Journal of Air Law and Commerce

Volume 8 | Issue 1 Article 8

1937

# Notes, Comments, Digests

# NOTES, COMMENTS, DIGESTS

## COMMENTS AND OPINIONS

**Contracts—Infants—Flying Course as a Necessary—Disaffirmance.—** [Massachusetts] This is an action of contract to recover $1600 paid to the defendant on the ground that the plaintiff was a minor when the contract was entered into. The trial judge, finding in behalf of the plaintiff filed the following:[1]

The Court found the following facts:

"This is an action of contract to recover the sum of sixteen hundred (1600) dollars and interest paid to the defendant under contracts made during the infancy of the plaintiff. The writ is dated July 11, 1931, returnable the second Saturday in August, 1931, with an *ad damnum* of three thousand (3000) dollars.

I find the facts to be substantially as follows:

The plaintiff, a minor, entered into a contract with the defendant, the Curtiss-Wright Flying Service, Inc., for instruction as a private pilot, on September 25, 1929. The cost of the course was three hundred (300) dollars, and the same was completed and paid for. On February 27, 1930, the plaintiff entered into a contract with the defendant for a course of instruction as a limited commercial pilot, the cost of the course being thirteen hundred (1300) dollars. The course was completed and paid for. On May 6, 1930, the plaintiff entered into a contract with the defendant for a course of instruction as a transport pilot, the cost of the course being thirty-two hundred (3200) dollars. This course was not completed and no amount was paid on account of the cost of the same. At the time these contracts were signed, the plaintiff was a minor. The plaintiff voluntarily withdrew from the transport pilot's course in May, 1930, and attained his majority on July 20, 1930. On February 28, 1931, after receiving a notice that he owed a balance of forty-eight dollars and fifty-five cents ($48.55) on account of the instruction received under the third contract, he visited the office of the attorney for the defendant at New Bedford, Mass., and stated that he did not owe any money to the defendant. He did not disaffirm his contracts until July 11, 1931, when he brought the present action. The plaintiff is the son of a textile weaver employed at New Bedford, Mass. He went to work at the age of sixteen, as a plumber's helper. Later, he worked in an auto garage, earning on an average of twenty (20) dollars per week, and later did some laboring work at twenty-two (22) dollars per week. He left New York in the early part of 1929, and went to work for Carpen Brothers as an upholsterer, earning on an average of twenty-four (24) dollars per week. He left this job to take the course of flying instruction from the defendant. At this time, his folks had accumulated two thousand (2000) dollars, and he, himself, had accumulated four hundred (400) dollars. He took the course 'because he wanted to learn a new trade and earn a good living.' The plaintiff failed to qualify as a private pilot, or as a limited commercial pilot, although he had taken examinations for same. He has been unable to obtain work in any commercial flying service as a result of having taken this course.

It is agreed by counsel for the parties hereto that the law of the State of New York is applicable in this case.

I find that the plaintiff was a minor at the time the contracts were made; that he was a minor at the time of the execution of the first and second contracts and at the time that he left the school in May, 1930; during his

1. See 7 JOURNAL OF AIR LAW 291 (1936) for full opinion of the Third District Court.

instruction under the third contract. I find that he disaffirmed his contracts and that the disaffirmance was within a reasonable time after attaining his majority. I further find that the courses of instruction were not necessaries for the plaintiff.

I rule that under the law of the State of New York, the plaintiff having received from the defendant only an intangible right, in the nature of flying school instruction, is not chargeable for the benefit, if any, received from such instruction. *International Text Book Co.* v. *Connelly*, 206 N. Y. 188; *Green* v. *Green*, 69 N. Y. 553; *Rice* v. *Butler*, 160 N. Y. 578; *Wyatt* v. *Lortscher*, 216 N. Y. Supp. 571; *McCarthy* v. *Bowling Green Storage Co.*, 169 N. Y. Supp. 463.

Judgment for the plaintiff in the sum of twenty-one hundred sixty-three dollars ($2163)."

The case is to be decided according to the law of New York. The three contentions made before us are—

(1) Did the course of instruction constitute necessaries for the plaintiff?

(2) Has the plaintiff a right to rescind this contract as an executed contract?

(3) If the plaintiff has the right to rescind did he do so within a reasonable time after reaching his majority?

(1) As to the contract being one of necessaries. It was said in *International Text Book Co.* v. *Connelly*, 206 N. Y. 188, 195, "what are necessaries depends on circumstances to some extent and frequently involves a question of fact. . . . The word necessaries as used in the law is a relative term, except when applied to such things as are obviously requisite for the maintenance of existence and depends on the social position and situation in life of the infant as well as upon his own fortune and that of his parents. What would be necessary in a legal sense for an infant with ample means of his own might not be so for one with no means at all. . . . A proper education is necessary but what is a proper education depends on circumstances. A common school education is doubtless necessary in this country, because it is essential to the transaction of business and the adequate discharge of civil and political duties. A classical or professional education, however, has been held not to come within the term (case cited). Still circumstances not found in the cases cited may exist where even such an education might properly be found a necessary as a matter of fact."

There it was held that a course of instruction in complete steam engineering with five years in which to finish it, was held not a necessary because of lack of evidence as to facts bearing on the question of its necessity. As to a course of electrical instruction and relying upon *International Text Book Co.* v. *Connelly*, *supra*, see *Crandall* v. *Coyne Electrical School*, 256 Ill. App. 322.

The defendant relies upon *Curtiss* v. *Roosevelt Aviation School, Inc.*,[2] 1934 U. S. Aviation Reports, 135. This was a municipal court case before a single justice, in which it was declared that a contract for instructions in an aviation school to prepare an infant student as a mechanic is a contract for necessaries. The sole sentence on this point in the opinion reads, "It is my view that the course of study sought was to secure mechanical knowledge to equip plaintiff for a job in that line and should be classified as a necessary." There are no citations supplementing that statement and evidently the words

2. See Comment, 6 JOURNAL OF AIR LAW 275 (1935).

of the justice are to be construed as a finding of fact rather than as a ruling of law. The course of instruction in the case at bar cannot be said, as matter of law, to be a necessary.

(2) As to the plaintiff's right to rescind an executed contract. In the nature of things, the contract being instruction given by the defendant to the plaintiff, there can be no return of the consideration received by the plaintiff.

In *Wyatt* v. *Lortscher,* 217 App. Div. (N. Y.) 224, it is said at page 226, "Contracts of infants, except for necessaries, although not void, are voidable at the will of the infant (cases cited). The infant himself may elect to disaffirm a contract within a reasonable time after becoming of age even though the contract has been fully executed. . . . (P. 227.) Disaffirmance, however, carries with it a reciprocal obligation of returning considerations received for the obligation disaffirmed. It would be inequitable to allow an infant to avoid obligations on his part and at the same time retain the benefits which continue to enrich him (cases cited). He is not required at all hazards, however, to restore the other party to the contract to the position he was in when the contract was made. If, for example, the infant has squandered some part of the property he has received, or even all of it, he may, nevertheless, disaffirm the contract and get back what he himself gave, giving back only what he continued to hold (cases cited). Were this not so, in many cases the result would be to hold the infant to his contract, which would be contrary to the considerate policy of the law toward those not yet of age." See also *Green* v. *Green,* 69 N. Y. 533, *Rice* v. *Butler,* 160 N. Y. 578, *McCarthy* v. *Bowling Green Storage Co.,* 169 N. Y. Supp. 463, cited by the trial judge in his memorandum.

If one is not obliged to put the other party in *statu quo* with reference to as much of the consideration as the minor may have squandered, there is no reason for saying that he is precluded from disaffirming because the nature of the consideration is such that inherently it cannot be restored to the other party. To allow otherwise would be indirectly to give full force to a contract made with the minor whenever the other party had received consideration for something intangible. The defendant suggests a difference exists between tangibles and intangibles. But that difference does not seem to have as yet been intimated in the decisions of New York. The contract of the minor in the case at bar is one which is subject to disaffirmance by the minor.

(3) We are of the opinion, however, that there was error in giving the plaintiff's tenth request and in denying the defendant's fifth request.

The facts found by the court are that (1) the plaintiff "attained his majority on July 20, 1930," (2) on February 28, 1931, after receiving a notice that he owed a balance of $48.55 . . . he visited the office of the attorney for the defendant "and said he owed nothing," (3) He did not disaffirm his contracts until July 11, 1931, when he brought the present action.

In *Welch* v. *King,* 279 Mass. 455 at page 450, Chief Justice Rugg stated the general rule. It is "that, since the privilege of disaffirmance belongs to the minor alone and cannot be exercised by the other party to the contract, it must be exercised within a reasonable time having regard to all the circumstances." See also *Darlington* v. *Hamilton Bank of New York,* 63 Misc. 289, and *Aldrich* v. *Funk,* 1 N. Y. Supp. 543.

That failure to disaffirm an executed contract within a reasonable time operates as a ratification. See *Parsons* v. *Teller,* 188 N. Y. 318 at 326, and *Washington Street Garage* v. *Malloy,* 230 A. D. 266 at 267.

The plaintiff, citing *Welch* v. *King, supra,* says that the law of New York is the same as that of Massachusetts with respect to ratification of infants contracts. He relies on the language in *Welch* v. *King,* in which it is said "no occasion has hitherto arisen for the defendant to declare herself in confirmation or repudiation." But the court in that case further said, "It would have been a dumb show for the defendant to undertake repudiation of the clause before anyone could have anticipated that it would ever be operative."

The facts in that case are quite different from those in the case at bar. Here the contracts which the plaintiff now seeks to disaffirm had long since been executed. Seven months after the plaintiff reached the age of twenty-one years the defendant notified him that it claimed he owed it a balance due, and only when the defendant brought suit for the alleged balance due did the plaintiff disaffirm.

This was practically one year after he became of legal age. It was five months after the demand by the defendant on him.

We are of the opinion that as a matter of law the plaintiff did not disaffirm the contracts within a reasonable time after attaining his majority and that under all the circumstances his failure to disaffirm constitutes a ratification thereof.

See *Lown* v. *Spoon,* 158 A. D. 900.

It is, therefore, ordered that the finding of the trial court be reversed, and finding entered for the defendant.[3]

**Negligence—Carriers—Alleged Injury of Passenger Due to Transportation in Rough Weather—Sufficiency of Evidence for Jury.**—[Federal] On March 17th, 1936, trial of an unique and interesting case was had in *Eleanor M. Hope* v. *United Air Lines, Inc.,* United States District Court for the Western Division of the Western District of Missouri, at Kansas City, Missouri. The novelty of the case lies in the fact that the plaintiff was attempting to recover solely because of alleged negligence of defendant airline in transporting her in rough weather, there being no crash, collision, or damage to plane or other passengers.[1] The case was not reported, and it has therefore been deemed advisable to set out here a rather full abstract of the testimony, with excerpts from the charge to the jury.[2]

Plaintiff alleged that she had been permanently injured by the negligent operation of a plane of the defendant in which she was a passenger being

3. The opinion of ESTES, J., is set out in full. The decision of the Appellate Division of District Courts, Southern District, Commonwealth of Massachusetts, in the case of *John P. Adamowski* v. *Curtiss-Wright Flying Service, Inc.,* was handed down during the latter part of December, 1936. No date appears on the decision, copy of which was furnished through the courtesy of Mr. Cyril Hyde Condon of Wherry, Condon & Forsyth of New York City, New York, counsel for defendant.

1. The only case on record in the United States involving even incidentally the alleged negligence of an air carrier for rough passage is *Casteel* v. *American Airlines, Inc.,* 88 S. W. (2d) 976 (1935) where, however, the case turned upon entirely different issues. See 7 JOURNAL OF AIR LAW 288 (1936).

2. The case, which aroused a great deal of interest at the time of the trial, was fully covered by the local newspapers. See the Kansas City Star, page 1, March 16, 1936; page 1, March 17, 1936; Kansas City Times, March 17, 1936; Kansas City Times, page 1, March 18, 1936; Kansas City Journal-Post (Home Edition), March 16, 1936; Kansas City Journal-Post, March 17, 1936.

transported from Chicago to Kansas City on September 2, 1934; and she prayed for $25,000 damages for her injuries. She alleged that the pilot negligently precipitated the plane into a violent windstorm and caused the plaintiff to be violently thrown against various parts of the interior of the plane, whereby she sustained injuries.

To sustain this theory of the case, the plaintiff testified that as she was about to board the plane at Chicago there was in progress at Chicago a torrential rain and windstorm; that in Chicago she asked the co-pilot if it was safe to fly in such a storm and he assured her that it was because they would fly above the storm; that, in reliance upon his statement that the plane would fly above the storm and that it was perfectly safe to fly, she boarded the plane and it took off without mishap, rose to an altitude of 9500 feet and flew above the storm as far as a point which she believed was Kirksville, Missouri; that the trip from Chicago to the point of intermediate landing had been delightful, a really beautiful trip; that the plane landed at this intermediate point and the pilot told her the reason for the landing was that he had "run out of gas." Plaintiff testified that it was still raining at Kirksville, Missouri, when the pilot again took off, but that from Kirksville to Kansas City he did not fly above the storm. Instead, plaintiff said, he flew right into the storm and when the plane was fifteen or twenty minutes out of Kirksville it ran into "dreadful air pockets" and was tossed up and down and back and forth; that the plaintiff was strapped in her seat which had been reclined by the stewardess and she was helplessly tossed hither and yon in the plane against various parts of the interior thereof for about an hour; that she screamed for help time and time again but the stewardess did not come to her aid and neither did either of the other two passengers, who were in the rear of the plane behind the plaintiff; that as the plane neared Kansas City the storm abated and the landing at Kansas City was made in a normal manner when, for the first time, the stewardess came to the plaintiff who was unable to get out of her seat and the stewardess helped her to disembark. Plaintiff was met by friends who assisted her to the automobile and she was taken to her hotel, put to bed and a doctor was called.

Plaintiff produced six lay witnesses and two medical witnesses to substantiate her testimony as to injuries. One of the medical witnesses was the hotel physician, and the other was a person who described himself as an osteopath with training in medicine and a specialist in the X-ray.

At the close of the plaintiff's testimony the defendant moved for a directed verdict, but the court overruled the motion "with reservations."

The theory of the defense was that there had been no negligent operation of the plane on the day in question, and that the plane had not been precipitated into a violent windstorm, and that the injuries, if any, sustained by the plaintiff were sustained while the plane was attempting to land at Kansas City airport where there had been a mild wind shift just at the time the plane was about to approach Kansas City, and these injuries, if any, were caused by known hazards of the air for which the defendant was not responsible.

Defendant introduced the testimony of the co-pilot, stewardess, pilot and assistant auditor of the United Air Lines, and a meteorologist from the Kansas City airport, and established by the testimony of the crew that there was no torrential rain or windstorm in Chicago at the time in question; that the

plaintiff did not talk to the co-pilot in Chicago and that he did not tell her that it was safe to fly and that the plane would fly above the storm and he had no conversation with her whatever; that the plane did not stop at Kirksville, Missouri, but at Burlington, Iowa; that the pilot did not say that he had run out of gas; that he had not run out of gas but on the contrary had 165 gallons of gas at the time he landed at Burlington to refuel simply as a safety measure due to headwinds; that from Burlington to Kansas City there was so little out of the the ordinary about the weather conditions that the trip made no particular impression on the crew; but when the ship was descending preparatory to landing at Kansas City there was a mild wind shift over the Kansas City airport which created a turbulent air condition and the air was rough when approaching the airport; that the pilot circled the airport to ascertain the dominant wind direction and then landed into the wind in a perfect landing.

In regard to plaintiff's testimony as to the hour that she was tossed about in the violent windstorm between Burlington and Kansas City, the stewardess testified that as a matter of fact during about one-third of that time from Burlington to Kansas City she was seated next to the plaintiff and visited with her discussing clothes, books, poetry, travel and other subjects, and that there was no storm and that the plaintiff made no complaint about any injury or any storm. At about 10 minutes before the plane landed at Kansas City the stewardess had checked the safety belts of all the passengers including that of the plaintiff and at that time the plaintiff made no complaint of any injury or any storm or any roughness; that after the landing in Kansas City the plaintiff did complain to the stewardess about having caught her foot under the foot rest and hurting her ankle during the descent into Kansas City.

The assistant auditor identified certain records which confirmed the testimony of the crew in regard to the time of the flight, the stop at Burlington, the amount of gas on hand at Burlington and the amount of gas used between Burlington and Kansas City. The meteorologist confirmed the testimony of the crew that the records of the airport showed that the flying conditions were good until about 3 minutes before the plane landed in Kansas City when the records showed that there was a mild wind shift reported over the airport.

The Court in overruling defendant's motion for a directed verdict stated that in his opinion the testimony of the plaintiff had created as issue of fact for the jury as to whether the pilot had negligently precipitated the plane into the violent windstorm as described by the plaintiff. The following excerpts from the Court's charge to the jury are given:[3]

Reeves, J.: * * * "Briefly, as to the issues in the case, it appears from undisputed evidence that the defendant was operating an airplane line or an airship between Chicago and Kansas City on the 2nd day of September, 1934; and there is no controversy in the case but that the plaintiff became a passenger on that ship at Chicago and traveled on it to Kansas City. The testimony is in like manner undisputed that the ship left Chicago approximately five twenty-five o'clock in the afternoon, and that it arrived in Kansas City at eight forty-five o'clock. It is also established without controversy that the plane descended at an intermediate point. There was some little question as to whether it was at Kirksville, or a landing field near Kirksville,

3. General instructions have been omitted.

or at Burlington, Iowa, where the plane landed. I take it that upon the proofs in the case there is no controversy now but that the plane descended at Burlington, Iowa, which is an intermediate point between Chicago and Kansas City. There is also without controversy evidence that the trip from Chicago to the field at Burlington, Iowa, to the airport there was without incident. In other words, there is no question as to the travel over that portion of the trip but that the plane flew probably above what was referred to as the 'over-cast,' or in the language we may more clearly understand, above the clouds, a smooth trip, and that the plane came down, as I said, at Burlington, Iowa.

"There is some evidence that the plane descended—I believe there is no controversy but that it did descend for the purpose of taking on more fuel, gasoline and probably oil, for its use in continuing its journey on to Kansas City.

"The plaintiff in her petition states that after they left Burlington, Iowa, and were somewhere over Missouri, those in control of the plane carelessly and negligently precipitated the plane into a violent windstorm, and that she was violently thrown in the interior of the plane against various parts of the plane, and that she was severely shocked and jarred, and that she suffered injuries by reason of what she says was the negligent and careless act of the defendant in thus precipitating the ship into a windstorm, so that she has suffered multiple injuries, and she says she has continued to suffer from such injuries and that she was totally disabled as the result of bruises and twists to her body.

"The defendant on its part denies all these averments and says that if plaintiff did suffer any injuries on that trip it was such injuries as come as a natural consequence, as the usual hazards attendant upon travel by air.

"That makes the issue that you gentlemen are called upon after hearing the testimony in the case, to decide. There are a few preliminary instructions that I shall give you. In the first place, the burden in the case is upon the plaintiff to prove the allegations of her petition by a preponderance of the testimony. By preponderance of the testimony I do not mean necessarily the greater number of witnesses, but I do mean the testimony that seems to you the more reasonable or more probable and the more satisfying to your minds. If the testimony should be evenly balanced, then the plaintiff would not be entitled to a verdict, to recover. In other words, according to the averments of the petition the burden is upon the plaintiff to prove that the defendant carelessly and negligently through its operating agents precipitated the airship into a violent windstorm, and that on the trip from Kirksville or Burlington, Iowa, to Kansas City this was done, and as a result thereof she was violently thrown from side to side in the cabin of the ship and against various parts of the plane, and she was severely jarred and shaken, and that she suffered serious physical injuries as the result. If the tetimony should be evenly balanced as to whether or not the defendant carelessly and negligently precipitated the plane into a violent windstorm, or if it should be evenly balanced as to whether she was caused in such fashion to be thrown against parts of the plane so as to suffer injury, then it would be the duty of the jury to return a verdict for the defendant. If she has carried the burden and proved these things, then the plaintiff is entitled to recover.

"The only way a jury can know the facts of a lawsuit is from the testimony in the case. Naturally, the testimony comes, in this case particularly, from oral testimony of witnesses, so it is the right of the jury, since you are the triers of the facts in the case, to pass upon the credibility of the witnesses. The law has said that you are the sole judges of the credibility of the witnesses and of the weight to be accorded to the testimony of each and every witness who testified in the case. In determining what weight and what credence you should give to the testimony of any witness who may have testified you should take into consideration and account the conduct and demeanor of the witness on the witness stand, his interest in the case or in the results of the case, if any, his bias or his prejudice for or against either of the litigants in the case, his opportunity to know and understand the things about which he gave his testimony, the reasonableness or unrea-

sonableness of the testimony of such witness, and the probability or improbability of the facts occurring or existing as testified by such witness.

"Gentlemen, the parties have asked me to give certain instructions. They are my instructions, not those of counsel, of course. I am giving them to you as the law of the case:

"The Court charges the jury that while defendant cannot be held accountable for the weather conditions, it was its duty as a common carrier of passengers, to so conduct and operate its airplane as not to subject its passengers to hazards that could be avoided by the use of the facilities available and the exercise of human foresight.

"If you find that on September 2, 1934, the plaintiff was a passenger upon an airplane operated by the defendant between Chicago, Illinois, and Kansas City, Missouri, and on that question I will say you will be entirely justified in finding that she was a passenger on the plane because there is no controversy on that; and if you should further find that during the course of said passage the said airplane was conducted into rough or stormy atmospheric conditions, and that as a result thereof, if you so find, the plaintiff was injured by being shaken, jarred, or thrown against parts of the interior of said airplane, and, if you further find, that said injuries, if any, would have been avoided by exercise of the highest degree of care on the part of the defendant in the operation of said airplane, then your verdict will be for the plaintiff. By 'highest degree of care' I mean that degree of care which a very careful and prudent person would have used under like or similar circumstances.

"The defendant is required to use the highest degree of care and diligence for the safe carriage of its passengers, but it is not required to use such skill as will free the transportation of passengers from all possible peril.

"The plaintiff necessarily took upon herself all the usual and ordinary perils incident to airplane travel and if you find that defendant used all the care, skill, and diligence required by law as above defined and that nevertheless an accident occurred, the defendant would not be responsible therefor, and your verdict should be for the defendant. The defendant is not an insurer of the safety of its passengers and is not bound absolutely and in all events to carry them safely and without injury. All passengers take the risk of those dangers which cannot be averted by the exercise of the degree of care which the law requires.

"Negligence is never presumed, but the burden is upon the plaintiff to prove such negligence by a preponderance of the evidence as I have defined it to you, and further to prove that such negligence on the part of the defendant was the proximate cause of the injury. On both of these issues the burden is upon the plaintiff, and unless the plaintiff proves such negligence, and that it was the proximate cause of the injury, there can be no recovery herein and the verdict must be for the defendant and against the plaintiff.

"A defendant is not liable for an injury which is not caused by its negligence but which results from some natural agency over which it has no control.

"If you should find that the pilot acted in such a manner as a person of prudence and caution and skill would use under the same circumstances, then he was not negligent.

"One riding in an airplane assumes the risk that sudden and unavoidable storms and weather conditions may be encountered and that the plane of necessity must be brought from the sky to the earth under conditions of weather that involve unusual risk and danger in landing.

"I am not going to comment upon the testimony of the witnesses, but I am going to call your attention to the names of the witnesses and some of the things concerning which such witness gave testimony.

"Mrs. Hope was the first witness in the case. You gentlemen will remember Mrs. Hope, the plaintiff in the case, and what she said about her trip from Chicago, what she said her conversation was with the pilot at Chicago, either the pilot or the co-pilot, the conversation with some official of the company there, and also her conversation at that point where the plane descended, Burlington, Iowa, and the reason for its descent at that point.

I believe there is no controversy on that point. The pilot testified he descended for the purpose of refueling his ship. You gentlemen have before you the amount of fuel on hand and the amount ordinarily consumed in the course of the trip, at fifty to six gallons per hour regardless of weather conditions.

"Mr. Edgar Courtway testified for the plaintiff. He was the clerk at the Bellerive Hotel where Mrs. Hope was living at the time. She went to the Bellerive from the airport. The clerk assisted her, he said, to her room.

"Margaret Graham was the maid at the Bellerive. She said that she was called by Mr. Courtway, that she went to the room of Mrs. Hope and aided her in undressing, took her shoes off, and she testified as to what she observed as to the condition of her body, as to the bruised condition of her body.

"Dr. Shapiro was called as a witness. Dr. Schoen was also called as a witness. He was also an attending physician. He told you what he observed. Mr. and Mrs. Hundley were friends from Belton. They came in to call on the plaintiff and told you gentlemen the condition in which they found her. June Dawson was her personal maid who waited on her and looked after her, attended to her dressing and undressing. She told you gentlemen what she observed. Mrs. Thomas L. Bowles was in the automobile which met the plaintiff the night of her arrival from Chicago. She said she received a telegram from her. She told you what she observed. Mr. Schmidt was the assistant meteorologist at the airport. It was his duty to keep the records of weather conditions from time to time and report such conditions, and he reported the conditions as his records showed them to be, both here and at Kirksville, as I recall. Mr. Cochrane was sworn as a witness and my recollection is that the matter he sought to identify was excluded by the Court, so I just speak about it. There was nothing Mr. Cochrane said to which I need call your attention.

"For the defendant Mr. Lyman testified. Mr. Lyman was the co-pilot or assistant pilot. I do not believe that was the term used. He was the assistant to Mr. Rockwood, he testified. He testified to leaving Chicago and of attending to the refueling of the ship at Burlington, Iowa, of what he observed of the weather conditions, and the conversation, if any, that he had with the plaintiff in Chicago. He said he had no conversation with her at the landing field at Burlington, Iowa.

"Mrs. Stineman testified. She said she was the stewardess on the airplane, that she went to Chicago that day and back on the same ship, making the round trip that afternoon. She told you gentlemen about meeting and talking with the plaintiff, that she was in the cabin with her, and served lunch on the trip from Chicago to Burlington, Iowa, where they descended, and she said they had conversations. She told you about the plaintiff's condition when they reached Kansas City, that is, she told you what she said, what she thought the condition was.

"Mr. Rockwood was the pilot in charge. He told you about his conversation with the plaintiff. At Burlington, Iowa, he went back into the cabin to talk with her, but he did not recall all that was said. He testified as to weather conditions, as did Mr. Lyman, and the point where they say they actually met a windshift. Mr. Rockwood said it was not unusually serious and that he circled the field and brought his ship to what he described as a fine landing.

"Mr. Ellert was the auditor who kept records of the movement of ships between Chicago and Kansas City. He recorded, and it was offered in evidence, the record he made of the time schedule of this ship from the time it left the airport in Chicago to the time it arrived in Kansas City, and he gave you the time it arrived and left Burlington, Iowa, which he said was seven minutes past seven, the amount of gas that was taken on at Burlington, the amount of gas in the ship when it left Chicago, etc.

"Mr. Warren was the meteorologist at Kansas City and the airport. He made records of weather conditions and he testified to you gentlemen as to what the weather conditions were at various times.

"Now, gentlemen, so much for the testimony.

"If your verdict in this case should be for the plaintiff, then it shall be your duty to allow her such sum of money as you honestly feel would reasonably compensate her for the damages alleged to have been sustained by her on this trip on this airship. Such compensation would be for her pain and suffering, both physical and mental, for such pain and suffering as she may have endured in the past, if any, and such pain and suffering as she may sustain in the future, if any, such medical disbursements as she may have made for medical services, or may make in the future, if any, and for her inability and loss of ability to get around and do the work that she was able to do beforehand, not exceeding the sum of Twenty-five Thousand Dollars, which she has fixed as the maximum of her recovery. In naming that sum, there is no implication intended that that sum or any other should be determined by the jury. I name that for the reason that the plaintiff fixes her maximum for damages at Twenty-five Thousand Dollars, and the jury cannot go beyond that. If the verdict is for the plaintiff, within that sum the jury has the right to fix whatever damages they find and believe plaintiff sustained.

"Have you any further instructions, Mr. Madison?"

MR. MADISON: "No, Your Honor."

THE COURT: "I will allow you an exception to each of defendant's instructions, if you want it."

MR. MADISON: "Yes, Your Honor."

MR. MURRAY: (Out of hearing of the Jury) "Defendant excepts to that portion of the Charge which hypothesizes the facts under which plaintiff might recover, because, (1) the Charge does not define what conduct on defendant's part could be found to be negligence, and (2) the Charge gives to the Jury a roving commission to find negligence upon the part of the defendant upon any theory the Jury might evolve, whether within the issues and the evidence or not.

THE COURT: "Gentlemen of the Jury, when you go to the jury-room you should elect one of your number as your foreman to preside over your deliberations. You should bear in mind that it requires the judgment of all of your number, the concurring judgment of all of your number to return a verdict in this court. Jurors sometimes might be confused with the law in our State courts. In our State courts nine men of a jury of twelve men may return a verdict. That is not the law in this court. It takes all the twelve men to return a verdict in this court.

"If your verdict in this case should be for the plaintiff, then you will use this form which the clerk has provided for your use:

> We, the jury in the above entitled cause, find the issues herein in favor of the plaintiff Eleanor M. Hope and against the defendant United Air Lines, Incorporated, a Corporation, and assess the amount of plaintiff's damages in the sum of $.....

and you will find a blank space wherein you will insert the amount of that recovery, and then your foreman will sign.

"If your verdict should be for the defendant in this case you will use this form:

> 'We, the jury in the above entitled cause, find the issues herein in favor of the defendant United Air Lines, Incorporated, a Corporation, and against the plaintiff Eleanor M. Hope,

and in like case your foreman will sign in the blank space above the word 'Foreman'.

"Gentlemen, you will retire with an officer of the court to your jury room, and when you have reached a verdict let that fact be made known to an officer of the court and I will receive it."

(Thereupon the jury retired to consider of its verdict.)

* * *

(Very shortly after retiring, the jury was by the Court recalled to the court room:)

THE COURT: "Gentlemen of the Jury, I am sorry to have to call you back. In reading some instructions to you, I inadvertently omitted to read a very short instruction. I deem it encumbent upon me to do it, so I called

you back very briefly to give you this brief instruction to the effect that if you find and believe from the evidence that the injuries of plaintiff, if any, were received while the plane was coming to earth at the Kansas City airport, then I charge you that there is no evidence of negligent operation of the plane at that time and place and your verdict will be for the defendant. That is all. I thank you very much."

After deliberating for one hour and fifty minutes, the jury returned a verdict in favor of the defendant. No appeal was taken.

**Negligence—Carriers—Alleged Injury of Passenger Due to Transportation in Rough Weather—Sufficiency of Evidence for Jury.**—[Federal] Plaintiff boarded defendant's airplane at Chicago for transportation on a regularly scheduled trip to Kansas City. When the trip was about halfway completed, an unscheduled stop was made at an intermediate field for refueling. Plaintiff alleged that some time after resuming flight, turbulent air conditions were encountered which caused the plane to be severely tossed about, whereby she was injured. For these injuries she sues, alleging negligent handling of the airplane. Plaintiff adduces no expert testimony concerning the piloting of airplanes, their present day performance, nor the science of meeting turbulent air conditions. None of the other passengers was called as a witness. The defendant, whose testimony denied that of the plaintiff at every point, moved for a directed verdict; but the court ruled that the plaintiff's evidence was sufficient for the jury to determine the question of negligence. *Held:* verdict and judgment for defendant. *Eleanor M. Hope* v. *United Air Lines, Inc.* (W. D. Mo. March 17, 1936, Case No. 9247).[1]

The court's decision to present this case to the jury raises a new issue in the law of passenger carriers of the air, *i.e.*, whether evidence of such injurious occurrences during flight as extreme roughness of passage makes out a *prima facie* case of negligence. The ruling is an application of the so-called mild form of *res ipsa loquitur*.[2] Both in the mild form, and in the so-called severe form, *res ipsa loquitur* has appeared in air law, but until the present in no case except where the injuries complained of occurred in a crash.[3] It may be observed that in the field of personal injuries in trans-

1. See statement of facts and excerpts from the charge to the jury at page 132.

2. *Res ipsa loquitur* is found in three applications. In its mild form it serves merely to provide sufficient evidence to carry before a jury a case which would otherwise result in a directed verdict for the defendant. In the so-called severe form it has the force of a full presumption and will determine the case for the plaintiff if not overcome by defendant's evidence. 5 *Wigmore,* Evidence (2d ed. 1923) §2509. Intermediate these situations, the doctrine shifts the burden of proof to the defendant; but, after he has introduced evidence, the burden reverts to the plaintiff. The prerequisites warranting the use of the doctrine are the same in any of the three applications. *Carpenter,* "The Doctrine of *Res Ipsa Loquitur,*" 1 U. of Chi. L. Rev. 519 (1933). The mild form has for years been the prevailing rule of the federal courts.

3. Employed in the mild form in: *Conklin* v. *Canadian Colonial Airways, Inc.*, 242 App. Div. 625 (1934), aff'g N. Y. Sup. Ct., N. Y. Co. (1933), 1934 U. S. Av. R. 21 (unexplained crash of passenger carrier into high tension wires); see *Genero* v. *Ewing,* 28 P. (2d) 116 (Wash. 1934). Doctrine employed in the severe form in: *Stoll* v. *Curtiss Flying Service,* 236 App. Div. 664, 257 N. Y. S. 1010 (1932), aff'g N. Y. Sup. Ct., N. Y. County (1930), 1930 U. S. Av. Rep. 148 (crash resulting from bank at low altitude); *Seaman* v. *Curtiss Flying Service, Inc.,* 231 App. Div. 867, 247 N. Y. S. 251 (unexplained crash); *Smith* v. *O'Donnell,* 5 P. (2d) 690, aff'd 215 Cal. 714, 12 P. (2d) 933 (1932) (collision of two planes); *Parker* v. *Granger,* — Cal. Dec. —; 39 P. (2d) 833; — Cal. —; 52 P. (2d) 226 (1936) (collision); *Goodheart* v. *American Airlines, Inc.* (N. Y., Nassau Co.) 1936 U. S. Av. R. 179 (unexplained crash).

*Wilson* v. *Colonial Air Transport, Inc.,* 278 Mass. 420, 180 N. E. 212 (1932) refuses to apply the doctrine "because it is not in the normal course of flying that motors should be immune to failure for more than a few minutes." And

portation the doctrine is invoked most readily against the common carrier, the more easily as the type of vehicle involved reaches the stage of mechanical perfection and where the accident is to the vehicle itself, injuring its parts or impairing its normal operation.

In the law of railroads, nearly a century older than that of airplanes, *res ipsa loquitur* was formerly employed only in severe accidents, overturns, collisions, and smash-ups.[4] Though some jurisdictions still limit the use of the doctrine to such cases,[5] recently, under modern operating conditions, the doctrine has been employed in aid of sufferers from severe jerks occurring during passage on trains,[6] and on the modern motor buses.[7]

Like the airplane, the ship at sea cannot, even by the most prudent handling, avoid every injurious occurrence that comes with the winds; and although a *prima facie* case is made against the sea carrier when personal injuries occur in collisions,[8] founderings,[9] accidents at the wharves,[10] when storm warnings have been broadcast,[11] or certain equipment is lacking,[12] or there has been failure to warn the passenger,[13] *res ipsa loquitur* is not applied when the accident is caused by the elements.[14]

Surely the air is as uncontrollable as the sea. By analogy, *res ipsa loquitur* does not properly apply in the present case. Any suggestion or reasonable inference of negligence is overcome by the fact that under the conditions of present-day flight, the operations of airplanes would not be

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*Herndon* v. *Gregory*, 81 S. W. (2d) 849, 851 (Ark. 1935) (crash of private plane) argues against the use of *res ipsa loquitur* altogether in cases of an unexplained crash of an airplane (strong dissent).

4. First employment in the federal courts was in *Stokes* v. *Saltonstall*, 38 U. S. 181 (1839) (overturn of stage coach); applied to the railroads in *Railroad Co.* v. *Pollard*, 89 U. S. 341 (1874); *Gleeson* v. *Virginia Midland Railroad Co.*, 140 U. S. 435 (1891); see *Patton* v. *Texas and Pacific R. R. Co.*, 179 U. S. 659, 663 (1901).

5. *Denver & R. G. R. Co.* v. *Fotheringham*, 17 Colo. App. 410, 68 Pac. 978 (1902); *Nelson* v. *Lehigh Valley R. R. Co.*, 25 App. Div. 535, 50 N. Y. S. 63 (1898); *Delaney* v. *Buffalo R. R. Co.*, 266 Pa. 122, 109 A. 605 (1920); *Norfolk & Western R. R. Co.* v. *Rhodes*, 109 Va. 176, 63 S. E. 445 (1909).

6. *Capitol Traction Co.* v. *Lyon*, 24 F. (2d) 262 (C. C. A. D. C. 1928); *Delaware, L. & W. R. R. Co.* v. *Byrne*, 60 F. (2d) 268 (C. C. A. 3rd 1932); *Gibson* v. *Southern Pac. R. R. Co.*, 67 F. (2d) 758 (C. C. A. 5th 1933). *Contra: Norfolk & Western R. R. Co.* v. *Birchett*, 252 Fed. 512 (C. C. A. 4th, 1918) (earlier holding). *Meeks* v. *Graysonia, Nashville & Ashdon R. R. Co.*, 168 Ark. 966, 272 S. W. 360 (1925); *McIntosh* v. *Los Angeles R. R. Corp.*, 59 P. (2d) 959 (Cal. 1936); *O'Callaghan* v. *Dellwood Park Co.*, 242 Ill. 336, 89 N. E. 1005 (1909); *Heinecke* v. *Chicago City R. R. Co.*, 279 Ill. 210, 116 N. E. 761 (1917); *Paul* v. *St. Louis Public Service Co.*, 46 S. W. (2d) 911 (Mo. 1932); *Burr* v. *Pennsylvania R. R. Co.*, 64 N. J. L. 30, 44 Atl. 845 (1899).

7. *Seney* v. *Pickwick Stages, Northern Division*, 268 P. 451 (Cal. 1928); *Hoppe* v. *Boulevard Transport Co.*, 172 Minn. 516, 215 N. W. 852 (1927); *Seinner* v. *Public Service Coordinated Transport Co.*, 151 Atl. 624, (N. J. 1930); *McLaughlin* v. *United Transportation Co.*, 57 P. (2d) 868 (Okla. 1936); *Cumberland and Westernport Transport Co.* v. *Metz*, 158 Md. 424, 149 Atl. 4 (1930); *Roy* v. *United Electric R. R. Co.*, 164 Atl. 513 (R. I. 1923). *Contra: Quinn* v. *Colonial Motor Coach Corp.*, 266 N. Y. 584, 195 N. E. 211 (1934).

8. *Duggan* v. *New Jersey & W. Ferry Co.*, 23 Del. 318, 76 Atl 636 (1909).

9. *The Jane Grey*, 99 Fed. 582 (N. D. Wash. 1900).

10. *Inland S. Coasting Co.* v. *Tolson*, 139 U. S. 551 (1890).

11. *The Arabic*, 50 F. (2d) 96 (C. C. A. 2d, 1931).

12. *North German Lloyd S. S. Co.* v. *Roehl*, 144 S. W. 322 (Tex. 1912).

13. *Boston & Yarmouth S. S. Co., Ltd.* v. *Francis*, 249 Fed. 450 (C. C. A. 1st 1918).

14. *Morgan* v. *Oceanic Navigation Co., Limited*, 224 N. Y. S. 420 (1927). Due to the circumstance that practically all cases on this point are in admiralty, tried without a jury, opinions stating the inapplicability of *res ipsa loquitur* are extremely hard to find. But the type of language used in the following opinions, in admiralty, leaves little doubt that in a civil trial the court by employment of the doctrine would give judgment for the defendant without reference to the jury. See *The Great Northern*, 251 Fed. 826 (C. C. A. 9th 1918); *Winnepeg*, 5 F. Supp. 469 (N. D. Cal. 1933); *Carlsen* v. *A. Paladini, Inc.*, 5 F. (2d) 389 (C. C. A. 9th 1925); *Stiles* v. *Munson S. S. Co.*, 40 F. (2d) 276 (E. D. N. Y. 1930); *Silverman* v. *Bermuda*, 74 F. (2d) 683, 684 (C. C. A. 1st 1935).

entirely free of the sort of incident complained of, even though the highest degree of care is employed. While in the future man may be able to counteract air currents, the aviation industry of today, at any rate, is sufficiently remote from this goal that courts, in developing air law, may well guide themselves by the rules that are employed in cases of personal injuries caused at sea by elements still uncontrollable. In the field of injuries in the air, holdings similar to the present would throw the stripling air traffic upon the mercy of juries, by rules which are now applied to railroads after a century of their improvement. Although meteorology and the science of weather reporting are constantly improving and developing along with aviation, the air transport of today cannot, while in flight, be notified of every cross current or wind shift, nor infallibly avoid it when forewarned, nor may schedules be dissolved by every overcast sky.[15]

RICHARD SHELDON.*

## DIGESTS

**Insurance—Double Liability—Construction of "Engaging as a Passenger or Otherwise in Aeronautic Expeditions" Exclusion Clause.**— [Federal] The United States Supreme Court, on October 12, 1936, denied the petition of The Equitable Life Assurance Society of the United States for a writ of *certiorari* to the Circuit Court of Appeals, Tenth Circuit (83 F. (2d) 147). *The Equitable Life Assurance Society of the United States* v. *Iva A. Day*, 57 S. Ct. 11 (U. S. Supreme Court, October 12, 1936).

For a digest of the case see 7 JOURNAL OF AIR LAW 420 (1936).

**Negligence — Collision — Insufficient Allegation of Agency.** — [New York] In an action for damages arising out of a collision between the plaintiff's airplane with that of the defendant as both were about to land, the complaint alleged that the defendant's plane was being operated by one Donahue with the consent and permission of the defendant, and that the collision was caused solely by Donahue's negligence. On motion to dismiss the complaint for failure to state a cause of action, *held:* complaint dismissed, with leave to plaintiff to serve an amended complaint within ten days. There were no allegations that Donahue was operating the defendant's airplane as his agent, servant or employee, or in the defendant's business and within the scope of his employment. None will be inferred from the allegation that the defendant was the owner of and in control of the airplane. An allegation that Donahue was operating the vehicle with defendant's consent and permission would be sufficient to charge the latter in a case arising out of an automobile collision on a public highway under §59 of the Vehicle and Traffic law, but the statute is not applicable here. Consequently the common law rule governs, by which it is settled in New York that the owner of a vehicle will not be held liable for negligence of its operator unless at the time it was being used in the owner's business by the operator within the scope of his employment. *Munch & Romeo, Inc.* v. *Caton*, 96 N. Y. L. J. 876, 235 C. C. H. 1213 (County Court, Nassau County, New York, Sept. 25, 1936).

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15. Percentage of scheduled flights completed by the air transport companies of the United States:

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|---|---|
| 1931 | 93.61% |
| 1932 | 95.56% |
| 1933 | 95.55% |
| 1934 | 93.88% |
| 1935 | 95.18% |

7 *Air Commerce Bulletin* 282 (1936), Bureau of Air Commerce, Washington, D. C.

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**Taxation—Situs of Seaplanes.**—[California] Three seaplanes of X Airways Company, registered in New York, operate out of Alameda Airport, City of Alameda, California, in interstate and foreign commerce exclusively. No regular schedule is maintained, but the planes leave every ten days to two weeks for a round trip. The company, a New York Corporation, is not qualified to do business in California. The city and county seek to tax the planes as personalty situate within their jurisdictions. *Held:* such seaplanes are subject to taxation by the City of Alameda and the County of Alameda, California. They cannot be considered as vessels exempt from taxation within the meaning of Article XIII, §4, of the California State Constitution which provides that "all vessels of more than fifty (50) tons burden registered at any port in this state and engaged in the transportation of freight or passengers shall be exempt from taxation except for state purposes, until and including the first day of January, 1955." The fact that the property is engaged in interstate or foreign commerce does not render it immune from a non-discriminatory property tax by the state having jurisdiction. Registry of a vessel within the state is not necessary to confer such jurisdiction, and the seaplanes are taxable if they have an actual situs in the state of California. Using the base supplied by the rolling stock cases the average number of the planes habitually used and employed in the state will be subjected to taxation by the City of Alameda and the County of Alameda if the county assessor finds that on the average one or more of the seaplanes is habitually at the Alameda airport. *Opinion of the Attorney General of California to the State Board of Equalization,* No. 10870, August 3, 1936.