

# An Outline of the Law on Carriage by Air

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This article is not intended for the specialist in air law. Its object is to give a brief outline of the law on carriage by air for the benefit of the ordinary legal practitioner in Canada, so that, when confronted with a problem involving carriage by air, he will have a point of departure for the more detailed consideration of the law which will be necessary.

The first step in approaching any legal problem arising out of carriage by air is to ascertain if a contract of carriage was made and, if so, what its terms are. The terms of the contract are normally evidenced, in the case of carriage of passengers and baggage, by a ticket and baggage check (which are often combined) or, in the case of carriage of goods, by an air consignment note.

## *Categories of Carriage by Air*

There are three categories of carriage by air to be considered:

- (i) "International carriage" as defined by article 1(2) of the Convention for the unification of certain rules relating to international carriage by air;<sup>1</sup>
- (ii) internal carriage;
- (iii) carriage between countries which is not "international carriage".

The law applicable may differ depending on the category.

## *"International Carriage"*

If according to the contract the place of departure and the place of destination are (i) each within the territory of a high contrac-

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<sup>1</sup>The Convention for the unification of certain rules relating to international carriage by air was signed at Warsaw on October 12th, 1929, and is commonly known as the Warsaw Convention.

ting party to the Warsaw Convention, or (ii) the place of departure and the place of destination are both within the territory of the same high contracting party *and* there is an agreed stopping place anywhere outside that territory, and in either case the carriage is "performed by aircraft for reward" or, if gratuitous, is performed by an "air transport undertaking",<sup>2</sup> then the carriage in question is "international carriage" as defined in the Warsaw Convention.

The rights and obligations of the parties to the contract will then be governed in Canada by the provisions of the Carriage by Air Act, 1939,<sup>3</sup> in so far as they relate to anything which occurs on board the aircraft, or in the course of embarking or disembarking, or, in the case of carriage of luggage and goods, which occurs during the period in which the luggage or goods are in charge of the carrier.<sup>4</sup>

The Carriage by Air Act itself provides for a convenient method of determining who are "High Contracting Parties" to the Warsaw Convention. By section 2(2) the Governor-in-Council may from time to time by proclamation published in the Canada Gazette<sup>5</sup> certify who are the high contracting parties to the convention and in respect of what territories they are respectively parties.<sup>6</sup> Canada, the United Kingdom, the United States of America, France and nearly all the states in Europe, with the exception of Austria, are high contracting parties to the convention. Only Argentina, Brazil and Mexico among the states of Southern and Central America have adhered to the convention. All the Commonwealth countries are high contracting parties with the exception of the Union of South Africa.

On occasions it may be difficult to determine the "place of destination" when dealing with a round trip. If a passenger buys a return ticket for a round-trip flight from Toronto<sup>7</sup> to Havana<sup>8</sup>

<sup>2</sup> Article 1(1) of the Warsaw Convention.

<sup>3</sup> 3 Geo. VI, c. 12. The act was brought into force with effect from September 8th, 1947, by S.O.R. 48-68, dated January 30th, 1948. A translation of the original French text of the Warsaw Convention is set out in the first schedule to the act. The act incorporates the translation into the domestic law of Canada.

<sup>4</sup> Articles 17 and 18 of the Warsaw Convention.

<sup>5</sup> The current proclamation was published in the Canada Gazette for November 21st, 1952, Vol. LXXXVI, No. 18.

<sup>6</sup> For a discussion of the meaning of "High Contracting Party" to the Warsaw Convention in the absence of any proclamation or order in council, see the judgments of the English Court of Appeal in *Phillippson v. Imperial Airways Ltd.*, [1938] 1 All E.R. 759, and of the House of Lords, [1939] A.C. 333, [1938] U.S. Av. R. 42.

<sup>7</sup> Situated within the territory of a high contracting party—Canada.

<sup>8</sup> Not situated within the territory of a high contracting party—Cuba.

and back, where is his place of destination—Havana, in which case the carriage would not be international carriage—or Toronto, in which case Havana is merely an “agreed stopping place”?<sup>9</sup> In the latter case the contract would be one of “international carriage”. This was one of the questions considered by the English Court of Appeal in *Grein v. Imperial Airways Limited*.<sup>10</sup> There the Court of Appeal decided by a majority that in the case of a return ticket the place of destination is the same as the place of departure and the point to which the passenger is travelling on his outward journey is an “agreed stopping place”. Greene L.J. said:

The conclusion to which I have come is that the contract by reference to which the place of departure and the place of destination are to be ascertained may be any contract of carriage whether for a single journey, for a circular journey or for a return journey; that the place of departure and the place of destination mean the places at which under the particular contract in question the contractual carriage begins and ends; and that agreed stopping place means any place at which under the particular contract the aeroplane is to descend in foreign territory between the points of departure and destination. In the case of a return journey this will be or include, as the case may be, the place out to and back from which by the contract the passenger is to be carried. In the case of carriage of each type the same essential element is present—namely, the interposition between the beginning and the end of the contractual carriage of an agreed descent in the territory of another State. . . .

It is said that the expression ‘place of destination’ is not a natural expression to use in reference to the homeward end of a return journey; and that agreed stopping place is not a natural expression to use in reference to the outward end of such a journey. But the question is not what is the natural meaning of these expressions in the abstract or in some other context but what is their natural meaning in this context. If my analysis of the context is correct I see nothing unnatural in the meaning which I have attributed to these expressions.<sup>11</sup>

Talbot J., sitting as an additional lord justice in the Court of Appeal was of the same opinion as Greene L.J., but Greer L.J. dissented. This particular question has never been considered by the House of Lords or by any Canadian court. The point might be decided differently in Canada, but to the writer the arguments of Greene L.J. are persuasive.

It is never safe to assume without inquiry that a passenger ticket, a baggage check or an air consignment note necessarily constitutes the whole of the “contract made by the parties”, from which can be ascertained the places of departure and destination.

<sup>9</sup> Article 1(2), Warsaw Convention.

<sup>10</sup> [1937] 1 K.B. 50; [1936] 2 All E.R. 1258; [1936] U.S. Av. R. 211 (C.A.).

<sup>11</sup> [1937] 1 K.B. at p. 81.

A businessman wishing to travel from Toronto<sup>12</sup> to the French island of Miquelon<sup>13</sup> might be booked to fly on a regular scheduled airline from Toronto<sup>14</sup> to St. John's,<sup>14</sup> Newfoundland, and thence by a non-scheduled air carrier to Miquelon. His ticket from Toronto to St. John's would only be part of the evidence. He might also have been issued with a voucher to exchange at St. John's for a ticket for the final stage of his journey. If, in the words of article 1(3) of the Carriage by Air Act, the carriage was "regarded by the parties as a single operation", his place of destination would be Miquelon, not St. John's, and consequently the contract would be one of "international carriage". It is, therefore, essential to investigate the facts carefully in order to ascertain what constitutes the contract between the parties.

The following table of examples may help to clarify what is and what is not "international carriage":

Nature of Contract	Place of Departure <sup>15</sup>	Place of Destination <sup>15</sup>	Agreed Stopping Place <sup>15</sup>	Category of Carriage by Air
Single Ticket	Toronto <sup>16</sup>	New York <sup>17</sup>	Immaterial	"International carriage"
"	New York <sup>17</sup>	Toronto <sup>16</sup>	"	"International carriage"
"	Toronto <sup>16</sup>	Havana <sup>18</sup>	"	Not "international carriage"
"	Havana <sup>18</sup>	Toronto <sup>16</sup>	"	Not "international carriage"
"	Gander <sup>19</sup>	Goose Bay <sup>19</sup>	None	Internal carriage within Canada
"	Gander <sup>19</sup>	Goose Bay <sup>19</sup>	Miquelon <sup>20</sup>	"International carriage"
"	Seattle <sup>17</sup>	Fairbanks <sup>17</sup>	None	Not "international carriage"
"	Seattle <sup>17</sup>	Fairbanks <sup>17</sup>	White Horse <sup>20</sup>	"International carriage"
Return Ticket	Toronto <sup>16</sup>	New York <sup>17</sup>	Immaterial	"International carriage"
"	New York <sup>17</sup>	Toronto <sup>16</sup>	"	"International carriage"
"	Toronto <sup>16</sup>	Havana <sup>18</sup>	"	"International carriage"
"	Havana <sup>18</sup>	Toronto <sup>16</sup>	"	Not "international carriage"

<sup>12</sup> Situated within the territory of a high contracting party—Canada.

<sup>13</sup> Situated within the territory of a high contracting party—France.

<sup>14</sup> Situated within the territory of the same high contracting party—Canada.

<sup>15</sup> "According to the contract made by the parties": article 1(2), Warsaw Convention.

<sup>16</sup> Situated within the territory of a high contracting party—Canada.

<sup>17</sup> Situated within the territory of a high contracting party—United States of America.

<sup>18</sup> Not situated within the territory of a high contracting party—Cuba.

<sup>19</sup> Place of departure and of destination situate within the territory of the same high contracting party—Canada.

<sup>20</sup> Agreed stopping place within a territory of a power (whether a high contracting power or not) outside the territory of the high contracting power in which the places of departure and destination are situate.

In determining the rights and obligations of the parties to a contract of carriage by air, therefore, the flight on which the aircraft is engaged is wholly immaterial. The controlling factor is the contract of carriage. If on investigation of the terms of the contract between the parties it is found to be a contract for "international carriage", the provisions of the Warsaw Convention apply.

The Warsaw Convention establishes a code of law governing the legal rights and obligations, *inter se*, of the carrier and the passenger and of the carrier and the consignor or consignee of goods. The provisions of the convention have been incorporated into the domestic law of each high contracting party by varying methods. The convention also eliminates the problems of conflict of laws which would otherwise arise and determines the forum, the law to be applied and the period of limitation.

An action for damages must be brought in the territory of one of the high contracting parties either:<sup>21</sup>

- (a) where the carrier is ordinarily resident; or
- (b) where the carrier has his principal place of business; or
- (c) where the carrier has an establishment by which the contract was made; or
- (d) at the place of destination.

The period of limitation is two years<sup>22</sup> and all other questions of procedure are governed by the *lex fori*.<sup>23</sup>

The code of law established by the Warsaw Convention has provisions for passengers differing from those for baggage or goods.

(a) *Provisions of the Warsaw Convention on passengers*

The carrier is liable for an injury to or the death of a passenger if the accident which caused the damage took place on board the aircraft or in the course of the operations of embarking or disembarking.<sup>24</sup> The carrier can only avoid this liability if he proves that he has taken "all necessary measures to avoid the damage or that it was impossible for him . . . to take such measures",<sup>25</sup> a heavy burden of proof to discharge even if it is permissible to construe the provision as though it required the exercise of all reasonable care and skill in taking "all necessary measures to avoid causing damage by accident".<sup>26</sup>

<sup>21</sup> Article 28(1).

<sup>23</sup> Articles 21, 28(2) and 29(2)

<sup>25</sup> Article 20(1).

<sup>22</sup> Article 29(1).

<sup>24</sup> Article 17.

<sup>26</sup> For a discussion of identical words in a contract, see the judgment of Greer L.J. in *Greer v. Imperial Airways Ltd.* [1937] 1 K.B. at p. 71; [1936] 2 All E.R. at p. 1275.

If the carrier is unable to establish this, and there is no question of contributory negligence,<sup>27</sup> then the carrier will be liable for the amount of the damage sustained but not exceeding 125,000 gold "Poincaré" French francs.<sup>28</sup> The intention of the convention was to stimulate civil air carriage in the public interest by limiting the liability of the carrier for negligence to amounts the high contracting parties thought reasonable. If, however, the carrier sought to avoid all liability, the onus of proof would be on him to show he had taken "all necessary measures to avoid the damage . . .". Where, however, the damage is caused by the "wilful misconduct"<sup>29</sup> of the carrier the limitation does not apply<sup>30</sup> and, it is submitted, the carrier is then not entitled to any relief by reason of the contributory negligence of the passenger. The carrier may not contract out of his liability nor may he seek by his contract to fix limits of liability less than those prescribed. If he attempts to do so, then the offending provisions of the contract are null and void.<sup>31</sup>

The Warsaw Convention requires the carrier to issue "a passenger ticket" and stipulates what the ticket should contain.<sup>32</sup> But the carrier may still have the benefit of the provisions of the convention where a ticket is issued without the stipulated contents.<sup>33</sup> If, however, the carrier "accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability".<sup>34</sup> As the convention expressly makes the carrier liable in the event of the death or wounding of a passenger while on

<sup>27</sup> Article 21.

<sup>28</sup> Article 22(1). Article 22(4) of the Warsaw Convention provides a formula for ascertaining a hypothetical "nugget" of gold of a stated millesimal fineness. By ascertaining the currency units which would be paid for this "nugget" in accordance with the buying price of gold in that currency, one can ascertain the limit of liability in any desired currency. At the current price of gold, 125,000 "Poincaré" francs equal about \$8,300.

<sup>29</sup> The word in the authentic French text is "dol", for which there is no adequate translation into English.

<sup>30</sup> Article 25(1). See the direction on the law given by Barry J. to the jury in *Horabin v. British Overseas Airways Corporation*, [1952] 2 All E.R. at pp. 1019 *et seq.*, [1952] U.S. & C. Av. R. at p. 552. For some decisions on "wilful misconduct" in the U.S.A., see *American Airlines v. Ulen*, [1949] U.S. Av. R. at p. 543; *Ritts v. American Overseas Airlines*, [1949] U.S. Av. R. 65; *Pekelis v. Transcontinental & Western Airlines*, [1951] U.S. Av. R. 51; *Goepp v. American Overseas Airlines*, [1952] U.S. & C. Av. R. at pp. 491 *et seq.*; *Froman et al. v. Pan American Airways*, [1953] U.S. & C. Av. R. 1.

<sup>31</sup> Article 23.

<sup>32</sup> Article 3(1).

<sup>33</sup> Article 3(2). See *Gray v. American Airlines Inc.*, [1950] U.S. Av. R. 507.

<sup>34</sup> Article 3(2).

board the aircraft, or during embarking or disembarking,<sup>35</sup> the penalty for failure to issue a ticket is very drastic: it appears to deprive the carrier of the right to prove that the death or wounding was not his fault<sup>36</sup> or that there was contributory negligence by the passenger,<sup>37</sup> and it deprives him of the limitation of liability.<sup>38</sup> The effect seems to be that the carrier thereupon becomes absolutely liable for the death or wounding of a passenger as though he were an insurer.<sup>39</sup>

Section 2(4) of the Carriage by Air Act provides that the liability imposed by article 17 of the Warsaw Convention on the carrier for the death of a passenger on board an aircraft, or in the course of embarking or disembarking, "shall be in substitution for any liability of the carrier in respect of the death of that passenger under any law in force in Canada . . ." and that the provisions of the Warsaw Convention "shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable . . .". In the nine common-law provinces the effect is to substitute the provisions of the Warsaw Convention for those of the fatal-accidents or equivalent acts.

The second schedule to the Carriage by Air Act provides that the liability shall be enforceable "for the benefit of such of the members of the passenger's family as sustained damage by reason of his death". "Member of a family" is defined<sup>40</sup> and extends the act to persons who would have no claim at all under any of the fatal-accidents acts, for example, brothers and sisters. The second schedule also contains provisions on who may bring an action in the event of the death of a passenger and expressly gives the court power to prevent multiplicity of actions and to divide the amount recovered among the persons entitled.

#### (b) *Provisions of the Warsaw Convention on baggage and goods*

The carrier is liable for damage sustained in the event of destruction or loss of or damage to luggage and goods if the occurrence took place during the carriage by air.<sup>41</sup> The period of the carriage by air is defined in article 18(2) and (3) of the Warsaw Convention

<sup>35</sup> Article 17.

<sup>36</sup> Article 20(1)

<sup>37</sup> Article 21.

<sup>38</sup> Article 22(1)

<sup>39</sup> Cf. judgment of Lewis J. in *Westminster Bank v. Imperial Airways Ltd.*, [1936] 2 All E.R. at p. 895.

<sup>40</sup> ". . . 'member of a family' means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child, grandchild. Provided that, in deducing any such relationship as aforesaid, any legitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father, or, as the case may be, of his adopters."

<sup>41</sup> Article 18(1).

and is wider in scope than the corresponding provisions in the case of passengers.<sup>42</sup> The carrier may avoid liability if he proves that he took all necessary measures or that it was impossible for him to take such measures,<sup>43</sup> or that the damage was caused by negligent pilotage or negligence in the handling of the aircraft or in navigation and that in all other respects he took all necessary measures to avoid the damage.<sup>44</sup>

The carrier's liability is limited in the case of goods, or of luggage the passenger has registered, to 250 gold "Poincaré" French francs a kilogramme,<sup>45</sup> and in the case of luggage of which the passenger retains control to 5,000 such francs for each passenger.<sup>46</sup> As in the case of the carriage of passengers, the carrier is liable without limit if he is guilty of "wilful misconduct."<sup>47</sup>

The right to plead contributory negligence against a passenger in respect of luggage or a consignor or consignee in respect of goods does not appear to have been reserved to the carrier, as article 21 refers only to contributory negligence "of the injured person", which seems apt to refer to the death or wounding of a passenger only.

The convention also contains provisions on the disposition by the consignor of goods in transit<sup>48</sup> and generally regulates the rights and duties of carrier, consignor and consignee.<sup>49</sup>

The carrier is obliged to issue a luggage ticket or, for goods, an air consignment note, each of which must contain certain particulars.<sup>50</sup> Should the carrier fail to issue the required document or the document omit any obligatory particular, then he cannot avail himself of the ". . . provisions of the Convention which exclude or limit his liability". In other words, his liability then becomes that of an insurer of the luggage or goods.<sup>51</sup> It should be noted that, unlike a bill of lading, an air consignment note is not a document of title and is not negotiable.

The Warsaw Convention does not apply to carriage performed

<sup>42</sup> Cf. article 17.

<sup>43</sup> Article 20(1).

<sup>44</sup> Article 20(2). Note that there is no corresponding provision in the case of the carriage of passengers.

<sup>45</sup> Article 22(2). At the current price of gold, 250 "Poincaré" francs equal about \$17.00.

<sup>46</sup> Article 22(3). At the current price of gold, 5,000 "Poincaré" francs equal about \$332.

<sup>47</sup> Article 25.

<sup>48</sup> Article 12.

<sup>49</sup> *E.g.*, articles 13, 14, 15 and 16.

<sup>50</sup> Articles 4 and 5.

<sup>51</sup> Articles 4(4) and 9; *Phillippson v. Imperial Airways Ltd.*, [1939] A.C. 332; [1939] 1 All E.R. 761; [1939] U.S. Av. R. 63. See judgments of Lord Atkin, [1939] A.C. at p. 345, of Lord Russell of Killowen at p. 359, and of Lord Wright at p. 363. See also *Westminster Bank Ltd. v. Imperial Airways Ltd.*, [1936] 2 All E.R. 890; 55 Ll. L.R. 242; [1936] U.S. Av. R. 39.



under the terms of any international postal convention, that is to say, to the mail.<sup>52</sup>

### *Internal Carriage*

#### *(a) Within Canada*

The general rule is that any carrier, including a common carrier, is at liberty by the terms and conditions of his contract of carriage to exclude completely, or to limit, his liability to his passenger, even if the liability arises from the negligence of the carrier.<sup>53</sup> The general rule has long been modified in the case of carriers by rail or road, whose rights to impose such conditions have been severely modified by express statutory provisions. Until July 28th, 1954, there was no express statutory modification of the rights of the carrier by air. Now, by order in council<sup>54</sup> it is provided that the following condition of carriage is a provision of and must be inserted in the tariff of every air carrier for any carriage by air which is not international carriage within the meaning of the Convention for the unification of certain rules relating to international carriage by air:

Where the air carrier would otherwise be liable in respect of the death or injury of the passenger carried for hire sustained during the operations of the flight embarkation or disembarkation or at any time while the passenger is aboard the aircraft the liability of the air carrier in respect of that passenger shall not in any event be less than the minimum per passenger amount of passenger liability insurance or security stipulated by the Board as a condition of the air carrier's licence provided that this provision shall not apply in respect of any passenger whose condition is such as to involve unusual risk or hazard in regard to loss or damage which would not have been sustained but for the age or mental or physical condition of such passenger including in the case of a pregnant passenger any injury illness or disability sustained by an unborn child.

In practice, however, carriers engaged in domestic air carriage wholly within Canada have long been prevented from excluding their liability, because the Air Transport Board would only grant a licence to operate subject to approval of the conditions of carriage and the board has for some years disallowed any condition which would permit air carriers to deny or limit their liability for loss of life or injury to passengers below the amount of passenger liability insurance prescribed by the board.<sup>55</sup> The practice of the board has

<sup>52</sup> Article 2(2).

<sup>53</sup> See *Ludditt v. Ginger Coote Airways Limited*, [1947] A.C. 233; [1947] 1 All E.R. 328; [1947] 2 D.L.R. 241; [1947] U.S. Av. R. 1.

<sup>54</sup> P.C. 1954-1160, dated July 28th, 1954, published in the Canada Gazette, Part 2, August 11th, 1954.

<sup>55</sup> See Air Transport Board General Order No 1/51 and Circular No 12/51.

now been given statutory effect by the order in council of July 1954.<sup>56</sup> The minimum insurance the board requires today in domestic air carriage is \$20,000 for each passenger seat.<sup>57</sup>

Provided that a passenger has had due notice of the existence in his contract of such a condition as is contemplated by the order in council, and is, therefore, contractually bound by the condition, then in the event of injury to the passenger it will effectively limit the liability of the carrier to the stated amount. In the case of death, however, it is submitted that such a condition would not be effective to limit the amount the dependants of a deceased passenger could recover under any of the fatal-accidents or equivalent acts in force in the common-law provinces. This submission is based on the belief that a Canadian court would find the reasoning of the English Court of Appeal in the case of *Nunan v. Southern Railway Company* to be persuasive.<sup>58</sup>

In the *Nunan* case the Court of Appeal decided, on the wording of the English Fatal Accidents Act,<sup>59</sup> that once the court is satisfied that the deceased, had he lived, could have maintained an action and recovered damages, the dependants of the deceased are entitled to the rights conferred upon them by the Fatal Accidents Act, even though the amount of damages the deceased himself could have recovered was limited in amount by contract. The dependants are then entitled to recover the damages they have suffered in full, without regard to any purported limitation. The Fatal Accidents Act created, subject to certain prior conditions, a new and independent right of action in the dependants themselves.<sup>60</sup> The effect, therefore, is that, if the deceased had been unable, by reason of a condition in his contract of carriage, to recover any damages at all, the condition precedent would not be satisfied and the dependants would have no right of action.<sup>61</sup> Once, however, it is established that the deceased, had he lived, could have maintained an action and recovered any damages at all, then the de-

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<sup>56</sup> P.C. 1954-1160, dated July 28th, 1954, published in the Canada Gazette, Part 2, August 11th, 1954.

<sup>57</sup> See Air Transport Board General Order No. 11/54 dated September 12th, 1954.

<sup>58</sup> [1923] 2 K.B. 703; aff'd [1924] 1 K.B. 223.

<sup>59</sup> Identical wording appears in the fatal-accidents or equivalent acts of all nine common-law provinces.

<sup>60</sup> See the judgment of Lord Blackburn in *The Vera Cruz* (1885), 10 App. Cas. at pp. 70 and 71.

<sup>61</sup> *Griffiths v. Earl of Dudley* (1882), 9 Q.B.D. 357; *Haigh v. Royal Mail Steam Packet Co.* (1883), 49 L.T. 802; *The Stella*, [1900] P. 161; *British Columbia Electric Railway Co. v. Gentile*, [1914] A.C. 1034. Cf. *Littlely v. Brooks et al.*, [1932] S.C.R. 462, the result of which depended on the wording of the Ontario Contributory Negligence Act.

pendants are entitled to the full amount of the damage they have personally suffered as a result of the death of the deceased.

In the case of the carriage of passengers by air, the carrier, whether he be a common carrier or a private carrier, will be liable only if he has been negligent.<sup>62</sup> In the case of the carriage of baggage or goods, it is material to ascertain whether the carrier is a common carrier or a private carrier. If the carrier, by his conditions, has reserved to himself the right to refuse to accept goods for carriage, he will normally be a private carrier. A private carrier is liable only for loss or damage caused by negligence, whereas a common carrier is responsible for the safety of the goods from the time he accepts them until delivery and is liable for loss or damage arising from any cause whatever except act of God, the King's enemies, inherent vice of the goods themselves or the fault or misconduct of the consignor due, for example, to inadequate packing.

(b) *Elsewhere*

The rights and obligations of the carrier towards the passenger and in respect of the carriage of baggage and goods will be governed by the domestic law of the country concerned. It will be found that many countries have incorporated the provisions of the Warsaw Convention into their domestic law and have applied it to internal carriage as well as to "international carriage".<sup>63</sup>

*Carriage between Different Countries other than "International Carriage"*

Here the practitioner is left to struggle with the usual problems arising out of the conflict of laws. He must decide, among other problems, where the action should be brought and what law should be applied. It is not within the scope of this article to attempt to deal with such questions, which are not confined to carriage by air. It is, however, worth remembering that some countries, notably the United Kingdom, have applied the provisions of the Warsaw Convention to *all* carriage by air litigated in the courts of the United Kingdom. That is to say, the United Kingdom has extended the provisions of the convention to cover, not only "international

<sup>62</sup> *Readhead v. Midland Railway Co.* (1869), L.R. 4 Q.B. 379; *Ludditt v. Ginger Coote Airways Ltd.*, [1947] A.C. 233; [1947] 1 All E.R. 328; [1947] 2 D.L.R. 241; [1947] U.S. Av. R. 1.

<sup>63</sup> *E.g.* Norway, Sweden and Denmark. The United Kingdom applied the convention in a modified form internally with effect from April 1st, 1952, by the Carriage by Air (Non-International Carriage) (U.K.) Order, (1952) S.I. 1952, No. 158.

carriage" and domestic carriage wholly within the United Kingdom, but all carriage by air not being "international carriage".

When confronted with a problem arising out of international carriage by air which is not "international carriage", therefore, the practitioner will have to make exhaustive research into the domestic laws of each of the countries in which he considers it might be possible to bring an action and then take proceedings in that forum which appears to be most advantageous to his client.

### *Summary*

There are three categories of carriage by air:

- (a) "International carriage";
- (b) Domestic carriage
  - (i) within Canada
  - (ii) elsewhere;
- (c) Carriage between different countries which is not international carriage.

The contract made by the parties will determine the category of the carriage by air. Once the category is established, the law governing the carriage in question can be ascertained with more or less difficulty.

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## A Modest Competence

There was another principle of freedom scrupulously honoured in England. It was the legal sanctity of property. It was individual ownership, it was held, that enabled a man to defy excessive authority. Without a competence of his own to fall back on the subject could be bribed or intimidated: a John Hampden without an estate seemed impracticable to the English mind. The guardians of English liberty were the gentlemen of England whose hereditary independence protected them from the threats and guiles of despotism. They were tyrant-proof. That men might be rendered servile through wealth as well as through poverty had not yet dawned on them.

Any interference with a man's property by the State was regarded as pernicious. Freemen were supposed to be free to do as they liked with their own. Taxation had, therefore, to be kept as low as possible and the extent of a man's contribution to the upkeep of the State left wherever practicable to his own choice. "No taxation without representation" was the oldest battle-cry in the armoury of English freedom: it dominated the whole constitution. Those assembled in Parliament, did not represent numbers but property: the greater landowners in the House of Lords, the lesser in the Commons, side by side with the burgesses who represented the nation's mercantile interest. (Arthur Bryant: *The Years of Endurance 1793-1802*)