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PROPOSED LAW OF AIRFLIGHT*

PAUL M. GODEHN, GERALD B. BROPHY, FRANCIS D. BUTLER
and HAMILTON O. HALE†

I. INTRODUCTORY.

On May 13, 1937, Colonel Edgar S. Gorrell, president of the Air Transport Association of America, appointed the undersigned committee and instructed it to present to the American Law Institute, the American Bar Association and the National Conference of Commissioners on Uniform State Laws, criticisms and suggestions with reference to the proposed Uniform Aviation Liability Act, Uniform Law of Air Flight, and Uniform Air Jurisdiction Act.

The Air Transport Association of America is a voluntary association created by an agreement between corporations engaged in scheduled air transportation. Substantially all of the members of the association are air mail contractors. At the present time the Association has the following seventeen members, all of whom are engaged in domestic air commerce: American Airlines, Inc., Boston-Maine Airways, Inc., Braniff Airways, Inc., Chicago and Southern Air Lines, Inc., Continental Air Lines, Delta Air Lines, Eastern Air Lines, Hanford Airlines, Inc., Inter-Island Airways, Ltd., National Airlines System, Northwest Airlines, Inc., Pennsylvania-Central Airlines Corp., Transcontinental & Western Air, Inc., United Air Lines Transport Corporation, Western Air Express Corpora-

† A committee appointed by Colonel Edgar S. Gorrell, President of the Air Transport Association of America.
tion, Wilmington-Catalina Airline, Ltd., Wyoming Air Service, Inc.

Pan American Airway System is an associate member of the Association and is engaged in overseas and foreign air commerce. Canadian Airways, Ltd., operating in Canada and from Vancouver to Seattle, is also an associate member.

The report submitted by the undersigned Committee contains the unanimous views of its members as to the proposed legislation and sets forth the criticisms and suggestions of the Committee with reference to the proposed acts, with its reasons in support thereof.

The Committee acknowledges its indebtedness for invaluable assistance rendered by Mr. Howard C. Westwood of the District of Columbia Bar, Mr. Frank E. Quindry of the Chicago Bar, and Mr. James P. Kearney of the Northwestern University School of Law.

All references in this report are directed to the pamphlet published by the American Law Institute entitled "Law of Airflight, Tentative Draft No. 1," under date of April 7, 1937. * * *

II. The Uniform Aviation Liability Act.

A. Definition of Aircraft, Section 1 (a), Page 9, Lines 3 to 5.

"1 (a) Aircraft means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air."

This is a copy of the definition of aircraft contained in the Air Commerce Act of 1926 (49 U. S. C. 179), except for the omission of the following:

"except a parachute or other contrivance designed for such navigation but used primarily as safety equipment."

Congress considered the above exception necessary, evidently being of the opinion that the Air Commerce Act would be applicable to parachutes, unless the exception was made. If a similar exception is not incorporated in the Uniform Aviation Liability Act, a person descending in a parachute will come within the meaning of the definition of a passenger in Section 1 (e). If a person were injured in making a parachute descent from an airplane, engaged by him for this purpose, a strange situation would exist if the owner of the airplane also owned the parachute. Such owner would be liable under the terms of Section 3 to the extent of $10,000 for injuries sustained by the parachute "passenger" in a descent undertaken from choice and not necessity and possibly for compensation. The same liability would apply to the owner of the
parachute if he were not the owner of the airplane. Such situations may arise as a practical matter. Many parachute descents are undertaken from choice and the practice is certainly hazardous. Parachute descents, whether arising from necessity or choice, should be removed, in the opinion of the Committee, from the operation of the proposed uniform act. Such removal would not affect the liability under Section 3 of the owner of an airplane to a passenger compelled to use a parachute by reason of prospective crash of the plane.

B. Definition of Land, Section 1 (b), Page 9, Lines 6 and 7.

"1 (b) Land means the surface of the earth, and includes both ground and water."

Section 2 of the proposed statute imposes liability irrespective of negligence for "injuries within this state to individuals or property on the land." Notwithstanding the enlargement of the meaning of "land" to include water, Section 2 would not be applicable to injury or damage occasioned on navigable waters by a hydroplane. In Reinhardt v. Newport Flying Service Corp., 232 N. Y. 115, 133 N. E. 371, the court held that a hydroplane was a vessel subject to admiralty jurisdiction when afloat in navigable waters and that therefore an injury caused by such hydroplane could not be compensated under a State workmen's compensation act. Any structure used or capable of being used for transportation on water is a vessel (1 U. S. C. 3) and injuries or deaths caused by such vessels in navigable waters come within the jurisdiction of admiralty (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149; Chelentis v. Luckenbach Steamship Co., 247 U. S. 372; Southern Pacific Company v. Jensen, 244 U. S. 205, 216. See, however, The Hamilton, 207 U. S. 398).

This limitation of jurisdiction would exist in our opinion as to hydroplanes either landing, taking off or afloat on navigable waters. Whether admiralty jurisdiction would exist as to an airplane crashing on navigable waters, otherwise than in making an intentional landing with a hydroplane, has not been passed on in any reported case relating to aviation, but such a situation might be held to come within the admiralty rule that a cause of action originating upon land and completed on navigable water is within the jurisdiction of admiralty (Smith v. Lampe, 64 Fed. (2d) 201, 6th C. C. A.; Dorrington v. City of Detroit, 223 Fed. 232, 6th C. C. A.). Admiralty jurisdiction probably would not exist as to a hydroplane

The National Conference of Commissioners on Uniform State Laws recognized this limitation of jurisdictions by incorporating the following provision in Section 1 of the Uniform State Law for Aeronautics,

"A hydroplane, while at rest on water and while being operated on or immediately above water, shall be governed by the rules regarding water navigation."

Section 6 provides that liability in cases of collision between aircraft shall be determined by the rules of law applicable to collisions on land. There are some differences in common law rules applicable to torts on land and maritime rules applicable to collisions on navigable waters, with respect to questions such as contributory negligence as a defense (Panama Railroad Co. v. Johnson, 264 U.S. 375). Section 6 covers all collisions between aircraft "on land or in the air," and no matter where a collision might occur—at an airport, on navigable waters or in the air—questions of interpretation will arise under a statute providing that liability shall be determined by rules of law applicable to collisions on both ground and water. When the definition of "land" is read into Section 6, the statute provides that liability for collision shall be determined "by the rules of law applicable to collisions on both ground and water." We have never heard of any such collision. If Section 6 with the definition of "land" incorporated therein, means that both admiralty rules and common law rules are to be applied to determine liability for a particular collision, we repeat that some of the rules are different, so that a court might find it impossible to apply the rules of both branches of law. If Section 6 is intended to mean that liability for collision between aircraft on land or in the air shall be governed by rules of law applicable to collisions on land, and that collisions between aircraft on water shall be governed by rules of law applicable to collisions on water, then either the definition of land or Section 6 should be recast to express that meaning.

C. Definition of Operator, Section 1 (c), Page 9, Lines 8 to 10.

"1 (c) Operator means the individual (ordinarily the pilot) who is in direct physical control of the movement of aircraft during or incidental to flight."

The word "operator" is not used in the statute, except in Sec-
tion 6 relating to collision between aircraft and in Section 8 relating to service of process on non-residents.

Section 6 of the Act provides that liability of the owner or the operator of an aircraft, to the owner, operator or passenger of another aircraft or the owner or shipper of goods thereon, for damage, injury or death caused by collision, shall be determined by the rules of law applicable to collisions on land.

In order to determine the wisdom of making "direct physical control" the test to determine who is an operator under Section 6, let us assume that an airplane is being flown from west to east at an altitude of 8000 feet, contrary to Department of Commerce regulations (Aeronautics Bulletin 7, Sec. 70 as amended July 14, 1936), and that the result is collision with a westbound airplane properly flying at the same altitude. Then liability imposed by Section 6 on the operator, as defined in Section 1 (c), would rest on the person who was handling the controls when the collision occurred. If that person happened to be the co-pilot, would he be liable under the proposed Act even though he may have been flying at 8000 feet pursuant to directions from his superior, the pilot, and notwithstanding the Department of Commerce regulation (Aeronautics Bulletin 7E, Chap. 5, Sec. 1) providing that "the first pilot shall be in command during the operation and navigation of aircraft"?

A further objection to the definition of "operator" is found in the difficulty of proof, which would be encountered in cases of destruction of an airplane in a collision. It might often be impossible in such cases to determine who had physical control when the collision occurred.

"Operator" as now defined in the proposed Act means the person in direct physical control "during or incidental to flight." Ground personnel exercise certain control over flights in scheduled operations, which might properly be characterized as control "incidental to flight," but would not be considered "direct physical control." Therefore, there would be no liability under the statute against any member of ground personnel for a collision, even though it was clearly due to his negligence. For example, if a pilot should receive directions from the person in charge of a traffic control tower at an airport to take off on a certain runway, notwithstanding the fact that another airplane, not visible to the pilot, was about to land on the same runway, a resulting collision would clearly be due to the negligence of the person who gave the erroneous direction. In such a case the pilot flying the airplane would
not be liable under Section 6 (d) of the Act, because of the absence of any negligence on his part, and the person actually responsible would not be liable under the statute, because he would not come within the meaning of "operator," though he might be subject to a common law liability.

Four-engine airplanes are now being constructed for use by domestic airlines. They will require a larger crew than present aircraft and the crew may include a flight officer, who will not handle the controls but will have power to direct actual flying by the pilot and co-pilot. If the negligence of such a flight officer should cause a collision, he would not be liable under the statute, because he would not have "direct physical control" within the meaning of the definition of "operator," and the pilot having such physical control might escape liability under Section 6 (d), on the ground that the execution of orders received from his superior officer could not be said to be negligence on his part.

It is difficult to suggest a satisfactory definition of the term "operator." Whether the test is the exercise of "direct physical control," or the exercise of executive control, the result will be unsatisfactory as applied to particular cases. A collision may be caused by the negligence of a pilot in physical control or by another exercising executive authority over flight, or by a combination of both, or by a person who has neither physical nor executive control, but gives erroneous information to a pilot. During a flight in bad weather and poor visibility, the pilot of an airplane might give erroneous information by radio, as to his location, and the relaying of this information to another airplane, might cause a collision without physical control having anything to do with the accident. In order to place liability where it actually belongs, each case will have to be decided on the basis of the facts involved by a court or jury and not by a rule of statutory law to be applied to all cases.

If the definition is to be retained in the Act, a further question arises. Why should an operator (not an owner) who has "direct physical control" of an airplane be liable under Section 6 if his negligence causes a collision with another airplane, and not be liable under Sections 2 or 3 if his negligence causes collision with a house or a mountain? It may be urged that the distinction is proper, because liability under Sections 2 and 3 is imposed in a limited amount irrespective of negligence, whereas liability of an operator for causing a collision between aircraft does not exist under Section 6 in the absence of negligence. However, Sections 2 and 3 are silent with respect to liability of an operator (not an owner)
PROPOSED LAW OF AIRFLIGHT

and therefore common law liability may exist against him as a result of accidents other than collision of aircraft, notwithstanding the statute. To establish such a common law liability, there would have to be proof of negligence and absence of any contributory negligence by the plaintiff. This would not be true, however, in cases of collision between airplanes, because Section 6 purports to cover liability of an operator (not an owner), and says nothing whatever about contributory negligence as a defense. Therefore, if the proposed Act is adopted in its present form, an owner will be liable under Sections 2 and 3 for acts coming within the scope of those sections, but only in a limited amount, whereas an operator (not an owner) will be subject to a common law liability for an unlimited amount for the same acts with the further distinction that contributory negligence will be a defense against liability on the part of an operator (not an owner) in all cases, unless the damage, injury or death is caused by collision between aircraft.

The common law liability of the "operator" is not affected in the slightest by any provision of the proposed Act, nor is any additional liability imposed other than the submission of the "operator" to service of process under Section 8. In view of this, and because of the difficulties of interpretation indicated above, it is suggested that the definition of the term "operator" be eliminated. If, however, the definition of "operator" is to be retained, we suggest the possibility of defining an operator as the person who exercised such control of the aircraft as to result in the accident in question, with a prima facie presumption that the pilot was the operator.

D. Definition of Owner, Section 1 (d), Page 9, Lines 11 to 23.

"1 (d) Owner means the person whose consent is necessary for the operation of an aircraft. The person in whose name an aircraft is registered with the Department of Commerce of the United States shall be prima facie the owner thereof. Unless he is the person actually causing the aircraft to be operated, the holder of the title shall not be deemed the owner during a bona fide lease or bailment to another, nor shall a mortgagee, conditional seller, trustee for creditors, or other person having a security title only, be deemed the owner. A person shall not be deemed the owner if the aircraft has been taken from his possession without his consent or acquiescence."

The definition of "Owner" is important, because liability under Sections 2, 3 and 5 is imposed against the "owner" and against no one else. Therefore, this definition should be considered to ascen-
tain whether it includes all classes of persons who should be liable and whether it imposes liability against anyone who should not be liable.

The proposed definition does not purport to cover situations which will arise with respect to air flights conducted by independent contractors. There are a number of decisions relating to the question of liability or non-liability of one who engages an independent contractor to conduct a flight, for injuries or damage caused by the action of an independent contractor. The person engaging the independent contractor has been held liable in such cases whenever it appeared that the damage or injury was due in whole or in part to his negligence.  

Assume that A engages B, a pilot, to advertise A's product by sky writing; that B leases the airplane to be used for the flight from C and that because of the pilot's negligence, the airplane crashes, causing injury and damage to persons and property on ground. Under the common law, A, who caused the flight to be made, and C the owner of the airplane might or might not be liable, depending upon the facts involved. B, whose negligence caused the crash, would clearly be liable in the absence of any contributory negligence by the person injured or damaged. Under the proposed statute, neither A, B nor C would be liable. A could not reasonably be construed to be "the person whose consent is necessary for the operation of an aircraft" as to an airplane owned by C and piloted by B. Nor would the pilot and non-owner come within the meaning of the quoted words, and C, the owner would escape liability because the definition of "owner" provides that "the holder of the title shall not be deemed the owner during a bona fide lease or bailment to another."

1. Platt v. Erie County Agricultural Society, 149 N. Y. Supp. 520 (Defendant held liable for injuries received by a child who was struck by the wing of an airplane, on the ground that it neglected to provide adequate safeguards for spectators). Roper v. Ulster County Agricultural Society, 120 N. Y. Supp. 644 (Defendant held liable for injuries to a spectator who was caught by a rope attached to an ascending balloon, on the ground that it failed to erect barriers around the balloon). Peck et al. v. Bergen Beach Co., 60 N. Y. Supp. 966 (Defendant held liable for injuries caused by the breaking of a cleat used to anchor a balloon). Richmon & M. Ry. Co. v. Moore, 94 Va. 493, 27 S. E. 70 (Defendant held liable for the death of a boy caused by the fall of one of the poles used to steady a balloon). Morrison v. MacLaren. 150 Wis. 621, 152 N. W. 475 (Wisconsin State Board of Agriculture held not liable for injuries caused by an airplane engaged for public exhibition purposes, there being no evidence of negligence on the part of the members of the Board and the State Board being a governmental agency engaged in a governmental function). Burns v. Herman, 48 Colo. 359, 113 Pac. 310 (Association conducting a balloon ascension held not liable to a spectator who entered without a ticket and did not remain in the grandstand). Smith v. Benick, 87 Md. 610, 41 Atl. 56 (The operator of an amusement park held not liable for damage caused by a balloonist exhibiting as an independent contractor). Canney v. Rochester Agricultural & Mechanical Assn., 76 N. H. 60, 79 Atl. 517 (Defendant held liable for injury caused by a falling balloon operated by an independent contractor, on the ground that defendant should have known that such injury might result from the descent of the balloon).
This may be consistent with the intent of the framers of the statute and we therefore only call attention to the omission and to the fact that independent contractors are frequently engaged to conduct flights for various purposes, such as sky writing, photography, broadcasting, motion pictures, dusting operations and aerial exhibitions.

The leasing of airplanes is a fairly common practice and scheduled air transportation is frequently conducted with leased airplanes. The proposed definition of "owner" does not appear to contain any words designed to cover a lessee of aircraft who is responsible for an accident. This omission is no doubt intentional, because a prior draft of a proposed uniform act prepared by the Aviation Committee of the Commissioners on Uniform State Laws and the Committee on Aeronautical Law of the American Bar Association contained a provision to the effect that the word "owner" as used in the statute "shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire." (Vol. 3 Journal of Air Law, 632, 644.)

The definition of "owner" does not purport to cover pilots actually operating airplanes, except in cases where the pilot is also the owner. Pilots who are not owners are subject to no statutory liability, except under Section 6 for collision between aircraft, and the possible reasons for this distinction have already been considered in connection with the definition of "operator."

The definition of "owner" provides in part:

"Unless he is the person actually causing the aircraft to be operated, the holder of the title shall not be deemed the owner during a bona fide lease or bailment to another."

The italicized words are evidently designed to cover the contingency that an owner of an airplane might lease it to another, but nevertheless operate the airplane or cause it to be operated when the lease is in effect. The meaning of the phrase "causing the aircraft to be operated" is not clear. It might be construed to mean that the owner in such a case is liable, notwithstanding the lease or bailment, if he "causes" a flight to be made by the lessee or bailee, or to mean that the owner is liable when a lease is in effect only if he actually operates the airplane himself.

Assume that A, a pilot and owner, leases his airplane to a charter service company and hires out as a pilot. If he pilots his own airplane he is subject to liability under Sections 2, 3 and 6. If he pilots a similar airplane owned by his employer he is subject
to liability only under Section 6. The liability of the charter service company likewise depends upon such nonessentials.

We believe this section should be recast to cover the person who exercises the attributes of ownership in connection with the flight in question, whether he be lessor or lessee, bailor or bailee.

E. Definition of Passenger, Section 1 (e), Page 9, Lines 24 to 29.

"1 (e) Passenger means any individual in, on or boarding an aircraft for the purpose of riding therein or alighting from the aircraft following a flight or attempted flight therein excluding, however, any individual operating the aircraft as a pilot or serving as a member of the crew of the aircraft."

This definition in connection with Section 3 relating to liability for injuries or deaths of passengers carried for compensation, would impose liability, irrespective of negligence in cases where liability should not exist.

Stowaways or their estates should not have a cause of action for injury or death occurring when they are illegally in flight. Nor should an owner be liable to a person who illegally attempts to board an airplane and is thereby injured. Such cases might come within the exception relating to "wilful misconduct" in Section 2, on the ground that illegally boarding or attempting to board an airplane amounts to wilful misconduct, but a claimant would no doubt contend that the injury or death was not caused by such wilful misconduct. The doubt should be removed by making the definition of passengers include only individuals "legally" in, on or boarding an aircraft.

The proposed definition of passenger would also be construed to include non-revenue passengers. Section 3 of the statute imposes liability irrespective of negligence only as to owners of aircraft carrying passengers for compensation. Section 4 recognizes that owners of aircraft not carrying passengers for compensation should not be liable in the absence of negligence. Scheduled airlines very frequently carry both revenue and non-revenue passengers on the same trip. In such a case, would a claim for injury by a non-revenue passenger come within Section 3 or Section 4? The airline would be able to establish that it was not carrying the particular passenger for compensation, but the non-revenue passenger would maintain that Section 3 applied because, when the injury occurred, the airline was engaged in carrying other passengers for compensation. If such a question were decided adversely to the airline, then the law would probably be that an airline operating a
trip (such as the courtesy flights commonly conducted by airlines) for non-revenue passengers exclusively is not liable for injuries to them in the absence of negligence, but if it mingles revenue with non-revenue passengers on a particular trip, then it is liable to all passengers, both revenue and non-revenue, regardless of negligence. Even this is not entirely free from doubt, as the words in Section 3, "carrying passengers for compensation," in the phrase "the owner of aircraft carrying passengers for compensation," might be construed to modify the word "owner" and not the word "aircraft," so that if the owner were engaged in the business of transporting passengers for hire he would be liable, irrespective of negligence for injuries resulting from a particular trip operated with non-revenue passengers exclusively.

This difficulty arising from the inclusion of non-revenue passengers within the definition of "passenger" cannot be cured by limiting the definition to persons paying a fare, because in Section 4 of the Act the term "passenger" definitely refers to a person who does not pay a fare.

The only exception contained in the definition of passenger is "excluding, however, any individual operating the aircraft as a pilot or serving as a member of the crew of the aircraft." The italicized words intimate that a pilot is not a member of the crew and could be eliminated without changing the intended meaning of the phrase.

The exception should be enlarged to include employees of the owner of an aircraft traveling in discharge of their duties. Air transportation is extensively used by numerous employees of scheduled air lines traveling on company business, and the proposed legislation should not remove such employees from the operation of the workmen's compensation acts. The definition of "passenger" does not remove members of the crew of an airplane from the operation of the workmen's compensation acts and no reason is perceived why other employees of the owner of an airplane, while in discharge of their duties, should receive different treatment. Furthermore, the statute as now written would be unconstitutional on this ground in Wyoming and possibly also in other jurisdictions. Section 4 of Article X of the Constitution of Wyoming, relating to compensation for injuries to employees, provides that the right of employees to compensation from the State fund

"shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such
fund in favor of any person or persons by reason of any such injuries or death."

F. Liability for Injuries to Persons and Damage to Property on the Ground, Section 2, Pages 10 to 11, Lines 1 to 54.

"2 (a) For injuries within this state to individuals or property on the land, the owner of any aircraft, except a public aircraft, shall be liable, regardless of negligence to those, or to the personal representatives of those, injured in person or property, by the ascent or descent or attempt to ascend or flight or other movement of an aircraft, or by the falling or dropping of any object therefrom, unless the injury was caused by the wilful misconduct of the party injured in person or property, as follows:

(1) For personal injury or death, to the extent of the actual damage, but not exceeding ten thousand dollars ($10,000) for injury to or death by any one individual, and not exceeding maximum amounts, varying according to the horsepower of the aircraft, for injury to or death of any number of individuals in any one accident, as follows:

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(2) For property damage, to the extent of the actual damage, but not exceeding five dollars ($5.00) for each pound of the weight of the aircraft fully loaded, and not exceeding a maximum of one hundred thousand dollars ($100,000).

(3) For the purpose of this Section, the horsepower or weight fully loaded of an aircraft as stated in the application for registration filed with the Bureau of Air Commerce of the Government of the United States shall be conclusive; and a photostatic copy, duly certified, of such application shall be received in evidence in the courts of this state. In order to limit his liability under this Section, the burden of proving the horsepower or the weight fully loaded of an aircraft shall be upon the owner thereof.

(b) This Section shall not impose liability for injuries to or death of passengers, or of employees of the owner of the aircraft, or for loss of or damage to baggage, personal effects or goods on the aircraft at the time of or immediately prior to the accident.

(c) Any person or his personal representative may elect, notwithstanding the provisions of this Section, to seek to recover from the owner of an aircraft for negligence resulting in injury to individuals or property on the land, but in any proceeding to impose liability otherwise than under this Section such person or his personal
representative must prove affirmatively the cause of the accident and that it was caused by the negligence of the owner or of his agent."

A great many questions of interpretation are presented by Section 2. We have called attention to the possible conflict with admiralty jurisdiction arising from the use of the word "land" in Section 2 as defined in Section 1 (b). We have also called attention to the fact that under Section 2 (a) only the "owner," as defined in Section 1 (d), is liable and that Section 2 (a) does not assert liability against persons employing independent contractors to conduct flights, or to lessees or bailees operating aircraft, or to pilots who are not also owners.

Section 2 (a) exempts the owners of public aircraft from liability but, in certain jurisdictions at least, a remedy would nevertheless be available under existing law for injuries or damage to persons or property caused by public aircraft. In Sollak v. State of New York, 1929 U. S. Aviation Reports, page 42 (New York Court of Claims), an airplane operated by the State of New York, pursuant to orders and directions of the Governor, by an officer in the service of the military department of the State, was so negligently operated as to collide with an automobile in which the claimant was riding on a public highway. The Court held that the claimant was entitled to recover from the State of New York $938.00 for expenses and loss of personal effects and $6,000 damages for injuries.

Section 2 (a) provides for liability "regardless of negligence." We construe this phrase to mean that liability shall be imposed against an owner regardless of proof of either the absence or existence of negligence and regardless of lack of proof of either negligence or freedom from negligence. Section 2 (a) (1) provides that liability shall exist to the extent of "the actual damage." Therefore, it is our opinion that the statute means not only that liability shall be imposed "regardless of negligence," but also that damages must be assessed without reference to the character or degree of negligence which causes an accident. Liability of an owner for injury or death resulting from an accident caused by a latent defect in equipment, not discoverable by inspection or use, will be exactly the same as to amount as in the case of an accident caused by an unlicensed airplane operated by an unlicensed pilot while under the influence of liquor. Under existing laws, juries in assessing damages for injuries or deaths caused by wrongful acts,
may in many jurisdictions award exemplary damages when gross negligence exists (17 Corpus Juris, pp. 977 and 1321). In some jurisdictions statutes expressly provide that juries in such cases shall assess such damages as are fair and just, having regard to mitigating or aggravating circumstances or the degree of culpability of the defendant. (Sec. 3 of Chapter 50 of Col. Statutes Annotated, 1935; Sec. 5 of Chapter 229 of General Laws of Mass., 1932; Sec. 3264 of Missouri Statutes Annotated; Sec. 36-104, New Mexico Statutes Annotated, 1929.)

If Section 2 is properly construed to prevent an award of exemplary damages for injury or death by wrongful act, it might in a particular case violate Section 26 of Article XVI of the Constitution of Texas, which provides that every person or corporation that may commit a homicide through wilful act, or omission, or gross neglect, shall be responsible in exemplary damages.

Section 2 (a) does not purport to impose liability against an operator of aircraft, unless he is also the owner. As previously pointed out, an operator who is not an owner may be liable, notwithstanding the statute, at common law for damages in an unlimited amount. Furthermore, some other person, neither an owner nor an operator, whose act or negligence causes an accident, may likewise be liable at common law, notwithstanding the statute. These considerations raise the following questions:

1. Whether a recovery at common law against an operator (not an owner) or against some other person whose act or negligence caused an accident, would bar a second recovery against the owner under Section 2.

2. Whether an owner held liable under Section 2 would have a right of contribution from an operator or from any other person whose act or negligence may have caused the accident, either for the full amount of the liability established against the owner if the owner was free from negligence, or from some part of such amount if the owner’s negligence contributed to the accident.

The only exception made to the imposition of liability without fault under Section 2 is—

"unless the injury was caused by the wilful misconduct of the party injured in person or property."

If this exception is retained in its present form, the owner of aircraft will be liable under the statute for injury or damage to persons or property on the ground, even if it affirmatively appears that the accident causing the injury or damage was due to the negligence
of the claimant or of his agents. Owners of tall structures located near airports, or on the routes of scheduled air lines, are frequently required to maintain red obstruction lights during hours of darkness. (See Air Commerce Act of 1926, as amended, 49 U. S. C. A. Sec. 175 (a) and Communications Act of 1934, 47 U. S. C. A. Sec. 303 (q). If a person subject to such requirements should, through mere negligence, fail to maintain obstruction lights on a particular night and thus cause the crash of an airplane, resulting in damage to the structure, as well as destruction of the airplane, and injuries to or deaths of its occupants, the person guilty of the negligence which caused the accident would nevertheless have a valid claim against the owner of the airplane under Section 2 of the Act. In framing the Uniform State Law for Aeronautics, the National Conference of Commissioners on Uniform State Laws recognized the fact that mere negligence of the claimant should be a bar to recovery. Section 5 of the Uniform State Law for Aeronautics imposes liability regardless of negligence,

"unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured."

A further objection to Section 2 (a) is illustrated by the recent decision of the Court of Appeals of Maryland in *State, to Use of Birckhead v. Sammon*, 189 Atl. 265. An airplane in landing at an airport struck and killed a boy who was riding a bicycle across the airport. The Court held that the pilot of the airplane was not subject to absolute liability under Section 5 of the Uniform State Law for Aeronautics. However, the Court reached this conclusion because Section 4 of the Maryland statute provided that the landing of aircraft on the lands or waters of another, without his consent, was unlawful, except in case of a forced landing. The Court held that the two Sections should be construed together and said:

"The terms of the two interrelated sections do not, in our opinion, permit the interpretation that they were intended to apply to the authorized landing of airplanes at an airport."

Neither the proposed Uniform Aviation Liability Act nor the proposed Uniform Law of Airflight contains a provision similar to that part of Section 4 of the Maryland Act which was relied upon by the Court to sustain its conclusion that Section 5 was applicable only to landings constituting a trespass. In the absence of such a provision a literal interpretation of Section 2 (a) would have rendered the pilot liable, had the proposed Uniform Aviation Lia-
bility Act been in force in Maryland at the time, regardless of negligence of the airport proprietors in permitting the child to go upon the airport, and regardless of the amount of care which the pilot might have exercised to avoid striking the boy,—unless riding a bicycle across an airport constitutes wilful misconduct within the meaning of Section 2 (a).

Section 2 (a) (1) provides that total liability in any one accident shall be measured “according to the horsepower of the aircraft” and sets forth a graduated scale of total liabilities ranging from $20,000 for 200 horsepower or less to $100,000 for 901 horsepower or more.

If two airplanes should collide and cause injury to persons and damage to property on the ground, the determination of who should be liable and how the limitations of total liability should be applied under Section 2 might present insurmountable difficulties. Assume that an airplane owned by A, powered with an engine producing 200 horsepower, collides in the air with an airplane owned by B, powered with an engine producing 500 horsepower, and that the crash of the two airplanes is due solely to A’s negligence and results in the death of ten persons on the ground. Who would be liable and how would the limits of liability be determined under Section 2? The Act says that the owner of the aircraft shall be liable, but both A and B are owners. If B’s airplane should happen to be the one to fall on the ten persons killed, would B be liable, even though A’s negligence caused the accident, and would A escape liability just because his airplane happened to fall on unoccupied ground? If the two colliding airplanes should fall together in one mass, would there have to be proof in each of the ten cases as to whether death resulted from the fall of a part of A’s airplane or B’s airplane, in order to determine whether A or B was liable in each case? If the answer is that both A and B would be liable for all deaths, the solution would create the further problem of how to apply the limits of liability to A and B. If the horsepower of the two airplanes were combined to measure liability, then the limit would be $90,000, but if the limits of liability were imposed against A and B separately, then the limitation would be $70,000. If the limitations of liability were measured by the combined horsepower of the two airplanes, there would be a further difficulty in determining how to allocate the $90,000, as between A and B. If the limitations were applied to the two airplanes

2. Such claims would come within Section 2 and not Section 6. See pages 539 and 540.
separately, then A could be held for only $20,000, and B for $50,000, even though A's negligence caused the accident.

The use of horsepower as a measure of total liability is subject to a number of objections.

The limitation will, of course, have no meaning whatever as to free or captive balloons and gliders, which have no horsepower, nor as to parachutes, if they are retained in the definition of aircraft.

The amount of horsepower developed by modern airplane engines from time to time fluctuates with the percentage of power used, the altitude of flight and the kind of gasoline used. For example, the approved type certificates issued by the Department of Commerce with respect to Douglas DC-3 airplanes, equipped with Pratt & Whitney SB-3G double row Wasp engines, show the following:

"ATC rating for take-off, 1000 H. P. per engine at 2600 R. P. M.
ATC rating for normal cruise, 900 H. P. per engine at 2450
R. P. M. at 6500 feet.
All horsepower ratings based on the use of 87 octane gasoline."

Another objection to the use of horsepower as a means of measuring maximum liability is that it penalizes the user of dual-motor, tri-motor or four-motor airplanes, whereas multiple engines are a safety factor. Horsepower, in excess of the requirements of an airplane is also a safety factor, whether single or multiple engines are used.

The amount of ground damage which results from the crash of an airplane is dependent on many elements, such as weight, size, speed, amount of gasoline carried and, most important of all, the point of impact with the ground. No one element is controlling and no measure of liability can be devised which will not be subject to valid objections. A measure of liability that might be considered the best obtainable as to airplanes, might be wholly unsatisfactory as to dirigibles. When consideration is given to the question of the amount of ground damage likely to be caused by an accident, the locality of flight is the most important consideration. For example, scheduled operations between Los Angeles and Salt Lake City involve the use of terminal airports located 11½ miles northwest of Los Angeles and 4 miles west of Salt Lake City. The character of the country between these two terminals is such that the possibility of any substantial ground damage is exceedingly remote and not at all comparable to the amount of ground damage which might result from an accident on a line operating between
New York and Chicago. However, the flexibility of aircraft is such that locality of flight cannot possibly be used as a measure of liability.

Section 2 (a) (1) prescribes horsepower as a measure to determine limits of liability for injuries to persons on the ground, whereas Section 2 (a) (2) uses “the weight of the aircraft fully loaded” as the measure of liability for property damage. We see no reason for the use of two different methods for determining total liability and we are of the opinion that weight is a better measure of liability than horsepower. We suggest, however, that “maximum gross weight permitted by the Department of Commerce” would provide a more definite standard than “weight of the aircraft fully loaded.”

Section 2 (b) of the Act provides, among other things, that Section 2 shall not impose liability for injuries to or death “of passengers, or of employees of the owner of the aircraft, or for loss of or damage to baggage, personal effects or goods on the aircraft at the time of or immediately prior to the accident.”

In our opinion the italicized words do not modify the word “employees” and, if not, an owner of an airplane causing injury to or death of his employee would not be liable under Section 2, even though the employee was on the ground and not engaged in the discharge of his duties at the time of the accident.

Section 2 (c) of the Act provides that claimants may institute proceedings against an owner of aircraft to impose liability otherwise than under Section 2, but that in any such proceeding the claimant must prove affirmatively “the cause of the accident and that it was caused by the negligence of the owner or his agent.” The foregoing provision ignores contributory negligence of the claimant as a defense and might cause difficulties of interpretation in any case where injury or damage is partially due to an act or omission of a claimant.

G. Liability for Injuries to or Deaths of Passengers on Aircraft Carrying Passengers for Compensation, Section 3, Pages 12 to 13, Lines 1 to 55.

“3 (a) Except as provided in Subsection (b) of this Section, the owner of aircraft carrying passengers for compensation shall be liable, regardless of negligence, in the following amounts, for injury within this state to a passenger or death resulting therefrom, from any cause, unless the injury or death shall be shown to have been caused by the wilful misconduct of the passenger who or whose personal
representative is making claim; and a passenger or his personal representative shall be limited in recovery, to the following amounts:

For death, permanent total disability, the total and permanent loss of the sight of both eyes, or permanent loss of the use of both hands or permanent loss of the use of both feet, or permanent loss of the use of one hand and one foot, or permanent loss of the use of one hand and the total and permanent loss of the sight of one eye, or permanent loss of the use of one foot and the total and permanent loss of the sight of one eye, ten thousand dollars ($10,000);

For permanent loss of the use of one hand, five thousand dollars ($5,000);

For permanent loss of the use of one foot, five thousand dollars ($5,000);

For the total and permanent loss of the sight of one eye, three thousand dollars ($3,000);

For temporary total disability or permanent or temporary partial disability, or disfigurement or any other injury except those occasioned by the loss of members or sight as previously specified, the injured party's actual loss not exceeding five thousand dollars ($5,000).

(b) Any owner of an aircraft carrying passengers for compensation through or within this state may elect to establish a higher schedule of liabilities for injury or death which may vary according to the rate of compensation paid, and in such event the owner shall be liable, regardless of negligence, in the amounts stipulated in such schedule according to the higher rate paid; but any agreement to lessen the liabilities imposed by this Section shall be void as applied to injuries within this state or death resulting therefrom.

(c) Any owner of an aircraft who has established a higher schedule of liabilities as provided in the preceding subsection, shall keep a record of the name and address of every passenger who pays a rate imposing liabilities exceeding those specified in this Section, and shall furnish to every such passenger written or printed evidence of the payment of such rate. Such record shall be open to public inspection and the original or a photostatic copy thereof shall be received in evidence in any action brought in this state to recover under this Section."

Section 3 imposes absolute liability, regardless of negligence, against owners of aircraft carrying passengers for compensation

"for injury within this state to a passenger or death resulting therefrom from any cause."

The words "from any cause" as used in Section 3, when construed in connection with Sections 2 and 4, show an intent to impose liability for injuries or death resulting from causes having no relation to the operation of aircraft. Liability under Section 2 is
limited to injuries or damage caused by "the ascent or descent or attempt to ascend or flight or other movement of aircraft." Liability under Section 4 relating to owners not carrying passengers for compensation, is limited to injuries or death "from any cause incident to the operation of aircraft." A court in passing on Section 3 would hold that the omission in Section 3 of these qualifications contained in Sections 2 and 4 was intentional. We can not believe that it is the intent of the framers of this Act to recommend that the States adopt legislation purporting to impose absolute liability against air lines for injuries to passengers during flight caused by the careless use of a razor or by the breaking of a needle in connection with the self-administration of insulin, or by swallowing a fish bone or by an assault by one passenger on another, or by any one of a multitude of other accidents that may happen in flight or on the ground while the passenger status exists but which have no connection with the operation of an airplane.

The physical or mental condition of a particular passenger may be the cause of an accident occurring when the passenger status exists. Where a passenger is suffering from some incapacity that makes him unusually susceptible to injury, the carrier transporting him is not liable in the absence of knowledge of the incapacity for an injury which would not have occurred except for the incapacity (Jacksonville Street Ry. Co. v. Chappell, 21 Fla. 175, Churchill v. United Fruit Co., 294 Fed. 400, D. Ct. Mass.). Section 3, however, would impose absolute liability against air lines for such injuries.

The only exception to liability under Section 3 relates to cases where the injury or death is shown to have been caused by the "wilful misconduct of the passenger who or whose personal representative is making claim." In considering Section 2 of the Act, we asserted that mere negligence of a claimant or his agents should be a sufficient ground for exemption from liability. The same criticism is applicable to Section 3. If an airplane passenger is injured or killed because of his own negligence, he or his estate should not have a claim against anyone.

Contributory negligence is a defense at common law to personal injury actions. A number of reasons have been assigned by courts to support the rule that contributory negligence should bar recovery. Thus, courts have held that negligence by a plaintiff should be a defense because it severs the causal connection between the defendant's negligence and the accident which occurs (Thomas
v. Quartermaine, 18 Q. B. D. 685, 697); that the law will not undertake to apportion the consequences of concurring acts of negligence (McKay v. Syracuse Rapid Transit Railroad Co., 208 N. Y. 359, 363, 101 N. E. 885); and that a plaintiff who is negligent should be penalized as a matter of public policy to admonish others to use due care for their own safety (Holmes v. Missouri Pacific Rd. Co., 207 Mo. 149, 164, 105 S. W. 624). Contributory negligence of an injured passenger will not be a defense to a claim under Section 3, no matter what the degree of negligence may be. A passenger who walks into a revolving propeller which is properly guarded, or a passenger who is injured because of failure to fasten his safety belt when told to do so, will have a valid claim under Section 3, even though his negligence is the sole cause of the resulting injury. This probably would not be true under alternate Section 3, because that section, for reasons which we do not understand, exempts an air carrier from liability for injuries caused by "wilful negligence" of a passenger, instead of "wilful misconduct," which is the basis of the exception in Section 3.

The whole problem of liability for accidents in connection with aircraft is unlike the liability of an employer which is asserted under workmen's compensation acts irrespective of contributory negligence, since an industrial worker cannot be expected always to be free from some form of negligence and the industry should carry the burden. Contributory negligence is a defense to an action by railroad passengers and there have been no harsh results in permitting it as a defense.

Section 3 should also recognize an exception to liability on the ground of assumed risk. There is a distinction between contributory negligence and assumed risk. The former involves carelessness, but the latter implies a deliberate choice and is not inconsistent with the exercise of due care (Miner v. Connecticut River Railroad Co., 153 Mass. 398, 403, 26 N. E. 994).

In the consolidated cases of Kimmel and Byrd v. Pennsylvania Airlines and Transport Company, decided February 4, 1937, in the District Court of the United States for the District of Columbia (The Journal of Air Law, April, 1937, page 272), the plaintiffs were passengers for compensation on an airplane operated by a common carrier. They were seriously injured as the result of what is commonly called rough air. The airplane encountered a down draft of air, which resulted in a violent bump, so that plaintiffs were thrown from their seats and injured. The cases were tried
before a jury and verdicts were returned for the defendant. In instructing the jury, the Court said:

"You are instructed that the plaintiffs assumed the risks necessarily incident to traveling in the air, known as perils of the air, when the plane is being operated with the highest degree of skill and care commensurate with the practical operation of the plane, and if you find from the evidence that the plane at the time it hit a down-draft was being operated with the highest degree of skill and care, commensurate with the practical operation of the plane, but, nevertheless, the plaintiffs were injured, then your verdict must be for the defendant, that, of course, merely indicating that the pilots cannot control the air conditions, cannot control winds and storms, down-drafts, or things of that sort, but the fact that they cannot control those things and that passengers may be injured in those things does not relieve pilots from exercising the duty to avoid the consequences of them, to protect against them to the best of their ability and to take such action as ought to be required of a reasonable pilot under the circumstances whenever he knows or has reason to know or to believe that dangerous conditions are about to be encountered.

The jury is instructed that while the law demands the utmost care for the safety of passengers, it does not require the defendant to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. That is a simple way of stating that there are dangers in all these lines of transportation, that dangers exist, and that the practical operation of none of these agencies, ships or trains or airplanes, can relieve it of the practical facts that there are dangers in the operation of instrumentalities of such kinds.

The jury is instructed that an unavoidable accident is one that is not occasioned in any degree, either remotely or directly, by the want of such skill or care as the law holds the defendant is bound to exercise, and the defendant cannot be held to be negligent merely because it fails to provide against an accident which it could not reasonably be expected to foresee, and if you find from the evidence in this case that the injuries sustained by the plaintiffs were due to an unavoidable accident, then your verdict must be for the defendant."

Airplanes are subject to bumps in rough air, just as ocean vessels are subject to violent pitching and rolling in rough seas. He who elects to cross the ocean must assume the risk of rough water (Stiles v. Munson S. S. Lines, 40 Fed. (2d) 276, E. D. of N. Y.). A proposal to subject steamship operators to absolute liability for unavoidable injuries caused by rough seas, would receive no support from anyone, but a different rule is suggested for airplanes merely because the industry is new and therefore is presumed to be in need of new rules. The reasons which justify exemption from liability for injuries caused by rough seas apply
with added force to airplanes encountering rough air. Rough seas are caused by high winds and storm conditions, but rough air may be encountered on the clearest of days and when normal winds prevail. Nevertheless, the proposed Act provides that an air line shall be subject to absolute liability, regardless of negligence, for injuries caused by rough air.

The elimination of contributory negligence and assumption of risk as defenses to claims under Sections 2 and 3 would probably render those sections unconstitutional in Oklahoma. Section 6 of Article XXIII of the Oklahoma Constitution provides:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

A further objection to the single exception to liability, is found in the requirement that the "wilful misconduct" which exonerates an air line from absolute liability must be that of "the" passenger making the claim. On September 16, 1935, a passenger purchased a ticket from American Airlines for transportation from Chicago to New York. The passenger indulged in intoxicating liquor from a bottle carried in his pocket. He refused to surrender the bottle or stop drinking and was put off at Detroit. He then chartered an airplane to complete his trip to New York and while enroute assaulted the pilots. A fight resulted and one of the pilots hit the passenger on the head with a fire extinguisher. The passenger was killed by the blow but no liability, civil or criminal, was imposed against either pilot. If such an incident should occur on a transport airplane carrying other passengers, the air line would clearly be liable under the terms of Section 3 for all injuries to and deaths of passengers, with the possible exception of the passenger responsible for the accident. If such a liability is to be imposed against air lines by State laws, how can they protect themselves against liability under the Act? They cannot, as a practical matter, subject passengers to mental or alcoholic tests prior to flight or search them for concealed liquor or make inquiries as to their customary conduct while traveling. No such precaution is exercised by railroads and any person who travels by rail or boat, or even walks on the street, must take whatever risk is involved in possible encounter with an insane or drunken person. Why should air lines be subjected to liability without fault for the actions of such persons, when no other type of common carrier is subject to a similar liability? An alleged reason which may be advanced in answer to this
inquiry is that the action of an insane or drunken person on an airplane is apt to have more serious consequences than if the offender is on the ground. That may be true, but the fact is certainly known to the traveling public and any added risk presented by such remote contingencies is a risk which is and should be assumed. A railroad is not liable for injuries to a passenger caused by the act of a fellow passenger unless it appears that the injury could have been prevented by the exercise of proper care (10 Corpus Juris, page 902). The same rule should be applied to air lines.

If the misconduct of a passenger should cause the crash of an airplane carrying passengers for compensation, even the estate of the passenger guilty of the misconduct might have a claim under Section 3. The Act provides that only “wilful misconduct” shall be an excuse, and if the passenger involved were insane, it might be held that his act was not wilful.

A warning against the imposition of absolute liability against air carriers and the discrimination against this means of travel which might result from the application of the proposed law to situations not anticipated, is contained in reports of a recent airline disaster at Daytona Beach, Florida. An investigation discloses that upon take-off before dawn on August 10, 1937, at Daytona Beach, a transport airplane struck a power line which had been erected by a local utility company between 9:30 P. M. and 2:00 A. M. on the night of the accident, without notice to the airport officials or the airline. The pilot, co-pilot and two passengers met instant death and other passengers sustained injuries. Such a situation should not impose absolute liability against an air carrier, but should be governed by the rule of law applicable to other carriers which is stated as follows in Volume 52 of Corpus Juris at page 162:

“A railroad company is not liable for injuries due to collisions or accidents to its trains caused by the negligent or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent, even where such third persons are discharged employees and the injury is an indirect result of the discharge.”

H. Liability for Injuries or Deaths of Passengers on Aircraft Not Carrying Passengers for Compensation, Section 4, Page 13, Lines 1 to 11.

“4. The owner of aircraft not carrying passengers for compensation shall be liable for injury within this state to a passenger or death resulting therefrom, from any cause incident to the operation of aircraft, if such injury or death was caused by the negligence
of the owner or his agent, to the extent, if any, to which the owner of an automobile is liable for injury within this state to a passenger not for compensation or death resulting therefrom."

The degree of care which an operator of an airplane must exercise for the safety of passengers carried gratuitously has not been settled by court decisions. California has a statute on the subject (Stats. 1933, p. 1135; G. L. Cal. 1933 Supp. Title 12, Sec. 11½) providing that no liability exists for injury or death of a guest riding in an airplane, unless the plaintiff, establishes that the injury or death approximately resulted from the intoxication or wilful misconduct of the operator. In the absence of such a statute, courts would probably hold that liability exists for failure of the operator to exercise either a high degree of care or reasonable care. However, under Section 4 liability will not exist for mere negligence. Section 4 applies the rule which may exist in the particular State with reference to guests riding in automobiles. The Illinois statute on this subject provides that the owner or operator of a motor vehicle is not liable for injuries to a guest unless caused by "the wilful and wanton misconduct" of the operator (Ill. State Bar Stat., 1935, Chap. 95 (a), Sec. 47 (5)). Most automobile guest statutes contain similar provisions. Therefore, Section 4, unlike Section 3, is a restriction rather than an extension of existing liability.

In considering the definition of "passenger," we referred to difficulties which will be encountered in determining whether a particular claim comes within Section 3 or 4. The phrase at the beginning of Section 4, "owner of aircraft not carrying passengers for compensation" is ambiguous as applied to different situations which may arise, such as

(1) Both revenue and non-revenue passengers on a particular trip.

(2) Non-revenue passengers exclusively on a trip operated by an owner who carries revenue passengers on other trips.

A further question presented by Sections 3 and 4 is whether students at aeronautical schools would be considered passengers for compensation when flown by instructors. Though such students pay tuition, their instruction involves acrobatics and other assumed risks to which passengers are not subjected, and such students should be definitely excluded from the operation of Section 3.

The phrase "incident to the operation of aircraft," contained in
Section 4, could well be omitted from that section and be inserted in Section 3 (a) after the words “from any cause.”

I. Liability for Baggage, Personal Effects and Goods, Section 5, Pages 13 to 14, Lines 1 to 39.

“5 (a). Before the commencement of flight, the owner of aircraft carrying passengers or goods for compensation, shall provide the passenger or the shipper of goods with a blank upon which the passenger or shipper of goods shall specify in writing the actual value of the passenger’s baggage and the clothing and other effects on his person, or the shipper’s goods, and the passenger or shipper shall not thereafter be permitted to claim that the baggage, personal effects or goods were of a higher value.

(b) The owner of the aircraft may refuse to carry any passenger unless the passenger specifies in writing on the form supplied to him for the purpose, the actual value of his baggage and of the clothing and other effects on his person; and the owner of the aircraft may refuse to carry goods unless the shipper similarly specifies the actual value thereof.

(c) Upon the failure of the owner to obtain from the passenger or shipper a specification in writing of the value of the baggage, personal effects or goods, there shall be no limitation upon the right of the passenger or shipper to prove the actual value of the baggage, personal effects or goods.

(d) The owner of aircraft may establish and collect rates varying according to the value of baggage, personal effects or goods, as specified in writing by the passenger or shipper, the minimum rate being based upon baggage, personal effects or goods of the value of one hundred dollars ($100).

(e) For loss of or damage to baggage, personal effects or goods, the owner of aircraft shall be liable, regardless of negligence, in the amount of the loss actually proved by the person entitled to collect damages, but not exceeding the value specified.

(f) For delay in the delivery of baggage or goods, the owner of aircraft shall be liable for negligence, to the person entitled to collect damages, to the extent of the actual loss, not exceeding the value specified.”

There are mechanical and psychological reasons against requiring airplane passengers to fill in blanks specifying the value of their baggage and personal effects.

The service which air carriers render to the public is high speed transportation and carriers are compelled to conserve time in every reasonably practicable way. Passengers must be accommodated at points of departure and arrival with the least possible delay. Airports serving large cities are located at considerable distances from business districts and passengers nearly always arrive at airports
with only a few minutes to spare before departure. A large percentage of air travel is emergency travel and many passengers do not purchase tickets until arrival at the airport. During the limited time available at airports, the carriers must issue or check tickets, fill in reservation charts and manifests and weigh and check baggage, though baggage is occasionally checked at a few downtown ticket offices. This procedure is somewhat involved and requirements have been reduced to a minimum with a view of eliminating everything that is not essential. Passengers are not required to furnish written statements as to the value of their baggage and personal effects. Scheduled air lines in the United States believe that they obtain adequate protection regarding baggage and personal effects by a provision in the passenger's ticket contract reading somewhat as follows:

"The liability of the carrier for loss or damage to baggage or personal property or for delay in the delivery thereof is limited to its value which cannot exceed $100.00 per passenger, unless a higher valuation is declared in advance and an additional charge paid therefor."

The time available for conforming to existing procedure at airports of departure is barely adequate and if passengers should be required to fill in blanks as provided in Section 5, the mechanics involved would materially increase the time required to handle passengers. The blank provided for would have to identify the passenger by name and be signed by him and would have to show the value of his baggage and personal effects, his ticket and baggage check numbers, the date and the point of origin and destination and probably other details. Within the next two years, scheduled air lines expect to operate airplanes accommodating as many as forty passengers. If only a half minute were required as the average time to fill in the blanks provided for as to each of forty passengers, the total elapsed time would be 20 minutes. This time might be divided among several ticket agents, but the inevitable result would be delay and especially so at large cities where joint ticket offices are maintained and frequently have to handle more than one departure at a time.

In addition to these mechanical difficulties, it is very probable that the requirements of Section 5 would have an adverse psychological effect upon passengers. A passenger arriving at an airport a few minutes before departure, having baggage worth approximately $100, his jewelry and clothing, $200 in cash and a return ticket,
would probably have difficulty in arriving at a conclusion as to the value to be declared. $100 would not be adequate protection and a declaration of value above $100 would cost him an amount in excess of his regular fare. Such situations would probably lead to numerous complaints from passengers.

In view of the foregoing considerations and the probability that relatively few passengers would care to specify valuations in excess of $100 for their baggage and personal effects and pay extra charges therefor, it would seem that the interests of all concerned would be best served by placing the onus of declaring excess valuations upon those passengers who desire to pay the excess charge instead of requiring the air carriers to obtain written specifications of value from all passengers.

Section 5 also requires written specifications of the value of goods shipped by air. The conditions mentioned above with respect to baggage and personal effects would not necessarily apply in connection with shipments of goods, because waybills presently used generally contain specifications as to the value of goods shipped by air, and the shipping public is accustomed to pay additional charges based on excess values.

Air express shipments on scheduled air lines are handled by Railway Express Agency, which issues waybills conforming to the requirements of the Uniform Bills of Lading Act. Any requirements as to the filling in of blanks by shippers of air express should be coordinated with the provisions of the Uniform Bills of Lading Act. It is in force in many States and the proposed Uniform Aviation Liability Act should be framed so as to avoid duplication and conflict with the Uniform Bills of Lading Act.

Under the early common law, all bailees, including carriers, were held absolutely liable for loss of or damage to goods entrusted to them. (See Fletcher, The Carrier’s Liability, 1932.) This rule was gradually relaxed with respect to the various classes of bailees (Coggs v. Bernard, 92 Eng. Repr. 107), but common carriers have continued to be liable as insurers of goods carried by them, subject to the well-known exceptions of acts of God and the public enemy. In addition, the acts or negligence of the shipper and the inherent nature of goods shipped and natural causes such as the effect of high and low temperatures may relieve the carriers of liability. Common carriers, however, are permitted to modify this rigorous liability through any fair, reasonable and just agreement with shippers which does not include exemptions against the negligence
of the carriers or their servants. (Adams Express Co. v. Croninger, 226 U. S. 491, 509.)

It is not apparent why air carriers, particularly those engaged in private carriage, should be subjected to absolute liability with respect to goods and baggage carried by them, without the benefit of exemptions accorded by the common law with respect to carriers generally. On the contrary, there are reasons for not adopting such an inflexible rule.

If absolute liability were imposed upon air carriers, the inevitable result would be an increase in their costs. Rates for air carriage might be increased, to the disadvantage of passengers and shippers. If this occurred, air carriers would be placed at a disadvantage in their competition with surface carriers that are not subject to absolute liability. If the carriers absorbed the increased costs, it might tend to impair their financial ability to maintain proper operating standards. This would be especially true at the present time when no air carriers are showing substantial profits and many are sustaining operating losses.

Insofar as air mail carriers are concerned, if rates were not increased, the added costs absorbed by the carriers would be reflected in the amount of compensation payable by the federal government for the transportation of mail under the Air Mail Act of 1934, as amended. Most air mail contractors are required by their contracts with the Post Office Department to carry passengers and express, the theory being that revenues derived from passenger and express service will defray in part the costs of the contractors' operations, thus permitting reductions in air mail rates (Air-Mail Compensation, 206 I. C. C. 675, 679, 729). Under the Air Mail Act the Interstate Commerce Commission is required to fix fair and reasonable rates of air mail pay within the limitations of the Act, giving consideration, among other things, to the revenues and profits of contractors from all sources.

Obviously, the extreme rigors of the common law rule of liability applicable to common carriers of goods, with the few exemptions that it affords, are much more favorable to carriers of goods by air than the rule of absolute liability proposed in Section 5. We do not mean to imply, however, that Section 5 (e) could be remedied by providing for specified exemptions. Air transportation

3. Section 3 of the Uniform Bills of Lading Act provides:
A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not:
(a) Be contrary to law or public policy, or
(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.
has not developed to the maturity necessary for a fair determination as to what these exemptions should be. There are no reported court decisions in this country determining what the liability of air carriers should be for damage to or loss of air express. With the passage of time it may be found in the public interest either to restrict or to broaden the exemptions customarily afforded carriers in so far as air carriers are concerned. Future progress in the art of flying, navigating, and weather forecasting alone can be looked to for answers to these questions and no attempt should be made to decide them now, unless the exemptions specified are sufficiently liberal to encompass all reasonable possibilities such as is done in Articles 20 and 21 of The Warsaw Convention.

Sections 2 and 3 grant an exemption from liability for injury or damage caused by the "willful misconduct" of the claimant, but even this is not an exception under Section 5. If a time bomb were sent in a sealed package by air express with a declared value, as required by Section 5, could the shipper who thus caused destruction of an airplane recover the value of the bomb under Section 5(e)?

It is further not apparent why air carriers engaging in private carriage of goods and baggage should be held to the same degree of liability as scheduled air carriers. In air transportation there are wide differences between the conditions under which scheduled air carriers operate and the conditions under which private air carriers operate, which justify a distinction between them insofar as their respective liabilities are concerned. Private carriers by air frequently operate over routes and at places where scheduled air carriers do not operate and where the latter often would not be permitted to operate, due to inadequate facilities or particular terrain hazards. Furthermore, private air carriers are not equipped as are scheduled air carriers on the routes they traverse with extensive ground organizations and navigation facilities and equipment. At the same time, the services of private air carriers are beneficial to the public. The public, therefore, in dealing with them, should recognize and assume such of those risks which it ordinarily assumes with respect to private carriers generally.

4. Art. 20. (1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.
(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.
Art. 21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.
The question of damages recoverable under Section 5(e) should be clarified. As it now reads the carrier would be liable "in the amount of the loss actually proved," which is broad enough to include special damages that are not recoverable at common law in the absence of knowledge by the carrier of special circumstances (10 Corpus Juris, 401, 1228:1229).

Section 5(e) is not clear with respect to whether or not the rule of absolute liability would extend to the gratuitous carriage of goods and baggage, as well as carriage thereof for hire. Section 5(a) contains a reference to carriage for compensation, but this section deals with filling in blanks to specify value. At common law, gratuitous carriage of goods and baggage by common carriers does not subject them to liability as insurers and they are only required to exercise the care required of gratuitous bailees.

Section 5(e) further imposes absolute liability with respect to baggage and personal effects of passengers without any consideration being given to the reasonableness of its application in particular instances. At common law a common carrier is responsible as an insurer for the safe transportation of baggage, subject to the recognized exceptions heretofore mentioned, but the common law imposes no such liability with respect to personal effects or other property retained by passengers in their own custody or possession, or with respect to articles which are not properly classified as baggage or which are of exceptional value and are carried as baggage without notice of such character or value being given to the carrier. At common law, the general rules of liability applicable to the carriage of such property may be divided into five categories:

1. The carrier's contract is not presumed to cover property delivered to it by a passenger as baggage when such property does not properly constitute baggage within the legal meaning of that term. In Humphreys v. Perry, 148 U. S. 627, it was held that where a jewelry salesman checked a trunk containing jewelry valued at $9,818.46 as baggage, without informing the carrier of its contents, the carrier was not liable for damage to the jewelry, in the absence of proof of gross negligence on its part.

2. It has been held, however, that where the carrier has knowledge that property delivered to it for carriage as baggage, is not properly such, it is liable for the loss thereof as an insurer, the same as with respect to baggage generally. Hannibal Railroad v. Swift, 12 Wall. 262.
(3) Passengers always carry with them in their own possession clothing, cash and other articles reasonably necessary in connection with their journey and there have been numerous decisions holding that common carriers are liable only for failing to exercise reasonable care to protect such effects from loss or injury, and that they are not liable therefor as insurers. (See *Tower v. The Utica and Schenectady Rail-Road Company*, 7 Hill 47; *Sperry v. Consolidated Ry. Co.*, 79 Conn. 565, 65 Atl. 962; *Nashville, C. & St. L. R. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055). In the *Tower case*, a passenger left his overcoat on the seat of a train when he departed therefrom. The train conductor was thereafter notified by another passenger that the coat had been left on the seat, but before the conductor went to recover it, it had been stolen. The court held that there could be no recovery against the railroad and said:

"The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. Being an article of wearing apparel of present use, and in the care and keeping of the traveller himself for that purpose, the defendants have a right to say that it shall be regarded in the same light as if it had been upon his person. No carrier, however discreet and vigilant, would think of turning his attention to property of the passenger in the situation of the article in question, or imagine that any responsibility attached to him in respect to it. Even an innkeeper is not liable where the guest takes the goods to his room for the purpose of having the care of them himself.

* * * * *

"If the defendants were under any obligation to take charge of the article in question after it was discovered to have been left in the car, (and it is not necessary to deny that they were,) ordinary care is all that can be exacted, and that was sufficiently established."

In *Murphy v. Eastern Greyhound Lines*, 256 N. Y. S. 114, the court held that the defendant did not become a bailee for hire or otherwise with respect to a passenger's suitcase which was placed in a rack inside the bus, near the passenger.

(4) It may occur that a passenger will carry with him on his person large amounts of cash or other articles of exceptional value, not necessary in connection with his journey, without informing the carriers thereof. In such cases the courts have generally held that common carriers are not liable for loss of or damage to such effects, even as gratuitous bailees. *Weeks v. N. Y., N. H. and H. R. Co.*, 72 N. Y. 50; *Levins v. N. Y., N. H. and H. R. Co.*, 183 Mass. 175, 65 N. E. 803; *First National Bank of

In the Weeks case, a passenger was held up on a train and robbed of United States Bonds of the value of $16,000. In that case the court said:

"If the claim of the plaintiff is to be sustained, it must be held that, from the circumstances of the case, the defendant's owed such duty to the plaintiff as that it was an insurer of the safe carriage of his securities, in the mode of carriage adopted by him, and for no greater consideration than the usual price or compensation paid by any passenger on its vehicles, and without knowledge or notice that he had them upon his person.

The mind conversant with legal topics, and wont to look at the consequences of the laying down of a rule of law, and the lengths to which it may logically be carried, does not readily yield assent to that proposition, and inquires upon what principle the liability of the defendant is sought to be established. It is apparent that if the carrier is liable in such case for a loss by robbery, it is liable also for a loss by theft by strangers (see Abbott v. Bradstreet, 55 Maine 530); or for loss resulting from negligence in any way, no matter what the character of the valuables, or the amount of them borne upon the person, and in the sole care and custody of the passenger. It is then seen that the carrier of passengers, against its will, with no knowledge or notice of the charge and risk put upon it, becomes more in fact than a carrier of passengers; it becomes an 'express' carrier of packages of value. It becomes such 'express' carrier with unusual burdens. It is without knowledge of the value for which it is liable. It is not given the custody of the package. It is liable to be the subject of false and collusive claims of conspirators; and the victim of wicked plans, sustained by made-up testimony. This, perhaps, partakes of the argument ab inconvenienti. But it is a maxim: *Argumentum ab inconvenienti, plurimum valet in lege.* Good authority says that arguments, in doubtful cases, drawn from inconvenience, are of great weight." (pp. 56-57.)

"From our consideration of the case, it is our judgment that the valuable securities carried by the plaintiff were not a part of the property, which he could in his ordinary relation of passenger of the defendant bear about his person at its risk, and under its duty as a carrier to protect him and his necessary, convenient and ornamental, reasonable, personal chattels and money; that for that reason the value of them does not properly enter into an estimate of the damages with which it should be charged, on a recovery by him against it for not protecting him from violence while he was rightfully on its car, it being assumed to be guilty of negligence therein, and he being taken as free from contributory negligence." (p. 63).

(5) If the carrier has notice that a passenger is carrying on his person articles of exceptional value and not necessary in con-
nection with his journey, then it is possible that the carrier would be required to exercise some care relative thereto, but in no event would this liability extend beyond its liability with respect to other effects in the possession of the passenger.

Insofar as items of exceptional value are concerned, a measure of protection is afforded to air carriers by Section 5(a) requiring passengers to specify in writing the value of their baggage and personal effects, but as we have heretofore pointed out, such a requirement is not adaptable to air transportation. Furthermore, the air carrier is bound by Section 5 to accept the value stated and, at least so far as the terms of the statute are concerned, the carrier must submit to absolute liability therefor, no matter what the character or value of the baggage or personal effects may be.

Section 5(f) provides that for delay in delivery of baggage or goods, the owner of aircraft shall be liable for negligence "to the extent of the actual loss not exceeding the value specified." At common law a common carrier is liable for damages resulting from delay only insofar as such damages were in the contemplation of the parties when the contract of carriage was made, and in the absence of notice to the carrier of special circumstances it is not liable for special damages incurred by the passenger, shipper or consignee (10 Corpus Juris, 315, 1227). The words "to the extent of the actual loss" in Section 5(f) are broad enough to include special damages and to this extent the section represents a substantial departure from the common law rule.

Section 5(d) provides that the owner of aircraft may establish and collect rates according to the value of baggage, personal effects or goods as specified by the passenger or shipper and that the minimum rate should be based upon property of the value of $100. Does this section mean that carriers will be obligated to make a special charge when a value in excess of $100 is specified pursuant to Section 5(a)?

Section 5 contains no provision with respect to when the absolute liability provided for therein shall commence and terminate. Does the statutory liability exist from the time the air carrier receives property for transportation and continue until it is delivered to the consignee, or does it apply only with respect to actual carriage aboard an airplane?

It would seem advisable that some provision be made with regard to respective liabilities of connecting carriers involved in the transportation of goods and baggage. Provision should also
be made with regard to limitations of time for the filing of claims and institution of suits.

J. Collision of Aircraft, Section 6, Pages 14 to 16, Lines 1 to 47.

"6 (a) Except as otherwise in this Section provided, the liability of the owner or the operator of one aircraft to the owner, operator or passenger of another aircraft or his personal representative, for damage, injury or death caused by collision within this state on land or in the air, or to the owner or shipper of goods on another aircraft, damaged or destroyed by such collision, shall be determined by the rules of law applicable to collisions on land.

(b) If a collision within this state is due to negligence of two or more aircraft involved therein, the liability of the owner of each aircraft for damages caused to another aircraft, or to goods on another aircraft, or to individuals and property on the land, shall be in proportion to the degree of negligence shown; but if such proportion cannot be established, or if the degrees of negligence appear to be equal, the liability shall be shared equally.

(c) The owner of each aircraft carrying passengers for compensation involved in a collision within this state, shall be liable for injuries to or death of his own passengers in accordance with the provisions of this act relating to liability to passengers, but such owner may proceed against the owner of any other aircraft involved in the collision, for negligence, to recover the amounts paid to his passengers. His recovery in such case shall be in proportion to the degree of negligence shown, as in the preceding Subsection.

(d) In a suit by such owner's passenger or his personal representative against the owner or operator of another aircraft to recover damages for personal injury or death, it shall be necessary for the plaintiff to prove negligence; negligence shall not be presumed from the happening of the accident; and in the event of a recovery, the defendant shall be credited on account of the judgment against him with the amount, if any, paid or payable under the provisions of this act to the passenger or his personal representative by the owner of the passenger's aircraft.

(e) This Section shall not require any plaintiff to proceed against the owners of colliding aircraft jointly, but if he proceeds against the owner of only one aircraft such owner may bring an action for contribution, in accordance with the provisions of this Section, against any or all of the other aircraft involved in the collision."

The foregoing Section 6 relating to collision between aircraft has been referred to in connection with the consideration of the definitions of "land" and "operator" and in construing Section 2 relating to ground injury and damage.

In considering Section 2 relating to ground injury and damage, we stated that if an airplane owned by A should collide with an
airplane owned by B solely because of A's negligence and cause the death of persons on the ground, the death claims would come within Section 2 and not Section 6. Clearly, no liability is imposed as to such claims by Section 6(a) because liability under that section can only be established in behalf of "the owner, operator or passenger of another aircraft," or "the owner or shipper of goods on another aircraft." Section 6(b) goes beyond Section 6(a), in that it also covers liability for damages caused "to individuals and property on the land," but the entire Section 6(b) is confined to collision "due to negligence of two or more aircraft involved therein."

If such a collision between A and B should be due to their combined negligence, then, as we construe the proposed Act, absolute liability would be imposed against A and B under Section 2, and under Section 6(b), the extent of the liability of each would depend upon their respective degrees of negligence. But Section 2 provides that limits of liability shall be measured by horsepower and not by degrees of negligence. If A and B were equally negligent, it might not be possible to carry out the requirement of Section 6(b) that "the liability shall be shared equally," and at the same time observe the requirements of Section 2 under which A, having 200 horsepower in the assumed case, could be held for only $20,000 and B, having 500 horsepower, could be held for $50,000.

A further peculiarity of Section 6 is that Section 6(a) refers to liability of both "owner or the operator," whereas Section 6(b) first uses the term "negligence of two or more aircraft" (assuming that aircraft can be negligent) and then provides for liability only against the owner and not the operator. Section 6(c) and (e) likewise deal only with the owner of aircraft but Section 6(d) covers both owner and operator.

Section 6(a) provides that liability (and presumably also non-liability) for collision shall be determined by the rules of law applicable to collisions on land. A similar phrase is found in the Uniform State Law for Aeronautics, except that the term "torts on land" is used instead of "collisions on land." The reason for the change in terminology is not apparent. "Torts" is the broader word. A controlling precedent as to liability for collision might be found in a tort decision not involving a collision. But "collision" may be more appropriate, in that "land" is defined to include water and admiralty lawyers speak of collisions and not of torts.

In Groenke v. North American Airways Company, 201 Wis. 565, 230 N. W. 618, the court said that the provision of the Uni-
form State Law for Aeronautics, adopting as a test the rules of law applicable to torts on land, was simply declaratory of the common law and meant that every person must use ordinary care not to injure another. That apparently is the intent of Section 6(a), but if there is any reasonable possibility that "rules of law applicable to collisions on land" might be construed to limit a court to consideration of rules of the road, then Section 6(a) might be improved by adding at the end thereof "and any applicable air traffic rules." Situations on the ground do not afford any precedent to questions such as whether flight is properly conducted in a given case at odd or even thousand-foot levels of altitude.

Section 6(a) covers liability for damages caused by collision to "the owner or shipper of goods." What about baggage and personal effects which are distinguished from "goods" under Section 5?

Section 6(a) refers to damage, injury or death "caused by collision." Presumably this means collision between aircraft and not collision between aircraft and a truck or other object. The caption of Section 6 is "Collision of Aircraft."

Assume that an airplane is parked at an airport and that another airplane in making a landing or take-off crashes into the parked airplane. Does the owner of the parked airplane have a claim for ground damage under Section 2 or a collision claim under Section 6(a)?

Section 6 does not by its terms have any application to negligence by an operator of an airplane which causes an accident to another airplane, but not a collision between aircraft. A collision may be imminent due to the negligence of an operator, and another operator in trying to avoid a collision may crash to the ground. Section 6 makes no provision for such a contingency. In other words, if negligence by an operator of an airplane causes a collision with another airplane, Section 6 applies, but if such negligence by the operator of one airplane causes a crash of another airplane into the ground, Section 6 does not apply and the injured party has no cause of action under Section 6(a) or right of contribution under Section 6(c).

Section 6(c) provides that the owner of each aircraft involved in collision shall be liable for injuries to and deaths of his own passengers, but may proceed against the owner of any other aircraft involved in the collision "to recover the amounts paid to his passenger." This right of contribution is restricted, however, to the owners of aircraft "carrying passengers for compensation" and this limitation raises the question of whether the owner of an
airplane carrying non-revenue passengers injured in a collision, is
denied any right of contribution.

Can this right of contribution be enforced on the basis of
settlements made out of court, as well as on the basis of judgments
recovered? The same question arises under Sections 6(d) and
6(e).

Section 6(d) does not mention collision at all, but probably
would be construed to refer to collision because the entire section
deals with that subject.

The amount of money which an injured passenger may be
able to collect by suits under Sections 3 and 6 may depend upon
the order in which suits are started and tried. Assume that Jones,
a passenger on airplane A, is injured in a collision between air-
plane A and airplane B, caused solely by the negligence of the pilot
operating airplane B. Jones first sues the owner of airplane B
under Section 6 on the ground of negligence and recovers and
collects a judgment of $25,000. Jones then sues the owner of
airplane A, on which he was a passenger, under Section 3. The
limit of recovery under that Section is $10,000, but Jones has al-
ready been paid $25,000. There is nothing in Section 3 which
negatives the right of Jones to collect twice for the same injury.
Absolute liability is imposed on the mere ground that Jones was
a passenger and was injured. Therefore, if the injury sustained
by Jones comes within the class of injuries requiring payment of
$10,000, he will obtain a judgment against the owner of airplane
A for that amount, his total recoveries being $35,000. If, however,
Jones had sued the owner of airplane A first and had recovered
$10,000, then that amount would be deductible in a subsequent suit
against the owner of airplane B, pursuant to Section 6(d), so that
the judgment allowed against the owner of airplane B would be
only $15,000. By one method Jones collects $35,000 and by the
other method he collects $25,000. The owner of airplane A would
have a right of action against the owner of airplane B under Sec-
tion 6(c) for the recovery of $10,000 and if he sued and recovered,
the owner of airplane B would be out of pocket $35,000, notwith-
standing the fact that a court and jury said that he was only liable
for $25,000 in the action brought against him by Jones. Will the
owner of airplane B then have a right of action against Jones for
$10,000 on the ground that Jones would have recovered that much
less from B had he reversed the order of his suits?

Assume further that Jones sues the owner of airplane B pur-
suant to Section 6, but that the jury refuses to find negligence and
returns a verdict of not guilty. Jones then sues the owner of airplane A under Section 3 and collects $10,000. Can the owner of airplane A then re-try the issue of negligence in a contribution suit, pursuant to Section 6(c), against the owner of airplane B?

Section 6(a) provides for liability of the owner or operator of one aircraft to the owner, operator, or passenger of another aircraft, but makes no provision for liability to the crew of the other aircraft. There appears to be no reason why members of the crew should not also be covered even though they may be subject to workmen's compensation as far as the liability of their own employer is concerned. The situation is similar to that of a man employed to work on a road who is injured through the negligent operation of an automobile by a third person.

K. Assumption of Liability, Section 7, Page 16, Lines 1 to 7.

"No owner shall operate or permit to be operated, an aircraft, except a public aircraft, over land in this state unless such owner assumes the liabilities imposed by this act; and assumption on the part of the owner of such liabilities shall be conclusively presumed from the fact of flight over the land of this state."

Section 7 exempts "public aircraft" from its requirements though exemption from liability of public aircraft is provided for only in Section 2 and not in Sections 3, 4, 5 or 6. However, exemption as to liability of public aircraft under those sections may nevertheless exist in particular causes because of immunity from suit or non-liability for negligence while engaged in a governmental function.

We doubt the wisdom of adopting statutes which are clearly unenforcible. The first part of Section 7, preceding the semicolon, is clearly unenforicible, as an airplane in flight cannot be stopped at a State's border like an automobile. The object of Section 7 would be fully effected (subject to questions of constitutional law hereafter considered) by the second part providing that the act of flight over a State constitutes an assumption of liability under the statute.

L. Service of Process on Non-Residents, Section 8, Page 16, Lines 1 to 14.

"Every non-resident owner or operator of an aircraft is conclusively presumed by the fact of flight over land in this state to have constituted the (Secretary of State) his agent for the service of process in any action brought against him by any person to recover
for injury, death or damage resulting from such flight within this state. But such service shall not be complete until the plaintiff shall have filed with the (Secretary of State) an affidavit that he has mailed to the registered owner of the aircraft at the address stated in the owner’s registration a notice, of which a copy shall be attached, that suit has been instituted and that process is being served upon the (Secretary of State)."

The proposed Uniform Aviation Liability Act presents a number of questions of constitutional law which will be considered in a separate section of this report, in order to avoid the repetition which would be involved if the validity of each section were considered separately. Section 8, however, raises separate constitutional questions which can more conveniently be considered in connection with the discussion of that section.

Comparable non-resident motorist statutes have been upheld against constitutional attack upon different theories under which jurisdiction may be acquired. Some are supported on the theory of consent to jurisdiction and others on the basis of acts done within the state. In *Kane v. New Jersey*, 242 U. S. 160, it was held that a state could require a non-resident to register his car in the state and expressly appoint the Secretary of State as his agent to receive process in actions arising from operation of the car in the state. The defendant urged unsuccessfully that the statute did not apply because he was traveling from New York through New Jersey to Pennsylvania. There was reliance on *Hendrick v. Maryland*, 235 U. S. 610, where it was declared that a state could require licenses from non-residents before allowing them to drive in the state. In *Hess v. Pawloski*, 274 U. S. 352, use of the highways by a non-resident was deemed equivalent to appointment of the registrar of motor vehicles as his attorney for service of process in accidents growing out of highway accidents in Massachusetts. The court said that since automobiles are dangerous, a state may regulate their use by regulations reasonably calculated to promote the public safety. So far as due process was concerned the court found no difference between express and implied appointment.

The proposed uniform law reaches rather beyond the decision in the *Kane* and *Hess* cases in that the substituted service on the owner will be good for an action arising out of conduct of the operator as well as conduct of the owner himself. The proposed law may therefore transgress the limits of the decisions in *Young v. Masci*, 289 U. S. 253, and *Scheer v. Rockne Motors Corporation*, 68 Fed. (2d) 942 (2nd C. C. A.) discussed in Part III (C).
In Wuchter v. Pizzutti, 276 U. S. 13, the rule was laid down that a statute allowing substituted service on non-resident motorists must contain a provision making it reasonably probable that notice of the institution of suit reach the defendant in order to constitute due process of law. The New Jersey statute which was there held invalid made no provision for mailing notice to the defendant and under it service would be complete apparently by merely leaving a copy of process with the Secretary of State. The Massachusetts statute which was before the court in Hess v. Pawloski, 274 U. S. 352, required notice to the defendant by registered mail plus a return receipt signed by him. This return receipt feature has become the usual provision in non-resident motorist statutes.

There are some cases upholding statutes not requiring the defendant's receipt. In Hirsch v. Warren, 253 Ky. 62, 68 S. W. (2d) 767, where the Secretary of State was to notify the defendant by registered mail at the address given in the process by the plaintiff, the return receipt was not required, it being necessary only that the letter bear a return address and that the Secretary make a report of his compliance to the Clerk of the Court.

In Schilling v. Odlebak, 177 Minn. 90, 224 N. W. 694, a statute requiring the plaintiff to mail notice to defendant's last known address within ten days after serving the Secretary of State plus plaintiff's affidavit of compliance was held constitutional. The same result was also reached in Seitz v. Claybourne, 181 Minn. 4, 231 N. W. 714, on the theory that mailing to the last known address of a non-resident placed him on no worse a footing than residents who were similarly served. This statute also received a favorable construction in Jones v. Paxton, 27 F. (2d) 364 (D. C. Minn.), the court feeling certain the statute would be construed so as to afford ample protection to non-residents.

In Hartley v. Vitiello, 113 Conn. 74, 154 Atl. 255, a Connecticut statute (Gen. Stat. 1930, §§5473, 5463, 5466, 5503) was upheld although all that was required was the mailing by registered mail of a notice to the defendant at his last known address. The case was followed in Barbieri v. Pandiscio, 116 Conn. 48, 163 Atl. 469.

In Weiss v. Magnussen, 13 F. Supp. 948 (D. Va.) the statute provided (Va. Code, Supp. 1934, §2154) that the director of motor vehicles send notice by registered mail with return receipt requested "to the defendant," service being complete upon the official's filing an affidavit of compliance. No return receipt was required. The
court held that the notice had to be mailed to the defendant, indicating that his last known address would not suffice and placing the burden on the plaintiff of supplying the correct address. Although the court seems to frown on anything less than the actual address, the case is not authority for outlawing a “last known address” statute since this Virginia law requires that the notice go “to the defendant” and the court gave the phrase a literal construction.

On the other hand a New York court refused to credit a Connecticut judgment under a statute (Pub. Acts 1925, C. 122, §1) requiring notice to be sent to the last known address of the defendant, on the ground that it did not require mailing of the notice before the return day of the process thus making possible a default judgment without any notice being given the defendant. Freedman v. Poirier, 237 N. Y. S. 618. The court further discussed the advisability of the return receipt but the decision was really grounded on the time element.

In Grote v. Rogers, 158 Md. 685, 149 Atl. 547, the Maryland statute (Acts 1929, C. 254) required that notice be sent to the defendant at the address specified in the process by the plaintiff which should be conclusively presumed correct if it had been given by the defendant in any proceeding before any court, magistrate or justice of the peace or any police officer, at or subsequent to the accident, or if it was the latest address appearing on the records of the Commissioner of Motor Vehicles of the state in which any motor vehicle was registered in the name of defendant. No return receipt was required. The court held the statute invalid since the address specified in the process was not required to be the true address or even the last known address. The sources of information open to the plaintiff may not give him true information since between the accident and time of suit the defendant may have legitimately changed his address and a vital mistake innocently committed would be conclusively presumed correct. In the court’s opinion the statute failed to survive the reasonable probability of notice test laid down in Wuchter v. Pizzutti, supra. The notice was sent to the address specified in the process but it does not appear from what source information, as to the address, came. The court invalidated the statute not necessarily for what happened in this instance but for what might happen in other cases.

The Uniform Aviation Liability Act, Section 8, provides that notice be sent to the address of the owner as it appears on the registration of the airplane in question. By filing an affidavit that
he has done what is required the plaintiff presumably makes the service complete. This feature of the proposed act might possibly seem as objectionable as the court in Grote v. Rogers, supra, thought the Maryland statute. Maryland immediately amended her statute and provided for a return receipt (Acts, 1931, C. 70) and the court upheld it. Employers' Liability Assurance Corp v. Perkins, 169 Md. 269, 181 Atl. 436.

Several cases decided before Wuchter v. Pizzutti, supra, upheld statutes requiring mailing to defendant's last known address only, with no return receipt required. State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916; Cleary v. Johnston, 79 N. J. L. 49, 74 Atl. 538. Only in the former was the question raised, however; but the court held that there was a reasonable probability of notice since the duty was on the plaintiff to ascertain as a fact the last known address.

Return receipt statutes have been upheld in Arkansas, Delaware, Florida, Louisiana, Maryland, Minnesota, Massachusetts, New Hampshire, New Jersey, New York, North Carolina and Pennsylvania. It would seem that the Uniform Aviation Liability Act would be strengthened constitutionally by a return receipt provision.

Section 8 of the proposed statute regards "every non-resident owner or operator of an aircraft" as having constituted the secretary of state his agent for service of process. This indicates that suit might be brought against an operator, but notice need be sent only "to the registered owner of the aircraft at the address stated in the owner's registration." This sort of procedure does not raise any very strong probability that notice will necessarily reach the defendant operator and for that reason such service as to him would be invalid within the rule of Wuchter v. Pizzutti, supra.

As to the content of the notice to be mailed the defendant, the cases do not indicate what due process of law requires. However, the statutes usually specify that a copy of the process served on the state officer shall be mailed, as well as notice of service. Conceivably Section 8 of the proposed law might be constitutionally deficient in that it furnishes no assurance that the defendant will have any knowledge as to what the case is about.

Section 8 should be expressly restricted to actions to enforce liability imposed by the statute.

The method of service is defined in Section 8 only in a negative fashion. It is not complete, according to Section 8, until notice is mailed to the registered owner. But the law does not say when it is complete.
Again if the owner is not registered, which is a conceivable situation (cf. Wuchter v. Pizzuti and Kane v. N. J., supra), he would be immune from service under this section.

M. The Procedure for Enforcing Liability Regardless of Negligence for Injuries to Persons and Property on the Land, Section 9, Pages 16 to 18, Lines 1 to 83; Distribution of Amounts Recovered for Death, Section 11, Page 19, Lines 1 to 8.

9 (a) The liability regardless of negligence imposed by this act for injuries to individuals and property on the land shall be enforceable only in an action instituted in the court, within the time, and in the manner, hereinafter in this Section specified.

(b) Unless all claims have been sooner settled, within sixty (60) days after the happening of any accident resulting in injury within this state to an individual or property on the land, the owner of the aircraft involved in such accident shall file in the court of (common pleas) of the (county) in which the accident happened, a statement setting forth the time and place of the accident, the name of his insurer, and the name and addresses, as far as he has been able to ascertain them, of the persons injured in person or in property, excluding passengers and employees of the owner on the aircraft at the time of the accident. A copy of the owner's insurance policy shall be attached to such statement.

(c) If the owner fails to file the statement as required by the preceding Subsection, any person injured in person or property on the land, as the result of such accident, may file such statement, but he shall not be required to attach thereto a copy of the owner's insurance policy.

(d) Upon the filing of the statement the court shall issue its summons in the names of the persons injured in person or in property or their personal representatives, as plaintiffs, and the owner and his insurer, as defendants, returnable as usual.

(e) The summons shall be served by the (sheriff) upon all plaintiffs and defendants, but inability to obtain service upon the owner's insurer or any other party shall not prevent the case from proceeding.

(f) Contemporaneously with the issuance of the summons, the court shall direct the publication by the (clerk) of an advertisement, notifying all persons, except passengers and employees of the owner, having claims against the owner for injuries to individuals or property on the land, arising out of the accident involved in the case, within forty-five (45) days to intervene as parties plaintiff.

(g) Not later than sixty (60) days after the first publication of such advertisement, every party plaintiff shall file with the court his statement of damage, and not later than seventy-five (75) days after such first publication the defendants may file answers. There-
after the practice and procedure shall, except as herein otherwise provided, be the same as in an action for damages for negligence.

(h) Any party plaintiff may within the time allowed by this Section for filing his statement of damage, but not afterwards, give notice in such statement that he elects not to participate in any recovery in the action but to seek to recover for negligence in another action. Such party shall thereafter be precluded from any recovery in the action brought hereunder, but the court shall nevertheless proceed to assess the amount of damages which such party sustained.

(i) If the aggregate of all verdicts rendered against the owner, and of damages assessed by the court under the preceding Subsection, exceeds the aggregate of the owner's liability regardless of negligence, as limited by this act, the court shall reduce the verdicts and assessments of damages pro rata, to an aggregate amount equal to the owner's maximum liability.

(j) The owner or his insurer shall pay all costs of any action brought hereunder, exclusive of plaintiff's attorney's fees.

(k) Judgment may be entered as in other cases, on verdicts rendered in an action under this Section, and any party may appeal to the (Supreme) Court within the time allowed for appeals in other civil cases.

(l) Satisfaction by or on behalf of the owner, of the judgments in such proceeding shall discharge him in full from all claims for the liability regardless of negligence imposed by this act, for injuries to individuals and property on the land arising out of such accident.”

“Sec. 11. Distribution of Amounts Recovered for Death. The distribution of amounts recovered by personal representatives under the provisions of this act, for death, shall be distributed as provided in the act approved the ...... day of ............... one thousand .................., entitled ‘.......................... .........................’ (the act applicable to recovery for death by wrongful act).”

The procedure set forth in Section 9 requiring the adjudication of all claims under the statute for ground injury and damage in a single action in one court, is of course essential, in order to give effect to the limitation of liability which may be imposed with respect to any one accident.

One disadvantage to the public in the procedure of Section 9 is that it may require a person to file his claim before he knows what his claim is. Under existing law, a person who has a personal injury claim and does not know whether he will make a complete recovery or suffer permanent disability, can defer settlement or the institution of suit for any period short of the statute of limitations. Under Section 9 the owner's statement must be filed within sixty days after the accident involved. Publication of notice by the clerk follows under Section 9(f) and a claimant's statement of
damage must be filed under Section 9(g) not later than sixty days after the first publication.

A person having a claim for injuries under Section 2 might file his injury claim pursuant to Section 9 and after the claim had been allowed and paid might die as a result of his injuries. In that event his estate or dependents would not have a second cause of action under the statute because of the provisions in Section 9(1) but might proceed under a wrongful death or survival act, notwithstanding the recovery under the statute.

In an article in Vol. 44 of Harvard Law Review, at page 980, the author criticizes existing wrongful death and survival statutes on grounds hereafter set forth, which are applicable to Section 2 imposing liability, Section 9 providing a plan of enforcement, and Section 11 governing distribution of recoveries under death claims.

When a tort causes death, ordinarily two interests are invaded, first, the interest of the deceased in the security of his person, and, second the interest of his relatives in his future earnings. Damages allowed for the invasion of the first interest should go to the estate and be subject to the claims of creditors; but damages for invasion of the second interest being payable to dependents to compensate them for their loss should not be subject to claims of creditors of the deceased. Under most wrongful death acts, damages are measured by the pecuniary loss suffered by dependents or loss of earnings to the estate, and no recovery is allowed for the deceased's pain and suffering. Twenty-two states have wrongful death acts and also separate survival statutes, but in about one-third of these twenty jurisdictions the statutes have been construed to mean that actions cannot be brought under both statutes for the same tort, whereas in the remaining states two suits can be maintained. After making the above observations, the author of the article in Vol. 44 of Harvard Law Review continues at page 983:

"There is still the possibility, however, that the relatives may be cut off if the deceased has obtained satisfaction during his lifetime, either through judgment or as consideration for a release. In states where only one action may be maintained after death, though satisfaction has been held not to be a bar, the contrary result is more generally reached. Denial of recovery has often been based upon the provision prevalent in the death statutes that the wrongful act must have been such 'as would have entitled the injured party to maintain an action if death had not ensued.' Support for the interpretation is found in the belief that the purpose underlying the death legislation was simply to deprive the tortfeasor of the immunity accorded him at common law. But where a survival statute is also present, it
seems less likely that this was the intent, and it may be urged that the statutory provision was directed only to the accrual of the cause of action in the deceased and not to its continued existence at his death. Yet several of these jurisdictions hold that satisfaction is a bar. However, some have not faced the problem as yet, and Oklahoma, South Dakota, and apparently Ohio have held that settlement with the deceased has no effect upon the action for wrongful death."

The questions suggested above relating to recoveries for injuries and deaths are not solved by Sections 2, 9 and 11 of the proposed statute. Section 2(a) provides for recovery of "the actual damage" and neither Sections 2, 9 nor 11 provide (1) how damages shall be measured for death, or (2) whether the method of ascertaining damages under the State's Wrongful Death Act shall be applicable, or (3) whether amounts recovered shall or shall not be subject to the claims of creditors, or (4) whether a recovery for injuries would bar a second suit for death resulting from such injuries or (5) in states where suits can be maintained under a wrongful death act as well as a survival act, how the $10,000 limitation under Section 2 shall be apportioned between the two different interests entitled to recover.

Both Sections 2 and 9 would be improved by express references to liability for death, as well as injury, instead of covering death claims by implication.

Section 9(b) excludes passengers and employees of the owner as claimants, ignoring the fact that they might be the owners of ground property damaged by an accident.

A copy of the owner's insurance policy should not be required, as provided in Section 9(b). The owner should not be compelled in our opinion to disclose either the premium rate he pays or the amount of coverage against liability under Section 2(c). So long as an owner carries insurance for the maximum liability under the statute, he should not be required to do more than establish that fact and give the name of his insurer.

If the sixty-day limitation provided for in Section 9(b) also applies to Section 9(c), a person injured will have no time to prepare a statement unless he does so on the chance that the owner will not file one. Section 9(c) should specify a short time after the lapse of the first sixty-days period within which an injured person may file a statement.

Section 9(f) does not provide where the advertisement of the clerk shall be published, or for how long the publication shall be continued.
Sections 9(g) and (h) are mandatory and purport to require that a claimant must file a statement in the statutory proceeding even though he plans to sue for negligence in another action. If a claimant should fail to file a statement because he was not served, or for some other reason, would an action by him for negligence be barred because of the omission? Section 9(h) merely provides that a party who files a statement giving notice that he elects to bring an action for negligence, shall be precluded from recovery under the Act. It does not definitely provide that failure to make the election within the limited time shall bar an action for negligence either in the State adopting the statute or in any other State.

Section 9(h) provides that if a claimant elects to proceed in a separate action for negligence, the court nevertheless shall assess the damages which such party sustained. The damages so assessed are included in the aggregate under Section 9(i), and if the total damages of all claimants so arrived at exceed the statutory limit, the court is required to make a pro rata reduction in the damages allowed to the statutory claimants. If such a reduction were made in a particular case and if the non-participating claimant should thereafter fail to establish negligence in his separate action and be denied a recovery, the effect would be that the statutory claimants would be denied recovery in the full amount permitted by Section 2.

Section 9 also raises the question of whether the owner could make an effectual settlement with any statutory claimant unless he settled with all claimants, and, if so, whether settlements made out of court would be considered as verdicts in applying the statutory limit of damages recoverable for any one accident.

Section 9(j) obligates the owner or his insurer to pay all costs, exclusive of attorney's fees. Does this mean that an owner must pay costs even if it is determined that he is not liable? There is a statutory exception to liability, namely, the wilful misconduct of the party injured or damaged, and we assume that there is no disposition to impose obligation on an owner to pay costs when the owner is not liable.

N. Compulsory Insurance, Section 10, Pages 18 to 19, Lines 1 to 33.

"10 (a) It shall be unlawful for any person to operate or to cause to permit to be operated an aircraft, except a public aircraft, either on or over the land of this state, unless the owner of such aircraft carries insurance against the liability imposed by this act re-
Regardless of negligence for injuries to individuals or property on the land;

(b) It shall be unlawful for any person to operate or cause or permit to be operated an aircraft carrying passengers for compensation either on or over the land of this state, unless the owner of such aircraft carries insurance against the liability imposed by this act regardless of negligence for injuries to or death of passengers;

(c) To comply with the requirements of this Section, a person must carry insurance written by an insurance company authorized to transact business in this state or in the state or country in which the owner of the aircraft is domiciled or in which his principal place of business is located.

(d) Every person required by this Section to carry insurance, shall carry in the aircraft which is being operated on or over the land in this state, a certificate issued by the duly authorized agent of his insurance carrier, evidencing valid insurance coverage as required by this Section.

(e) Any person who shall violate the provisions of this Section shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five thousand dollars ($5,000) or by imprisonment for not more than one (1) year or both in the discretion of the court."

On July 1, 1937, there were only 7914 licensed and 1766 unlicensed airplanes in the United States (Air Commerce Bulletin, Vol. 9, No. 1, page 9). Contrary to popular impression, the number of aircraft in operation is decreasing rather than increasing. Vol. 8, No. 12 of the Air Commerce Bulletin, at page 264, shows that the number of licensed and unlicensed airplanes in operation in the United States was 9315 in 1929, 9218 in 1930, 10,090 in 1931, 9760 in 1932, 8780 in 1933, 6652 in 1934, 8613 in 1935 and 8849 in 1936. Airplanes used in conducting scheduled air line operations in the United States have likewise decreased. Vol. 8, No. 12 of the Air Commerce Bulletin, page 262, shows that the number of airplanes in service and reserve for scheduled air line operations was 442 in 1929, 497 in 1930, 490 in 1931, 456 in 1932, 408 in 1933, 417 in 1934, 356 in 1935, and 262 in 1936.

There has been a phenomenal increase during recent years in the number of passengers transported by domestic air lines, but the total number carried is still insignificant when compared with passengers using other methods of transportation. The Passenger Traffic Report of the Federal Co-ordinator of Transportation shows in Appendix 2, at pages 517 and 520, that 36,333,966 passengers traveled on trains and that 501,751 passengers traveled on domestic air lines in the United States during the year 1933.
The number of airplanes in operation is insignificant when compared with registered automobiles within the United States which is reported to have been 28,300,000 in 1936. The two States of the Union which have the smallest automobile registration are Delaware and Nevada, with approximately 55,000 automobiles each. This is approximately seven times the present number of licensed airplanes in the United States and may well be in excess of the number of airplanes that will be in operation in the United States at any time during the next ten years.

For the foregoing reasons insurance companies generally have regarded aviation as an enterprise that does not afford present or potential opportunities for a large volume of insurance. The limitation on volume, coupled with the fact that a short experience in a new industry disclosed a shrinkage in premium volume from year to year and an increase in loss ratio, made the insurance companies of the United States indifferent to the writing of aviation insurance. This lack of interest on the part of the insurance companies was considered an obstacle to the development of aviation and, in order to improve conditions, certain individuals connected with the aviation industry organized concerns to act as aviation managers or underwriters. Their object was to induce operators to conduct their affairs in a manner that would entitle them to insurance coverage and to induce insurance companies to provide the protection desired by aviation. At the present time there are three domestic markets for the writing of aviation insurance, namely: United States Aviation Underwriters, Associated Aviation Underwriters and Aero Insurance Underwriters.

In their efforts to develop aviation insurance, the underwriters have encountered many difficulties. In order to retain the interest and confidence of insurance companies, premiums must be assessed in amounts not less than losses incurred, plus expenses of operation. This requirement is a greater burden in the case of aviation than in any other industry. There is probably no other business where insurance premiums represent a larger or more burdensome item in the operating budget than in the case of aviation. A slight differential in the premium charged an aviation assured may mean the difference between profit and loss, and increases in premium rates, whether justified by experience or not, may be cause of the abandonment of an undertaking. Aviation underwriters realize that the success of their efforts is dependent upon the growth of aviation and that it cannot develop as it should if it is to be handicapped by unnecessary and increasing costs in the form of insurance premi-
PROPOSED LAW OF AIRFLIGHT

ums or otherwise. The insurance underwriters therefore view
with alarm the possible enactment of State laws imposing liability
without fault and providing for compulsory insurance.

They are opposed to the enactment of any laws which would
have a tendency to retard the growth of aviation. They are of
the opinion that there have been few, if any, instances where
justifiably aggrieved parties have not been adequately compensated
for injury or damage caused by aircraft and they believe that in
most cases the compensation paid was far in excess of what would
have been obtainable had the agency causing the injury or damage
been other than an aircraft. They therefore believe that there is
no justification or necessity for statutes requiring compulsory in-
surance in order to guarantee adequate redress.

The present level of aviation insurance rates has been pro-
duced through selective underwriting. The underwriters refuse
to insure unsound operations and they accept business at rates
which conform to their opinion as to the merit of each risk sub-
mitted. Aviation has not had sufficient experience or attained
sufficient size to permit the assessment of rates by formula or
manual. There is probably no other class of insurance that offers
as few units to insure and presents as large catastrophe hazards
as are found in the insuring of aircraft. Liability for loss of one
airplane may exceed the premiums paid in one year by the entire
industry. In recognition of these problems, the insurance depart-
ments of the various States, as well as the insurance departments
of European countries, permit aviation underwriters to engage in
selective underwriting and to rate each risk in accordance with an
estimate of the hazard involved.

If any considerable number of States adopt the proposed stat-
ute, selective underwriting will be at an end. In order to protect
owners and operators of aircraft, each State adopting the statute
may have to enact legislation providing for the approval of rates
to be charged by the underwriters. Efforts to change rates will
involve long and burdensome proceedings. Under such laws, or
in connection with the administration thereof, differences in rates
between one aircraft owner and another might be prohibited as
discriminatory, so that the better risks would have to carry a part of
the burden of the poorer risks.

In 1936 scheduled airlines of the United States (including
United States airlines engaged in foreign and overseas commerce)
operating 380 airplanes, flew 7,330,380 airplane miles for each
fatal accident, whereas miscellaneous operators with 8849 airplanes
flew 586,921 airplane miles for each fatal accident. (Vol. 8, No. 12, Air Commerce Bulletin, pp. 262-64.) For further comparisons see "Improved Aircraft Safety Factors," by John H. Geisse, 7 Journal of Air Law 343.

The officials in charge of the three aviation underwriters in the United States are all of the opinion that general adoption of the proposed statute would increase rates for passenger liability insurance and that unless uniform rates should be required by law, the increase will be greater for the miscellaneous operators than for scheduled air lines. This conclusion is based not only upon the effect on premiums of a law requiring the indiscriminate writing of aviation insurance against all classes of risks, but also upon the fact that Section 3 of the statute imposes liability as to passengers where liability does not now exist.

The underwriters have advised the Committee that they cannot submit any estimate as to the extent in dollars to which passenger liability rates would be increased because of the adoption of the proposed statute. They have no experience on which to base such an estimate. The exact rates chargeable under the new law will depend in part upon the number of States which adopt the law. Air transportation is essentially a means of interstate travel. A transcontinental air line may have to fly over only one State or a dozen States where the Act is in effect, and one air line may find that no State over which it flies has adopted the statute imposing absolute liability and another air line may find that all the States over which it flies have adopted the statute. Insurance departments of States adopting the proposed Act may reach different conclusions as to whether rates chargeable for the statutory insurance shall be controlled and as to whether rates must be uniform as to all carriers.

The adoption of the proposed Act by any substantial number of States would create great confusion and difficulty with respect to the proper determination of insurance rates for passenger liability. Assume that a transcontinental air line operates over three States in which the new Act is in effect and in which there are no statutory limitations as to the amount recoverable for death by wrongful act, three States in which the new Act is in effect but in which there are such statutory limitations, three States in which the new Act is not in effect and in which there are no statutory limitations as to the amount recoverable for death by wrongful act, and three States in which the new Act is not in effect but in which there are such statutory limitations. Assume further that the air
line involved carries both transcontinental passengers and local pas-
sengers, both revenue and non-revenue passengers, and also on
occasions passengers riding on through tickets to foreign points,
so that liability as to them is governed by the Warsaw Convention
and not by State laws. In determining the proper rate for pas-
senger liability insurance with respect to such an operation, the
underwriters would have to consider conflicting requirements of
State insurance departments and also take into consideration the
contingencies that in the event of an accident, liability would de-
pend upon the State in which it happened to occur, and, if it oc-
curred in a State having the new Act, upon the extent to which
passengers would proceed under the statute or to recover for
negligence.

The authors of the proposed Act are evidently of the opinion
that if the law goes into effect in a particular State, insurance will
be collectible with respect to every aviation accident occurring in
that State. No consideration is given to the fact that an insurance
company may have a valid defense to claims under its policies.
Aviation insurance policies contain a number of exclusions to cover-
age. Policies carried by scheduled air lines against passenger lia-
ability contain exclusions such as operations for unlawful purposes,
or by unlicensed pilots, flights in violation of federal regulations,
the transportation of explosives, intentional maneuvers not neces-
sary to air navigation, excess loads, the transportation of passengers
in excess of passenger capacity and injuries, deaths or damage
caued by war, invasion, insurrections, riots, civil commotion, mili-
tary, naval or usurped power, or by order of any civil authority.

If insurance policies are to be required which do not contain
such exclusions and defenses, then certainly premiums will have to
be substantially increased. Furthermore, any such requirements
would definitely decrease the number of insurance companies willing
to entertain aviation risks.

The prohibition of Section 10 against operation of aircraft
without insurance is directed to "any person," though liability
under Sections 2 and 3 of the statute is imposed only against the
owner. A pilot who flies an airplane is subject to fine and imprison-
ment under Section 10(e), unless the owner of the airplane carries
the insurance required by the Act. It may be said that this should
be so, because all a pilot has to do to protect himself is to examine
the insurance certificate required to be kept in the airplane under
Section 10(d). However, State laws imposing absolute liability
may lead to the writing of policies restricted to operations over
particular States and, in order to be sure that he is immune to fine and imprisonment, the pilot will also have to ascertain the States in which the Uniform Act is in effect and whether the insurance carried by the owner covers operations in all such States in which the pilot intends to fly. And having obtained that information, he may also in particular cases have to devise some means of recognizing State boundaries from the air and he will have to stay over States where he is covered even though weather conditions may make a landing in some other State advisable.

O. Repeal, Section 15, Page 20, Lines 1 to 3.

"15. All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed."

The Uniform State Law for Aeronautics was approved in 1922 by the National Conference of Commissioners on Uniform State Laws and has been adopted either in its original form or with modifications thereof by 20 States. In States where this act is in effect, Section 1 (definition of aircraft and passenger), Section 5 (ground damage and injury) and Section 6 (collision) will be repealed in whole or in part by implication, if the Uniform Aviation Liability Act is adopted. The Uniform Act will also repeal by implication statutes in certain States governing the amount recoverable for death by wrongful act.

The summary of State statutes set forth in the appendix to "Limitation of Airline Passenger Liability," by Saul N. Rittenberg, 6 Journal of Air Law 365, 392-408, refers to various other State statutes which might be repealed by implication, in whole or in part, by adoption of the Uniform Aviation Liability Act.

The repeal of statutes by implication is not favored (United States v. Yuginovich, 256 U. S. 450, 463). We suggest that in adopting legislation of this character, a study should be made of aviation legislation existing in each State, so that statutory provisions no longer desired may be repealed by specific reference thereto, instead of by the mere enactment of a subsequent law with inconsistent provisions necessitating court decisions to determine the extent to which repeals have been effected.

P. Alternate Section 3 Designed for Use in States in Which Section 3 Would Be Unconstitutional Because of Constitutional Prohibitions Against Legislative Limitations on Damages Recoverable for Injuries or Death, Pages 20 to 23, Lines 1 to 98.
The purpose of alternate Section 3 is to accomplish on a contractual basis, absolute but limited liability for injuries occurring in States which have constitutional prohibitions against limitations on the amount of damages recoverable for injury or death. Both owners of aircraft (alternate Section 3b) and passengers (alternate Section 3f) are conclusively presumed to assent to the statutory liability imposed by alternate Section 3, unless one or the other rejects the statutory liability by written notice delivered to the other party and receipted for by him prior to flight.

The plan is highly impracticable. The statute purports to give air lines carrying passengers for compensation an option to assume or reject a statutory liability, but the option is only theoretical. Air lines engaged in the solicitation and promotion of passenger business would not be disposed to ask a prospective passenger to sign a receipt for a notice stating that, if the passenger is killed in a particular State, the air line shall not be subject to statutory liability under alternate Section 3. Nor can passengers reasonably be expected to know that such constitutional provisions exist in nine States and to keep themselves advised as to whether the legislatures in those States have adopted alternate Section 3 and, having acquired this information, to make an election which will necessitate the hasty employment of a lawyer to prepare a notice satisfying the requirements of alternate Section 3(f), if the passenger decides to reject the statutory liability.

Alternate Section 3 is lengthy. The complete text is printed in the appendix hereto and is not repeated here because there are comparatively few objections arising from the text which have not already been considered in connection with the discussion of Section 3.

(To be continued)