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## THE LIABILITY OF AN AVIATOR FOR DAMAGE TO PERSONS AND PROPERTY ON THE GROUND

BY JULIAN G. HEARNE, JR.\*

In dealing with the subject matter of this article, many writers have approached the question of an aviator's liability as though there were but two possible solutions,—that is, the imposition of absolute liability for all injuries to persons and property on the ground, or to hold the aviator only for injuries due to his negligence.<sup>1</sup> Statutes of many states have adopted the first proposed solution, several states have enacted laws prescribing the second, while other commonwealths have merged the two, sometimes adding or subtracting various features.<sup>2</sup> Therefore, the sum total of all the legislation on the subject presents a picture as colorful as the rainbow, and as far reaching in its extremes, notwithstanding the fact that the purpose of each enactment is the same,—that is, to establish a just rule of tort liability for airplane cases.

It is the purpose of this article to approach the question from a different angle, by suggesting that liability should depend on the cause of the fall of the airplane (or whatever it is that inflicts the injury), and then to suggest how common law rules should be applied to the various classifications of causes. Just results may be reached without a liability statute, and West Virginia, along with such outstanding states as Massachusetts, New York, Ohio, Virginia and others, has wisely refrained from any

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<sup>1</sup>See, for example, Baldwin, *Liability for Accidents in Aerial Navigation* (1910) 9 MICH. L. REV. 20; Bogert, *Problems in Aviation Law* (1921) 6 CORN. L. Q. 271. For an exhaustive bibliography on all phases of aviation law, see Hirschberg, *The Liability of the Aviator to Third Persons* (1929) 2 SO. CALIF. L. REV. 405.

<sup>2</sup>Del. Laws 1923, c. 199; Hawaii Laws 1923, c. 109, REV. LAWS (1925) §§ 3891-3905 (1925); Idaho Laws 1923, c. 92; Ind. Laws 1927, c. 43; Md. Laws 1927, c. 637; Mich. Laws 1923, p. 224; Minn. Laws 1929, c. 219; Nev. Laws 1923, c. 66; N. J. Laws 1929, c. 311; N. C. Laws 1929, c. 190; N. D. Laws 1923, c. 1; S. D. Laws 1925, c. 6; Tenn. Laws 1923, c. 30; Utah Laws 1923, c. 24; and Vermont Public Acts 1923, p. 155. These statutes impose absolute liability on the owner of the aircraft, in the absence of contributory negligence of the landsman,—and on the pilot if he was negligent. This is the Uniform State Law on the subject, as set forth in the text of this article, *infra*. Pennsylvania Laws 1929, Act 317, makes the rules of torts on land applicable to aircraft cases. Ariz. Laws 1929, c. 38, and Conn. Public Acts 1929, c. 253, impose liability only for the negligence of the pilot. R. I. Laws 1929, c. 1435, makes the owner absolutely liable unless the plane was in the hands of a lessee, and in such a case the owner is only liable for negligence; but the injured party has a lien on the aircraft. S. C. Laws 1929, Act 189, and Wis. Laws 1929, c. 348 make the owner and lessee jointly

such enactment. Our discussion will be devoted chiefly to cases in which the damage occurs while the pilot is lawfully avigating<sup>3</sup> his airplane in the exercise of due care, after proper inspection beforehand, for these will all be cases of first impression when they arise. Cases in which the aviator's *negligence* is the proximate cause of the injury present no new questions, for in most cases where negligence,—including the violation of a statute,—can be shown on the part of the aviator the present rules of tort law are sufficiently broad to be justly applicable.

In speaking of the violation of statutes, it should be pointed out that West Virginia has prescribed<sup>4</sup> twenty-five hundred feet as the minimum safe altitude for flying over any city, town or village except at landing fields, while the Federal Air Commerce Act of 1926,<sup>5</sup> and the Department of Commerce Regulations<sup>6</sup> promulgated in pursuance thereof, are of their own force the law of this State on many points directly concerning the duties of a pilot during flight and in preparation of flight.<sup>7</sup> On turning to

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liable for all injuries, and others only to the extent of their own negligence. With the exception of Pennsylvania, the courts of each of these states are thus confined within definite bounds in the determination of aircraft damage suits, and it appears that the legislatures of some states radically disagree with the law making bodies of other commonwealths as to what constitutes a just rule to follow.

<sup>3</sup> W. VA. REV. CODE (1931), c. 8, Art. 11, § 1, defines avigation as "the steering, directing, or managing of an aircraft, in or through the air, and is here used as a substitute for aerial navigation". This word was probably coined by the Legislature of New York, as the New York Act seems to be the earliest statute in which that word is used. N. Y. Acts 1928, c. 233, Art. 14, § 240.

<sup>4</sup> W. VA. REV. CODE (1931), c. 8, Art. 11, § 12.

<sup>5</sup> 44 Stat. 568; 49 U. S. C. A., 1930 CUM. POCKET PART § 171 *et seq.* See also an enlightening article by F. P. Lee, legislative counsel for the U. S. Senate, entitled "The Air Commerce Act of 1926", (1926) 12 A. B. A. J. 317.

<sup>6</sup> "Air Commerce Regulations"—published in pamphlet form by Dept. of Commerce. Also published in 1929 U. S. Av. R. 185.

<sup>7</sup> There is no Federal liability statute. The Federal legislation and ordinances require registration of aircraft and airmen in the case of interstate and foreign air commerce, and leave it optional for others. Other features are stated in the text, *infra*. The constitutionality of the Federal regulations, as applied to intrastate aviation, is sometimes challenged, but it is worthy of note that the Uniform State Law omits a traffic rules section, due to the belief that the Federal Act would be upheld. (See HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, (1922) pp. 319, 321.) The Committee on Aeronautics of the American Bar Association has also approved this section of the Federal Act as constitutional. (46 Am. Bar Assn. Reports 498-530), while more recently, Mr. Frederick D. Fagg, Jr., Managing Director of Airlaw Institute at Northwestern University, expressed the same opinion in quoting Mr. George B. Logan, Chairman of the Bar Association Committee. *National Conference Held on Uniform Aeronautic Regulatory Laws* (1931) 17 A. B. A. J. 77, at

Chapter 8 of the Air Commerce Regulations, known as the "Air Traffic Rules", we find that these rules apply to all aircraft alike, commercial and non-commercial, intrastate and interstate. Besides providing a set of traffic rules for the navigation of aircraft, this Chapter prescribes certain altitudes below which flying is prohibited, according to specified circumstances.<sup>8</sup> It regulates stunt flying and prohibits it over cities, towns and settlements; and provides that any deviation from the "Air Traffic Rules" shall be unlawful and subject the offender to a civil penalty, payable to the Secretary of Commerce,—but it is further specified that a violation of the Rules shall not of itself make the act unlawful

"when special circumstances render a departure necessary to avoid immediate danger or when such departure is required because of stress of weather conditions or other unavoidable cause".

Another section specifically provides

"When an aircraft is in flight the pilot shall not drop or release, or permit any person to drop or release, any object or thing which may endanger life or injure property, except when necessary to the personal safety of the pilot, passengers or crew."

Chapters 2 and 3 of the Regulations require inspections by the owners of registered aircraft before and after flights, and impose other duties on the owners of registered aircraft in order to insure airworthiness. In view of these provisions, if an aviator injure a person in a village by reason of doing a stunt, or if he injure persons or property by flying lower than the minimum safe altitude, or by some other violation of law, we would have a breach of a law imposed for the protection of persons and property,

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81. As to interstate and foreign commerce there should be no question as to the constitutionality. For purposes of our discussion we will assume that these Federal laws are constitutional.

<sup>8</sup>This section provides that aircraft shall be flown at a height sufficient to permit of a reasonably safe emergency landing,—which in no case shall be less than 1000 feet,—over any city, town or settlement; elsewhere 500 feet, except at airports and landing fields. Observe that in some cases it may be possible to fly over a city at an altitude of between 1000 and 2500 feet and still be able to make a safe landing. In such a case the Federal and State Acts would conflict, and one or the other would have to give way. The writer believes that the Federal Act should prevail, but a discussion of constitutional law is beyond the scope of this article. See note 7, *supra*.

<sup>9</sup>It should be observed that it is the pilot on whom the duty of care is imposed. It seems unreasonable that a passenger who dropped any article causing harm below should not be held to answer also, on the basis of his own negligence, and courts would probably so hold.

which, according to West Virginia decisions,<sup>10</sup> would constitute actionable negligence; while a United States District Court has held<sup>11</sup> that flight below the minimum safe altitude, which in that case was 500 feet, constitutes trespass on the land beneath.

Now, take a case in which no deviation from the "Air Traffic Rules" or some statute is responsible for the injuries caused the plaintiff landsman, but nevertheless, the aviator is negligent in the preparation of his aircraft for the flight, or becomes negligent in the operation of his craft while flying. The result is the act complained of, such as collision with an automobile prudently driven on a public highway. The New York Court of Claims has imposed liability in such a case,<sup>12</sup> and properly allowed the plaintiff the benefit of the doctrine of *res ipsa loquitur* in order to establish negligence, holding that

"In absence of any explanation of how the collision occurred, the doctrine of *res ipsa loquitur* raises the presumption of negligence on the part of the airplane."<sup>13</sup>

So, we see that where a violation of a statute or ordinance or other regulation is responsible for the plaintiff's injury, or where the injury is due to defendant's negligence, it is not unjust to impose liability, and existing tort rules are sufficient to do so.

But it is the chief purpose of this article to deal with cases

<sup>10</sup> *Carrico v. R. R.*, 35 W. Va., 389, 14 S. E. 12 (1891); *Dickinson v. Colliery Co.*, 71 W. Va. 325, 76 S. E. 654 (1912); *Bobbs v. Morgantown Press Co.*, 89 W. V. 206, 108 S. E. 879 (1921).

<sup>11</sup> *Swetland v. Curtiss Airports*, 41 F. (2d) 929 (D. C., N. D. Ohio 1930). See also *Smith v. New England Aircraft Co.*, 170 N. E. 385 (Mass. 1930), where flight over land at one hundred feet, contrary to statute, was held to be a trespass. It should be noted that the courts concerned in both cases limited their decisions to the few points involved, chief of which was flight below the minimum safe altitude, and Judge Hahn took care to point out that "no inquiry as to the general or absolute liability for injuries to persons or property due to the lawful or illegal operation of aircraft, whether arising from negligence, accident or otherwise, is involved in the case at bar". Cf. *Commonwealth v. Nevin and Smith*, 2 Dist. & Co. Reps. (Penn.) 241, 1928 U. S. Av. R. 39 (1922). Commented upon in (1922) 71 PA. LAW REV. 88. In this case an inferior court held that flight over certain posted property was not an "illegal entry" thereon, within the meaning of a criminal statute, although the altitude was as low as 50 feet. This was before our present day statutes had been enacted, however.

<sup>12</sup> *Sollak v. State of N. Y.*, 1929 U. S. Av. R. 42.

<sup>13</sup> "A tabulation of accidents occurring in civil aviation during the year 1928, prepared by the Dept. of Commerce, shows that only 8.11% were of undetermined cause. The remainder were attributed to errors of operating personnel, power plant failures, structural failures, and other causes which might reasonably be said to have arisen from some negligent act of omission or commission." "Aircraft Accident Reports" 308, National Advisory Committee on Aeronautics. Quoted from A. L. Newman II, *Damage Liability in Aircraft Cases* (1929). 29 COL. L. REV. 1039, at 1046.

in which we have no violation of a statute or ordinance and in which the aviator is in the exercise of due care. We may again look to the common law in determining what is due care on the part of the pilot, and it has been held<sup>14</sup> that, in landing an airplane, it is the duty of the pilot to use

“ordinary care, which is the degree of care that men of reasonable vigilance and foresight ordinarily exercise in that operation”,

while a charge that, in landing an airplane, a pilot must use “the highest degree of care” has been held to be erroneous.<sup>15</sup> It has also been held<sup>16</sup> that the pilot of an airplane which is a common carrier

“must use the utmost care and diligence for the safe carriage of passengers”.

So, we see that “due care” will simply depend on the circumstances of each case. The old balloon case of *Guille v. Swan*<sup>17</sup> immediately comes to mind, but this case does not help us, for a balloon is guided by the winds and its descent is usually controlled by the whims of Nature rather than by the balloonist, all of which is expected, while an airplane is guided by the hand of man and is subject to his complete control. The easiest way out would be to apply the rule of the Uniform State Law,<sup>18</sup> and make the owner absolutely liable for all injuries to persons and property caused by

“the ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by . . . . [contributory negligence] . . . . An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence.”

But there are objections to this rule in its entirety. For instance, the owner would be liable for an injury caused by a forced landing, although the reason for such landing was due to a collision with another plane which was entirely at fault for the smashup in the air. Also, the owner would be liable, although he had loaned or leased his machine to a licensed aviator, as competent as Admiral Byrd or Colonel Lindbergh, to use on a “frolic of his

<sup>14</sup> *Sollak v. State of N. Y.*, *supra* n. 12.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Allison v. Standard Air Lines*, 1930 U. S. Av. R. 292 (Fed. 9th Cir. 1930).

<sup>17</sup> 19 Johns. (N. Y.) 381, 10 Am. Decs. 234 (1822).

<sup>18</sup> Uniform State Law for Aeronautics, § 5. See n. 2, *supra*.

own", or if the plane had been stolen. The principles of agency should apply, of course, but there is no reason why the owners of aircraft should be singled out and liability imposed on them in cases in which their agents are exempt, while owners of other vehicles are not subject to any such rule,—even assuming that aviation is a dangerous occupation.

The writer contends that liability on the part of the non-negligent aviator should depend on how the damage or injury occurs.<sup>19</sup> Let us consider, therefore, the various kinds of airplane accidents which can occur under non-negligent circumstances. To simplify our discussion, we can divide our cases into six natural groups, the first two of which are as follows:

1. Where a force wrongfully set in motion by another person, or where the omission of another person under duty to act, causes the damage complained of, as where another aviator wrongfully collides with the defendant, forcing him down on plaintiff's premises, or, to put an extreme case, where defendant is brought down by rifle fire;

2. Where defendant willfully does the act causing the damage complained of, due to the exigencies of an emergency caused by the wrongful act or omission of another person, as where defendant is forced to swoop down on the plaintiff's premises in order to avoid a collision with some reckless aviator.

In these two situations we see that some third party is responsible for the injury,—therefore, it is submitted that it would be imposing an unjust burden on aviation to impose liability on the pilot in such cases. There is no reason why aviation should be singled out, and absolute liability imposed, while other enterprises are not held to answer for the acts or omissions of "the other fellow". Nor would this doctrine impose a hardship on the injured landsman— for when a third party is to blame for the collision he would be liable in damages to the extent of the injury.<sup>20</sup> In point with the first situation is *Woods v. Greathead*,<sup>21</sup> where defendant's automobile was thrown on plaintiff's premises by reason of a collision with X. No liability was imposed on defendant. Again, in *Trauerman v. Oliver's Administrator*,<sup>22</sup> where defendant's car was knocked against the deceased by X's car, the personal repre-

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<sup>19</sup> Of course, contributory negligence on part of plaintiff landsman must be considered, as in any other case. In our discussion we will assume his due care.

<sup>20</sup> *Boggs v. Jewell Tea Co.*, 266 Pa. 428, 109 Atl. 666 (1920).

<sup>21</sup> 151 L. T. 10 (Eng. 1921).

<sup>22</sup> 125 Va. 458, 99 S. E. 647 (1919).

sentative was not allowed to recover. In point with the second situation is *Fleming v. Hartrick*,<sup>23</sup> where defendant's car was forced to pull off to the side of the road in order to avoid collision with X's car, thereby hitting plaintiff's intestate. No liability was imposed on defendant. In another case the defendant, being pursued by X, who threatened to inflict bodily harm, ran on to plaintiff's premises to escape. No liability was imposed for this intrusion.<sup>24</sup>

Consider next the following group of cases in which no third party is involved:

3. Where the defendant willfully does the act causing the damage complained of because of the exigencies of an emergency caused by natural forces, or other (and perhaps unknown) causes not based on negligence, as where defendant is forced to land on plaintiff's premises or to throw ballast thereon by reason of a violent and sudden storm above, or by reason of his motor suddenly going dead;

4. Where natural forces or other causes not based on negligence directly cause the damage complained of, regardless of the will of the pilot, as where the plane encounters an air pocket<sup>25</sup> and goes into a dive, or where some latent defect which could not have been discovered by reasonable inspection before flight, causes part of the wing to collapse, forcing the plane down.

It should be apparent that cases in these groups involve dangers which other means of transportation do not have to contend with. A pilot may have his aircraft in perfect condition for flight,—but from the moment he takes off until he finally descends, he is always subject to the possibility of encountering unavoidable dangers, which are nearly always unseen. That the possibility of encountering perils in aviation is greater than in other means of transportation is attested by the higher rate of insurance for aviation. The pilot realizes all this when he takes off and he also knows that in case of emergency he may be forced to descend, or that he may even come down involuntarily, on a dwelling house, barn, or on whatever happens to be in the path of his fall. Each ascent subjects every landsman to this possibility of danger, which,

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<sup>23</sup> 100 W. Va. 714, 131 S. E. 558 (1926).

<sup>24</sup> *Vanderburgh v. Traux*, 4 Denio 464 (N. Y. 1847); *Cunningham v. Pitzer*, 2 W. Va. 264, 94 Am. Dec. 526 (1867).

<sup>25</sup> It is the writer's understanding that aviators have discarded the term "air pocket", and *in lieu* thereof, the expression "the air is bumpy" is used. However that may be, certain atmospheric conditions often cause airplanes to drop abruptly many feet at a time, while sometimes the ship is carried upward by the same reason.

obviously, the landsman can not avoid. In these two situations, unlike classifications one and two, we have good reason to single out the aviator while exempting others.

A case falling within the third classification could well be disposed of under the rule of the Minnesota Court, which held the owner of a ship liable for damages to a wharf, caused by the captain's prudent and necessary act of making his ship fast to the wharf in order to save the craft from floundering in a violent storm.<sup>26</sup> The fourth classification is different, however, in that no willful act on the part of the aviator is involved, for the airplane no longer is under his control. Trespass will not lie, for the injury would be consequential rather than by the aviator's direct act, for his airplane would be "running away from him", and his acts, if any, would be ineffective. It has been held that where a usually gentle horse, drawing a wagon and driver, becomes frightened at some object and, becoming unmanageable, runs on the premises of another and does damage, there is no liability.<sup>27</sup> And even the Minnesota case stated that had the ship been driven against the pier by force of the waves alone, rather than by the captain's act, that there could be no recovery. So, trespass being inapplicable, we turn to trespass on the case, and find that it is based on negligence, with few exceptions. The rule governing trespassing animals is obviously inapplicable to aircraft cases, while the doctrine of *Rylands v. Fletcher*<sup>28</sup> is not only inapplicable, but is purported to have been rejected by the West Virginia Court.<sup>29</sup> In affirming this rejection, the Court says,<sup>30</sup>

"It is a well settled principle of law that one in the prosecution of a lawful act or business is not liable for an injury resulting from an unavoidable accident which occurs without any blame or fault on his part."

But these are only supposed obstacles in the way of imposing liability. The Court need not be troubled by the doctrine of *stare decisis*, for there are no aviation cases in point at all, and our

<sup>26</sup> *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N. W. 221 (1910).

<sup>27</sup> *Gibbons v. Pepper*, 1 Ld. Ray. 38, 91 Eng. Reprint 957 (1696); see also *Coller v. Knox*, 222 Pa. 362, 71 Atl. 539 (1908).

<sup>28</sup> L. R., 3 H. L. 330 (1868).

<sup>29</sup> *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187 (1902). See article by Prof. E. C. Dickinson, *The Rylands v. Fletcher Rule in West Virginia* (1924) 30 W. Va. L. Q. 248. Mr. Dickinson cites a number of cases to show that our Court is hopelessly confused on this point, and that it is, therefore, uncertain just what the law of this State is in regard to this doctrine.

<sup>30</sup> *Mahaaffey v. Lumber Co.*, 61 W. Va. 571, 56 S. E. 893 (1907).

Legislature has wisely refrained from enacting liability statutes, which must, of necessity, be only general. The writer suggests that, to impose liability here, the *sic utere tuo* doctrine of the West Virginia case of *Wilson v. Phoenix Powder Company*<sup>21</sup> should be applied. In that case a powder mill exploded, due to no fault of the defendant company. The injury to the plaintiff's property was consequential rather than a trespass, for no act on the part of the defendant was alleged or proved. To that extent the case is squarely in point with our own situation. In holding for the plaintiff the Court stated that it is the duty of every one so to use his own property as not to injure another, and it was also said in the opinion by Judge Brannon that negligence was an unnecessary allegation in the declaration. The cases are still squarely on all fours. Now although the actual decision was based on the theory that the powder mill was a nuisance,—and we should not call an airplane by that name,—certainly the language of the *Phoenix* case is broad enough to include our own aviation case. In line with this we have the New York decision of *Sullivan v. Dunham*,<sup>22</sup> in which it was held that, by public policy, the safety of persons and property and the public generally

“is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure, by preventing a use of one piece by one man as may injure all his neighbors”.

This case allowed recovery for personal injuries. No negligence was involved and, although a blasting case, the decision is not based on the nuisance theory, but imposes absolute liability.

There is another way, however. Negligence could be alleged in the declaration and no proof of it required at the trial. Although the doctrine of *Rylands v. Fletcher* has been expressly repudiated, a later West Virginia case<sup>23</sup> quotes that famous English rule almost verbatim and then goes on to say, in regard to the bursting of a water tank,

“The rule of *res ipsa loquitur* applies. If the person whose duty it was to keep the tank in repair had not been negligent in some respect, the tank would not have burst . . . . . We are compelled to say as a question of law proof of the bursting of the hoops was also proof of the defendant's negligence”.

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<sup>21</sup> 40 W. Va. 413, 21 S. E. 1035 (1895).

<sup>22</sup> 161 N. Y. 290, 55 N. E. 923 (1900).

<sup>23</sup> *Mercantile Co. v. Thurmand*, 68 W. Va. 530, 70 S. E. 126 (1911).

In a still later case,<sup>84</sup> this principle was affirmed and defendant's evidence as to due care in construction and maintenance of the tank was rejected. Certainly water stored on one's premises is not any more likely to cause harm to others than is the flight of an airplane. So, on the basis of these cases, the Court could say that proof of the fall of the plane is proof of defendant's negligence, in the absence of any act or omission of a third party, as in our first two classifications. It is submitted that these cases are unsound, and that their application to our needs would be equally unsound, therefore, this solution is not recommended. The second sentence in the quoted passage is a clear *non sequitur*.

In answering any argument that absolute liability on the pilot in cases within the third and fourth classifications would impose an unjust burden on aviation and would hinder its progress, it is only necessary to point to the great strides England has made in the field of aeronautics since 1920, when their absolute liability statute took effect.<sup>85</sup> As to accidents caused by latent defects, for which the aviator is blameless, it should be remembered that the landsman is equally without fault,—we are simply putting the burden on the party who made the accident possible, and in doing so we should perhaps allow him to recover his damages from the manufacturer,—but that question exceeds the bounds of our discussion.

The next classification of cases is as follows:

5. Where an act of God causes the damage complained of, regardless of the will of the pilot.

As to cases within this classification, the authorities are uniform in holding no liability, and the writer submits that this rule should apply to aviators as well as to others. Our only difficulty is in determining when the facts of any particular case would justify its removal from the fourth classification to the fifth. Although a condition of the atmosphere sometimes called an "air-pocket" would be a condition due to Nature and natural forces alone, the writer believes that such a condition, being one of the characteristic dangers of aviation, the possibility of which is to be anticipated in any aerial flight, should not properly be termed "an act of God" in any action against the aviator by a landsman,—although in the case of a passenger, who would assume such a risk, the rule should be different. It may be admitted that the sinking of a

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<sup>84</sup> *Wiegall v. City of Parkersburg*, 74 W. Va. 25, 81 S. E. 554 (1914).

<sup>85</sup> 10 & 11 Geo. V. Ch. 80.

seaworthy ship in a storm on the high seas, although foreseeable, may be an "act of God" for which the owners would not be liable to passengers or shippers of property. But such persons also act, by their going aboard the vessel or loading on of their freight, so that their acts continue and concur with the "act of God". But when an airworthy airplane "sinks", although the aviator may not be liable to his passengers or shippers, the landsman in the path of his fall has not acted concurrently with any "act of God", nor has he assented to any risk. It is therefore submitted that the courts should at all times keep in mind the inherent dangers of an aerial flight which might be encountered, and the fact that the landsman consents to none of these dangers, and be strict in their determinations as to what constitutes "acts of God" in such cases. (No doubt the Los Angeles Chamber of Commerce would contend that a snowstorm at an altitude of less than one thousand feet anywhere in sunny California, at any time of the year, would surely be an "act of God"—and the writer does not care to dispute that contention. If that is so, then the Wheeling, West Virginia, Chamber of Commerce should be sustained in a contention that an earthquake anywhere in West Virginia, at any time of the year, which causes atmospheric conditions dangerous to aviation, would be an "act of God".)

Let us consider now our last group of cases:

6. Where the very act of lawfully navigating the plane in the intended course of flight is the act complained of. This situation should be divided into

(a) Cases in which there is impact, as where defendant loses his way in the night and encounters a highly perched water tank; and

(b) Cases in which there is no impact, as where defendant flies above plaintiff's pasture, thereby frightening plaintiff's cattle so as to injure them.

In classification 6(a), it is submitted that liability should depend on whether or not the damage results from some possible danger characteristic of an aerial flight. If a commercial airline pilot loses his way in a storm at night and crashes into the top of a highly perched water tank, for example, the writer would say that the damage does result from such a cause and that liability should be imposed on the same basis as in the third or fourth classifications. It is probable, however, that there will be few cases within this classification in which the question of absolute liability will arise, because negligence will undoubtedly be responsible for by far the greater part of the collisions in which the very act of piloting the

plane causes the injury, while if the aviator is violating the minimum safe altitude law we have trespass *quare clausum fregit*.<sup>33</sup>

As to cases within classification 6(b), it is submitted that the general rules of tort law should apply. Injuries without impact, where the defendant is acting lawfully and in the exercise of due care, are generally held to be without remedy, and there is no reason why aviation should be set apart from other pursuits and a penalty inflicted upon it. A decision<sup>37</sup> of the Comptroller General of the United States held no liability on the part of the Government for damages to plaintiff's cattle and fence caused by a stampede, brought about by fright when an Army airplane crossed plaintiff's pasture to land in an adjoining field, no negligence or unlawful act on the part of the pilot having been shown. Of course, if the aviator continually hovers about over plaintiff's premises so that the noise constitutes a nuisance, he should be subject to an injunction in the same manner as one who continually plays a loud Victrola on his own property to the great annoyance of a neighbor across the street.<sup>38</sup> Also, if an airplane endangers a landowner by stunt flying above his house, it has been held<sup>39</sup> that an injunction for nuisance is the proper remedy, while the blowing of dust on one's land by propellers at an adjoining airport may also be enjoined.<sup>40</sup>

This article has been chiefly concerned with cases in which the aviator has been lawfully avigating his aircraft in the exercise of due care and in which someone on the ground is the person who seeks to recover. In view of the fact that statutes in many states,<sup>41</sup> and in England<sup>42</sup> and various other foreign countries,<sup>43</sup> impose absolute liability on the owners of aircraft in such cases, (in the absence of contributory negligence, of course) the writer believes that this discussion is timely for, as pointed out, there are various

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<sup>33</sup> Another feature which might be considered in this connection, perhaps at some later date, is the use to which the subjacent land is put. In some cases it is possible that the landsman may be making an unreasonable use of his land under the circumstances, or that he may be guilty of contributory negligence.

<sup>37</sup> 3 Comp. Gen. 234, 1928 U. S. Av. R. 46.

<sup>38</sup> *Stodder v. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N. E. 251 (1922). See also *Appeal of Ladies' Art Club*, 10 Sadler (Pa.) 150, 13 Atl. 537 (1888); *Powell v. Bentley Gerwig Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085 (1891).

<sup>39</sup> *Johnson v. Curtiss Northwest Airplane Co.*, 1928 U. S. Av. R. 42.

<sup>40</sup> *Svetland v. Curtiss Airports*, *supra* n. 11.

<sup>41</sup> See citation of statutes, *supra* n. 2.

<sup>42</sup> 10 & 11 Geo. V. Ch. 80.

<sup>43</sup> *Bogert, loc. cit. supra* n. 1.

situations in which it would be unfair to impose liability on the pilot of an aircraft, while in many more cases it would be unfair to hold the owner liable for acts of his agent for which the agent is exempt. Aviation may in time become as important in transportation, and as safe, as the railroads are today,—and we should, therefore, be cautious in enunciating broad rules for the imposition of liability, which we might later regret. We should take each case as it comes and thereby be in a position to do justice in each case. Although new factual situations will have to be met, it is probable that the appropriate tort rules are sufficiently flexible to meet these situations, except possibly in the case of stowaways. There is a square conflict of opinion on this point,—some people, including the writer, believing that a stowaway should be heaved overboard with neatness and dispatch, while others are in favor of a gold medal and a “fat” movie contract.