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Jurisdiction and Venue in Aviation Accident Cases Including Workmen's Compensation Claims*

John J. Goldberg†

PRELIMINARY CONSIDERATIONS

We are concerned here primarily with controversies involving the liability of air carriers for injury to or death of passengers or employees resulting from air transportation, with particular reference to the forum which has jurisdiction to try a particular controversy and is the proper forum to hear and determine the same. In the main, the rules of law involved are those governing other common carriers, and the question for consideration here is the application of such rules to air carriers.

It has been aptly stated that "'jurisdiction' connotes the power to decide a case upon its merits; 'venue' connotes locality, the place where the suit should be heard." In the case of injury to or death of a passenger jurisdiction in most instances would be in a state court of general jurisdiction, subject to the right of the plaintiff to commence or the defendant to remove the case to the federal court of the proper district if there should be the necessary diversity of citizenship. Proper venue would depend upon residence of the respective parties and other factors to be considered later. If, however, a passenger dies of fatal injury sustained on the high seas more than three miles from the shores of the United States or its territories as the result of air transportation over water, the federal Death on the High Seas Act appears to be the basis of liability; jurisdiction of the action for wrongful death is in either the federal or state court, as the suitor.

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may elect, subject to the defendant's right to remove from the state court for diversity of citizenship.

When the injury or death of a member of an aircraft's crew occurs during the course of, and arises out of, his employment, the workmen's compensation act of some particular state will usually supply the remedy, even though interstate commerce be involved. It may happen, however, that the workmen's compensation act under which the carrier has qualified is not the one which the court ultimately decides to be applicable; in that event the carrier, if he has not also qualified under the applicable act, may be faced with a common law action for injury or a statutory death action. Some compensation acts allow the employee to elect between a common law action based on negligence and workmen's compensation. If injury of an employee occurs on navigable waters or on the high seas, including injuries where death results, the question of applicability of the Jones Act or the Death on the High Seas Act may also be raised; and jurisdiction of the federal courts on the admiralty side may be invoked.

Sometimes an employee who is not a member of the crew is being transported to his work by the carrier and is injured or killed in the course of transportation. Does workmen's compensation apply, and if so, under what act, or does liability depend on negligence? Either form of relief may be granted depending upon the particular facts involved.

Sometimes a passenger injured or killed in air transportation was then in the course of his employment for a third party and subject to a workmen's compensation act. If benefits are paid thereunder is the claim against the air carrier for alleged negligence maintainable by the employee or by the employer? The particular compensation act governs.

Venue likewise depends upon various facts that determine whether or not the particular court chosen by the plaintiff for trial of his lawsuit is the court which the air carrier is required to accept. These are

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the matters to be considered in the light of the present incomplete state of the law.

JURISDICTION

Workmen's Compensation Claims

1. Effect of federal legislation on the claims of employees of air carriers injured in their employment. Although Congress has enacted comprehensive legislation in the field of aviation and the regulation of air carriers, there is no federal legislation either substantive or procedural on the subject of compensating employees of air carriers for injuries sustained in employment. For those employees working in interstate commerce, or who may be said to be engaged in maritime work, Congress could provide the exclusive remedy for injury in employment as it has for railroad employees, completely superseding state laws on the subject; however, it has not done so for longshoremen and harbor workers.

But merely because Congress has legislated in the field of aviation, no bar to the continued application of state compensation law for industrial injury is created so long as Congress refrains from legislating on that particular subject. In the analogous field of motor carriers federal regulatory legislation has been enacted, not touching, however, upon the compensation of employees for industrial injury. It has been argued that by reason of such federal legislation state workmen's compensation laws are no longer applicable to bus drivers, bus porters and other persons engaged in interstate carriage by motor bus. The courts have not accepted that argument but on the contrary have held that state law continues applicable.

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7 Civil Aeronautics Act of 1938, 52 STAT. (1938) 977, as amended, 49 U.S.C. (1940) §§401 et seq.
9 Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. (1927) 1424, 33 U.S.C. (1940) §§901 et seq. The coverage supplied by this legislation does not supersede state law; the law was drafted to provide coverage in a field in which state law could not validly operate. 33 U.S.C. (1940) 903(a).
Somewhat analogous is the situation created by enactment of the federal safety appliance acts applicable to vehicles of interstate railroads whether used in interstate or intrastate commerce. In the case of railroad employees engaged in intrastate commerce injured through violation of the safety appliance acts it was urged that rights under state workmen’s compensation acts had been superseded by the federal legislation. The Supreme Court of the United States held otherwise. The basis of decision was laid down in *Gilvary v. Cuyahoga Valley Railway Co.* A railroad switchman engaged in intrastate commerce at Cleveland, Ohio, was injured by the failure of the railroad company to equip its cars with automatic couplers, in violation of one of the safety appliance acts. Employer and employee had theretofore elected to be governed by the Ohio workmen’s compensation act. The employee commenced an action in the state court to recover for personal injuries. The trial court struck out the defense that the employee’s sole remedy was under the state compensation act. The trial resulted in a verdict and judgment for the employee. This was reversed on appeal on the ground that the state compensation act was a complete bar to recovery in the action. In affirming the state court decision the Supreme Court announced the rule applicable for all cases involving possible conflict between federal and state legislation in fields where the federal government may, if it chooses, exclude the effect of state legislation and make federal legislation exclusively applicable. The Court said:

Unless excluded by congressional enactment under the commerce clause, state law governs the respective liabilities and rights of railroad carriers and their employees growing out of injuries suffered by the latter whether in interstate or intrastate commerce . . . . The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action . . . . The purpose exclusively to regulate need

within and beyond this state, gave rise to a legal status which did not end when the employee crossed the state line in interstate commerce as porter on the bus. In performing the required service he went beyond the border clothed with his rights as an employee. By holding the claim compensable this court does not give extra-territorial effect to the Workmen’s Compensation Law but rather to the status arising from the contract of hire by virtue of the constitutional and statutory provisions. The contract and resulting status are, however, always subject to the right of Congress to pre-empt the field by appropriate legislation.”


not be specifically declared . . . . But, ordinarily such intention will
not be implied unless, when fairly interpreted, the federal measure is
clearly inconsistent with state regulation of the same matter . . . .

The Safety Appliance Acts govern common carriers by railroad en-
gaged in interstate commerce. The Act of 1893 applied only to vehicles
used by them in moving interstate traffic. USC title 45, sec. 2. Its re-
quirements were by the Act of 1903 extended to all their vehicles . . . .
So far as the safety equipment of such vehicles is concerned these Acts
operate to exclude state regulation whether consistent, complemen-
tary, additional or otherwise . . . . The imposition of penalties and
abrogation of assumption of risk are measures for enforcement.

A violation of the Acts is a breach of duty to the public and employee
whether he is at the time engaged in interstate or intrastate commerce.
And by abolishing assumption of risk the Acts impliedly recognize the
right to recover for injuries resulting therefrom. But the absence of a
declaration similar to that in the Federal Employers Liability Act,
which denounces contracts and other arrangements made for the pur-
pose of exempting carriers from liability created by that Act (USC
title 45, sec. 55) strongly suggests a lack of legislative purpose to
create any cause of action therefor. Moreover, if there had been such
purpose, Congress probably would have included provisions in respect
of venue, jurisdiction of courts, limitations, measure of damages and
beneficiaries in case of death.

These Acts do not create, prescribe the measure or govern the enforce-
ment of, the liability arising from the breach. They do not extend to
the field occupied by the State Compensation Act.15

The Federal Employers' Liability Act applicable to railroad em-
ployees in interstate commerce and the Jones Act applicable to sea-
men injured in the course of employment are not workmen's compen-
sation laws. They provide for court proceedings against the employer,
based on negligence, and in their respective fields they exclude the
effect of state legislation providing a different remedy.16

The United States Employees’ Compensation Act17 and the Long-
shoremen’s and Harbor Workers’ Compensation Act18 are federal
workmen’s compensation acts for their respective fields. The latter
act provides the exclusive remedy for the employees subject thereto.19
None of these statutes, however, nor any other enacted by Congress,
provides workmen's compensation for employees of air carriers.

15 292 U. S. at 60.
16 For the scope of the Federal Employers’ Liability Act, see So. Pac. v. Ind. Acc.
Comm. (1942) 19 Cal. (2d) 271, 120 P. (2d) 880. For the scope of the Jones Act, see
18 Supra note 9.
Whether employees injured in air transportation over water are within the scope of the Jones Act will be considered presently.

2. Effect of interstate commerce on the application of state compensation acts. When the aircraft is flying in interstate commerce the employees making up the crew are of course engaged in interstate commerce. It has been urged that this fact makes state compensation acts inapplicable, the field of compensation for injury of employees in interstate commerce being exclusively subject to federal regulation. As will appear, however, states are not barred from applying workmen's compensation acts to air carrier employees engaged in interstate commerce, provided that in any particular case the compensation act involved does not itself exclude from its operation employees engaged in interstate commerce. That distinction, as well as the general rule, appears from the following statement of the Wisconsin supreme court in a case in which the state statute expressly excluded application to employees engaged in interstate commerce:

Plaintiffs also contend that the Industrial Commission has no jurisdiction because jurisdiction of aircraft navigation is vested exclusively in the federal government. In that connection it is to be noted that sec. 114.21, Stats., provides, 'Aircraft operating within this state shall comply with air-traffic rules identical with those promulgated by the department of commerce of the United States'; and also that one of the air-traffic rules adopted by the department of commerce provides that 'The air-traffic rules are to apply whether the aircraft is engaged in commerce or noncommerce or in foreign, interstate, or intrastate navigation in the United States.' Consequently, although the airplane in question was being operated by Field, at the time of his injury, in intrastate navigation, the federal Air Commerce Act and air-traffic rules promulgated by the department of commerce were applicable. However, it does not appear that either Congress or the department of commerce had adopted any rule as to the compensation of injured employees, or the relative rights and obligations of employees and employers in cases of injury to the former while engaged in the employment. As those subjects do not necessarily require a general system or uniformity of regulation, the power of Congress in relation to them is not exclusive, and consequently the states may act within their respective jurisdictions until Congress does act and thus by the exercise of its authority overrides all conflicting state legislation. Simpson v. Shepard, 230 U.S. 352, 399, 400, 33 Sup. Ct. 729, 57 Law Ed. 1511. Consequently, the state workmen's compensation act is applicable to employees and employers who are engaged merely in intrastate aircraft navigation, if they are otherwise subject to its provisions. There is no reason to hold the state Workmen's Compensation Act inapplicable to such an employee unless at the time of
injury he was engaged in work which was engaged in interstate commerce or in work so closely related thereto as to be a part thereof.\textsuperscript{20}

In those reported cases in which an employee of an air carrier was injured while engaged in interstate commerce and a workmen’s compensation act was otherwise applicable, such act was applied to furnish the remedy even though interstate commerce was involved.\textsuperscript{21} In view of the fact, however, that interstate commerce is frequently involved and that therefore the injury which is the basis of claim often occurs in a state other than the state in which the employee was hired or resides or in which the air carrier has its principal place of business, the problem which has arisen and which will undoubtedly arise many times in the future is the determination of which workmen’s compensation act governs. Actually there may well be two compensation acts equally applicable, and the employee may seek to recover under both; or it may happen that the air carrier has failed to qualify under the only compensation act which a court subsequently determines to be applicable. These are matters which, while they concern all employers whose employees in the course of their employment are temporarily employed outside the state where they are hired or their employer has his principal place of business, are nevertheless of extreme importance to air carriers and their insurers and deserve careful consideration.

3. \textit{In most cases the compensation act of the place of hiring or place of injury is applicable.}\textsuperscript{22} When an employee is hired in one state which has an applicable workmen’s compensation act and in the course of his employment is injured while temporarily working in another state which also has an applicable workmen’s compensation act, the

\textsuperscript{20} Sheboygan Airways Inc. v. Ind. Comm., \textit{supra} note 10, at 360, 245 N.W. at 181.


\textsuperscript{22} The workmen’s compensation laws of the various states differ not only in that some are mandatory and others are elective but they differ also in the scope of their coverage. While some acts cover employees, with very slight exceptions, others are so limited in scope that many classes of employees are not covered. Such lack of coverage may apply and has been found to apply, under a particular act, to pilots and stewardesses of air lines. See State \textit{ex rel.} Northwest Airlines, Inc. v. Hoover (1939) 200 Wash. 277, 93 P. (2d) 346.
rule is that either act may be invoked by the employee, and in such event it is no defense that the act of another state is also applicable. It is assumed that, if the employee at the time of injury was engaged in interstate commerce, neither applicable compensation act excluded from its operation employees so engaged. If the act of one of the states involved did contain such an exclusion the act of the other state would undoubtedly apply.

Although neither the existence of an applicable workmen's compensation act in one state nor even the pendency of a proceeding thereunder to obtain an award will bar a like proceeding in another state under an applicable act of that state, an award of compensation which has been made and has become final under the act of one state may be res judicata and a bar to a proceeding for compensation in another state. In a five-to-four decision rendered by the Supreme Court of the United States in 1943 in Magnolia Petroleum Company v. Hunt, where the employee was hired in Louisiana and injured in Texas, it was held that a final award of compensation under the Texas act was res judicata and under the full faith and credit clause of the United States Constitution barred an award under the Louisiana compensation act. In that case the majority criticized the statement in the Restatement of the Law of Conflict of Laws that a recovery under one compensation act is not a bar to recovery under the compensation act of another state, merely requiring that one award be credited against the other. However, in the later case of Industrial Commission v. McCartin the Supreme Court held that an Illinois award of compensation did not bar a subsequent Wisconsin award. In that case the employee, a resident of Illinois, was injured while working in Wisconsin. He first obtained an award in Illinois which, however, expressly reserved his right to proceed under the workmen's compensation act of Wisconsin. In the subsequent Wisconsin proceeding the Illinois award was set up as a defense. The Industrial Commission of Wisconsin nevertheless made an award, crediting thereon the sums paid under the Illinois award. The Wisconsin court felt bound by the Magnolia Petroleum Company decision and an-

25 (1943) 320 U.S. 430.
26 Art. IV, §1.
27 Sec. 403.
28 320 U.S. at 441, n. 5.
29 (1947) 330 U.S. 622.
nulled the award. The Supreme Court reversed, distinguishing its decision in the Magnolia Petroleum Company case on two grounds: the Texas statute involved in the Magnolia Petroleum Company case made the remedy thereunder exclusive of any and all remedies which the injured employee might otherwise have (not merely his remedy under the law of Texas), but that there was nothing in the Illinois statute or in the decisions thereunder to indicate that the remedy afforded by that statute was intended to be exclusive of any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment; and by the terms of the Illinois award, made in compliance with the statute, an additional award under the laws of another state was not foreclosed. Thus the extent to which the rule of the Restatement, permitting successive awards, is to have application is still undetermined. It has been applied in some cases but in others its application has been denied.

If the air carrier has provided workmen’s compensation insurance in the state of hiring and also in the state of injury and an award has been made in the state of hiring, an award in the state where the injury occurred may be denied when the compensation act of that state expressly recognizes and makes exclusive the remedy given by the compensation act of the state of hiring. In Utah such recognition is given, conditioned upon the employer carrying compensation insurance under the act of the state of hiring and upon such act containing reciprocal provision affording like exemption to employers in Utah.

It has been held that the compensation act of the state where the employer’s business has become “localized” applies to an employee hired in another state and injured in a third state. A co-pilot was employed at the air carrier’s place of business in Iowa, but he lived in Minnesota and flew between St. Paul and Chicago. He was injured while the plane was over Wisconsin, and the court held that the carrier had with respect to a part of its business become “localized” in Minnesota and therefore the Minnesota compensation law applied. In that case the employee had commenced a common law action in the state


court, and it was removed to the federal court for diversity of citizenship. That court relying on decisions of the Minnesota supreme court held that the Minnesota compensation act provided the exclusive remedy and denied relief. It is not clear that the court considered the Minnesota act to be the only compensation act applicable. The Supreme Court denied certiorari. It will be noted that this decision is not in harmony with the rule of the Restatement that "no recovery can be had under the workmen's compensation act of a state if neither the harm occurred nor the contract of employment was made in the state".

4. *Election of remedies*. In many states the application of the workmen's compensation law is elective and either the employer or employee may, in accordance with the procedure provided by the particular act, elect either to be bound or not to be bound thereby. In some states that election may be made after the injury has occurred. If election is against an otherwise applicable compensation act, the employee's remedy is in the courts. The result may be similar when the employer has failed to provide workmen's compensation insurance under the particular act which the court determines applicable. Where an air carrier had its principal place of business in Minnesota and carried workmen's compensation insurance under the act of that state and had as an employee a pilot who was hired in Minnesota but resided in and worked from the state of Washington, and died in the course of employment in that state, an action for wrongful death was brought in the Washington state court. That court held that only the Washington compensation act was applicable, and since the air carrier had not complied with that act the remedy under the state death statute was held applicable; a very substantial jury verdict against the carrier was awarded and sustained.

5. *Special wartime legislation*. Special situations arose during the war in which the question of conflict between federal and state compensation laws did occur in connection with the operation of aircraft. In one case a contractor doing war construction work for the government in Alaska operated a fleet of aircraft for the transportation of personnel connected with the work. A contract of employment of

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34 *Restatement, Conflict of Laws* (1934) §400.
an airplane mechanic was entered into at Seattle, Washington, for work to be performed at Anchorage, Alaska. Pursuant to the contract the contractor agreed to furnish the transportation. Transportation was furnished by means of one of the company's aircraft which crashed en route near Ketchikan, Alaska. There were at this time three separate compensation acts, each of which might have been applicable: the Washington act, because that was the state in which the contract of hire was made; the Alaska act, because that was the place where the injury occurred as well as the place where the work was to be performed; and the Longshoremen's and Harbor Workers' Compensation Act, as extended to employees on certain government construction projects by the Defense Bases Act. 38 If the Longshoremen's and Harbor Workers' Act applied it provided the sole remedy, to the exclusion of state acts. 39 The contractor's insurance carrier made payments to the employee on the basis of the Longshoremen's and Harbor Workers' Act and these were accepted by the employee. Payments ceased after several months and thereafter the employee commenced an action in the state court in California to recover damages for the injuries suffered by him. After removal to the federal court for diversity of citizenship, the court granted a motion for summary judgment in favor of the employer on the ground that the employee's remedy lay exclusively with the Longshoremen's and Harbor Workers' Act. 40 Although the injury to the employee occurred before he reached the place where performance of his services was to com-

38 55 Stat. (1941) 622, as amended, 42 U. S. C. (Supp. 1946) §§1651-1654. The case was decided on the basis of the act before it was amended December 2, 1942.


40 An interesting procedural sidelight in this case arose out of the fact that the employee sought to recover for property damage, though small in amount, as well as for personal injury. The compensation afforded by the statute for injury did not include property damage. Accordingly, the court could grant only partial summary judgment, leaving the property damage claims for later disposition. See Bamberger Broadcasting Service Inc. v. Wm. Irving Hamilton, Inc. (S. D. N. Y. 1940) 33 Fed. Supp. 273; Tractor & Equip. Corp. v. Chain Belt Co. (S. D. N. Y. 1942) 50 Fed. Supp. 1001.

mence, the employer's agreement to furnish the transportation brought the case within the exception to the coming and going rule that employees on their way to or from the place of employment are not at that time in the course of employment.\(^{41}\)

In another case,\(^{42}\) a test pilot in the employ of Republic Aviation Corporation was killed while testing a plane at Ia Shima in the Pacific Ocean during the war. An award of compensation was made under the Longshoremen's and Harbor Workers' Act as extended by the Defense Bases Act. The employer sought an injunction in the federal district court in New York to suspend and set aside the award. The court granted the defendant's motion for summary judgment and dismissed the complaint on the ground that the employee was covered by the federal act mentioned.

6. Workmen's compensation acts affecting passengers. Workmen's compensation acts may also become important to an air carrier even in the case of injury to a passenger rather than to an employee. Where the passenger during transportation is in the course of his employment for a third party, there are varying provisions in state compensation acts applicable to the right of recovery against the air carrier if the injury to or death of the passenger is caused by negligence of the air carrier. Generally, such an employee injured as a passenger is entitled not only to workmen's compensation but also to an action against the carrier based on negligence, subject only to the right of his employer or the latter's insurance carrier to prior reimbursement from the recovery for compensation paid or to be paid to the employee. In some states, however, the compensation act requires the employee to elect between accepting compensation and proceeding against the alleged tortfeasor. When the employee elects to take workmen's compensation his claim against the tortfeasor is assigned to the employer or insurance carrier and may not be asserted by the employee. Such a situation has occurred in at least one airline case.\(^{43}\)

7. Enforcement in other states. Workmen's compensation acts, being usually administered by boards or commissions, may not as a rule be made the basis of recovery in the courts of another state. Some acts, however, provide that relief thereunder be obtained in a proceeding in court. In those situations the courts of a sister state will undertake to provide relief where jurisdiction of the parties has been ob-

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\(^{43}\) Biddy, adm'r x. v. Bluebird Air Service (1940) 374 Ill. 506, 30 N.E. (2d) 14.
tain, and in such situations removal to the federal court for diver-
sity of citizenship is also permitted.44

8. Implications of the Jones Act and the Death on the High Seas
Act. Where a member of the crew of an aircraft is injured or killed
by reason of an accident to the aircraft occurring while it is in flight
over water, the operation of state workmen’s compensation laws may
be superseded by federal statute. The Merchant Marine Act of 1920,45
commonly known as the Jones Act, provides that any seaman who
shall suffer personal injury in the course of his employment may
maintain an action for damages at law, with the right of trial by
jury, and in such action all statutes of the United States modifying
or extending the common law right or remedy in cases of personal in-
jury to railway employees shall apply. A similar right of action is
given to the personal representative of any seaman who shall die as
the result of such personal injury. Under the statute, as interpreted by
the United States Supreme Court, if the work of the seaman at the
time of injury or death was maritime in character, relief against the
employer can be obtained only on proof of negligence in an action
at law in either the federal or state court or by suit in admiralty. State
workmen’s compensation laws cannot be applied.46

Thus far there appears to be but one reported case in which it was
contended that a member of the crew of an aircraft in flight over
water was a seaman whose personal representative was entitled to
sue under the Jones Act. In that case, Stickrod v. Pan American Air-
ways Co.,47 the alleged seaman was the flight engineer of the Samoan
Clipper which was lost in the Pacific Ocean. A district court dismissed
the complaint on motion of the defendants on the ground that a sea-
plane or flying boat is not a vessel within the definition thereof in the
shipping law.48 The court bolstered its conclusion by reference to the
Air Commerce Act of 1926 which provides:49

44 Texas Pipe Line Co. v. Ware (C. C. A. 8th, 1926) 15 F. (2d) 171, cert. den.,
(1926) 273 U. S. 742; United Dredging Co. v. Lindberg (C. C. A. 5th, 1927) 18 F. (2d)
The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

Supporting the decision of the court in the *Stickrod* case are other cases holding that an aircraft is not a vessel for purposes of limitation of liability under admiralty law, nor for the purpose of imposing an admiralty lien for repairs, nor for purpose of punishing for violation of a federal statute prohibiting stowaways on vessels a person who was a stowaway on an aircraft making an overwater flight.

There is of course the case of *Reinhardt v. Newport Flying Service Corp.*, in which the New York Court of Appeals held that a person, employed to watch over a seaplane anchored in navigable waters of New York State, who was injured when struck by the propeller, while trying to turn the seaplane about after it had begun to drift toward the beach, had a claim cognizable only in admiralty and was not entitled to the benefits of the New York workmen’s compensation act. On the basis of the subsequent cases in the United States Supreme Court holding state compensation laws applicable where the work was local in character it would appear that the conclusion in the *Reinhardt* case might well be different today.

Assuming, however, that no remedy is provided by the Jones Act for injury to or death of a member of the crew of an aircraft injured in the course of flight over water, remedy for the death of such an employee may be provided by the federal Death on the High Seas Act. That act was adopted March 30, 1920 and provides:

> Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child or dependent relative against

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53 (1921) 232 N. Y. 115, 133 N. E. 371.

the vessel, person or corporation which would have been liable if death had not ensued.

It has been held that this statute supplies the right of action for the death of a passenger killed in the flight of an aircraft over water, superseding any state death statute which might otherwise be applicable. Since the statute does not in terms limit the class of persons for whose death it may be invoked, it may be urged that the Death on the High Seas Act applies to the death of a member of the crew of an aircraft killed in connection with a flight over water more than three miles from the territorial limits of the United States and its territories. As to seamen it has been urged that the later Jones Act is solely applicable, particularly since the respective beneficiaries under the two acts are different. Assuming that an aircraft is not a vessel and that admiralty jurisdiction is therefore not involved, the question arises whether a state compensation act intended to cover crew members while in flight over water or the Death on the High Seas Act governs.

Passenger Claims

1. Injury to passengers on land. Claims arising out of injury to or death of passengers on land present no special problems of jurisdiction in the strict sense of that term. Any state court of general jurisdiction can entertain a common law action for injury or a statutory death action. It would of course be necessary to obtain proper service of process on the air carrier within the state; and the carrier could remove for diversity of citizenship to the federal court of the district in which the action was commenced or the plaintiff could begin his action in such federal court if proper diversity exists. The federal court would apply the law of the state, and actions for wrongful death would be based entirely on the death statute of the place where

65 Choy v. Pan American Airways Co. (S. D. N. Y. 1941) 1941 U. S. Av. Rep. 10; Wyman v. Pan American Airways, Inc., supra note 4, in which case the Warsaw Convention (49 State. [1936] 3000) was applied to determine liability and damages but the right to sue for death was based on the Death on the High Seas Act.


67 See Alaska Packer's Ass'n. v. Marshall (C. C. A. 9th, 1938) 95 F. (2d) 279 (a "maritime but local" situation in which employees drowned in Alaskan waters were held subject to California Compensation Act without consideration of the effect of the Death on the High Seas Act).

68 Erie R. Co. v. Tompkins (1938) 304 U. S. 64.
death occurred. Conceivably, the courts of another state might refuse to entertain the action if it were determined that the particular death statute involved is so dissimilar in material respects from the death statute of the forum that comity does not require its enforcement by the other state.

Although the usual personal injury action based on negligence presents no federal question and, except for diversity of citizenship, may be brought only in the state court, it is conceivable that an action might be based purely on the violation of a federal statute or regulation concerned with aviation or air carriers. In such case there would be a sufficient federal question to invoke the original jurisdiction of the federal courts.

2. Injury of passengers at sea. Claims for injury to passengers at sea resulting from air transportation over water likewise present no special problems of jurisdiction. A common law action for negligence could be brought either in the courts of the state where the air carrier is incorporated or in the federal court in that state, if the plaintiff is a nonresident thereof, or in the courts of another state where the air carrier does business and can properly be served, to the same extent as in the case of personal injury suits against railroad companies and other carriers. As previously indicated, claims for death of passengers at sea resulting from air transportation over water and occurring more than three miles from the shores of the United States or its territories appear to be governed by the federal Death on the High Seas Act. The Warsaw Convention, where applicable, would provide rules for the determination and limitation of liability, but the right

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of action would depend on the federal act. This act permits a suit in admiralty in the federal court, and the more recent cases also permit a suit at law in the federal or state courts, although earlier federal court cases held suit in admiralty to be the exclusive remedy. The subsidiary question whether in such event the air carrier could limit liability under admiralty law, has, as previously indicated, been decided against the right to limit liability.

VENUE

Air carriers, like railroads, carry on their business in many states. In the states where air carriers do business, such as those where their termini are located and those where their aircraft land in scheduled operation, air carriers are probably required to qualify as foreign corporations and to designate agents for the service of process. In other states air carriers may maintain offices solely for the solicitation of business when their aircraft do not pass over those particular states. In such states the air carrier may or may not be required to qualify as a foreign corporation and designate an agent for service of process, depending on the requirements of the particular state statute and the interpretation thereof by the courts of that state. In any event it frequently happens that an action based on injury to or death of a passenger occurring in one state is commenced in a distant state, not that of the carrier's principal place of business. The question then arises whether service of process can properly be made on the carrier in the latter state and whether, even if so made, the carrier should be required to defend itself in that state.

1. Service of process on statutory agent. A number of courts have held that where an action is commenced against a carrier or other corporation in a state in which it is a foreign corporation and where the cause of action arose outside of the state and had no connection with business done by the carrier in the state, service of process on the carrier's statutory agent is ineffective unless the statute under which the carrier is qualified to do business in the state requires the carrier to consent to service in any and all actions brought in the state, regardless of where they arise. In Miner v. United Air Lines Transport

64 See cases cited in note 4, supra.
65 See cases cited in note 51, supra.
Corporation,\textsuperscript{67} the action was for damages for a passenger's death occurring in Wyoming. The action was commenced in the federal court in California. The decedent had purchased a round-trip ticket from Chicago, Illinois to Los Angeles, California, and was returning to Chicago when the accident occurred. The defendant was a foreign corporation which had appointed a statutory agent in California. Service was made on that agent. The court granted a motion to quash service of summons on the ground that the carrier in appointing the agent under the California statute did not thereby consent to service upon such agent in suits founded upon causes of action not arising out of business done by the carrier in that state. The court quoted from the decision of the United States Supreme Court in Missouri Pacific Railroad Company v. Clarendon Boat Oar Company as follows:\textsuperscript{88}

In dealing with statutes providing for service upon foreign corporations doing business in the state, upon agents whose designation as such is specially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the state.

The result would of course be different if the statute in question provided that a foreign corporation as a condition of qualifying in the state must consent to being sued therein on claims no matter where they arise. The Miner case has been cited and followed in several later decisions.\textsuperscript{69}

In the cases above mentioned where service of process on the statutory agent of the corporation would be ineffective, would the result be any different if the service were made on an actual agent of the foreign corporation? On this point the authorities are not uniform. Although it may be stated generally that the majority favors service on an actual agent as being sufficient there are likewise many cases to the contrary.\textsuperscript{70}

2. *Convenience of the forum.* Convenience of forum and unreasonable burden on interstate commerce have been frequent bases of

\textsuperscript{67} \textit{Supra} note 66.

\textsuperscript{68} 16 Fed. Supp. at 931.

\textsuperscript{69} Cases cited in note 66, \textit{supra}.

\textsuperscript{70} See Notes (1924) 30 A. L. R. 255; (1935) 96 A. L. R. 366; (1938) 113 A. L. R. 9, 134.
attacking the right of a particular court to try an action against a common carrier. The decision of the Supreme Court in *International Milling Company v. Columbian Transport Company*71 has been relied upon in a number of cases denying dismissal of actions against common carriers which had contended that an unreasonable burden on interstate commerce was involved. Several airline cases were decided that way.72 The Supreme Court, however, did not overrule, but in fact in that case relied upon, its earlier decision in *Denver & Rio Grande Western Railroad v. Terte*,73 in which as to one railroad the action was dismissed because no part of that railroad's line was in the state in which the action was commenced. The latter case in turn relied upon an earlier Supreme Court decision in *Davis v. Farmers' Cooperative Equity Company.*74 In the *Davis* case the director general of railroads was sued in Minnesota for the value of grain alleged to have been lost while in another state in the possession of a railroad for transportation. Recovery was allowed in the state court. The Supreme Court reversed on the ground that maintenance of the suit in Minnesota was an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution. Neither the plaintiff nor the defendant in that case resided in Minnesota although the railroad did have an agency in the state for the solicitation of business.

The more recent cases indicate considerable liberality in permitting service on common carriers in states where neither party resides and where the only activity of the carrier is the solicitation of business.75 But objection to a particular forum on the ground of inconvenience has recently been given new weight by the Supreme Court in two cases in which it sustained dismissals by the trial court which relied upon the doctrine of *forum non conveniens.*76 The Supreme

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71 (1934) 292 U. S. 511.
72 See cases cited in note 62, supra.
73 (1932) 284 U. S. 284.
74 (1923) 262 U. S. 312.
75 Moss v. Atlantic Coast Line R. Co. (C. C. A. 2d, 1946) 157 F. (2d) 1005, cert. den., (1947) 330 U. S. 839. See also earlier case between the same parties, 149 F. (2d) 701, in which the court referred to the requirement of the New York statute that foreign corporations qualifying to do business there must consent to be sued in New York on claims wherever arising. As to jurisdiction over interstate carriers in state where carrier is foreign corporation and is engaged only in soliciting business and cause of action arose in another state, see Notes (1927) 46 A. L. R. 570; (1935) 95 A. L. R. 1478. As to service on foreign corporations generally, see Notes (1929) 60 A. L. R. 994; (1936) 101 A. L. R. 133; (1943) 146 A. L. R. 941.
76 Gulf Oil Corp. v. Gilbert (1947) 330 U. S. 501, a tort action commenced in the United States District Court for the Southern District of New York by a resident of Vir-
Court indicated that the doctrine will be applied only in "rather rare cases," such application has since been made in an aviation case. A special administratrix residing in Minnesota sued in the United States district court in that state for damages for death of a passenger of an airplane. The passenger had resided in California and his widow continued to do so. The accident occurred in California. The defendant airline was a Delaware corporation having a statutory agent for process in Minnesota, but its main office and principal place of business was in California. The special administratrix was an employee of the attorney, since deceased, who had commenced the action, and whose office had been in Minnesota. The court, relying on the *Gilbert* case, concluded "that this is one of the 'rare cases' in which the doctrine should be applied".

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77 Gulf Oil Corp. v. Gilbert, *supra* note 76.  