Journal of Air Law and Commerce

Volume 9 | Issue 3 Article 8

1938

Notes, Comments, Digests

NOTES, COMMENTS, DIGESTS

COMMENTS

Fire Caused in Flight by Negligent Design—Universal Practice as Evidence of Due Care—Refusal of Bureau of Air Commerce to Testify to the Approved Type Certificate.—The plaintiff's airplane, made by the defendant, took fire when in transit from Chicago to Springfield, Illinois, and the plaintiff suffered injury from the fire; the details are not mentioned in the report. The plaintiff's claim was based on negligence of the manufacturer-defendant in using a defective design for the airplane. The alleged defect consisted in two principal items, first that the exhaust stacks, in projecting only one inch from the skin of the fuselage, were not long enough to carry flame or vapor far enough away into the air, and secondly, that the carburetor drain was too short, as well as too close to the exhaust stacks; so that, as a result of these two features, gasoline escaped from the carburetor drain pipe and adhered to the underbody of the plane, and that there it was ignited by hot gasses from the exhaust stacks. *Christine Maynard* v. *Stinson Aircraft Co.* (Circuit Court of Wayne Co., Michigan, date not stated; Commerce Clearing House, Aviation Law Service, Report No. 31, Dec. 2, 1937, p. 1253).

There was expert evidence on these main items, as well as the consequent details; and the Court left the question of fact to the jury, who found for the plaintiff in the sum of $27,500.

Two important questions of law arose:

(1) The Court charged the jury that if the construction of this plane was "in accordance with standard and accepted practice," that fact was evidence in favor of the defendant on the issue of due care in design, but was not conclusive. So far so good. (Authorities cited in Wigmore on Evidence, §461). But in concluding the charge on this rule, the Court added: "No practice and no custom can warrant its following where that practice or that custom can be said to be such that its following creates a hazard to human life." And at this point the charge should have added, "where the custom creates a hazard to human life *to the knowledge or reasonable apprehension of the defendant in his experience with such design*"; for otherwise the defendant could not be said to have failed in due care. The omission of this qualifying condition may or may not here have affected the jury's conclusion.

(2) The second important point of law involved the refusal of the Court to accept the approved type certificate of the Federal Bureau of Air Commerce, as establishing that the design of the defendant's plane was "in accordance with standard and accepted practice." This refusal was on the facts and the law justified; but the facts were extraordinary and demand the consideration of all persons interested in aeronautics. The facts were these:

The defendant offered the approved type certificate, duly stamped at the Bureau. The Court refused to accept the certificate by itself, without testimony or deposition of the person making it. This ruling was sound enough.

At common law, no such certificates are admissible, and the State of Michigan has no statute authorizing it, nor is there a Federal statute. Of course there ought to be; the lack of such a statute is a defect in the law—Wisconsin has such a statute.

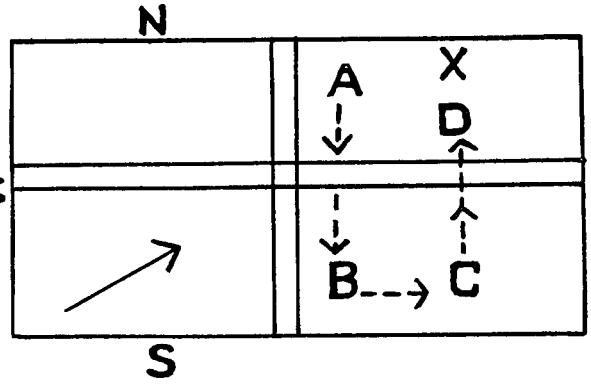
However, the Court was ready to accept the certificate when deposed to by the official making it, on investigation as to "what examination was made of these precise plans that have been offered in evidence here." But what happened when the defendant sought to take the depositions in Washington of the officials who collaborated in making the certificate? *"Under instructions from the attorney of the Secretary of Commerce,"* says the opinion, *"the witnesses were not permitted to answer the questions whether they ever examined these plans,* or whether any one for the Department of Commerce ever made any examination of the plans, or if they did make an examination who made it and what kind of an examination was made." This was a most extraordinary attitude to be taken by the Department of Commerce. The approved type certificate is a document representing the result of the most profound research and engineering skill. Its details are prescribed after the most exhaustive consideration, by many competent minds, of every minute element entering into safety and efficiency of design. The approved type certificate, is, or ought to be, the pride of the Bureau of Air Commerce. And yet, on the facts recited in the opinion, the approved type certificate was here treated, by the attorney for the Bureau, as if the Bureau was ashamed of its work and was afraid to stand up for it when called upon to explain!

Was there any government secret or confidential matter of public interest involved? How could there be? And if there was any private trade secret of the manufacturer involved, the defendant manufacturer was here willing to have it disclosed, in order to protect himself from a charge of negligent designing?

We should think that airplane manufacturers would be justly dissatisfied with this inexplicable ruling at the Bureau.

JOHN H. WIGMORE.

Ground Collision—Air Traffic Rules—Landing Plane's Right of Way—Pilot's Negligence.—Action for damage to the plaintiff's airplane, caused by collision on the ground with the defendant's airplane. The plaintiff's plane was landing, the defendant's had landed, and was taxiing at a 5-mile speed. The airport's dimensions are E.-W., 2025 feet and N.-S., 1240 feet. The wind being S.-W. the runways were not being used. Plaintiff had landed at about point A, then rolled to about point B, *stopped for two minutes,* then turned left



to point C and taxied back at 5 m. p. h. to about point D, when the defendant plane, coming in at point X, crashed into the plaintiff's left wing. Each party testified that he did not see the other plane. *Tiedt* v. *Gibbons* and *Prosperi*, C. C. H. Aviation Law Service, Report No. 31, Dec., 1937, p. 1259 (Circuit Court of Cook Co., Illinois, Nov. 22, 1937).

To determine the respective duties of the parties, the Federal Air Traffic Rules, par. 75 (now superseded by Civil Air Regulations, Part 60), were introduced, giving to a landing plane the right of way over planes moving on the ground, and concluding "but this shall not excuse the pilots of either or both such aircraft from the exercise of due care and diligence." The Illinois Aeronautic Commission's Regulations, par. 501, lay down the rule in identical terms. Hence the Court had no occasion to rule on the applicability of the Federal regulation to intra-state traffic; and it is not obvious why the counsel for the plaintiff should have troubled to object to the admission of the Federal regulations.

The Court laid stress on the qualifying clause of the regulation as to the pilot's negligence superseding the right-of-way. The Court, viewing the case from the point of time when the plaintiff's plane was approaching point D, and the defendant's plane had landed at point X, held that the plaintiff was then not in position to control his movements, other than by stopping short (which he did), while the defendant plane on the contrary was in a position to avoid the collision either by taking off again or by moving to right or to left. Also the Court held that the defendant was negligent in landing without looking for and seeing the plaintiff's plane taxiing north in the defendant's direction. Thus the situation was treated as calling for the "last clear chance" rule in ordinary terrestrial collisions. The Court therefore found for the plaintiff, awarding damages of $871.67 with costs.

In our opinion, the Court took a wrong view. In the first place, the rule for the landing plane's right of way is a primary one, fundamental to all airport management. Any qualification of it is an exception, which must be clearly shown to demand application. In the next place, the plaintiff in this case was not in a position to demand that the exception be applied in his favor, because he himself had been the negligent cause of finding himself in danger from the arriving plane. Note that the plaintiff, after landing and rolling to point B, had there *stopped for two minutes,* then turned and taxied north again. From the moment he arrived at point C and stopped, he was in complete control of his plane. From that moment, he was no longer a landing plane, and had no right of way. From that moment, the duty of foresight and the risk of harm was all on him. Did he expect to go taxiing about the field 'ad libitum' and expecting all landing planes to keep out of his way for the rest of the day? It was negligence on his part to turn and proceed north as he did. Even though the defendant's plane, on landing was negligent in not observing the approach of the plaintiff's plane, the plaintiff's negligence was contributory, and should have barred his recovery.

JOHN H. WIGMORE.