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Notes, Comments, Digests

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NOTES, COMMENTS, DIGESTS

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COMMENTS

NEGLIGENCE—TRESPASS—RES IPSA LOQUITUR—CRASH AGAINST ELECTRIC TRANSMISSION TOWER.—[New York] Plaintiff was the owner of an electric transmission line suspended from steel towers some fifty feet high. At about ten o'clock at night, while flying toward the Rochester airport, defendant's motor failed from some unknown reason and, in attempting to land, he crashed into one of plaintiff's towers—which was not visible in the darkness. The accident was not fatal. The injury to the tower amounted to some $545. Plaintiff sued for damages, on both a trespass and a negligence count. Defendant counterclaimed for his damages, on a theory not explained in the report. In the lower court, plaintiff claimed the right to recover on the basis of negligence, on the theory of *res ipsa loquitur,* but offered no evidence of negligence. The court dismissed the cause of action based on negligence and, after proofs were in, submitted the question of trespass to the jury. The jury found for the defendant, and plaintiff appealed on the ground that the lower court should have held, as a matter of law, that there was trespass. *Held,* on appeal, reversed. The upper court sustained plaintiff's contention as to the trespass being a question of law—since there was no dispute of fact.

The court first considered the effect of the maxim *cujus est solum* and firmly stated that "if that maxim ever meant that the owner of land owned the space above the land to an indefinite height, it is no longer the law." However, the court did not doubt that, in the absence of an exercise of the police power, the right of the owner of land extends to the superjacent space to such height as he may build a structure upon the land. Hence, according to the court, when defendant's aircraft came in contact with plaintiff's tower, the rights and liabilities of the parties were quite the same as they would have been if the aircraft had come in contact with the earth below. This essential question, then, pertained to those rights and liabilities.

The court agreed with defendant's contention that the doctrine of *res ipsa loquitur* did not apply because aircraft accidents occur when there is no negligence on the part of the pilot. So much for accidental trespass. But who should bear the loss? The answer of the court is clear: "Such chance as there may be that a properly equipped and well-handled aeroplane may still crash upon and injure private property, *shall be borne by him who takes the machine aloft.*"[1] The only question which should have been submitted to the jury was as to the amount of damages suffered by the plaintiff.

The court's decision was poised upon this logical dilemma: "If it can be said from human experience that an aeroplane will not fall except

1. Italics ours.

through negligence, then the plaintiff proved a *prima facie* case under its first cause of action. If, on the other hand, common experience requires the opposite conclusion, namely, that, no matter how perfectly constructed, or how carefully managed an aeroplane may be, it may still fall, then the man who takes it over another's land and kills his cow or knocks off his chimney has committed an inexcusable trespass." This view of absolute liability, with or without fault is grounded on the opinion that the aircraft is essentially an inherently dangerous instrumentality. Not only are the courts slowly departing from that view, but also (and as a reason for the departure) mechanical improvements may be expected to change and have been changing the airplane into an essentially safe vehicle. It is more than conceivable that they will be so well constructed that failure to perform as expected will be as rare as in the case of other types of vehicles. Where absolute liability is not imposed, the other horn of the dilemma remains to be considered. Is it true that "an aeroplane will not fall except through negligence"? In other words, assuming that liability must be based on negligence, is the *res ipsa loquitur* doctrine applicable in every case of injury by aircraft to objects on the ground? This is no mere academic question, nor one based on conjectures as to the future. In many jurisdictions the liability without fault rule is not enforced.[2] The old Uniform State Law for Aeronautics provides that an owner of aircraft will be absolutely liable for injuries to property on the surface.[3] Several states have by legislation made the rules of torts on land applicable to aircraft,[4] and recent cases have held similarly.[5] It has been contended that negligence has no place at all in airplane accident cases where there is an injury to objects on the ground. Thus it has been said that "there is either absolute liability, or total lack of liability due to plaintiff's contributory negligence, or an excusable trespass, and in neither event is defendant's negligence in issue."[6] But in the case of excusable trespass, the excuse of unavoidable accident must be established, and except in the case of *vis major,* negligence may have been a factor in causing the accident.

The doctrine of *res ipsa loquitur* is a device used to shift the burden of proof.[7] It is well-known that the courts are not in harmony on the question of whether this shift is merely of the burden of going forward with the evidence, or the ultimate burden of non-persuasion, but the trial mechanics of the doctrine are clear.[8] "The principle which the courts have developed in these cases is that when certain types of harms occur under circumstances which from common experience, strongly suggest negligence and when the agency or instrumentality which occasioned the harm is under the exclusive control and management of the defendant so that he is in a

2. See *Kingsley & Gates,* "Liability to Persons and Property on the Ground," 4 JOURNAL OF AIR LAW 515 (1933).

3. It is not stated, in the instant case, whether defendant owned, as well as piloted, the plane. For an attack on the constitutionality of the act as far as absolute liability is concerned,, see *Cooper, J. C., Jr.,* "Aircraft Liability to Persons and Property on the Ground," 17 A. B. A. Jour. 435 (1931). For an answer, see *Ball, George W.,* "Compulsory Aircraft Insurance," 4 JOURNAL OF AIR LAW 52, 62 (1933).

4. *Op. cit., supra,* note 2, at p. 520.

5. *Livingston* v. *Flaherty,* Superior Ct. of Cal., L. A. County, No. 329013; *Greunke* v. *North American Airways, Inc.,* 201 Wis. 565, 230 N. W. 618 (1930).

6. *Osterhout, Howard,* "Doctrine of Res Ipsa Loquitur as Applied to Aviation," 2 Air Law Rev. 9 (1931) at p. 19.

7. See comment, 3 JOURNAL OF AIR LAW 662 (1932).

8. 5 *Wigmore,* Evidence (2d. Ed.), §2509.

better position to prove his innocence than the plaintiff is to prove his negligence, there exists a *res ipsa loquitur* case."[9] Whether the doctrine should be applied in aircraft cases has been a debated question. It has been suggested as an escape from the alternatives of absolute liability on the one hand and liability for negligence on the other. There has been some question as to the range of its applicability: whether to common carriers only, or to all aircraft; whether to accidents to passengers and goods in the air only, or also to objects on the ground. In any of these cases, it seems, a part of the formula at least is satisfied. That is, the plaintiff is usually in a disadvantageous position as far as proof of negligence is concerned. The instrument of harm is "under the exclusive control and management" of the pilot, and the defendant "is in a better position to prove his innocence than plaintiff is to prove his negligence." Whether the other section of the formula is found in these cases is not self-evident. There may be circumstances in which the negligence of owner or operator is not clear, as where *vis major* or a latent defect, undiscoverable in the exercise of reasonable care, may be involved. Nor can it be said that common experience in flying is so broad that particular facts will always suggest negligence.[10] Despite this fact, however, *res ipsa loquitur* has been relied on in the past, and probably will continue to be used in the future.

In the few cases in which the problem has arisen, the courts have not been unanimous in their views on the applicability of the doctrine. Analogies from other types of cases, especially those involving falling objects such as glass and bricks, are not helpful, because the doctrine cannot be enforced as a matter of rule, but as a matter of discretion, according to the facts of the case. In New York, California, and Texas, the *res ipsa loquitur* formula has been used to aid the plaintiff. Massachusetts seems *contra*. The first case in which the problem arose gave an inconclusive answer. In *Sollak* v. *State of New York*[11] an airplane collided with an automobile which had been stopped on the highway by heavy traffic. The plaintiff contended that in the absence of any explanation by the defendant, negligence must be presumed. Although recovery was allowed on the ground of negligence, nothing was said in the opinion of plaintiff's argument for the application of the *res ipsa loquitur* makeweight. There are two reported cases in 1930 which affirmatively used the doctrine. In *Stoll* v. *Curtiss Flying Service*,[12] a good part of the court's instructions to the jury dealt with *res ipsa loquitur*. In *Seaman* v. *Curtiss Flying Service*,[13] the lower court refused such an instruction, the facts being that the plane crashed as it was making a sharp bank at a low altitude. The appellate court reversed specifically on the ground that this state of facts clearly called for a use of the *res ipsa loquitur* formula. In *English* v. *Miller*,[14] a passenger was injured when the plane looped at a low altitude. The Texas court held that the *res ipsa* doctrine would have been applicable had plaintiff not pleaded the specific acts of negligence relied on. This rule is not recognized in many jurisdictions. Finally, in *Smith* v. *O'Donnell*,[15] a case arising out of a collision

9. *Harper*, Torts, p. 183.
10. *Wilson* v. *Colonial Air Transport*, 278 Mass. 420, 180 N. E. 212 (1932).
11. 1929 U. S. Av. R. 42 (N. Y. Ct. of Claims).
12. 1930 U. S. Av. R. 148 (N. Y.).
13. 231 App. Div. 867, 247 N. Y. Supp. 251 (1930).
14. 53 S. W. (2d) 642 (Tex. Civ. App. 1931).
15. 215 Cal. 714, 12 P. (2d) 933 (1932).

of two airplanes, the doctrine was held applicable by a California court; which said, "If the proper degree of care is used, a collision in midair does not ordinarily occur." Opposed to these decisions is *Wilson* v. *Colonial Air Transport*.[16] There the accident was the failure of a motor. Plaintiff contended that by proving this, he established a *prima facie* case. The contention was overruled, the court holding that since there was no testimony as to the fact of inspection nor as to the party inspecting, and since the pilot's non-negligence was unquestioned, the *res ipsa loquitur* doctrine was inapplicable. This decision should not be considered authority for the proposition that in no airplane accident case will a Massachusetts court allow the plaintiff the aid of a *prima facie* case. It is evident that had defendant, in the exercise of due care, hired some independent contractor to inspect and maintain its engines, it was not "in exclusive control and management" of the injury-producing agency. Plaintiff would have been in no better position to prove the inspector's negligence than defendant.

Analytically, there are roughly three categories of safety. A thing may be so safe that an accident is to be expected only as an extraordinary occurrence. In such case, the *res ipsa loquitur* doctrine would seem to be most validly used. Aircraft have not yet reached that stage, and it is doubtful that they, as well as automobiles, for example, ever will, not from the standpoint of mechanical efficiency, but from the human angle. On the other extreme, the thing may be inherently unsafe and dangerous. In such cases, absolute liability is imposed, though of course there are other reasons than its mere unsafe nature for such a strict rule. Unless the fact of gravitation is considered to counterbalance all safety factors, airplanes are not in this class. And furthermore, this rule of liability is not everywhere used. The third possibility is a rather neutral one. That is, the thing may be ordinarily safe, so that, while accident is not to be expected, neither is it very likely. It is in this type of case that the application of the doctrine must depend on the surrounding circumstances. So in airplane cases, the rule should not be that in every case the plaintiff has the benefit of *res ipsa loquitur*. But where the plaintiff is at a great disadvantage in proving negligence, and the exigencies of proof are such that defendant is in a better position to show lack of negligence, it seems equitable to force him to do so by the operation of the doctrine. It would be going too far to force him to explain just how the accident occurred, for often he may not know any more about it than the plaintiff, but he could not complain, in the proper case, if he were merely to show that he was in the exercise of due care.[17]

SAUL N. RITTENBERG.

DIGESTS

AIR MAIL—JURISDICTION—SUITS AGAINST THE UNITED STATES.—[Federal] Petitioner, who is the holder of an unexpired "route certificate" authorizing it to carry the United States mails, sought to enjoin the Postmaster at New York City and the Postmaster-General from carrying into effect the order

16. *Supra*, note 10.

17. Other problems are raised by this interesting case. For example, there is the problem of the incomplete privilege to enter another's land in the protection of one's life or property. It seems that any damage done in such case must be compensated. There is also the defense to trespass of involuntary act. It might be interesting to consider whether this doctrine needs any modification in airplane cases. Lastly, there is the question of plaintiff's contributory negligence, if any, in leaving the transmission line tower unlighted.

of the latter, issued Feb. 9, 1934, annulling petitioner's right so to carry the mail. *Held:* the suit should have been dismissed for want of jurisdiction. *Transcontinental & Western Air, Inc.* v. *Farley,* 71 Fed. (2d) 288 (C. C. A. 2d., June 11, 1934).

It is a well settled rule that the United States, being a sovereign power, cannot be sued without its consent: 65 C. J., United States, sec. 176. A corollary of this rule is the doctrine that an action cannot be maintained against an officer of the government if the effect of the suit would, in effect, be to compel the government itself to act or to refrain from acting: *Wells* v. *Roper,* 246 U. S. 335, 38 Sup. Ct. 317, 62 L. Ed. 755. In the instant case, the court reasoned that the effect of the injunction sought would be to compel the United States specifically to perform its contract for the carriage of the mails by the petitioner; hence the case fell within the doctrine above stated, and the court had no jurisdiction to maintain it.

ROBERT KINGSLEY.

CHATTEL MORTGAGE—LIEN FOR SUBSEQUENT REPAIRS—RIGHTS OF PARTIES—FOREIGN CORPORATION DOING BUSINESS IN STATE—SERVICE OF PROCESS.—[Idaho] The Moscow Air Transportation Company leased an airplane to one Adair who placed it with Boise Flying Service, Inc. (appellant), for repairs, August 20, 1931. On June 4, 1930, at the time of the original purchase of the plane, one Ruddach executed, in Chicago, a chattel mortgage upon the said plane which mortgage was subsequently assigned to respondent, General Motors Acceptance Corporation. Foreclosure upon the mortgage was commenced Sept. 3, 1931. It does not appear from the record of the present case that the mortgage was ever filed for record in Ada county or in any other county in Idaho; nor does it appear that appellant knew of the existence of the mortgage at the time the plane was repaired. On Feb. 9, 1932, appellant commenced suit to foreclose upon the statutory lien and to impress said plane with such lien for material and labor furnished in its repair. In absence of an agent residing in Ada county, summons was served upon defendant by delivery to the county auditor, who failed to notify respondent and judgment subsequently was entered in favor of appellant. Later, an order was made and filed vacating and setting aside said judgment, on grounds that respondent was a foreign corporation not doing business within the state and upon whom no valid process had been served. From that order comes this appeal.

Held: In view of its having held and disposed of merchandise in the state, and having maintained a representative in the state, and having carried on financing plans throughout the state, although the transactions there concerned depended upon approval from an office located without the state, and in view of the failure of respondent to deny that it had represented, in both State and Federal courts, and as late as within ten days after the commencement of this suit, that it was, "qualified to do business within the state of Idaho," it was concluded that respondent was doing business within the state, within the meaning of subdivision No. 3, Section 5-507, I.C.A., sufficient to justify service of process upon the county auditor. "Service of summons upon the county auditor is substituted service, and gives the court jurisdiction the same as personal service to try the action and enter judgment." As provided in the section of I. C. A. referred to above, failure of the county auditor to notify the defendant had no effect upon the validity of the service. The reason for serving the county auditor appeared in the return of the sheriff that "the said defendant being a foreign corporation and does not have any designated person or agent actually residing in Ada county, Idaho, the county in which the defendant is doing business in this state, upon whom process can be served." *Boise Flying Service, Inc.* v. *General Motors Acceptance Corporation,* 54 Idaho — (Unreported to date; digest of case appears in 234 C. C. H. 3050—Idaho Supreme Court, February 9, 1934).

H. DON REYNOLDS.

COMMISSIONS—DEFINITION OF AIR SCHOOL—LICENSES.—[Minnesota] In an opinion rendered May 21, 1934, the Attorney General of Minnesota replied to an inquiry as to whether an air school, operating both a ground and flying school, was obliged to pay a $10.00 license fee for each type of school so operated. According to Laws 1933, Ch. 430, Sec. 1(j), an air school is defined as follows: "Any person engaged in giving instruction, or offering to give instruction in aeronautics—either in flying or ground subjects, or both—for or without hire or reward, and advertising, representing, or holding himself or itself out as giving or offering to give such instruction, shall be termed and considered an 'Air School'." In Section 12 of the same Act, it is stated that "the Commission is hereby authorized to issue a certificate of its approval in each case and to make the following charges therefor: . . . For issuance of each annual air school, $10.00 . . . ." It would seem therefore that the term "Air School" includes both the terms "ground school" and "flying school," within the provisions of the law. Thus, an air school which operates a ground school and a flying school jointly, that the ground instruction may prepare the student for flying instruction, and that such student may be able to obtain a pilot's license, should be termed an "Air School" and cannot be required to pay but one $10.00 license fee according to the provisions of the Act. *Opinion of the Attorney General of Minneapolis,* May 21, 1934, 234 C. C. H. 3120.

KATHERINE FRITTS.

COMMISSIONS—ENFORCEMENT OF U. S. DEPARTMENT OF COMMERCE REGULATIONS.—[Florida.] The Attorney General of Florida, in an opinion rendered August 17, 1934, stated that Traffic Inspectors may properly assist in enforcing the regulations of the Department of Commerce of the United States in regard to commercial aircraft and pilots, in cooperation with peace officers. The activities of such Inspectors are limited, and they have no authority to make arrests. The regulations of the Department of Commerce were adopted by Chapter 14,642, Acts 1931 of Florida. *Opinion of the Attorney General of Florida,* August 17, 1934, 234 C. C. H. 3120.

KATHERINE FRITTS.

CONTRACTS—DISTRIBUTORS—AGENCY.—[California] Plaintiff sued for damages for breach of an alleged contract whereby plaintiff was to be the exclusive distributor for defendant's airplanes in southern California and Arizona. Defendant had theretofore appointed one Rankin as its distributor for a group of western states, including California, and all of plaintiff's negotiations were with Rankin. Airplanes shipped under the arrangement entered into were billed by defendant to Rankin and by him to the plaintiff; and plaintiff and Rankin split the commissions on such planes. *Held:* that the evidence showed only a contract between plaintiff and Rankin, whereby plaintiff became a sub-distributor for the latter. Consequently, defendant was under no obligation toward plaintiff. *Ruckstell Corp., Ltd.* v. *Great Lakes Aircraft Corp.,* 77 Cal. App. Dec. 715, 33 Pac. (2d) 32 (May 28, 1934), rehearing denied, 78 Cal. App. Dec. 31, 34 Pac. (2d) 495 (June 26, 1934).

ROBERT KINGSLEY.

CUSTOMS—ADMIRALTY—INTERVENING LIBEL FOR REPAIRS TO SEAPLANE—SEAPLANE AS VESSEL.—[Federal] A seaplane, libelled by the United States, was found guilty of certain illegal acts, and libelant asked that it be sold. Between the time of the unlawful acts and the date of seizure, repairs had been made to the plane by the intervening libelant, which claimed that it had no knowledge of the plane's violations of the law. The seaplane was capable of indefinite navigation on the water, and in fact had navigated on the water to the slip of the intervening libelant, the pilot wishing to have it repaired by that company. Libelant's theory was that the plane was not and never was a vessel, that the intervening lien attempted to be enforced was not a maritime lien, and that the court was without maritime or admiralty jurisdiction to enforce the lien.

Whether there was a maritime lien for the repairs depended on the construction of a statute, passed in 1926 (c. 344, §7(a), 44 Stat. 572, 49 USCA §177(a)), which provides, in part, that "the navigation and shipping laws of the United States, including any definitions of 'vessel' or 'vehicle' found therein . . . shall not be construed to apply to seaplanes or other aircraft . . . ." The court held that Congress did not intend, merely by the general reference to "shipping laws," to deny a maritime lien in such a case as this. This conclusion was reached by a consideration of the surrounding sections of the act (49 USCA §176(a-c), §177(a-d)), applying to them the maxims *noscitur a sociis* and *ejusdem generis*. The subject matter of those sections was foreign aircraft and foreign commerce. The statute giving a maritime lien for repairs (46 USCA §971) is not restricted to foreign watercraft or commerce. Section 177(a) did not, therefore, apply to maritime liens, and so did not deny such a lien in case like the present one. *United States* v. *One Fairchild Seaplane*, 6 F. Supp. 579, (U. S. Dist. Ct., Western Dist. of Washington, April 16, 1934). Also see comment, 5 JOURNAL OF AIR LAW 149.

S. N. RITTENBERG.

INSURANCE—DOUBLE INDEMNITY—"PARTICIPATION IN AERONAUTICS."—[Arkansas] Appeal from a judgment in favor of insurer on the life of beneficiary's husband, who was killed when the plane crashed in which he was riding as an invited guest. The policy was issued on the life of decedent and the appeal involved the construction of the clause providing for exemption from double indemnity if death resulted from "participation in aeronautics." The facts and circumstances of the crash and death were involved in the case of *Missouri State Life Insurance Company* v. *Martin* (69 S. W. (2d) 1081), the clause in that case differing from the present one only in that exemption in the former was for "participation in aviation . . . operations." (See 5 JOURNAL OF AIR LAW 504.) The Court referred to the distinction it drew in the first case between "participating in aeronautics" and "participating in aviation *operations*," but based its present decision on the dictum pronounced in *Missouri State Life Ins. Co.* v. *Martin* (*supra*). *Held:* The phrase "participate in aeronautics" connotes to a purchaser of life insurance an active share in the management of a plane, equivalent to the phrase "engaged in"; and such a purchaser would not expect exemption from liability merely because he took passage as an invited guest upon one isolated trip by airplane. Insurer had full power and opportunity to exempt itself from liability beyond any question, cavil or doubt had it elected so to do; and the contract being thus ambiguous and susceptible of more than one reasonable interpretation, it should be construed in favor of insured. Judgment in favor of insurer reversed and remanded. *Martin* v. *The Mutual Life Insurance Company of New York*, 71 S. W. (2d) 694 (Supreme Court of Arkansas, decided May 21, 1934).

LORRAINE ARNOLD.

NEGLIGENCE—PARTNERSHIP LIABILITY—DAMAGES TO PROPERTY OF THIRD PERSON—EVIDENCE—COLLATERAL ATTACK ON INCORPORATION.—[Nebraska] The same facts involved in this case were before the Supreme Court of Nebraska in *Interstate Airlines, Inc.* v. *Arnold, et al*, 124 Neb. 546, 247 N. W. 358, where the judgment of the lower court was reversed as to the present defendant and cause remanded for further proceeding. (For digest of that case see 4 JOURNAL OF AIR LAW 440.) In the retrial of the same cause of action in the district court, Arnold alone defending, the jury rendered a verdict in his favor and from a second judgment of dismissal as to him plaintiff again appealed. *Held:* Judgment in favor of defendant affirmed. The verdict was amply supported by evidence that: joint defendants in the first action, Arnold and Cahow, purchased the plane in question but they had assigned all their interest in their contract to purchase the airplane to X U Airways, which was incorporated before the accident; no written or oral partnership agreement was made at any time; there was no joint lia-

bility of Arnold and Cahow for the latter's negligence in damaging plaintiff's airplane; Cahow, without the knowledge or consent of Arnold, started the motor at night, when the Stinson plane was not equipped for night flying, intending to use it for his own personal business or pleasure in violation of federal regulations while operated by a pilot not approved by the seller; no one was authorized by the seller to fly the plane by night. It was within the discretion of the trial court to admit proof of the judgment recovered in the first trial against Cahow, the principal witness called by plaintiff in the present case, for whatever bearing it had on the credibility of Cahow as a witness or on the weight of his testimony. For the purposes of this case X U Airways was a legal corporation as stated in the instruction of the trial court, since its articles of incorporation were adopted, registered, certified by the Secretary of State and notice published, and since there was no proof of bad faith or fraud in the organization of the corporation or in its corporate act; and therefore its incorporation was not open to collateral attack by plaintiff. Even if the corporation had no legal existence and therefore Cahow and Arnold were partners, the jury was still at liberty under the evidence to find in favor of Arnold. A partnership or corporation owning an airplane is not liable for damage to property of a third person, while the airplane is being wrongfully and negligently operated by a partner or a corporate officer exclusively for individual purposes of the operator, without authority from or knowledge or consent of the owner. *Interstate Airlines, Inc.* v. *Arnold* (Supreme Court of Nebraska, decided Oct. 4, 1934, 234 C. C. H. 3117).

LORRAINE ARNOLD.