Notes, Comments, Digests

David Axelrod
Sam E. Gates
Robert A. Mendelson
Katherine Fritts

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

Recommended Citation
David Axelrod et al., Notes, Comments, Digests, 4 J. Air L. & Com. 427 (1933)
https://scholar.smu.edu/jalc/vol4/iss3/10

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.
NOTES, COMMENTS, DIGESTS

Department Editors..........................{Robert Kingsley
....................................{Robert L. Grover

COMMENTS

AIRPORTS—AUTHORITY OF CITY TO ENFORCE FLYING REGULATION BEYOND ITS CORPORATE LIMITS.—[Tenn.] The city of Chattanooga owns and operates a municipal airport on land acquired for that purpose located something more than two miles beyond its corporate limits. By Chapter 2 of the Private Acts of 1929, the city was expressly authorized to acquire, establish, and operate an airport, either within, or without, its corporate limits. The city Charter also provides: "The Board of Commissioners shall have power by ordinance within the city to provide for enclosing, improving and regulating all public grounds belonging to the city in or out of the corporate limits." Silverman operated his airplane at and over this airport in violation of an ordinance regulating the operation of aircraft, and appealed from a judgment against him on the ground that the city was without power to punish for this violation of its ordinance, because it was without jurisdiction of this territory lying beyond the charter limits of the city, even though owned and operated as an airport by the municipality. Held, the city charter expressly conferring upon the city the power by ordinance of "regulating all public grounds belonging to the city, in or out of the corporate limits," embraces the power to enforce a violation of these regulations in ordinance form. Silverman v. City of Chattanooga, 57 S. W. (2d) 554 (Tennessee).

A municipal airport is necessarily governed by municipal corporation law in its establishment, acquisition, and operation. As such it is well settled that a municipal corporation possesses and can exercise only such powers as are granted in express terms, those necessarily implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. So, the authority of municipal corporations to exercise powers beyond their territorial limits must be derived from some statute expressly, or by necessary implication.

Ex necessitate, a limited police power may be granted to municipalities over a small section of country surrounding their boundaries for their protection against nuisances and to safeguard the health of the people residing in them. It is significant, however, that while the extraterritorial effect of a city ordinance depends upon legislative authority conferred, yet the language of the charter here expressly conferred the power exercised. The result is further fortified by two subsequent statutes apparently not appearing or relied upon anywhere in the opinion in the instant case. It is conjectural, therefore, whether either were invoked. Thus, municipalities operating airports without their geographical limits were specifically granted

1. Ogden v. Madison, 111 Wis. 413 (1901).
3. In re Blois, 179 Cal. 281 (1918).
the same police powers over such airports as they may be authorized to exercise within the geographical limits of such subdivision, and all municipal corporations were empowered, for corporate purposes, to hold real estate beyond their limits.

Apart from statute, the question of the power of a municipality to impose police regulations beyond its corporate limits seems at best a controverted one. It is difficult to conceive a more evident case of bare necessity and the exercise of the police power more clearly authorized than on the facts herein. It is submitted that in the instant case of a city owning an airport two miles beyond corporate limits, it must of bare necessity, if not expressly, have jurisdiction thereof. However, despite this consideration, seemingly, in the absence of enabling legislation, the city could not so extend its jurisdiction.

Many states have passed laws authorizing municipalities to acquire, establish, maintain, and operate airports within or without the city limits, and some of them have extended the police power of the city to the airports and their immediate surroundings. An analysis of the cases touching the question of the right and power of municipalities to establish and maintain airports has indicated a manifestation of airports being classified as public harbors in the nature of public utilities. Thus, Hile v. City of Cleveland, was the first of a line of decisions holding that an airport is a proper city purpose and public enterprise; followed by other decisions of like effect. Subsequently, an airport has been conveniently placed in the category of a public utility. So, too, the airport was held properly included within park purposes. In other instances, the municipality was designated as acting in a proprietary capacity.

Statutes authorizing airports are of great practical importance, furnishing as they do, a great stimulus to aviation activities. Because of the unanimity of the decisions of the courts of the various states, there is probably sufficient precedent to conclude that the constitutionality of state airport enabling acts is fairly well established. Particularly emphatic today is the statement that aviation is no longer an experiment.

The greater problem in all these cases involving municipal airports and the municipalities' extraterritorial jurisdiction over airports without the boundaries of the city is that of aviation in general. Thus the airport is to air transportation what harbors and docks and stations and yards are to

4. Tenn. Public Acts 1931, Ch. 74, Sec. 9.
5. Tenn. Code 1922, Sec. 3324.
marine and rail transportation. Airports have been well termed "harbors on the ocean of the air," and as Justice Cardozo said: "Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition."^{12}

DAVID AXELROD.

NEGligence—COnmon CARriers—Res IPSA LOquitur.—[California] One of the most interesting and carefully reasoned opinions of a court of last resort on the applicability of the doctrine of res ipsa loquitur to aviation is the California case of Smith v. O'Donnell.¹ The case arose out of the following facts: The defendant O'Donnell was engaged in the business of carrying passengers for hire, on sight-seeing trips, from the Long Beach Municipal Airport up and down the road along the ocean. He pursued no fixed schedule of flights nor had any established termini other than the airport. The plaintiff was invited by the defendant to take a free ride. The evidence showed, however, that the defendant desired to incur the plaintiff's favor and thereby obtain business from him for his, defendant's, machine shop. In landing, and when at an altitude of about 50 feet, the defendant's plane descended upon and collided with a plane under the control of one Ebrite, who was at that time engaged in instructing a student pilot how to land a plane. Both planes crashed to earth, and the plaintiff received severe injuries.

The trial court gave four instructions to the jury, all based upon the proposition that the defendant was a common carrier and that the doctrine of res ipsa loquitur was applicable. The Supreme Court of California held that the instructions were proper (but judgment for the plaintiff was reversed on other grounds).

In reaching its conclusion that the defendant was a common carrier, the court referred to and distinguished the cases of North American Accident Insurance Co. v. Pitts,² and Brown v. Pacific Mutual Life Insurance Co. of Cal.,³ saying:

"He [the pilot, Lieut. Whitted, in North American Accident Ins. Co. v. Pitts] operated on such days and under such conditions as pleased him and did not pretend to make regular schedules. The essential difference

¹. 34 Cal. Dec. 6. 12 P. (2d) 983 (1932).
³. 8 F. (2d) 996, 1928 U. S. Av. R. 186 (C. C. A. 5, 1925). See also Ziser v. Colonial Western Airways, Inc., N. J. Sup. Ct. (Oct. 10, 1932). In this decision the court says, in speaking of the common carrier: "As to the degree of care required, the trial court certainly did not err unfavorably to defendant in leaving the question of common carrier vel non to the jury. The regulations on taking of passengers cited by counsel as removing defendant from the common carrier class seem to us to be merely proper rules for such a carrier to make and enforce, as e. g., no drunken or noisy person to be taken, no overloading, no flight if weather bad. A set schedule is no essential of common carrying; nor is such a carrier required, when there is no set schedule, to operate with half a load. The practice, which the brief asserts was followed in some cases, of filling the plane to part capacity and then requiring the Intending passengers to leave it and make room for a party of later arrivals which would fill the plane, might well subject the defendant to actions for damages unless stipulated in advance, but of itself would not countervail the other conditions marking defendant as a common carrier. We think the judge might properly have charged that defendant was a common carrier."
between the instant case and the operations of Lieut. Whitted is that here the defendant operated a regular place of business for the express purpose of carrying those who applied.°

The problem of what constitutes a common carrier might well be the subject of a separate comment. For the purpose of this discussion, it is suggested that the holding of the federal and Alabama courts in Brown v. Pacific Mutual Life Ins. Co. of Cal, and North American Accident Ins. Co. v. Pitts, is open to question. Query: Whether by rejecting negroes, intoxicated and disorderly persons, a carrier of passengers for hire disqualifies himself as a common carrier. The distinction between private and common carriers is primarily important to this discussion because of its effect upon the standard of care exacted of the defendant. It is elementary that the highest duty of care known to the common law is imposed upon common carriers and, consequently, when an injury is caused by a common carrier, the zone of probable undischarged duty is greater than in cases where only ordinary care is required, so the "inference" or "presumption" of negligence, which is the mainspring of res ipsa loquitur, is most readily raised in common carrier cases.7

Probably the earliest decision announcing the theory of res ipsa loquitur was rendered in 1809 by Lord Mansfield in the case of Christie v. Griggs, in holding that, when a passenger was injured by the overturning of a stagecoach, the burden was upon the owner to prove that he had hired a good driver, had provided steady horses and a sound coach. Since its timely inception, the doctrine has been applied to cases of injuries caused by every mode of common carriage developed by man, viz., stagecoaches,9 steam10 and electric11 railroads, steamships,12 scenic railroads,18 automobile13 and other transportation means.14

4. See Kingsley, Comment, 3 JOURNAL OF AIR LAW 463 (1932).
8. 2 Camp. 79 (1809).
biles, motorcoaches, taxicabs, elevators, and, finally, the courts of New York, Texas and California have indicated that the doctrine will be applied to injuries caused to passengers by common carriers of the air.

However, it has been seriously urged in recent criticisms that the rule of res ipsa loquitur should not be applied to cases involving injuries to passengers of common carriers by air. What, then, will be the answer of the law to the challenge of a new era in transportation facilities? Is there enough elasticity in legal doctrine to keep apace with science?

Referring briefly to the historical development of the doctrine of res ipsa loquitur, two early English cases adhering to the principle laid down by Lord Mansfield, are significant. In the first of these, Byrne v. Boodle, in 1863, the plaintiff sought to recover for injuries received by him when a barrel rolled out of an upper window and fell on him while he was walking in the street below, and in the latter, Scott v. London and St. Katherine Docks Co., in 1865, the plaintiff was injured by sacks of sugar which fell upon him while they were being lowered from defendant’s warehouse. In both cases, the English courts followed the rule of res ipsa loquitur, although not by name. Lord Erle, in the latter case, put down a concise statement which has been often quoted, saying:

“But where the thing is shown to be under the management of the defendant or his servants and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care.”

The unfairness of requiring a plaintiff to prove facts (negligent acts) about which he knew nothing, no doubt appealed to the English sporting sense and the English justices formulated the rule which we now have. Thus, it was born of reason and fairness. It was quickly seized upon by Anglo-American courts and their reports since these early cases are replete with decisions involving an endless variety of factual circumstances in which the rule has been applied. If the instrumentality causing the injury

---

21. 3 Hurl. & C. 596 (1865).
is exclusively controlled by the defendant and if, in the exercise of due care, accidents of a particular nature do not usually occur from ordinary operation and user, then it is said by the courts, for the purpose of requiring the defendant to go forward with the evidence and make explanation, that a "presumption" or "inference" of negligence is raised. Proof of the mere happening of an accident does not of itself constitute a prima facie case of negligence, but there must be attendant circumstances from which a want of due care may be inferred or facts from which the court may take judicial notice that unless negligence had been present in some form the injury would not have occurred. It is obvious that the last statements are simply two ways of announcing the same legal principle. The diversified sets of facts, in addition to those already mentioned in which the rule has been invoked by a plaintiff to recover for injuries sustained, include cases where a brick fell from an archway, where electric wires fell in an alleyway, and across a fence, where a boiler exploded, where an awning fell, where burns were caused by the taking of an X-ray, where a high school student was injured by an exploding test-tube, where a pedestrian was struck by a skidding automobile, where an automobile started from an unknown cause, where gas escaped, where one attending a theatre slipped and fell on stairway carpet, where a seat in a theatre collapsed, where the bucket of a concrete mixer dropped, where drain pipes on a building fell, and where the wall of a building collapsed. In fact, the doctrine has been extended to include almost any accident where the instrumentality is in the control of the defendant and where the surrounding circumstances will permit a reasonable inference that there has been negligence, and from an analysis of the cases it would seem that wherever the accident is of an extraordinary character, the inference of negligence is raised.

It is true that the great majority of courts say that res ipsa loquitur

32. Damgaard v. Oakland High School, 212 Cal. 316, 295 P. 983 (1931).
34. Cleveland Ice Creams v. Call, 28 Ohio App. 521, 162 N. E. 812 (1928).
NOTES, COMMENTS, DIGESTS

is a rule of evidence only, but, realistically, it must be conceded that it materially affects the liability of defendants embraced in this class of cases. The rule may be justified upon the grounds of public policy; that is, its tendency to induce a greater standard of care as some protection against the growing hazards of a highly mechanized society. When the rule of res ipso loquitur is viewed thus realistically, its close relationship to the rule of absolute liability announced in Fletcher v. Rylands, to the so-called "humanitarian doctrine" followed in the Missouri courts, is readily perceived. The interesting lines which mark the distinctions between the various degrees of liability for injuries resulting to others from the use of one's property, are really shifting and the elasticity of the common law is demonstrated.

Professor Francis H. Bohlen, in discussing the effect of the rebuttable presumption of negligence arising from the application of res ipso loquitur, states:

"The legal force of a presumption is . . . the additional weight given by it to data not in itself of sufficient probative force to permit or require the jury to find the existence of the fact presumed. All such presumptions are therefore created by some policy of law which requires this abnormal weight to be given to meet some judicially felt need or to accomplish some purpose recognized as desirable."

That the real reason for the rule, particularly in cases of common carriers and evidenced by the multitude of decisions involving carriers by rail, is predicated upon public policy, cannot be questioned. The courts of Iowa go so far as to admit that the rule in the case of a common carrier actually shifts the burden of proof and places the risk of non-persuasion upon the defendant. Obviously, the same public interest which seeks to protect travellers by rail must reach forward to protect travellers by air. A passenger on an airplane can never know what act or omission of the pilot or what act of negligence in the maintenance of the airway system has resulted in his injury. The theory of the public policy involved was very succinctly stated by the Supreme Court of California in the instant case:

"It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air today (and we do not say there are) who are sufficiently unmindful of their humanitarian duties as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service."

41. L. R. 3 H. L. 330 (1868).
42. Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 26 S. W. 706 (1903); Murphy v. Wabash Ry. Co., 228 Mo. 56, 128 S. W. 481 (1910).
The advocates of the contrary position urge two major propositions: (a) That the application of the doctrine to aeronautical accidents would tend to stifle an infant industry; and (b) that, due to the natural hazards of air transportation, the inference of negligence cannot reasonably be raised from the occurrence of an accident. The answer on principle to the first proposition is ably stated in the foregoing excerpt from the opinion of the California Supreme Court. The practical answer is that it is entirely possible for air carriers to cover themselves against liability for passenger accidents by a system of insurance, thus spreading the losses involved. One recent commentator has said:

"Premiums for aviation public liability and property damage insurance are lower than premiums for the same coverage on a large baggage or express truck or a truck used for general hauling. Premium rates for all forms of aviation insurance are based on loss experience—as improvements in the design and construction of aircraft continue and as the skill and experience of the operating personnel increase, so may we expect a decrease in the premium rates for practically all classes of aviation."  

Professor Edwin C. Goddard discusses a similar problem with reference to the liability of the common carrier of baggage, stating that but for an unfortunate decision of Mr. Justice Nelson the common carrier would have remained an insurer without possibility of limitation of liability. He states:

"The carrier would have remained an insurer, and would it not have been to his advantage as well as to that of the shipper? The slight additional cost of insurance would have been spread by the carrier over his tariffs and eventually paid by the public. The shipper would have been protected by the payment of a slight additional cost to his carrier costs and both would have been saved the huge cost of litigation that from that day to this has flooded the courts with questions about the limitations of the carrier's liability. Moreover, the carrier would have avoided much of the resulting irritation and ill-will on the part of the public. . . ."  

Commenting upon the desirability of a rule of absolute liability, for common carriers, Mr. Arthur A. Ballantine, in an article in the Harvard Law Review, says:

"The establishment of such liability would have a direct tendency to make transportation more safe; it has been found that since employers have been absolutely liable for accidents to employees the number of such accidents has decreased. Such a regulation would relate directly to the character of the service, for the protection of the passenger through compensation against financial loss from injury is as clearly a part of the service as protection from the injury itself."  

Although there is no judicial decision indicating that a rule of absolute liability will be adopted for aircraft or any other common carriers,

51. Italics ours.
NOTES, COMMENTS, DIGESTS

it is true that the doctrine of \textit{res ipsa loquitur} achieves approximately the same beneficial results for the public, and it was evidently upon that ground that the California Supreme Court reached its decision in the instant case.

As to the second objection stated above, the statistics prepared semi-annually by the Department of Commerce indicate that serious accidents are very rare in air transport service. One reference to the facts is typical. From January, 1930, to December, 1931, a general average of 9,414,428 passenger miles were flown in scheduled air transport service per passenger fatality.\(^{52}\) The common carriers by air are constantly advertising to the public the high quality of safety of their transport systems. The Department of Commerce regulations require air transport companies to maintain meteorological stations, to provide for adequate inspection of the mechanical and structural parts of the plane, to maintain adequate airports with modern lighting facilities and to engage only highly skilled pilots. Certainly, the defendant, under such conditions, is better able to explain whether or not he has complied with these requirements. Under such circumstances, it would seem only fair to hold them to all of the liabilities of common carriers under our system of law, and the holding in the instant case seems sound in this respect. The accident involved in the instant case was a collision between two airplanes and it was urged that the doctrine should not be applied due to the fact that two vehicles were involved and either might have caused the injuries of the plaintiff. Although there is some confusion, the weight of authorities is to the effect that presumption of negligence arises against the carrier in whose vehicle the plaintiff was at the time of the accident.\(^{53}\) In principle, this is consistent with the orthodox statement of the rule of \textit{res ipsa loquitur} which permits the defendant to show that any other cause than his own negligence was the proximate cause of the injuries of the plaintiff.

The Supreme Court of Massachusetts, in the case of \textit{Wilson v. Colonial Airways},\(^{54}\) apparently reached an opposite conclusion to that of the California court in the instant case. The Massachusetts case arose out of the following facts: A tri-motored Ford transport plane was taking off on a scheduled flight from Boston to New York. One of its motors failed in the takeoff and it fell into the bay. The Massachusetts court found that the inspection of the plane had not been under the control of the defendants immediately prior to the takeoff.\(^{55}\) Further, the plaintiff in his pleadings relied upon an allegation of a faulty engine, thereby relieving the defendant of a general burden of exculpation,\(^{56}\) and consequently the court held that the doctrine of \textit{res ipsa loquitur} was inapplicable. Although in these re-

\(^{52}\) U. S. Department of Commerce, \textit{Air Commerce Bulletin} 407 (1932).
pects the cases are distinguishable, substantially they seem to present a conflict of authority.\textsuperscript{57} However, from the language of the opinion in the Massachusetts case, it seems reasonable to infer that had the plaintiff shown the instrumentality to have been within the exclusive control of the defendant or his agents, the rule of \textit{res ipsa loquitur} would have been applied.\textsuperscript{58}

The reasoning of the court in the instant case, \textit{Smith v. O'Donnell}, appears to be more consistent with an expansion of accepted principles of law to meet the changing social conditions of our modern civilization. "If the proper degree of care is used a collision in midair does not ordinarily occur . . . ." Will the decision in the California case be a precedent for other American jurisdictions? The answer to that question will be awaited with interest by the members of both the bench and bar.

\textbf{Sam E. Gates.}

\textbf{WORKMEN'S COMPENSATION—AIRPLANE CRASH—VIOLATION OF STATUTE.—[Federal] Deceased, an employee of an oil company, lost his life in an aeroplane crash. He had owned the plane for about three years and, although he had neither aircraft license nor pilot's license, had acted as his own pilot. He had used the plane occasionally for business, without the authorization or knowledge of employer (who knew that he owned it)—the employer furnishing an automobile for business purposes. On the day of the crash, deceased flew to a nearby town for supplies and, on the take-off for the return flight, the plane crashed, deceased being fatally injured. An action was brought under the Texas Workmen's Compensation Law. Held, defendant cannot recover. \textit{Bugh v. Employers' Reinsurance Corporation}, 63 Fed. (2d) 36 (C. C. A. 5th 1933).

The opinion of the court, although rather ambiguous, appears to be based on the ground that deceased was acting outside the scope of his employment, on two theories: (1) that he was exposing himself to a peril not reasonably inherent in his work; and (2) that the violation of the statute, being unauthorized, removed him from such scope.

As to statutory breach and its effect upon ability to recover under the

\textsuperscript{57} \textit{Axelrod}, Comment, 3 \textit{Journal of Air Law} 662 (1932).

\textsuperscript{58} \textit{Wilson v. Colonial Air Transport, Inc.}, 180 N. E. 212, 1932 U. S. Av. R. 139 (Mass., 1932): "The rules of law relating to the operation of aircraft, in the absence of statute, in general are rules relating to negligence and nuisance, and are not distinguishable from those which relate to the operation of vehicles, perhaps more closely, to motor vehicles on land. In this Commonwealth at present there is no statute specifically applicable to the issue of negligence in the operation of aircraft, and the ordinary rules of negligence and due care obtain. * * * The principle \textit{res ipsa loquitur} only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendants or their servants. * * * It is to be noted that the presumption raised in favor of the plaintiff by the application of the \textit{res ipsa loquitur} doctrine is one of evidence and not of substances, and that the burden of proof remains during the trial upon the plaintiff. * * * It is also to be observed that the doctrine will not be applied if there was no negligence at all; nor does it apply in any instance when the agency causing the accident is not under the sole and exclusive control of the person sought to be charged with the injury. * * * There is nothing in the record to indicate by whom the airplane was inspected. It does not appear that the inspectors, to whom the pilot, according to his testimony, turned over the airplane on his arrival, and from whom he received it a few minutes before he took off, were employed by the defendant. They may have been servants of an independent contractor or of one conducting an independent business, to whom as mechanics skilled in aircraft the defendant in the exercise of a high degree of care committed the inspection and repair of the airplane."
Workmen's Compensation Law; in general, the gravamen of the matter seems to be whether the sphere of employment is limited by the prohibition. This was the rule laid down by Lord Dunedin in the leading case of *Plumb v. Cobden Flour Mills Company, Ltd.* In the case of *A. G. Moore & Co. v. Donnelly,* this doctrine was applied to statutory prohibitions as well as to prohibitions of the employer. The general rule, then, is that if the statute is one limiting the sphere of employment of the workman, the violation of such statute will bar recovery, whereas, on the other hand, if the statute is one which directs the mode of performance of a task, or directs that a task be not done in a certain manner, the workman is still within the sphere of employment even though he disobeys the statute.

Under the statutes of most of the States, including Texas, "willful misconduct" bars recovery. The courts, therefore, when not able to find a bar to liability due to the fact the employee has, by statutory violation, acted without the sphere of employment, have the possibility of finding that the statutory breach constituted "willful misconduct." Generally, liability is barred on the basis of "willful misconduct," when the statute violated was designed especially to protect the employee. Whether it was so designed is a matter of fact. California seems to have gone quite far in finding "willful misconduct," for in the case of *Industrial Accident Commission v. Fidelity & Deposit Company of Maryland,* it was held that a violation of an automobile speed regulation barred recovery. There have been modifications and refinements of the doctrine, but the principles mentioned above are the ones most frequently enunciated by the courts. Of course, in order that a breach of statute (or employer's rule) act as a bar to recovery on the basis either of the workman having acted beyond the scope of authority or of the breach constituting "willful misconduct," there must be proximate cause between the breach and the injury.

In what is apparently the only other case squarely considering the application of these rules to aviation, it was held that acrobatic flying at the time of the crash, in violation of a statute forbidding it, constituted an act without the scope of employment. In the instant case, the scope of

---

5. It is to be noted that, although the wording of the phrase varies from State to State, essentially the meaning is the same. The Texas statutes, *Tex. Vernon's Comp. Stats.* (1928), Art. 8306, §1(3), and Art. 8309, §1, use the term "willful intention."
the employment is definitely limited by the licensing statutes. Under the Texas statute, it is stated definitely that one is barred from acting as an aviator unless he and the plane are licensed by federal license. On the other hand, it would seem that there is a lack of showing of causal connection between the absence of an airman's license and the crash, especially since the deceased was an experienced aviator. It would seem to be analogous to the cases of colliding when driving illegally without a chauffeur's license, which does not bar recovery. The court might have assumed a better position if they had barred recovery solely on the basis of absence of plane license, for obviously, in the case of a three-year-old plane, the absence of the plane license might be quite significant. It would appear, however, that the court should not attempt to bar liability on the statutory basis alone; the question of proximate cause would seem to be one which should be inquired into, which was not done by the court in the instant case.

As to whether the plaintiff would be barred on the basis of "willful misconduct," the inquiry must be made as to whether the statutes requiring licenses were intended to protect the airman. It would appear from the reading of the Texas statute that it was intended for the protection of the public, not of the airman, for it states: "The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress ..." On the basis of this statement, it would appear that the plaintiff might prevail, since the statute was not designed especially for the protection of the employee, but of the public.

ROBERT A. MENDELSON.

DIGESTS

CRIMINAL LAW—TRANSPORTATION OF LIQUOR BY AIRCRAFT—EVIDENCE.—[Federal] This is an appeal from a conviction obtained in the United States District Court, fifth circuit, for the carrying of liquor in an airplane. Flying from New Orleans to a point in Michigan, the plane in which the appellant, owner and a pilot were flying, was forced down in Mississippi and some fifteen cases of imported liquor taken from a hidden compartment in the rear of the cabin. Appellant, though admitting to a prohibition agent that the plane had been loaded with liquor in New Orleans, later took the position that his confession was inadmissible, inasmuch as there was not separate proof that the plane had been loaded with liquor before it had left New Orleans and it would be as consistent with the

10. Tex. Vernon's Comp. Stats. (1931 Supp.), Art. 1137b, §2, states: "The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this State should conform with respect to design, construction, and airworthiness to the standards prescribed by the United States Government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the State, whether for commercial, pleasure, or non commercial purposes, unless it is licensed and registered by the Departments of Commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States Government then in force."

§3. "No person shall serve as an airman in connection with any civil aircraft when such aircraft is flown or operated in this state until he shall have obtained a license under the provisions of the Federal Air Commerce Act of 1926 and amendments thereto and the Air Commerce Regulations and Air Traffic Rules pursuant thereto."


evidence to state that the plane had been loaded after being forced to land. *Held:* it is within the province of the jury to decide whether the liquor was in the plane before it landed or was placed therein after landing. Appellant's confession that he was the transporter was definitely admissible, for, since the liquor was a foreign product and must therefore have been transported by someone to the place where it was found, any supposition is completely broken down that the liquor was loaded in the plane after the forced landing. Judgment affirmed. *Pinkemulder v. U. S.*, 64 F. (2d) 535. Decided April 19, 1933, U. S. C. C. A., 5th Circuit, Mississippi.

**NOTES, COMMENTS, DIGESTS**

**KATHERINE FRITTS.**

**GASOLINE TAX—COMMERCE—STATE TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[U. S. Supreme Court]** A Wyoming statute (Wyoming Laws of 1929, Sp. Sess., c. 14, amending Laws of 1929, c. 139) levies a "license tax of four cents per gallon ... on all gasoline used or sold in this state ... for domestic consumption" and requires every "wholesaler" engaged in the "sale or use of gasoline" within the state to report to the state treasurer each month all the gasoline "sold or used" by it in the state, and to pay the tax upon it. The term "wholesaler" is defined and the statute further provides that "every person ... who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this State" shall render a like statement and pay a like tax. Respondent brought suit in equity against the state tax officials and the cities of Cheyenne and Rock Springs, with which cities it had contracted for the use of their municipal landing fields, to enjoin the collection of a state excise tax levied upon the use of gasoline by respondent within the state, as a violation of the commerce clause of the Constitution. The trial court upheld the tax and dismissed the bill. This decree was reversed by the Circuit Court of Appeals and the injunction was ordered: 61 F. (2d) 130, and see comment 4 JOURNAL OF AIR LAW 113. The case then went to the United States Supreme Court on a writ of certiorari, where the judgment of the lower court was reversed.

Respondent made no objection to the collection of a tax on the gasoline which it purchased in the state, and on which the tax had not been paid by the wholesaler, as well as on all gasoline which it sold within the state at its airport or withdrew from the tanks for local use. The contention of respondent, upheld by the Court of Appeals, was that the tax cannot validly be applied to the gasoline imported from outside the state, stored in tanks at the airports and used for "filling" the interstate airplanes in which it is eventually consumed. The only question before the United States Supreme Court was whether the taxation of the gasoline which respondent withdraws from storage and uses for "filling" its planes imposed an unconstitutional burden on interstate commerce.

The Supreme Court upheld the interpretation of the statute as given by the officers of the State that the tax is not unconstitutional since it is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes, but is rather applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. The stored gasoline is deemed to be "used" within the state and therefore subject to the tax, when it is withdrawn from the tanks. The Court followed *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 287 U. S. — (1933) and *held:* a state may validly tax the "use" to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. The storage and withdrawal from storage of the gasoline is complete before interstate commerce begins, and the burden of the tax is too indirect and remote from the function of interstate commerce to transgress constitutional limitations. *Edelman, State Treasurer, et al. v. Boeing Air Transport, Inc.*, 53 S. Ct. R. 591, decided April 17, 1933.

**LORRAINE ARNOLD.**
Negligence—Damage to Aircraft—Evidence—Proof of Partnership.—[Nebraska] The plaintiff was the owner of a Pitcairn airplane which, on the night of January 29, 1931, was parked on the north side of the hangar in Omaha. A Stinson plane, which was alleged to be partnership property of defendants Arnold and Cahow, was parked on the south side of the hangar. Defendant Cahow attempted to start the motor of the Stinson but did not have it under control and the plane crossed the hangar apron and crashed into plaintiff's Pitcairn on the other side of the hangar. It was alleged that defendant Cahow violated certain Department of Commerce regulations in that no starting blocks had been placed under the wheels of the Stinson, that it was not in charge of a licensed mechanic or pilot, and that it was not equipped for night flying. Plaintiff sued for $1700 damages. Defendant Cahow filed no pleadings, nor did he make any appearance at the trial. The District Court, at the close of evidence, sustained defendant Arnold's motion and dismissed the plaintiff's action against him. Plaintiff appealed to the Supreme Court of Nebraska.

The sole question for the Court to determine was whether the evidence was sufficient to prove that a partnership existed between defendants at the time of the accident and that they were therefore jointly liable for the damage to plaintiff's plane. In that case, the trial court erred in withdrawing the case from the jury and dismissing the action as against Arnold.

An examination of the evidence showed that defendant Arnold denied that he was the owner or in any way responsible for the operation of the Stinson at the time of the accident and he denied that defendant Cahow was his agent or partner. Arnold offered evidence to show that the purchasers intended to form a corporation and that such corporation for the handling of the plane had been formed before the accident occurred. On the other hand, from the deposition of defendant Cahow, evidence was offered to show that a partnership did exist between Arnold and Cahow. In the light of this conflicting and disputed evidence from which different minds might draw different conclusions, the Court Held: plaintiff was entitled to have a jury pass on the question as to whether the facts offered in evidence were sufficient to warrant a finding that defendants were partners at the time of the accident and therefore jointly liable for the damage to plaintiff's plane. The lower court therefore erred in withdrawing the case from the jury and dismissing the action against Arnold. The judgment was reversed and the cause remanded for further proceedings. Interstate Airlines, Inc. v. Arnold, et al., 247 N. W. R. 358 (1933).

Negligence—Transportation of Airplane Along a Public Highway—Violation of Statute.—[South Dakota] The plaintiffs who jointly owned a Curtiss biplane wished to fly it from a field two miles from their home. In furtherance of that purpose, they attached the tail of the plane to the rear of an automobile and thus towed it along the public highway in the direction of the field. The road was completely obstructed by the wings of the plane which extended beyond the width of the road. To circumvent the passage of other travelers, one of the plaintiffs would go on ahead when someone appeared and signal with a white flag for the conveyance to come to a stop, go up a side road or make such arrangements as the situation warranted. The defendant was signalled as were others, but he totally disregarded plaintiff's efforts of safety, and ran his car into the right wing of the plane. An action for damages, because of defendant's failure to exercise due care, resulted in a verdict and judgment for the plaintiff for $500 and cost. Defendant's motion for a new trial was denied, whereupon he appealed upon two grounds: (1) the evidence was not sufficient to sustain the verdict; (2) as a matter of law the plaintiff was contributorily negligent, since he violated a statute. The court resolved both objections in favor of the plaintiff. Harvison, et al. v. Herrick, 248 N. W. 205. Decided April 24, 1933, by the Supreme Court of South Dakota.

The second objection is of interest. A statute, Rev. Code, 1919, Sec. 4309, provides that "every person who shall without authority...ob-
struct . . . any public highway . . . shall be deemed guilty of a misdemeanor . . . and liable for all damages to person or property by reason of the same." However, another statute, L. 1927, Ch. 141, Sec. 3, allows for the transportation of a large article over the highway after the issuance of a special written permit for a single trip by the County Highway superintendent. The violation in the instant situation consisted in not having the special permit. The court refused to look upon this violation as negligence per se, unless it in some manner contributed as part of the proximate cause of the damage. The presence of the permit, it was believed, would not have varied the plaintiff's operations; they exercised due care.

Apparently, the court extended itself to reach this result. The statute expressly makes any obstructor of the highway, without authority, liable for damages. This provision seems to create negligence per se, yet the court refused to so rule. The statute furthermore was intended to protect travelers on the road from the dangers of obstructions. The special permit was in the form of a dispensation in special situations. While the actual presence of the permit in the plaintiff's pocket may not have avoided the accident, yet it must be assumed that it would only be granted after a careful analysis of dangers by the highway superintendent. The question of proximate cause when a statute has been violated is really an attempt to discover whether the statute proposes to protect from the type of injury involved. Cf. Green, Rationale of Proximate Cause [1927], p. 40. For a criticism of the use of proximate cause in statutory and administrative violations, see comment, 4 Journal of Air Law 283-5; and for a discussion of the effect of a violation of a statute upon the question of negligence, see comment, 4 Journal of Air Law 285.

Leo Freedman.

Taxation—Stamp Tax on Aircraft Passenger Tickets—Aircraft as Vessels within Meaning of Federal Revenue Act.—[Federal] In General Counsel's Memorandum No. 7152 (C. B. VIII-2, 429), the conclusion was reached that the stamp tax, provided for in Schedule A(5), Title VIII, of the Revenue Act of 1926, as amended by Section 442 of the Revenue Act of 1928, imposing a stamp tax on tickets sold or issued in the United States for passage by vessel to foreign ports other than ports in Canada, Mexico, or Cuba, is not applicable to tickets for passage on seaplanes, hydroplanes or amphibians. By Rev. Stat. Sec. 3, "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

The ruling in G. C. M. No. 7152 was questioned and has since been modified, largely upon the authority of the case of McBoyle v. United States, 283 U. S. 25; see comment 2 Journal of Air Law 437 (1931). Admittedly, the term "vessel" etymologically is broad enough to signify any container, irrespective of the medium in which it operates. Yet, in its common meaning, when used with respect to transportation, the term signifies some craft which actually moves and conducts its business of transportation on the water. When Congress has used the term in a statute pertaining to water carriage, the statute should not be construed as applicable to aircraft whose use of the water is only for taking-off and landing, and not at all during its main business of transportation by air. The brief presented in behalf of counsel also indicated the discriminatory effects of such an interpretation as between passengers using the various aircraft services—even on a single airline. As stated, G. C. M. No. 7152 was modified by G. C. M. No. 11539, XII-13-6104, 233 C. C. H. 3051.

F. D. F.

Taxation—Exemption—Land Leased as Naval Aviation Base Constructed as Armory.—[Michigan] Five acres of land were acquired by the state of Michigan upon which was expended $100,000 by the state and $500,000 by the federal government to establish an airport. To this was
added 379 acres of leased land, to form a United States Naval Reserve aviation base. The land which was leased and the equipment contained thereon was placed on the assessment roll by the assessor of the township. Protest was made on the ground that the land was not legally assessable since it was being used for military purposes. Section 692 of the Compiled Laws of Michigan [1929] exempts from taxes "armories erected" by governmental or private agencies and used by the militia. The township board of review refused the exemption whereupon an appeal was taken to the State Tax Commission where the exemption was granted. The court in the instant case upheld the order of the State Commission. It was admitted that armories in their narrow sense would not include surrounding land, but to further the intent of the statute in increasing the efficiency of the military establishment of the state, a broad construction was adopted. It was pointed out that surrounding lands used for drilling purposes are part of a military establishment. The land here in question when properly leased for an aviation base is part of the military establishment and therefore exempt from taxation.

Three judges dissented, pointing out that statutes exempting private property from taxation must be strictly construed. Further, that the words "armories erected" obviously referred to buildings only and so carried its own boundaries by clear legislative expression. Grosse Ile Tp. et al v. Saunders et al. — Mich. —, 247 N. W. 912 (April 4, 1933).

LEO FREEDMAN.

WORKMEN'S COMPENSATION—AIRCRAFT PILOT AS EMPLOYEE OR INDEPENDENT CONTRACTOR—COMPENSATION.—[Texas] Plaintiff brought suit to recover workmen's compensation for the death of her husband, an airplane pilot in the employ of the Texas Worth Tool Company, a corporation, which carried workmen's compensation insurance with appellant company. From a judgment in favor of the plaintiff given in the District Court, defendant company brought error to the Court of Civil Appeals of Texas. Writ of error was granted.

The deceased was employed by Mennis, the President and General Manager of the Texas Worth Tool Company, to pilot the plane belonging to him (Mennis) as and when needed, for $10 a day and expenses. When the plane was used in the corporation's business the President and General Manager reported his expenses of such trips and included as such the $10 a day and expenses of the pilot, and the corporation paid same. Kelly, the pilot, worked under this arrangement on an average of 3 days a week for 3 months before the accident occurred, although his pay was not included in the pay roll of the company, on which premiums for the policy sued on were computed. The accident occurred when Kelly was piloting the plane for his employer on corporation business, and both pilot and employer were killed.

On special issues the jury found that Kelly was an employee of the Texas Worth Tool Company, was in the course of his employment, was not in the employ of Mennis, the President and General Manager, that $70 a week was an average weekly wage, and that Mennis was not an independent contractor on this trip, nor was deceased, Kelly.

The Court of Civil Appeals examined the assignments of error and Held: (1) The evidence was sufficient to support the verdict finding that deceased pilot was an "employee" of the Texas Worth Tool Company and not an "independent contractor" since (a) the materials and appliances of his work were supplied by a person who had the right to stand in the place of the company, and did so, according to the finding of the jury; (b) there was no evidence that Kelly exercised or claimed any control over his work except such of those details of the actual flying that were beyond the ability of his employer, but rather, Kelly went when, where, and by that route and carried those people and that baggage as his employer told him to do; (c) while Kelly was not carried on the pay roll of the Texas Worth Tool Company, still that company was knowingly and intentionally paying his hire of $10 a day under the head of expenses of General Mana-
ger Mennis on company business; (d) to employ a driver for a vehicle to carry those representing the company in order that they may confer with salesmen regarding the company's business is within the usual course of that business. (2) Error, if any, in determining wages received by deceased employee was harmless, where the evidence showed that 60% of the minimum weekly wage exceeded the maximum weekly compensation. (3) In a compensation case, a statement by plaintiff's counsel relating to objections to testimony was not so prejudicial as to require mistrial. (4) In a compensation case, argument of plaintiff's counsel relating to the business of writing insurance for employers was not so prejudicial as to require discharge of jury. The judgment of the lower court was therefore affirmed. *Texas Employers' Insurance Association v. Kelly, et al.*, 56 S. W. Rep. (2d) 1108 (1932), rehearing denied Nov. 19, 1932.

LORRAINE ARNOLD.