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Common Carrier–Aeroplane as Common Carrier–Limitation of Liability

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or merely declaratory of the common law.²⁰ Consequently it appears that the trial court in the principal case might have properly disbarred the defendant without a prior conviction of a criminal offense; but since the disbarment order was considered mandatory and predicated upon the supposed misdemeanor, the reversal as to this part of the order seems consistent with reason under the extraordinary circumstances, and in no way precludes a disbarment proceeding independent of this action.

—W. F. WUNSCHIEL.

COMMON CARRIER — AEROPLANE AS COMMON CARRIER — LIMITATION OF LIABILITY. — In the District Court the plaintiff recovered a verdict against the defendant aeroplane corporation for damages suffered by her through the death of her husband, alleged to have been brought about by the negligence of the defendant. The defendant appealed to the Circuit Court of Appeals from this judgment claiming that it was not liable for damages in excess of the amount stipulated in the passenger's ticket. *Held*: Aeroplane carriers, like other common carriers, cannot limit their legal liability for negligent injury of the passengers. Judgment affirmed. *Curtiss-Wright Flying Service Inc. v. Glose*.¹

From the very infancy of aviation, writers have anticipated the application of "common carrier" law to aeroplane transportation.² But, even so, it does not appear that there have been any decisions of the Supreme Court of the United States nor any Fed-

and the absence of other statutory causes of disbarment did not prevent disbarment proceedings where the attorney was guilty of personal or professional misconduct. *Contra*: *Kane v. Haywood*, 66 N. C. 1 (1872). A statute has been held to restrict the powers of the judiciary as to punishment and disbarment of attorneys, where it leaves no room for construction and goes on with manifest intention to restrict. *In re Eaton*, 4 N. D. 514, 62 N. W. 597 (1895). Where a statute enumerates grounds for the disbarment of an attorney no other grounds can be considered by the court. *In re Collins*, 147 Cal. 8, 81 Pac. 220 (1905).

²⁰ *State v. Harber*, 129 Mo. 314, 31 S. W. 889 (1895).

¹ 66 F. (2d) 710 (C. C. A. 3d, 1933).

² "Doubtless the rules governing the business of a common carrier by airship could be readily assimilated to most of those applied to other common carriers." Moore, *Aerial Navigation* (1900) 4 LAW NOTES 87. See also (1926) 20 ILL. L. REV. 511. A common carrier in the modern sense includes a carrier of passengers as well as one of goods. The carrier is not an insurer but is bound to exercise care and diligence for safety of passengers. *Chaput v. Lussier*, 165 Atl. 573 (Maine, 1933). 2 HUTCHEISON, LAW OF CARRIERS (3d ed. 1906) § 963.

eral legislation specifically placing the aeroplane carrier in the class of a common carrier.³ State courts, however, have in a number of cases applied the law of common carrier to aeroplanes.⁴ In *Wilson v. Colonial Air Transport Inc.*,⁵ the ordinary rules of negligence and care, and liability of carriers in general obtain as to the operation of aircraft. In *Curtiss-Wright Flying Service Inc. v. Williamson*,⁶ the court applied settled rules of law requiring a common carrier to furnish a safe place to alight and a safe egress from its plane to the hangar. In *Smith v. O'Donnell*,⁷ the court again invokes the rule requiring a high degree of care⁸ and considers a prospective customer, invited to ride, as a "passenger" entitled to this high degree of care.⁹ This court also holds that the owner of the plane would not be liable for injury to the passenger in the absence of negligence.¹⁰ This immunity from liability clearly indicates the trend of the courts to distinguish between injury to the passengers and injury to property, for, the owner of the plane is liable for damages to property on land regardless of negligence.¹¹

³ The AIR COMMERCE ACT, 44 STAT. 574 (1926) 49 U. S. C. § 180 (Supp. 1933), recognizes a right of flight but has no provision dealing with aeroplanes as common carriers.

In the Uniform Aeronautics Act which has been enacted in substance in ten states, we find the following: § 6 "The liability of the owner of one aircraft to the owner of another aircraft or to the aeronauts or passengers on either aircraft for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land." 9 U. L. A. (1932) 13. This seems to be the only provision that concerns passengers.

⁴ The test of whether one is "common carrier" by land, water, or air, is whether he held out that he would carry for hire, so long as he has room, all persons applying or goods of every one bringing goods to him for carriage. *North American Accid. Ins. Co. v. Pitts*, 213 Ala. 102, 104 So. 21 (1925).

Wilson v. Colonial Air Transport Inc., 278 Mass. 420, 180 N. E. 212 (1932); *Curtiss-Wright Flying Service Inc. v. Williamson*, 51 S. W. (2d) 1047 (Tex. Civ. App. 1932); *Smith v. O'Donnell*, 215 Cal. 714, 12 P. (2d) 933 (1932); *Seaman v. Curtiss Flying Service Inc.*, 231 App. Div. 867, 247 N. Y. S. 251 (1930). See *Brown v. Pacific Mutual Life Insurance Co.*, 8 F. (2d) 996 (C. C. A. 5th, 1933) (person merely taking up passengers deemed not a common carrier).

⁵ *Supra* n. 4.

⁶ *Supra* n. 4.

⁷ *Supra* n. 4.

⁸ ". . . the law imposes on him (the carrier) a meticulous regard for possibilities which should ordinarily be ignored." *Giger v. N. Y. N. H. & H. R. Co.*, 60 F. (2d) 63, 64 (C. C. A. 2d, 1932).

⁹ *Vandalia R. Co. v. Darby*, 60 Ind. App. 294, 108 N. E. 778 (1915) (Similar application to railroad).

¹⁰ A carrier is not an insurer against personal injuries. *West. Md. R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618 (1905).

¹¹ UNIFORM AERONAUTICS ACT, *op. cit. supra* n. 3, § 5. "The owner of every aircraft which is operated over the lands and water of this State is

Only a few cases have involved a higher court's determination of the duties due to an aeroplane passenger. But, assuming, in the light of these cases, that certain aircraft should be placed in the class of "common carriers", the denial of a right to stipulate against damages for negligent injuries would seem proper,¹² and would be consistent with the rule prevailing in the United States, which prevents the ordinary common carrier for hire from limiting its legal liability for the negligent injury of passengers.¹³

—ROBERT W. BURK.

INSURANCE — ESCHEAT — MURDER OF INSURED BY BENEFICIARY WHO IS SOLE DISTRIBUTE. — A wife, beneficiary under her husband's insurance policy, feloniously killed him and then committed suicide. Recovery of the proceeds of the policy by husband's administrator was denied.¹ The state then brought suit against the insurance company for the proceeds, on the ground that, insured having left no blood relatives, his wife being his sole distributee, and there being no unpaid creditors of the estate, the insurance proceeds were derelict and without a rightful owner and therefore escheated to the state. Upon demurrers of the insurance company the circuit sustained the bills and certified their sufficiency to the Supreme Court of Appeals. *Held*: Reversed; no

absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of aircraft, . . . whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured."

¹²See, *Anderson v. Fidelity & Casualty Co.*, 228 N. Y. 475, 481, 127 N. E. 584, 585 (1920). " . . . if there are those in the business of carrying passengers in the air to-day . . . who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service." *Smith v. O'Donnell*, *supra* n. 4. Note (1933) 83 A. L. R. 357, cites *Law v. Transcontinental Air Transport* (1931) U. S. Av. R. 205, as holding that the aeroplane carrier cannot limit its liability by a stipulation in passenger's ticket. See also 4 AIR LAW JOURNAL*272 (1933), citing a like New Zealand decision.

¹³HUTCHISON, *LAW OF CARRIERS*, *op. cit. supra* n. 2, § 1072. "The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract: and properly, for the obligation is wider than any that could be based on mutual assent." 2 WILLISTON ON CONTRACTS (1920 ed.) § 1113.

¹Wickline *Adm'r v. Ins. Co.*, 106 W. Va. 424, 145 S. E. 743 (1928).