The Civil Liability of an Aviator as Carrier of Goods and Passengers

Rowan A. Greer
It is axiomatic to say that law is not an exact science. This is most forcibly illustrated by the fact that there is no unanimity of opinion, even among lawyers, as to the definition of law itself. For many years Blackstone's Commentaries was the fundamental basis upon which any study of law, particularly in this country, was built. No man was considered competent to engage in the practice of law without some knowledge of these lectures. Today, in most of the high ranking legal educational institutions, there are few, if any, lectures on Blackstone. His work is no longer used as a text book and, indeed, even rarely referred to. He lived and worked in the Eighteenth Century when both secular and ecclesiastical authority recognized the so-called divine rights of the sovereign. Therefore, in giving his definition of law, Sir William Blackstone said it was:

"A rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."

We are not told where we are to find the right or the wrong of any situation except in the mandate or the prohibition contained in the rule itself. However, the king—the supreme power in the state—being divine, or executing his powers through divine inspiration, could do no wrong and hence for the philosophy of Blackstone's age and time, this definition was quite satisfactory and sound enough.

Without inviting argument over the merits of the question, we will venture the bold assertion that there has been an advance in
knowledge, culture and civilization since the age of Blackstone. No one will now so much as do reverence to the doctrine of divine rights or support any action of a sovereign power upon the theory that the king can do no wrong. As a consequence, we cannot in this day and time say that the mere pronouncement of the supreme power in a state, by either mandate or prohibition, can make any action right or wrong from an ethical consideration. Even our great Declaration of Independence after setting forth the inalienable rights with which all men are endowed says:

“That, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.”

From this, the writer personally prefers the definition of law given by Professor Holland in his work on “The Elements of Jurisprudence,” where he says:

“A law, in the proper sense of the term, is a general rule of human action taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.”

When the true origin and function of law is borne in mind, then, it is nothing more nor less than a rule of conduct settled by universal, or more accurately speaking dominant custom, by virtue of the acceptance and adoption of the same by the element in the particular society concerned that is paramount. In a pure, or a representative democracy, such as ours, that paramount element is not the courts nor yet the legislatures or congress, but the majority of the people themselves. From a theoretical point of view, an Act of Congress or the decision of a judge does not become a law merely by virtue of its passage or pronouncement. An act of a legislative body or an opinion of a judge becomes law in its true sense and gains its weight or authority only so far as it reflects what the public opinion of the society by its acts and customs have established as the most generally accepted rule. The act or the decision is not law ipso facto, but becomes so in its true sense only so far as it reflects what the public opinion of the society it affects has established as the rule most generally accepted. The act or decision is only the concrete evidence of what that law is or should be. This being true, municipal law, if its proper function be taken into consideration, can never lead but must always follow public opinion or custom.
II.

In the field of aerodynamics, the practicability of sustained flight by man was demonstrated by the Wright Brothers a little over twenty-five years ago at Kitty Hawk, North Carolina. Many of us can remember that first flight on December 17, 1903, and can likewise recall the skepticism with which the news was received. Though forced to admit the reality of this first flight, there were few who believed that the airplane would ever be taken seriously as a means of transportation or become a factor in the commercial life of the country. That aviation is here today was most forcibly illustrated in an interview at the beginning of the year 1930, by Mr. Kent Cooper, the General Manager of the Associated Press, where, in pointing out ten of the most conspicuous news items of the year 1929, he mentioned three out of the ten that concerned aviation; the first being the globe encircling flight of the Graf Zeppelin in April; the second, the disaster of the T.A.T. passenger carrying ship in September when seven people were killed and the third, the flight of Commander, now Admiral Byrd in November over the South Pole. When any one phase of activity can attract such prominent attention in the current events of the world, surely the subject is worthy of note by all who are concerned with what is taking place around them.

The regular scheduled air transport planes in the United States are now flying approximately ninety thousand miles per day and this represents only about fifteen per cent of the flying for hire that is done in commercial aeronautics. According to statistics that are available, during the past year sixteen million miles were flown on scheduled operations in the United States, eighty-five thousand passengers were carried and over eight million pounds of mail transported. 1930 bids fair to greatly increase these figures. Under this state of facts and with this volume of business carried on, one can scarcely deny the proposition that custom has had some opportunity of determining a rule of conduct fixing the liability and defining the responsibility of the aircraft operator.

The legal profession should be the first to sense what time and custom establishes as that rule of conduct or law and to see that it is based upon principles of justice and right and that in the court decisions and legislative enactments a true and correct expression of that rule is given.

Our law of damages under which compensation is awarded to an injured party is uniformly based upon either a tortious breach
of some contractual obligation or some act of negligence where the rights of another are invaded through either the doing of something that an ordinarily careful and prudent person, under similar circumstances, would not have done, or stated negatively, the failing to do what an ordinarily careful and prudent person under similar circumstances would have done.

III.

In the matter of transportation of goods and persons through other agencies than the air, there are two distinct rules of conduct fixing the responsibility and liability of the carrier. If the carrier is a special or private carrier, the standard or guide to go by in fixing his liability is that of ordinary negligence, whether it be persons or goods that are transported. In other words, a carrier, other than a common carrier, is merely a bailee for hire for the mutual benefit of both parties and his liability rests upon the showing of ordinary negligence in carrying out the contract of transportation. On the other hand, if the carrier is what the law designates as a common carrier, a different rule exists as to the responsibility and duty under which the carrier operates. If the contract is for the transportation of goods, as stated in 4 R.C.L., Paragraph 175:

"At common law, it has been long settled that a common carrier is responsible for the safe transportation and delivery of goods received by him for carriage, and can justify or excuse a default only when occasioned by the act of God or the public enemy. Hence, while a contract for the carriage of goods is of course a form of bailment so that a common carrier is liable, as an ordinary bailee, for negligence, his liability is not confined merely to such losses as are the consequences of his own negligence or want of skill, but he is also held responsible for all losses or damage which may happen to goods while in his charge for the purposes of his employment, though occasioned by unavoidable accident or by any casualty whatever, except only as above mentioned. Thus, within the purview of his common law contract of carriage is embraced protection against all losses due to accident, mistake, and numerous unavoidable occurrences not falling under the head of acts of God or the public enemy, and against which it is not within the reach of human vigilance or foresight to provide, as, for instance, the wrongful acts of third persons, accidental fires, robbery, or the violence of mobs. From this severe responsibility to which by the common law he is subjected, he cannot relieve himself by proof of the highest possible care on his part, nor will his entire faultlessness excuse him, but, whenever a loss occurs from any cause other than the act of God or the public enemy, the law may be said to raise against the carrier an absolute and conclusive presumption of negligence. So it may be stated that the liabilities of a common carrier are distinguish-
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able into two classes: the one, a liability for losses by neglect, which is the liability of a bailee; the other, a liability for losses by accident, or other unavoidable occurrence, which is the liability of an insurer."

In many states the exceptions allowed by the common law rule, as above stated, have been broadened to include such things as where the goods were lost by their own decay, from an inherent infirmity, or by some act or default of the owner or shipper himself but at the same time it is safe to say that the general doctrine practically accepted in all states is that as to transportation of goods, the duty and liability of a common carrier under American jurisprudence is that of an insurer.

As to the carriage of passengers, again we find in 4 R.C.L., Paragraphs 582 to 586 a very full and fair statement of the rule of liability applicable to common carriers as follows:

"While carriers of goods are practically insurers of the property entrusted to them, yet in the carriage of passengers the same principles of law are not applied, for the obvious reason that a great distinction exists between persons and goods, passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods who have entrusted them to others cannot do. Although a few early English cases apparently countenanced the doctrine that common carriers of passengers are liable as insurers of the safety of the passengers whom they undertake to carry, it is now well established, both in England and in the United States, that carriers of passengers are not insurers against accident, but are answerable for any injury to a passenger only when there has been a want of proper care, diligence or skill on the part of the carrier or his servants, unless such injury be wilfully inflicted. It will thus be seen that the liability of the carrier of passengers differs materially from that of a carrier of goods. The latter is held to be an insurer against all injuries except such as are caused by the act of God, the public enemy, or the owner, while a carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard, and not in any degree caused by negligence, nor for such perils as occur wholly without their agency, unless there is some want of care in escaping from the consequences of such perils. Thus, for instance, a carrier of passengers is not liable for injuries to passengers through accidents arising from an extraordinary storm, flood, or other unavoidable casualty caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated, nor for injuries arising from acts of strangers or fellow passengers over whom the carrier has no control, and whose action is not reasonably to be expected. * * * What degree of care a carrier must observe for the safety of a passenger, to exonerate it from liability for injury, is a question of law, and the generally accepted rule on this point is to the effect that carriers of passengers are bound to exercise the highest degree of care,
vigilance and precaution. Attempts have been made, with varying success, to point out the distinction between gross, ordinary and slight negligence and if there is any real distinction it is clear that the law imposes on a carrier a liability to a passenger for slight negligence, requiring of it the exercise of the highest possible degree of care. The rule as to the degree of care required of carriers of passengers has been variously stated, some courts employing the word 'utmost,' others 'greatest' and still others 'extraordinary.' The difference in the statements, however, is merely a choice of words, and does not denote conflicting views. The reason for imposing such a high degree of care on carriers of passengers is that the safety and lives of their passengers rests entirely in their hands, the passengers having no control whatever over the dangerous instrumentalities employed in their transportation, and public policy requires that a high degree of care be exacted."

From this it appears that before the airplane was used as a means of transportation, the rule of law as to other modes of carriage was comparatively clear. If the carrier is a private or special carrier, liability as to both goods and persons only attached upon a showing of ordinary negligence on the part of the carrier. In other words, the same conditions of liability exist as prevail in any mutual benefit bailment contract. If the carrier is a so-called common carrier, then as to the transportation of goods he stands generally speaking as an insurer and as to persons he is bound to exercise the highest degree of care known to mankind in that particular line of business as a practical means of securing safe passage.

IV.

There is no fixed or uniform rule at present as to the aviator. Shall he be held as an ordinary bailee, an insurer, be bound to the exercise of the highest degree of care, or should an entirely different rule of law be applied to this mode of transportation from that applicable to other agencies performing the same service? To intelligently answer this question, it seems there must first be a determination of the point as to whether one conducting a business of transportation of goods and passengers, similarly to other concerns but using the airplane as a method or means of carriage, should be regarded as a common carrier or merely a special or private carrier. What then constitutes being a common carrier? The definition of a common carrier usually adopted in this country is that of C. J. Parker in Dwight v. Brewster, where he says:

1. 1 Pick. 50.
"A common carrier is one who undertakes for hire to transport the goods of such as choose to employ him from place to place."

Chancellor Kent has said that common carriers are those who:

"Undertake generally and not as a casual occupation and for all people indefinitely to convey goods and deliver them at a place appointed, for hire, as a business and with or without a special agreement as to price."²

In the case of North American Accident Insurance Company v. Pitts,³ the Supreme Court of the State of Alabama in deciding whether the death from an airplane accident entitled the plaintiff to the double indemnity provided in an insurance policy that contained a provision of double compensation in the event of death while traveling as a passenger on a common carrier, adopted the definition of a common carrier as previously announced by the same court in Georgia Life Insurance Company v. Easter,⁴ where the definition pertained to travel by land or water, the court saying the words "or air" might be added after the word "water" with propriety announced:

"The real test whether a man is a common carrier, either by land or water (or air), therefore, really is whether it is held that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire so long as he has room the goods of all persons individually who send him goods to be carried."

In the particular case last referred to, under the facts presented, the court held that the aviator was not a common carrier. Another suit involving the same state of fact was disposed of in the Circuit Court of Appeals for the Fifth Circuit. In reaching the same conclusion arrived at by the Supreme Court of Alabama, the Circuit Court of Appeals recited the facts of the case as follows:⁵

"The following facts are not disputed:

Lieutenant Whitted, formerly in the Naval Aviation Service, owned a hydroaeroplane and operated it himself at Camp Walton, Fla., a summer resort, where he took passengers upon pleasure trips in the air to let them enjoy the doubtful pleasures of flying. The plane held six persons, including the pilot. The trips lasted about ten minutes in the air and the plane returned to the point from which it started"

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2. 2 Kent Com. 598.
3. 213 Ala. 103 (1925).
4. 189 Ala. 478.
5. 8 F. (2d) 996.
for which he charged the passengers $5.00 each. He would not go up with less than three passengers and carried only white people. He operated on such days and such hours and under such conditions as pleased him and did not pretend to maintain regular schedules. He did not advertise his business unless keeping his plane anchored at the resort and having his helper in the vicinity of the usual landing place to give information would be so called. On August 19, 1923, Hugh D. Brown, the insured, who was visiting Camp Walton with his wife, went up with Whitted and three others. When up in the air something went wrong with the machine; it fell and all were killed. From the above-quoted facts, it is clear that Whitted was not a common carrier. He assumed no duty to the public to carry them and if he refused to do so, without any reason at all, no action would lie against him. See Hutchinson on Carriers (3d Ed. Secs. 47, 48)."

I do not think anyone would seriously contend that there is any error in the conclusion reached by the court in this case but, at the same time, reasoning conversely from the facts cited therein, one is equally forced to the conclusion that had Lieutenant Whitted been engaged in carrying passengers from one point to another, making regular scheduled flights that were advertised publicly for certain days or at certain hours, and that this was his regular business and he offered inducements and sought to have the public generally patronize his ship in going from place to place and maintained regular waiting rooms, terminal facilities and sold regular printed tickets to all who offered themselves as passengers, one cannot doubt, but that under such circumstances, he would have been regarded as a common carrier of passengers.

According to the Air Commerce Bulletin of the United States Department of Commerce of January 15, 1930, there were altogether in this country as of that date seventy-six air transport routes, regularly maintained with scheduled flights over these various routes, by airplane transportation companies. Of these seventy-six routes, twenty-six were maintained for passenger-carrying purposes alone and covered distances generally from fifteen miles between Seattle and Bremerton with eleven flights per day to 1,439 miles between Los Angeles and Kansas City with one plane a day each day of the year. Twelve of these routes carried mail alone. Six of them carried mail and express. Ten carried passengers and express and thirteen of them carried mail, passengers and express combined. Except for the ones carrying mail alone, it is confidently believed that the operators of all these lines, if the question be brought before a court, would be regarded as common carriers. They all maintain regular terminal facilities of one way
or another, have standard fares, regular trips and advertise their willingness to transport passengers and express and seek the patronage of the public in quite an energetic way. More than one company advertises generally a regular transport service of a transcontinental character in conjunction with a railroad, over a joint air-rail route, where the travel by day is on the air line, and the travel by night over a connecting railway. In all the advertisements of one of these companies, printed rather inconspicuously, is the statement "A Private Carrier." The ticket that is sold by this company has a number of conditions printed thereon headed by the statement:

"Not a Common Carrier. This company is not a common carrier for hire and does not hold out itself to the public as a common carrier and reserves the right to reject any and/or all applicants for transportation; and to accept applicants for transportation upon such terms and conditions as it may deem fit, irrespective of the terms and conditions accorded others who may be accepted for transportation."

Mr. E. A. Harriman of the Washington, D. C. Bar, in an article appearing in the Journal of Air Law, commenting upon such a condition on a contract of carriage, said:

"Stranger things have happened than the adjustment by the courts of old definitions to new facts and it will require not one decision but a series of decisions to insure the success of the air carrier in its attempt to form part of a transcontinental route in this manner and at the same time to escape by contract any liability as a common carrier."

The business organization of this company is identical with that of the associated railroad company and its purpose is identically the same, to-wit, the transportation of passengers and goods from place to place in a regular way for a certain fixed compensation or price. In other words, it has every earmark and characteristic of a common carrier, similar to its associated railroad company, with the exception that it seeks to say that, although it does the same thing the railroad company does, it is not a common carrier.

Mr. Hutchinson in his work on Common Carriers, 3rd Edition, Sec. 44, says:

"It is, however, by no means to be understood that the common carrier can by his contract or in any other mode become as to the carriage of particular goods merely a private carrier for hire, whilst he is, in fact, a common carrier of such goods generally. If he could do this, he could, of course, provide by contract against liability for

6. Volume 1, No. 1, Pages 33, 36.
losses occurring from the negligence of himself or his servants which, as we have seen, it is competent for the private carrier to do. But according to the weight of authority, at least in this country, as we shall hereafter see, common carriers will not be permitted under any circumstances or in any manner to protect themselves against the consequence of their own negligence in the carriage of either goods or passengers."

The same authority later on, speaking of railroad companies, said:

"Railroad companies are by their very nature and organic character common carriers, whether made so by the general statute or by their charters or not; and whenever they are made so by the express provisions of a law, such provisions will be considered as merely declaratory of the law as it already existed and will neither increase their duties and obligations nor in any respect qualify their liability. They have sometimes attempted to defend themselves from liability by disputing the proposition that they were common carriers, but the contention has received no countenance from the courts and it has been held in many cases, for reasons peculiarly applicable to them, that as carriers of both passengers and freight, the rules as to the responsibility of common carriers and of passenger carriers should be applied to them with full force. Being recognized as public utilities as well as private enterprises extensive rights and franchises have been conferred upon them which are not enjoyed by other carriers, among them being the right to invoke the power of eminent domain. Not only have they been fostered by the Government but by reason of aggregation of capital and the great facilities which they control for the transportation of all the commodities of commerce, they have practically monopolized the land carriage of the country. It is but just, therefore, that in their dealings with the public, whether as carriers of goods or of passengers, they should be held to that strict accountability which the public safety and policy require."

To blindly follow precedent is to do away with individual reasoning. However, the premises laid down in the above quotation from an eminent authority are without question true and the conclusion drawn from the same is not only logical but fair and just. Likewise, all that is said therein as to railroads, applies with just as much force, fairness and justice to operators of air lines engaged in the same character of business. Indeed, as to air lines, even greater rights and franchises are granted than the power of eminent domain, for while it is not a firmly established doctrine conceded on all sides, that an aviator has a right to use the air over the property of a subjacent owner of the land, certainly the great trend of thought and authority permits such action, but not without consent of the Government. In addition, in a great many
instances, municipal airports are provided as terminals for commercial lines, without expense to the aviator, except for service charges. Furthermore, the Federal Government through the Department of Commerce, has laid out and mapped the leading airways of the country and lighted many of them and in every way cooperated with and fostered the growth and development of air transportation as an avenue of commerce. Surely under these circumstances when a railroad company is admittedly held to the degree of liability imposed upon a common carrier, it is nothing more than right and just that air transportation companies:

“In their dealing with the public, whether as carriers of goods or of passengers, they should be held to that strict accountability which the public safety and policy require.”

In a report to the American Air Transport Association, on the question of a Uniform Ticket Contract and Standard Ticket Form, a Committee of that Association relative to the question of whether an air transport company should be regarded as a common carrier or not, said in consideration of one of the conditions recommended to be printed upon a Standard Ticket Form, the following:

“Any attempt to limit liability of the carrier where it is caused by the carrier’s negligence or misfeasance is certainly against public policy and in the opinion of this Committee would be so held by the various supreme courts of the land. No attempt has been made to force the public to adhere to the theory that airplanes traveling on scheduled flights and carrying passengers for hire are private carriers. The Railroad Company vs. Lockwood, 84 U. S. 357, clearly states that the test is not in what you say you are but in what you are actually doing. There is hardly a company that has submitted its ticket form to your committee that is not, in the opinion of a majority of the committee, a common carrier and would be adjudicated such in any supreme court of the land.”

V.

Let us see what action has been taken, so far, by the authorities in fixing this question of the civil liability of the aviator as a carrier of goods and passengers. Our laws in this country, with the exception of the State of Louisiana and a few Southwestern states that were formerly possessions or territory of Spain, all sound in the common law of England and the laws of that country today are frequently cited as authority as persuasive, if not controlling. The Air Navigation Act of 1920 of the British Parliament 10 and 11 Geo. V. Chap. 80, Sec. 9, reads that:
"Where material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person or any such aircraft, or by any article falling from such aircraft, to any person or property on land or water, damage shall be recoverable from the owner of the aircraft in respect to 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, negligence or default, except when the damage or loss was caused by or contributed to by the negligence of persons by whom the same was suffered."

A careful reading of this Statute shows that it deals alone with the question of liability to one, on land or water, as the result of an aerial flight and does not touch the question of the duty and obligation of the air operator to goods or passengers carried, nor is there any declaration at all as to whether the air carrier is to be regarded as a common or a private carrier. Presumably the theory upon which this absolute liability for damage or injury to person or property on the land or water beneath, in connection with an aerial flight, is based upon the proposition that while the right to navigate the air space above is granted, still there is enough left in the old doctrine of *cujus est solum ejus usque ad coelum* to guarantee to the owner of the subjacent land or water ownership in the air space above, to prevent any interference with life or activity on the land or water beneath by reason of such air passage and that an air passage that does so interfere as to cause damage, constitutes a trespass. This appears to be a sound rule of conduct consonant with reason, fairness and justice to all parties, but is aside from the question of the duty and obligation owed to a passenger on, or owner of goods shipped by, the airplane.

Congress passed in May, 1926, what is now called the Air Commerce Act of 1926,' and while there is no declaration of law contained in that Act that specifically defines air operators as either common or private carriers, the Act does contain certain regulatory provisions, or power to make the same is conferred upon the Department of Commerce, and all through the Act there is the clear inference that air transportation companies are to be regarded as public utilities.

So far as the writer has been able to discover, there are no decisions yet of any of our Federal courts that recognize any rule of law affirmatively placing air transportation companies squarely within the category of common carriers, but again the clear inference from the opinion of the Court of Appeals for the Fifth
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Circuit in *Brown v. Pacific Mutual Life Insurance Co.*, *supra*, is, that any aviator or aviation company whose operations come within the meaning of “common carrier,” as applied to any other known means of transportation, would likewise be held to be such a common carrier.

The American Bar Association has done much creditable work in considering this new branch of jurisprudence to meet, from a judicial point of view, the new and novel conditions that development of air navigation has occasioned, and among those most prominently active in this work has been the Honorable William P. MacCracken, formerly Assistant Secretary of Commerce for Aeronautics. This Association has adopted and recommended for passage to the various states a Uniform State Law concerning aeronautics. Among the provisions of that law are Sections 5, 6 and 7, which read as follows:

“Sec. 5 (Damage on Land).—The owner of every aircraft which is operated over the land or waters of this state is absolutely liable for injury to persons or property on the land or waters beneath caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused, in whole or in part, by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable and they may be sued jointly or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person or owner, or bailee of the injured property shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it.

“Sec. 6 (Collision of Aircraft).—The liability of the owner of one aircraft to the owner of another aircraft or to aeronauts or passengers on either aircraft for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land.

“Sec. 7 (Jurisdiction of Crimes and Torts).—All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this state shall be governed by the laws of this state and the question whether damage occasioned by or to an aircraft while in flight over this state constitutes a crime, tort or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state.”

This proposed law fixes the question of liability for damage done to person or property on the land or water beneath and is largely similar to the British law. It is evidently based on the concession of the right of free navigation, provided there is no interference by the aircraft with the right of enjoyment of the air by the
earth-bound creatures. While Section 5 of the Act does contain a sentence reading that a aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence, we are still left, even under the terms of this Act, with no definite statement of the question as to whether an aeronaut is a common carrier, or not, or what rule of law should fix the degree of care or responsibility of the aeronaut to his passengers or goods entrusted to him for carriage.

According to Aeronautics Bulletin No. 18 of the United States Department of Commerce, Aeronautics Branch, up to September 1, 1929, every state and territory of the United States, including Hawaii and the Philippines, with the exceptions of Alabama, Georgia and Oklahoma, have passed statutes undertaking in one way or another to regulate the operation of aircraft in the various states and territories or possessions. An examination of the statutes mentioned shows that the following make no mention of the question of the civil liability of the aviator, nor specify what rule of law is applicable in determining that issue:

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The following states have in one form or another adopted, through legislative enactment, the Uniform State Law recommended by the American Bar Association, which fixes a method of determining liability for damage or injury to person or property on the land or water beneath, but sheds little light on the question of whether the aeronaut who transports goods or persons for hire, should do business under the duties and obligations of a common carrier, private carrier or otherwise:

| Delaware | Nevada | Tennessee |
| Hawaii | North Carolina | Utah |
| Idaho | North Dakota | Vermont |
| Indiana | Rhode Island | Wisconsin |
| Maryland | South Carolina |
| Michigan | South Dakota |

The State of Arizona, by Act approved March 6, 1929, has adopted a rule of liability that makes both the pilot and employer...
liable for such damage as results from the negligence of the pilot while controlling the aircraft himself or while giving instructions to others. This statute likewise provides that the liability of the owner for collision shall be determined by the rules of law applicable to torts on land and that:

“All crimes, torts and other wrongs while in flight over the state, shall be governed by the laws of the state.”

However, there is no declaration as to what degree of care is required or whether the negligence referred to is that of an ordinary bailee or that of a common carrier, but it is thought that as to the carriage of goods, this statute would be held not to create as great a degree of liability on the part of the aeronaut as the common law imposes upon a common carrier.

The law in Connecticut, as stated in Chapter 324, passed May 10, 1927, of the laws of that state, is somewhat similar to that of Arizona and may be stated to be that the pilot is responsible for all damages to either person or property caused by aircraft directed by him or under his control, which damage shall have resulted from the negligence of the pilot, either in controlling the aircraft himself or while giving instructions to another. If the pilot is the agent or employee of another, both he and his principal or employer are responsible for damage, provided any pilot and/or principal or employer would be responsible for injuries to any passenger only when such injury shall result from the negligence of such pilot. Here again it would seem that the common law liability of a common carrier as an insurer, so far as goods are concerned, would not apply, since the liability is made to depend upon “negligence” and, also, there is no attempt to determine the degree of negligence in fixing the liability. In commenting upon this Connecticut Statute, Mr. Henry G. Hotchkiss in his work on “Aviation Law,” published in 1928, has pointed out that Connecticut was the first state in the Union to adopt a law, in which the specific test of liability in cases of damages to passengers or property in connection with aircraft was fixed by law, being an Act of that State’s Legislature passed in 1911 and under which absolute liability was declared, and says:

“The measure of liability thus adopted (that is by a later Act of 1927) can hardly have been arrived at fortuitously, since it was Connecticut that adopted the first law relating to aviation in the United States in 1911, and in this law the rule on absolute liability was provided for and ‘every aeronaut was held responsible for all damages’.”

8. Hotchkiss in Aviation Law, Page 38.
It would thus appear that in Connecticut, at present, it is the rules of ordinary negligence that determine liability and not the standard required under the common law rules applicable to common carriers, either as to goods or passengers, or the absolute liability fixed in the original Act of 1911.

In Louisiana, there is no statutory law as to what standard of care should be used to determine liability but Act 52, approved June 6, 1926, makes it the duty of every person, firm or corporation engaged in the business of operating airplanes, whether if owner, lessee or otherwise, for the purpose of carrying passengers for hire within the state, to procure and execute an indemnity bond in the amount of $15,000.00 if only one airplane is used in said business, and an increase of $1,000.00 additional for every additional airplane with a good and solvent surety company authorized to do business in the state as surety, with the obligation running in favor of any person who may be injured in person or property, or otherwise suffer loss or damage by the operation of any airplane so used by said person, firm or corporation in said business in the State of Louisiana. From this Statute it might be reasonably argued that as to both goods and passengers there is an absolute liability on the part of the aviator regardless of negligence, the only proof necessary to recover under the bond, at any rate, being a showing of loss or damage as the result of the operation of the airplane.

In Massachusetts, the situation is not altogether clear. Quoting again from Mr. Hotchkiss on Page 39 from his “Aviation Law” we find the following:

“In Massachusetts, the State first adopted a statute fixing a heavy, though not absolute, liability for aircraft accidents. In the Acts of 1913, Chapter 663, Section 6, it is provided that an airman ‘shall be liable for injuries resulting from his flight unless he can demonstrate that he had taken every reasonable precaution to prevent such injury.’ This law was changed by the Act of 1919, Chapter 306, reading in part as follows:

‘No person shall operate aircraft over buildings, persons or animals in such manner as to endanger his own life or the lives or safety of those below him, or the safety of himself and his passengers, if he be carrying passengers.’

‘This Act was in turn repealed by the Acts of 1922, chapter 535, and again by the Acts of 1925, chapter 189, in neither of which are any standards of negligence set up. The absence of any pronouncement on the question of negligence is frequent enough in many state statutes. But in Massachusetts the legislature had definitely adopted a rule or standard of liability for aircraft different from the usual rule
in these matters. When, then, it dropped or repealed the new rule, it seems a reasonable inference that the Legislature intended that the ordinary rules of negligence shall apply. It is the writer's opinion that Massachusetts, like Connecticut has adopted the ordinary rules of negligence."

The writer is rather disposed to agree with this reasoning of Mr. Hotchkiss but in the Bulletin of the Department of Commerce, referred to in the first part of this article, Massachusetts is listed among the states as having no statutory law defining the rules of liability of an aviator.

Missouri, by Act of its Legislature approved June 1, 1929, declared that the liability of the owner of one aircraft to the owner of another aircraft or to areonauts or passengers on either aircraft for damages caused by collision on land or in the air, shall be determined by rules of law applicable to torts on land and all crimes, torts and other wrongs committed while in flight shall be governed by the laws of the state. This is quite similar to the Uniform State Law recommended by the American Bar Association and as I interpret the same would leave to the courts to determine whether the airplane carrier comes within the definition of a common carrier or not, with the resultant rights and obligations arising therefrom.

Montana, by Senate Bill No. 25, passed February 19, 1929, has declared that the landing of aircraft on the land or waters of another, without his consent, is unlawful except in the case of forced landings and that in the event damages are caused by forced landings, the owner or lessee of the aircraft, or the airman, shall be liable for actual damage caused by such forced landing. Otherwise, there is no attempt in that State to fix the rules determining the liability of the airman.

The State of Pennsylvania appears to have approached this new field of jurisprudence with more care and attention than any other state in the Union. By Statute known as Act No. 316, approved April 25, 1929, and effective from and after July 1, 1929, most minute provisions have been made as to many details, and an apparent effort made to cover the entire field of statutory regulations. Another Statute, known as Act No. 317, but approved the same day, declares that the owner or the operator, or either of them, of every aircraft which is operated over the lands or waters of the Commonwealth shall be liable for injuries or damages to either person or property on or over the land or water beneath caused by the ascent, descent or flight of aircraft or the dropping or falling of any object therefrom in accordance with the rules of law
applicable to torts on land in that Commonwealth and jurisdiction over crimes and torts are governed by the laws of the Commonwealth. Act No. 316 creates a State Aeronautics Commission and defines its powers. Article XII of this Act defines what shall constitute commercial flying and provides that:

"It shall be unlawful to operate or navigate civil aircraft engaged in commercial flying within the Commonwealth of Pennsylvania without first having had and obtained:

(1) From the Commission, commercial flying licenses for all civil aircraft so used or to be used; and

(2) A certificate evidencing the approval of the Commission of the qualifications and safety of the aircraft, airport, landing field or other navigation facilities used or to be used in such commercial flying."

Section 1203 of this Act then provides:

"It shall be unlawful to operate or navigate civil aircraft as a common carrier within the Commonwealth of Pennsylvania without first having had and obtained:

(1) From the Commission, commercial flying licenses for all civil aircraft used or to be used; and

(2) A certificate evidencing the approval of the Commission of the qualifications and safety of the aircraft, airport, landing field or other navigation facilities used or to be used in such commercial flying; and

(3) A certificate of public convenience evidencing the approval of the Public Service Commission of Pennsylvania of the right and privilege to operate such aircraft as a common carrier."

The other regulatory powers of the Commission are then set forth, including how its hearing shall be conducted, and then among other provisions in Section 1207 is the recital that:

"The Public Service Commission shall first determine whether or not the services performed or to be performed by the applicant constitute operation of aircraft as a common carrier within this Commonwealth. Should the Public Service Commission determine that such service does not constitute operation of aircraft as a common carrier, the complete record shall be returned to the Commission with the report of such finding by the Public Service Commission."

Other pertinent portions of this Act are as follows:

"Sec. 1208. Following a determination by the public service commission that the service performed or to be performed by an applicant constitutes operation of an aircraft as a common carrier, the public service commission shall then determine whether or not the granting or approval of such application is necessary or proper for the service, accommodation, or convenience of the public."
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"Sec. 1209. The Powers and duties of the public-service commission to supervise and regulate the transportation of persons and property by civil aircraft as a common carrier shall remain in the public-service commission, excepting and reserving, however, the right and duty conferred by this act upon the State aeronautic commission to license, supervise, and regulate the qualifications, equipment and safety of civil aircraft, airmen, airports, landing field, and air-navigation facilities used or to be used as common carriers within this Commonwealth.

"Sec. 1210. Following the determination of the public-service commission that the services engaged in or to be engaged in by aircraft in commercial flying does not constitute the operation of aircraft as a common carrier within this Commonwealth, and the return of the record, the commission shall issue to the applicant a commercial flying license and its certificate of qualifications and safety, which certificate shall authorize the operation of aircraft in commercial flying within this Commonwealth, subject to the rules and regulations adopted by the commission. Should the commercial flying so engaged in become at any time an operation of aircraft as a common carrier, such commercial flying shall then become unlawful, without first having obtained a certificate from the public-service commission of its approval of such operation of aircraft as a common carrier.

"Sec. 1211. Whenever the public-service commission shall determine that an aircraft, airman, airport, landing field, or air-navigation facility has been engaged in transportation of passengers, property, or merchandise as a common carrier, within the Commonwealth of Pennsylvania without first having secured a certificate of public convenience to so operate from the public-service commission as provided in this act, it may certify such determination and finding to the commission, together with its request that the registration or license issued by the commission for such aircraft, airman, airport, landing field, or air-navigation facility, be suspended or revoked. The commission shall suspend or revoke the registration and license of any aircraft, airman, airport, landing field, or air-navigation facility upon the certification and request of the public-service commission as above provided."

This Statute is the most pretentious and comprehensive of any State Legislative Enactment affecting or applicable to civil aviation that the writer has found and in the author's opinion is admirable in all its provisions and could be well regarded as a model for all the states to uniformly adopt. The public service commission determining the question of whether the aeronaut was a common carrier there should be no difficulty in applying the same rules and laws of liability as to him as are applied to other common carriers.

The State of Virginia has passed a Statute regulating civil aviation in that state (Chapter 463 H. B. 338, approved March 26, 1928), which vests power in the State Corporation Commission to issue, suspend or revoke licenses for civil aircraft, and power to
promulgate such rules and regulations relative to air traffic and such kindred matters as said commission may deem proper and necessary. No mention is made in the Act as to the rules of law applicable to the liability or responsibility of the aviator but the State Corporation Commission has adopted a regulatory rule requiring liability and property damage insurance from any operator before a license to fly can be obtained.

There are some authorities who have advocated the adoption of a third rule of liability as to air carriers, making them absolutely liable in the event of damage or injury not only to goods but passengers, or in other words extending the common law liability of insurers of common carriers of goods to passengers as well. There seem to be two grounds advanced for this theory; first, that the airplane should be regarded as a dangerous instrumentality, such as explosives, ferocious animals and the like, and that anyone making use of such agencies does so at his peril and in the event of damages following, can excuse himself only by showing that the same was the result of some vis major or the act of God; secondly, that by the very nature of things proof of negligence is exceedingly difficult for the passenger or shipper if not next to impossible. It has also been argued that such a rule furnished at least a fixed standard to go by, under which insurance could be obtained by the carrier for his protection. As to the first reason advanced when it is considered that in scheduled air transport operations for the period from January to June, 1929, there were 9,201,338 miles flown and the mileage for each fatal accident was 1,022,371, it seems scarcely fair to look upon the airplane as a dangerous instrumentality. As to proof of negligence, the Department of Commerce is able to render a report analyzing accidents in aircraft so as to classify them as being due to negligence of personnel, failure of power plant, structural defects, faulty instruments, handling, qualities, inclement weather, airport or terrain difficulties and it is, therefore, not thought that this is a valid or persuasive reason for imposing greater burdens on this industry than that under which the other mechanical commercial activities of our times exist. Of course, the doctrine of res ipsa loquitur is not a rule of liability, but more properly considered is nothing but a rule of evidence and it may be that it would be wise to establish a doctrine that as to airplane accidents this rule of evidence would apply upon mere proof of the contract of carriage and damage, loss or injury resulting therefrom, would make out a prima facie case, so as to shift the burden upon the defendant, of showing that the damage was not
the result of negligence or failure to exercise any duty or obligation resting upon it or any other character of common carrier. As to the question of insurance, Mr. Hotchkiss on Pages 40 and 41 of his work above referred to, advances the following criticism with apparent soundness:

"The most persuasive argument in favor of the rule of absolute liability is the one that asserts that the loss will be spread by means of insurance. The difficulty with this argument is that it is an assumption contrary to fact. Modern insurance is firmly based on actuarial postulates. Despite the advance in aviation during the past years there is as yet insufficient data of passengers and freight carrying by air to enable the construction of proper actuarial tables. This is true in the United States, and to a lesser degree in England and in continental Europe.

"This being the fact, the insurance of passengers of freight carried by air resolves itself into a series of negotiations covering each particular case with the certainty that the premium in any case will be high. The costliness of the premium makes it out of the question for small companies or independent fliers to cover themselves. Therefore, in their cases the rule of absolute liability, in case of accident, makes no difference.

"In the case of the more strongly intrenched companies the high premiums offer a difficult obstacle. To include it in the charges for passengers or freight is to raise what must at present be a high rate, still higher. To add it without raising the rate is to decrease the chance of operating in the only way that private airlines should be operated, that is, at a profit. As a result there is a strong temptation for the company to be its own insurer.

"The fact is that the rule of absolute liability largely defeats its own purpose unless it is coupled with compulsory insurance. If and when the use of aircraft is sufficiently widespread to permit of the imposition of a tax to create an insurance fund then the rule might properly be invoked. This time has not come yet in aviation and in many States has not been reached with reference to the omnipresent automobile."

In addition to all this, what reason is there that this species of carrier should have imposed upon it higher or greater responsibility than those which rest on other carriers? After much consideration of the question and almost daily contact with it, the writer is convinced that it would be unfair to impose this different and more burdensome rule on the aviator and would constitute a kind of class legislation or differentiation, lacking in justice and right dealing.
VI.

From all of the above it appears:

(1) *That there is no fixed or uniform rule of law in federal or state jurisprudence on the question of the civil liability of the aviator.*

(2) *That some states have fixed an absolute liability for damages to person or property on the land or water beneath as the result of the operation of aircraft, and others have taken no positive stand.*

(3) *That some states, notably Connecticut and Massachusetts, appear to have adopted a rule of mere ordinary negligence to determine the liability of the airplane carrier for loss or damage to goods or passengers.*

(4) *That one state, Pennsylvania, appears to think that the aviator, when he comes within the definition of a common carrier, as applied to other means and modes of transportation, should be held to a similar degree of care and responsibility as any other common carrier.*

(5) *That some air transport companies, regardless of the character of business they conduct, seek to claim the privilege of regarding themselves as private or special carriers.*

In conclusion, it is submitted that no one can doubt the wisdom of a uniform rule under both federal and state jurisdictions and the opinion of the writer is that in all fairness there is no just reason for regarding the airplane operator in the carriage of goods or passengers from any different point of view than that under which other carriers function and that if common custom and public opinion is to settle our aviation law, then that law should be similar to all assuming responsibilities of like character under it. If other common carriers are insurers of goods, and are bound to exercise the highest degree of care known to mankind in that particular art or science, as to passengers, then that same rule of law, and no other, should apply to the aviator.

The lawyers should be the most dominant factor in molding public opinion and seeing that that public opinion, as reflected in judicial decisions or statutory enactments, is based on principles of justice and right, and this article is submitted as an argument for the members of the Legal profession to take part in the formation of the principles of law in this new field of jurisprudence, along those lines.