Notes, Comments, Digests

Raymond I. Suekoff
George W. Ball
Leo Freedman
G.W.K. Snyder

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
Raymond I. Suekoff et al., Notes, Comments, Digests, 4 J. Air L. & Com. 274 (1933)
https://scholar.smu.edu/jalc/vol4/iss2/11

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
COMMENTS, DIGESTS

Department Editors........................................
{ROBERT KINGSLEY
{CHARLES G. BRIGGLE, JR.

COMMENTS

GASOLINE TAX—COMMERCE—STATE TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Federal] An Idaho statute requires each dealer engaged in the sale of motor fuels to pay a license tax of five cents per gallon on all motor fuels sold and/or used by him in the state of Idaho.1 The term "dealer" is defined to include anyone who imports motor fuel.2 A bill to enjoin officers of the state from collecting the tax was brought by plaintiff, an interstate air carrier, which does not sell gasoline within the state, but imports it for its own use in propelling its airplanes in interstate commerce. Held: Perpetual injunction granted. From the terms of the statute only a "dealer" who is engaged in the sale of motor fuel is subject to the tax. Although plaintiff is a "dealer" within the meaning of the statute, it did not engage in the sale of motor fuels: Varney Air Lines, Inc. v. Babcock, 1 F. Supp. 687 (S. D. Idaho 1932).

The court's conclusion that plaintiff was not included within the terms of the statute seems quite correct. It is interesting to note that a subsequent section of the Idaho revised statutes requires every dealer in motor fuels to render a monthly statement of the number of gallons of motor fuels imported into the state, and sold and/or used by him during the preceding calendar month.3 The latter section is not limited to those dealers who engage in the sale of motor fuels, but since the section contains no taxing provision, it does not affect the instant case.

A further question of constitutionality in application to interstate air carriers would arise if the statute were amended to omit the words "engaged in the sale of motor fuels," to interstate air carriers. By way of dicta, the court in the instant case upheld the tax as a valid charge for the use of air navigation facilities that the state furnishes. Prior to the decision in Eastern Air Transport, Inc. v. South Carolina Tax Commission4 a tax on the sale of gasoline destined to be used by airplanes engaged in interstate commerce was considered valid as a reasonable charge for the privilege of using municipal airports.5 It is now unnecessary to sustain a sales tax as a charge for facilities furnished.6 However, since a state may exact a tax from agencies of interstate commerce for the privilege of using public highways,7 it would appear that the state may logically charge interstate commerce agencies for the use of public airports. A tax on automobiles

1. Idaho Code 1932, ch. 48, sec. 702.
2. Ibid, sec. 701.
3. Ibid, sec. 703.
engaged in interstate commerce based upon their mileage within the state has been held valid. It is submitted that the amount of tax levied on interstate airplanes for the use of public airports may reasonably be assessed on the basis of gasoline consumption within the state.

RAYMOND I. SUEKOFF.

INSURANCE—Exception Clause—Incontestability.—[Washington] The plaintiff insurance company sought in this action against the state insurance commissioner an adjudication of its right to insert in its life insurance policies the following exception:

"Except as hereinbelow provided, death resulting directly or indirectly, in whole or in part, from being in or on any vehicle or mechanical device for aerial navigation, or from falling therefrom or therewith, or while operating or handling any such vehicle or device, is a risk not assumed under this Policy, but in the event of death so occurring, the Company will pay the reserve under this Policy and the Policy shall thereupon be terminated. "Exception: This Policy covers the death of the Insured while riding as a fare-paying passenger in a licensed passenger aeroplane or a licensed passenger dirigible owned and provided by an incorporated passenger carrier for passenger service and while operated by a licensed passenger pilot on a regular passenger schedule over a definitely established regular passenger route of such carrier and between definitely established air ports."

In the insurance code there was a provision that all life policies "shall be incontestable from two years from its date of issue, except for non-payment of its premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war." The insurance commissioner refused to approve the aviation exclusion clause because of its alleged repugnancy to the incontestable provision in the insurance code. The Superior Court awarded the insurance company the relief which it had asked. The commissioner appealed to the Supreme Court. Held: that the insurance commissioner be restrained from interfering with the plaintiff's insertion of the aviation clause. Pacific Mutual Life Insurance Company v. Fishback.¹

This decision is in accord with the holding of the New York court in Metropolitan Life Ins. Co. v. Conway.² In that case the rider in question provided that "death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy . . . ." Possible conflict was suggested between that provision and the insurance law which read into every policy an incontestable provision substantially the one in the instant case. Mr. Chief Justice Cardozo, in holding that there was no conflict, pointed out the difference between "a denial of coverage" and "a defense of invalidity":

"Provisions are not unusual that an insured entering the military or naval service shall forfeit his insurance. A condition of that order is more than a limitation of the risk. In the event of violation, the policy, at the election of the insurer, is avoided altogether, and this though the death is unrelated

to the breach. No such result follows where there is a mere restriction as to coverage. The policy is still valid in respect of risks assumed." See also Mack v. Connecticut General Life Ins. Co. This case was followed in American Home Foundation v. Canada Life Assurance Co. and in Head v. New York Life Insurance Co. (a federal case in which the New York law was construed). It is the accepted New York doctrine. Apparently the only case involving the exclusion clause for air travel decided contrary to it is Bernier v. Pacific Mutual Life Insurance Co. The stipulation in the policy there involved was "it is hereby understood and agreed in the event of the death of the insured arising . . . from engaging in aerial navigation, except while riding as a fare-paying passenger in a licensed commercial aircraft provided by an incorporated common carrier for passenger service . . . the only liability under this policy shall be for a sum equal to the premiums paid thereon, and the policy shall thereupon be terminated." The airplane in which the insured was killed did not satisfy these specifications. The insurance company, maintaining that their liability was but for the amount of the premiums, relied upon the Conway case. The Louisiana Supreme Court might in this case have held for the insurance company and yet reconciled their decision with the New York rule as expressed in the Conway case. The court, however, preferred to hold that "if the insurance company intended to except also, from the incontestable clause, a violation of the conditions relating to aerial navigation, that exception, like the exception relating to military or naval service in time of war, should have been expressed." In other words, the court refused to read into the incontestability clause any exception which was not there expressed, nor did it specifically assert, as it might well have done, that the aviation clause made any violation invalid rather than merely that it excepted such a risk from the coverage.

These two cases apparently represent diverse attitudes towards the nature of an incontestability clause. The present case, in following the New York rule, has chosen the logic which seems the more convincing.

GEORGE W. BALL.

NEGLIGENCE—AIRCRAFT COLLISION WITH TRUCK LEFT UNATTENDED ON THE FIELD—DUTY TO KEEP RUNWAYS CLEAR—CONTRIBUTORY NEGLIGENCE—
[New York] The plaintiff had his plane lined up with several others in front of their hangars. He stepped into the cockpit for the purpose of taxiing over to the gas tank. At this particular point, because of adjacent planes, he was unable to observe the path he was to take down the field. When he came onto the field, however, his vision was unobstructed. A glance to the right could have brought to his attention a truck which had been left standing there by some workmen. The plaintiff testified that he took a "casual glance" down the field but saw nothing. While taxiing down the runway, he collided with the truck and damaged his right wing and propeller. This action is brought against the airport company to recover compensation for injuries to his plane. The court applied the ordi-
mary rules of tort law to dispose of the case. It was admitted that the defendant airport company was obliged to keep the runways unobstructed and hence they were negligent. Recovery, however, was denied on the basis of the court's finding that the plaintiff had not exercised reasonable care to see that the course he was pursuing was not dangerous. Furthermore, it did not matter that he had the right of way, for he was still bound to use reasonable care to avoid a collision.1

The decision above digested may be commented upon in four phases. (1) Was the defendant airport company legally obligated to clear the runways? (2) What would constitute contributory negligence in the present factual situation? (3) Who is to shoulder the burden of evidence, to establish or defeat the doctrine of contributory negligence? (4) What is the effect of the mutual fault?

(1) The plaintiff was either a tenant or invitee of the airport company. If a tenant, the airport would owe a duty to keep the runways clear; for "* * * the airport proprietor is liable for injuries resulting to the tenants for defects in those portions of the field which the tenant is expressly or impliedly permitted to use, and which are still under the control of the proprietor."2 If the plaintiff were not a tenant (the facts do not definitely indicate his status), then surely he can be placed in the category of an invitee. The mutual interests of the parties is the test to determine the existence of an invitee relation, as distinguished from a mere licensee, where the plaintiff is on the field by permission but for his own benefit.3 It is assumed the aviator was invited to use the field, and therefore the defendant must use reasonable care to render the premises safe.4 An airport is not free from dangers. The invitor must circumvent those dangers to the same degree as would men of ordinary prudence in like circumstances.5 Where fairs were held, the courts have assessed damages upon the sponsors thereof for injuries to spectators, because the invitation to attend implied an assertion that the spectacle could be safely witnessed.6

In the instant case, it might be said the obstruction was occasioned by some third party, a workman, rather than the airport proprietor. Liability would nevertheless be imposed either on the theory of respondeat superior, or for permitting a dangerous situation to exist, if it is decided that the workman was an independent contractor.7 It must be conceded that an obstructed runway is dangerous. To pilots in the present plaintiff's position, that is, to those who are still on the ground, the danger is minimized.

2. Logan, "The Liability of Airport Proprietors," 1 JOURNAL OF AIR LAW 263 (1930), and cases cited.
5. Ibid.
but those who are in the air and are about to land are confronted with a real danger.

(2) The municipal court, in the reported case, arrives at its rather flexible decision in a somewhat cursory manner. Recovery is barred because the plaintiff did not exercise reasonable care for his own safety. Let us proceed to some of the precedent in an attempt to illuminate the surface expressions of the court.

Primarily, the plaintiff failed in his duty to keep a proper lookout. The courts when dealing with automobile situations have universally required the driver to maintain a reasonably careful lookout for other travelers and for dangers on the highway. Failure to keep a proper lookout will amount to contributory negligence. This duty to look fluctuates with the character of the machine used and the locality and surroundings in which it is being used. The judgment rests largely with the jury.

Thus, the driver of a heavily loaded truck was required to maintain a vigilant watch at all times. Then again, when making a grade crossing, a more careful observation in both directions is necessitated by reason of the nature of steam locomotion. Failure to have such lights will be negligence as a matter of law. Or as expressed in Kelly v. Knabb, the hitting of a parked car at night as alleged in the declaration constitutes contributory negligence in itself. These last two propositions really tend toward the rather extreme doctrine requiring an individual to “drive within the radius of his lights.” Any accident that does occur is concluded to be by reason of a violation of that principle. The application of the doctrine of driving within the radius of one’s lights does not reach the realities of night driving; it indicates, however, the extent to which courts will go in requiring a proper lookout.

Generally the courts have said the duty to look implies the duty to see. “In its present state the law is not able to protect one who has eyes and will not see, ears and will not hear.” In Massachusetts, the same tendency is expressed by the application of the doctrine of “negligent looking.” The court will review the circumstances, and if they find that the accident occurred in broad daylight, that the plaintiff realized the dangers and was proceeding at a low speed, and that there were no obstructions, they will presume that a reasonable look would have avoided

---

16. 300 F. 256 (Dist. Ct., S. D. Fla., 1924).
the injury. Therefore, even though the plaintiff claims to have kept a lookout, he is taken to have been negligent in that function. All the above circumstances were part of the present case; could any alleged lookout be considered reasonable?

The duty to keep a proper lookout is further complicated by the existence of collateral presumptions. It has been asserted that no man is bound to assume the negligence of another. In other words a presumption arises that others will exercise ordinary care. In the instant case, this presumption would lead to the conclusion that no obstruction would be allowed on the field, and as a consequence the necessity of keeping a lookout would be diminished. In the motor vehicle cases, the driver is permitted to proceed on the assumption that the road is reasonably safe. However, that does not absolve the driver from the duty to use reasonable care for his own safety and therefore keep a lookout. A somewhat analogous situation occurs where the plaintiff has a right of way by reason of a green light, reaching an intersection first, or being on the right of an approaching vehicle. It might more strongly be argued that the plaintiff can proceed in reliance upon others observing his right of way. It has been universally held, however, that the motorist is still required to observe due care to protect others from a collision. This view is in accord with the pronouncement in the present case. The policy underlying the utilization of the formula is sound. The law above all should attempt to prevent injuries from occurring rather than to grope doctrinally for legal rights. It has been said that an insistence upon a right of way in view of dangers to others is the grossest kind of negligence. It has been universally considered reasonable. Therefore, even though the plaintiff claims to have kept a lookout, he is taken to have been negligent in that function. All the above circumstances were part of the present case; could any alleged lookout be considered reasonable?

The minority on the other hand view the absence of contributory negligence as part of the cause of action. The defendant may be negligent but he doesn't actually owe a duty to protect the plaintiff unless the latter has himself exercised reasonable care. The plaintiff must then in the first instance show he is free from contributory negligence. Statutes have been enacted in several of the minority jurisdictions, expressly requiring the defendant to prove contributory negligence.

(4) After evidence of negligence and contributory negligence has been established it next becomes necessary to determine the effect of such evidence. According to the English rule, when "the plaintiff himself so far contributes to the misfortune by his own negligence or want of ordinary care that but for such negligence on his part, the misfortune would not have happened," recovery is denied. This view has been substantially followed in the great majority of American jurisdictions. Mutual fault eliminates the cause of action. This doctrine avoids the necessity of weighing different degrees of negligence and the apportioning of damages. It serves to simplify the judicial machinery. The opposite legal pole utilizes the doctrine of comparative negligence, to give relative weight to the negligence of both parties. Most courts have considered contributory negligence an insufficient defense as against the defendant's wilful and wanton or gross negligence. This rule is to be distinguished from the problem of comparative negligence where the judicial function is concerned with the measuring of slightly varying degrees of negligence, and then mitigating damages accordingly. The distinction is one of degree and therefore difficult to maintain in close cases.

Various states have at times given voice to the doctrine of comparative negligence only to repudiate or modify it later. In Kansas in the early case of Union Pac. Ry. Co. v. Collins, comparative negligence was used. In later cases the court renounced the use of the doctrine to measure and set-off slight differences of negligence. They were willing to allow

---

30. Wendt v. N. Y. C. & H. R. R. Co., 91 N. Y. 420 (1883)—infant required to show he exercised that degree of care required of him.
35. 5 Kan. 187 (1869).
the plaintiff to maintain an action if his negligence was only trivial, while the defendant's was gross.\textsuperscript{35}

In Illinois the court indulged in see-saw activities in its application of the comparative negligence set-up. In \textit{Aurora Branch R. Co. v. Grimes},\textsuperscript{36} contributory negligence barred recovery. However, the court departed from that view, with the use of the following language: "The more gross the negligence manifested by defendant, the less degree of care will be required of the plaintiff to enable him to recover. \textsuperscript{**} \textsuperscript{**} The degrees of negligence must be measured and considered and wherever it shall appear that the plaintiff's negligence is comparatively slight and that of defendant's gross, he shall not be deprived of his action."\textsuperscript{37} This view was approved in later cases.\textsuperscript{38} The doctrine was repudiated, however, and by the now prevailing view contained in \textit{Macon v. Holcomb},\textsuperscript{39} contributory negligence destroys the right to bring an action.

In Tennessee, the courts first used contributory negligence merely in mitigation of damages,\textsuperscript{40} but they later modified the doctrine, effectuating a bar to recovery when the plaintiff contributed directly to the injury. But if his contributory negligence was remote they retained it to mitigate damages.\textsuperscript{41} This view seems only to tend toward confusion. In Mississippi, a similar formula appears. Unless the plaintiff's contributory negligence was the sole proximate cause of the accident it will only be used in mitigation of damages.\textsuperscript{42}

The Georgia court adopts yet another variation. The plaintiff may recover though guilty of contributory negligence. However, when he does discover defendant's negligence he is bound to use reasonable care to avoid the injury.\textsuperscript{43}

Many statutes have been enacted which adopt the theory of comparative negligence to apportion damages in certain types of cases, usually where a railroad is involved, the running of trains, or suit by an employee.\textsuperscript{44} In admiralty cases, contributory negligence does not bar recovery, but only goes to a reduction of the amount of damages recoverable.\textsuperscript{45} The admiralty courts are allegedly competent to apply the theory of comparative negligence, for not only are there no juries, but the proceedings are summary.\textsuperscript{46} At common law with the "almighty" jury pervading the judicial atmosphere, fine distinctions would only be muddled in the jury room by personal judgments. So it has been said the common law has refused the


\textsuperscript{36} 13 Ill. 686 (1852).

\textsuperscript{37} \textit{Galena \\& C. O. R. Co. v. Jacobs}, 20 Ill. 478 (1858).

\textsuperscript{38} \textit{Chi. B. \\& O. R. Co. v. Warner}, 123 Ill. 38, 14 N. E. 206 (1887—requiring an instruction, that plaintiff exercise ordinary care).

\textsuperscript{39} 206 Ill. 643, 69 N. E. 73 (1903).

\textsuperscript{40} \textit{Nash \\& C. R. Co. v. Smith}, 53 Tenn. 174 (1871).

\textsuperscript{41} \textit{Ev. Co. v. Hull}, 55 Tenn. 33, 12 S. W. 419 (1889) ; \textit{Befack v. Colby}, 141 Tenn. 686, 214 S. W. 899 (1919).

\textsuperscript{42} \textit{Dent v. Town of Mendenhall}, 129 Miss. 104 S 82 (1925).


\textsuperscript{44} \textit{Federal Employers' Liability Act}, 45 U. S. C. A., P. 53; \textit{Comp. Gen. Laws of Fla.} (1927), Sec. 7082; \textit{Laws of N. C.}, 1913, Ch. 6, Sec. 2; \textit{Genl. Code of Ohio} (1921), Sec. 9018 (discussed in \textit{Hibbett v. Pa. Co.}, 245 F. 326 (C. C. A. 6, 1917)) ; \textit{Arkansas, Crawford and Moses Dig.}, Sec. 8075, \textit{Acts of Ark.}, 719, P. 143.


\textsuperscript{46} \textit{Max Morris}, supra.
doctrine of comparative negligence because it possesses no scales to determine which wrongs weigh more. In the words of Strong, J., in *Heil v. Glanding*,

"The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is not that the wrong of the one is set off against the wrong of the other, it is that the law cannot measure how much the damages suffered is attributable to the plaintiff's own fault. If he were allowed to recover it might be that he would obtain from the other party compensation for his own misconduct."

It seems to me that primarily underlying this rule is the public policy that when there are two parties who have wronged, the court will leave them to take care of themselves.

We are here dealing with a new situation; it is essential that the proper rule be employed. The rules of law applicable to torts on land seem appropriate. The collision occurred on land. Besides, the Uniform State Law for Aeronautics, Section 6, would favor this application even in case of collisions between aircraft. The proof of negligence is normally a nebulous undertaking, but in cases of aircraft collisions it becomes even more difficult. One can quite agree with the result reached in the instant case yet might wish to limit its application to accidents on the ground and employ the theory of comparative negligence for collisions occurring in mid-air. In those cases participants are usually dead, evidence of negligence or contributory negligence is scarce, the rights of the parties could not be accurately ascertained; comparative negligence would then divide the damages equally.

The doctrine permitting an apportionment of damages would seem to reach a more just result. Admittedly, both parties are at fault, but that is no reason to let one go free and shift the entire burden upon the injured party. Legislators have seen the wisdom of an apportionment of damages where employees were involved. Admiralty has accepted the doctrine as a part of its flexible proceeding. The adoption of all admiralty proceedings in state courts would be very tenuous because of the varying and unfamiliar rules of administration. The incorporation of comparative negligence into aeronautics law however, either as a principle of admiralty law or as a former common law view, seems justified.

The extreme difficulties, that have been indicated above, in the use of the negligence formula as a means of assessing liability in cases involving aircraft, might be overcome or greatly relieved through compulsory airplane insurance.

LEO FREEDMAN.

NEGLIGENCE—AIRCRAFT ACCIDENT—EFFECT OF VIOLATION OF AN ADMINISTRATIVE REGULATION.—[Maryland] In the recent case of *Beall v. McLeod*, plaintiff's husband, a passenger in defendant's plane, was killed when the plane crashed from a height of two hundred feet, the accident allegedly

47. 42 Pa. St. 453, 499 (1862).
49. *Hotchkiss, Aviation Law* (1928), p. 34.

1. Superior Court of Baltimore City, Maryland, June 1, 1932. Not officially reported. 1932 U. S. Av. R. 94.
NOTES, COMMENTS, DIGESTS

resulting from the unairworthy condition of defendant's plane. At the
time of the crash defendant was violating two Air Commerce regulations:
he was disregarding the terms of his Limited Commercial Pilot's License
by taking passengers for hire outside the limits of the area specified in
the license; he was carrying passengers in a plane which had not been licensed,
but only registered for identification. Several issues were raised in the
case, but for present purposes the only problem to be considered is the
evidentiary significance of the violation of an administrative regulation.
The court instructed that "The violation of the rule . . . is not of itself
negligence, and before the plaintiff is entitled to recover he must establish
by a preponderance of the evidence that the violation of the rule was the
proximate cause of the accident."

This question has arisen in but few air cases, none of which has gone
beyond the trial court on the point. In Herrick, Olsen et al v. Curtiss Flying
Service and Byrnes it was charged that "the effect of a violation of
.. these [administrative] rules is not of itself evidence of negligence
. . . A result of the violation of such . . . rules . . . is always a
question which the jury may take into consideration in determining whether
or not the violation was negligence, but, of course, the violation must
have been the proximate cause of the accident in order for you to take
then into consideration." In Zisen v. Colonial Western Airways, Inc. the
court instructed that "The effect of the violation of the New Jersey statute
and of any one of these rules is not negligence . . . When rules are
adopted . . . the effect of them is to warn persons that it is dangerous
to operate aircraft other than in accordance with these rules. Therefore,
when an accident occurs . . . as the result of the violation of such statutes
and rules, it is always a question which the jury may take into consideration
as to whether or not their violation was not negligence; but of course . . .
the results of such violation must have been . . . the proximate cause of
the accident in order for you to take them into consideration."

The above quoted instructions do not represent the current doctrine
concerning the evidentiary weight of the violation of an administrative
regulation. That doctrine, as set forth in the leading case of Schuuer v. Caplen
concedes that the violation of a regulation can never be negligence
per se, but it allows such a violation to be considered as some evidence of
negligence. In the instant case and its two companion cases the courts,
by importing principles of statutory use into the administartive field, have
laid the foundations for a legal tower of Babel. The effect of the viola-
tion of a statute or ordinance in a civil case may be negligence per
se, it may be only a prima facie case of negligence, or it may be merely some

2. Degree of care required of one carrying passengers for hire; assumption
of risk by a passenger; burden of proof in an action for negligence.
3. Supreme Court, Nassau County, New York, June 27, 1932. Not officially
reported. 1932 U. S. Av. R. 110.
4. State of New Jersey, Supreme Court of Essex County, April 10, 1931.
Not officially reported. 1932 U. S. Av. R. 110. For comment, see p. 285 of
this number.
6. Herrick, Olsen et al v. Curtiss Flying Service and Byrnes, supra note
3; Hagymasi v. Western Airways, supra note 4.
7. Carroll Blake Construction Co. v. Boyle, 140 Tenn. 166, 203 S. W. 945
(1918); Propulsion v. Goebel Construction Co., 279 Mo. 358, 213 S. W. 792
(1919); Partridge v. Eberstein, 228 Ill. App. 203 (1922).
evidence of negligence.\textsuperscript{9} The violation must be the proximate cause of the injury.\textsuperscript{10} The statute or ordinance must have been intended for private protection, as well as a public purpose,\textsuperscript{11} or more particularly, it must have been intended to include within its scope the particular object toward which the duty violation occurred.\textsuperscript{12}

The confused rulings in statute and ordinance cases should not be allowed to cut down the operative scope of commission rules. Principles of statutory application have no place in the administrative field, in view of the clear-cut distinction between regulations and statutes. The regulations concerning the objects within the scope of a commission's powers are ordinarily a compact body of interrelated rules, designed to fill out the details of a regulative pattern. Violation of such a rule is indicative of remiss conduct toward the principal object of the group of rules, regardless of the immediate causal connection between the violation and a subsequent mishap.\textsuperscript{13} Although administrative regulations are by statute given the force and effect of law, they do not fall within the category of legislation,\textsuperscript{14} and should not be interpreted as if they were legislative enactments. In the instant case this factor has seemingly been omitted from consideration. The result is a departure from the simple rule of \textit{Schumer v. Caplen},\textsuperscript{15} which represents the high point of judicial astuteness in recognizing the distinction between statutes and regulations, as well as the essentially differing applications adapted to each class.

The introduction of the doctrine of proximate cause is an obnoxious feature of the instant case. Proximate cause as used in cases of statutory application such as the \textit{Blake} case\textsuperscript{16} is a confusion of two questions which should logically be separated: causal relation, and the intended scope of the statute. For the reasons above pointed out, the intended scope of an administrative regulation should not be submitted to a jury; save under extraordinary circumstances it should not be made a question at all. Neither should the causal connection between the violation and the accident be made a prerequisite to consideration of the violation by a jury. The violation is some evidence of negligence, to be considered as any other evidence, according to the leading case on the subject.\textsuperscript{17} The weight to be given the violation is a jury question. It will undoubtedly be weighed according to its direct or indirect relation to the mishap, but the important point is that the evidence is before the jury, not eliminated from consideration by a perfunctory conclusion that it is not the "proximate cause."

It may be objected that the proximate cause doctrine is of value in nullifying the defense of contributory negligence, where the negligence al-

\begin{itemize}
\item \textsuperscript{9} Davis v. Whiting, 201 Mass. 91, 87 N. E. 199 (1909); Flynt v. Rightmeyer et al., 177 N. Y. S. 842, 197 Misc. R. 602 (1919).
\item \textsuperscript{10} Cherry v. Atlantic Coast Line R. Co., 186 N. C. 263, 119 S. E. 361 (1923); Schmidt v. Wisconsin Sugar Co., 176 Wis. 613, 186 N. W. 322 (1922).
\item \textsuperscript{11} Flynt v. Rightmeyer, supra note 9; Propulonite v. Goebel Construction Co., supra note 1.
\item \textsuperscript{12} Davis v. Whiting, supra note 9.
\item \textsuperscript{13} The court in the \textit{Hagymasi} case, supra note 4, recognized this fact in substance, when he charged that "When rules are adopted . . . the effect of them is to warn persons that it is dangerous to operate aircraft other than in accordance with these rules." Later portions of the instructions nullified the effect of the broad charge quoted.
\item \textsuperscript{15} Supra note 5.
\item \textsuperscript{16} Supra note 7.
\item \textsuperscript{17} \textit{Schumer v. Caplen}, supra note 5.
\end{itemize}
leged to be contributory consisted of the violation of a highly technical regulation. Such an application would be of primary importance in collision cases in which each party violated regulations. There are two answers to the objection. The first is based upon the doctrine of comparative negligence, the use of which is highly consistent with the principle contended for. All violations of regulations might be considered as bearing upon the question of culpability and damages, but the comparative weight of the violations would be the principal consideration in settling the main issue: who was the more negligent. The second answer to the objection is found in the distinction drawn between the "planes of duty" in cases in which each party has violated some statutory duty. This is a less desirable course of action, since it contemplates the evaluation of some evidence by the court. It also necessitates a distinction between rules governing the mechanics of flying, and those dealing with purely administrative details, designed to facilitate the efficient operation of the commission. Such a distinction is practical under present administrative practice, although in some cases the classification would of necessity be arbitrary.

It has been suggested that the proximate cause doctrine might be used to advantage in checking the civil effects of over-regulation. Technically burdensome and prolix regulations might lose their severity when subjected to the acid test of the layman's view of proximate cause. But the same effect may be gained by the use of either of the solutions mentioned above, without subjecting regulations to the ravages of a general use of a misleading doctrine. The commission itself might expressly limit the civil effect of certain regulations of the purely administrative type, and avoid entirely the necessity of extending the protection sought.

The practical effect of the ruling in the instant case, supported by the Ziser case and the Curtiss case, is to rob commission regulations of much of their efficacy. Criminal proceedings in enforcement are necessarily haphazard, and may conveniently be supplemented by the imposition of civil liability. Such a result can be brought about by adherence to the doctrine of Schumer v. Caplen, admitting all violations of regulations as some evidence of negligence.

ROBERT L. GROVER.

NEGLIGENCE—VIOLATION OF STATUTE—OVERLOADING—BURDEN OF PROOF.—

[New Jersey] The defendant company was engaged in "hopping" trips from the Newark Airport over New York Bay, carrying passengers for $5.00 per head in a trimotor Ford transport plane. On the particular trip they overloaded the plane, carrying one more passenger than allowed for a capacity load. Shortly after the take-off, the left motor "quit" and the center motor cut its revolutions to almost one-half. The plane was unable to maintain its altitude and crashed into a gondola freight car.


20. The writer of a comment in 13 St. Louis Law Rev. 86 (1927) proposes this remedy to support the efficiency of municipal ordinances, violations of which were not accompanied by civil liability in the jurisdiction of which he wrote.

21. Supra note 5.
with the accompanying disastrous result of the death of fourteen of the occupants, the pilot alone remaining uninjured. In an action brought by the administrators, ad prosequendum, of the deceased to recover damages for death by wrongful act, the court held that the defendants were liable for negligence as a common carrier because: (1) the pilot was poorly acquainted with the locale and the terrain; (2) the pilot had failed to observe a ground rule; (3) the company had overloaded the plane beyond its originally designed seating capacity. Ziser v. Colonial Western Airways, Inc., 162 A. 591 (1932).

Under the general topic of negligence several questions arise, one of which has a double aspect which requires some discussion and consideration. That is: what is the status, as regards negligence, of an air transport company when it has violated, first, a state statute regulating intrastate flying, and second, the regulations of the airport defined by the airways commission of the state?

At the time of the accident, a statute of New Jersey was in force and effect which incorporated, by reference, the rules of the Department of Commerce of the United States in regard to interstate aviation and aircraft, applying them to intrastate flying. The two rules in question in the case were: (1) the provision that the license of aircraft shall be suspended or revoked for operation in excess of the originally designed seating capacity; (2) that a "licensed pilot, authorized to transport passengers for hire, shall not do so in a type of plane which he has not previously operated within the last ninety days for at least two hours . . . ."

The first aspect of the question of the violation of the statute by the defendant company is whether a private right of action arises out of a public wrong. The decisions of the courts in the several jurisdictions are manifestly in conflict on this question. That the legislature has the right to extend or create duties by statute which did not exist at common law is unquestionable. And where civil liability is expressly imposed by the statute for a criminal violation of its provisions, there is no doubt that such liability exists. The nature of the action, however, in such a case is purely statutory and there can be no question of negligence. Where civil liability is not provided for in the terms of the statute, the courts have taken four views in this interpretation of the statute's effect. The majority of the jurisdictions of the United States is committed to the view that even where the statute is penal in character, a violation of it gives rise to a common law action for negligence, consisting in either the breach of the statutory duty and/or the failure to anticipate the injurious consequences which are the probable result of the overt act and/or the omission to fulfill the statutory obligation. That is to say, that the weight of authority holds the breach of a statutory duty is negligence per se and, if the other elements of actionable negligence, such as proximate cause, etc., are present, the action will lie in favor of the person within the class protected by the

Meanwhile, and continues in the principal case. It is submitted that the weight of authority that such a violation is negligence. This is a compromise. When an accident occurs—and note this point—as a result of the violation, it is always a question which the jury may take into consideration as to whether or not the violation was negligence. This is a compromise midway between the Kentucky view that the statute was passed as to whether or not the violation was negligence. This is a compromise. The courts of these jurisdictions have based their decisions on the theory that the ordinary prudent man, who in his fictionized person is presumed to know the law, would realize that the legislature had denominated such conduct as dangerous. In one jurisdiction, namely Kentucky, still a fourth view is taken. This is the extremely strict view that in the absence of an express provision for civil liability, the statute does not apply to civil actions and cannot be considered at all in the matter of a common law action for negligence.

The instant case was decided on the ground that such a violation is only "some evidence of negligence." the court giving the following instructions, which were upheld on review: "the effect of the violation . . . is not negligence . . . that when . . . rules, such as these, are adopted, the effect is to cause the person to foresee that it is dangerous to operate other than in accordance with these rules . . . Therefore when an accident occurs—and note this point—as a result of the violation . . . it is always a question which the jury may take into consideration as to whether or not the violation was negligence." This is a compromise midway between the Kentucky view that the statute was passed *alia intuitus* and therefore does not relate to civil matters and the view of the greater weight of authority that such a violation is negligence *per se* in a civil action. The New Jersey court in an earlier case, while commenting on Dean Thayer's, Public Wrong and Private Action, says "... the reason why no civil action can be based on violation of the statute is because no right of action was given by the legislature in the statute . . . the statute seeks only to eliminate the source of danger to the public by imposing a penalty . . . the legislature could, if it so intended, have provided that anyone injured by the violation might have a private right of action . . . the plaintiff must recover on the theory of common law negligence. This has been the consistent view of the New Jersey courts, meanwhile, and continues in the principal case. It is submitted that the


7. *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 119 (1906); *Martin v. Hersz*, 228 N. Y. 164, 126 N. E. 814 (1920—but note that the legislature had provided that the violation would raise the presumption); *Hubbard v. Bartholomew*, 163 Ind. 58, 144 N. W. 13 (1913).


courts' strict interpretation of the legislative intent is the proper one. No more should be attributed to a statute, which does not have the fault of ambiguity, than what appears on its face. But the courts' difficulty eventually arises at the point where it speaks of the effect of the statute as causing the actor to "foresee that it is dangerous to operate other than in accordance with these rules." Is it not a non-sequitur for the court to say "that the jury may take this into consideration"? It would seem that the court then is substituting the opinion of the jury for that of the legislature. This is the hurdle which the above view fails to clear. It is submitted that if the court were to make the distinction that the jury may use this in its deliberations because it is only applying the expressed intent of the legislature in a criminal proceeding as a yardstick for measuring activity in a civil proceeding, it would avoid the inconsistency of its position.

The court further charged that the violation of the ground rule, which provided that the first turn after the take-off should be to the left, was some evidence of negligence. This instruction would be followed even in those jurisdictions which hold that the violation of a statute is negligence per se. The holding is based on the theory that regulations do not have the formality and definiteness of a statute. Indeed, some jurisdictions have made a distinction between a statute and a municipal ordinance, holding that the violation of the former may be negligence per se but the violation of the latter can only be evidence of negligence.

The second aspect of the violation of the statute is "whether a statute, which has previously been termed unconstitutional, can be evidence of negligence." In a recent nisi prius decision, a New Jersey Court held that this statute, which had been reenacted in 1931, was unconstitutional on the grounds that by (1) the incorporation of standards of another sovereignty; and (2) the delegation of authority to a commission to set the standard of activity, the legislature had failed to set up a sufficiently definite standard. It is submitted that, in view of these courts holding such statutes unconstitutional, the violation of the same court not, under any circumstances (in so far as the objection of the courts to these statutes has been that "they set up too vague and uncertain a standard") be admitted as evidence of negligence.

Considering the Ziser case in the light of the future it may be said that the court has laid down a sane rationale of the rules of negligence to be followed in considering that class of cases which is bound to arise more and more frequently with the subsequent growth and effective development of the airplane as a means of transporting traffic.

G. W. K. Snyder.

DIGESTS

DAMAGES—WRONGFUL DEATH—AMOUNT OF VERDICT.—[New Jersey] The case of Boele, Administratrix v. Colonial Western Airways, decided by the New Jersey Supreme Court, 158 A. 440, 1932 U. S. Av. R. 51, was affirmed.

15. Ex parte Burke, 190 Cal. 326, 212 P. 193 (1923); In Re Opinion of Justices, 230 Mass. 600, 123 N. E. 463 (1921); Liberty Highboy Co. v. Mich. Public Utilities, 284 Fed. 703 (Dist. Ct. E. D. Mich. S. D., 1923). But see Schumer v. Capita, cit. note 12, where the court did not expressly hold on the constitutionality of the statute but intimated that it would be so, and held that the violation of a regulation was some evidence of negligence.
by the New Jersey Court of Errors and Appeals, January 31, 1933. 233 C. C. H. 3019.

For a digest, stating the facts of the case, see 4 Journal of Air Law 118.

F. D. F.

**Gasoline Tax—Storing and Distributing—Ultimate Use in Interstate Commerce.**—[U. S. Supreme Ct.] The case of The Nashville, Chattanooga & St. Louis Ry. v. Wallace, decided by the Supreme Court of Tennessee, April 29, 1932, was affirmed by the United States Supreme Court, February 6, 1933. 233 C. C. H. 3055.

For a digest stating the facts of the case, see 3 Journal of Air Law 468.

F. D. F.

**Insurance—Participation in Aeronautics—Double Indemnity.**—[Federal] Suit was brought to recover double indemnity on three policies of insurance each of which policies contained provisions that the double indemnity benefit should not be payable if the death of the insured resulted “directly or indirectly, wholly or partly . . . from participation in aeronautic . . . operations.” Insured was president of an airplane company. At the time of his death he was riding as passenger in one of his own planes, paying the company for the gasoline and oil and the services of the pilot as would any ordinary passenger: Held: insured was participating in aeronautical operations within the meaning of the clause. First National Bank of Chattanooga v. Phoenix Mutual Life Ins. Co., 62 F. (2d) 681. Decided January 17th, 1933, C. C. A. 6th Cir. Tenn.

This case merely adds one more authority to the impressive law which has gathered about the distinction between “engaging” and “participating” in aeronautics. The highly artificial basis for this distinction was pointed out in a comment in 3 Journal of Air Law 311.

George W. Ball.

**Insurance—Engaging in Aeronautics—Double Indemnity.**—[Federal] Plaintiff sued in equity as the beneficiary named in two accident insurance policies to compel the defendant to pay to itself as trustee for the plaintiff’s use $60,000. Insured was killed while riding as a passenger in an airplane. Each of the policies in litigation here contained provisions that if the insured lost his life “from engaging, as a passenger or otherwise, in submarine or aeronautic operations” double indemnity would not be paid. The court decided that the phrase “as a passenger or otherwise” could not well be disregarded and that its effect was to take this case out of that group of cases in which “engaged” has been defined to imply some active operation of the airplane. Goldsmith v. New York Life Ins. Co., 233 C. C. H. 3003. Decided December 8th, 1932, U. S. Dist. Ct., Eastern Dist. of Mo.

The implication from the language used in this policy that a passenger may engage in aeronautical operations and the acquiescence by the court to the use of that language would seem rather to deny the validity of those innumerable decisions which hold that a passenger may “participate” but certainly may not “engage” in aeronautical operations. The use by the insurance company of the word “engage” in this case clearly demonstrates that the carriers themselves had no idea of this distinction when these policies were written. Courts, however, have attributed to insurance companies a subtlety in the use of language which apparently they have not possessed.

George W. Ball.

For a digest, stating the facts of the case, see 4 Journal of Air Law 120.

F. D. F.

Negligence—Airplane Accident—Inferior Gasoline—Statute of Limitations Avoided—Fraudulent Concealment of Cause of Action.—[Tennessee] The plaintiff's husband took passage with the Southern Flyers, Inc., for a trip from Chattanooga to Florida. The plane was equipped with gasoline furnished by the defendant oil company, with full knowledge of its intended use in an airplane. In the course of the flight the motors refused to respond to the pilot's urging, and the aircraft fell suddenly to the ground, thereby causing the death of plaintiff's husband. The accident, it is now discovered, was occasioned by an inferior quality of gasoline. The defendants were aware of this situation and, to avoid possible liability, compelled their employees to remain silent as to the inferior quality of the gasoline under threat of losing their employment. These facts were discovered only two months before this action (for damages for wrongful death) was brought and over two years after the death occurred. A one year statute of limitations controls these actions in Tennessee. The plaintiff would circumvent the effect of the statutory limitation by averring that defendants fraudulently concealed the causes of action. A demurrer to the declaration was sustained in the trial court and the suit dismissed. On appeal to the Supreme Court, the judgment was affirmed on the ground that defendants had not fraudulently concealed the plaintiff's cause of action, since: (1) there was no contractual or confidential relation between the parties which would impose a legal or equitable obligation to make a disclosure. (2) Mere silence of itself does not constitute fraud; (a) there must be a withholding of information asked for, or (b) the use of some trick or device to intentionally avoid suspicion. (3) There was an insufficient showing of facts to warrant the conclusion that an efficient investigation of the cause of accident was made. Patten v. Standard Oil Co. of Louisiana, — Tenn. —, 55 S. W. (2d) 759 (1933).

Leo Freedman.

Sale of Aircraft—Waiver of Default by Seller—Necessity of Notice Before Forfeiture.—[Utah] This was an action to recover possession of and title to an airplane. Peck, the vendor of two airplanes sold to Brenner and Luke, partners, agreed with the latter that a balance of $975 owing him on the purchase price of the first plane be considered as part of the purchase price of the new plane. Accordingly, the partners signed a title-retaining note on the new plane for the amount of this unpaid balance. No payments were made on the due dates specified. Peck then assigned his note to the defendant, Stevens, who was employed by the plaintiff corporation, which was the assignee of the partnership. Subsequently the defendant, having completed his day's work, took the plane to the hangar of a different company and then for the first time, without notice or demand on the plaintiff, notified the plaintiff that he held the note. The plaintiff tendered the amount of the note plus interest but this tender was refused by the defendant because it did not include his wages. The defendant contended that he rightfully repossessed the plane because of the default. The plaintiff's position was that Peck, by accepting payments on the note after the due date thereof, thereby waived strict performance of the contract, and that neither he nor his assignee, Stevens, could thereafter lawfully repossess the plane without first giving the plaintiff notice and a reasonable opportunity to pay the balance due, and that further, when the full amount due on the note was tendered, the plaintiff became the owner and entitled to possession of the plane. Held, judgment for plaintiff. Peck's conduct sufficiently showed an intention to waive the strict performance of the contract and to receive further payments. Peck had waived the default; consequently he must give notice and an opportunity for payment before a forfeiture and repossession could be claimed. Therefore, when the defendant, as assignee of Peck, took possession of the plane he did so wrong-
fully, so that when tender was made of the whole amount due, the plaintiff became entitled to the possession of and title to the plane. Columbia Airways, Inc. v. Stevens, 14 P. (2d) 984 (Utah, 1932).

DAVID AXELROD.

WORKMEN'S COMPENSATION—PLACE OF EMPLOYMENT.—[New York] Decedent, an airplane pilot, was killed in Connecticut while piloting a plane from Boston, Massachusetts, to Newark, New Jersey. The contract of employment was made in New York City in the main office of the employer, a Connecticut corporation. The State Industrial Board decided that decedent's place of employment was in the State of New York, and awarded plaintiff compensation under the New York Workmen's Compensation Law. This award was affirmed by the Appellate Division of the Supreme Court, and upon appeal to the Court of Appeals was affirmed without an opinion. Tallman v. Colonial Air Transport, Inc. et al., 259 N. Y. 512 (1932).

LEO FREEDMAN.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT—INJURY RESULTING FROM PROHIBITED ACROBATIC FLYING.—[Wisconsin] A pilot who carried passengers on short observation flights, was killed when his plane, in which he was carrying two passengers failed to right itself after entering upon a power dive. The Industrial Commission awarded compensation to the wife of the deceased. The case was appealed to the Circuit Court which reversed the finding of the Industrial Commission and held that the deceased had stepped out of the course of his employment by making the dive and that therefore his widow was not entitled to compensation. The Industrial Commission appealed to the Supreme Court. The award of compensation was resisted by the defendant employer on three grounds: (1) the defendant was not subject to the Workmen's Compensation Act because it did not have three persons in its employ within the meaning of the Act; (2) the deceased was not engaged in performing services growing out of and incidental to his employment at the time of the accident; (3) the jurisdiction over the subject-matter of this action was vested in the Federal Government exclusively, and the industrial Commission had no jurisdiction over it. It appeared that at various times from three to five persons were employed by the defendant in moving, preparing and piloting the planes. Held: reversed and remanded. The defendant was within the provisions of the Workmen's Compensation Act. The Circuit Court erred in making a finding of fact when there was a conflict in the inferences or presumptions that could be drawn from the evidence on that subject; such finding should have been made by the Industrial Commission. The state Workmen's Compensation Act is applicable to employees and employers who are engaged in intrastate aircraft navigation: Sheboygan Airways v. Industrial Commission 245 N. W. 178 (1932).

For a note on the merits of this case see 3 JOURNAL OF AIR LAW 464.

WESLEY F. HANNER.