Comparative Aspects of Airport Operators' Liability in the United Kingdom and the United States.

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by

D.D. MACKINTOSH,
B.A., B.C.L.(Oxon).

Faculty of Law
McGill University
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D.D. Mackintosh.

16, Old Broad Street,
London, E.C.2.

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CHAPTER I.

General Introduction.

A. Classification of Airports in the United Kingdom and the United States.

United Kingdom.

In the United Kingdom specific power is conferred upon both the Minister of Transport and Civil Aviation and the Local Authorities to establish aerodromes for the purposes of civil aviation by virtue of The Civil Aviation Act, 1949. Under Section 16 of the Act:-

"(1) The Minister[1] may for the purposes of civil aviation establish and maintain aerodromes[2] and provide and maintain in connection therewith roads, approaches, apparatus, equipment, and buildings and other accommodation:----------

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(2) The Minister shall appoint for each aerodrome vested in him an officer who shall be responsible to the Minister for all services provided on the aerodrome on behalf of the Minister, including signalling services, flying control services, and services connected with the execution of works."

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(1) "The Minister" is defined in Section 63(1) of the Act as "The Minister of Civil Aviation."

(2) "Aerodrome" is defined in Section 63(1) of the Act as "any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft." Cf. The definition of an aerodrome in Annex 14 to the Chicago Convention, 1944, as "a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and movement of aircraft."

With respect to Local Authorities[1] Section 19 of the Act provides:-

"(1) Any local authority may, with the consent of the Minister and subject to such conditions as he may impose, establish and maintain aerodromes, and provide and maintain in connection therewith roads, approaches, apparatus, equipment and buildings and other accommodation:----------

(2) A local authority may, for the purpose of exercising any of the powers conferred on the authority by the foregoing subsection, acquire land by agreement or be authorised by the Minister to purchase land compulsorily."

In the Air Navigation Order, 1949 the term "Government aerodrome" is used and in Art.73 this term is defined to mean any aerodrome under the control of the Minister of Transport and Civil Aviation or the Minister of Supply and any naval, military or air-force aerodrome.

Government aerodromes may be notified[2] as available for use as places of landing or departure by aircraft not belonging to or employed in the service of the Crown, in which case they may be used accordingly. In the absence of notification and subject to

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(1) "Local Authority" except in relation to Scotland, means the council of a county, county borough, metropolitan borough or county district, or the Common Council of the City of London and, in relation to Scotland, any county or town council (Civil Aviation Act, 1949 s.63(1))

(2) Notification is made by publication in either "Notam - United Kingdom(Notice to Airmen)" or "Information Circular" or the "United Kingdom Air Pilot" (all being publications issued by the Minister) or any pamphlet issued for the purpose of enabling the provisions of the Air Navigation Order 1954 to be complied with.

some exceptions no aircraft other than aircraft belonging to or employed in the service of the Crown may use a Government aerodrome. (1)

Apart from Government aerodromes and those owned or controlled by Local Authorities the only other class of aerodromes used for purposes of Civil Aviation in the United Kingdom are airfields or aerodromes leased to or owned byindividuals or private or public companies.

There is no general requirement that all aerodromes should be licensed, but, subject to certain exceptions, no aircraft carrying passengers for hire or reward may use as a place of landing or departure any place in the United Kingdom other than an aerodrome licensed for use by such aircraft, or a Government aerodrome which has been notified as available for such use. (2)

It would not appear from the wording of Articles 50 and 54 of the Air Navigation Order 1954, that the Minister has to license aerodromes under his own control, and established by virtue of the Civil Aviation Act 1949, for public use even though such aerodromes are in fact used by aircraft carrying passengers for hire or reward. Article 50 provides that the Minister "may license an aerodrome for public use or for use by particular persons or classes of persons" (sub-section 1), and "all military aircraft belonging to or employed in the service of Her Majesty----------shall have------ the right of access to any licensed aerodrome."(sub-section 5). Article 54 is headed "Passenger aerodromes" and prohibits aircraft

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(1) Air Navigation Order, 1954. Article 53.
(2) Air Navigation Order, 1954. Article 50(1)

carrying passengers for hire or reward from landing or departing from any place in the United Kingdom other than "(a) an aerodrome licensed for use by such an aircraft, or (b) a Government aerodrome which has been notified as available for use by such an aircraft." "Government aerodrome" by definition in Article 73 of the Order means an aerodrome "under the control of the Minister---------and a naval, military or air force aerodrome belonging to or used in the service of Her Majesty----------". This exception would not apply to aerodromes owned by Local Authorities, which would require the Minister's license before their use was authorised for public use by aircraft for the purposes of civil aviation.

For the purposes of this paper, with reference to the United Kingdom, it is proposed to refer to aerodromes owned or operated by the Minister as "Government aerodromes," since any proceedings in contract or tort would only lie against the Crown within the provisions of the Crown Proceedings Act, 1947, and to all other aerodromes whether owned or operated by Local Authorities, which have no sovereign immunity and are not protected by statute, with exemption from liability, or by individuals or private or public companies as "licensed aerodromes."

All aircraft arriving in the United Kingdom from abroad, or leaving for abroad must land or depart from a customs aerodrome.(1) The Minister may by order with the concurrence of the Commissioners of Customs and Excise designate aerodromes which are places of

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(1) Customs and Excise Act, 1952.s.15 (1) & (2). To land at a non-customs aerodrome due to engine trouble is not an offence. Pentz v R.(1936).USAR 294.

landing or departure of aircraft for the purpose of the enactments relating to customs.

In addition the Minister may establish an Aerodrome Control at any land aerodrome, where in his opinion this course is necessary in the interests of safety. "Aerodrome Control" is defined[1] to mean "a service established to provide Air Traffic Control for aerodromes." Schedule 2 of the Air Navigation Order 1954 contains the Rules of the Air and Air Traffic Control mentioned in Art.47 of the Order which provides that every person and every aircraft shall comply with such of these Rules as may be applicable in the circumstances of the case. The system of air traffic control provided for by the Rules of the Air specifies air spaces of three classes, namely, control areas, control zones and flight information regions. Regulation of aerial traffic within these air spaces is made by rules which differ according to the particular class of air space through which the flight is made. Rule 1 of Schedule 2 of the Order defines these air spaces as follows:-

Control area: a defined air space within which Air Traffic Control (a service established to promote the safe, orderly and expeditious flow of air traffic) is exercised;

Control zone: a defined air space, designated by the appropriate authority of a contracting state[2] to include one or more aerodromes

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(1) Air Navigation Order, 1954. Schedule 2, rule 1.
(2) i.e. a party to the Chicago Convention, 1944, and therefore urged to comply with Annexes 2 and 11 to the Convention, on which Schedule 2 to the Air Navigation Order, 1954, is based, by a resolution of the ICAO Council dated 13th April, 1948.

within which measures additional to those governing flight in controlled areas apply for the protection of air traffic against collision;

Flight information region: a defined air space which has been designated by the appropriate authorityof a contracting state as an area within which an Air Traffic Control Centre is responsible for providing flight information and for initiating measures for search and rescue.

Within the United Kingdom the Minister has power to designate such control areas, control zones and flight information regions as he considers necessary.(1)

Within control areas and control zones Contracting States to the Chicago Convention, 1944 are authorised in Annex 11 to determine and establish air traffic services comprising three services identified(2) as:-

1) Area Control service: The provision of air traffic control service for IFR flights.

2) Approach control service: The provision of air traffic control service for those parts of an IFR flight when an aircraft is engaged in manoeuvres associated with arrival or departure.

3) Aerodrome control service: The provision of air traffic service for aerodrome traffic.(3)

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(1) Air Navigation Order, 1954. Schedule 2, rule 6.
(2) Annex 11, Chapter 2.
(3) Defined in chapter 1 of Annex 11 to be "all traffic on the manoeuvring area of an aerodrome and all traffic flying in the vicinity of an aerodrome."

It is submitted that in so far as the service identified as "Aerodrome control service" is operated or provided in a control zone either by the aerodrome operator or separately by a Government Department or Agency it is relevant to consider in this paper[1] what liability attaches to acts or omissions of the operator of the "service" which results in loss of or damage to passengers or air crew on board aircraft or loss or damage of aircraft. This "aerodrome control service" will in ordinary circumstances be provided from the aerodrome control tower which is established to provide "air traffic control service to aerodrome traffic,"[2] and it is this meaning which must attach to any later references to "control tower operations."

United States.

According to the Statistical Handbook of Civil Aviation for 1949, published by the Civil Aeronautics Administration, the following types of airports and airfields in the United States were classified with their designations by the CAA on 1st July, 1949.

1) Commercial: airports or airfields privately owned or operated, i.e. by individuals or corporations/companies, for commercial purposes.

2) Municiple: airports or airfields municipally owned or operated by cities or counties.[3]

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(1) See Chapter

(2) Annex 11, chapter 1.

(3) C.S.Rhyne: 'Airports and the Courts' p.20. "In 1944 every state and territory had legislation authorising public bodies to acquire, maintain and operate public airports." In using the word "public," "municiple" is intended.

3) CAA Intermediate: built for public use only but do not provide any services (they are operated by the CAA).

4) Military: when they are military-operated and restricted to the public.

5)"All other": airports which serve emergency use only, provide no public services and are either privately owned for personal use or government owned for its Forest Service or other governmental agencies.

For the purposes of this paper consideration of questions of liability will be limited to the first three types of airports and airfields specified in the Handbook. Though to this list should be added the type of airport/airfield used exclusively for the landing and taking off of helicopters and to which the name "heliport" has been attached: in most cases these "heliports" will be either commercially or municipally owned, but it is believed that bodies such as the Port of New York Authority either have or are now in the process of establishing this type of specialised airport.

In 1946 Congress enacted The Federal Airport Act which authorised federal expenditure of $ 500,000,000 over a seven-year period to carry out a national airport plan. Under this Act, cities and states must match, on a fifty-fifty basis, the federal grants. The Act also directed the Administrator of Civil Aeronautics to prepare development plans for the development of public airports in Alaska, Hawaii and Puerto Rico. The 81st.Congress passed a Bill (Public Law 846) extending the time for appropriating and expending funds to carry out the provisions of the Federal Airport Act to the

beginning of the 1959 fiscal year. Under the working of the scheme the CAA prepares national airport plans for each year indicating either the municiple-owned airports that will be improved or new airports which should be constructed by cities and counties. There is in every state legislation which gives cities and counties the right to purchase land for the development of airports. Land may be condemned for that purpose under the power of eminent domain. As early as 1928 the Supreme Court of the State of Missouri held in DYSART v CITY of St.Louis 321 Mo.514, 1929 USAR 15 that "the construction of an airport is a public purpose for which a municipality may, if authorised by legislative authority, issue bonds and levy taxes." In the same year in HESSE v RATH 249 NY 436, 1929 USAR 10 CARDOZO J. held that "a city acts for city purposes when it builds a dock or a bridge or a street or a subway. Its purpose is not different when it builds an airport." Once the airport has been established, the city or county exercises all necessary powers to properly operate it.

The Civil Aeronautics Administration is supporting for adoption by state legislatures a "Model Airports Act" designed to give cities and counties adequate powers to establish and operate airports as well as to receive federal aid for such purposes. This "Model" bill was sponsored by the National Association of State Aviation Officials(NASAO) and other aviation groups in 1943 to replace the Uniform Airports Act, 1935 which dealt with the right of political sub-divisions of a state to acquire and regulate airports, and declared the acquisition and ownership of land for that

purpose to be a governmental function, conferring powers of condemnation and taxation with it. Under the new "Model" bill state agencies are directly charged with assisting the municipalities of the state in the development of airports.

B. Distinction between Governmental and Proprietory functions in municiple owned airports in United States.

The liability of municipalities for tortious acts occurring in the course of their management and operation of an airport depends primarily upon whether the airport is considered a governmental or a proprietory function.(1)

"The weight of authority supports the view that in the absence of a statute indicating an intention to exempt municipalities from liability in such cases, the maintenance or operation of an airport by a municiple corporation is the exercise of a proprietory function, and that the municipality may be liable for torts in connection therewith."(2)

In City of MOBILE v LARTIGUE (1930) 23 ALA.App.479 the maintenance of an airport by the city was held to constitute a corporate or proprietory function, and not a governmental one, and the City were liable for injuries which resulted to adjacent lands from improper conditions created at the airport. The maintenance of the airport was a commercial undertaking and the city were not exempted from liability by the fact that its operations were not profitable.

The head-note to PEAVEY v City of MIAMI (1941) 1 So.(2)614, 1 CCH 955 states:-

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(1) For a general discussion, see David, "Municiple Liability in Tort in Calfiornia," 6 So.Cal.L.Rev.269.
(2) 138 ALR Annotated.

"The operation of a municiple airport (unless exclusively for municiple or governmental purposes) is a proprietary and not a governmental function and a municipality is liable for its torts and those of its agents."

The head-note is defective in that it fails to define how or when a municiple airport will be "exclusively for municiple or governmental purposes" so as to bar a suit against the municipality. It is to be noted that section 2 of the Uniform Airports Act, 1935 (adopted by a considerable number of states) reads:-

"Any lands acquired, owned, leased, controlled, or occupied by such counties, municipalities or other political sub-divisions----- shall and are hereby declared to be acquired, owned, leased, controlled, or occupied for public, governmental and municiple purposes."

This section has been construed in some State Courts as exempting municipalities from liability for torts in connection with the operation of municiple airports. In Mayor of SAVANNAH v LYONS (1936) 54 Ga.App.661, 1 CCH 657 the Georgia Court of Appeals held the operation of an airport by the City of Savannah to be a governmental function in the exercise of which the city was not liable for injuries caused by the negligence of its agents or employees or as a result of a dangerous defect in a roadway within the airport. The Court of Appeals based its decision on two grounds:-

1) On a construction of section 2 of the Uniform Airports Act, 1935 any land acquired for the purpose of an airport was acquired and owned for "governmental" purposes.

2) In an amending statute to the Savannah Charter the expression "landing or flying field or park" was used so many times that the

landing field (or airport) must be considered to be a park.

Stephens J. in giving the judgement of the Court of Appeals referred to the decision of the Georgia Supreme Court in SWOGER v GLYNN County (1934) 179 Ga.768(2), 1 CCH 551 for support in that it was there held that the maintenance of an airport was a public county purpose under the Uniform Airport Act. But in that case no question of liability was involved since the point before the Court was whether under an amendment to the Constitution of Georgia by the General Assembly, which authorised the State Highway Board to issue certificates of indebtedness to the counties of the state, it was legal for such certificates to be issued in respect of airport building debts which had been incurred.

Further difficulty is encountered where in certain jurisdictions an airport has been held to be a "park", and so operated by the municipality as a government function.(1)

The distinction between "proprietary" and "governmental" functions was considered in CHAFOR v City of LONG BEACH 174 Cal.478(2) where the Court stated:-

"Under the theory of the common law that the municipality is protected from liability only while exercising the delegated functions of sovereignity, the governmental powers of a city are those pertaining to the making and enforcement of police regulations, to

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(1) Cf. Mayor of SAVANNAH v LYONS supra; CROWELL v EASTERN Air Lines 81 SE (2) 178.

(2) Cited by DOOLING J. in COLEMAN v City of OAKLAND (1930) 1 CCH 253 where in spite of the fact that in earlier California decisions airports were specifically declared to be proper park functions and parks had been repeatedly held there to be a "governmental" function the airport in this case was termed a "proprietary" function.

prevent crime, to preserve the public health, to prevent fires, the caring for the poor and the education of the young, and in the performance of these functions all buildings and instrumental ties connected therewith come under the application of the principle.

An airport falls naturally into the same classification as such public utilities as electric light, gas, water and transportation systems, which are universally classed as proprietary."(1)

C.S.Rhyne in his book "Airports and the Courts" states that in Iowa(2), Georgia(3), and Tennessee(4) cities have been held not liable for acts of negligence On the theory that the cities in operating the airports are engaged in a governmental function.

The only conclusion that can be drawn from the conflicting decisions between state courts as to whether cities in those states are engaged in governmental or proprietary functions in operating airports is that the majority of state decisions are in favour of the latter view, and that in the absence of statute this view will

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(1) Cf.DYSART v City of St.Louis 62 ALR 762: an airport with its beacons, landing fields, runways and hangars is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those who navigate the air!

(2) ABBOTT v City of DES MOINES 138 ALR 120.

(3) Mayor of SAVANNAH v LYONS supra.

(4) STOCKER v City of NASHVILLE 174 Tenn.483 where a statute declaring the maintenance of airports a governmental function and that no action should be brought against a municipality relating thereto was held valid. Contra CHRISTOPHER v City of EL PASO 98 Sw(2) 394 where the Texas Court of Civil Appeals held a statute relieving cities of liability for injuries resulting from the negligent operation of a municipal airport to be unconstitutional since it contravened both the equal protection clause of the 14th Amendment to the Federal Constitution and the due process clause of the Texas Constitution.

probably prevail. But the rule will vary from jurisdiction to jurisdiction. Where the state courts have held that an airport is being operated by a municipality in its governmental capacity that municipality as the operator of the airport will not be liable for the negligent acts of its servants.(1)

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(1) The defence of governmental capacity will probably exempt the municipality from any suits in tort. Mayor and City Council of BALTIMORE v CROWN CORK and SEAL Co. (1941) 1 CCH 994.

CHAPTER II.

Duty to Persons entering Airport.

A. Duty to Passengers and their Friends generally in relation to Premises.

The duty is that of any person inviting persons on to his premises -- to see that the premises shall be reasonably safe: Booth v NER Co.(1866) LR 2 Ex 173. In Washington RR Co. v Harman's Administrators 147 US 571 the duty expressed of a passenger carrier was to "carry safely and deliver the passenger, and in so doing not only to provide safe and convenient means of entering and leaving the carriages----------but extends to all incidents attending the safe discharge and safe reception of passengers." Thus ferrymen have been under a duty to provide safe steps on to their ferry boats: Willoughby v Harridge 12 CB 742 where Jervis C.J. in the Court of Common Pleas stated that "it is not good enough for them (the ferrymen) to convey passengers across the river, unless they also bridge over the intervening space between the vessel and the landing place. They are as much bound to furnish a safe slip for that purpose as to furnish a safe vessel to cross the river." But the duty owed to such passengers is higher than that of an invitor: it is the duty of an occupier based on contractual liability, though this will depend on whether the entry is merely incidental to the real object of the contract, or whether it forms the basis of the contract. "It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe."(1) Salmond, 11th Ed.S.161 regards a higher duty as

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(1) Hall v Brooklands (1933) 1KB 223 per Green L.J.

being required where the contract is based on the sole use of the premises, and as being less strict where the use of the premises is merely incidental to the contract. This distinction was adopted in Protheroe v Rly.Executive (1951) 1 KB 376 where the plaintiff passenger slipped on a platform due to faulty paving stones when about to enter a train. Parker J. held that there was an implied warranty that the premises were reasonably safe in respect to the areas used by passengers. He preferred not to follow Maclenan v Segar (infra) but adopted the test used by du Parcq L.J. in Gilmore v LCC 159 LT 615, namely: "If any person invites a man for reward to come for a purpose to premises which he has hired or for the time being is in possession, then that person impliedly warrants that he has taken reasonable care that the premises are in all respects safe for the purpose."

In Maclenan v Segar (1917) 2 KB 325(2) MacCardie J. adopted the general principal that: "where the contract agrees that a person shall have the right to enter premises, it contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them." It is probable that the inference of a 'warranty' is a slightly too high duty owed as far as the carrier is concerned, and that "reasonable care and skill" is the more definite duty.

Thus the care owed will vary according to circumstances; especially weather conditions, maintenance of floors, good upkeep of furnishings, etc. In Schlarb v LNER (1936)1AER 71 the plaintiff slipped off a station platform on a foggy night due to poor lighting

which failed to show up the white line marking the platform edge. Atkinson J. held the railway company liable, for "the circumstances of the fog imposed upon them a duty to take all reasonable precautions to protect her from the dangers besetting all movement, and action incidental to movement on the platform. Here the defendants knew or ought to have known that the lighting was wholly inadequate on this particular night." But in Tomlinson v Railway Executive (1953) 1 AER 1 CA. the defendants were not liable where a passenger slipped in stepping out of a train on a snow-covered platform. Here the circumstances were unusual. The station was looked after by one porter who had been compelled to stop putting gravel down on the platform in order to light the station oil lamps due to a threatened electricity cut. The Court of Appeal held that under the contract of carriage the defendants were under an obligation to provide safe means of egress, but in the circumstances they had not failed to take reasonable care to see that the station was reasonably safe. "The question whether the duty has been complied with in any given case is necessarily a question of fact and degree: here the shortness of time is most significant." (Jenkins L.J.)

However, it may be that doubt may exist whether the duty owed arises under the contractual liability of the occupier, or that of an invitor to an invitee. The cases themselves are not entirely clear into which class a passenger falls. In Schlarb v LNER (supra) Atkinson J. was not prepared to follow Brackley v Midland Railway Co. (1916) 85 LJKB 1596 in holding that the passenger was a mere invitee, but put the duty owed on a slightly higher basis since the defendants "knew or ought to have known" of the danger and should have taken

"all reasonable precautions."

It therefore becomes necessary to state the recognised duty owed by an invitor to an invitee as stated in the famous dicta of Willes J. in Indermaur v Dames (1866) LR 1 CP 274,287 that the occupier "shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know" as long as the visitor uses "all reasonable care on his part for his own safety." Persons meeting or seeing off friends at stations have been held to be invitees: Bloomstein v Railway Executive(1952) 2 AER 418(2a).

This distinction may be of great importance in relation to airports where the carrier is not the occupier, in that he does not own the buildings or lease them. If the carrier does operate the airport, he will owe a contractual duty to the passenger as occupier and his duty will be governed by Schlarb v LNER(supra). He will be in the position of an invitor to the passenger's friends in view of the Railway Executive cases recently. But where the passenger is under the control of the carrier in an airport which the latter does not operate, it is suggested that the carrier will be under a duty to warn the passenger of dangers which he knows about, and that failure to do so will render him liable for a breach of ordinary care to the passenger and he may be joined with the airport operator as a joint tortfeasor. Though once under the care of the carrier, it is suggested that the contract of carriage will already have begun, in which case the carrier will be in breach of his contract to take care of the passenger. In this case the Warsaw Convention raises difficulties. Under Article 17, the carrier is liable for injuries suffered "in the course of any of the operations

of embarking or disembarking." Leaving aside the carrier's position qua carrier and examining his position in relation to the premises, if the carrier is occupier and injury were suffered to the passenger in the terminal, and it was held that the "course of embarking" has begun the action against the carrier will be under the contract. But is the carrier to be strictly liable in such a case whether he is airport occupier or not? For if he is not the occupier he will not be able to prove that "all necessary measures" were taken under Article 21. Again if the carrier is not the airport occupier and the "course of embarking" is not held to have begun yet the passenger is under the control of the carrier, in cases of liability for negligence to the passenger in failing to warn him of a known danger(1), his liability will still be outside the Convention limitations of damages.

A further point is, if the course of embarking has begun, but before the passenger has boarded the aircraft, could both carrier and airport occupier be joined as joint tortfeasors? The former will be liable in contract, and the latter in tort.(2) The wrong-

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(1) Perhaps a conducted tour of the airport by the carrier to amuse the passengers whilst the plane is delayed in servicing before take-off.

(2) Assuming there is no evidence of contributory negligence by b oth carrier and occupier.

doing is a tort by the carrier vis-a-vis the occupier but not to the passenger in the strict sense of defending the action. The old Common Law rule established in Merryweather v Nixan (1799) 8 TR 186 was that "no person who had been guilty of wilful wrongdoing, and had been made liable in damages, had any right of contribution or indemnity against any other person who was a joint wrongdoer with him." This rule was abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935, S.6(1) of which provides that a tortfeasor may recover from any other tortfeasor , who is, or would if sued, have been liable in respect of the same damage whether as a joint tortfeasor or otherwise." It is suggested that the last words "or otherwise" (in the absence of a clear definition of a joint tortfeasor) might allow the occupier to recover from the carrier and vice versa, and might allow both to be joined as joint tortfeasors. In Littlewood v Wimpey & BOAC (1954) 3 WLR 932 the House of Lords held that the word "liable" means "held liable in a judgement of the court" and not "responsible at law." But what if the court assessed damage at say £12,000 and each tortfeasor was equally liable, would the carrier only be compelled to pay the Warsaw limit and the occupier the rest, or would the passenger lose the residue of the carrier's liability? And if the occupier were made to pay the rest of the figure over the Warsaw limit could he recover what the carrier was protected from paying to the passenger from the carrier in view of the occupier's extra assessment?

It is probable that in relation to the airport occupier, who is not the carrier, the passenger is an invitee and not a mere licensee. For in Smith v London Dock Ltd.(1868) LR 3 CP 326 it was

held that the occupiers of a dock were invitors to persons visiting ships on business, in that they had a mutual interest in such persons. The authority of this case may be considered doubtful.

It must be wondered what authorities were cited to Barry J. in Waring v East Anglian Flying Services (1951) WN 55. There the defendants owned the plane but not the airfield, which was owned by Southend Corporation. The plaintiff's husband was killed when seeing her off, by walking into or being struck by a propellor. Barry J. held that the deceased was a licensee in relation to the defendants who would be bound "to warn him of any unusual dangers of which they were aware and of which he knew nothing." But Southend Corporation, as airfield owners, owed the deceased "only a duty to take reasonable care to see the premises were safe. Their relationship at the highest to him was that of licensors." The Railway Executive cases have put both passengers and their friends almost on the same basis and made them both practically invitees. If this assimilation is correct, and Barry J. is correct in holding the deceased only a licensee, then passengers also in relation to airport owners are merely licensees, and the decision in Smith v London Dock(supra) is now no longer good authority.

As a general rule, it can probably be stated that in the dock and railway cases the passengers have been held invitees of the dock owners, at least. Similarly the railway cases have put passengers' friends on an equally high plane. It is suggested that the same rule should be applied to airports and the passengers held to be invitees in relation to the owner. But whether the railway cases assimilation of passengers and friends will be applied here

remains an open question. It may appear hard that the independent airport owner should be made an invitor to passengers' friends in whom he has no interest: but the Railway Executive have been placed in that category. Barry J. in the Waring case was only prepared to hold the husband a licensee and not an invitee. It may be that the test suggested by Black J. in Boylan v Dublin Corporation (1949) IR 60 will be adopted: "Whether the party in occupation would normally have a material interest in visits made for that purpose."

B. Passengers.

(i) To see that Premises are safe for embarking and disembarking.

Rhyne in "Airports and the Courts" states the general rule as follows:-

"An operator of an airport or his employees must exercise ordinary care as to persons and property on the airport or respond in damages for all injury resulting from lack of such care."(1)

He adds that attempts to define "ordinary care" would be difficult, and must depend on the facts of each particular case.

In Crowell v Eastern Air Lines (1954) US & CAR 249 the plaintiff fell at a doorsill while passing from the waiting room at Charlotte Airport, which was leased by the municipality to the airline, to the loading ramp. She alleged that the doorsill was in a poor con-

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(1) Logan in 1 JAL 263 suggests the liability of the proprietor will be different as between passenger and prospective passenger. In the case of the former the burden of proof that the highest degree of care was exercised will be on the common carrier. But the prospective passenger will have the burden of proving the proprietor failed to exercise ordinary care. This argument seems based on the carrier and proprietor being the same person.

dition with the result that her heel caught. The North Carolina Supreme Court held the airline liable since "the agreement with the city to make repairs did not exculpate the airline's neglect to provide the passenger with a reasonably safe passageway to board the aircraft."

The proprietor's duty was stated by Sutton C.J. in Delta Air Lines Inc. v Millirons (1952) 3 CCH 18,053 to be "that of any owner or occupier to those whom he induces, by express or implied invitation, to enter his premises for lawful purposes, and that duty is to exercise ordinary care in keeping the premises and approaches safe: Coffer v Bradshaw 46 Ga.App.143. The charge imposes a duty, not an absolute one, to keep the premises reasonably safe; that is, not absolutely free from risk or danger, but only reasonably so." In this case the reverse of the procedure in the Crowell Case occurred. The plaintiff while going from the aircraft from which he had descended, to his car in the parking area, was blinded by a floodlight on the roof of the airport building, operated by the defendant airline, and stumbled against a concrete wall, receiving injuries. The Georgia Court of Appeals confirmed the liability of the carrier, not on the grounds of either breach of the contract of carriage or breach of the carrier's duty as a carrier to its passengers, but as having the duty to exercise ordinary care in keeping the premises reasonably safe as the owners and controllers of the airport. If this decision is correct it would seem that the passenger would have a right to damages outside the limits laid down in the Warsaw Convention where, even though his contract of carriage is governed by the Warsaw Rules, he is injured "in the course of any of

the operations of embarking or disembarking,"[1] (Article 17) and the carrier and airport proprietor are the same person since the state of the airport premises is that governed by the conditions of the contract of carriage, and the carrier owes a separate duty to the passenger in respect to these premises which gives the passenger a right of action in tort in the event of a breach of this duty.

Three years later, Delta Air Lines were the defendants again in a further claim for personal injuries suffered at an airport, but this time jointly with the municipality. In City of Knoxville v Bailey (1955) 222 F.(2d) 520, the Circuit Court of Appeals held that a common carrier should not be relieved from liability for injury to one of its passengers resulting from the unsafe condition of the airport premises by reason of the fact that the premises were under the control of the municipality with whom the carrier had contracted for terminal facilities. The plaintiff fell in attempting to descend from one landing to another adjacent to one of the airport buildings, one of her allegations being that the colour of the tiles so blended as to prevent a differentiation of the steps.

(ii) To provide equipment for embarking and disembarking.

The carrier is under a primary duty to provide equipment for safe means of either embarking or disembarking from aircraft. Art.17 of the Warsaw Convention provides that the carrier shall be liable

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(1) i.e. either before he enters or after he has left the aircraft.

for any injury sustained "in the course of any of the operations of embarking or disembarking:" if he is held so liable it is for breach of duty which is imposed on him by the Convention - to provide safe means of entry and egress to and from the aircraft. But the carrier may contract that the necessary equipment shall be provided by the airport operator if he is someone different from the carrier. If such a course is adopted it may not relieve the carrier of liability within the terms of Art.17, but it may provide the passenger with an additional right of action against the airport operator if the equipment should be faulty or its method of use by the employees of the airport operator negligent. Similar common law rights will protect the passenger when the contract of transportation is not governed by the Warsaw Convention in so far as those rights are not excluded by the terms of the contract.

In Chutter v KLM & Allied Aviation Service Corp.(1955) 132 F. Supp.611, the question of whether the provisions of the Warsaw Convention inured to the benefit of an agent of an air carrier was answered in the affirmative. The Court found that the injuries sustained by the plaintiff were incurred during transportation by air, and while under a contract of transportation which was within subsection (1) of Article I of the Warsaw Convention. After being escorted to her seat, and while the "fasten seat belts" sign was still lighted, the plaintiff got up from her seat, and went to wave to her daughter from the open rear door of the plane. At that moment, the agent of the carrier was pulling the ramp away from the plane, the plaintiff stepped out towards the ramp and fell to the ground. The Court held that the plaintiff had failed to bring her

action within the two year period specified in the Convention, and went on to consider whether the provisions of the Convention protected the agent of the carrier. The Court said (at p.613):-

"In selling a ticket to the plaintiff the air carrier obviously assured the obligation of affording her a means of entrance and egress from the aircraft; in delegating the function of ramp handling to the defendant aviation service company, the carrier made it the agency by which part of the contract of transportation was to be fulfilled. It seems immaterial whether the service company be regarded technically as an agent or an independent contractor--------- consequently this action was not timely commenced against the defendant Allied."

And at p.616:-

"The conditions and limitations of the Warsaw Convention inure to the benefit of the defendant Allied Aviation Service, as the agency whereby the defendant airline was fulfilling part of its obligation under the contract of transportation."

It would seem that the Court was correct in stating that it was "immaterial whether the service company was regarded as an agent or an independent contractor." For although the American Restatement on Torts provides that an employer is not liable for the acts of an independent contractor, there are certain exceptions to this rule. Section 429 states:-

"One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for bodily harm caused by the negligence of the

contractor in supplying such services--------."

A passenger contracting with a carrier assumes that the latter will provide the safe means of entry and egress from the aircraft. And if the carrier contracts with the airport operator to render these services as an independent contractor, the latter is only performing a service which the carrier ought to perform and which the passenger is entitled to assume that he is performing.

It is suggested that despite the words of the Court in the Chutter Case this point is undecided. For in a second case involving the same service agency it was held that the provisions of the Warsaw Convention did not extend to protect the service agency. In Scarfe v Allied ..viation Corporation & TWA (1955)[1], the plaintiff mounted a ramp to enter the aircraft and while doing so the blast from another plane of the defendant airline moved the ramp with the result that the plaintiff was injured. The accident took place at Gander, but the action was brought in the Southern district of New York State. The defendant airline successfully moved want of proper jurisdiction, since the flight was an international one within the terms of the Warsaw Convention, under Articles 28 and 29 of the Convention. But the Federal District Court held that the complaint against the service corporation, that they had been negligent in failing to attach the ramp to the plane, was good in law (whether for misfeasance or malfeasance) and that the tort of the service corporation was not the tort of the carrier, and therefore the

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(1) Mentioned 23 JAL & C.232.

benefits of the Warsaw Convention did not inure to the service corporation. The Court referred to the Chutter Case and distinguished it as a case decided purely on a question of fact where the negligence attributed to the carrier was that of a principal for the service corporation as its agent.

The distinction between the two cases is that in the Chutter Case the action was brought against the airline for the negligence of its agent. The agent was held to fall within and be protected by the provisions of the Warsaw Convention. Since the action against the carrier was brought out of time so was that against the agency; and the action was dismissed. In the Scarfe Case there was no contention that the carrier should be liable for the negligence of the service corporation, and the action against the service corporation was regarded as a separate issue to be considered on its own merits.

Until this point goes to a higher court it seems impossible to state how far the service agency is going to be protected by the Warsaw Convention. But the object lesson for the injured passenger appears obvious. In the Chutter Case the action alleged breach of contract of safe carriage and negligence in its performance and the service corporation was joined as one of the carrier's agents and held to be protected by the provisions of the Warsaw Convention. Though the Court held that whether the service corporation was an agent or an independent contractor the carrier would still be liable for the corporation's acts. In the Scarfe Case the action was in tort against the service corporation and outside the contract of carriage. The injured passenger will have a better possibility of

obtaining unlimited damages by suing in tort against the service corporation, and placing the burden of setting up protection of the contract, if he can, on the latter.

The service agent of the carrier may be equally unprotected by the contract in English Law. In Adler v Dickson (1954) 3 WLR 696 CA the passenger on a liner who slipped and fell when mounting a gangway sued the captain and boatswain of the ship instead of the company in spite of a clause in her ticket which provided that the company should not be liable for any injury "whether the same shall arise from or be occasioned by the negligence of the company's servants." The Court of Appeal held that since the contract neither expressly nor by necessary implication deprived the plaintiff of her right to sue the servants she was entitled to pursue her claim in tort. Jenkins L.J. doubted whether even if the words had purported to exclude the liability of the servants they would be so protected because they were not parties to the contract. But Denning L.J. would not go as far as that. He said (at p.704):-

"The law permits a carrier of passengers to stipulate for exemption of liability-------for those whom he engages to carry out the contract--------subject to this important qualification. The injured party must expressly assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound."

In the course of his judgement Denning L.J. did suggest that in certain cases Parliament by statute may intend to protect other persons in addition to the carrier. Referring to the Carriage by Air Act, 1932 (which gives statutory force to the Warsaw Convention

1929) he said (at p.704):-

"The provisions under that Act contain certain exemptions and limitations in favour of the carrier. The pilot is not expressly given the benefit of them, but Parliament must have intended that he should have the same protection as the carrier."

In fact, s.54 of the Civil Aviation Act, 1949 (re-enacting s.29 of the Air Navigation Act,1936) provides that "references to agents" in the Carriage by Air Act, 1932, "include references to servants." The legislature has, therefore, felt it necessary to enact this protection rather than leave it to a presumed intention. But doubt must be expressed as to how far the intention to protect agents would in effect protect service agencies. It may be that a passenger will not be held to have assented to the exclusion of any liability for the negligence of an agent of the carrier unless there is some overt act of assent, i.e. being requested to put his signature to the contract of carriage, as in Ludditt v Ginger Coote Airways(1947) AC 233, by which it may be assumed that he is bound whether he read the clauses and agreed to them or not, and that the mere handing over of a ticket with clauses printed inside will not suffice to impute the assent of the passenger either expressly or by necessary implication. The Courts will endeavour to ascertain whether the passenger knew that the carrier was contracting on behalf of the agency and agreed to the latter being protected as regards liability by the terms of the contract.

C) Employees.

At common law a master owes a duty to his servant to take reasonable care for his servant's safety. This duty was described by Lord Herschell in Smith v Baker(1891) AC 325 HL at p.362 as:- "the duty of taking reasonable care--------so as to carry on his (the employer's) operations as not to subject those employed by him to unnecessary risk." In Paris v Stepney B.C(1951) AC 367 HL Lord Oaksey extended this duty further by saying:- "the duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case."

The duty is owed to each individual servant, so that all the circumstances relevantto each servant must be taken into consideration. The House of Lords in Paris v Stepney B.C.(supra) stated that if the servant is known to have only one eye greater care must be taken of him than of a man with two eyes, so that if he is employed at work involving the risk of a chip of metal entering his eye goggles should be provided for him, though they may not be necessary in the case of a man with two eyes. If his variation from the normal is not known to the employer no greater care need be exercised towards him than to the normal servant.

While the doctrine of common employment was still in force in English Law, a distinction was drawn between the personal negligence of the employer, for which the employer was liable, and the negligence of the fellow servants of an injured servant, for which the employer was not liable. From July 5th 1948 this doctrine of common employment has no longer existed. It was abolished by the Law Reform (Personal Injuries) Act, 1948. Section 1(3) of the Act renders void any provision in a contract excluding or limiting the liability

of an employer for personal injuries caused to an employee or apprentice by the negligence of persons in common employment with him. An employer is now, therefore, liable to his servant not only for his own personal negligence, but also for the negligence of his servants - the fellow servants of the injured person. The duty of one person to another is governed by the ordinary law of negligence. Clerk & Lindsell on Torts (11th Ed.) paragraph 636 state the employer's duty as follows:-

"The employer's duty, as opposed to that of his servants, was said to be (1) to employ competent servants, (2) to provide and maintain adequate plant and appliances for the work to be carried out, (3) to provide and maintain a safe place of work, and (4) to provide and enforce a safe system of work. It is unnecessary to consider the first of these since the abolition of the doctrine of common employment."

Prosser on Torts(1) states the duty of an employer in the United States as one "to protect his servants which was limited to certain more or less specific obligations, beyond which the servant was expected to assume all the risks of his employment. The master was required to use reasonable care to a) provide a safe place of work, b) provide safe appliances and equipment, c) warn and instruct the servant as to dangers of which he might be expected to remain in ignorance, d) provide a sufficient number of suitable and competent

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(1) 2nd. Ed. Sections 67-69.

fellow servants, and e) make reasonable rules for the conduct of the work."

The common law defences open to the employer in the United States when his servant is injured, according to Prosser, are:- a) contributory negligence on the part of the servant, b) assumption of risk by remaining in the employment with knowledge of the employer's negligence and appreciation of the danger; c) the fellow servant rule, by which the employer was not liable for the negligence of other servants who injured the plaintiff.

All American jurisdictions have adopted workmen compensation acts, founded on a theory of strict liability of the employer, with the losses distributed by liability insurance.

The Courts have adopted a lenient attitude to the employer where the servant has been in a position to appreciate the risk or hazards of any task he undertakes. In Spartan Aircraft Co. v Jamison 181 OKLA. 645 an air school were operating an airport and a night watchman ran out to an aircraft to help to put a fire out and ran into a revolving propellor. The air school were held not liable for the watchman's death since his own negligence contributed to this, and being fully familiar with aircraft, he knew that he must look out for revolving propellors.(1)

A master owes a duty to his servant to take care to provide adequate plant and appliances for the work to be done and to maintain them in proper condition. "The obligation to provide and

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(1) Contra Strong v Chronicle Pub.Co(Infra)

maintain proper plant and appliances is a continuing one" per Lord Wright in Wilson & Clyde Coal Co. v English (1938) AC 57 HL at p.87. Lord Herschell describes it as a "duty of taking reasonable care to provide proper appliances, and to maintain them in proper condition."(1) The duty is not an absolute one, so that the employer is not liable for a latent defect which cannot be detected on reasonable examination: Toronto Power Co. v Paskwan (1915) AC 734, 738.

In Magnolia Petroleum Co. v Angelly(1955) 4 CCH 17,994 the plaintiff, a minor, was employed in a part-time capacity at a small airport where his duties consisted of servicing planes, keeping animals off the field and being in charge during the absence of the owner of the field. He was injured when gasoline leaking from an improperly installed pump exploded. The Oklahoma Supreme Court ruled that the operator of an airport owes a duty to his employees to furnish them with reasonably safe appliances. It found the defendants negligent in that they failed to provide a proper and safe gasoline pump.

D. Other Persons entering Airport.

An airport operator is not liable where part of the airport is used by trespassing children without the express consent of the operator. In Prokopu v Becker(1942) 1 CCH 1069 the plaintiff's minor son was killed, though being struck by the landing gear of a plane in the process of landing, while cycling along a road inside the boundaries of the airport. Notwithstanding the fact that the

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(1) Smith v Baker (1891) AC 325, 362.

deceased was a licensee in the vicinity of the hangars and intermittently used the road, the Pennsylvania Supreme Court held that the evidence was not sufficient to bring the operator within the operation of the playground rule imposing a duty to exercise ordinary care with respect to trespassing children. But in Strong v Chronicle Pub.Co. 93 P (2) 649 a child entered the airport with the implied knowledge of the operator. The Santa Rosa Municiple Airport was operated by an individual as a commercial enterprise. The boy went to the airport to collect arrived newspapers. The aircraft had landed, but in the darkness the propellor continued to turn although the ignition had been switched off, and the boy was hit by the revolving propellor which he could not see due to insufficient lighting. He was held to be an invitee and not a licensee because he entered with the implied or express authority of the operator, and the latter had failed to provide reasonably prudent means of warning the boy against the dangers of coming into contact with the aircraft propellors.(1)

In Rose v Peters (1955) 82 So.(2d) 585 the Florida Supreme Court found that neither the operator of an airport nor the occupant of a hangar were liable for the death of an official of a roofing company which had contracted to repair the roof of the hangar. The complaint was based on the claim that the deceased had met his death in an attempt to rescue his men in a position of

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(1) Contra Spartan Aircraft Co. v Jamison (supra) where the deceased was a servant and had knowledge of the danger.

great danger brought about by the defendants' negligence. The Court dismissed the action, saying (at p.586):-

"We are convinced that the rescue doctrine cannot be invoked here because: (1) he was aware of the dangerous condition of the roof before work commenced on it but did not warn his men of the dangerous condition, (2) there is no showing here of tortious acts of the defendants contributing to the rescue or that the defendants were guilty of negligence to him at any time------- Neither the Port Authority nor Aerodex Inc. attempted to instruct the crew foreman as to the details of performing the work. The defects in its roof were not latent or concealed, they were obvious."

E. Spectators.

(i) By Airport Operator permitting public to view aircfaft.

The American Restatement on Tort provides that(1) a person who carries on an ultrahazardous activity is liable to another for injury suffered when the injury should have been foreseen as likely to result from this activity even though the utmost care is taken to prevent harm. Section 523 provides a qualification in that the author of the ultrahazardous activity will not be liable where the person injured by the activity has reason to know of the risk and either (1) takes part in it, or (2) brings himself with the area which will be endangered by a miscarriage of the activity "in the exercise of a privilege derived from the consent of the person carrying on "the operation." The 'comment' on this section states:-

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(1) Section 519.

"One who goes to an airport to welcome a friend who is travelling by air, or as a mere licensee to indulge his curiosity, cannot recover for harm caused by an aeroplane in the absence of negligence on the part of the persons operating the airport or the aviators who use it as a place of departure and arrival."

One may conclude from this statement that: (1) there is no strict liability imposed on an airport operator for injury suffered by a spectator or licensee, (2) a spectator may recover if injured due to the negligence of the operator, and (3) the spectator may recover if injured not through the negligence of the operator but through the negligence of a carrier using the airport.(1)

On the authority of South Western Portland Cement Co. v Bustillos 216 SW 268 the Corpus Juris Secundum(2) states:-

"The owner or occupant of premises is required to exercise ordinary care to keep them in a safe condition for uses, purposes, activities and operations known or contemplated by him." The same duty was laid down by the Florida Supreme Court in Peavey v City of Miami (1941) 1 CCH 955: "The law imposes a duty to use proper care, precaution and diligence in providing and maintaining the accommodations in a reasonably safe condition for the purposes to which they are adapted and are apparently designed to be used."

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(1) But in English Law by virtue of s.40(2) of Civil Aviation Act, 1949, damages are recoverable for any loss or damage caused to person or property by an aircraft "while in flight, taking off or landing" without proof of negligence unless the injury was contributed to by the negligence of the person injured. Cubitt & Terry v Gower(1933) 77 SOL.J.732. A spectator would come within this provision.

(2) 45 C.J.S.856.

In Mills v Wichita 73 P(2) 1054 it was held that where a person at an airport is not in the vicinity of aircraft, but in part of the administrative building what constitutes ordinary care would be deemed similar to that necessary in any public building or depot. The balcony for viewing planes was not level with the corridor, and the plaintiff fell on the step. The Court held that the step was not such a dangerous one as to make the defendant liable. The care owed to the plaintiff, who was an invitee, was to "exercise reasonable care to afford a reasonably safe way to go out onto the balcony and return." She fell because she was not looking. The defendant, on the rule in Ware v Evangelical Baptist Soc. 181 Mass.283, did not owe the plaintiff a duty to construct the building so that she could go onto the balcony without stepping either up or down.

An airport operator who admits spectators and allows them to wander anywhere in the airport will be liable if they are injured through his failing either to warn them of dangers or to provide adequate protection and supervision. In Roper v Ulster County Agricultural Society (1909)(Reported 1928 USAR 102) a fair association were liable for failure to warn a spectator at a balloon ascension of the danger of the rope attached to the balloon, so that she was carried up into the air and injured. A further ground of negligence was the failure to provide barriers to prevent the woman from going near the point of danger, particularly since the entrance ticket allowed her to go anywhere on the ground, and in the absence of barriers she was not at fault in being where she was. The balloon ascension was conducted by an independent contractor, and in Platt v Erie County Agricultural Society (1914)(Reported 1928

USAR 116) the Appellate Division of the Supreme Court of New York again held a fair association liable for an injury suffered by a spectator through the act of an independent contractor. In this case a child was struck by the wing of an aircraft landing due to the failure to provide safeguards around the landing space. The extent of the duty imposed on the defendants was to guard spectators from injury by such means as would seem prudent, and prudence, in the view of the Court, depended on the character of the aircraft.

Spectators have even been held to be invitees. In Layden v Goodyear Tyre Co. 28A(2)96 the public were invited to a field to look at a balloon ascent. There was no rope or barrier warning people from the danger area, and the plaintiff was injured while saving his daughter from being struck by part of a balloon. It was held that the privilege of entry in such a case was not a license, and the plaintiff was an invitee to whom reasonable care was owed by the management. It is to be questioned whether the Court were correct in holding the plaintiff to be an invitee, and whether they would not have been on firmer ground in holding that there was a contractual liability on the part of the defendants; but if this was the case it is doubtful if the defendants could have been liable for the act of an independent contractor which may explain why the Court were anxious to found liability in tort, under the duty owed to an invitee, and not in contract.

(ii) By Airport Operator organising public shows or demonstrations.(1)

Apart from the condition of the structure of the premises, the person admitting spectators by payment to witness an organised spectacle owes a duty to the payer to take reasonable care that the performance itself will not expose the payer to unusual danger which was known or ought to have been known to the person receiving payment. In Cox v Coulson (1916)2 KB 177 the plaintiff paid for her seat at a theatre and was injured by a bullet fired from a pistol by an actor who was employed by a theatrical company but not by the theatre lessee. It was held that the obligation of the theatre lessee was:- 1) not to give a performance of an intrinsically dangerous nature, and 2) to take reasonable care not to expose spectators to unusual danger of which he knew or ought to have known.

He was not, however, liable for the negligence of one of the actors if he could not have prevented it by the exercise of reasonable care or supervision.

Nor will the organiser of a competitive car race meeting be liable for injuries to spectators through an accident on the track if it was one which no reasonable diligence could foresee and arose from a danger inherent in sport which any reasonable spectator could foresee and of which he took the risk. In Hall v Brooklands Auto Racing Club(1933) 1 KB 205 the plaintiff was admitted by payment to a car race-track, and chose to stand along the railing of

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(1) Under ANO 1954 Art.35(1) the Minister of Civil Aviation may impose flying restrictions in any area where it is intended to hold "an aircraft race, or contest or flying exhibition."

the track. Two race cars collided in circumstances and in an accident which had never happened before: and one car was hurled through the railings killing and injuring spectators. The jury found that the defendants had been negligent in inviting the public to witness a highly dangerous sport and in failing to keep spectators at a safe distance from the track. The Court of Appeal held that there was no evidence to support the evidence of the jury and reversed the decision. The duty of the defendants was to see that the course was as free from danger as reasonable care and skill could make it. Scrutton L.J. said:- "Those who pay for admission or seats in stands at a flying meeting run a risk of the performing aeroplanes falling on their heads. What is the liability of the person taking payment for permission to view these sports?----------It is not an absolute warranty of safety, but a promise to use reasonable care to ensure safety. What is reasonable care would depend on the perils which might be reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils."

It may be held that this decision is solely applicable to sports meetings and competitions, and not to demonstrations which the public are invited to witness. On the other hand, even though these words are 'obiter dicta,' Scrutton L.J. in his judgement referred to "flying meetings," and it is arguable that these words could refer to a flying competition or demonstration of whatsoever kind. Against the organiser, it might be argued that in 1933 the risks of flying were not altogether known, whereas today the organiser should be able to assess the risks which he should guard or forewarn

his spectators against; even then he will not be required to give an absolute warranty of safety. If the implied warranty of safety is excluded or restricted by contract, it may not be open to the injured party to sue in tort.

It appears that the Court may take notice of the plaintiff's knowledge or lack of knowledge of danger. In Shanney v Madison Square Garden Corp.(1936) 296 Mass.168 the plaintiff attended a hockey game and was hit by a puck. She testified that this was the first hockey game she had ever attended and that she had no idea the puck was liable to fly among spectators. On appeal the judgement in favour of the plaintiff was upheld based on the defendant's negligence in not providing protection for or warning the plaintiff who did not assume the risk.(1)

This decision seems to be an extension of the law of contributory negligence to take account not of the actions but of the state of mind of the plaintiff. Any extension in this direction can hardly be lauded since it is a flight to the disadvantage of the plaintiff from the implied term in contract and an extension of the defence of contributory negligence to the advantage of the defendant, in tort by way of a subjective test directed at the plaintiff's inactions but appreciation of the situation.(2)

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(1) For an opposite decision on similar facts, v. Murray v Harringay Arena Ltd.(1951) 2 AER 320. In Payne v Maple Leaf Gardens(1949) 1 DLR an action failed against the proprietor but succeeded against the player. Cf.Bolton v Stone (1951) AC 850 HL.

(2) v. Christopher v City of El Paso (1936) 98 SW(2)394: no liability on part of city to spectator injured at air show since City had leased municiple airport to provide operator and no negligence on part of city proved.

F. Defences open to operator when persons admitted by ticket.

The condition on which persons admitted to airport property, whether as spectators or licensees or in some other capacity, will frequently be governed by contract, which may exclude, subject to statutory provision to the contrary, all possible liability resulting in damage, whether to persons or to property. The effective extent of such exclusion depends upon the terms of the contract in each case, but it cannot exclude liability to persons who are strangers to the contract. Thus an agreement between the carrier and passenger excluding liability even though stated to extend to cover relatives of the passenger witnessing his departure or arrival, would not debar relatives of the passenger from suing the carrier if he was the operator of the airport. In the case of spectators admitted by ticket, the terms must be agreed, and therefore all reasonable steps must be taken to bring any such exclusion to the notice of the other party. In the words of Lord Haldane in Hood v Anchor Line(1918) AC 837 HL at p.844:- "whether all that was reasonably necessary to give him this notice (of exclusion of liability) was done is a question of fact, in answering which the tribunal must look at all the circumstances and the situations of the parties------ the question is not whether the appellant actually knew of the condition. The real question is whether he deliberately took the risk of there being conditions in the face of a warning sufficiently conveyed that some conditions were made and would bind him. If he had signed the contract, he certainly could not have been heard to say he was not bound to look. And when he accepted a document that told him on its face that it contained conditions----------he must be

held as bound by the document as clearly as if he had signed it."

NOTE.

Since this chapter was written the Royal Assent has been given, on 6th June, 1957, to the Occupiers' Liability Bill,1957 which now becomes an Act of Parliament. The effect of the Act is to abolish, in English Law, the distinction between invitees and licensees. The occupier of premises will owe the same duty, called the "common duty of care" to all his visitors (Cl.2(1)). There is an exception to allow him to modify the duty by agreement or otherwise where he is free to make such agreement. By Cl.2(2) the "common duty of care" is expressed as a duty"to take all such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." This is more than a duty to warn (which under the old law would be sufficient in the case of licensees, but not in the case of invitees) but less than a duty "to make the premises reasonably safe." It is a duty to see that the visitor is reasonably safe. The common duty of care shall regulate the duty which an occupier owes to his visitors not only in respect of the state of the premises but also in respect of things omitted or done (Cl.1(1)). An occupier may plead 'volenti non fit injuria' as a defence when applicable (Cl.2(5)) Clause 5 provides that the implied duty under a contract shall be the common duty of care.

Any reference in the above chapter to English Cases based on the distinction in tort between invitees and licensees should be read and treated in the light of this NOTE. Trespassers are not

mentioned in the new Act, and there is no change in the law with respect to them. Careful notice should be taken of the wording of the definition of the "common duty of care" which is now to be owed to all persons entering by invitation, by express or implied permission.

CHAPTER III.

Duty with respect to Aircraft and Goods.

A. To Passengers to see that Aircraft is safe when owned or hired by Operator.

Where the aircraft is either owned or controlled by the operator of the airport he will be bound as the carrier to carry the passengers safely and properly. That he is bound to do as carrier was established as early as 1791 in White v Boulton Peake(N.P.)81. In order to carry the passengers safely he is under an obligation to maintain the requisite standard of care with regard to the maintenance of the vehicle of carriage, and owes this duty to all those who are lawfully using the vehicle. In Marshall v Newcastle & Berwick Rly.Col.11 CB 655 the Court held that the right which a passenger has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts upon the carrier the duty to carry him safely.

The question of the degree of duty required of the operator where he controls aircraft operating from the airport was considered in Boulineaux v City of Knoxville(1935) 1 CCH 600 where the plaintiff sued the airport owner for damages for injuries resulting from the crash of an aircraft operated from the airport. It was alleged that the plane was not airworthy in that it was not equipped with safety belts and was carrying an auxiliary tank and gravity fuel system which rendered it unsafe and unfit for passengers. The Court held that the absence of safety belts from and the presence of an additional gas tank on the plane could not be considered in determining the liability for a plane crash unless they were shown to be the proximate causes of the accident. But plane passengers assume

only such risks as occur without negligence on the part of those in control of the operation. It must be stated that in this case the pilot was not the servant or agent of the operator, and since the accident was solely due to the negligence of the pilot, over whom the operator had no control, the operator was not liable. But the Tennessee Court of Appeal accepted the words of the trial judge that the duty placed on the airport operator is "an affirmative and continuous duty which it must have performed to make reasonable inspection to see that the plane used was airworthy and reasonably safe for the carrying of passengers." The Court rejected the contention that the duty is restricted to inspection and relieves the operator of the duty to exercise continued supervision.

These words of the Court on the operator's duty are wide, and it must be suggested that to a large degree they are 'obiter.' For in this case, it was found that the aircraft was not operated by the airport owner, but by an independent operator to whom permission had been given to use the airport. If there is an "affirmative and continuous duty of supervision," which is a higher duty than inspection only, over all aircraft flying from the airport, whether operated by the airport owner or not, then the liability of the operator may be extremely wide. It was alleged by the plaintiff that control of a plane was control of a dangerous instrumentality. This suggests that in 1935 the Courts were prepared to impose strict liability in the operation of aircraft in the early days of aviation. Since that date the Courts have retreated from this doctrine in aviation cases. It is more likely that today it would be considered unreasonable to suggest that an operator should exercise super-

vision over aircraft which in fact he does not control, and that although he may be liable if he allows aircraft to use the airport which to his knowledge are defective apart from this his liability will be confined to aircraft over which he has actual control.(1)

Where an airport owner has quoted a price for chartering an aircraft without revealing that the aircraft is owned by another company he may be liable as principal. This is the effect of the English decision in Fosbroke-Hobbes v Airwork Ltd.(1937) 1 AER 108 where a person telephoned an airport to arrange for a plane and the airport owners quoted a price for a plane owned by another company without revealing that they were acting as agents or brokers. The airport owners had held themselves out as principals and they were liable to the charterers as principals.

The operator will be liable for the negligence if the pilot as his servant of the latter is acting within the scope of his authority or in the course of his employment. In Bruce v O'Neal (1951) 3 CCH 17,657 the pilot was the employee of a flying service and was found to have been negligent in the performance of air show manoeuvres so that the flying service were held liable for the death of a guest passenger resulting from a crash resulting from the pilot performing too many spins. There was no evidence that the passenger had acquiesced in the negligent operations, and that

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(1) For cases alleging defects in planes causing injury to third parties, see Spartan Aircraft Co. v Jamison(1938) 1 CCH 738; D'Anna v USA(1950) 3 CCH 17,171; Evans v USA(1951) 3 CCH 17,766.

the fact that he was a flier himself was of no relevance. But where the passenger owned the aircraft and the pilot was an instructor supplied by contract with a flying service, and a crash occurred when the aircraft was being flown over country not referred to in the agreement it was held that the flying service were not liable since the instructor was acting outside his "authorised sphere" but within the area ordered by the owner of the plane. Pickering v California Airways Co.(1931) 1 CCH 294. And in Towler v Phillips (1943) 1 CCH 1086 the Court refused damages where the plaintiff's husband was killed in a crash while a guest in a plane equipped with dual controls. The doctrine of 'res ipsa loquitur' was held inapplicable since there was no specific evidence that the plane was under the sole control of the pilot.

The use of a pilot suffering from fatigue has been held to be negligence. In McCusker v Curtiss-Wright Flying Service (1933) 1 CCH 431 the plaintiff chartered a plane for an emergency night flight. The plane landed at an unscheduled airport, and in doing so unaccountably struck a tree which was nowhere near the landing path. The Court found that the flying service had used a tired pilot and that the accident was due to his inability to exercise the necessary degree of care due to his weariness. The flying service were liable.

The servant of a taxi-cab company was acting within the scope of his employment and the company were liable when an accident occurred while he was driving the general manager of the company upon the latter's private business. The general manager had no authority to use the cab for that purpose, because the cab had by

agreement been appropriated to the exclusive use of one customer: but the driver had no reason to suppose that the order was an improper one: Irwin v Waterloo Taxi-Cab Co.Ltd.(1912) 3 KB 588 CA.(1)

B. Duty with regard to Goods at Airport.

The customary procedure appears to be that goods are stored not by the airport operator but by the carrier, who has contracted to carry the goods, in premises supplied by the operator. It will, therefore, only seldom occur that the operator is responsible for goods. Occasions may arise when both the carrier and the operator are one and the same person, and if the contract for the carriage of the goods is one of "international carriage," the provisions of the Warsaw Convention, 1929 will apply. Under Art.18(1) of the Convention the carrier is liable for the loss of or damage to goods taking place "during the carriage by air." By sub-section 2 of Art. 18 "the carriage by air" with reference to goods is defined as "the period during which the goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever." In Westminster Bank Ltd. v Imperial Airways(1936) 2 AER 890 it was held that the carriage by air had begun, and the carrier was liable for their loss, where gold bars were collected and removed to an airport and stored in a strong-room, from which they were stolen, overnight. Lewes J. said:-

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(1) Cf. Penny v Wimbledon UDC(1899) 2 QB 72; Lloyd v Grace, Smith & Co.(1912) AC 716; and Dalton v Angus(1881) 6 APP.CAS.740.

"In view of the fact that the goods were stolen from a strong-room in a building at Croydon Airport, and that when so stolen they were in the charge of the defendants, it seems to me impossible successfully to contend that at the time when the loss was sustained the carriage by air had not begun."

The carrier may escape liability if he proves that he and his agents have taken all necessary measures to avoid the damage or loss: Art.20(1) of the Warsaw Convention. It must be questioned whether the word "agent" would include the airport operator storing goods on behalf of the carrier in view of the recent decision of a United States District Court in Scarfe v Allied Aviation Service Corp. & TWA (1955) that a service agency may be liable for its own tort.

In Rugani v KLM (1954) IATA Reporter No.25 the plaintiff successfully contended, and recovered damages for their loss, that the carrier had failed to take "all necessary measures" to protect a consignment of skins which were stolen from a warehouse at Idlewild Airport. The "measures," which the carrier had failed to take, were: 1) there was no guard on the warehouse during the time when the skins were stolen; 2) the guard was not armed; 3) robbery should have been contemplated by the carrier; and 4) two of the five doors to the warehouse were left unlocked.

The terms and conditions on which premises are supplied to the carrier will depend on the contract between the carrier and the operator. If the premises are not secure or safe for the purposes for which they are provided any right of action on the part of the carrier against the operator for failure to provide

safe premises will depend on the terms of the contract between the two parties.

Where the operator does undertake to store goods on behalf of the carrier, or the consignor or consignee, then his position will be that of a bailee, either gratuitously or for reward, and his liability will be governed by the ordinary laws of bailment. The measure of diligence demanded of a gratuitous bailee is that degree of diligence which men of prudence generally exercise about their own affairs: Giblin v McMullen(1869) LR 2 PC 317 at p.337 per Lord Chelmsford. "The bailee for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him by the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous bailee, and must be that care and diligence which a vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances: Coggs v Bernard(1703) 2 Ld.RAYM.909 per Holt C.J. at p.916.

CHAPTER IV.

Liability with respect to Persons or Property on Contiguous Land.

A. For Private or Public Nuisance due to:-

(1) Noise and Vibration.

There appears to be no specific rule in the United States as to whether noise originating on an airport is or is not an actionable nuisance. In the United Kingdom airports in certain classifications are given statutory protection under the Civil Aviation Act 1949 and Orders in Council promulgated thereunder, and these provisions will be referred to later. From the cases which have arisen in the United States and in which noise and vibration have been pleaded as alleging nuisance, it is only possible to attempt to find a general rule, since the decisions in the cases which have arisen vary from state jurisdiction to state jurisdiction.

The rule as stated by the Corpus Juris Secundum(1) is as follows:

"An airport, landing field or flying school is not a nuisance 'per se'----------although it may become a nuisance from the mannar of its construction or operation; in other words, it can be regarded as a nuisance only if located in an unsuitable place, or if operated so as to interfere unreasonably with the comfort of adjoining property owners. Thus, an airport which by reason of bright illumination and the noises incident to its operation, will unavoidably interfere with, if not destroy, a neighbouring landowner's enjoyment of his property constitutes a nuisance, which may be enjoined."

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(1) Vol.2. Aerial Navigation. Section 29.

This statement is somewhat contradictory and misleading. Although stating that an airport is not a nuisance 'per se' in the first sentence, the authors in the second sentence appear to cast the onus on the airport operator to justify that no nuisance is created by implying that 'prima facie' any airport interfering with neighbouring property even to the slightest degree, is a nuisance. It would then be for the Courts to decide whether to enjoin the operations of the airport or not. FIXEL(1) adopts the view that the onus is on the landowner to prove that the operations are a nuisance, and it is suggested that the words of this author are correct in principle:-

"An airport may become a nuisance because of improper operation. Noise, proximity and the number of aircraft may be taken into account, but where the operation of aircraft vertically above lands is not harmful to the health or comfort of ordinary people there is no nuisance."

The authority that is generally cited for the statement that an airport is not a nuisance 'per se' is Thrasher v City of Atlanta (1934) 1 CCH 518 where an airport was sued, and an injunction and damages sought, in respect of nuisance created by danger, noise and dust. The Georgia Supreme Court dismissed the petition, although it was found as a fact that noise and dust had injured the health of the plaintiff's wife and damaged his property: for it had not been shown that the noise was unnecessary or due to improper oper-

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(1) FIXEL: The Law of Aviation, 1948.

ation. Nuisance was defined as anything causing hurt, inconvenience or damage to another, not of a fanciful nature but such as would affect the ordinary reasonable man. Though this definition would appear to be sufficient to have substantiated the plaintiff's claim, in actual fact it seems that the complaints alleged were not sufficient enough, or to such a degree of inconvenience, to constitute a nuisance.

This case followed two earlier ones which were decided in different ways, the second by a Circuit Court of Appeals.

The first case was Smith v New England Aircraft Co.(1930) USAR 1 in which the Supreme Judicial Court of Massachusetts held that whether an airport is a nuisance, which adjoining residents may enjoin, is a question of what is fair and reasonable in the circumstances. Noise, proximity and number of aircraft, which are not actually harmful to the health and comfort of ordinary people, will not justify an injunction against using the airport in the absence of evidence of fright or apprehension of personal danger or injury to livestock or property.

Two years later the Circuit Court of Appeals were prepared to adopt impairment of enjoyment of residential property as the test. And in Swetland v Curtiss Airports (1932) USAR 1 the operation of an airport near residential property, even though properly conducted, was held to have so interfered with the enjoyment of property as to be an abatable nuisance.

An attempt to reconcile the decisions in these last two cases seems impossible. If a distinction can be drawn it is that in addition to allegations of noise and dust in the Swetland Case the

plaintiff also complained that low flying was interfering with the enjoyment of his property, and the Court was prepared to classify such low flying as an abatable nuisance, and held that the remedy of a landowner against low flying was an action in nuisance and not trespass. It may have been, therefore, that the Court was persuaded by the complaint of low flying and prepared to hold such low flying a nuisance, and at the same time adding noise and dust to the list of complaints against which an injunction was issued. In the Smith Case, on the contrary, low flying was also alleged, and held by the Court to be a trespass if proved.

The general principles, therefore, established by these early cases were:-

1) The degree of noise alleged would be taken into consideration, and judged against an assessment of what might be considered fair and reasonable in the circumstances.

2) If low flying was alleged as an additional nuisance and the Court was prepared to classify low flying as a nuisance and not a trespass, it might be prepared to enjoin noise and dust as additional nuisances.(1)

After the Swetland Case decision, and presumably with the development of Civil Aviation, the Courts adopted a harsher attitude in declining to grant injunctions on allegations of nuisance caused by noise unless, it appears, the nuisance caused was (a) persistent,

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(1) Gay v Taylor(1932) 1 CCH 381: noise from planes taking off and in flight low over plaintiff's property held to be a nuisance. It appears that low flying was a nuisance because of (a) the noise, and (b) the interference with the enjoyment of property.

and (b) a substantial impairment, due to exceptional density, of the use and enjoyment of property.

In Mohican & Reena v Tobiasz 1 CCH 741 the constant noise of aeroplane flights over a children's camp interfering with the rest of the children, and disrupting other camp activities, was held to be a nuisance and enjoined. And in Brandes v Mitterling(1948) 2 CCH 14,686 the Arizona Supreme Court held that the owners of property adjacent to an airport were entitled to an injunction on the grounds of private nuisance when the operations of the airport resulted in dust and noise disturbing schools and houses nearby and causing illness.

The Courts may be prepared to differentiate between national airports and airports of secondary importance. Such a distinction seems to lose sight of legal principles, and to depend solely on an assessment of particular facts. For in People of California v Dycer Flying Services(1939) 1 CCH 817 the California Supreme Court in holding an airport to be a public nuisance and granting an injunction to restrain its operation permanently, particularly discussed the doctrine of "the balance of hardships" and went on to state its view that this particular airport was not an important one. The complaints which were alleged against the airport were that dust emanating from it settled over neighbouring property and planes landing and departing emitted oil and disturbing noises. It is suggested that if an airport is to be declared a nuisance only because of its diminished importance then any Court so passing judgement is not sitting as one of Law but merely as an administrative tribunal.

It is suggested that the decision of the Arizona Supreme Court in Brandes v Mitterling (supra) marked the furthest extension of the line of decisions which "followed" Swetland v Curtiss Airports (supra). The majority of pre-1939 cases appear to have followed that decision. But the cases after 1942 and commencing with Delta Air Corp. v Kersey(1942) 1 CCH 1003, seem to swing back and follow the decision of the Supreme Judicial Court of Massachusetts, earlier than the Swetland Case, in Smith v New England Aircraft Co(supra). It may be that the tests of "fairness and necessity" and "reasonableness" laid down in the Smith Case and in Thrasher v Atlanta(supra) have now come to be regarded as the correct tests to be adopted, and the decision in the Swetland Case with the cases which followed it in the 1930's as a wrong deviation no longer to be adopted except in exceptional circumstances.

If this view is correct then Delta Air Corp. v Kersey(supra) marked the turning point and the return to the "true" strain, and that and the decisions since must be examined. As in Thrasher v Atlanta, the decision in Delta Air Corp. v Kersey was one of the Supreme Court of Georgia. Kersey built a house in 1923, and construction of the airport followed in 1927. He claimed that dust and noise emanating from the airport rendered the house unsuitable as a home. The Court held that the construction of the airport was a lawful business and in the public interest, and in the absence of any allegations that the site of the airport was improperly chosen or it was operated in an improper manner, noise and dust emanating from it and arising from the ordinary and necessary use of the airport cannot amount to nuisance.

The basis of future operation was adopted by the Michigan Supreme Court in Warren v Detroit(1944) 1 CCH 1162 where the plaintiff sought to enjoin the construction of an airport. The Court adopted the view that though the operation of the airport could in the future destroy the purpose for which the plaintiff purchased his property, as a school building, yet whether or not the noise materialising from it amounted to a nuisance could only be determined after it came into operation.

Where an airport was operated in accordance with law(1), governmental regulations, and accepted standards and practices it could not amount to a nuisance on account of noise. But flying was enjoined after 10 p.m. at night: Rhoads v Piacitelli(1948) 2 CCH 14,658, following Crew v Gallagher(1948) 2 CCH 14,587 in which the Supreme Court of Pennsylvania stated:- "The Testimony discloses no additional volumn of objectionable noise in comparison with the existing noise level in the immediate vicinity of the proposed airport. Farm tractors, passenger cars, and heavy trucks---------- already disturb the tranquility of this neighbourhood. No one is entitled to absolute quiet in the enjoyment of his property; he may insist only upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells."(2)

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(1) 'Quaere' what the Court meant by "law." Possibly the Common Law tests of nuisance.
(2) The Court also approved the statement on Airports and Nuisance in 6 Am.Jur.Aviation.Section 16.

In 1953, and in what appears to be the last of reported major cases on nuisance to date, the Arizona Supreme Court adopted a more equitable view than it had done earlier in Brandes v Mitterling (supra). In City of Phoenix v Harlan(1953) US & CAR 222 the plaintiff alleged that the operations of a runway amounted to a nuisance in view of the noise and vibration resulting, and damages were sought against the airport owner. The Arizona Supreme Court held that a municiple airport could not be put out of operation without a strong showing of unreasonable use of its runways. It must be shown that either the airport facilities are inadequate or the airport owner knew of the improper use of the airport facilities. A nuisance is not a wrong which may be exactly defined; it involves a balancing of the respective rights of the parties. Annoyances resulting from installations which are useful and needful to the public will not be condemned unless they cause a substantial impairment of the use and enjoyment of private property.

It is suggested that if any conclusions can be drawn from these cases of conflicting decisions in different state jurisdictions they must be as follows:-

1) An airport is not a nuisance 'per se.'

2) It may become a nuisance in the course of its operation, or construction.

3) The tests of "necessity" and of what is "fair and reasonable" in the circumstances may be adopted to assess whether the degree of noise emanating from the airport constitutes a nuisance: Smith v New England Aircraft Co.

4) The alternative, and stricter, test which may be adopted is whether there is any intereference with the enjoyment of property: Swetland v Curtiss Airports.

5) The test adopted in the Swetland Case seems to have been followed by the Courts in the ten years, 1932-1942. Since the last date, and the decision in the Delta Air Corp. Case there seems to have been a return to the test adopted in the Smith Case. This test of "fair and reasonable" appears more equitable in the light of the development of Civil Aviation, and it is suggested that the test of enjoyment would only be resorted to either in extreme cases of excessive noise at national airports, or in dealing with secondary airports: People of California v Dycer Flying Services.

6) The question of whether the facilities at the airport are adequate may be examined by the Court. Whether the facilities are being improperly used to constitute "unreasonableness" in the operation of the airport may also be examined: City of Phoenix v Harlan.

7) The Courts will not allow a landowner to erect barriers on his land in an attempt to prevent low flying with the effect of noise and disturbance to his property: Pennsylvania v Von Bestecki(1937) 1 CCH 680.

In the United Kingdom no action will lie in respect of nuisance created on certain aerodromes on specified occasions. The position is clearly indicated in statutory enactments. Under the Civil Aviation Act, 1949, section 41, it is provided:_

"(i) Order in Council----------may provide for regulating the conditions under which noise and vibration may be caused by

aircraft on aerodromes and may provide that subsection(2) of this section shall apply to any aerodrome as respects which provision as to noise and vibration caused by aircraft is so made.

(2) No action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome to which this subsection applies----------as long as the provisions of the Order in Council are duly complied with."

The Air Navigation Order, 1954, Article 56 states:- "The Minister may prescribe the conditions under which noise and vibration may be caused by aircraft (including military aircraft) on Government aerodromes(1), licensed aerodromes(1) or on aerodromes at which the manufacture, repair or maintenance of aircraft is carried out by persons carrying on business as manufacturers or repairers of aircraft----------."

The "prescribed conditions" are set out in the Air Navigation (General) Regulations, 1954, Pt.14, reg.230, which is stated to apply to the aerodromes stated in Article 56 (supra), as follows:-

"(a) the aircraft is taking off(2) or landing; (b) the aircraft is moving on the ground or on the water; (c) the engines are being operated in the aircraft (1) for the purpose of ensuring their satisfactory performance,(2) for the purpose of bringing them to a proper temperature for, or at the end of, a flight, or (3) for the purpose of ensuring that the instruments, accessories or other

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(1) For definition see Chapter I.
(2) For an attempt by a Court to define "taking off" see Blankley v Godley (1952) 1 AER 436 (supra).

components of the aircraft are in a satisfactory condition, and also such special conditions, if any, as may be prescribed as respects any such aerodrome as aforesaid."

The ordinary law of nuisance applies in relation to any type of aerodromes not listed in Art.56 of the Air Navigation Order, 1954, or to any noise originating under a condition not covered in the "prescribed conditions" set out above, i.e. on any aerodrome which is not a government, licensed or manufacture or repair aerodrome and on specified aerodromes where aircraft engines are not being run for stated purposes. Any other kind of noise or vibration emanating from an aerodrome may amount to a nuisance.

It is to be noted that under the terms of Regulation 230 the engines must be "operated in the aircraft." Thus, any aircraft engine being operated in a test bed, other than an aircraft, might constitute a nuisance. In Bosworth-Smith v Gwynnes Ltd.(1920) 89 L.J.Ch.368 the defendants acquired a factory in a residential area for the purpose of manufacturing and testing aero engines. The plaintiffs sought an injunction to restrain the testing of engines, the noise from which had caused discomfort to local residents. In granting an injunction Peterson J. stated that the noise at the factory had not been proved to have been a nuisance, but the noise complained of was of such a character and such a volumn as to have seriously interfered with the comfort of the plaintiffs in the occupation of their homes. There was a nuisance during the night testing, and a continuing nuisance afterwards when the atmospheric and wind conditions were favourable.

Recently the Court of Appeal has dealt with a nuisance caused by vibration and dust due to blasting in a quarry. In Attorney-General v PYA Quarries Ltd.(1957) 2 WLR 770 the Crown alleged that a nuisance was being caused to Her Majesty's subjects by dust and vibration. The Court of Appeal held that any nuisance which materially affected the reasonable comfort and convenience of life of a class of Her Majesty's subjects was a public nuisance. The sphere of the nuisance might be described generally as "the neighbourhood," but the question whether the local community within the sphere comprised a sufficient number of persons to constitute a class of the public was a question of fact in every case.(1)

In dealing with private and public nuisance Lord Justice (now Lord) Denning said (at p.786):- "The question arises whether every rare incident is a public nuisance.----------I should have thought that it might, but the punishment would be measured according to the degree to which the defendants were at fault.---------- I quite agree that a private nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with may give rise to an action for negligence, or an action under the rule in Rylands v Fletcher (1868) LR 3 HL 330, but not an action for nuisance.----------But an isolated act may amount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated." (2)

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(1) Cf. Southport Corporation v Esso Petroleum Co.(1954) 2 QB 182.
(2) For an example of an isolated act giving rise to an action for negligence, see Nova Mink v TCA (1951) 2 DLR 241.
Cf. Nebraska Silver Fox Corp. v Boeing ATI(1932) USAR 162.

It will, therefore, be seen that no cases involving nuisance at airports have arisen in the United Kingdom. As the law of nuisance stands, and as was shown in the Bosworth-Smith Case, the criterion is the discomfort caused by the nuisance and the serious interference with the enjoyment of property. This is a parallel to the decision in the United States in 1932 in the Swetland Case, and the decisions which followed it in the later 1930's. It remains to be seen when cases of nuisance at airports do arise in the United Kingdom whether the criterion of discomfort and interference is continued, or whether nuisance at airports will be judged on the lines of the tests laid down in the United States in Smith v New England Aircraft Co.(supra), i.e. on grounds of "necessity" and " "fairness and reasonableness." The last view already has one supporter in the United Kingdom. For Moeller(1), writing in 1936, stated:- "In licensing aerodromes and taking power over all aerodromes Parliament must have intended them to be used for aircraft, and for the usual incidents of the landing and departure of aircraft. Consequently, what otherwise might have been an actionable nuisance, in the absence of negligence on the part of the aerodrome authorities, or those using the aerodrome, does not apply."

2) Low Flying.

Considerable divergence of views have appeared in state jurisdictions of the United States regarding the low flights of aircraft over property adjacent to or neighbouring on airports. At the

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(1) Moeller. Law of Civil Aviation. p.189.

suit of the landowner some jurisdictions have held such flights to constitute a nuisance, while others have held that a trespass has been committed.

It has already been pointed out that in Smith v New England Aircraft Co. (supra) the Massachusetts Supreme Judicial Court held low flying to be a trespass. While the Circuit Court of Appeals in Swetland v Curtiss Airports (supra) held that low flying was an abatable nuisance. Thus in the two major early cases on the subject differing decisions were arrived at.

It may be wondered why the airport owner should be legally responsible for flights of aircraft over the property of others either after or before the aircraft has reached the sphere of the airport over which the operator exercises control. Rhyne, in his book, "Airports and the Courts," suggests that the Courts have been quick to hold airport owners responsible for those acts of aviators which can be attributed to the use of the airport. In support of this argument, Rhyne cites the words of the Supreme Court of Pennsylvania in Gay v Taylor (1932) 1 CCH 381:- "If others, attracted to this locality by the presence of the airport, bring their planes there, store them there and operate them out of the said airport or simply use the field occasionally for landing purposes, and while so doing commit objectionable acts amounting to nuisance, the airport must shoulder the responsibility and its actions may be enjoined."

Rhyne concludes that airport owners and operators are legally responsible for low flying and other acts which are brought about by the use of the airport.

Before commenting on the conclusions on Rhyne, and whether these conclusions are correct, it is necessary to examine the cases in which the Courts have held low flights to constitute either nuisance or trespass. But in this section only the cases of nuisance will be considered, and conclusions will be postponed until the cases of trespass have been considered in the next section.

In Thrasher v City of Atlanta (1934) 1 CCH 518 the complaint of the plaintiff failed on both allegations of trespass and nuisance. The Georgia Supreme Court held that the act of flying over a person's property was not a trespass since transient passage was not an "appropriation." The complaint was not definite enough to constitute a nuisance. It seems that the Courts basis of rejecting both allegations was curious, since it is suggested that "infringement" with property would have been the test of trespass and not "appropriation." With regard to the rejection of nuisance, it must be assumed that the plaintiff failed to substantiate his allegation. But in 1942 the same Supreme Court, in Delta Air Corp. v Kersey 1 CCH 1003 held that repeated flights over adjacent land, necessary in the circumstances, at such a low altitude as to endanger the life and health of the owner constituted the airport as a nuisance. But the Court went on to explain that the flights were dangerous to health and life, and therefore a nuisance, in so far as they created noise and dust. The assumption is that the noise of the flight and not the flight itself constituted the nuisance.(1)(2). On the

(1)Cf. People of California v Dycer Flying Services(1939)1 CCH 817 where flights of aircraft at a "dangerously low level" constituted a nuisance.

(2)In Brandes v Mitterling(1948) 2 CCH 14,686 low flying was enjoined as a nuisance on the analogy of noise and dust emanating from the airport.

question of trespass the Court adopted the view that the owner of realty to the airspace directly above his land, but only to a height reasonable in the circumstances, and following a Statute of Georgia flights over land were lawful unless at such a low level as to interfere with the reasonable use of land or as to become dangerous to persons or property.

The size of aircraft using the airport may be taken into account. The Michigan Supreme Court in Warren v Detroit (1944) 1 CCH 1162 stated that the use of a proposed airport by large aircraft in the future might constitute a nuisance if such use destroyed the usefulness of a school property.

In Hampstead Warehouse Corp. v US (1951) 3 CCH 17,753 the US Court of Claims rejected the assertion that low flying did positive damage to property and that it affected the use and enjoyment of it. The plaintiffs had claimed damages on the basis that serious financial loss had been incurred due to the depreciation of the value of property as a result of low flying. The Court found no evidence to support this claim. The method of operation may be considered by the Court. Buzzing, stunting and the operation of planes at low levels over adjacent property were held subject to an injunction as constituting a nuisance by the California Supreme Court in Anderson v Souza(1952) 3 CCH 17,887. The Court held that an airport could become a nuisance either because of unsuitable location or improper operation, and in this case the method of operation in allowing low flying and not the operation itself constituted the nuisance.

From these cases it would appear:-

1) that the noise created by low flying aircraft may be a nuisance;
2) the operation of an airport may be enjoined under the fiction that the airport itself is an "allurement" which "attracts" aircraft, thereby creating disturbance over adjacent property by the flights of aircraft, and for which the operator must be liable as the perpetrator of the "allurement"; Gay v Taylor(supra);
3) the operation of the airport may be held to be improper if the operator deliberately or impliedly authorises unnecessary low flying, e.g. buzzing and stunting, so that danger or discomfort is caused to adjacent property dwellers and a nuisance created.

In the United Kingdom actions for nuisance are statute-barred, except under certain conditions. The Civil Aviation Act, 1949, section 40, sub-section 1, provides:-

"No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of Part II and this Part of this Act and any Order in Council---------- are duly complied with."

It is, therefore, open to a Court, if an action is brought, presumably to decide (a) whether the nature of the flight was "reasonable," or (b) whether, considering all incidents of the flight, the provisions of Parts II and IV of the Act were complied with. The section is badly drafted because it is not clear whether

the flight must be both "unreasonable" and in non-compliance with the provisions of the specified Parts of the Act before an action will succeed, or whether "reasonableness" and "compliance" are two different heads. Another interpretation might be that "wind, weather and all the circumstances" are the "ordinary incidents of such flight," and that "reasonable" refers to compliance with the provisions of the specified Parts of the Act. For information Part II of the Act deals with the Regulation of Civil Aviation, and the only apparent section in Part II which might allow an action for nuisance is Section 11, sub-section 1, which states:_

"Where an aircraft is flown in such a manner as to cause unnecessary danger to any person or property on land or water, the pilot or the person in charge of the aircraft, and also the owner thereof unless he proves to the satisfaction of the Court that the aircraft was so flown without his actual fault or privity, shall be liable on summary conviction to----------."(Penalty named).

It is questionable whether any person involved in dangerous flying would be liable to both a prosecution, as stated in Section 11, and a Civil action for trespass or nuisance. On the decision in Hesketh v Liverpool Corp. (1940) 4 AER 429, both might be allowed. But the more likely view, now supported by Martin v Queensland Airlines (1956) QSR 362, is that in fixing a penalty for breach of a statutory duty not to fly dangerously, Parliament excluded the right to bring a civil action.

Part IV of the Act deals with liability for damage caused by aircraft, of which Sections 40 and 41, dealing with trespass and nuisance, have been recited.

There are no reported cases under section 40(i) of the Civil Aviation Act, 1949. But in Minister of Transport and Civil Aviation v Evening Standard Co. & Green (1954) Crim.LR 293 a prosecution under Regulation 14(2)(4) of Article 44 of Air Navigation Order, 1949 was successful where a helicopter flew at less than 60 feet over Woolwich Arsenal, the Magistrates holding that the height at which the helicopter was flown did not give sufficient manoeuvability without danger.(1)

(1) Cf. Shepherd v Royal Insurance Co.Ltd. (1951) US & CAR 452 where, although Canadian Air Regulations do not define "low altitude" flight over fields so low that aircraft had to rise to pass over houses, was "low flying" where an insurance policy excluded cover of flying "in violation of Air Regulations."

B. For Trespass:-

(1) To Property by movement of aircraft in the air.

The Common Law maxim 'cuius est solum, eius est usque ad coelum et ad inferos' is not entirely decisive of the question, since the Court have waivered on the extent of its application; and it can be said that in the United Kingdom the extent of its application has never been judicially determined. A person may exercise rights in the air space over land owned by him, as by granting the right to carry electricity wires or telegraph wires over it, and he may exclude persons from any use they might formerly have had in part of that air space by building on his land or adding extra stories to an existing mansion, or he may limit his rights in air space by private contract only suffering the acquisition of a prescriptive right to light and air. In Colls v Home & Colonial Stores Ltd. AC 179 Lord Halsbury stated (at p.182):- "Light like air is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none." In Saunders v Smith(1838) 2 JUR 491, Shadwell V.C. said:- "Now the Court does not interfere to prevent trivial and insignificant trespasses. Thus upon the maxim of law 'cuius est solum eius est usque ad coelum,' an injunction might be granted for cutting timber and severing crops; but suppose a person should apply to restrain an aerial wrong, as by sailing through the air over a person's freehold, in a balloon; this surely would be too contemptible to be taken notice of."

Examining the cases in which trespass to air space has been alleged in the United States it is apparent that the dominant right

of the landowner to the air space over his property has been slowly "cut down" by the assumption of Federal control over the air until the landowner may now be left solely with a right to non-interference with the lower 'stratum.' The progress of this diminishment can only be outlined in a review of the cases over the last twenty-five years. Before tracing the assumption of Federal control in the United States, it should be recalled that the United Kingdom Government in the preamble to the Air Navigation Act 1920 (now repealed) found it necessary to declare that:-

"The full and absolute sovereignty and rightful jurisdiction of His Majesty extends and has always extended over the air superincumbent on all parts of His Majesty's dominions and territorial waters adjacent thereto."

Yet there is nowhere in the United Kingdom Statutes a positive statutory definition of the rights of private individuals in relation to the air. Section 40(1)(supra) of the Civil Aviation Act 1949 implies the existence of rights by legalising absolutely the use of the air space in certain circumstances, e.g. in the case of flights which having regard to all conditions are "reasonable," but the nature of those rights must be ascertained by reference to the Common Law.

In Smith v New England Aircraft Co.(1930) USAR 1 the Supreme Judicial Court of Massachusetts held that a resident near an airport could not enjoin the flight of aircraft to and from the airport at a "reasonable" height over his land. "Reasonable height" depended on the character of the land flown over. Statutes of both the

United States and Massachusetts authorised the flying of aircraft over privately owned land, but whether such flights resulted in a trespass being committed to the property of the landowner depended on the height at which the flight took place. Flight at a height of 100 feet would constitute a trespass, but flight at 500 feet or over almost certainly would not. Whether flight below 500 feet but in excess of 100 feet was a trespass was not decided. But the Court did point out that if planes repeatedly trespass, they did not trespass in the same place as to linear space or altitudes, and so no prescriptive right to any particular way of passage could be obtained.

The Circuit Court of Appeals considered the maxim of 'cuius est solum eius est usque ad coelum' in Swetland v Curtiss Airports (1932) USAR 1. The Court said that the maxim must be interpreted and applied in harmony with the economic and social needs of the times. On this view it was held that it was not a trespass in every case to fly through airspace over the surface, but the owner has the dominant right of occupancy for purposes incident to the use and enjoyment of the surface. The owner has the dominant right of occupancy of lower 'stratum' of overlying air incident to the use and enjoyment of the property. But he has no right in the upper 'stratum' which he can not reasonably be expected to occupy except to prevent the use by others who may unreasonably interfere with his enjoyment of the surface. The height below which an owner of land may reasonably be expected to occupy the air space is determined on the particular facts of each case, and the question in this case was unaffected by the Air Commerce Regulations and Ohio

State Regulations which imposed a minimum flight level of 500 feet. The Court did state that the remedy of any landowner who alleged interference of his land through unreasonable flying through the upper 'stratum' would be an action for nuisance and not trespass.

Thus, it was established in these two early cases that:-

1) The owner of land had a dominant right of occupancy over the lower 'stratum' of airspace above his property.

2) The owner of land had no right in the upper 'stratum' subject to the upper 'stratum' being used by others without unreasonable interference to the surface.

3) Federal or States Regulations fixing minimum height levels of 500 feet did not affect the issue of trespass.

4) Flight at 100 feet would constitute a trespass.

5) Flight at levels above 100 feet but below 500 feet might constitute trespass.

6) Flight above 500 feet would probably not constitute trespass in the absence of unreasonable interference with the surface.

7) No prescriptive right to a passage of air space could be acquired since aircraft would not trespass in the same section of linear air space or at the same altitude during repeated flights.

8) Unreasonable use of the upper 'stratum' by aircraft might provide a remedy to the landowner in an action for nuisance but not trespass.

In Tucker v United Air Lines (1935) USAR 1 a landowner planted fast-growing trees along his boundary with an airport in an attempt

to prevent aircraft flying low over his property.(1) The municipality and the airline using the airport sought an injunction to restrain the landowner, who cross-petitioned alleging nuisance. The municipality and airline were enjoined from operating aircraft at a height of less than 30 feet, and the landowner was enjoined from allowing the trees to exceed 25 feet in height. In so ordering, the Court cut down the privilege of airspace which the landowner might enjoy over his land to 30 feet, and must also be taken to have allowed the right of flight over the surface by denying the landowner the privilege of interference.

Under the provisions of the Air Commerce Act, 1926, as amended by the Civil Aeronautics Act, 1938, the Federal Government were given exclusive sovereignty over the airspace above the United States as conditioned by the safety altitudes prescribed by the Civil Aeronautics Authority. This provision of exclusive sovereignty fell for consideration by the Supreme Court of the United States in US v Causby (1946) 2 CCH 14,189. But it must be clearly stated that the Supreme Court was not concerned here with questions of either trespass or nuisance. The case reached the Supreme Court from the US Court of Claims before whom the plaintiffs had contended that low flights of aircraft above their property constituted a "taking" of their property so that compensation should be paid.

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(1) See note in (1936) 36 COL.L R 483. Cf. Pennsylvania v Von Bestecki (1937) 1 CCH 680. And cf. Hohfeld, Fundamental Legal Conceptions, 38-50-.

The glide path on to the airport runway over the plaintiffs' property (100 feet X 1200 feet) passed over their house at 67 feet, down to 18 feet over the boundary trees. The Federal Government, relying on the statutory provisions of exclusive sovereignty, claimed that the flights were within these provisions and that there was no taking of the property. The Supreme Court held that although Congress had placed "navigable air space" in the public domain, and empowered the CAA to prescribe minimum altitudes of flight, this had not deprived landowners of their rights in the air space. Since the glide path in this case came so close to private property as to interfere with its use, this was equivalent to a taking of private property and the plaintiffs were entitled to compensation.(1)

It is suggested that this decision of the Supreme Court is of no importance in ascertaining the rights of a landowner in either trespass or nuisance. The question before the Supreme Court was one of compensation not damages or an injunction. What the Supreme Court did decide, however, was that the vesting of exclusive sovereignty of airspace in the Federal Government did not deprive landowners of all rights to airspace, and the remedies for infringement of it. It is difficult to see that the decision went further than this.

An Indiana Statute provided that all electric power lines

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(1) Cf. Hampstead Warehouse Corp. v USA (1951) 3 CCH 17,753.

should be insulated at points where the public were 'liable to come into contact with the wire.' The Indiana Supreme Court in Capital Airways v Indianapolis Power & Light Co.(1939) 1 CCH 807 held that planes, in flying over property adjacent to an airport, were uninvited trespassers, whose presence was not reasonably foreseeable and whom the law made no effort to protect, so that the Power Company were not bound to see that the power lines adjacent to the airport were insulated to protect the planes using the airport.

But in Yoffee v Pennsylvania Power & Light Co.(1956) 123 A (2d) 636 the Supreme Court of Pennsylvania held that, where a Piper Cub plane flying along the Susquehanna River below the minimum altitude prescribed by the State but not below the minimum prescribed by the Federal Government, crashed into a transmission line across the river the Power Company had a duty to mark its towers and wires in view of the fact that there were numerous licensed fliers and airfields in the area. The Court observed (at p.639):-

"The Supreme Court of the United States declared in US v Causby that 'the air is a public highway, as Congress has declared! The right of flight in navigable unused air space is now as constitutionally established as the right to walk through the public square. No one, beyond the extent of the enjoyment of his property as laid down by law, can infringe upon that right of flight.'

The Court ruled that the Federal regulations prescribing minimum altitudes were superior to the differing regulations of the State and predominated. The Court further rejected a contention that the Power Company's property rights had been invaded, saying,

(at p.644):-

"The proprietor of a piece of land owns such airspace above it as is needed for the enjoyment of that land - but no more. No longer does he own the slice of the Universe which penetrates above his property into the infinite.----------Each proprietor of land must relinquish title to the vast aerial spaces which have become the lanes of travel for aircraft----------."(1)

The plaintiff's contentions that the construction of an airport would lead to trespass from low flying and resulting in damage to property was rejected by the Ohio Court of Appeal in Antonik v Chamberlain (1947) 2 CCH 14,500. The Court held that the Federal Government had assumed sovereignty over the airspace of the United States and under federal regulations a licence had been given to aircraft to fly over the property of landowners at a height of less than 500 feet when necessary for the purposes of taking off and landing. It was the duty of the Court to weigh up the conflicting interests of the parties and to recognise the public policy of the present generation, deciding not simply whether a neighbour is annoyed or disturbed but whether there was an injury to a legal right of a neighbour.(2)

In a Canadian case the plaintiff claimed that by taking an easement over part of his land and erecting a lighting system on adjoining land in order to assist planes in landing at a neighbour-

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(1) In Stephens & Mathias v MacMillan & MacMillan (1954) 2 DLR 135 the High Court of Ontario held the erection of wires, into which an aircraft crashed, to be a public nuisance since the wires were over navigable waters and the required permission had not been granted under the Navigable Waters Protection Act 1927.

(2) Cf. Cory v Physical Culture Hotel (1937) 1 CCH 678.

ing airport the Crown had established a "flightway" over his land, and had interefered with his rights of ownership.(1) The Exchequer Court of Canada held that no "flightway" had been established, and that even if such a "flightway" had been established there was no interference with the plaintiff's rights of ownership.

The provision of the Civil Aviation Act, 1949(2), dealing with trespass and nuisance to land in the United Kingdom has been set out. There are no reported cases in the United Kingdom where an action for trespass to land caused by aircraft has succeeded.(3) Attention has already been drawn to the word "reasonable" in Section 40(1)of the Act, and the difficulty which the Courts may have in interpreting this word in view of the successive words in the section.

In a recent decision in Kelsen v Imperial Tobacco Co.(of Great Britain and Ireland) Ltd.(1957) 2 AER 343, in which it was held that the air space was part of the premises demised with a shop and the invasion of the air space by a sign amounted to a trespass and not merely to a nuisance (applying Gifford v Dent (1926) WN 336), McNair, J. stated in his judgement (at p.351):-

"That decision(4), I think, has been recognised by the text-book writers, and, in particular, by the late Professor Winfield(5),

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(1) Lacroix v R. (1954) 4 DLR 470.
(2) Section 40 (1) (supra).
(3) A claim for nuisance or trespass in respect of the flight of aircraft over property was made in Roedean School Ltd. v Cornwall Aviation Ltd.(1926) 'The Times' 3rd.July. There was no decision in this case as it was settled between the parties. Cf. Clifton v Bury(Viscount(1887)) 4 TLR 8 on right of action for "trespass on the case," and nuisance.
(4) Gifford v Dent.
(5) See Winfield on Tort(6th Ed.)(1954) p.379.

as stating the true law. It is not without significance that in the Air Navigation Act, 1920, s.9(1), which was replaced by s.40(1) of the Civil Aviation Act, 1949, the legislature found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature was not taking the same view of the matter as Lord Ellenborough in Pickering v Rudd(1815) 4 CAMP.219, but was taking the view accepted in the later cases, such as Wandsworth Board of Works v United Telephone Co. (1884) 13 QBD 904, subsequently followed by Romer J. in Gifford v Dent (supra)(1). "Accordingly, I reach the conclusion that a trespass, and not a mere nuisance, was created by the invasion of the plaintiff's air space by this sign."

The conclusions which can be reached are that whereas in the United States the landowner has lost virtually all his rights in the airspace above his property, except to an undefined limit, which has varied considerably in different jurisdictions, and from positive interference, in the United Kingdom, statutory enactment has removed all remedies from the occupier of land except in certain circumstances, but where these circumstances do exist it seems likely that the Courts will enforce the Common Law maxim of 'cuius est solum, eius usque ad coelum.'

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(1) Romer J. said (1926) WN at p.336:- "The tenants of the forecourt----------were tenants of the space above the forecourt 'usque ad coelum'. The projection (of the sign) was clearly a trespass----------."

To summarise the present position:-

1) In the United States the owner of land has a dominant right of occupancy over the lower 'stratum' of air space above his property.

2) The height to which this lower 'stratum' rises has varied from 30 feet to 500 feet.

3) The right of action for interference with the lower 'stratum' of airspace will be in trespass.

4) The right of action for positive interference to property by the passage of aircraft in the upper 'stratum' will be in nuisance.

5) The vesting of exclusive sovereignty of air space in the Federal Government has not deprived the landowner of all rights in the airspace at certain heights and in certain circumstances, the latter depending on the facts in each case.

6) Where there is a conflict between Federal regulations and State regulations governing the use of airspace the former are superior and will prevail.

7) A duty is imposed on the owners of large obstructions rising into the lower 'stratum' above 100 feet to mark these obstructions: Yoffee Case.

8) In the United Kingdom actions for trespass or nuisance are barred except within the provision of s.40(1) of the Civil Aviation Act 1949.

9) Where an action for trespass may be brought in the United Kingdom the Courts will not willingly depart from the rule that ownership of land includes the right to enjoy the airspace above the land.

It will be recalled that in the view of Rhyne[1], airport owners and operators are legally responsible for low flying and other acts which are brought about by the use of the airport. Rhyne does not state whether he means legally responsible in nuisance or for trespass. But since he relies on Gay v Taylor (1932) (supra) in which nuisance was alleged, it is assumed that he refers to legal responsibility for nuisance and not trespass. It is suggested that it is wholly untenable that the airport operator can be liable in trespass, since the act of trespass is not committed by the operator, and it is the carrier who must be responsible for the act of trespass. It is further suggested that in the absence of direct control over the aircraft the operator should not be responsible for acts of nuisance committed by the aircraft. The operator must be responsible for nuisances emanating from the airport, but the act of nuisance committed by the flight of an aircraft is the act of the carrier, to whom responsibility should attach. The decision in Gay v Taylor should be disapproved.

(2) To Persons by movement of aircraft in the air.

In Dahlstrom v US (1956) 228 F.(2d) 819 an aircraft of the CAA on a survey flight was flying low and frightened a team of horses with the result that the plaintiff was injured. The District Court held that although an act of trespass had been committed at Common

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(1) Stated above.

Law and under the statutes of Minnesota, yet the United States was not liable under the Federal Tort Claims Act since the survey flight was the performance of a discretionary function to establish aids to navigation. The Circuit Court of Appeals reversed this decision and held that the Federal Government was acting here at an operational level, and, therefore, the Government pilots were under a duty to exercise reasonable care and precaution in their low level flights. The Court relied on the decision in Union Trust Co. v Eastern Air Lines (infra) for the basis of their view that the discretionary exemption of the Tort Claims Act did not shield the Federal Government from liability. The case was remanded to the District Court for a finding as to whether or not the CAA pilots were guilty of negligence proximately causing injury to the plaintiff.(1)

In similar circumstances in a case in the United Kingdom, and on the point which was referred back to the District Court in Dahlstrom v US, the plaintiff claimed damages against the pilot and owners of an aircraft alleging that injuries which she sustained in a fall from a horse were caused by the aircraft swooping low over her head. In Greenfield v Low (1955)(2), judgement was given for the defendants by Gorman J. because on the evidence it was impossible to say that the accident was caused by the aircraft.

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(1) No further report appears available on this case.
(2) Mentioned in 'The Times' 24th November, 1955. No other report on the case is known to exist.

It is believed that this action was brought by the plaintiff on alternative claims of trespass and/or negligence. Comparing the decision of Gorman J. with that of the Circuit Court of Appeals in Dahlstrom v US it is evident that before a claim in trespass to the person would succeed, when alleged to be caused by the flight of an aircraft, it would be necessary to prove beyond all doubt that the low flight of the aircraft was the proximate cause of the accident.

(3) To Persons and Property by contact of aircraft, with the Ground.

The earliest reported case of a flying object coming into contact with the ground and causing damage either in the course of, or as the result of, doing so, is a decision of the Supreme Court of New York in Guille v Swan in 1822 (1). Guille descended into Swan's garden in a balloon, and summoned assistance. A crowd broke into the garden and did considerable damage to the produce. It was held that although the balloon descent was not unlawful, yet the method of descent was such as would ordinarily attract a crowd, and Guille was liable in trespass for the damage caused to the garden by the crowd. In modern terminology, it is presumed that in the view of the Court Guille should have foreseen that his method of descent would attract a crowd, and he would be presumed to have known that a crowd would be drawn when he summoned assistance. He was liable for his own frolic, and since it is no defence that the

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(1) Reported (1928) USAR 53.

trespass is unintentional where the act is voluntary, it must be presumed that by proper control of the balloon the descent could have been prevented. Where such a descent took place in circumstances of an involuntary act, it is a matter of dispute whether a plea of inevitable accident would be accepted as a complete defence. A suggested distinction is between trespass in its tortious aspect, where fault is an element in liability, and trespass in its proprietary aspect, when fault is immaterial.(1)

In King v US (1949) 2 CCH 15,103, where a student pilot of the USAF crashed while on a frolic of his own the United States was not liable for the damage done to the plaintiff's house under the Federal Tort Claims Act since the pilot was not acting within the scope of his office or employment at the time of the accident. But in USv Kesinger (1951) 3 CCH 17,609 the pilot of an army plane which crashed and destroyed farm buildings was acting within the scope of his employment while on a flying mission and the Federal Government were liable. The Circuit Court of Appeals found that the proximate cause of the accident was the negligence of the operators in failing to maintain proper control over the aircraft after take-off. The flying of the aircraft into the buildings was an act of trespass.(2)

A pilot who does not fly his plane at a safe altitude as fixed by CAA Regulations, so that the aircraft crashes causing injury to persons and property, is guilty of trespass. This was held by the

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(1) See G.H.Treitel. 15 MOD.L R 84. Cf. National Coal Board v J.E.Evans (Cardiff) Ltd.(1951). 2 KB 861 and Walmsley v Humenick (1954) 2 DLR 232.

(2) Cf.Evans v USA (1951) 3 CCH 17,766. Action under Louisiana Civil Code.

Circuit Court of Appeals in US v Gaidys (1952) 3 CCH 17,831. The plaintiff sued in both negligence and trespass. The United States was liable under the Federal Tort Claims Act, but in trespass only. The claim in negligence, based on the doctrine of 'Res Ipsa Loquitur' failed.

In the United Kingdom the Civil Aviation Act, 1949, section 40(2) provides: "Where material loss or damage is caused to any person or property on land or water by, or by any person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage (1) was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft----------,"

This section has not so far been judicially construed. It is assumed that it applies to the crash of, and not merely for damage caused by, an aircraft, while in flight, so that statutory liability is imposed on the operator. If the damage occurred while the aircraft was rising from or approaching the ground the section would certainly seem to apply.

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(1) In Cubitt and Terry v Gower (1933) 77 SOL.Jo.732, it was held that the burden of proof was on the defendant to show that he came within the exception. This section reproduces S.9(1) of the Air Navigation Act, 1920.

CHAPTER V.

Recent Problems arising out of the Acquisition, Abandonment and Control of Land for Airport Purposes in the United States.

(1) Control of Flight Space.

In Allegheny Airlines v Village of Cedarhurst (1955)[1], the District Court for the Eastern District of New York had to decide the "constitutionality" of an ordinance, which prohibited aircraft using Idlewild Airport from flying over the village of Cedarhurst at a height below 1000 feet. The passing of the ordinance provoked the conflict of sovereignty between state and federal regulations in usable air space. The question for the Court was what air space below 1000 feet the United States Congress has determined as "navigable air space" and subject to flight control, and to what extent the ordinance passed to protect the village of Cedarhurst was unconstitutional as being contrary to and in conflict with powers of Congress and regulations issued by virtue of those powers. In declaring the ordinance to be unconstitutional the Court declared that the basic issue was whether Congress has pre-empted the field of regulation and control of flight of aircraft, including the right to fix minimum safe altitudes for take-offs and landings.

The opinion stated by the Court was that Congress has pre-empted the field of regulation of air traffic in navigable air space under the Commerce Clauses in the United States Constitution. But the exercise of Congressional power in this field does not prevent

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(1) Mentioned 23 JAL & C. 1,85.

the states from exercising inherent powers in fields outside those pre-empted by Congress. Yet it does preclude the states from regulating those phases of national commerce, which, because of the need for national uniformity, demand that their regulation should be prescribed by a single authority. Federal control of traffic in navigable air space includes the airspace through which planes necessarily fly in order to take off or land. For that reason any attempt to prohibit by local ordinance flight below 1000 feet when planes were approaching or departing from Idlewild Airport was contrary to powers vested in Congress, and the ordinance legislated for the protection of this particular village was unconstitutional.

The conception that an ordinance of this kind would be valid and constitutional was, it is suggested, created by the Supreme Court of the United States in US v Causby (1946) 2 CCH 14,189. The Supreme Court held that congress had placed "navigable air space" in the public domain, yet re-iterated that landowners had not been deprived of all rights in the airspace above their property. The Court stated that if landing and departure operations came so close to private property as to interfere with its enjoyment, such operations amounted to a "taking" without just compensation. The Supreme Court left the impression in its decision that since all rights had not been removed from landowners, they had a right to take measures to protect their property, to the extent of not infringing "navigable air space." It would seem that these very measures were taken by the inhabitants of Cedarhurst, who sought to give themselves collective protection by statutory ordinance. For this ordinance

seemed to be only a collective incorporation of the rights which had been stated by the Supreme Court to belong to the individual in US v Causby. If the Supreme Court had gone further in that case and defined more aptly what it termed "navigable air space," this method of statutory protection by an ordinance might not have been attempted.

This decision of the District Court seems to whittle away even further the rights, if any, of the landowner in airspace. Since the effect of the decision appears to be that any glide path low over property is through navigable air space,(1) and subject to provisions of just compensation for a "taking" of the property, the landowner will have no remedies for the annoyance caused to him by such low flights, apart from being able to allege and substantiate nuisance, since such flights fall under the powers of Congress to regulate matters of commerce.

(2) Condemnation.

In Aeroville v Lincoln County Power District No.1 (1955) 290 P. (2d) 970 the Nevada Supreme Court held that a power district may condemn land in order to relocate a power line which was situated in the immediate vicinity of an Air Force base and which had caused a series of aircraft accidents. It appeared that the power district had authority to condemn the land on the grounds of necessity, since

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(1) Cf. Gardner v Allegheny County (1955). Mentioned 23 JAL & C 106.

a failure to do so could have led to further aircraft accidents and surface interruption.

Where an easement of flight over several separately owned parcels of land was sought for the use of a nearby Air Force base, the Government sought to have the condemnation proceedings referred to a commission rather than a jury under Rule 71A of the Federal Rules of Procedure which authorises a federal court to refer the issue of just compensation to a commission "because of the character, location or quantity of the property to be condemned, or for other reasons in the interest of justice." In US v 4.43 Acres of Land, More or Less (1956) 137 F.Supp.567 the court decided to refer the matter to a commission since the easement of rights by the Government in each of the condemnation proceedings was unusual in character and presented exceptional and extraordinary circumstances, and the height of the "glide angle plane" above the ground varied from tract to tract because of its inclination.(1)

(3) Abandonment.

In Jackson v City of Abilene (1955) 281 SW (2d) 767 the Texas Court of Civil Appeals held that where a municipality had abandoned an airport acquired by condemnation, the land did not revert back to the original owner since the fee simple title to the land was in the city. The Court did not permit the earlier judgement in the condemnation proceedings to be attacked collaterally, saying (at p.769):-

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(1) Cf. Hampstead Warehous Corp. v US (1951) 3 CCH 17,753 and the Canadian Case of Roberts v R.(1955) 4 CCH 17,901.

"The judgement is the final act of the Court and where a Court has jurisdiction of the subject-matter, and renders a judgement, its validity will depend neither on the regulating of the process, nor on the sufficiency of the pleadings."

CHAPTER VI.

Duty with respect to Landing and Departure of Aircraft.

A. To keep Runways and Approaches clear of:-

(1) Unmarked Obstructions.

"The owner of premises----------as the defendant here who owned, operated and maintained a commercial landing field for aircraft----------owes a legal duty to use reasonable care to keep the premises in a reasonably safe condition so that the plaintiff in landing his aircraft would not be unreasonably exposed to any danger." Judge Bard in Beck v Wings Field Inc.35 F.Supp.953.

The Courts will consider carefully whether the pilot of an aircraft knew of the obstruction and was careless in not avoiding it: for it is inevitable that obstructions may be found at times on or near runways when repairs are being carried out, and pilots may have been informed of these. In Peavey v City of Miami(1941) 1 CCH 955 a collision occurred between an aircraft and a piece of machinery on a roadway under construction. An action was brought based on careless maintenance of a municiple airport. But the Supreme Court of Florida found that there had been no failure to show proper warning since the airport had informed pilots by written notice of the construction work and had placed lights around the machinery.

But where the obstruction has not been called to the attention of the pilot the operator will be liable for injuries suffered, provided that the failure to warn the pilot is found to be the proximate cause of the accident. In Miller v County of Contra Costa(1951) 3 CCH 17,692 the Californian District Court of Appeals held that the County had been negligent in failing to warn the pilot of an

aircraft of an obstruction on a runway at an airport operated by them. But it further appears that the airport may even have been liable 'prima facie' for having an obstruction at an airport open to the public. For the Court found that even if the pilot had knowledge of the obstruction, he would not have acted differently in the emergency situation in which his landing took place. If this is correct, then it is a departure from the defence of contributory negligence: possibly on the grounds that an aircraft without radio and prior to the possible publication of a warning which may be seen by the pilot cannot be assumed to expect unusual danger at an airport in public use. This may, however, have been an exceptional decision in view of the fact that the pilot found himself in an emergency situation.

It is suggested that the Courts may expect a pilot to examine the state of a runway by circling prior to landing if the landing is to be made at an airport which is not considered to be one of international grading. For in Davies v Oshkosh Airport(1934) 1 CCH 503 the Wisconsin Supreme Court held that a pilot who alighted on a new, brightly coloured hay rake standing on the runway had been negligent in not ascertaining whether the runway was clear. The pilot had alleged that he had landed into the sun which blinded him and prevented the sighting of any obstruction on the runway. The Court held that it was his duty to circle the airport before landing to gain a clear view of the runway. In the opinion of the Court the duty of the pilot was as laid down by the same Court in Greunke v Nth.American Airways(1930) 1 CCH 219, namely:-

"Not necessarily to use the highest degree of care that might

be taken, but the ordinary care that a reasonable person would take in landing under such circumstances--------such care as the danger of the situation and the consequences that may follow an accident demand----------it is the degree of care that men of reasonable viligance and foresight ordinarily exercise in the practical conduct of their affairs."

The exercise of ordinary care includes reading the notices of the US Department of Commerce in the 'Airman's Guide.' In Plewes v City of Lancaster(1950) 3 CCH 17,286 the pilot of an aircraft sued for injury suffered by him when he collided with an unlighted obstacle after landing at an airport. The Pennsylvania Court of Common Pleas held that the operator owed a duty to express or implied invitees to keep the premises in a reasonably safe condition for use by aircraft. But it was further found that the pilot had been contributory negligent in:- 1) failing to read the latest supplement to the 'Airman's Guide' which gave notice of the obstruction, 2) failing to request that the airport's flood lights be turned on, and 3) failing to land on an unobstructed green-lighted macadam runway, instead of which he chose a stretch of grass verge where the damage occurred.

Exercise of ordinary care by a pilot has been held to include an inspection of the apron and runway before take off. In Read v New York Airport(1932) 1 CCH 370 an aircraft was damaged when it collided with an unattended truck standing on the runway. The pilot admitted that had he taken the trouble to walk a few steps round some parked planes before entering his own, he would have seen the truck. It was held that in the exercise of ordinary care it was his

duty to do so, and his failure amounted to contributory negligence which debarred recovery of damages. Modern standards may require due vigilance on the part of pilots, but not to the extent of searching the runway before departure. (1)

In an English decision the Court has been prepared to hold that unlighted obstacles constitute a trap, and therefore negligence at Common Law on the part of the operator. In Hesketh v Liverpool Corporation(1940) 4 AER 429 the plaintiff was injured when striking some trees on the airport perimeter when making a night landing at Speke Airport. The license under which the airport was operated provided certain requirements regarding the removal of obstructions within a direct line of flight to the runways, and a Schedule to the Air Navigation Order, 1923, specified that red lights should be fixed to all obstructions within 1000 yards of the boundary of the landing area. It was held that since the presence of the trees constituted a breach of the statutory conditions, the plaintiff was entitled to succeed.(2) But even apart from statute, he was entitled to succeed at Common Law on the ground that the trees constituted a trap.(3)

But an Australian Court has recently distinguished the Hesketh Case and held that a breach of statutory regulations does not necessarily give a cause of action to the person injured by the breach.

(1) Cf. K.L.M. v. Netherlandse Antillen (1954) I.A.T.A. Reporter No.16. and Pignet v. City of Santa Monica (1941) 1 C.C.H. 984.

(2) For a review of judicial opinions on an action for breach of statutory duty, see Dominion Airlines v Strand (1932) 1 CCH 392.

(3) Cf.McCusker v Curtiss-Wright Flying Service(1933) 1 CCH 431.

In Martin v Queensland Airlines(1956) QSR 362 the question was whether the legislature in creating statutory duties by provisions in Air Navigation Regulations intended to give a person injured through their breach a cause of action in tort. The Supreme Court of Queensland held that since the Common Law imposes upon persons operating aircraft the same obligations to take care as it imposes upon those who bring vehicles on the highway, there was a strong presumption that delegated legislation did not impose new duties in favour of individuals and new causes of action for breach of them. The regulations could be characterised as a means of reducing accidents and protecting passengers, and avoiding the occurrence of accidents which were actionable by the ordinary law of negligence; hence the only sanction was to be found in the penalty provisions specified in the Regulations. Any exception must depend, as stated by Lord Simonds in Cutler v Wandsworth Stadium Ltd. (1949) AC 398 HL, on a consideration of the whole Act on legislation in the circumstances, including the pre-existing law in which it was enacted.

In view of this strong Australian decision it must now be doubted whether any action is open to carrier or passenger on the grounds of breach of statutory duty where certain obligations imposed by legislation have not been carried out. As regards the decision in the Hesketh Case the Queensland Court said that the question of whether a breach of statute gave a right to a civil action was not the real basis, and that the judgement largely revolved around the questions of nuisance, and possible contributory negligence on the part of the pilot. This decision was, therefore,

no authority for damages arising from breach of a statutory condition. But it must be noticed that the Queensland Court emphasised the right of action at Common Law arising out of negligence, and this must lend strength to the decision of Stable J. in the Kesketh Case that the trees "constituted a trap." It may be open to any plaintiff to allege that an unlighted obstacle, which he did not know of and could not have observed through due diligence, "constitutes a trap."

Unfortunately, a recent United States action on rather the same lines failed on the grounds of insufficient evidence, and was dismissed. In Banki v Linee Aeree Italiane and the Port of New York Authority Index No.228, 1956, Sup.Ct.NY Co. the plaintiff, a passenger in an aircraft of LAI, was injured when the aircraft crashed into an approach light pier in the waters adjacent to New York International Airport. One of the grounds of the plaintiff's claim against the airport operator was that the approach lighting system was non-standard at the time of the accident and, therefore, could have caused it. As a defence the Port Authority's trial memorandum of law argued that pursuant to Acts of Congress, the Federal Government had assumed sole and exclusive responsibility for the installation, control, operation, ownership, and maintenance of approach light lanes to the instrument runway at the Airport, so that as a matter of law and of fact the Port Authority could not be held liable. The Port Authority also refuted the allegation that the Federal approach lights at the time of the accident were non-standard. After seven days of trial the Port Authority moved to dismiss the complaint on the ground that the plaintiff had failed to make out a

'prima facie' case against it and that the evidence was overwhelmingly in support of the Port Authority's defence. The trial court dismissed the action as against the Port Authority on the ground that the plaintiff failed to prove any negligence on its part.(1)

(2) Concealed Dangers.

The operator is under a legal duty to keep the airport in a reasonably safe condition for the landing of aircraft. Damages caused to a pilot and aircraft due to a failure to provide a safe landing surface, in the absence of any contributory negligence on the part of the pilot or aircraft owner, must be paid by the airport operator. In Beck v Wings Field Inc.(1941) 1 CCH 974 the pilot of a plane was awarded damages by a Federal District Court for injuries suffered when his plane turned over while running along the ground due to an unmarked depression in the field.(2)

The reasonably safe condition in which the surface of an airport or airfield must be maintained applies to intermediate or "secondary" airports in the United States as well as main or "primary" airports. In Israel v United States(1956) 140 F.Supp.89 the plaintiff was a passenger in a light private aircraft en route from New York to Ohio. A stopover at an intermediate airfield in Pennsylvania, operated by the CAA as an emergency field, was made when the

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(1) But the case against the airline went to the jury who returned a verdict in the plaintiff's favour.
Query whether, if the plaintiff had been able to prove that the approach lighting was non-standard, an action against the Federal Government would have succeeded on the basis of the decision of the US Supreme Court in Indian Towing Co. v US(1955) 350 US 61 (infra).

(2) The decision was subsequently reversed by the Circuit Court of Appeals, but on the grounds that erroneous evidence had been submitted in the lower court: 35 Fed.Supp.953.

aircraft ran short of fuel. Later a take-off was attempted, but the roughness of the runway surface did not permit the plane to gain sufficient speed, and when braking was attempted it came too late with the result that the plane crashed. The Court held that once the government had undertaken to provide an intermediate or emergency airfield it was under a duty to maintain it in a safe condition, citing Eastern Air Lines v Union Trust Co.(infra). The Court found that the Federal Government was liable for injuries sustained by the plaintiff, since the field was either unsafe or negligently maintained by the Government, and that it was the Government's duty to maintain the surface of the airfield on a par with other airfields of the same type.

But if the obstruction is one which is obvious to pilots exercising reasonable care the operator may not be liable. In a Canadian case the Crown was held not liable for failing to give adequate warning where a pilot crashed into a drainage ditch which was marked by flags and poles and exhibited on a current plan of the airport. The Exchequer Court in Grossman v R.(1950) 3 CCH 17,472 held that the pilot was a licensee, and therefore the duty owed to him was that stated by the House of Lords in Fairman v Perpetual Building Society (1923) Ac.74, namely that while the owner of premises must not expose its licensee to a hidden peril, the licensee in his turn must take the premises as he finds them. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care the owner owes a duty to the licensee

to inform him of it. "If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable" (per Lord Wrenbury). In this case the ditch was obvious to any pilot exercising reasonable care, and the plaintiff had failed to seek the reasonable information which a careful pilot would have sought before landing so that the Crown as operator of the airport was not liable.

Where similar facts presented themselves in a case in the United States the pilot was held to be an invitee and the operator was held not to have exercised the required degree of reasonable care which the owner of premises owes to an invitee. In Behnke v City of Moberly(1951) 3 CCH 17,740 the pilot crashed into a muddy trench which was contiguous to a newly-constructed parking apron and which at the time of the accident was concealed by snow. The Missouri Court of Appeals held that the municipality, who operated the airport, had failed to mark the concealed danger of the trench or warn the pilot of the hazard.

Apart from the distinction, which seems irreconcilable, between the pilot as an invitee and a licensee in this case and the Canadian case, it appears that in the Canadian case not only was the trench marked but the pilot would have observed it by the use of prudence, whereas in the Behnke Case the trench was concealed by snow and it would not have been possible for the pilot to observe it even exercising the highest degree of care as opposed to the reasonable degree of care which is expected from him.

It is the duty of the operator to ascertain that not only is

the airport safe to land on but also that the landing strips or runways are of sufficient strength to bear the weight of aircraft for which the airport is open. Where a cover over a stream, across which an aircraft was taxiing after landing, collapsed, the jury found that the aerodrome proprietors ought to have known of the danger and that they were liable for the damages sustained by the aircraft. According to a note in the United States Aviation Reports the effect of this English decision in Imperial Airways v National Flying Services Ltd.(1933) USAR 50 (1) is that airport operators are under an obligation:- (a) to see that the airport is safe for use by such aircraft as are entitled to use it, and (b) to give proper warning of any danger of which they know or ought to have known.

B. To Have a Safe and Proper System:-

(1) To Provide Equipment.

Any operator who fails to provide equipment which may be deemed necessary for the safe use of the airport by aircraft may be guilty of negligence at Common Law, for a duty may be inferred that care will be taken to see that every measure of assistance by way of equipment is available for the safe landing and departure of aircraft at primary airports. But it is suggested that stat-

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(1) It is extraordinary that the only existing report of this case is a note supplied to the Editors of the USAR by a London firm of solicitors(Messrs.Beaumont & Son.)

utory duties have been superimposed on Common Law duties and that the authorisation under which an airport is operated will include provisions which make mandatory the availability of certain equipment.

In the United Kingdom the Civil Aviation Act, 1949 s.8(2)(c) allows the Minister of Civil Aviation to make provision by Order in Council for the "licensing" of aerodromes. Air Navigation Order, 1954, Art.50(2) states:-

"The Minister may grant a licence in respect of an aerodrome on such conditions as may be specified in the license, and any conditions so specified shall be complied with by the licensee of the aerodrome as if they were contained in this Order."

In Hesketh v Liverpool Corporation (1940) 3 AER 429 the license to the Corporation as the operators of Speke Airport specified the fixing of red lights to trees on the perimeter, and the failure to do so constituted a breach of the statutory condition.

The penalty specified in Art.67 of the Air Navigation Order, 1954, for any person who fails to comply with its provisions, which must include the conditions specified in an airport license, is "a fine not exceeding two hundred pounds on summary conviction or to imprisonment for a term not exceeding six months" or both.

In the United States similar powers with regard to airports are conferred on the Civil Aeronautics Board by s.582 of Civil Aeronautics Act, 1938.

(2) To Make Proper Use of Equipment.

It is suggested that an airport operator is under a duty to maintain and properly use any equipment which is necessary for the safe landing and departure of aircraft or the safe embarkation and disembarkation of passengers. Such a duty may be implied from the obligations imposed on Member States by Annex 14 to the Chicago Convention 1944, and with the recommendations of which, in the absence of notifications to the contrary, it is assumed that governments of states will force operators to comply with. If they fail to comply with the recommendations on airport equipment, either for provision or maintenance, the operator may be liable for misfeasance on the same basis of liability as is imposed on local authorities in English law for the maintenance of highways. No action will lie against any local authority entrusted with the care of highways for damage suffered in consequence of their statutory duty of keeping highways in repair; but this exemption from liability extends only to cases of pure non-feasance, and the local authority is responsible for any active misfeasance by which the highway is rendered dangerous.(1) Where an artificial structure which causes an accident has been placed on a highway, not by the local authority having charge of the highway, but by some other person or body lawfully authorised thereto, the same principles

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(1) Salmond. Torts. 11th Ed. Section 90.

apply. If the structure is itself in disrepair, the persons who placed it there are responsible for it: Chapman v Fylde Waterworks Co.(1894) 2 QB 599.

It has already been noted that a United States District Court has recently held - in Scarfe v Allied Aviation Service Corp.& TWA (supra) - that a ground agency may be liable (whether for misfeasance or malfeasance) for its own torts in failing to secure landing equipment to an aircraft. Such torts were not the torts of the carrier and quite apart from the contract of transportation. It can be assumed that where the operator provides the equipment the duty is imposed on him to make proper use of it.

But this duty to make use of equipment may not extend to make the operator liable for failing to provide signalling equipment for the purpose of controlling aircraft in movement on the airport. In Finfera v Thomas(1941) 1 CCH 949 the City of Detroit as operators of the municiple airport were not liable for failing to warn the plaintiff by signalling of the likelihood of a collision. For Rule 19 of the Rules of the Board of Aeronautics of Michigan imposed a responsibility on the pilot of seeing that there was no danger of collision when taxiing or landing, and any signalling on the part of the airport control tower was only done as a matter of convenience. S.6 of the Uniform State Law for Aeronautics, 1922 provided that damage arising out of such collisions on the ground should be determined by the rules of law applicable to torts on land. Section 3.2.2.4.3 of Annex 14 (re-enacted in the United Kingdom in the Air Navigation Order, 1954, Art.14(6)) states that:-

"An aircraft about to take off shall not attempt to do so until there is no apparent risk of collision with other aircraft." The final duty is imposed not on the operator but on the pilot-in-command of the aircraft.(1)(2)

(3) To Take Necessary Steps for Rescue.

It would seem that one of the major duties imposed on an operator would be that of providing the necessary rescue equipment at an airport for use in the case of crash or accident of an aircraft. Aircraft are no longer classified as "dangerous instrumentalities," but the difficulties which an aircraft may encounter on landing or departure must be considered common knowledge, and it would be negligence on the part of the operator not to keep equipment in a sufficient state of readiness for use in an emergency.(3)*

In Banki v Linee Italiane and the Port of New York Authority (1956) Index No.228 Sup.Ct.NY CO. the plaintiff claimed that the airport operator was negligent in two respects, namely, first that the airport's approach lighting system was noh-standard at the time of the crash and, therefore, could have caused it, and secondly, that the airport operator's water rescue and life saving procedures and equipment were inadequate. With regard to the second contention, the Port Authority argued in defence in their trial memorandum of

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(1) Cubitt & Terry v Gower(1933) Ll.LR 65; Smith v BEA(1951) 2 KB 893; Paulson v Hall (1948) US & CAR 538.
(2) In Blankley v Godley(1952) 1 AER 436 the words "taking off" were defined as "the period after the pilot has come to the take-off position" when construing s.40(2) of Civil Aviation Act, 1949.
(3)* Cf.Gilmore v United Air Lines(1938) USAR 138.

law that if they, as airport operators, owed any legal duties whatsoever to the plaintiff to rescue him from the perils of fire and water into which he had been thrust by the action of the Italian Airline, it was a duty only to exercise ordinary and reasonable care in the aid and assistance of the plaintiff after the crash. It was further argued that the proof at the trial would show that the Port Authority's air crash, fire fighting and rescue and aid procedures, and the particular aid and assistance rendered in this case, far exceeded whatever duties were required by law.

It did not become necessary for the Court to consider what duty is required by the law, or what standard of care is imposed, for rescue services because the Port Authority's submission that the plaintiff had failed to make out a "prima facie" case was upheld and the case against the Port Authority was dismissed on the ground that the plaintiff had failed to prove any negligence on its part.

CHAPTER VII

Liability of Control Tower Operators.

It has already been pointed out in Chapter I that in the United Kingdom the Minister of Transport and Civil Aviation may establish an Aerodrome Control(1) by virtue of the Air Navigation Order 1954 at any land aerodrome(2) where in his opinion this course is necessary in the interests of safety. For the purposes of this chapter it will be assumed that all ground control operators in the United Kingdom are servants of the Minister and that proceedings for negligence on the part of these servants can only be brought within the provisions of the Crown Proceedings Act, 1947.

In the United States according to the Statistical Handbook of Civil Aviation for 1949 published by the Civil Aeronautics Administration, the federal government through the Civil Aeronautics Administration was operating 165 of the nation's 200 traffic control towers. Operators of non-government control towers, the majority of whom are agents of state governments or municipalities, must follow prescribed CAA procedures.(3)

It seems desirable to examine the arguments which have been put forward by three writers(4) for determining problems of liability, but before doing so it is necessary to determine what elements constitute "air traffic control" which all three writers discuss. In Chapter I attention was drawn to the provisions of

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(1) "Aerodrome control" means a service established to provide air traffic control for aerodromes (Air Navigation Order 1954, Sch.2,r.1).
(2) Including licensed and Government aerodromes.
(3) Fed.Reg.p.742. Pt.26. § 26.55(1941).
(4) Infra pp.

Annex 11 of the Chicago Convention which require member states to provide air traffic services of three types, namely:- "1)

1) Area Control Service: the provision of air traffic control service for IFR flights.

2) Approach Control Service: the provision of air traffic control service for those parts of an IFR flight when an aircraft is engaged in manoeuvres associated with arrival or departure.

3) Aerodrome Control Service: the provision of air traffic service for aerodrome traffic."

The immediate questions that occur are (i) "Does 'aerodrome traffic' mean only aircraft on the ground?" and (ii) "If it does not, what is the distinction between Service (2) and Service (3)?" In Chapter I of Annex 11 "aerodrome traffic" is defined as "all traffic on the manoeuvring area of an aerodrome and all traffic in the vicinity of an aerodrome." An additional note is added which states:- "An aircraft is in the vicinity of an aerodrome when it is in, entering or leaving an aerodrome traffic circuit." It is, therefore, relevant to consider the second question, and to examine further provisions of Annex 11. According to Chapter III of the Annex the two services shall be provided as follows:-(1)

"2) Approach Control Service:

(a) by an aerodrome control tower or area control centre when it is necessary or desirable to combine under the responsibility of one unit the functions of the approach control service with those

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(1) Paragraph 3.2.

of the aerodrome control service or the area control service.

(b) by an approach control office when it is necessary or desirable to establish a separate unit.

3) Aerodrome Control Service: by an aerodrome control tower."

In the Information attachment to Annex 11 the position is clarified:-

"2.1. If----------the anticipated traffic density reaches a point where the pilots cannot be expected to take the responsibility of deciding the correct action necessary----------an aerodrome control tower should be established to provide aerodrome control service. The establishment of an aerodrome control tower does not necessarily imply the erection of a special structure, but rather it is intended to mean the establishment of a suitable service----------. The aerodrome control tower responsibility will extend only to aerodrome traffic within a reasonable distance of the aerodrome----------where only VFR traffic is controlled, the designation of a controlled airspace is not necessary and is not desirable.

2.2. Where it is decided that an aerodrome shall handle IFR traffic, it becomes necessary to protect such traffic bhy extending control to IFR flights----------. To accomplish this, a control zone should be established to contain at least those portions of the airspace containing the holding and letting down paths of the IFR flights.

4.1. The main purpose of the control zone is to provide for the controlled airspace extending upwards from the ground or water in

by the same aerodrome control tower which is providing the aerodrome control service when both functions are combined or by an approach control office when the service is provided by a different unit.

It seems relevant to discuss the theories on liability put forward by three writers.

1) "The Volunteer Theory." (1)

Eastman puts forward the rule of tort liability that whenever one voluntarily comes to the aid of another and the latter relies upon such an undertaking of the former there is imposed upon the former a duty of care at least to the extent of not placing the person acting in reliance in a more disadvantageous position than he was in prior to the voluntary undertaking. In support Eastman quotes § 323 of the Restatement of the Law of Torts:-

"(i) one who gratuitously renders services to another is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses.

(ii) one who gratuitously renders services to another--------is not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were begun."

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(1) v. Eastman: 'Liability of Ground Control Operator for Negligence.' (1950) 17 JAL & C.170.

The case on which this section of the Restatement (and cited by Eastman) is based is Erie RR CO. v Stewart where the failure of the Railroad Company to maintain a watchman at one of its crossings constituted a breach of duty to a passenger riding in a truck struck by one of the Company's trains. It is submitted that this case does not lend support to Eastman's theory at all because the basis of the Court's decision was that one who had adopted a customary method of warning in excess of reasonable requirements and when under no duty (imposed by law) to do so may not abandon the practice without reasonable care to give warning of the discontinuance. The decision would support "The Volunteer Theory" where the provision of air traffic control was a purely voluntary act[1] on the part of the airport operator and not one to be relied upon by the carrier as establishing a definite service. But it can hardly be a ground for determining the liability of air traffic services which are maintained, in the majority, by the federal government in the United States or by the appropriate Minister in the United Kingdom, at major aerodromes as an established service.

It is submitted that Eastman's theory is fallacious on two points:- (1) he puts forward the rule of the volunteer in tort which implies that every act of air traffic control is a voluntary one and done on the basis of a "rescue" operation. But under section 551(a) of the Civil Aeronautics Act, 1938 the Civil Aeronautics Board is "empowered, and it shall be its duty, to promote

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(1) Cf. Finfera v Thomas (1941) 1 CCH 949.

safety of flight in air commerce---------." It can, therefore, hardly be said that an air traffic controller "volunteers" to give directions to the pilot. The controller is under a statutory duty to do so, and Para.617 of the Code of Federal Regulations states "when flying in IFR weather conditions it is obviously impossible for the pilot to assume the responsibility of avoiding collision with other aircraft except as directed by the ground control agency." It may be said that when in a control area, any directions given to a pilot by a control centre are in the nature of "assistance" to him, whether flying in VFR or IFR conditions. But when the aircraft is in the aerodrome traffic circuit it is imperative for the safety not only of the aircraft but of others that the directions of the control tower are obeyed subject to the last "ultimate authority" of the pilot to take measures to avoid a collision or to save his aircraft. And under Art.47 of the Air Navigation Order, 1954, in the United Kingdom "every person and every aircraft shall comply with such of the Rules of ----------Air Traffic Control laid down in Schedule II to this Order as may be applicable-------- in the circumstances of the case."

(2) It seems dangerous to assume that all traffic control is provided as a gratuitous service. This may be true of services provided at municiple or commercial airports in the United States in respect of non-international or private flying, but is dubious as far as international services are concerned. In the United Kingdom charges are levied not only in respect of all passengers boarding outward bound planes from airports, whether to a destination inside or outside the United Kingdom, but also by way of landing fees from

all foreign air carriers using United Kingdom airports. Art.51(1) of the Air Navigation Order, 1954, specifically states:-

"The Minister may prescribe the charges to be made in respect of any services to or in connection with aircraft at any aerodrome licensed(1) for public use and conditions to be observed in relation to those charges or the performance of those services, and may pursuant to this paragraph prescribe maximum and minimum charges."

Art.52 states:-

"The person in control of any aerodrome which is open to public use by British aircraft on payment of charges shall allow the aircraft of all Contracting States(2) alike to use the aerodrome to the same extent and upon the same conditions and shall ensure that any charges made at any such aerodrome are uniformly applicable with respect to the aircraft of all Contracting States alike."

In view of the use of the words "in respect of any services" in Art.51 it might be argued that part of the purpose of laying charges from the air carrier is to provide air traffic control and equipment, and the same argument can be advanced in respect of airport fees levied from outward bound passengers. In this case air traffic services cannot be described as being provided on a gratuitous basis. The anomaly would be in respect of the inward bound passenger from whom no charge is levied. Hence the curious position

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(1) Query whether it is lawful for the Minister to levy charges at Government aerodromes. Art.53 permits the use of a Government aerodrome "subject to any conditions or limitations which may be specified."

(2) i.e. to the Chicago Convention.

may exist in the United Kingdom in the following situations:-

(1) British carrier flies in to X Airport which is Government owned. No landing fees levied. Air traffic service might be described as "gratuitous" in estimating what "duty" owed to carrier and passengers.

(2) Foreign carrier flies in to X Airport and a landing charge levied from the carrier. Air traffic service not gratuitous as far as carrier is conerned, but query position of passengers.

(3) British and foreign passengers leave X Airport, and a fee of 5/- levied from each. Air traffic service not gratuitous as regards passengers, but query carrier.

(4) British and foreign passengers fly in to X Airport. No landing fees levied from them. Air traffic service might be "gratuitous" in estimating what "duty" owed to passengers. No gratuitous service to foreign carrier but query position of British carrier.

2). <u>"The Attributable Blame Theory."</u>(1)*

Under this theory the facts of every accident must be assessed and examination made as to whether the blame can be apportioned between the carrier and the control tower. Joint liability would be a proper solution where evidence indicated (1) that the carrier was not exercising the highest degree of care, (2) that the control tower was negligent in the manner of its attempt to help the airliner, and (3) it is impossible to determine whose negligence was responsible

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(1)* v. Unsigned article "Control Zone Accidents: Allocation of Liability between Air Carrier and Control Tower."(1956) 23 JAL & C.239.

the vicinity of an aerodrome. Therefore, it should extend to at least the lower limit of the control area above which such a control area is established."

These notes on Annex 11 must be qualified by paragraph 3.1.1 of Chapter 3 which provides that "air traffic control service shall be provided:

1) to all IFR flights in control areas and control zones, and

2) to aerodrome traffic at controlled aerodromes."

The position of air traffic services at aerodromes or in airspace adjacent to aerodromes where such services have been established by Contracting States to the Chicago Convention, is, therefore, that at all aerodromes used by carriers of passengers or goods for hire or reward an aerodrome control service, operated from an aerodrome control tower, will control all aircraft in the manoeuvring area of the aerodrome and all aircraft in the vicinity of the aerodrome entering or leaving a given radius of airspace constituting an aerodrome traffic circuit and controlled by the aerodrome control tower, provided that all such traffic movements by aircraft are in accordance with visual flight rules (VFR). Where the aerodrome is handling instrument flight rule (IFR) traffic a larger area of airspace absorbing the airspace constituting the aerodrome traffic circuit, termed a control zone, is designated to encompass those portions of the airspace which are not within control areas and containing the paths of IFR flights arriving at and departing from the aerodrome used under IFR conditions. The service established to provide air traffic control to IFR flights in such a control zone is termed an "approach control service" and may be provided either

for the accident. But joint liability should never result if one defendant is at fault and the other is not. In what is termed a "landing situation" the control tower should be liable if final clearance was given and a "collision" subsequently occurs. But the carrier would be liable if final clearance was not given and an accident occurred when the aircraft was out of the flight pattern. Proper allocation of liability, therefore, rests upon the determination of whether the control tower or the carrier was the one who violated his duty (to the passenger) immediately prior to the accident and whether this violation of duty caused the accident. Thus liability would be placed on either the carrier or the control tower in the following circumstances:-

1) Carrier liable if accident occurred while pilot disobeying instructions from control tower and no emergency exists.

2) Carrier liable if after instructions from control tower it is proved that the pilot through the usual powers of observation attributed to pilots should have been aware of the danger and avoided the crash. The suggestion is made that the Air Traffic Regulations of CAA in order to achieve the highest degree of safety attempt to impose a duty on the person who had the last chance of avoiding the accident.

3) Control tower liable for negligently given instructions or for unworkable landing instruments if they cause an accident and it is shown that the pilot could not have observed the danger and avoided the accident.

4) Carrier and control tower jointly liable if both are negligent and it is impossible to determine whose negligence caused the

accident.

The weakness of this theory that after a complete examination of the facts and circumstances of the accident blame can be attached to either the carrier or the control tower or to both if it is impossible to determine whose negligence caused the accident lies in the extreme difficulty of post-accident accumulation and analysis of the detailed events prior to the accident.

Two examples will suffice, one occurring in good visibility conditions and the other in extremely bad weather conditions.

In the cases(1) which arose out of the accident on November 1,1949, at Washington National Airport, when a P-38 fighter type aircraft owned by the Bolivian Government collided with an Eastern Air Lines DC-4 the United States District Court for the District of Columbia basically held that the airport control tower operator cleared both planes to land on the same runway at the same time. The District Court also found against Eastern Air Lines. Appeals were taken to the Circuit Court of Appeals for the District of Columbia by both defendants and the Court of Appeals reversed the judgement against Eastern Air Lines remanding the case to the District Court for a new trial on the grounds that the trial judge was in submitting the case to the jury on the insufficient negative testimony from an airline pilot who stated that he was on the same frequency with Eastern and did not hear Eastern cleared to land.

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(1) Union Trust Company v Eastern Air Lines and Union Trust Company v United States (1955) 221 F.(2d)62.

It is a fact that Eastern did not follow the traffic pattern prescribed for Washington National Airport, but the Civil Aeronautics Administrator testified to the Court that if Eastern was "cleared to land" by the control tower, it had the absolute right to leave the pattern and make a landing approach.

Here there was a landing approach made in good weather conditions, and yet there is grave doubt as to what were the exact instructions given by the control tower, and whether in fact Eastern was ever "cleared to land." If the pilot was not "cleared" he was negligent in leaving the traffic pattern; and if he was "cleared" the jury had to consider whether proper vigilance on the part of the pilot would have resulted in the Bolivian plane being observed and the accident avoided. In view of the extreme doubt as to the actions of both defendants on the theory advanced by the author in 23 JAL & C joint liability would have to be attributed to both parties.

On 1 October, 1956 an RAF Vulcan bomber aircraft crashed while approaching London Airport in very poor visibility after completing a 26,000-mile return flight ffom Australia and New Zealand. The weather forecast indicated broken low cloud with visibility at 1,100 yards. The pilot decided to make one attempt to land at London Airport, and set his "break off" height at 300 feet - that is, he decided to come down under talk - down control until his altimeter stood at 300 feet, and if it was then not possible to make the landing he intended to overshoot at that height. The ground controlled approach talk-down instructions were followed up to a point three-quarters of a mile from touch-down when the pilot

was informed that he was 80 feet above the glide path. The pilot received no further information on elevation and seven seconds later, at a point about 1,000 yards from the touch-down point the aircraft struck the ground. In a report made to Parliament by the Secretary of State for Air[1] it was stated that the pilot made an error of judgement in selecting a break-off height of 300 feet and in going below it. It was agreed that the GCA controller did not give adequate guidance on elevation during the descent and, in particular, that he was at fault in the concluding stages in not warning the pilot that he was dangerously close to the ground. The Secretary of State for Air said "the apportionment of responsibility is difficult. I accept the conclusions of the RAF court, but I-------- do not feel able to define the degree of responsibility precisely." It was subsequently found that doubt existed as to the accuracy of the altimeter in the aircraft.

In this accident, again, so far as the facts are at present known it is impossible to attribute sole blame on any one person. On the findings of the service court of inquiry both the pilot and the GCA operator made errors, the one of judgement in deciding at what height to "break-off" and the other of failing to give adequate guidance; yet a major contributory cause of the accident could have been a fault in the aircraft itself. Although no passengers were involved in this accident it would seem that since it would be impossible to say that either the pilot or the GCA controller was

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(1) Reported in 'The Times' 21 December, 1956.

the only party who may have been negligent, and if responsibility had to be defined it should be placed jointly on both parties.

3) Shawcross and Beaumont Theory.[1]

Persons exercising air traffic control are under a duty to take reasonable care in giving instructions, permissions or advice which the person to whom they are given is legally bound to obey or obtain[2], and they and those responsible as their employers would be liable for any damage caused by a breach of this duty[3]. They are under a similar duty and liability in respect of any instructions or advice issued with the intention that they should be acted on, even if not falling within the categories of instructions which the recipient is legally bound to obey. They are further probably under a duty to take reasonable care to give all such instructions and advice as may be necessary to promote the safety of aircraft within their area of responsibility, and would therefore be liable for negligently omitting to give such instructions or advice as well as for negligently giving incorrect instructions or advice. In all fairness to the authors of this view it should be added that they clearly state that it is impossible to express any confident opinion as to the duties and liabilities to third parties of those responsible for the provision and operation of facilities, i.e./air traffic control, other than aerodromes.

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(1)Shawcross and Beaumont. 2nd. Ed. para.586.
(2)See Arts.44 & 65 of Air Navigation Order, 1954 for United Kingdom.
(3)On the general principle stated by Lord Atkin in Donoghue v Stevenson(1932) AC 562 at p.580.

This is a cautious approach based on the principles of Common Law in the absence of any explanation of this topic by the English Courts to date. It has much to recommend it as against the 'codifying" of situations and principles of liability governing those "situations" since in the absence of statutory liability it leaves the position open for the Courts to develop this field of law in accordance with established and known principles of Common Law. But it is apparent from cases decided so far that this theory based entirely on the Duty of Care concept would not necessarily be the guiding criterion in the United States.

As far as the United States federal government is concerned in its operation of control towers through the agency of the Civil Aeronautics Administration Eastman in his article(1) questions whether there is any basis on which the federal government may be liable in tort for its negligence. He points out that neither the United States nor its component states may be sued without its consent. In state jurisdictions consent of a more or less limited nature has been granted by statute. Consent of the United States to be sued in tort is contained in the Federal Tort Claims Act,1946. Section 2674 of Title 28 US Code states:- "The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances----------."

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(1)v. Eastman: 'Liability of Ground Control Operator for Negligence' (1950) 17 JAL & C 170.

But this wide section is qualified by a later section which provides exceptions by way of immunity from claims in tort. Section 2680 of Title 28 states:- "The provisions of this Chapter---------shall not apply to;- (a) any claim based upon an act or omission of the Government---------in the exercise of a statute or regulation ----------or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government----------."

In Thomas v US(1949) 81 Fed.Supp.881 the federal government was held to be charged with an absolute duty and not to be exercising a discretionary function where the War Department caused damage to property by the incorrect location of dykes on the Missouri River. Eastman concluded that:- (a) where there is a clear violation of an order or regulation by an employee of the federal government acting within the scope of his authority the exception contained in Section 2674 would not apply; (b) where the act or omission complained of is in the exercise of a discretionary function or duty, or pursuant to a regulation or order, the federal government would not be liable unless there was a substantial showing of negligence.

This very point, which Eastman earlier raised, was discussed in Union Trust Co. v United States 221 F.(2d) 62 where the Circuit Court of Appeals for the District of Columbia found the Government liable under the Federal Tort Claims Act for the negligence of its employee in clearing both planes to land on the same runway at the same time and overruling the contentions of the Government that there was no analagous private liability and that the control tower

operator's activities constituted "a discretionary function or duty" within the meaning of the exception to the Act. From this decision the Government filed a petition for Certiorari for alleged erroneous application of the Federal Tort Claims Act to the Supreme Court of the United States, which petition was granted and the judgement of the Circuit Court of Appeals against the Government affirmed without opinion[1] on the basis of Indian Towing Co. v United States (1955) 350 US 61[2].

In the Indian Towing Co. case the Court, in an opinion by Mr. Justice Frankfurter, ruled that the Government was liable under the Federal Tort Claims Act for navigation functions of Coast Guard personnel, if negligently performed. The particular injury in that case consisted of the grounding of the plaintiff's vessel due to the failure of a light at a Coast Guard lighthouse. The Court noted the Government's concession that the activity occurred at the "operational level" of Government so that the discretionary function exception was not involved. The Court ruled squarely that the requirement in the statute that the Government be liable "as a private individual under like circumstances" was fulfilled because

"---------it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."[3]

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(1) Reported at 350 US 907 and 350 US 911.
(2) For this account of the Indian Towing Case and the decision of the Supreme Court in the Union Trust Co. v US I am indebted to the NIMLO Annual Report of Committee on Airports, 1956 supplied to me by the Law Department of The Port of New York Authority, and for an account sent by Mr. Joseph W. Henderson of the law firm of Rawle and Henderson, Philadelphia.
(3) This appears to endorse 'The Volunteer Theory' advanced by Eastman supra.

Since the Supreme Court's affirmance in the Union Trust case was expressly based on its prior decision in the Indian Towing case it may be fairly concluded that the tort liability of the federal government for its control tower personnel is based on the factors in the Indian Towing Co. case, namely:- (a) that control tower operations are at the "operational level" of government; and (b) that once the Government undertakes the function, through its control tower personnel, of aiding and guiding navigation of aircraft, it is liable for the negligence of its employees in the performance of functions so undertaken.

In the United Kingdom civil proceedings against the Ministry of Transport and Civil Aviation are governed by the Crown Proceedings Act, 1947. The general effect of the Act is that claims against the Crown which, before the Act, could have been enforced by petition of right, or "by a proceeding provided by any statutory provision repealed by this Act," can be enforced by proceeding against "the appropriate authorised Government department" or, in certain cases, the Attorney-General. Section 2 of the Act provides that subject to certain qualifications the Crown becomes "subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at Common Law by reason of being their employer;

(c) in respect of the duties attaching at common law to the owner-

ship, occupation, possession or control of property."

The grounds on which the plaintiffs petitioned for Certiorari to the Supreme Court of the United States against the federal government in Union Trust Co. v United States(1955) 350 US 907 was that the Circuit Court of Appeals was wrong in limiting the amount of recovery for wrongful death to $15,000 in accordance with the provisions of Virginia law. This petition was denied by the Supreme Court and the decision of the Court of Appeals affirmed that although the planes collided in the airspace over the District of Columbia the negligent acts and omissions of the tower operators occurred in the control tower at Washington National Airport which is in Virginia (and therefore the law of Virginia applied). The decision seems a clear indication that, in the United States at any rate, the 'situs' of a negligent act or omission on the part of a control tower which results in an accident whether this occurs on the aerodrome or in the airspace some distance away, and provided that there is no negligence on the part of the pilot of the aircraft involved, will be held to be the control tower in which the negligent act or omission occurs.

It now seems prudent to examine the cases and decisions in the United States courts in which allegations of negligence on the part of control towers have been raised, and to see whether any pattern of liability can be drawn from these cases as they have been decided to date.

1) Accidents which have occurred in the Air.

In Johnson v Western Air Express Corp.(1941) 1 CCH $76 the defendant airline were operating a service into Burbank Airport

where the Union Air Terminal was operated by United Airports Co. of California Ltd. who also operated the radio control tower and radio station. The aircraft operated by the defendant airline came onto the radio beam and flew from a first approach station to a second one, from whence a direct approach lay over a 3,000 ft. mountain pass to the airport. The aircraft went three miles off course and crashed into the mountains. The plaintiffs alleged that the Airport Company failed to supply a radio localizer beam to the aircraft for an instrument approach. The District Court of Appeals for California held that there was no evidence that such a radio beam was not supplied and further that there was no evidence that the giving or failure to give such a beam in any way caused the aircraft to depart from its position of safety.

This case did not involve the control tower as such, but the radio service provided from the airport to give assistance to aircraft making instrument approaches. If the evidence had shown that this radio service was provided on request and relied upon by pilots in order to make a safe approach through mountain terrains and the Airport Company had been negligent in the provision of this service it would seem clear that they would have been held liable for the accident.

The first of the two cases involving the control tower at Washington National Airport occurred in 1949. In Georger v United States(1949) 2 CCH 14,859 the plaintiff brought an action under the Federal Tort Claims Act for the death of a passenger. The pilot of a Capital Airlines aircraft requested permission from the CAA Airway Traffic Control Centre to change course. This permission was

given and after altering course and dropping height, which was notified to the control centre, the aircraft crashed. The United States District Court for the Eastern District of Virginia held that there was no evidence to show that the controller at the Control Centre failed to use due care in the exercise of his duties and even if negligence could be proved there was no evidence that it caused the accident.

It is worth noting that under the Code of Federal Regulations the primary object of the air traffic control service is to "promote the safe, orderly and expeditious movement of air traffic" (1) which includes the prevention of "collisions between aircraft and aircraft and obstructions," and "expediting and maintaining an orderly flow of air traffic." The control service is also to assist the pilot "by providing such advice and information as may be useful for the safe and efficient conduct of a flight."(2)

It would seem that the controller might have been negligent in failing to observe the type of territory which the pilot was flying over when he asked for and was given permission to alter course, and later informed the controller that he was dropping height, in so far as he failed to provide "information----------for the efficient conduct of the flight." But it is presumed that the Court were unable to find any evidence that the accident was due to the sole negligence of the controller.

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(1) CFR (1949 Ed.)Pt.617.4.
(2) Cf.Thomas v American Airways(1935) 1 CCH 566 where held that if carrier deviates from Air Traffic Rules and causes a dangerous situation the antecedent negligence involved in such a vidation may be considered the primary cause of the accident and the carrier cannot avoid responsibility.

It has already been observed that in the second case involving Washington National Airport, in Eastern Airlines v Union Trust Co. (1955) 221 F.(2d) 62, the federal government were held liable for the negligent operation of the control tower. The District Court judge found that the control tower was negligent for:- 1) failing to warn the airliner of the position of the fighter on its final approach; 2) failing to warn the fighter that the airliner had final clearance; 3) failing to keep both planes aware of each other's position; 4) clearing both planes to land on the same runway at approximately the same time.

Appeals were taken to the Circuit Court of Appeals for the District of Columbia by the United States Government and by Eastern Air Lines (who had also been found liable for negligence by the jury.) The Court of Appeals affirmed the judgement against the Government, and reversed the judgement against Eastern Air Lines, remanding the case to the District Court for a new trial(1):

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(1) The subsequent litigation as far as Eastern Air Lines is complicated. The Union Trust Co. filed a Petition for Certiorari to the Supreme Court of the United States from the decision of the Court of Appeals. The Supreme Court granted the Petition and reversed the decision of the Court of Appeals.(350 US 907). Eastern Air Lines filed a Petition for Re-Hearing to the Supreme Court as a result of which the Court modified its earlier order by remanding the case to the Court of Appeals for decision on the points not passed upon by that Court in the original appeal. (350 US 962). The Court of Appeals heard further oral argument and decided against Eastern on the remaining points, with one dissent (239 F.2d.25). A Petition for Re-Hearing was filed and denied, and Eastern then filed a Petition for a Writ of Certiorari to the Supreme Court which has recently been denied(not yet reported). It is presumed that the litigation as far as Eastern Air Lines is concerned is also now at an end.

From that decision, the Government filed a Petition for Certiorari to the Supreme Court of the United States, which Petition was granted and the judgement of the Court of Appeals affirmed, thus ending the litigation with respect to the Government.(1)

In another case involving the issue of liability of the United States for CAA control tower operations, Smerdon v United States (1955) 135 F.Supp.929, the Court, although following the interpretation of the Federal Tort Claims Act in the Union Trust Case, held that the evidence did not justify a finding of negligence on the part of the Government control tower personnel.

The pilot was advised by the tower that visibility at Boston Airport was below the minimums required for landings and that radar instruments in control tower were clouded to make landing impossible. However, the pilot mistook a favourable weather report given by the same control tower and concerning a nearby airfield to be applicable to the Boston Airport. Seeing the end of the Boston Airport runway, and in reliance on the weather report, the pilot asked for visual flight clearance to make his landing and the request was granted. On the approach to the runway the aircraft entered a fog bank and crashed into the harbour. The Court noted:- "----------Congress has consented for the government to be sued for damages resulting from the negligence of its tower operators within the scope of their employment."(p.931).

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(1) Reported at 350 US 907.

It was held that the rules governing the control of aircraft flying in a Control Area[1] "do not place upon Air Traffic Control operators the responsibility of determining whether or not a given weather condition is safe for a landing. The operator's duty in this case was limited to maintaining control of the airways to prevent collision between aircraft under his control."(p.932).

The Court concluded its opinion with the observation that the job of air traffic control operators was to assist a pilot to land safely and expeditiously, to furnish him with official weather reports and to clear the selected air corridor. But the Court said that it was not the duty of the tower to dispute the pilot's finding of visibility.

The author of the article on the subject of Control Towers in 23 JAL & C puts forward the opinion that the Smerdon Case has construed the Air Traffic Control Rules in the CF Regulations as not imposing a duty on air traffic controllers to forbid landing attempts if weather conditions render them unsafe. He suggests that in order to impose responsibility on control towers the Air Traffic Control Rules should be amended to include a provision which would make control towers responsible for failing to forbid a landing attempt if conditions at the airport make an attempted landing unsafe.

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(1) As in Georger v US supra.

2) Accidents which have occurred on the Ground at Airports.

In Finfera v Thomas(1941) 1 CCH 949 the appellant, who had prior to landing listened to control tower instructions to another plane, landed at Detroit Airport and seeing no signal from the control tower assumed that it was safe to taxi along the runway. While taxiing up the runway a collision occurred between him and an aircraft which had landed to his left.

Under Rule 19 of the Board of Aeronautics of Michigan responsibility was placed on pilots to ensure that there was no danger of collisions at airports between aircraft taxiing. Pilots had further been instructed that a green or white light shown in the control tower in no way relieved them from the exercise of care in observing and avoiding planes.

The Circuit Court of Appeals held that the failure of the appellant to look in a direction in which he had an unobstructed view was contributory negligence as a matter of law. Further, no reliance should have been placed on the control tower which was operated by the City of Detroit only as a matter of accommodation to regulate traffic - and the instructions of the airport manager to the air traffic controllers was that they were only to regulate airport traffic when they were not otherwise engaged in controlling traffic in the air.

In Marino v US (1949) 2 CCH 14,957 the plaintiff was injured when operating a tractor, on the runway of an airfield, which was struck by the wing of a US Army aircraft moving down the runway. The plaintiff had been told to watch the control tower for signals when planes were moving on the runway, and prior to the accident

occurring he had been given no such signal. The pilot was unable to see the runway due to the construction of the plane which gave him a maximum vision of 45° at any one time; but he had been cautioned that men were working on the runway. The Federal District Court found that the control tower was negligent since:- "It was the duty of the men in the tower to inform themselves of the presence of the tractor on the runway---------and not to give clearance to the P-51 to proceed along the runway until the runway was known to be clear. The duties existed----------and were not performed."(1)

The pilot was given permission to proceed along the runway, but was not informed of the presence of the tractor.

On the decision in Marino v US it would appear that air traffic control authorities may be liable for misleading orders or negligent information given which result in an accident where the pilot has acted in reliance and had no opportunity of avoiding the accident. If this is correct then it is necessary to examine the decisions of the Courts in both the United Kingdom and the United States where the cause of complaint by the plaintiff has been a negligent misstatement on which he has acted and as the result of which he had received injury either to person or property. It is suggested that such a cause of complaint may be applicable where an accident results whether in the air or on the ground from a careless or negligent misstatement on the part of the control tower.

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(1) Cf. US v Douglas Aircraft Co.2 CCH 14,727 where a government aircraft landed at an airport operated by a municipality and the control tower by CAA. The pilot had requested control tower to send a tractor to tow aircraft in, but ten minutes later another aircraft landed with control tower permission and collided with the government aircraft. "Whether or not the action or non-action of the traffic tower in any instance was customary, its operation may constitute negligence."

The Shawcross and Beaumont view[1] is that persons exercising air traffic control are under a duty to take reasonable care in giving instructions, and they would be liable for negligently omitting to give instructions or for negligently giving incorrect instructions or advice as a result of which an accident occurs. One uncertainty is as to how far such a cause of complaint giving rise to an action would extend. It would clearly be open to the carrier, but would it also extend to the passenger who is not in contact with the control tower? It is submitted that in the United Kingdom the passengger would be able to bring an action under the broad principle laid down by Lord Atkin in Donoghue v Stevenson[2] as a person whom the control tower operator "ought reasonably to have in his contemplation" and to whom a duty is thereby owed. If this should not be correct, then the passenger would have to proceed against the carrier under Article 20 of the Warsaw Convention as his only protection.

In Candler v Crane, Christmas & Co. (1951) 2 KB 164 the plaintiff brought an action against a firm of accountants alleging that through their carelessness in preparing the accounts of a Company, which they had been asked to do by the Company so that the plaintiff could consider these before making an investment, he had invested money in the Company on the strength of the accounts prepared and suffered a loss when the Company was wound up. The Court of Appeal

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(1) Supra p.122.
(2) (1932) AC 562 at p.580.

held that a false statement carelessly as opposed to fraudulently made was not actionable in the absence of any contractual or fiduciary relationship. But the reason behind the decision of the Court of Appeal is summed up in the words of Asquith L.J.:-

"I think---------that physical injury to property may suffice, but it has never been applied to injury other than physical."(p.189).

In other words, although the Courts will recognise an action for negligent misstatement where injury to the person is concerned, and they may also entertain an action on the same ground where property has been physically damaged, but they will not entertain such an action where the only damage or loss alleged is a pecuniary one. Further on in his judgement Asquith L.J. said:- "The case had been instanced---------of a marine cartographer who carelessly omits to indicate on his map the existence of a reef. The Captain of the "Queen Mary" in reliance of the map, and having no opporunity of checking it by reference to any other map, steers her on the unsuspected rocks and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages?----------If it be said that there is no proximity between the cartographer and those for whose use his map is designed, the reply surely is that there is just as much "proximity" as there was between the manufacturer of the peccant ginger beer bottle and its ultimate consumer[1]."(p.194).

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(1) A reference to the decision in Donoghue v Stevenson supra where the manufacturer was liable to the consumer in negligence for putting into circulation a ginger beer bottle which contained a snail inside and the glass of which was so coloured that it did not allow inspection of the contents by the consumer.

Although this hypothetical example of Asquith L.J. is only 'obiter dictum' it would have some bearing where instructions were carelessly given by a control tower and the pilot had no opportunity of questioning and checking these instructions himself. It would also be applicable to meteorological services. Comparison may be made with the words of Annex 2 to the Chicago Convention: "The pilot-in-command of an aircraft shall be responsible for compliance with air traffic control instructions or clearances received."(1) When the Court considered this rule in Eastern Air Lines v US(1953) US & C AR 156 it was stated: "under the air traffic rules the pilot has ultimate authority and no rule relieves him from the responsibility of taking such action as would best aid to avoid a collision" What the Court said there regarding the ultimate authority of the pilot can also be said of the captain of a ship. Ultimate responsibility lies with both, but there are occasions when they are both bound to place explicit faith in the conduct of another party and if that other party is careless in the performance of his duty he must accept liability. The facts of the Indian Towing Co.Case (2) are an example of the reliability placed by a person in command on the operation work of a federal agency.

The majority of the judges in the Candler Case referred to the judgement of Cardozo C.J. in Ultramares Corporation v Touche (1931) 174 NE 441 in which accountants were held not liable for negligence in preparing a financial report of a company on the

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(1) 3.5.1.1.
(2) supra.

strength of which a third person advanced money to the Company. But earlier, in 1922, in Glanzer v Shepherd 135 NE 275 the same judge, in allowing recovery where the plaintiff had overpaid for bags of beans where the defendant, employed by the vendor to weigh the beans, had been negligent in the performance of his job, said - "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully if he acts at all.----------The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor."

But in Guay v Sun Publishing Co.Ltd.(1953) 4 DLR 577 the Supreme Court of Canada held that for damage resulting from false statements it was necessary for a plaintiff to prove "malice." It is suggested that this case turned on whether the defendants should have the relatives of a person in mind when reporting that that person has been killed and, therefore, owe those relatives a duty to check the information.

Before attempting to draw any conclusions on the present liability of control towers reference should be made to the future control methods of air traffic. In opening an air transport course at Oriel College, Oxford, this year, Lord Douglas of Kirtleside, Chairman of BEA and President of the International Air Transport Association, said that sooner or later there would have to be devised a system of control for all aircraft, including military aircraft, operating in civil airways and airport approaches. "I think we shall have to abandon altogether the visual method of avoidance and rely entirely on control methods, which will apply at all times

regardless of weather," he said. "This requires the development of entirely new equipment and techniques of air traffic control and I do not think we are devoting enough attention to this requirement."(1)(2)

In the United Kingdom the Ministry of Transport and Civil Aviation have introduced for a trial period(3) stricter control of aircraft in airways. Hitherto, there has been strict control in the airways only when visibility was less than five miles ahead, one mile laterally, and 1,000 ft. vertically(4). Under the new procedures all aircraft in airways will be required to conform to the same procedures as in IMC (instrument conditions), and air traffic control will affect separation of known traffic, except that where conditions warrant air traffic control will permit a pilot to make a VMC (clear weather) climb or descent, during which he will be responsible for maintaining separation from other traffic.(5)

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(1) The Times, 26 March, 1957.
(2) These remarks of Lord Douglas were probably in reference to the congestion in United Kingdom and European airspace. But it is suggested that these remarks are also true of the control zones around and the airways between the cities in the east and on the western seaboard of the United States.
(3) The Times, 7 June, 1957.
(4) The corresponding figures which are still accepted by ICAO are three miles, 2,000 feet, and 500 feet. The Times 25 October 1956.
(5) This tightening of control follows a "near-miss" incident involving an RAF jet trainer and a BEA airliner near Daventry on 26 March, 1956.

The conclusions which can be drawn regarding the present and the possible future liability of air traffic control are as follows:-

1) The authority of air traffic control is becoming stricter in the United Kingdom, and almost certainly the United States, due to the increase of traffic movements in congested airspace and the developing speed of aircraft with the increasing collision possibility. It is probably correct to state that in the not too distant future all traffic in both aerodrome traffic circuits and in control areas, whether flying in VFR or IFR conditions, will be strictly controlled by control towers or centres. Theoretically, it would be possible to ensure safety from risk of collision by controlling all aircraft from the ground at all times. But it is evident that in the United Kingdom at present neither the air traffic control organisation nor all aircraft are equipped to provide such control.(1)

2) In the United States the federal government through the agency of the Civil Aeronautics Authority may be liable for the negligent operation of its control towers on the grounds that such operations are at the "operational level" of government.

3) In the United Kingdom proceedings may be brought against the Ministry of Transport and Civil Aviation under section 2 of the Crown Proceedings Act, 1947 for the negligent operation of control towers at government or licensed aerodromes.

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(1) See written reply made by Secretary of State for Air to House of Commons reported in the Times, 25 October, 1956.

4) The pilot in command is the person with ultimate authority for the safety of the aircraft. It is suggested that, subject to the provision of contributory negligence on the part of the other party, the following scheme may provide a guide to liability:-

(a) Area Control Service in VFR conditions: pilot may have to accept full responsibility for any accident either through collision or ground impact.

(b) Area Control Service in IFR conditions: pilot may have to accept full responsibility for ground impact since he should know the approximate terrain of the territory he is flying over and his altimeter should be his safety guide. Authority for this view is in Georger v US and Johnson v Western Air Express Corp. The control centre may become jointly liable for an accident due to collision, depending on evidence as to visibility at the time of the accident, and whether pilot had time to avoid accident.

(c) Approach Control Service in IFR conditions: responsibility will depend on weather conditions and visibility at the time of the accident. If traffic is controlled by a separate approach control centre and the accident occurs through a collision it is suggested that primary responsibility may be with the approach control centre since the first duty of this centre should be the separation of traffic. If traffic is controlled from aerodrome control tower, circumstances may differ slightly in that the duty of the controller includes safe landing and departure of aircraft in addition to separation of traffic, though this will not excuse negligence.

(d) Aerodrome Control Service in VFR conditions: the control tower will have to accept full responsibility for instructions given which

directly result in an accident being caused where the pilot has no opportunity of avoiding the accident by taking normal precautions of observation and care in the traffic circuit. Union Trust Co. v US (where pilot exercised discretion and failed to follow traffic pattern).

(e) Aerodrome Control of traffic on ground: where control tower is negligent in the performance of its duties in giving safe clearance to aircraft for movement on landing or departure runways the operator will be liable: Marino v US.

5) CAA Control towers, on the strength of the decision in Smerdon v US, appear to have no power to close airports and forbid landing attempts under VFR conditions where IFR control has been refused. It has been suggested that the Air Traffic Control Rules may have to be altered to make this possible.

6) It is suggested that, in view of the duty owed by the air traffic controller to the persons being carried in the aircraft, on the strength of some of the 'dictum' in Candler v Crane,Christmas & Co., an action may lie against the operator for negligent misstatement where careless instructions or directions are given by the controller. The ground of action would seem doubtful in the United States in view of the decision of Cardozo J. in Ultramares Corporation v Touche.

CHAPTER VIII.

Liability to Owners of Aircraft on the Airport.

When Aircraft are:-

(1) Parked on the Airport.

If the operator permits aircraft to be parked on the airport he would seem to be under no liability to the owner of the aircraft unless a bailment is created. He would be under a duty not to cause damage to the aircraft, but the mere fact that an aircraft is allowed to be parked would appear to create no special duty or obligation on the part of the operator. But there is the possibility that the operator might be considered to be an involuntary bailee, and the legal position of involuntary bailees is by no means clear on the authorities. In Howard v Harris (1884) C & E 253, where an author sent a manuscript of a play to the defendant (the lessee of a theatre), who lost it, it was held that no duty of any kind was cast on the defendant by sending him something he had not asked for. This ruling was questioned in Summer v Challenor (1926) 70 S.J.760. In Elvin & Powell Ltd. v Plummer Roddis Ltd.(1933) 50 TLR 158 Hawke J. said that, "if persons were involuntary bailees and had done everything reasonable they were not liable to pay damages if something which they did resulted in the loss of the property."

Yet in Johnson v City of Corpus Christi (1951) 3 CCH 17,654 Price Ch.J. in the Texas Court of Civil Appeals said that, "it is elementary that the duty rested upon the city to use ordinary care to prevent damage to the plaintiff's plane." The plane was allowed to be parked on the airport and was damaged when portable scaffolding broke loose in a windstorm and crashed against the plane. The

owner failed to recover damages for two reasons, namely:- (1) the Court found that the airport had used ordinary care to prevent damage to the plane; (2) the damage which occurred was the result of an unavoidable accident.

It is suggested that this case, inspite of the words of Price Ch.J., imposed no new obligation on the operator. The ordinary care required was that of seeing that the aircraft was not damaged by anything under the control of the operator. The scaffolding was under the control of the operator, and in the opinion of the Court care had been taken to prevent damage, and the accident which did occur was unavoidable, i.e. presumably unforeseeable in so far as the likelihood existed of damage occurring to the aircraft from airport property. No duty of care is imposed on the operator by this decision to take steps to protect a plane, parked on the airport, which is in danger of suffering damage from the ordinary incidents of the operation of the airport or from the weather. But if, of course, the parked plane was an obstruction, then the operator would be compelled to move it, and exercise ordinary care in the course of doing so. In Searle v Corley (1950) 3 CCH 17,176, an earlier decision of the Texas Court of Civil Appeals, the airport was liable where an aircraft overturned while being taxied to a new position by an employee of the airport operator since the acts of the employee were negligent and the proximate cause of the accident.

But where an aircraft owner left his plane at an airport due to weather conditions, and warned the operator not to move the

plane it was held that the operator was liable for the destruction of the plane through the act of one of his employees piloting the plane on a test-flight without the consent of the owner: Trans-continental Airport of Toledo v Ogden (1932) 1 CCH 319. The Ohio Court of Appeals took the view that a bailment had been created, and the operator had not exercised the care required of a bailee. It is difficult to understand what evidence existed for the Court to hold that a bailment of the aircraft had been made. The presumption is that since the owner had made specific directions, which the operator must have accepted, those directions were sufficient to show that some form of agreement had been made between the owner and the operator, and that agreement constituted a bailment of the aircraft.

(2) In the Possession of the Airport Operator for:-

(A) Safe Custody.

Where aircraft are accepted for storage in a hangar, and no charge is made upon the owner for the storage, the operator will be a gratuitous bailee and the duty required of him will be that imposed by the Common Law on gratuitous bailees. The position will be the same if the bailee owns the hangar only and not the remainder of the airport. In Hills & Sons Ltd. v British Airways Ltd.(1936) 56 Lloyds L.R. 20 the defendants, who owned a hangar at an airfield, accepted an aircraft for custody in their hangar. While the aircraft was being removed from the hangar it was blown over and damaged. The defendants were held to be gratuitous bailees, and their duty in such circumstances was to use that skill and care which per-

sons in their position, being persons of ordinary prudence, would have used if the plane had been their own; but they failed in their duty as such because even assuming that the plane was blown over by a strong gust of wind, the bailees should have realised the possibility of such a gust, and taken the necessary precautions.

In the course of his judgement Lewes J. said:- "A gratuitous bailee is under a duty to use the same skill as a person of ordinary prudence, bearing in mind who the person is, would use towards his own affairs.----------Although they were gratuitous bailees and their duty may be less than in the case of bailees for reward I am satisfied that they did not use that skill or care which persons in their position, being persons of ordinary prudence, would have used if the machine had been their machine."

The ordinary rules of bailment apply to aircraft, in the same way as they apply to automobiles. This was clearly stated by Pettle J. in Braman-Johnson Flying Service v Thomson (1938) 1 CCH 758(1). And in Pottawatomie Airport v Winger (1954) US & CAR 313, the Kansas Supreme Court held that a gratuitous bailee is held to a high degree of care.(2)

Where a county is authorised by statute to engage in airport business in its proprietary capacity it is not protected by a rule of sovereign immunity from liability for its torts while acting in

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(1) On the authority of Whitehead v Johnson (1934) 1 CCH 501; Transcontinental Airport of Toledo v Ogden(1932) 1 CCH 319; Ambassador Airways v Frank 124 CAL.APP.56.

(2) Though a hire of an aircraft was involved in this case. Cf. Whitehead v Johnson(1934) 1 CCH 501. misuse or wrongful deviation constitutes breach of bailment.

that capacity. In Granite Oil Securities Inc. v Douglas County(1950) 3 CCH 17,228 the county were liable for the destruction of a plane in a hangar at a county airport caused by the negligent installation of a gasoline pump system. But in Aircraft Sales & Service Inc. v Bramlett(1950) 3 CCH 17,331 the acceptance of an aircraft described as "highly inflammable," for storage was held to cast on the bailee the implied obligation of using reasonable care to protect it from fire. This duty of exercising reasonable care extended not only to the means employed for the prevention of fire, but also to the method and agency used to arrest the progress of the fire after it had started.

The burden of proving that the destruction of an aircraft by fire was not caused by negligence was held by the New Jersey Supreme Court to lie with the airport in Hopper's Inc. v Red Bank Airport Inc.(1951) 3 CCH 17,745. Evidence that the airport's manner of operation and precautionary steps prior to the fire were consistent with accepted airport practices and customs did not, by itself, justify a judgement in favour of the airport, since the issue of negligence was a factual one.(1) Jacobs J. stated:- "Where goods are lost or damaged while in the bailee's custody a presumption of negligence arises.----------Proof by the bailor of the bailment establishes a 'prima facie' case and casts upon the bailee the burden of going forward with evidence to show that the loss did

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(1) Cf. 2 Wigmore, Evidence 489 (3rd ed. 1940), and Indermaur Corp. v Crandon (1952) 3 CCH 17,883; fact that stored plane destroyed by fire sufficient evidence to take question of negligence to jury.

not occur through his negligence or that he exercised a degree of care sufficient to rebut the presumption of negligence."

But in Wyatt v Baughman d.b.a.Skyway Flying Service Inc.(1951) 3 CCH 17,791 the Utah Supreme Court held that where planes stored in a hangar are destroyed by fire a presumption of negligence on the part of the airport operator arises, and this presumption of negligence disappears upon presentation by the operator of evidence of due care. There then remains an inference of negligence which is weighed by the jury as part of the evidence of the case.

An operator may not shelter behind a plea of Act of God where an aircraft is destroyed in a windstorm. The plea will only be successful where there is no concurring negligence on the part of the operator. In the words of McGhee J. of the New Mexico Supreme Court in Shepherd v Graham Bell Aviation Service Inc.(1952) 3 CCH 17,886: "Except for the negligence of the defendant the loss would not have occurred, so instead of providing the defendant with an escape hatch for its negligence the plea (of destruction of the aircraft by Act of God) shuts the door in its face."

(B) Repair.

Recovery of damage occurring to aircraft in the possession of the operator for repair will depend on the terms of the contract between the owner and operator. Jones on Bailments at p.91 states that a bailee with whom goods are bailed, that work may be performed thereon or with respect thereto, for pecuniary or other reward, is bound not only to perform his contract as to the work to be done but also to use ordinary diligence in preserving the property entrusted

to him. The liability continues until the relationship of bailor and bailee ends. In Leck v Maestaer (1807) 1 CAMP.138 it was held that the bailee is bound to exert himself in order to protect the thing bailed from any unexpected danger to which it may be exposed. And in Clarke v Earnshaw (1818) Gow.30, where A entrusted to B a chronometer to be repaired, and B allowed his servant to sleep in the shop in which it was deposited, but deposited his own watches in a more secure place, he was liable to A for its value after it had been stolen by his servant. Such a bailee is not, however, an insurer: Consolidated Tea Co. v Oliver's Wharf (1910) 2 KB 395. But in the event of loss or injury the 'onus' is on the bailee to prove that it is not attributable to his neglect: Travers & Sons Ltd. v Cooper(1915) 1 KB 73.

Where a hangar caught fire, in which a plane was stored for repair and the plane was damaged, it was held in Downey v Martin Aircraft Services Ltd.(1950) 3 CCH 17,126 that it was not enough for the defendant to escape liability by showing that the property was lost, stolen or destroyed, but he must show that the loss occurred without negligence on his part. But if the contract of repair contains a liability release for damages resulting beyond the control of the airport, the owners, in order to collect, have the burden of proving negligence on the part of the airport: Revenue Aero Club Inc. v Alexandria Airport Inc.(1951) 3 CCH 17,553. In the course of his judgement in the Virginia Supreme Court of Appeals, Eccleston J. said:- "The bailor has the ultimate burden of proving that the loss of the property deposited with the bailee was due to the latter's

negligence. Yet there is a conflict of judicial opinion as to the duty of going forward with the evidence where the bailor alleges or proves that the loss of the property, while in the custody of the bailee, has been caused by fire, robbery or theft, or by any means which would ordinarily and reasonably seem to be unavoidable."

It is suggested that this view is not entirely correct as far as being in accord with general Common Law principles, and appears to be based on a view adopted in the state of Virginia(1), and that the accepted principle is that stated in Travers & Sons Ltd. v Cooper (1915)(2), that in the event of loss or injury, the 'onus' is on the bailee to prove that it is not attributable to his neglect.

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(1) v. 6 AM.JUR.REV.ED. Bailments, sections 372-378, pp. 462-470. Corpus Juris Secundum, Vol. 8 Bailments, Sect.50. p.342.
(2) Supra.

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