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The Canadian Law of Civil Aviation

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THE CANADIAN LAW OF CIVIL AVIATION*

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INTRODUCTORY

The growth of air transportation during the past few years is evidence of the permanence and importance of the place aviation has already taken in the national and international life and of the unlimited future which lies before it. The law and the lawyer have their place in such development. The law of aviation presents an almost completely new set of problems to the lawyer and the law is as yet in its early childhood. It may be difficult to arrive at a true decision merely by analogy to the old rules of common law. The doctrine of the ownership of land and of the air above it, the right to fly through the air, the burden of proof of negligence all present special problems requiring urgent solution. Litigation arising from aviation is on the increase. New rules must be developed. As avation continues to advance in international life the necessary concomitance of that advance is a further development and solidification of the law applied to it. Some consider that the common law with its ancient ability to expand in order to cover new social conditions is gradually impressing itself upon the public consciousness as being adequate to deal with the problems of aviation. As to this, more will be said later.

The last time the subject of aviation was dealt with generally by this Association at an Annual Meeting was in 1921, when Colonel O. M. Biggar, K.C., addressed us on "The Law Relating to the Air" (Proceedings of The Canadian Bar Association, Vol. 6 (1921), p. 196) to which address you are referred.

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This address will only endeavor to present an outline of the law of Canada relating to civil aviation. It will not deal with military law nor the law in time of war. It will try to state the present statute law, to deal with the right as between the Dominion and the Provinces to legislate on matters pertaining to aviation, to refer to such international law as yet affects Canada and to make some mention of certain other international treaties which it is reasonable to suppose Canada will in time adopt as the law of the country. It will then touch upon some phases of the general law, principally in relation to liability in tort and to some incidents of contract.

Present Statute Law

In 1919 the Dominion passed "The Air Board Act" (1919, c. 11) and on the 17th of January, 1920, air regulations approved by the Governor-in-Council pursuant to statute were published in the Canada Gazette. The statute established an air board. In 1922 the Dominion Government passed "The National Defense Act 1922" (1922, c. 34), under which Act the powers, duties and functions vested in the Air Board or by order or regulation made thereunder were in future to be administered, exercised and performed by, or under the direction of, the Minister of National Defense, and the Air Board Act became known as the Aeronautics Act, being an Act to authorize the control of aeronautics (1922) c. 34; R.S.C. (1927) c. 3. Certain provisions are found in the Aeronautics Act and not in the Air Board Act which it is not necessary to mention here. In 1936 "The Department of Transport Act 1936" (c. 34, s. 5) transferred the control and supervision of the civil aviation branch of the Department of National Defense, from the Minister of National Defense, to the Minister of Transport. This Act came into force on the 2nd of November, 1936, on the publication in the Canada Gazette of October 3rd, 1936, of the proclamation of the Governor-in-Council and it empowered the Minister of Transport to exercise all and every of the duties, powers and functions previously vested. with respect to civil aviation, in the Minister of National Defense by any act, order or regulation.

The Aeronautics Act enacts that it is the duty of the Minister (now the Minister of Transport) "to supervise all matters connected with aeronautics (s. 3 (a)) and, among other things, "to consider, draft and prepare for approval by the Governor-in-Council such regulations as may be considered necessary for the control and operation of aeronautics in Canada or within the limits of the

territorial waters of Canada" (s. 3, ss (L) and further enacts that all regulations under the provisions of the Act shall upon approval and publication in the Canada Gazette have the same force in law as if they formed part of the Act (s. 4, ss. (3)). Subject to approval by the Governor-in-Council, the Minister of Transport is given power to regulate and control aerial navigation over Canada and the territorial waters of Canada. As has already been stated, air regulations pursuant to the statute were approved and became effective on the 17th of January, 1920. There have been fairly frequent amendments and additions to the air regulations and it is understood that the Department of Transport has now under way a complete revision of all regulations with substantial additions thereto. The present regulations define many aeronautical terms, make rules respecting registration and marking of aircraft, licensing of air harbors, pilots, navigators, engineers, and inspectors, make rules as to lights and signals, set up rules of the air and rules for traffic in the vicinity of licensed aerodromes and seaplane stations, provide prohibition against dangerous flying and regulate inter-state flying and scheduled air transport service. There are other general provisions, for example, it is provided that if any aircraft flies in breach of the regulations the owner of the aircraft as well as the pilot thereof and any other member of the crew, who has been a party to the breach, shall be liable therefor and that if there is a breach of the regulations relating to the use of an air harbor the owner as well as the person in charge thereof shall be liable, if such owner permits or could reasonably have prevented the breach (Regulation 128). It is also provided that the owner of an aircraft or the owner of an air harbor, as the case may be, shall be liable for any damages for which the pilot or any member of the crew of such aircraft or the person in charge of such air harbor becomes liable by reason of any act or omission in connection with the navigation of such aircraft or the management of such air harbor or by reason of any breach of the regulations relating to such aircraft or air harbor (Regulation 129). A further regulation worthy of note here provides that in construing the regulations due regard shall be had to all dangers of navigation and collision and to any special circumstances which render a departure therefrom necessary in order to avoid immediate danger and that, if such breach is proved to have been due to stress of weather or other unavoidable cause, it shall be a good defense to any proceedings for a breach of these regulations (Regulation 135).

A study of the statute law and regulations issued pursuant

thereto in England, in the United States and in other countries shows clearly that Canada has not dealt with the law of aviation by legislation nearly as extensively as have most other jurisdictions.

Constitutional Aspects

So far as I have discovered, no Province has by statute entered the field of aviation law. In 1931, the Legislative Assembly for the Province of Alberta considered a Bill respecting the liability for damage arising out of aircraft operation, which Bill declared the owner of any aircraft operated within the Province liable for all damages to persons or property caused during aircraft operation and further provided for the owner carrying insurance indemnifying him in respect of liability for damages to persons and property unless the aircraft owner satisfied the Board of Public Utility Commissioners that he was financially responsible. (Bill No. 24, 1931.) The Bill was withdrawn. In 1930 certain questions were submitted by the Dominion Government to the Supreme Court of Canada and subsequently in 1931 on appeal to the Privy Council respecting the question of the exclusive legislative authority of the Federal Parliament (see Reference re Aeronautics in Canada (1932) A. C. 54; (1932) 1 D. L. R. 58; (1931) 3 W. W. R. 625). The Judicial Committee was asked first whether the Parliament and Government of Canada had exclusive legislative and executive authority for performing the obligations of Canada or of any Province thereof under the Convention entitled "Convention relating to the regulation of aerial navigation," generally known as the Convention of Paris and hereinafter referred to; second, whether legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province necessary or proper for performing the obligations of Canada or of any of the Provinces thereof under the Convention, is within the meaning of section 132 of The British North America Act (1867); third, whether the Parliament of Canada had legislative authority to enact in whole or in part the provisions of section 4 of the Aeronautics Act, i. e., the section which purported to empower the Ministers to regulate and control aerial navigation over Canada and the territorial waters of Canada; fourth, whether the Parliament of Canada had legislative authority to sanction the making and enforcing in whole or in part of the regulations contained in the Air Regulations. All questions were answered by the Privy Coun-

cil in the affirmative. The Judicial Committee stated that the authority of the Parliament of Canada with respect to the obligations contained in the Convention might possibly have rested solely upon section 132 of The B. N. A. Act, which is as follows:

> "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries."

but the Committtee brought to the aid of that section the consideration of the fact that further legislative power in relation to aerial navigation resides in the Parliament of Canada by virtue of section 91, subsection (2), subsection (5) and subsection (7), that is, the provisions relating to the regulation of trade and commerce, postal service, militia, military and naval services of defense. Their Lordships added further that they did

> "not think that aeronautics can be brought within the subject of navigation and shipping although undoubtedly to a large extent and in some respects it might be brought under the regulation of trade and commerce, or the postal service. . . . Their Lordships do not think that aeronautics is a class of subject within property and civil rights in the provinces, although here again, ingenious argument may show that some small part of it might be so included.
>
> In their Lordships' view transport as a subject is dealt with in certain branches, both of s. 91 and of s. 92, but neither of those sections deals especially with that branch of transport which is concerned with aeronautics."

To their findings in all these respects the Board added:

> "There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion; but neither is it vested by specific words in the provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

In reference to their Lordships' remarks in respect to section 132 of the B. N. A. Act, it is interesting to note the Committee's reasons for judgment in the Weekly Rest Reference (1937) 1 W. W. R. 229, and in particular the remarks of Lord Atkin, at p. 309; Canadian Bar Review (1937) Vol. 15, Part 6, p. 401.

International Obligations

The Aeronautics Act makes it the duty of the Minister of Transport to take such action as may be necessary to secure, by international regulations or otherwise, the rights of His Majesty in respect of His Government of Canada in international air routes (s. 3 (h)).

Obviously most questions which will arise will be in regard to international flying between Canada and the United States and on the 22nd of October, 1929, the Dominion Government entered into an agreement with the United States of America providing that subject to the conditions and limitations in the agreement contained and set in force Canadian civil aircraft would be permitted to operate in the United States and in like manner civil aircraft of the United States would be permitted to operate in the Dominion of Canada. The limitations and conditions are comparatively few in number and deal principally with such necessary matters as customs regulations, air-worthiness, the carrying of government licenses and prohibitions against the carrying of photographic apparatus and the taking of photographs. A copy of this agreement is printed as an appendix to the Air Regulations as published by the King's Printer.

Prior to this agreement between Canada and the United States of America, namely, in 1922, Canada had become a party to The Convention of Paris, previously referred to, dated the 13th of October, 1919, which came into force on the 11th of July, 1922. In accordance with Article 34 of the Convention, the International Commission for Air Navigation was instituted and has since held many sessions and on the 1st of March, 1935, modifications to the Convention previously approved of came into effect. In general the Convention as modified lays down that the contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory and the territorial waters adjacent thereto. Each contracting State undertakes in time of peace to afford freedom of innocent passage over its territory to aircraft of the other contracting states provided that the conditions laid down in the Convention are observed. A copy of the Convention and a list of the countries parties thereto are to be found as appendices A and B to Moller's "The Law of Civil Aviation (1936)." The Convention marks an important starting point in an entirely new branch of International law. The provisions of these Conventions and Treaties only become the law of Canada

to the extent that they have been enacted into the Law of Canada by the Aeronautics Act or under authority of the Act have been by regulations made a part of the law of Canada; see Re Arrow River and Tributaries Slide & Boom Company (1932) 2 D. L. R. 250. On the contrary Treaties duly made in the United States become law as if duly enacted, see Lamont, J., *supra* at 260, and see 63 C. J. page 827.

There are two other important International Conventions subscribed to by many if not by most of the countries of the World but to which Canada has not yet become a party. I refer to the Warsaw Convention dealing with the rights of passengers and to the Rome Convention dealing with the rights of third parties on the surface. Aviation requires an international code of law. For this reason it is submitted that Canada ought to give immediate consideration to at once becoming a party to these two Conventions and making them part of the law of Canada; otherwise Canadian aviators and aircraft owners may under certain circumstances find themselves in a less fortunate position than are aviators and aircraft owners of other countries, and mention at least should be made of these two Conventions here. The Warsaw Convention, which was adopted and became the law of Great Britain by "The Carriage by Air Act 1932," and of the United States of America in 1934, provides certain limits as to the liability of the carrier for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by the passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking (See Moller, Appendix E). The Rome Convention 1933 unifies certain rules relating to damage caused by aircraft to third parties on the surface. This Convention provides that damage caused by an aircraft in flight to persons or property on the surface gives a right to compensation on proof only that the damage exists and that it is attributable to the aircraft. The liability is set aside or diminished only if the damage has been caused or contributed to by the negligence of the injured party. Certain limitations are placed on the amount of the liability. The operator of the aircraft may not avail himself of the provisions of the Convention limiting his liability if it is proved that the damage resulted from the gross negligence or wilful misconduct of the operator or his servants or agents, except where the operator proves that the damage resulted from negligence in pilotage, handling or navigation of the aircraft or where his servants or agents are concerned that he has taken all

proper steps to prevent the damage. (See Moller, Appendix F.) The remarks of Lord Atkin in the Weekly Rest Reference (*supra*) may raise a doubt as to whether the Dominion has jurisdiction to make the provisions of these Conventions the law of Canada.

Trespass and Nuisance in Air Space

The question of proprietary rights in air space centres principally around the maxim *"cujus est solum, ejus est usque ad coelum et ad inferos"* (Whose is the soil, his is also that which is above and below it). With particular reference to aircraft, English authority appears to be more in favor of a strict interpretation of this doctrine than is American legal opinion. At page 351, of his work Torts, 11th edition, Sir Frederick Pollock makes the following statement:

> "It has been doubted whether it is a trespass to pass over land without touching the soil.—Lord Ellenborough thought it was not in itself a trespass 'to interfere with the column of air superincumbent on the close' and that the remedy would be by action on the case for any actual damage: though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot falls on his neighbour's land. 50 years later Lord Blackburn inclined to think differently and his opinion seems the better. Clearly, there can be a wrongful entry on land below the surface, as by mining.—It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession which might be the most reasonable rule. Clearly, it would be a trespass to sail over another man's land in a balloon (how much more in a controlled aircraft) at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land even at a greater height. As regards shooting, it would be strange if we could object to shots being fired point-blank across our land only in the event of actual injury being caused,—."

In an article at p. 730 of 46 Canadian Law Journal, is found the following quotation:

> "There seems every reason to support the proposition that a mere flight over a person's land is an act of trespass and that an action would lie against the offending aviator."

In support of this view, an analogy is drawn by several authorities between invasion of air space by telegraph and telephone wires and cables and by aircraft. It is also said that ownership of air space is impliedly recognized by certain provisions of the English Telegraph and Aeronautics Acts, which provide that no

action for trespass may be instituted where the invasion of the air space was made under the provisions of these Acts. (See Clerk & Lindsell, 8th edition, at p. 307.)

An interesting article on a recent Tasmanian case, *Davies* v. *Bennison,* is to be found in Vol. 64 of The Law Journal, at p. 6. The facts in this case were that the defendant discharged a gun at the plaintiff's cat and killed it while the cat was in the plaintiff's garden. The plaintiff sued for shock, loss of the cat and for trespass but the jury gave a verdict for the defendant. At the hearing of an application for a new trial the Chief Justice of Tasmania is quoted as follows:

> "Such distinctions have no place in the science of the common law. If the hovering airplane is perfected, the logical outcome of Lord Ellenborough's dictum would be that a man might hover as long as he pleased above his neighbour's soil and not be a trespasser, yet if he should touch it for one second he is a trespasser. A man has an undoubted right to build a high tower on his land, and the space above the land is exclusively his for that purpose. Then why not for any other legal purpose? So far as the ability to use land and the air above it exists, mechanically speaking, to my mind any intrusion above land is a direct physical breach of the negative duty not to interfere with the owner's use of his land."

A new trial was ordered on the issues of trespass to land.

Freeman, and Salmond do not appear to agree with this view of the question. After reviewing the earlier cases on the subject of trespass by air, Freeman, at p. 86 of his text on "Air and Aviation Law," makes the following comment:

> "It will be seen from the foregoing that the mere passing over by an aviator does not constitute an act of trespass against the owner of the land beneath; there must be some actual interference with the land itself—a landing for example—to constitute trespass but equally so any interference from above which disturbs the normal conditions under which the owner or occupier of land may be in enjoyment of his property can easily constitute a nuisance."

Salmond on Torts, 8th edition, edited by Stallybrass, at p. 216, reads:

> "It does not follow that an entry above the surface is in itself an actionable trespass; nor is there any sufficient authority that this is so. Such an extension of the rights of a landowner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in an aeroplane, or fire artillery, even in cases where no actual or probable

damage, danger, or inconvenience could be proved by the subjacent landowners. The state of the authorities is such that it is impossible to say with any confidence what the law on this point really is. It is submitted, however, that there can be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil), and that a mere entry into the air space above the land is not an actionable wrong unless it causes some harm, danger or inconvenience to the occupier of the surface. When any such harm, danger or inconvenience does exist, there is a cause of action in the nature of nuisance."

The following English decisions are of interest:

Pickering v. *Rudd* (1815) 4 Camp. 219.
Saunders v. *Smith* (1838) 2 Jurist 491.
Kenyon v. *Harte* (1865) 6 B. & S. 249.
Regina v. *Pratt* (1855) 4 E. & B. 860.
Fay v. *Prentice* (1845) 1 C. B. 828.
Corbett v. *Hill* (1870) Law Reports, 9 Eq. p. 671.
Metropolitan District Railway and Cosh (1879) 13 Chancery Division, 607.
In Re Lancashire & Yorkshire Railway and Earl of Derby's Contract (1909) 100 L. T. 44.

Recent American decisions are in accord with the view that the maxim should not be interpreted literally. In the case of *Cory* v. *Physical Culture Hotel,* reported in (1936) U. S. Av. R. 16, it was said that an airplane operator had the right to fly over property without the owner's consent provided he did so in a reasonable manner and at such a height as not to interfere unreasonably with the owner's use and enjoyment of his property. These statements would appear to be obiter as the Court found the flight in question had been made with the owner's consent.

A much more decisive opinion in this matter is to be found in the case of *Hinman* v. *the United Air Lines* (1936) U. S. Av. R. 1. After a review of what he refers to as the *ad coelum* doctrine, Heaney, D. Ct.J., of the U. S. Circuit Court of Appeal, at the foot of page 4 of his learned judgment, comments as follows:

"This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use."

And again on page 6 the learned Judge says:

"We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This

> right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."

The United States Supreme Court refused to grant a petition of *certiorari,* thus in effect affirming this decision.

Freeman, at p. 87, discusses the distinction between trespass and nuisance in aviation law and says as to nuisance:

> "It is not easy to see any distinction between noise and vibration emanating from low-flying airplanes, and the same emanating from a neighbouring factory; and the rules of law laid down in dealing with the latter class of cases are equally applicable to the former."

It is submitted by Moller (page 189) that the same principles as apply to licensed railroads and the noise and damage from them will apply to licensed aerodromes and airplanes (see *London, Brighton & South Coast Railway* v. *Trueman* (1886), 11 Appeal Cases, 45).

It seems certain that if any decision were given in Canada holding that reasonable use of the air for aviation purposes constituted trespass it would be followed immediately by legislation redefining the respective rights of landowners and other users of air space. In view of the unsettled state of our authorities such a decision is not likely because our law has always shown itself to be adaptable and, if it is once decided that the *cujus est solum* doctrine is subject to modification under modern conditions, American authorities provide a wealth of material as a guide to the intricacies of the relative rights involved.

It is worthy of note that by section 9 of "The Air Navigation Act 1920" (10 & 11 Geo. V. C. 80), the statute passed pursuant to the Convention of Paris 1919, Great Britain enacted that no action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all other circumstances of the case is reasonable, or the ordinary incidents of such flight, but that where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in such aircraft, or by any article or person falling from such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or con-

tributed to by the negligence of the person by whom the same was suffered.

Negligence Generally

While the operation of aircraft requires care and skill in proportion to the risks involved, it has been held in *Fosbrooke-Hobbs* v. *Airworks Ltd.* (1937) 1 All E.R. 108, at 112, that an airplane cannot be treated as a thing dangerous in itself. Apart from statute the common law duties apply. No doubt the judges and juries will frequently need the assistance of expert witnesses in determining whether due care has been exercised. In *Grein* v. *Imperial Airways Ltd.* (1936) 2 All E.R. 1258, it was held that after the pilot failed to get any message in reply to his call to Haren, Belgium, he was guilty of negligence in continuing his flight at a height below the height of the wireless masts in the vicinity instead of trying to get above the clouds or, if that was too dangerous, turning around to go back to Haren. The airplane collided with a radio mast in a fog. It has been held in the United States that an aircraft operator is not liable when gusts of wind, sudden snow, fogs or rain come so quickly that human foresight cannot take precautions against them. These risks are assumed by passengers (*Law* v. *Transcontinental Air Transport* (1931) U. S. Av. R. 205). In emergencies a pilot is not required to show the same caution and skill as when there is time for deliberate judgment. (*Allison* v. *Standard Air Lines* (1930) U. S. Av. R. 292.)

The negligence found in *Fosbrooke-Hobbs* v. *Airworks Ltd.* (*supra*) was that the pilot left the ground with the tail too far down, thereby causing a stall. In *Cubitt and Terry* v. *Gower* (1933) 77 Sol. Journal 732, the unsuccessful defendant taxied her plane into the plaintiff's plane which she claimed must have been moved into her runway within 15 seconds before she started her run. The Court referred to the similarity of running down cases. In *Olsen* v. *Corry and Gravesend Aviation Ltd.* (1936) 3 All E.R. 241, the Plaintiff, an apprentice, was injured while swinging the propeller because of the pilot's failure to observe the routine of signals up to "contact" before switching on the engine. It was held that the infant apprentice was not bound by a release of liability in the deed and that "volenti" did not apply. In *Hough* v. *Curtiss Flying Service Inc.* (1929) U. S. Av. R. 99, it was held that where the plaintiff's intestate after an airplane flight walked towards the hangar and into the revolving propeller and was killed the operator was not liable for having failed to provide guards or an escort or

a safer means of egress. The same result was reached in *Hamilton* v. *O'Toole* (1930) U. S. Av. R. 133, on the ground of contributory negligence where the passenger left the cockpit and stepped forward off the wing and was struck by the revolving propeller.

An attempt was made in *Maindonald* v. *Marlborough Aero Club and New Zealand Airways Ltd.* (1935) N.Z.L.R. 371, to apply the principle of the snail case (*M'Alister (or Donoghue)* v. *Stevenson* (1932) L.R. App. Cases, 562) in a claim against the defendant airways Company which had repaired the plane, but it was held that the defect, if any, was discoverable on a reasonable inspection and that the repairing company owed the deceased no duty.

Breach of Statutes or Regulations as Negligence

As has already been mentioned, section 4, subsection (1), paragraph (i), of the Aeronautics Act 1919, gives to the Minister power to make regulations with respect to the institution and enforcement of such laws, rules and regulations as may be necessary for the safe and proper navigation of aircraft in Canada, etc. By section 4, subsection (3), all regulations upon being published shall have the same force in law as if they formed part of the Act and by section 4, subsection (2), penalties are imposed for breaches of regulations. This subsection will no doubt be pressed as indicating that the regulations do not affect civil rights on the strength of the dictum in *Ceal* v. *Winnipeg Electric* (1932) A.C. 690, but it is likely that these regulations will be held to establish duties and that an action will lie for any damage shown to have resulted from a breach. The question is one of the intention of the Legislature but the present tendency seems to be to treat the statutory provisions governing other forms of transportation as creating civil rights. In Canada see *Connell* v. *Olson* (1933) 3 D.L.R. 419, and *Falsetto* v. *Brown* (1933) 3 D.L.R. 545. In England the tendency is clearly towards giving civil rights for "statutory negligence." See *Lochgelly Iron* v. *M'Mullan* (1934) A.C. 1, and also *Monk* v. *Warbey* (1935) 1 K.B. 75. See also the articles in (1935) 8 C.B.R. 535, and 3 Fortnightly Law Journal, 310. The question has been considered with relation to aviation in the case of *Dominion Air Lines Limited* v. *Strand* (1933) N.Z.L.R. 1, where it was held by the majority of the Supreme Court of New Zealand that the aviation regulations gave civil rights notwithstanding the presence of a penalty section.

Many of the regulations are so similar to the rules of highway

or ocean traffic that there will be little need to break new ground in applying them. There are minute provisions on lights, signs, and signals and rules of the air. Because of the great speed of air traffic it is even more important that these rules be strictly observed and it is to be hoped that the courts will not whittle away their protection as has been done so frequently with rules of the road by overworking the principles of contributory negligence and ultimate negligence. Regulation 69 provides a right-of-way for the aircraft on the right. The similar Highway Traffic Act section after a period of unsatisfactory decisions was given greater effect by the decision of the Supreme Court of Canada in *Swartz* v. *Wills* (1935) 3 D.L.R. 277. Regulation 71 furnishes a guide for the aircraft with the right-of-way; it should maintain its course and speed but where because of weather or other cause the aircraft cannot alone avoid the collision the aircraft having the right-of-way must also take such action as will best avert collision.

Regulation 12 requires certificates of airworthiness for certain aircraft, and Regulation 117 provides that no commercial aircraft shall fly on any day unless it has previously been inspected and certified as to fitness by an Air Engineer on that day or in the case of a flight commencing not later than 8 o'clock in the morning, at some time between noon of the previous day, or the termination of the last flight made by the aircraft on the previous day whichever is the later, and the flight in question. In *Maindonald* v. *Marlborough Aero Club and New Zealand Airways Ltd.* (1935) N.Z.L.R. 371, the case against the defendant Club was based on the failure to hold a ground inspection and on breach of the regulations in the failure to hold such inspection but the Court held that the necessary "nexus" between the injury and the breach of the statutory duty had not been established because the ground inspection did not touch the defective cotter pin which caused the accident.

Res Ipsa Loquitur

The principle of "res ipsa loquitur" while a rule of evidence is so important that it usually receives separate treatment in negligence texts, and in aviation disasters where frequently the evidence is destroyed and all witnesses killed the application of the principle must become a question of paramount importance. Its application to various other fields of activity is shown in an extensive discussion of the cases by Mr. J. J. Kelly in his article in (1936) 1 D.L.R. 609, and the nature of the principle has received

up-to-date comment in the decision of the Supreme Court of Canada in *United Motor Service Inc.* v. *Hutson, et al.* (1937) 1 D.L.R. 737. The branch which will receive most frequent consideration in aviation accidents is that propounded in *Scott* v. *London & St. Katherine Docks Co.*. 3 H.&C. 596, that where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care. That the principle can apply to aviation accidents was stated obiter by Goddard J., in *Fosbrooke-Hobbs* v. *Airworks Ltd. and British American Air Services Ltd.* (*supra*), commented on in 83 L.J. at p. 110. In that case the plane had risen from the aerodrome to a height of 75 to 100 feet when it crashed, as his Lordship found, because the pilot left the ground with the tail end of the plane too far down causing the plane to stall. His Lordship held that *res ipsa loquitur* applied but also found specific negligence. It is submittted that the principle must and will be applied with great caution if at all to those unexplained crashes which destroy all evidence, including the company's servants who would ordinarily be available to give the explanations which would shift the onus. Airplanes fall in many instances from causes beyond the pilot's control. See Vol. 2, Corpus Juris Secundum, p. 910, citing *Rochester Gas* v. *Dunlop*, 266 N.Y.S. 469, where the Court refused to apply the doctrine when the plane crashed into a tower carrying a transmission line. *"Res ispa loquitur"* was held not applicable where a plane fell due to the engine cutting out while taking off (*Wilson* v. *Colonial Air Transport* (1931) U. S. Av. R. 109), but it was applied in charging the jury (*Goodheart* v. *American Airlines Inc.* (1936) U. S. Av. R. 177), where the plane which was last heard from half an hour after rising was found with its nose embedded in the side of a mountain 200 feet below the top. (The jury nevertheless found for the defendant). The judgment of the majority of the Supreme Court of Arkansas in *Herndon* v. *Gregory* (1935) U. S. Av. R. 38, contains a review of the previous American decisions and holds that the principle *"res ipsa loquitur"* does not apply where the only evidence is that the plane fell. The opinion of the minority on this point is not easy to ascertain because the real point was whether the complaint was demurrable but apparently the minority were of the opinion that the maximum should have been applied. It would seem that the majority view more clearly meets the needs of avia-

tion law. The plane was destroyed by fire and all four occupants were killed. To hold otherwise would remove the principle of negligence entirely and establish a principle of absolute liability in a large number of aviation cases. This never was the purpose of the rule of evidence as applied to other forms of transportation.

Aircraft as Carriers of Goods and Passengers

Since much of our flying involves American as well as our own law, it is of use to note that the authorities in our two countries on aircraft as carriers are in substantial conflict both as to when aircraft are common carriers and as to the incidents of that relationship. The American cases more readily find that the relation exists and having so found many of them deny on public policy the right to limit liability respecting both goods and passengers.

The Aeronautics Act, section 4 (1) (d), gives to the Minister power to make regulations with respect to carrying of goods, mails and passengers and for the licensing of such services but so far I believe no terms of carriage have been prescribed for civil aviation and we are left to determine by analogy to other forms of transportation the legal status of aircraft carriers in Canada.

From what I have seen of the contracts and tickets in use by air carriers in Canada to date, I think that generally they are not common carriers. This is largely a question of fact depending largely on the carrier's representations. See Moller, p. 266, para. 2, and see *Aslan* v. *Imperial Airways* (1933) 33 Times Commercial Cases 227; 149 L.T. 276, where it was held on the contract that the defendants were not common carriers and not under the liability of common carriers but only bailees for reward of the box of bullion carried. The contract reserved a right to refuse goods and expressly stipulated that the defendants were not common carriers. The contracts which I have seen in use in Canada for carriage of goods provide that the owner assumes all risks and releases all liability and that the Company may decline to carry any goods and may even after commencing the carriage land the goods and refund the balance of the carrying charges. Similarly the passenger ticket contains a release of liability. It seems unlikely that aircraft operating generally under such contracts will be held to be common carriers, particularly when so few operate on fixed schedules or routes. With the advent of the Trans-Canada and Trans-Atlantic services new elements may be introduced.

In any case where the Court finds a relationship of common carrier established the ordinary rule of liability for loss of or dam-

age to goods established by *Coggs* v. *Barnard* (1704) 2 Ld. Raymond 909, will be applied and the carrier will be liable in all events except for damage caused by the Act of God, the King's enemies or defects in the goods, including loss occasioned by the shipper's own acts. Difficulty may arise as to whether the common carrier of goods warrants the "airworthiness" of the aircraft and whether the rules of the sea or of the land carrier apply. See Moller, p. 277, *et sequi,* and the cases, including *Trickett* v. *Queensland Insurance Co.* (1936) A.C. 159; Freeman, p. 90. If the rules of the sea apply, the recent case of *Timm & Son* v. *Northumbrian Shipping Co.* (1937) 2 All E.R. 847, which considered whether failure of fuel rendered a ship unseaworthy, would be an important aviation decision.

As common carriers of passengers the liability is no different to that of a private carrier. Hals. 2nd edit. vol. 4. p. 60, *et seq.*. but every carrier for reward has a high duty of care, *Roadhouse* v. *Winnipeg Electric* (1936) S.C.R. 147.

Aircraft Carriers Limiting Liability

In Canada a carrier of passengers whether common or private can contract out of liability by apt words. Moller, p. 269, but the passenger must have assented expressly or impliedly to the limitation. 2 Ont. C.E.D. p. 217; Moller, p. 270. Two recent cases on parking lot liability are in point. In *Ashby* v. *Tolhurst* (1937) 2 All E.R. 837, 83 L.J. 377, the English Court of Appeal held the wording on the ticket handed to the car owner a sufficient release of any liability even for negligence of the lot operators' servants. In *Spooner* v. *Starkman* (1937) O.W.N. 254, the car owner was held not bound by the release of liability because this part of the ticket was in small print and he had not seen the similar signs on the premises. In *Fosbrooke-Hobbs* v. *Airworks Ltd.* (*supra*) the conditions in the ticket exempting liability were not communicated to the hirer before the journey and the plane crashed on rising so that no opportunity was given to read them. This was a private and not a regular air service and no notice of such conditions could be implied. Had the conditions applied they would have bound the hirers' guests also. In *Grein* v. *Imperial Airways Ltd.* (*supra*), it was held that the agreement of the deceased to limit his damages was not binding on the dependents under the Fatal Accidents Act. On the words necessary to effectively limit liability see *Aslan* v. *Imperial Airways* (*supra*), where the cases are reviewed.

In Canada, due I understand to the American view that releases of the liability of common carriers are invalid, the giving of releases is not consistently insisted upon and it would probably be difficult to imply such a term merely because such a limitation had been expressly agreed upon on a previous occasion. Even a common carrier of goods may restrict his liability in some respects and without losing his status as such in others. Hals, 2nd edit., vol. 4, p. 27; Moller, p. 267.

In the United States many courts hold most commercial carriers to be common carriers of passengers and refuse them the right to limit liability to such passengers.

In *Smith* v. *O'Donnell* (1932) 12 p. (2nd) 933. the defendant operated a machine shop but also took persons who applied at a fixed rate for trips toward the ocean and back. The injured person was invited and taken up to advance the goodwill of the machine shop and the relationship was held to be that of passenger and common carrier.

In *Curtiss-Wright Inc.* v. *Globe* (1933) U. S. Av. R. 26, where the passenger was carried alone under a contract by which the Company reserved its right to cancel the flight or any portion or to revoke the license (ticket) at will, it was held that the relation was that of common carrier and passenger and that a term limiting liability to $10,000.00 was accordingly invalid. In *McCusker* v. *Curtiss-Wright Flying Service Inc.* (1933) U. S. Av. R. 105, extensive reference was made to the defendant company's advertisements in deciding that the defendant was a common carrier. The flight was a special trip for the plaintiff alone to see her sick mother.

That a common carrier of passengers cannot limit liability has been held in *Allison* v. *Standard Air Lines Inc.* (1930) U. S. Av. R. 292; (1933) U. S. Av. R. 92; *Thomas* v. *American Airways Inc. et al.* (1935) U. S. Av. R. 102; *Glose* v. *Curtiss-Wright Flying Service Inc.* (1933) U. S. Av. R. 26, and *Law* v. *Transcontinental Air Transport* (1931) U S. Av. R. 205.

Conclusion

The Editor of The Law Journal, in a recent number (June 12th, 1937, p. 405) says:

> "The law is confusing enough on the ground. When it leaves the earth it seems to seek the obscurity of the clouds rather than the clarity of the stars."

In The Canadian Bar Review (1926, at p. 29) Mr. Norman MacKenzie, writing of his attendance at the International Congress on the Law of Aviation held in September and October, 1925, and where he represented this Association, stated:

> "I would suggest the appointment of a small committee from among your members (or a single member) who may be interested in the laws of aviation. This committee or individual might then undertake to be responsible for keeping up with the changes in the laws of aviation, and at the same time should keep in touch with other similar committees in other countries and with the international committee which is responsible for the holding of the congresses and other matters."

Although made over a decade ago, these suggestions would seem to be still very much worthwhile.