the loan. Section 21 of the Act, being the section which makes the appropriation, was amended in the Special Session of 1932 (see General Acts of Alabama, Extra Session 1932, page 298). Under the terms and provisions of this Act, can the Alabama Air Service Building Commission borrow from the Federal Government under the Federal Emergency Appropriation for Public Works and pledge the appropriation for the repayment of the loan? If an application is made for a loan by the Alabama Air Service Building Commission, and approved by me as Governor, will such loan be in violation of section 213 of the Constitution of Alabama as amended by a vote of the people on July 18, 1933, the amendment being made a part of the Constitution by proclamation dated August 2, 1933? If a loan is made to the Alabama Air Service Building Commission, can the loan be repaid without a violation of any of the provisions of the budget law? Can such loan be made and repaid without offending any part of section 213 of the Constitution as amended by Governor's proclamation dated August 2, 1933?"

Held, "the Air Service Commission Act expressly authorizes the commission to borrow money for construction purposes and to pledge the appropriation for the payment of such loan. This is within the authority of the Legislature, but subject to constitutional limitations affecting such appropriation, or the amount that may become available thereunder. The recent constitutional amendment (Gen. Acts 1933, Ex. Sess., p. 196), known as the McDaniel Amendment, amending section 213 of the Constitution for the purpose of validating a floating debt heretofore incurred under appropriations in excess of revenues, incorporated provisions expressly intended to prevent future deficits in the state treasury. To this end available funds for the payment of claims, in case of a deficit, are to be prorated, and all excess unpaid appropriations are declared null and void. We would not anticipate the questions that may arise touching the claims included in such prorate, nor what appropriations, if any, are without such provision because of other constitutional provisions. Suffice to say, we find nothing to except the appropriation in question from the operation of section 213 as thus amended. Whatever effect be given to sections 20 and 22 of the Fletcher Bill (Gen. Acts 1932, Ex. Sess., p. 35), touching permanent constructions, or capital projects, we find nothing in amended section 213, which will permit the Legislature to give preference thereto by setting apart or directing you to set apart from the general funds in the treasury such sums as may be required to meet them in full, and thus deplete the funds available to meet the current operations of the several departments or state institutions, who must take on a pro rata basis. We conclude the appropriation in question is subject to amended section 213." *In re Opinions of the Justices*, 149 So. 775.

F. D. F.

INSURANCE—ACTION BY AGENT FOR LOSS OF COMMISSIONS.—[New York] Plaintiff, an assignee of an insurance agent, sought recovery of damages for breach of contract of employment. Plaintiff's assignor was employed by a firm of general agents of the defendant to solicit life insurance, and said defendant had issued a circular offering a special policy eliminating aviation risks from coverage. Plaintiff's assignor secured an application for a twenty-year endowment policy with the aviation risk excluded and the payment of the first quarterly premium. The defendant rejected the application on the ground that it had decided not to insure airplane owners. *Held,*

for plaintiff, on the ground that where the agent had procured an application by a good insurable risk for life insurance with the aviation risk excluded, insurer was liable to the agent's assignee for the full commission, where the applicant's expectancy exceeded the period during which the commission was payable. *Johnson* v. *National Life Ins. Co.,* 268 N. Y. S. 495 (Supreme Court, New York County).

F. D. F.

INSURANCE—PARTICIPATION IN AVIATION OPERATIONS.—[Arkansas] Appeal prosecuted from a judgment against appellant insurance company in favor of appellee, the beneficiary in an accident policy for double indemnity alleged to be due under the terms of the policy. The insured paid no fare and was killed when the plane crashed. The insurance policy provided that the double indemnity should not be payable in case death resulted from "participation in aviation operations." *Held,* judgment for plaintiff affirmed, and rehearing denied. There was no contractual relation between the pilot of the plane and the insured and no expectation of a fare to be paid and collected for the trip, the insured being an invited guest only and not a passenger, and it cannot be said that insured received the injuries from which he died "from participation in aviation operations," within the meaning of the terms of the policy, and is thereby excluded from its coverage. The effect of the word "operations" in connection with the phrase "participation in aviation" necessarily limits the scope of the meaning of the word "participation," and, though the word "participate," standing alone, might denote activities not included in the narrow compass of "engaged in" when the effect of the word "operations" is considered (which can only mean the management and control of the airplane), it becomes more apparent that "participation" is to be considered in its active sense and viewed as the equivalent of "engaged in."* *Missouri State Life Ins. Co.* v. *Martin,* 69 S. W. (2d) 1081 (Supreme Court of Arkansas).

F. D. F.

INSURANCE—ENGAGING IN AERONAUTICS AS PASSENGER OR OTHERWISE IN AERONAUTIC OPERATIONS.—[Federal] A passenger in an airplane was killed as a result of a plane crash and recovery of double indemnity was sought. Double indemnity was not payable if the insured's death resulted "from engaging, as a passenger or otherwise, in submarine or aeronautic operations." *Held,* for defendant, by affirming a decree dismissing the bill for want of equity. This on the ground that the double indemnity clause excluded from coverage death resulting from engaging in a single trip in an airplane as a passenger.† *Goldsmith* v. *New York Life Ins. Co.,* 69 F. (2d) 273 (U. S. C. C. A. 8th, Missouri).

Petition for writ of certiorari denied by the United States Supreme Court, May 28, 1934. 234 C.C.H. 3095.

F. D. F.

INSURANCE—FIRE POLICY—OWNERSHIP.—[Pennsylvania] Insured was a pilot, and the president of an amusement company advanced the money with which to purchase the airplane to be used to carry passengers in the amusement park. The bill of sale was first made out to the president of the amusement company but was changed to show the pilot as buyer. It was then recorded with the Federal Department of Commerce, and the registration card, carried in the plane, contained the insured's name. *Held,* that proof showed the insured to be the owner and therefore had an insurable interest in the plane entitling him to recover on a fire insurance policy for loss of the plane by fire. The fact that the employer paid for the plane was not conclusive that it was not owned by the employee so as to entitle

*See dissent by Smith, J., p. 1086.

†See dissent by Stone, J., p. 276.

the latter to recover on the fire policy, taken in his name. *Newman* v. *North. River Ins. Co.*, 171 A. 601 (Supreme Court of Pennsylvania).

F. D. F.

NEGLIGENCE—AIRPORT COLLISION—MUNICIPAL ORDINANCE.—[Georgia] An ordinance of the City of Atlanta prohibits the leaving of any aircraft—with motors running—on the city airport unless the pilot or mechanic is therein. Plaintiff left his plane with defendant to be mechanically tested and, after a test flight, defendant's servant started the motor without placing chock blocks at the wheels or otherwise securing it. The plane ran across the field and crashed into other planes on the field and caused considerable damage to plaintiff's plane. *Held,* that the jury were authorized to find a violation of the city ordinance, and that the violation constituted negligence. The ordinance was reasonable and the court did not err in charging the jury that a violation of same would constitute negligence per se, nor in admitting the ordinance in evidence. Since there was no allegation or evidence to show that the plane could not have been made secure, the servant's act was not excusable on the ground that he was afraid that the plane would cause an accident unless removed immediately. Judgment for plaintiff, affirmed. *T. A. T. Flying Service, Inc.* v. *Adamson,* 169 S. E. 851 (Ct. of Appeals of Georgia, Div. No. 8).

LORRAINE ARNOLD.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COLLISION WITH HAYRAKE ON RUNWAY—ORDINARY CARE.—[Wisconsin] Action by plaintiff to recover for damages to his airplane which were sustained in alighting on a hayrake, which defendant had permitted to be on its landing field. On the trial the jury returned a special verdict that defendant's negligence in permitting the rake to be left on the field was a cause of plaintiff's damage, and that plaintiff's pilot did not fail to exercise ordinary care in respect to attempting to land on an unlighted field or in respect to keeping a proper lookout for objects on the field. Judgment in favor of the plaintiff and defendant appealed.

Held, reversed and remanded. Plaintiff's pilot was under a duty to exercise ordinary care in the operation and control of the airplane; and, in the case of airplane operation, ordinary care requires that the pilot is not to land until he has seen that he has a clear place on which to land, and safe piloting requires that he make as many turns as possible before landing so as to be able to see what is on the ground below. In the present case, plaintiff's pilot failed to circle the field more than once and was so blinded by the setting sun that he landed on the hayrake which was standing on the landing runway. The court *held* that the pilot was negligent as a matter of law, if he so proceeded to land, voluntarily, at a time when he was unable, because his vision was obscured, to see the rake, which otherwise would have been visible from his position in the airplane. In order to be free from contributory negligence plaintiff's pilot should have continued to circle about the field until he had a sufficient lookout to ascertain whether the field was clear. His negligence in so alighting without exercising this ordinary care so contributed to the collision as to defeat plaintiff's right to recover. *Davies* v. *Oshkosh Airport,* 252 N. W. 602 (Supreme Court of Wisconsin).