1935

Notes, Comments, Digests

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Recommended Citation
Fred D. Fagg Jr. et al., Notes, Comments, Digests, 6 J. Air L. & Com. 271 (1935)
https://scholar.smu.edu/jalc/vol6/iss2/10

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NOTE AND OPINION

AIR TRANSPORT—AIRLINE PILOTS' WAGE DISPUTE.—[National Labor Relations Board] Section 13 of the Revised Air Mail Law provides that:

It shall be a condition upon the awarding or extending and the holding of any air-mail contract that the rate of compensation and the working conditions and relations for all pilots, mechanics, and laborers employed by the holder of such contract shall conform to decisions of the National Labor Board. This section shall not be construed as restricting the right of collective bargaining on the part of such employees.

Extensions of temporary air mail contracts embody agreements on the part of the contractors to conform to decisions of the National Labor Board and not to restrict the right of collective bargaining.

The National Labor Board was created on August 5, 1933, under authority of the National Industrial Recovery Act, and in September, 1933, the Air Line Pilots' Association and five air transport companies submitted a controversy over rates and methods of pay for pilots to the Board. Due to uncertain conditions in the industry following the cancellation of the air mail contracts, the opinion of the Board was not rendered until May 10, 1934. The decision continued the pay differentials existing on October 1, 1933, for co-pilots and for flying over dangerous terrain. The Chairman of the Board indicated that the rates provided in the opinion should apply if S. 3170 became law. That bill was approved on June 12, 1934, and became known as the Revised Air Mail Law.

Many of the operators paid the scale fixed in this opinion, and others paid the equivalent thereof. However, some did not pay the scale—despite an agreement to do so as a condition to the extension of their temporary contracts. As a result, complaint was made to the Post Office Department of the alleged failure of Long and Harman, contractor on Air Mail Route 15, to pay the scale provided for in the opinion of the Labor Board.

The Post Office Department held a formal hearing and a memorandum decision was issued by Solicitor Karl Crowley on December 5, 1934, providing in general that the Revised Air Mail Law requires the application of the Labor Board's opinion to the contract in question. The memorandum permitted the contractor to conform to the scale set up, by January 1, 1935, or have its contract cancelled as of January 15, 1935.

1. Public Act No. 308, 73rd Congress, 2d Session, approved June 12, 1934. 1 JOURNAL OF AIR LAW 462 (1934).
2. 48 Stat. 195.
5. Supra, note 1.
Eventually appeals were taken by both the Air Line Pilots' Association, in the case of Pilots Hays, Kay, and Turner, and by Long and Harman. These appeals were taken up by the new National Labor Relations Board which had been created by Executive Order of June 29, 1934.6

The decision of the National Labor Relations Board is as follows:7

Long and Harman Incorporated is subject to the Code of Fair Competition for the Air Transport Industry. This company secured an air-mail contract from the United States Government effective for the period of a year from June 1, 1934, subject to satisfactory operation during a preliminary period ending August 31, 1934. After receiving the contract, the company hired several pilots. The terms of employment were made with each pilot individually. The agreements were oral and the exact terms do not appear in the record. From all the circumstances it appears that the term of employment was to be extended and the wage scale increased if the government extended the contract beyond the preliminary period.

After a month or six weeks had elapsed the company asked the individuals to sign contracts embodying the wage scale being paid and definitely ending the term of employment on August 31, 1934. The pilots refused to sign such contracts, and at this time the company did not insist. The pilots, much disturbed over what they considered to be the efforts of the company to change their conditions of employment, began to meet together frequently. A majority of the pilots became members of the Air Line Pilots' Association. L. S. Turner, one of the pilots, was the local representative of the union. M. M. Kay, another pilot, met with the others although he was not a member of the union. Apparently the pilots had banded together as a defensive measure out of fear that the company would change the conditions of employment. No demand was made on the company for a collective agreement or for any concession in working conditions. Toward the end of August the situation became acute. Harman, one of the owners, called the pilots individually into his office to demand that they sign contracts continuing the existing wage scale after August 31st. Two of them, Kay and Hays, refused to sign. They asked to be allowed to see the contract but Harman refused to allow them to read it until they had signed. Due to their refusal to sign they lost their positions on August 31st. Turner was not asked to sign a contract. The company discharged him on August 31st. The remainder of the pilots' group either signed the contracts or left the company voluntarily.

Although the pilots had made no formal demands on the company for recognition they did make informal requests on August 25th to be heard by the employer as a group on the dispute over wages and other terms of employment. Turner, on August 25th, requested the operations manager to arrange a meeting for the pilots with Harman. Later in the day Kay, the non-union man, acting as the representative of the others, asked Harman to call in the pilots and talk over the disputed issues collectively. These requests for a group meeting were turned down. Harman continued his insistence that the men sign the individual contracts.

It is clear from the record that Harman was aware of the organization of the company's pilots. We are convinced that the pilots brought home to the company their desire to have the dispute considered on a collective rather than an individual basis. We held in the Caldwell case* that insistence by the company upon individual contracts in the face of an expressed request of the employees for collective bargaining is a violation of Section 7(a). The situation in the present case is similar. The employees were acting in concert to

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NOTES, COMMENTS, DIGESTS

protect their working conditions and requested through their representative an opportunity to deal collectively on the matter in dispute. The company ignored the request for a collective discussion and instead insisted on individual bargaining leading to individual contracts as a condition to further employment. We regard this action of the company as a violation of Section 7(a).

L. S. Turner was not asked to sign a contract in August. The company admits that its failure to offer Turner employment after August 31st amounted to a discharge. A number of reasons are advanced for his discharge but we are not impressed by them. Turner is an able pilot and during his employment with Long and Harman put in more hours of flying for the company than any other pilot. The record shows that the company was hostile to Turner because of his union affiliations. He was an active union man and served as the local representative of the Air Line Pilots' Association. We are convinced that his participation in the collective activity of the pilots, as previously related, was a determining factor in his discharge.

Long and Harman Incorporated on January 1, 1935, transferred and assigned its air-mail contract to Braniff Airways, with the approval of the Postmaster General. What obligation, if any, by the terms of the air-mail contract and the Air Mail Act of 1934, may rest upon the assignee, Braniff Airways, as a result of this decision, is within the province of the Postmaster General to determine. Braniff Airways was not a party to the proceedings before us. Long and Harman Incorporated, according to our information, has ceased to engage in flying operations. Reinstatement of M. M. Kay, G. L. Hays and L. S. Turner to their former positions which would be the normal restitution for the violation involved, has thus become impracticable. The company should, however, pay to Messrs. Kay, Hays and Turner back pay from August 31, 1934, the date of termination of their employment, to December 31, 1934, the date on which the company ceased flying operations pursuant to its assignment of the air-mail contract to Braniff Airways. The amount of this restitution should be equal to the sums paid, during the period stated, to the men who were employed to fill the places of Kay, Hays and Turner.

Findings: By insistence upon individual bargaining in denial of a request for collective negotiations which resulted in forcing out of employment M. M. Kay and G. L. Hays and by discharging L. S. Turner under the circumstances above set forth, Long and Harman Incorporated has violated Section 7(a) of the National Industrial Recovery Act.

Enforcement: Unless within ten days from the date of this decision Long and Harman Incorporated notifies this Board that it has paid to Kay, Hays and Turner the money restitution above specified, the case will be referred to the Compliance Division of the National Recovery Administration and to other agencies of the Government for appropriate action.

NATIONAL LABOR RELATIONS BOARD.
Francis Biddle, Chairman,
H. A. Millis,
Edwin S. Smith.

F. D. F.

COMMENTS

AIRPORTS—MUNICIPAL—PLEDGING OF GENERAL REVENUE FOR REPAYMENT OF FEDERAL LOAN.—[Arkansas] Suit was brought to enjoin the City of Little Rock from entering into a contract with the Federal Emergency Administration of Public Works for the purpose of obtaining a loan with which to construct and equip a municipal airport. The plan of repayment was threefold: (1) By the pledging of the earnings of the airport; (2) by the transfer of
money from the city's general revenue fund to an airport fund if the earnings were insufficient to pay the expenses of operation and maintenance; and (3) by the payment of $3,800.00 per annum from its general revenue fund or as much as would be necessary to repay the loan. The grounds of complaint were constitutional limitations on the power of the municipality to use general revenue funds for repayment of the loan. Held: Cities of the first class may pledge their general revenue for repayment of loan for municipal airport on the condition that such money is expended after the city has paid the expenses of its essential statutory functions. Parker v. City of Little Rock, — Ark. —, 75 S. W. (2d) 243 (1934).

In 1934, the constitution of Arkansas was amended to protect the taxpayers from the overburdening debts of counties and cities by stipulating that fiscal affairs must be conducted on a sound financial basis. However, this was soon considered insufficient to accomplish the purpose and in 1926 another amendment was enacted with the provision that municipalities shall not lend their credit nor issue bonds with certain exceptions but with a proviso allowing cities of the first and second classes to issue bonds with the consent of the electorate to be obtained on each issue. In 1929, the state legislature passed a statute allowing cities of the first class to acquire and own airports. The respondent city availed itself of this provision and planned to effect its accomplishment by means of a Federal loan. The question of the necessary bond issue was not submitted to the people.

When the validity of such action by the municipality was questioned in the Supreme Court, the majority decided in favor of its constitutionality in light of the amendment of 1924, and omitted any discussion of the amendment of 1926. The opinion does not make it clear whether the Federal loan was evidenced by bonds. The impression is given that the majority of the court

1. "The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound, financial basis, and no county court or levying board or agent of any county shall make or authorize any contract to make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made:" Ark. Const. Am. XI. (1924).

2. "Neither the State nor any city, county, town or other municipality in this State shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the State shall never issue any interest-bearing treasury warrants or scrip: provided that cities of the first and second class, may issue by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows: . . . for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality . . . said election shall be held at such time as the city council may designate by ordinance, which ordinance shall specifically state the purpose for which the bonds are to be issued, and if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose . . . ." Ark. Const. Am. XVI. (1926).

3. The final step of referendum by the electorate as means of check is widely used. After discussing the varied means available for the initiating of local airport development, Mr. Grover says, "It must not be forgotten that state constitutions and general revenue statutes frequently call for a referendum upon an increase in the tax levy for a new project, and for a bond issue. Thus even where the power of acquisition and maintenance seems to rest in the local governing body without ratification, the electorate retains indirect control by its power to throttle necessary financial measures:" R. L. Grover, "Legal Basis of Municipal Airports," 5 JOURNAL OF AIR LAW 410, 418 (1934).

4. See dissenting opinion at page 247.
could envision no harm in allowing the city to take advantage of the Federal government's generosity in aiding the city in advancing its public activities on the theory that the city would be limited in its total expenditures to the annual revenue and that only the amount remaining from such total after all the necessary municipal expenses had been paid would be available for other public expenditures. Therefore, the court was obliging in overlooking the constitutional mandate of 1928.

The dissenting judges pointed out that the very essence of the latter amendment was put aside by the action of the majority in refusing to take notice of its existence. If the means adopted by the city in pledging its revenue was that of a bond issue as it seems to have been from the discussion in the dissent, it is difficult to give any satisfactory legal explanation for the majority's view. The public opinion of the state seems to indicate a hostility to the extension of such financial activities of officials without the sanction of the electorate and it appears unwise to hinder the public support of municipal aviation by the deliberate failure to follow the procedure adopted by the people themselves. The advantages of the attempt to gain favor by granting the opportunity to the electorate to put their stamp of approval upon the project would seem to outweigh the possible disadvantage of a vote disapproving the plan, since once the support of the city's inhabitants is obtained by respecting their regulations a large gain in public support in many phases of the project will have been the beneficial outcome of cooperation.

Hortense Klein.

Contracts—Infants—Aviation Mechanics Course as a Necessary.—

[New York] Plaintiff enrolled in the defendant school for a course in aviation mechanics; his father paid part of the tuition fee and the plaintiff paid the remainder. After completing the course, he attempted to rescind the contract on the ground of his infancy and he brought this action, by his guardian ad litem, to recover the tuition fee. The training course was held to be a necessary. Defendant had judgment on the additional ground that this was an original undertaking of the father for the benefit of the son. Curtis v. Roosevelt Aviation School, Inc., Municipal Court of New York, Borough of Brooklyn, 6th Jud. Dist., May 25, 1934.

The rule is everywhere established that an infant, when his parent or guardian is either unable or unwilling to furnish them, may bind himself for necessaries; and the term necessaries includes food, clothing, medical care, and such education and training as may be suitable to his estate and expectations. In the United States, a common school education is generally held to

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5. "In the Little Rock case thousands of dollars of the general revenue of the city is pledged to pay this bond issue:"

6. The city of Pine Bluff called an election to determine whether the city should issue bonds for the building of city sewer system after an agreement had been made between the city engineers and the Civil Works Administration: Atkinson v. City of Pine Bluff. — Ark. — 76 S. W. (2d) 982 (1934).

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1. Co. Lit. 172a. But it must be shown that the contracting infant has no parent or guardian able or willing to furnish the necessaries: Rime v. L'Amoreuse, 5 Paige (N. Y.) 419 (1831); Mauldin v. So. Shorthand & Business University, 128 Ga. 681, 56 S. E. 222 (1906); McKanna v. Merry, 61 Ill. 177 (1871). Any recovery from an infant is upon a quasi-contractual basis: Wallin v. Highland Park Co., 127 La. 131, 102 N. W. 859 (1905). Whether or not the education was suitable to the infant's station and expectations is a matter for the Jury: Cory v. Cook, 24 R. I. 421, 53 A. 315 (1902—bookkeeping); Nielsen v. International Text Book Co., 106 Me. 104, 75 A. 320 (1909—course in
be a necessary as a matter of law; whereas, except in unusual circumstances, a professional or classical education is generally held not to be one. However, training whereby an infant may learn a trade suitable to his position is a necessary. Thus training for the occupations of pattern maker, cabinet maker, and farmer is a necessary.

Hamilton v. Bennett\(^6\) is authority for the proposition that flying instructions do not fall within the category of necessaries for which an infant might bind himself, but in that case it did not appear that the course of training was such as to qualify the infant for employment as a pilot. It would seem that to be deemed a necessary a course of flying instructions would have to prepare one for employment in the field of commercial aviation.

In deciding whether or not a given training course in the field of aviation is to be classed as a necessary, circumstances in addition to the conventional inquiries with regard to the infant's having a parent or guardian able and willing to supply him with suitable education and training and whether the cost of the training is reasonably proportionate to the estate and expectations of the infant will merit serious consideration. The course of training should be such as would enable a student successfully completing it to comply with the license requirements\(^6\) for airplane mechanic, engine mechanic, or commercial pilot of United States Department of Commerce. If the course consists of flying instruction, the court should be satisfied that the infant is physically qualified to obtain a commercial pilot's license, in the event of his successful completion of the course. In other words, the course of training should be such that the student, upon the successful completion thereof, would be qualified to pursue his chosen trade.

A minority in number of American jurisdictions require an infant seeking to rescind a contract on the ground of infancy, when the contract is a beneficial one although not strictly for a necessary, to return to the other party such consideration as the infant may have received, or the reasonable value thereof? This case was brought in such a jurisdiction. Because of the impossibility of returning the benefits in a case such as this, the nature of the training course might not need to be as closely scrutinized as would be

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\(^6\) See also Department of Commerce Aeronautics Bulletin No. 1, pp. 29-42.
the case if the controversy arose in a jurisdiction following the majority rule.

Francis D. Roth.

Constitutional Law—State Legislation—Aircraft Licensing—Delegation of Legislative Power.—[Minnesota] The decision in the second Minnesota case testing the constitutionality of their act to regulate aeronautics has been handed down. The suit was brought against the members of the Minnesota Aeronautics Commission under the Declaratory Judgments Act. The plaintiff contended that the requirement of a Federal license for both plane and pilot was an unwarranted delegation of legislative power. With this the court was in accord. Nieman v. Minnesota Aeronautics Commission, District Court of Ramsey County, Minnesota, 2nd Judicial District, January, 1935.

The logic of the opinion eludes the present writer's comprehension. The view is taken that it was permissible for the legislature to provide that aircraft operating within the state should conform with respect to design, construction, and airworthiness to the standards prescribed by the United States. But when that body conferred the power to grant such licenses on the Department of Commerce, says the court, it delegated its legislative power. Is it not obvious that before a license is conferred, the legislative process has been completed? Here the legislature adopted as its own the standards of the Air Commerce Act which consist of the rules and regulations promulgated by the Commerce Department. When it had done that, only the ministerial or quasi judicial function of granting the license remained. The decision of the court would seem to be based upon a questionable interpretation of the nature of a delegation of legislative power.

The outcome of the case has resulted in a proposed amendment to the Minnesota Aeronautics Act, whereby licenses for intrastate flying may be obtained either through the Commerce Department or the Minnesota Aeronautics Commission. The passage of such bill would be extremely regrettable. It would undo what the American Bar Association Committee on Aeronautical Law and the National Association of State Aviation Officials have accomplished only after a fight of many years. A Federal license requirement is the only practical solution of the licensing problem. It is the only means by which the essential uniformity can be assured. But the bill will do more than result in a divergence of standards. It will cause unnecessary duplication, less efficiency, and increased expense which the state may find itself unable to bear. And finally, it seems unreasonable to suppose that anyone who can qualify for a Federal license will apply to the state. In the interest of aeronautical progress, the present code should be permitted to stand.

Cecile L. Pitz.

1. For earlier mention, see comment in 6 Journal of Air Law 146 (January, 1935).
3. Ibid., §3.
4. The arbitrary action so feared by Judge Michael is much more likely to arise under the proposed legislation since no hearing is provided either on refusal or revocation of a license. There is, however, such provision in the Federal licensing act. And, further, should the court's view be given weight, the proposed section 2(a) which provides that the Minnesota Aeronautics Commission may require an approved type certificate issued by the Department of Commerce, can be said to be an invalid delegation.
INSURANCE—CONSTRUCTION OF "ENGAGED IN" AND "PARTICIPATING IN" AVIATION CLAUSES.—[Federal and New Mexico] Recently two cases have been decided which involve a new and interesting angle on the problem of the construction of aviation clauses in insurance policies. The first dealt with the situation where the insured was killed, while a passenger, by a fall of the airplane during a scheduled trip. The policy contained the following provision: "This double indemnity benefit will not apply if the insured's death resulted . . . from engaging, as a passenger or otherwise, in submarine or aeronautic operations." The plaintiff was defeated in the lower court. Held, on appeal, affirmed. The clause was free from ambiguity and contained the specific provision "as passenger or otherwise" which made it all-inclusive; and it therefore exempted the insurer from liability. Mayer v. New York Life Insurance Co., 74 F. (2d) 118, C. C. A. 6th, December 7, 1934.

The appellant contended that the word "engaged" denotes continuity, frequency, and regularity, and is not synonymous with "participating" and therefore does not cover the casual passenger. He argued further that there are different classes of passengers, one composed of those who are engaged in aeronautic operations—such as an executive of the company—, and another comprising casual passengers who ride for pleasure or transportation and who are not engaged in aeronautic operations; the clause referred to the former class, but not the latter. The court gave no weight to these contentions, but referred to and followed the case of Goldsmith v. New York Life Insurance Co. There the court followed the same reasoning in reaching its conclusions as the court did in the principal case. There was a dissenting opinion in the Goldsmith case, that followed the reasoning and interpretation that was advanced by the appellant in the principal case, that the phrase "passenger or otherwise" pertained only to passengers who were affiliated with airplane companies. However, this dissenting view seems to be an unreasonable and technical interpretation of the clause and contrary to the intent of its framers. A case reaching a seemingly contrary result to that of the Goldsmith case was Provident Trust Co. of Philadelphia v. Equitable Life Assurance Society. The policy contained a clause which was the same as in the principal case, except that it ended with "aeronautic expeditions" instead of "aeronautic operations." The court held that since the ordinary meaning of the words should be applied to this phrase, a passenger riding in a plane would not be engaging in "aeronautic expeditions" and allowed recovery. But the problem was, of course, distinguishable from that raised by the clauses "engaged in" and "participating in."

In the Goldsmith case, the court made an exhaustive survey of the past decisions dealing with the problem and concluded that they fell into two classes, allowing recovery to a passenger, or prohibiting it. The first classification is as follows: "The words, 'engaged in aeronautics or aviation,' 'engaged in aeronautic activity,' 'engaged in aeronautic expeditions,' do allow recovery in the case of an ordinary passenger in an airplane." Many cases can be found that support this conclusion.\[1\]

1. 69 F. (2d) 278 (C. C. A. 8th, 1938).
2. 316 Pa. 21, 172 A. 701 (1933).
4. Supra note 1.
5. Benefit Assn. of Ry. Employers v. Hayden, 175 Ark. 555, 299 S. W. 295 (1927); In this case the policy excluded from coverage fatal injury "while
It can be seen that this is primarily a problem of construction and interpretation of the various clauses. Therefore, it would be advisable to consider the proper definitions of the words in these clauses. The word “engaged” has been, in previous cases, defined as a “word that denotes action; it means take part in.” Also it has been defined as a “word that means to take part in, be employed in, however the employment may arise.” It has often been pointed out that the word denotes regularity and frequency as opposed to the word “participating” which signifies the contrary. Thus when the word “engaged” is used in an aviation clause of an insurance policy it has almost uniformly been construed as affecting only those actually and permanently affiliated with and employed in the industry. Therefore, the casual passenger is covered by the policy and the insurer is not freed from liability in case of the insured’s death by flying. The appellant in the principal case consequently maintained that the case fell into that class. To answer this argument it is necessary to examine the clause more closely. It is seen that the word, “engaged,” is modified by the phrase “passenger or otherwise.” The court said in this respect, “Applying their ordinary meanings to these words it is in fact difficult to conceive of any way in which one could engage ‘as a passenger’ in aeronautic operations except by riding in a plane. The words ‘as a passenger or otherwise’ define and modify the words ‘engaging . . . in aeronautic operations,’ and are unlimited in scope.” The idea of regularity and frequency is modified by the latter part of the clause, and is thus nullified. This seems a very reasonable interpretation and one that more nearly corresponds with the apparent intent of the party who framed the contract of insurance. It seems quite obvious that this clause...
was born of a desire to evade the construction the courts have made of previous clauses of this nature and was an attempt to make an all-inclusive exemption from liability in the case of death due to airplane accident.

The second recent case falls into the other classification. There the insured's wife and beneficiary sued the insurer on the policy for the death of her husband. He was riding as a casual, invited passenger in a plane owned and piloted by a friend of his, and was killed by its fall. The company denied liability under the policy because of a clause which read, "This policy does not cover death or other loss due to accident or otherwise, or sustained as the result of participation in aviation, aeronautics or subaquatics, . . ." The lower court found for the plaintiff. Held, on appeal, reversed. The court interpreted the clause to read, "This policy does not cover death or other loss . . . sustained as a result of participating in aviation or aeronautics." Although the clause was poorly drafted, this was held to be the logical and sensible meaning, and a strained or unreasonable meaning would not be allowed although it might be grammatically correct. Therefore, under this construction the insurer was not liable for this type of risk: *Sneddon v. Massachusetts Protective Association, Inc.* — N. M. —, 39 P. (2d) 1023 (Jan. 10, 1935).

The appellee in the case relied on two arguments. The first and more important was that there is no real distinction between the term "engaged in aviation" and "participation in aviation." However, as the court pointed out, this is contrary to the authorities. The *Goldsmith* case stated the second classification of these cases to include: "Those clauses using the words 'participating as a passenger or otherwise in aeronautics or aviation,' 'participating as a passenger or otherwise in aeronautic activity,' or 'participating as a passenger or otherwise in aeronautic expeditions.' [These] cover a passenger in an airplane."\(^8\) Many cases can be found supporting this rule.\(^9\) The word "participating" has been defined as "... to receive or have a part in a share of; to partake of; experience in common with others; ..."\(^10\) Participating, in reference to these clauses, has been used to denote


9. *Bew v. Travellers Ins. Co.*, 95 N. J. Law 533, 112 A. 859 (1921); in this case the policy excluded "injuries . . . sustained . . . while participating in or in consequence of having participated in aeronautics." The insured was a passenger in an airplane when killed. His death was held to be excluded from coverage.

In *Pittman v. Lamar Life Ins. Co.*, 17 F. (2d) 370 (C. C. A. 5th, 1927), cert. denied 274 U. S. 750, 47 S. Ct. 764 (1927), the policy excluded death "while participating or as a result of participating in any submarine or aeronautic expedition, as passenger or otherwise." The insured who was part owner of the airplane, was killed by the moving propeller blade as he passed near the front of the machine after landing. He had just returned from a flight during which his partner operated the plane. It was held that he was killed while participating in an aeronautic activity.

In *Head v. N. Y. Life Ins. Co.*, 43 F. (2d) 517 (C. C. A. 10th, 1930), the policy excluded from double indemnity "death . . . from participating, as a passenger or otherwise, in aviation or aeronautics." It was held that a passenger in an airplane flying in the air participates in aeronautics and the plaintiff could not recover double indemnity for death of the insured while riding as a passenger.

In *First Natl. Bank of Chattanooga v. Phoenix Mutal Life Ins. Co.*, 42 F. (2d) 681 (C. C. A. 6th, 1930), the policy excluded from double indemnity benefits death "from participation in aeronautics . . . operations." The insured was president of an aviation company operating around Chattanooga. He had a student pilot permit and took a pleasure trip to Florida in one of the company's airplanes, which was operated by a company pilot. The plane crashed and the insured was killed. Although not acting as pilot on the trip, he was more than a passive participant in the venture. It was held his beneficiary could not collect double indemnity.

casual and infrequent trips in an airplane, while the word “engaged,” as
defined above, denotes actual operation of an airplane. In the case of Price
v. Prudential Insurance Co.,11 the court said as to this distinction, “Being
engaged in aviation operations means taking part in the operations of an
aeroplane in some direct way, other than merely participating in the aero-
autics by being in an airplane while it is in the air.” The courts have uni-
formly followed this distinction throughout the cases. Where the word
“engaged” is used recovery is allowed for the insured who meets death while
a passenger, unless the words “as a passenger” are added. However, where
the word “participating” is used the insured is not covered by the policy if a
passenger. There has been no reported case that has allowed recovery where
the word “participating” has been used with the exception of the case of
Tierney v. Occidental Life Insurance Co.12 There the insured was killed by
a propeller blade after leaving the plane, and the court held that since the
flight was over, the fact that he was struck by the propeller blade, and not
the flight itself, was the proximate cause of his death.13

The appellee in the Sneddon case also contended that the clause referred
only to loss and death due to diseases arising from participating in aviation
or aeronautics. The court admitted that the clause was poorly drafted and
that it would have been much clearer if the words “death or other loss” had
been repeated before the word “sustained.” However, they refused to permit
this technical and unreasonable construction when the intent of the framers
so obviously was that no recovery should be allowed for loss or death sus-
tained as a result of participating in aviation or aeronautics. Thus it is clear
that this case comes under the second classification, and the court followed
the long line of precedent in interpreting the word “participating.”

The above indicates the manner in which the courts have construed avia-
tion insurance clauses in the past. When most of these clauses were framed,
the aviation industry was in its infancy. The terms used in the clauses had
entirely different meanings at the time, because aviation was considered an
adventurous undertaking for the pleasure of a few daring people. How-
ever, the courts today apply the present day meanings to terms which are in
many cases substantially different.14 This is due to the rapid growth of avia-
tion. It is now a recognized means of transportation, carrying thousands of
passengers a year and still expanding rapidly. Therefore, due to the con-
struction of the clauses, which were framed some years ago, in the light of
the present day knowledge of aviation the insurance companies have been
forced to assume risks that they never intended to contract for. They have
naturally desired to relieve themselves of this liability and have changed the
wording of the clauses, intending to abolish their ambiguity and broaden
their scope.

During the last ten years the courts have formed the two lines of pre-
cedent that are discussed above. The most recent clauses have been designed

11. 98 Fla. 1044, 124 S. 817 (1929).
12. 89 Cal. App. 772, 265 P. 400 (1928).
(1931); K. J. Kreml, “Aviation Insurance Law,” 2 Journal of Air Law 524
(1931); Ralph Straub, “The Air Passenger and His Insurance,” 33 Law Notes 105 (1929); and note by M. H. Braun, in 2 Air L. Rev. 77 (1931).
to avoid any controversy as to their meaning. Thus it seems that the clause used in the Mayer case, "engaging, as a passenger or otherwise, in submarine or aeronautic operations," meets both classifications. The word "engaged" takes care of those that are permanently connected with the aviation industry, and the phrase, "as a passenger," excludes the casual passenger from the risk insured against. Two courts have construed this clause and both arrive at the same conclusion. Thus it seems that the insurance companies have succeeded in framing a clause that will convey their intention and free them from a risk not bargained for.\(^1\)

WILLIAM G. KARNS.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COLLISION WITH HAYRAKE ON RUNWAY—ORDINARY CARE.—[Wisconsin] Plaintiff's airplane was returning to defendant's airport from the northwest, in a northwest wind. The plane skirted the west side of the field, circled the south end, and then approached the field from the southeast. In landing, the pilot was blinded by the sun, and the plane struck a hayrake which was on the runway. Plaintiff sued for the resulting damage to the plane.\(^3\) In the lower court, the jury found for the plaintiff. Held: on appeal, reversed. The pilot was negligent, as a matter of law, if he proceeded to land voluntarily at a time when he was unable, because his vision was obscured, to see the rake. Davies v. Oshkosh Airport, Inc., 214 Wis. 236, 252 N. W. 602 (1934), 1934 U. S. Av. R. 122.

Governmental regulation\(^2\) and flying technique require that normally a pilot, in landing a plane, do so into the wind, which in this case was from the northwest, with the result that plaintiff's pilot was landing into the sun, as well as into the wind. The decision in the instant case seems correct, since the pilot should have "spotted" the hayrake on the runway as he was skirting the west side of the field when the sun was at his back; but the court, in laying down a specific standard of care for all cases, has only acted to involve itself in all manner of future difficulties.\(^8\) In the principal case the pilot's failure to circle the field until he could get a clear view of the runway when his vision was unobstructed by the sun did constitute negligence. However, a different case would be presented if the pilot had been flying, for

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15. There are clauses in use today that allow recovery to a passenger killed while riding in a plane: see the case of Metropolitan Life Insurance Co. v. Conway, 252 N. Y. 449, 150 N. E. 642 (1930). For notes, see 30 Colum. Law Rev. 572 (April, 1930) and 78 Uni. of Penn. Law Review 914 (May, 1930); there was involved a policy that stated, "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." The court held a clause of this nature was consistent with the insurance statutes of the state. Also see the case, Leidinger v. Pacific Mutual Life Insurance Co. of California, 172 La. 41, 135 S. 85 (1931), note in 2 Journal of Air Law 602 (1931), which involved a policy with a clause that limited the liability of the company to the return of the paid premiums if the death of the insured occurred in aerial navigation, except as a fare-paying passenger in a licensed commercial aircraft, operated by a licensed pilot, and flying in a regular civil airway between definite established air ports. The insured was killed while a passenger in an airplane and his widow, the plaintiff in the case, was allowed recovery.

1. For an exhaustive treatment of the duties involved in a similar factual situation, see comment, 4 Journal of Air Law 276 (1933).


3. The same situation was presented in B. & O. R. Co. v. Goodman, 275 U. S. 68, 48 S. Ct. 25 (1927); and Pokora v. Wabash Ry Co., 54 Ill. 580 (1934); see note by S. N. Rittenberg, 29 Ill. L. R. 263 (1934).
instance, in a fog; the court's standard would force the cautious pilot to remain in the air until the fog lifted.

It has been held that, in the absence of statute, the rules applicable to torts on land generally govern accidents involving airplanes. In order to arrive at the decision in the instant case, the court accepted as a standard of reasonable care, the expert testimony that good practice requires that a pilot make as many turns as possible before landing so as to be able to see what is on the ground below. The court then reached its result by applying a formula of doubtful value even in automobile cases, to the effect that the driver of an automobile must halt when his vision is obscured; therefore a pilot, in order to be free from contributory negligence, must continue to circle about the field until he has a sufficient lookout to ascertain that the runway is clear!

The court seems to have erred in at least two respects: (1) The analogy between driving an automobile and landing an airplane is not perfect. When confronted by an obstruction to the vision, the activity required of a pilot to free himself of the charge of negligence is not comparable to that required of a motorist. However inconvenient it may be, it is a perfectly practicable thing to stop an automobile at the side of the road to wait for the removal of the obscurity, since such a position of repose can presumably be maintained indefinitely. But in flying an airplane there is certainly a limit to the time a pilot can continue to circle a field. Nor can it be said that there is no increase in danger to the pilot, his passenger, and persons on the ground while he thus waits for visibility to improve over an airport; the exact opposite is often the case. It is a matter of common knowledge that a pilot who hesitates, hoping for a light fog to clear and afford perfect vision, is likely to be rewarded for his caution with an increasing density of fog. (2) The rule of law referred to in the instant case, that the driver of an automobile is negligent as a matter of law if he proceeds when his vision is obstructed, is not universal but is subject to modification and exceptions based on considerations of necessity and practicability. For example, (a) a driver who encountered dense fog, being in the country with no facilities for putting up for the night, was held to be justified in proceeding through the fog on his way home with caution commensurate with progress under these conditions; (b) a driver who proceeded when his vision was interfered with by glaring


There can be no recovery for injuries if the person injured was guilty of contributory negligence: Peterson v. Kliingaard, 218 Cal. 516, 295 P. 64 (1931); Fletcher v. Boston & Maine Ry., 187 Mass. 463, 73 N. E. 552, 195 Am. St. Rep. 414 (1905); 20 R. C. L. Negligence (1929), §§ 87. Nor can there be recovery if the injury results from the negligence of the defendant's representative or agent, because the negligence of the representative or agent is, in law, the negligence of his principal: McLaughlin v. Pittsburgh Rys., 252 Pa. 32, 97 A. 107 (1919); 20 R. C. L. Negligence (1929), §§ 121, and 105, §§ 138.

lights, was held not to be negligent in not stopping, or so retarding his speed as to eliminate absolutely all chance of danger to a person who might be on the highway ahead of him, for, "if it were the duty of the driver to come to a practical standstill, it would be the duty of the other driver, who would no doubt be blinded in the same way, to act in the same manner, and it would lead to a practical stoppage of traffic;" (c) it was held that, in driving through fog, a driver need not drive at such a speed as to enable him to stop within the distance disclosed by his own headlights, as this rule would require him to stop when he is in a very dense fog, and if one driver stops in a fog bank until the fog clears, all must do so or the danger is thereby increased; therefore he may proceed in a careful and prudent manner, and what is careful and prudent will usually be a question for the jury.

The same consideration that prevents the application of the rule to automobiles in cases where it would increase danger is applicable to prevent the initial invocation of a doctrine essentially dangerous to aircraft. The presence of these various modifications of the general rule in automobile cases points the inherent weakness of a specific standard of care. Each new fact situation necessitates its alteration while if the general "prudent man" formula were employed alterations of fact might be brought within its broad outlines. Impractical in all cases, the specific standard should never be employed in cases involving aircraft where the consideration affecting judgment must needs be complex.

Neil B. Ross.

NEGLIGENCE—DAMAGES—COMMON CARRIERS—CONTRACTUAL LIMITATION OF LIABILITY FOR NEGLIGENCE.—[New York] Decedent bought a passenger ticket for a regularly scheduled air trip from Albany, New York, to Newark, New Jersey. The ticket read in part: "This passage ticket is issued by the company and accepted by the holder hereof on the following conditions: . . .

6. That the holder voluntarily assumes the ordinary risks of air transportation, and stipulates that the Company shall not be responsible save for its own neglect of duty, and that the liability of the Company to the holder hereof or his legal representatives in case of accident resulting in death or physical disability, in any event, and under any circumstances, is limited as follows: Class A Contract (Minimum Rate), Maximum Liability, $5,000.00, Class B Contract (Double Rate), Maximum Liability, $10,000.00, Class C Contract (Triple Rate), Maximum Liability, $15,000.00. "Company's ticket agents are provided with all three forms of contract. This is a Class 'A' Contract. "The Holder Hereof Has Read and Accepted The Forgoing Conditions of Passage."

[Signature of holder.]

The plane in which decedent rode, and its passengers were destroyed when, in making a landing in a fog, it struck against high tension electric wires. In a suit by the administratrix of the estate, the jury found that the company was negligent, and awarded damages, which by stipulation were reduced to some $50,000. On appeal, the company did not dispute its negligence, but set up the contract limitation of liability. Held: where the two cases referred to in the text.

passenger has no opportunity to choose between full and limited liability, with corresponding price differentials, the limitation is void as against public policy. Conklin v. Canadian-Colonial Airways, Inc., New York, 1935.¹

It is to be noted that the only choice given a passenger was between three grades of limited liability. Had there been a standard rate for an unlimited liability passage, and other standard rates, on a decreasing price scale, for limited liability passage, it seems that the clause would have been valid. The decision is directed against absolute exemption from unlimited liability for the carrier's negligence. The court correctly points out that the great weight of authority in this country opposes such contracts.² Some states, among them being New York, allow the absolute exemption in the case of gratuitous passage. The "voluntary choice" formula should allow air lines to reach practically the same result attempted to be reached by the contract now declared invalid.

There have been but few American cases before this one dealing with airline exemption clauses.³ Their cumulative effect has been to invalidate almost every type of suggested limited liability contract in use.⁴ The clause which offers a choice between three grades of limited liability was here nullified. A provision absolutely exempting the company from liability, leaving no choice of any kind, was early held to have no effect.⁵ An analogous immunity clause read: "in the event of the injury or death of the holder due to any cause for which the Company is legally liable, the Company's liability is limited to $10,000." In Curtiss-Wright Flying Service v. Glose,⁶ it was held invalid, on the ground that the policy of the law forbids a common carrier to compel passengers to release liability for negligence. Another device, not limiting damages to a named sum, but intended to reduce the degree of care required of the carrier, was nullified in Allison v. Standard Air Lines.⁷ The nugatory clause provided: "Should the Company accept the holder hereof for a flight in one of its airplanes, such acceptance shall not be deemed to make the Company a common carrier, but it is specifically agreed and understood between the holder and the Company that the Company is a private carrier and is liable to the holder not as an insurer, but only for proven negligence of its employees and agents and the mere occurrence of an accident resulting in injury or loss of life to the holder shall not be any evidence of negligence." The futility of attempting to contract away a legal status and its obligations is patent.

A fourth type of clause in use provides: "This is a Class A ticket. The fare under a Class A ticket is lower than under a Class B ticket. In consideration of said reduced fare, the passenger agrees that the company shall

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². For numerous citations, see 10 C. J. Carriers, §1164, note 76. The court assumed without discussion that the company was a common carrier. In Germany, it is not against public policy to contract against such liability. But the contract will be strictly construed against the carrier. Thus the clause "By participating in flight the passenger waives for himself and his legal representatives all claims for damages occurring medially or immediately through the use of the aircraft..." has been held not to exempt a carrier from liability for its negligence. See 1 JOURNAL OF AIR LAW 219 ff. (1930).
³. The writer has been able to find only three reported, all being in the Federal courts.
⁶. 66 F. (2d) 710 (C. C. A. 2d, 1933).
in no event be liable to said passenger, his heir or representative, for injury or damage to said passenger in an excess of $25,000." In view of the rule announced in the present case, this formula will probably be given effect, at least in New York.8

SAUL N. RITTENBERG.

NEGLIGENCE—FORCED LANDING—CONTRACTS—ACTION FOR DAMAGES BY LESSOR.—[Iowa] Plaintiff conducted a flying school where he gave a course of instruction in flying to defendant who then secured a private license from the United States Department of Commerce. Thereafter defendant entered into an arrangement with plaintiff whereby for consideration he was to be allowed to use the planes belonging to plaintiff and to be responsible for any damages sustained to a plane while he was flying. On the day of the accident, defendant secured permission to take up an Eagle Rock biplane belonging to plaintiff, with instructions to use it for not over fifteen minutes—plaintiff informing defendant that there was not much gasoline in the tank and that the latter should turn on the reserve tank. Plaintiff further instructed defendant to stay within gliding distance of the airport and not to fly over Iowa City. Shortly after taking off, and at an altitude of about 2,000 feet, the motor started sputtering and defendant headed the plane back toward the port, but as the plane was steadily losing altitude it appeared to defendant that it would be impossible for him to reach the port, and so he turned westward and made an emergency landing on a golf course and damaged the plane. Plaintiff sued in three counts for the resulting damage, the first two being on the contract and later withdrawn because defendant was a minor at the time of the alleged making of the contract, the third charging the defendant with negligence. The case was submitted to a jury on the third count alone and a verdict was found for the plaintiff. Held: on appeal, reversed. There was no evidence of negligence for the court to submit to the jury, and it was error on the part of the court to submit as one of the grounds of negligence that the motor was working normally at the time of the emergency landing. Shaw v. Carson, Iowa Supreme Court, decided November 13, 1934, 257 N. W. 194, 234 C. C. H. 3129.

For the first time the Iowa court has been confronted with a case involving the law of the air and its decision adds further support to the argument that courts at the present time are not adequately equipped with knowledge of flying technique to handle aviation cases which should rather be submitted to a body of experts in the field. The opinion reveals not only

8. J. K. Edmunds, supra note 3, thought that even this type of clause will be insufficient. It has not yet been judicially tested. An interesting conflict of laws problem is raised in the principal case. The contract was made in New York, but the accident occurred in New Jersey. Assuming a suit in tort, the plaintiff might well rely on the usually accepted rule that the law of the place of injury controls. That theory was useless in this case, of course, since the clause was void in the forum of the contract. The court here held that the usual contract rule applies, even though the suit is ex delicto, and the validity was to be determined by the lex loci contractus. It is a common device to hold, in cases of tort happening while a contractual relation exists, that the conflict of laws rules for contracts will govern, rather than those for torts. But cf. Lake Shore & M. S. Ry. Co. v. Teeters, 166 Ind. 938, 77 N. E. 599 (1906), where the contract was made in New York (where it was valid), the injury was in Indiana (where the limitation of liability was void), and suit was brought in Indiana. The public policy of the latter state was held to be strong enough to overcome the usual conflicts rule.
the awkwardness of the court in dealing with the problem but also the ineptitude of counsel in trying the case. The record presented the court was apparently replete with misinformation, and evidence of many important elements was omitted entirely. The proper result was reached, but in spite of the inexpert handling of the case.

The lower court submitted to the jury three grounds of negligence: (1) the failure of the appellant properly to make an emergency landing upon available emergency landing field as soon as the plane (motor) commenced to miss fire; (2) after the motor commenced to miss fire, the appellant conducted the airplane over the city of Iowa City, the Finkbine Golf Course, and then negligently and carelessly failed to land his plane on one of the available emergency landing areas; (3) at the time appellant reached a point over the golf course the motor began to function normally, and at that time no emergency landing was necessary. The Supreme Court based its reversal entirely on the error in the last allegation of negligence, although the first two as well might have been held erroneous.

Had the situation of this case been presented to experts, their efforts to fix the responsibility for the crash would have been controlled by entirely different and more determinative inquiries. The first would have involved the experience of the defendant in emergency landing. Apparently there was some evidence presented on this question but it was mishandled due to the court's failure to realize the important conclusion to which it might have been directed. The court is quite correct in its statement that "In the training course the student is taught that the first thing a flyer of a plane must do is to preserve life, and that as he is flying along through the air, listening to the hum of the motor, he must keep a continual lookout for emergency landing fields, for the ability of the plane to stay in the air and maintain its altitude depends upon the motor that is pulling the plane. . . . And so the pilot is trained to keep his eye peeled for what is known as an emergency landing field." While there are no regulations on this point, it is consistent with careful practice for the instructor to see that his student pilot "assimilates" forced landings. Shaw apparently had never given Carson such instruction since the court later states: "Carson was a young, inexperienced flyer. This was his first emergency landing. He had never before been confronted with the necessity of picking out from a distance of two thousand feet in the air a place to land his plane, with a motor that was not functioning properly." In view of the fact that defendant apparently had never even had instruction, to say nothing of practice, in forced landings, an expert would have been driven to the conclusion either that defendant exercised good judgment in heading for the golf course instead of trying to make the airport, or that the plaintiff was contributorily negligent in failing to give such instruction. Curiously enough, the defense of contributory negligence was not raised.

Certain other elements having a bearing on the conclusions to be drawn should have been brought out and considered by the jury as well as by the court, such as the direction and velocity of the wind, how much gas there was available in the reserve tank, what assurance there was that the motor had been properly maintained, and how much total flying time Carson had
had. The evidence on the cause of the motor difficulty is most unsatisfactory, that is, whether it was due to lack of fuel or from some mechanical trouble. The fact that it "missed fire" for a prolonged time would normally indicate that the motor failure was not due to lack of fuel. If, as is more plausible, it indicated some mechanical trouble, then the condition of the motor before Carson took the plane up should have been shown. Had the motor been "revved" up before the take-off? How long had defendant run it before taking-off? Was it operating normally when and if it was warmed up, or did it show signs then of "missing fire"? Did the plaintiff-owner supervise this customary preliminary process? Certainly it would constitute gross negligence and a violation of the regulations, if the pilot (as the opinion states) merely "cranked the motor, jumped in and took off"! At one point it appeared that the defendant himself testified that the motor had stopped running, and his witnesses bore him out in this conclusion. At another point there was testimony that the condition of the propeller after the accident showed that it must have been turning up one-half or one-quarter. The court, giving credence to the latter testimony, naively concluded that "certainly, in view of such evidence, it could not be said that the motor was working normally." The court was entirely misled on this point. Under normal landing conditions the motor should be turning at minimum speed and would not, as a matter of fact, be turning as high as one half or one quarter. In case of a forced landing, the motor should normally be cut entirely. The only conclusion that should have been drawn from the evidence, lacking more, is that the motor was not dead.

Another factor which is not brought out in the opinion or record is the possibility that Carson might have glided safely to the airport. Normally, the safe gliding ratio of a plane used for pleasure flying is seven to one. That is, at an altitude of 2,000 feet the normal gliding distance of Carson's plane would have been 14,000 feet or nearly enough to bring him back to the airport—a distance of three miles. Here again, the factors of wind direction and velocity might modify this statement. The particular type of plane used by Carson on that day, however, is notorious for its gliding ability, having instead of the usual seven to one ratio, a ratio of approximately eleven to one (dependent however on the type of motor used).

Taking the court's opinion piecemeal, one conclusion can be drawn: The evidence before the court is of practically no value. Consequently, the court is not to be criticized since it arrived at a satisfactory result without being aided by reliable or accurate evidence.

Lorraine Arnold.

DIGESTS

Air Mail—Nullification of Contracts by Postmaster General—Jurisdiction—Suits Against the United States.—[Federal] The United States Supreme Court on October 15, 1934, denied the petition for writ of certiorari in Transcontinental & Western Air, Inc. v. Farley, 234 C. C. H. 3123.

For digest of the facts in this case see 5 Journal of Air Law 658 (1934).
NOTES, COMMENTS, DIGESTS

AIR MAIL—CANCELLATION OF CONTRACTS—REMEDY AT LAW.—[District of Columbia] The several plaintiff-appellants had been awarded contracts for the carrying of air mail over the various routes designated in the respective contracts, which contracts in effect were breached by Postmaster General Farley's order of February 9, 1934. Held: decrees dismissing the bills in equity affirmed, since the government may not be required in equity to specifically perform its contracts and since the holders of the contracts have an adequate and complete remedy at law if the breach of the contracts operated to deprive them of their property rights without due process of law. Boeing Air Transport, Inc. v. James A. Farley, National Air Transport, Inc. v. Same, Pacific Air Transport v. Same, Varney Air Lines, Inc. v. Same. Court of Appeals, District of Columbia, February 4, 1935. 235 C. C. H. 4001.

CONTRACTS—AGENCY TO DISTRIBUTE AIRPLANES—ASSIGNMENT—CONSTRUCTION—EVIDENCE.—[California] The California Supreme Court on December 28, 1934, affirmed the decision of the California District Court of Appeals, 2nd Appellate District, adopting the opinion of the District Court of Appeals "as and for the decision of this Court." Ruckstell Corp., Ltd. v. Great Lakes Aircraft Corp., 89 Cal. Dec. 46.

For digest of the facts of this case, see 5 JOURNAL OF AIR LAW 660 (1934).

NEGLIGENCE—AIRCRAFT COLLISION—AIR TRAFFIC RULES—RES IPSA LOQUI TUR.—[California] On January 2, 1930, Fox Film Company, engaged in the business of producing motion pictures, entered into a written contract with respondent James E. Granger, Inc., to furnish one Lockheed Vega cabin plane and two "Whirlwind planes" as camera planes, at stated prices per day, in first-class condition and with licensed pilots to operate the same, to be used under direction of Kenneth Hawks as director and Max Gold as assistant director of the Fox Film Company in the filming of a picture showing a parachute jump over the Pacific Ocean. James E. Granger, Inc., obtained and furnished the services of a Lockheed Vega plane with Captain Roscoe Turner as lawfully licensed pilot thereof, and made arrangements to hire from Tanner Motor Livery, a corporation, also a respondent herein, two Stinson planes for use as camera planes, with licensed pilots to operate the same, agreeing to pay therefor a hire fixed in terms of dollars per hour. These planes and pilots were offered by James E. Granger, Inc., to Fox Film Company and by it approved and accepted for use in making the picture. After dual controls were installed in the Stinson planes and cameras mounted therein, and Hawks had given detailed directions as to the course of the flight and the positions of the planes when photographing was to be done, the flight of the three planes commenced. Captain Turner was pilot of the Lockheed Vega, carrying the parachute jumper; Hallock Rouse, a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of one Stinson plane, with Max Gold sitting beside him at the dual control, and Ross Cook, also a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of the other Stinson plane, with Hawks sitting beside him at the dual control. Neither Hawks nor Gold was a licensed pilot. Six other employees of Fox Film Company, participating in the picture making, were divided between the two Stinson planes. While flying out over the bay in a general southwesterly direction on a designated course to be followed for a distance with return thereon, the Lockheed Vega was in the lead, one Stinson to its left and rear, the other to the left and somewhat to the rear and below the first Stinson. The Lockheed Vega allowed the two Stinsons to pass and then made a left turn to follow the return course. Thereupon the two Stinsons commenced to make a left turn, when the leading one appeared to slide sideways, the tips of the wings on the two planes touched, then their noses came together, there was an
explosion, and both planes fell into the ocean carrying to their death all the occupants thereof.

Eight separate actions were commenced by the heirs or personal representatives of persons who lost their lives in a collision between two airplanes. The cases were consolidated and tried together, and from judgments in favor of defendants these appeals are taken: Held: (1) The orders denying the motions for judgment notwithstanding the verdicts are affirmed, and (2) the judgments for defendants are reversed.

The flight of the planes herein mentioned was intrastate, and under the federal Constitution and the California Aircraft Act enacted in 1929 the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights. No such rules had been made by the legislature when the accident herein occurred, and the conduct of the pilots and others involved in the accident would be measured and judged only under the general law and rules of negligence pertinent and applicable to the case. The federal regulations pertaining to air traffic offer nothing therein of which the court was charged with judicial notice and which the court was called upon to declare to the jury.

Concerning the applicability of the doctrine of res ipsa loquitur, the court relied upon the holding in Steele v. Pacific Electric Ry. Co., 168 Cal. 375, to the effect that a prima facie case of negligence having been once established by the evidence under the operation of the doctrine in question, the duty devolves upon the defendant to explain how the accident occurred, and to show that he was without negligence or that it was the result of causes beyond his control, in order to secure relief from responsibility. Thomas H. Parker v. James E. Granger, Inc., —Cal. App —, 39 P. (2d) 833 (Dec. 31, 1934).