The rules of liability in cases where the corporation is dissolved before the expiration of its stated chartered existence seem fair and logical. However, there seems no real reason for allowing a corporation to make a lease which must extend beyond the period of its corporate existence. Such a lease is sure to cause complications when the charter expires. If it is not assigned to a successor corporation, there will surely be a dispute over the correct determination of the amount of the damages, since this involves the prior determination of the highly speculative problem of the amount for which the premises can be rented to some other tenant for the balance of the term. If the leasehold interest is assigned, the landlord may find that he now has an irresponsible tenant in place of the thoroughly solvent corporation with which he originally contracted. Moreover, it would seem that such leases are contrary to the fundamental public policy expressed in the requirement that the corporation have a definitely limited life span.

GEORGE W. SIMPKINS, '33.

AIRPLANES AS COMMON CARRIERS

The mechanics of air carriage are of very recent origin. Its present efficiency, more quickly developed than that of other carriers, has been greatly aided by the modern tendency towards encouragement of new inventions and industries. In the ordinary development of new instruments of general public usage, the creation of new mechanical problems usually results in new legal thought. In connection with carriage by air, new legal thought has scarcely begun to develop. The advent of the airplane as a mode of conveyance has not caused a departure or modification of the principles of the law of carriers as heretofore established and applied by the courts. The airplane is regarded as merely a modern method of transportation to which the settled rules can extend.[1] These rules have classified carriers into two types: the private or ordinary carrier; and the public or common carrier. They have their origin in an early period of English history when conditions of traveling were undeveloped and when public need

[1] In Law v. Transcontinental Air Transport, Inc. (D. C. Pa. 1931) 1931 U. S. Av. Rep. 205, the trial judge said "These rules were laid down before airplanes were known, and were intended originally to apply to railroad transportation and transportation even earlier than that by stage coach, so when you come to determine what is the highest degree of practicable care and diligence you will have to remember that in dealing with travel by airplane you are dealing with a new kind of transportation which is now navigating a new element. There are many more factors which are unknown, unforeseeable, and not preventable arising in connection with an airplane journey than with a railroad journey."

for protection in traveling caused the courts to impose greater liabilities upon certain types of carriers. As the stagecoach was superseded by the railroad this distinction of liability was extended since the same basis for its application existed. The classification has been extended to every new means of carriage which the courts felt could be brought under its distinctions.

The private carrier is subjected to only the ordinary rules of liability for acts of omission or commission, but the common carrier is subjected to these rules and more "because one who entrusts his property [or person] to the carrier is in the nature of the case so helpless to protect himself against the negligence or fraud of the carrier."[2] The difficulty lies in ascertaining when a carrier falls into either class. The general test is that "to constitute a common carrier there must be a dedication of property to public use of such character that the product and service are available to the public generally and indiscriminately, and that the carrier must hold himself ready to serve the public indifferently to the limit of his capacity."[3] Under this general rule, the large transcontinental transport air carriers who sell tickets generally to the public, maintain a regular schedule, advertise extensively, and fly publicly known routes, are held as common carriers.[4] They are so held even if they insert in their contracts express provisions that they are to be liable only as private carriers.[5] These limitations have only evidential value. Provisions relieving from all liability are generally held against public policy and void. Where the facts of operation indicate to the court that the carrier falls within the classification of a common carrier given above the carrier cannot escape the legal consequences. In this respect there is similarity between the common carrier by air and other common carriers.[6] The imposition of the common carrier's high degree of liability upon the carrier by air, when the industry is still in its early development, has been criticized on the ground that it will retard the progress of the industry and its future potential use.[7] But it is submitted that this liability may achieve the con-

[2] Goddard, Outline of Bailments and Carriers (2nd ed.), sec. 189.

[3] Hissem v. Guran (1925) 112 Ohio St. 59, 146 N. E. 808.

[4] Law v. Transcontinental Air Transport, Inc., note 1, supra; Wilson v. Colonial Air Transport, Inc. (Mun. Ct. Boston, Mass., 1931), 1931 U. S. Av. Rep. 109; Allison, Admr. v. Standard Air Lines, Inc. (Cal., 1930) 1930 U. S. Av. Rep. 292; Smith v. O'Donnell (Cal. 1932) 12 P. (2d) 933, 1932 U. S. Av. Rep. 145.

[5] Cases cited in note 4, supra. See (1932) 3 Journal of Air Law 662.

[6] Buckley v. Bangor and A. R. Co. (1915) 113 Me. 164, 93 Atl. 65; Doyle v. Fitchburg R. Co. (1896) 166 Mass. 492, 44 N. E. 611; Bank of Kentucky v. Adams (1876) 93 U. S. 174.

[7] John F. O'Ryan, Limitation of Aircraft Liability (1932) 3 Air Law Review 27.

trary result by causing a greater amount of efficiency and safety to be employed, thus being conducive to the general betterment of the industry. In general, the courts in dealing with the airplane carrier have adhered to the age old classification of carriers and their respective liabilities.

To determine whether other carriers are common carriers courts consider the extent and scope of their business. An important factor is whether the carrier is engaged in the business of transportation as a regular vocation. In the case of *Smith v. O'Donnell*[8] the carrier did not have regular routes, but merely took passengers up for a few minutes and then returned to the starting point. He maintained a regular place of business and had certain fixed prices. The plaintiff came to the defendant's airport not to take a ride, but to solicit business from the defendant. He accepted the ride gratuitously. In a suit to recover damages for an accident that occurred the defendant was held as a common carrier. The court cited two earlier cases, *North Atlantic Acc. Ins. Co. v. Pitts*,[9] and *Brown v. Pacific Mutual Life Ins. Co.*,[10] which arose out of similar facts. In them the pilot did not operate on a schedule, took up only white persons, did not operate at a fixed establishment, and did not take baggage. Each passenger was carried up for a few minutes' ride by special arrangement. In suits to recover on insurance policies in which the amounts of the indemnities turned upon whether the insured was injured while on a common carrier, the carrier was held not to be a common carrier. These cases were distinguished from the principal case on the ground that the carrier in the principal case maintained a regular place of business and that a statute of California defining common carriers was broad enough to include this carrier's activities.[11] Maintenance of a regular business establishment is a traditional test for determining the carrier's status.[12] *Smith v. O'Donnell* proceeds farther in that it presents the issue whether a common carrier may lose his character as such under special arrangements resulting from a private agreement rather than from the holding out generally to the public. The liability of other common carriers can be controlled by special agreement

[8] See note 4, supra. Also notes in (1932) 3 Journal of Air Law 463 and (1932) 21 Cal. L. Rev. 70.

[9] (1925) 213 Ala. 102, 104 S. 21, 1928 U. S. Av. Rep. 178.

[10] (C. C. A. 5, 1925) 8 F. (2d) 996, 1928 U. S. Av. Rep. 178. See (1930) 1 Air Law Review 409.

[11] R. C. Cal. (1929) Section 2168: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

[12] Stevenson & Co. Inc., v. Hartman (1921) 231 N. Y. 378, 132 N. E. 121, and see annotation in 18 A. L. R. 1323.

affecting the nature of the service, if not contrary to public policy.[13] This freedom of contract should be open to the common carrier by air. The definition of a common carrier is one of law, but whether the particular act is one of a common carrier is a question of fact. Where the airplane carrier offers carriage merely for convenience or as a temporary service, the question whether he is a common carrier is at least one for the jury to determine.

Cases which consider the airplane carrier as a common carrier are becoming more numerous as the mode of carriage has increased in use. In each instance the issues are chiefly factual, so that an extensive citation of cases would be useful only so far as precedents for some factual situations. Obviously, there are air carriers whose classification is apparent; but in the main the courts are confronted with carriers whose activities are in the peripheral zones of both private and common carriers.[14] Suggestive criteria for determining if the status of a common carrier exists are: (1) the good faith of the carrier in question, under which would be a limitation upon the carrier to deny the liability and duties which should attach to the maintained status of the carrier; (2) the scope and usage of the carrier as a regular as distinct from a mere temporary activity; (3) proportionate assumed field of carriage rather than the number of contracts; (4) manner of holding out rather than the numbers of passengers carried; and (5), the nature of the carrier's business and character of contracts under which the operations are carried.[15]

Unlike accidents that occur on land or sea, the accidents that occur in the air leave few traces. In the majority of cases, the actual existence of negligence is practically impossible to prove or disprove. The question is presented whether the traditional

[13] Bates v. Old Colony R. Co. (1888) 147 Mass. 255, 17 N. E. 633; Blank v. Ill. R. Co. (1899) 182 Ill. 332, 55 N. E. 332. In McCusker v. Curtiss-Wright Flying Service, Inc. (Ill., 1932) 1932 U. S. Av. Rep. 100, although the plane was chartered specially for a trip, the court instructed as to the common carrier position of the defendant. Judgment was for the plaintiff.

[14] Cases presenting the use of the airplane for special purposes are obviously more difficult for classification. In State ex. rel. Beall v. McLeod (Md. 1932) 1932 U. S. Av. Rep. 94, where the operator carried passengers for sightseeing trips, taking off and landing on the same field, and who accepted no objectionable passengers, the defendant was held as a common carrier. See also Hagymasi, Admr. v. Colonial Airways, Inc. (N. J. 1931) 1931 U. S. Av. Rep. 73. However, in Conklin v. Curtiss Flying Service, Inc. (N. J. 1930) 1930 U. S. Av. Rep. 188, where the plane was used for the purposes of advertising a resort and taking up passengers for sightseeing, the court held the defendant not to be a common carrier.

[15] Cannon, What Constitutes a Common Carrier? (1931) 15 Marquette L. Rev. 67.

rules of negligence that have been applied to the other common carriers are fitting and proper to determine the negligence of common carriers by air. The influences of concern both for those who travel by air and for the welfare of the industry itself is illustrated in the case of *Berg v. Seitz.*[16] The court says, "The nature of the conveyance and the great danger involved would seem to require the utmost practical care and prudence for the safety of the passenger." This statement does not, nor did the court intend to make, a distinction between private and common carrier in the degree of care involved, if the plaintiff was in fact a passenger. The view considers the practical and inherent difficulty of distinguishing the degrees of care in an instrumentality like the airplane where in flight any lack of care proves disastrous. This is an excellent illustration of the creation of new legal thought adapted to the situation presented by a new mechanism.

Where certain regulations have been made by governmental authorities for the purpose of mechanical fitness, the issue arises as to the probative effect of proof of a non-compliance with a regulation. Owing to the inherent dangerousness of the instrumentality it would seem that all regulations of this type should be strictly adhered to by the carrier and that a non-compliance should be prima facie evidence of negligence. In this respect no distinction should be made between private or common carrier. In *Hagymasi, Administrator, v. Colonial Airways Inc.*,[17] it was held that the failure of a pilot to comply with statutory requirements as to license, inspection, and capacity of the aircraft, was not negligence *per se,* but a factor to be considered to determine whether negligence of the carrier was the proximate cause of the disaster.[18] The mere issuance of the pilot license should not be considered as conclusive of the fitness of the pilot since it may be disproved at the particular instance by drunkenness or other physical disqualifications. In all cases the particular failure to comply with any requirement made to promote safety and care should have a proximate causal connection with the injury in order to be actionable.

When it is said that the carrier owes the passenger the highest degree of care and diligence, "the terms in question do not mean all the care and diligence the human mind can conceive, nor such as will render the transportation free from all possible peril, nor such as would drive the carrier from his business."[19] This statement indicates that the degree of care required of the common car-

[16] (Kan. 1931) 1931 U. S. Av. Rep. 111.

[17] See note 14, supra. Noted in (1931) 2 Air Law Review 402.

[18] Also State ex rel. Beall v. McLeod, note 14, supra; and Law v. Transcontinental Air Transport, Inc., note 1, supra.

[19] Indianapolis & St. Louis R. Co. v. Horst (1876) 93 U. S. 291.

rier by air is no different from that required of other common carriers.[20] In determining negligence of other common carriers the *res ipsa loquitur* doctrine, "the thing speaks for itself," has been applied. Its use in cases of common carriers by air has a greater significance in its application than other common carrier instances because of the difficulty to prove or disprove facts due to the entire destructibility of all evidence in most airplane accidents. In *McCusker v. Curtiss-Wright Flying Service, Inc.*,[21] it was held that an airplane carrier for hire is not a guarantor or insurer of the safety of the passenger, but is required to exercise the highest degree of care in the management and control of an airplane consistent with practical operation; that the burden of proof is upon the plaintiff to establish negligence by a preponderance of evidence. The doctrine of *res ipsa loquitur* is merely an aid to establish such negligence. The doctrine is held particularly applicable to common carriers because as said in *Housel v. Pacific Electric Railway*,[22] "The reason for the application of the doctrine in such cases appears to be practically as stated in this quotation, viz.: that in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercise such care, and that ordinarily when such an accident occurs, it is due to the failure on the part of the person operating to use the proper degree of care in so operating, or in other words to the manner in which the defendant used or directed the instrumentality under his control." The doctrine of *res ipsa loquitur* is purely a rule of evidence, "not a rule of law, but a statement of what is permissible, not mandatory, in a course of reasoning and of drawing inferences. . . . A given act bears the badge of carelessness. It causes injury. Liability follows."[23] As a rule of evidence, the doctrine is not only rebuttable, but it cannot be invoked in every airplane accident. If the plaintiff has affirmative proof of the cause he cannot invoke this rule. In the case, *Law v. Transcontinental Air*

[20] Foot v. Northwest Airways, Inc. (Minn. 1930) 1931 U. S. Av. Rep. 66; Hamilton v. O'Toole (Mass. 1927) 1930 U. S. Av. Rep. 133. The courts have disregarded the distinctions of degrees of care required, and now rule that the degree of care required must be consistent with the operation, equipment, maintenance, and adjustment of the plane to guarantee the safety of the passenger.

[21] See note 13, supra.

[22] (1914) 167 Cal. 245, 139 Pac. 73.

[23] Wilson v. Colonial Air Transport, Inc., Note 4, supra. See Osterhout, Doctrine of Res Ipsa Loquitur as Applied to Aviation (1931) 2 Air Law Review 9, and Harper, Res Ipsa Loquitur in Air Law (1930) 1 Air Law Review 478.

Transport Co.,[24] where plaintiff's intestate as a passenger on the defendant's plane was killed when the pilot in attempting to avoid a storm overran the field and struck a field stump, the affirmative proof thus shown was held to deny the application of the doctrine. The fact that an airplane motor ceases to function within a few minutes after taking off was held in *Wilson v. Colonial Air Transport, Inc.*,[25] not to be evidence of such a factual situation as to give rise to a presumption of negligence under the doctrine of *res ipsa loquitur*. The court felt that until the causes of the failure of airplane motors to function are more definitely known, it is rather premature to say that only lack of ordinary care could have caused it.[26] The doctrine is also not applicable to the cases where the direct cause of the accident, and so much of the surrounding circumstances as were essential to its occurrence were not within the sole control of the carrier. This assumes that the passenger on an airplane common carrier bears the ordinary perils incident to airplane travel over and above the perils against which the carrier must, under its legal liability, guard. It is obvious that the doctrine can be suitably applied to determine the negligence of the common carrier by air, but its application should be restricted only to those instances where reasonable inferences of negligence appear; otherwise, in instances noted, where there is an absence of any proofs, the doctrine would be conclusive as to the element of negligence. It would be questionable whether proof by the carrier that it took all precautions necessary would be sufficient rebuttal in the absence of another compelling motive for the occurrence. In *Seaman v. Curtiss Flying Service, Inc.*,[27] where *res ipsa loquitur* was held applicable as a rule of evidence to aid the jury to pass upon the issue of negligence when the plane crashed after making a turn, the court stated that the doctrine of vis major was inapplicable, since there was proof of weather clear of atmospheric disturbances. The application of the doctrine to common carriers by air has perhaps been the cause of the policy adopted by the majority of the large transcontinental companies of insuring each passenger and including cost of such insurance in the price of the ticket.

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[24] See note 1, supra.

[25] See note 4, supra.

[26] "There is at present no common knowledge of which courts can take cognizance concerning the customs or usual practice of air transport companies as to operation, inspection, and repairs of their airplanes. There must be evidence. We are not as yet, in respect to the operation, care and characteristics of aircraft, in a position where the doctrine of cases like Ware v. Gay, 11 Pick. 106, as to a stagecoach, O'Neill v. Toomey, 218 Mass. 242, as to the qualities of ice, or Gilchrist v. Boston Electric Ry., 272 Mass. 346, as to the trolley car or steam railroad trains, can be applied."

[27] (N. Y. 1931) 1931 U. S. Av. Rep. 229.

In considering the status of passengers, the ordinary rules of liability that other common carriers owe to passengers would seem appropriate for application to the common carrier by air. However, the obligation to serve all, in its application to air carriage, should have a liberal interpretation consonant with the conditions pertinent to this type of carriage. Because of the lack of contact and experience which the public generally has with this mode of traveling, it is obvious that the carrier by air should have a wider latitude of discrimination without consequent legal liability.

The rules applied to other common carriers to establish the relation of carriers and passenger and to determine the duties of performance are applicable to the common carrier by air. The passenger status is always the result of a contract, expressed or implied.[28] The offer to carry is usually the holding out, though subject to revocation if the carrier is reluctant to have his offer accepted because of some lack of fitness of the person who wished to accept. This person must not only have an intention of becoming a passenger but must also do some act expressive of that intent. The expression of the act subjects the common carrier by air to the same impositions of liability of ingress and egress to his instrumentality to which other common carriers are subjected. The airport is in legal contemplation similar to the railroad depot. The passenger should enter and leave the airport by the regular entrances. The liabilities attaching to ingress and egress are limited to the scope of the activities undertaken between the passenger and the airplane carrier. These activities have been held broad enough to include what is ordinarily incident to an airplane trip and especially the passenger's presence or movements in or near to the machine incidental to beginning or concluding the trip.[29] The very recent cases of *Williamson v. Curtiss-Wright Flying Service, Inc.*,[30] and *Berg v. Seitz*[31] hold the carrier liable for injuries resulting to the passen-

[28] Weber v. Chicago & Alton R. Co. (1915) 175 Iowa 358, 151 N. W. 852; Todd, Admx. v. L. & N. R. Co. (1916) 274 Ill. 201, 113 N. E.

[29] An analogous problem of determining the scope of the aeronautical activity arises in cases concerning insurance liability. In the cases of Blonski v. Bankers Life Ins. Co. (Wis. 1932) 243 N. W. 410, 1932 U. S. Av. Rep. 57, and Pittman v. Lamar Life Ins. Co. (C. C. A. 5, 1927) 17 F. (2d) 370, 1928 U. S. Av. Rep. 188, the movements incident to the trip were held to within the terms of the policies; but in Tierney v. Occidental Life Ins. Co. (1927) 89 Cal. App. 779, 265 Pac. 400, 1928 U. S. Av. Rep. 191, the movements of leaving the plane after a trip were not held to be a phase of aeronautical activity.

[30] (Tex. 1932) 51 S. W. (2d) 1047. Noted in (1933) 4 Journal of Air Law 113.

[31] See note 16, supra.

ger after concluding a trip because of the failure of the common carrier to provide safe egress. In the *Williamson* case, the plane, after a regularly routed trip, landed facing the wrong way, thus requiring the passengers to pass around the plane in order to reach the company's office, rest room, and passenger exit. In passing around the plane the passenger was struck by the whirling propeller and received serious injuries. The case was presented to the jury on special issues. The carrier was found guilty of negligence in not putting a guard around the propeller, or in furnishing a guide to the passenger to conduct him to the hangar. The jury also found specially that the passenger was not guilty of contributory negligence.[32] The verdict in favor of the plaintiff was sustained by the court on the ground that there was sufficient evidence for the jury to reach its findings. The issue of contributory negligence in this case presents a situation similar to that pertaining to railroads whose station is so placed as to require passengers to cross tracks in order to go to or come from the station. While the passenger may reasonably assume that the tracks are clear, he must exercise a reasonable amount of precaution; and if he fail to exercise this his contributory acts will generally bar recovery.[33] As in the principal case the issue is determined by the jury. In *Berg v. Seitz* the plane was used for amusement and exhibition purposes. The plaintiff was injured by the propeller while passing around the plane to the exit. The defendant was held guilty of negligence in failing to warn the plaintiff. The court held that the high degree of care applied to common carriers would be applicable to private carriers of passengers by air in carriage and the incidents of carriage. Whether the high degree of care required in carriage will be required outside of the immediate incidents of carriage will depend upon the jurisdiction in which the case arises, for there is a sharp conflict among the courts. It is a safe prediction that the same degree which a particular court imposes on other common carriers as to station grounds will be extended to the common carrier by air as to its airport grounds. The weight of authority as to other common carriers seems to be that as to station buildings and other appurtenances, only ordinary or reasonable care is required.[34] As to these grounds the common carrier is treated as

[32] In Hough, Admx. v. Curtiss-Wright Flying Service, Inc. (Me. 1929) 1929 U. S. Av. Rep. 99, concerning facts similar to the Williamson case, the defense of contributory negligence was sustained. The application of the defense is mainly factual; but courts should consider the effects of air carriage upon those not accustomed to this mode of traveling.

[33] Youngerman v. N. Y. etc. R. Co. (1916) 223 Mass. 29, 111 N. E. 607; Graven v. McLeod (C. C. A. 6, 1899) 92 Fed. 846.

[34] Kelley v. Manhattan R. Co. (1889) 112 N. Y. 443, 20 N. E. 383; Falls v.

an ordinary owner of property with the burden of care consistent with the danger. The minority rule applies the same degree of care required in the carriage of passengers to the ownership of all property incident to the carriage even outside the immediate mechanical operations of the instrumentality.[35]

Courts reflect current trends in the application of rules. The prevailing feeling that the air industry should not be saddled with the aged theories and principles of laws of the ground common carriers will receive more deliberation as new problems create new phases for the application of these rules. Though the public policy of affording legal redress and protection for those who travel by air may conflict with the public interest centered in the progress of the air industry, the courts should realize that present conditions of aerial travel and transportation demand that liability be limited in the interest of the community itself so that the greatest benefits of the instrumentality may be obtained. Extensions of the future use of the airplane with a corresponding growth of its business will be influenced by the weight of legal thought and application of rules.

LOUIS SHANFELD, '33.

S. F. & N. P. R. Co. (1893) 97 Cal. 114, 31 P. 901; McCormick v. Detroit, etc. R. Co. (1905) 141 Mich. 17, 104 N. E. 390. See note 10 A. L. R. 259.

[35] Knight v. Portland S. & P. R. Co. (1868) 56 Me. 234, 96 Am. Dec. 449; Fremont E. & M. R. Co. v. Hoghblad (1904) 72 Neb. 773, 101 N. W. 1041; Brackett v. S. R. Co. (1911) 88 S. C. 447, 70 S. E. 1026.