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AERONAUTICAL LAW DEVELOPMENTS IN 1940

BY GEORGE B. LOGAN

In this year, of all years, it would seem that the legal report would be particularly voluminous, in view of the fact that many laws have been proposed and some passed quite vitally affecting aviation.

But most of these come under the head of our national defense measures; many of them are in the legislative process and not finally passed; and those few which have been passed are as parts of other acts which come under the head of appropriation bills, etc., and these I have not had available for analytical study. I refer particularly to the recent appropriation for airports, which I have not yet been able to study.

However, two rather significant state laws have been passed, by Kentucky and Rhode Island, which will be referred to later.

In the field of decided cases, there have been some interesting developments, though nothing particularly startling. It would seem to me that the startling part of some of these cases has been the original conceptions of the litigants, or their excessive optimism in urging the points which were presented to the courts.

SPYCHOLA V. METROPOLITAN LIFE INS. CO.,[1]

The first case relates to insurance, a topic about which you have heard me talk often—I may say without hesitation—too often.

This policy had in it the familiar clause that the company would not be liable for death or injury to the assured "while participating in aviation or aeronautics, except as a fare-paying passenger." Mr. Thaddius G. Spychola became the operator of a gliding plane, and while piloting his own glider, it crashed and he was killed. Suit was brought by his administrator to recover against the Metropolitan Life Ins. Co. and the contention was made that the art of gliding was not a part of, nor included within, the words, "aviation or aeronautics."

I think it is hardly necessary for me to point out that the Court, unless very badly advised, could have reached no other con-

1. Sup. Ct. of Pa., May 6, 1940; 235 C. C. H. par. 535, p. 560.

clusion than the one it did; namely, that gliding was included within the meaning of the words, "aviation or aeronautics."

REYNAUD v. MUTUAL LIFE INSURANCE COMPANY[2]

This case is illustrative of ingenuity on the part of the insurance company rather than on the part of the policyholder.

Mr. Arthur Reynaud took out this insurance while following the profession or avocation of a poultry raiser. The policy was taken out on June 22, 1933. However, the insurance company at that time was protecting itself against the increased hazard by providing in its policy that in the event the assured would actively take up aviation within a period of two years (as a student pilot or pilot), the policy should either become void or conversely should be limited in liability to the total number of premiums paid, plus interest. The exact language which the company saw fit to use in this case was:

> "This policy is free from all restrictions from aeronautics providing the insured does not make an aerial flight as a pilot or student pilot within two years after the date of issue, unless he shall have first given notice in writing and shall have paid an extra premium, as provided herein before such flight."

It was further provided, in the event this prior notice was not given and the prior premium was not paid, as follows:

> "If death occurs within such period or thereafter as a direct or indirect result of having made a flight as pilot or student pilot, then the policy shall be limited as I have heretofore stated."

You will note that this phrase starts out with an invitation by saying that it is free from restrictions from aeronautics, but ends up by slamming the door in the policyholders face, by taking away the benefits of the policy if the flight is made within two years.

That might be considered bad enough, but what actually happened was this:

Mr. Reynaud abandoned his poultry business long enough to become a student pilot within the two years period and made several flights as such. But nothing happened. In fact, nothing happened until October 9, 1938, when he was a full-fledged pilot, and at which time he crashed and was killed.

2. British Columbia Supreme Court, Oct. 3, 1939; 235 C. C. H. par. 531, p. 548.

The company, therefore, contended that because he had made a flight prior to June 22, 1935, which was two years after the policy was issued, and because he had subsequently been killed while making a flight on October 9, 1938, the beneficiary of the policy was entitled to only a return of the premiums.

To illustrate the Court's decision in this case, I want to give you a little background of insurance law. In the early days the insurance companies, that is, in the struggling beginnings, before they were financially strong and before state insurance commissioners and before sound public opinion took control of their business policies, waged a constant war with themselves in trying to fix up an insurance policy that seemed attractive to the insured, but at the same time legally removed most all risks. In other words, there was a constant fight between the sales end of the insurance business and the legal end, of which the policywriter was in the middle.

One of the favorite forms of the insurance companies was in the fire insurance policy, which insured against loss by fire and then, in the back of the policy, inserted a paragraph headed "conditions." One of the conditions, in the horse and buggy days, and in the coal-oil lamp days was this: "This policy shall be void if, during the policy period, there shall be stored on the insured premises any gasoline, coaloil, naphtha, benzine, etc., etc."

There was hardly a house in the United States that did not have in it coaloil for the lamps and gasoline for the cooking stove. And, of course, a great many fires resulted from the use of coaloil or gasoline. Wherever this occurred, the courts uniformly held that the insurance did not cover. But this did not satisfy the insurance companies. If a fire resulted from a careless child playing with matches or from an overheated stove, or any other innocent cause, the insurance company would make an investigation, and if they found out that there had been stored any coaloil or gasoline, the point was raised that immediately thereupon the policy had become void, and they would tender back the unearned premium to the date of the fire and deny liability.

The courts made very short work of this contention, as fast as it was made, until finally we find every state in the union condemning this attempted evasion of liability. And the holding of the courts was to the effect that this condition was not broken unless it was a cause of or resulted in the loss.

Apparently, this insurance company had this history in mind and sought to apply it to aviation.

Naturally, the court held in this case that if the death had been caused while flying during the two year period, the policy would have been void, but it also held that it was free from aeronautic restrictions after the two year period; that the death which occurred five years after the policy was issued had nothing to do with the breach of condition which took place in the first two years; hence. the assured was entitled to recover the full amount.

RICHARDSON v. IOWA STATE TRAVELLING MEN'S ASS'N.[3]

Mr. Charles L. Richardson was a Commissioner of Labor Conciliation in the Department of Labor. On the 5th day of February, 1938, he was ordered by his superior to proceed at once to Puerto Rico, to see if he could not render some service as conciliator to a long-shoremens' strike then in progress there. Arrangements were made with the Air Corps of the Army to fly Mr. Richardson to Miami, and on the night of February 5th, he took off from Langley Field with Major William C. Goldsborough as pilot. The flight was being made in a two-passenger Army ship and bad weather was encountered soon after leaving Langley Field. The weather was particularly stormy at 3,000 feet. The Major climbed to a higher altitude to escape the storm, but when he got there, found that the heater failed to operate and neither the Major nor his passenger could stand the intense cold at that altitude. The result was that they came down to 1,000 feet, where the weather was still stormy and where they encountered a bad ground fog.

By using the radio, they contacted Charleston and were told that Charleston was closed, but that there was a 1500 foot ceiling at Jacksonville. The Major kept on until they arrived over the airport at Jacksonville and found that Jacksonville had closed in. In fact, he descended to 300 feet, but was unable to see the ground. He cruised all night, in the neighborhood of Jacksonville, until daylight, and when daylight came the fog had not lifted and was still so heavy as to make it impossible to make a landing.

Finally, the Major, with his last bit of gasoline, took the plane to 3,500 feet and gave his passenger written instructions as to how to bail out. He had previously instructed him, he said, at the time the passenger got into the plane at Langley Field.

According to Major Goldsborough's testimony, his passenger and bailed out. Major Goldsborough watched him until he dis-climbed up on the side of the cockpit, waved his hand in readiness appeared into the fog below, but at that time the parachute had not

3. Iowa Sup. Ct. April 2, 1940; 235 C. C. H. par. 534, p. 555; 291 N. W. 408.

opened. Major Goldsborough then bailed out and made a safe landing. When the body of Mr. Richardson was found, it was impossible to tell whether the parachute had failed to work or whether he had not attempted to open it.

The insurance in this case had a provision that the company would not be liable for death "in, on, or caused by any aerial conveyance." The contention of the policyholder was that at the time Mr. Richardson left the plane he was in perfect health and that death, therefore, had not been in an airplane, nor on one, nor caused by one. The Iowa Supreme Court did not waste much time with this argument; holding very clearly that the thing that took Mr. Richardson up into the air, as a result of which he met his death, was an aerial conveyance. The Company was held not to be liable.

THEODORE T. BROWN, v. C.A.A.[4]

We have had, during this past year, two cases involving Civil Aeronautics Authority regulations. I anticipate that there will be more of these as time goes on, as civil aviation grows, and as the C.A.A. aided by the State Aviation Officials, is able to bring more and more of their regulation violations to Court.

In this particular case, after a due hearing before a representative of the C.A.A., Mr. Brown had been found guilty of violating the traffic regulations of the Los Angeles Municipal Airport and of misusing an experimental aircraft. The penalty meted out to him was a suspension of his license for sixty days and the requirement that, at the expiration of sixty days, he should take a written examination on certain parts of the C.A.A. regulations and on the regulations of the local airports.

Mr. Brown appealed and filed, as is the usual case in appealing from the conviction under any sort of law, the requisite bond. The question then arose as to whether or not the filing of a bond would act as a "supersedeas." Mr. Brown moved the court to so rule that while his appeal was pending his license was not suspended and asked the court to hold that he still had the right to fly until the higher court should dispose of this case. The application for this order was made in the higher court to which the appeal was destined. The higher court held that normally the filing of a bond would act as a supersedeas, and would act as a supersedeas in this case, except that the sentence imposed upon Mr. Brown was not entirely punitive. It was both punitive and remedial. In other words, the Authority had said to him in effect: "Your license is suspended for sixty

4. U. S. C. C. A., 9th Circuit, June 7, 1940; 235 C. C. H. par. 2810, p. 2812.

days and in addition is suspended until you pass a satisfactory examination."

The Court, therefore, held that he was not entitled to fly until he passed the examination; that, pending the appeal, he could be relieved of the sixty day suspension, but could not be relieved of the requirement that he take the examination before he could fly. The Court thereupon directed the C.A.A. to give him the examination within five days and held that if the examination was passed, his suspension would be "superseded" until his appeal was determined. Otherwise, if he did not pass, he could not fly.

I might add, parenthetically, that, if the penalty imposed by the Authority had been a fine of $50.00 pending the appeal, with the proper appeal bond, the fine would not have to be paid nor could it be collected until the appeal was determined.

PERCY RINEHART v. WOODSWORTH FLYING SERVICE[5]

In this next case involving the regulations of the C.A.A., I would like to introduce a little past history of a legal discussion which took place eight or ten years ago and which is presumably now at rest.

When we were working on the possible forms of State Regulatory Acts, and when we had in mind the absolute necessity of uniformity between federal and state regulation, we gave a lot of thought to the method of keeping them uniform. It was proposed that the state law should carry a provision that all persons operating aircraft within the boundary of the state should operate same in conformity with the regulations of the Bureau of Air Commerce then or thereafter existing, and the failure so to do would be a violation of state law. This immediately met the opposition of those lawyers who realized that, by such a law, a state was adopting, before it was ever passed, a federal regulation and was making its citizens subject to criminal prosecution under the state law if they should violate a regulation which they had, as a matter of fact probably never seen and which a search of the state statutes did not disclose. This was truly a valid objection. It really amounted to an abdication by the state of its authority over aviation and substituted the authority of the Federal Government therefor.

Therefore, it was finally proposed that the problem could be met by giving to the state aeronautical body the right to regulate aviation within the state by requiring of the state body that its regu-

5. Sup. Ct. of West Va., July 11, 1940; 235 C. C. H. par. 2811, p. 2813. 9 S. E. (2d) 521.

lations, as promulgated, should coincide, insofar as possible, with the regulations of the Federal Government. This clause had two advantages over the prior suggestion. One was that you did not have to adopt in toto all federal regulations, but only insofar as possible, and the other advantage was that your citizens would not be guilty of violating a state law which they had never seen. In other words, there was no state law unless a regulation was promulgated by the state body. This, in substance, is the language used in the Uniform Regulatory Act adopted by this Association some years ago, and, in substance, is the language used in the Uniform Regulatory Act adopted by the American Bar Association.

Evidently West Virginia, in passing its law, used the prior method because West Virginia gave to its Board of Aeronautics authority over all aviation and required it to adopt and enforce the provisions of the Federal Air Commerce Act now in force or as hereafter amended. As a matter of fact, this was a sort of compromise because this had the advantage of causing regulations to be promulgated in West Virginia, but had the disadvantage of abdicating legislation to the Federal Government. However, the West Virginia Board of Aeronautics promulgated a rule that no person should land at an airport except in accordance with the Air Commerce Regulations. It so happened, however, that a commercial air meet was in progress at Elkins Municipal Airport, which was the home port of Mr. Rinehart's plane. The manager of the airport had, for the purposes of the meet, issued some local regulations governing landing. These regulations were not complied with by Mr. Rinehart, who was unaware of the local regulations.

Mr. Rinehart, in landing, complied with the regulations of the C. A. A. then in force. However, the defendant's plane, that is, the one owned by the Woodsworth Flying Service, landed in the opposite direction and in accordance with the local regulations.

In the lawsuit which followed from the property damage to the two planes, the defendants took the position that the plaintiff, knowing the meet was in progress, should have circled the field until he saw how the planes in the meet were landing. The court held, however, that the plaintiff's full duty was complied with by following the regulations of the C. A. A. and that the defendant was liable for the breach of these regulations and that the temporary regulations of the airport manager were no protection.

CITY OF ALBANY v. LEONARD BOL, ET AL.[6]

In view of the progress which is now about to receive great

6. New York Supreme Court, Special Term, May 2, 1940; 173 Misc. 1047; 235 C. C. H. par. 1830, p. 1865.

impetus as a measure of national defense in the building of new airports, I think we will all be interested in this decision. Not only are many new airports to be built, but many of them must be extended and many cities will very likely be face to face with the problem of either buying, leasing or condemning additional land.

The City of Albany, in attempting to extend its land, desired to acquire land which was not only outside of its own city limits, but was inside of the city limits of another municipality, the town of Colonie. Apparently, not being able to purchase this land by negotiations, the City of Albany filed a condemnation suit. Two of the land owners, Robert O. Hellwig and wife, contested the right of the city to condemn land outside of its own limits, and inside of another city, for airport purposes.

It was pointed out by them that the City of Albany was exceeding its statutory authority granted by Article 14 of the General Municipal Law (Chapter 169 of the Laws of 1928) and also the authority granted by Section 35 of the General Municipal Law, on the grounds that, although these acts allowed the erection of an airport, they contained no positive provision, right, or authority, to extend or enlarge the airport after its original construction; and particularly contended that they were compelled to stay within the original boundaries until they had sought and secured legislative sanction.

The court held that the right to extend is a necessary attribute to the original delegation of the legislative power of construction and operation. In deciding this case, the court quoted from the case of Hesse v. Rath, 249 N. Y. 436, which was one of the early cases legalizing the issue of bonds for airport purposes. I think it might be well to quote from this case as a sort of tribute to the genius of Mr. Justice Cardozo, who was then on the New York Court of Appeals before his service on the U. S. Supreme Court. In that case, Mr. Justice Cardozo said:

> "Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind because its founders rejected the nobler site of Bysantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

HOWARD, ET AL. v. CITY OF ATLANTA[7]

The Supreme Court of Georgia, in a decisoin handed down as late as July 16, 1940, had before it precisely the same point and reached the same decision. The necessity of expanding the airport of the City of Atlanta had arisen and apparently the only way to extend it was to a point within the limits of the City of College Park. Condemnation was resorted to for the purpose of acquiring title to some privately owned land and the point was made that the right of eminent domain, which the City was attempting to exercise, did not extend beyond the municipal corporate limits and could not be exercised within the limits of another municipality. This question of exercising the right of eminent domain by one city within the limits of another is pretty much of a tough legal nut to crack. Carried to its ultimate, it would be possible for one city to condemn all of the privately owned land within another city and thus deprive the latter city of the right to tax any of the land within its borders and hence destroy that municipal government.

However, the Supreme Court found that the Act of 1927, which expressly auhorized the City of Atlanta to acquire land for an airport, either within or without its territorial limits, contained within it the language which said that such airport should be "under the exclusive jurisdiction and control of the City and no city or town in which said land may be located shall have or exercise any police jurisdiction of the same."

It was also provided by the same Act that no other municipality or town, although the land may be located within its limits, should have "any authority to charge or exact any license fees or occupation taxes." The court held on the strength of these two provisions that it was evident that the functions of a Municipal Government in which the airport might be located should be restricted insofar as necessary for the maintenance and operation of Atlanta's airport, and that this necessarily included the right to expansion.

From the realistic standpoint, both of these decisions would seem to be well taken in the light of progress and in the light of Mr. Justice Cardozo's language, but they do seem to do considerable violence to our previous concepts of Municipal Law.

BATCHELLER, ET AL. v. COMMONWEALTH, EX REL., ETC.[8]

This is a case which has great interest from the standpoint of the present student training program of the C.A.A., and also because

7. Georgia Sup. Ct., July 16, 1940; C. C. H. par. 1833, p. 1868.
8. Virginia Sup. Ct. of Appeals, Sept. 5, 1940; 235 C. C. H. par. 1934, p. 1875.

it raises again, in a different way, the old question of the "right of flight" as against possible nuisances, decreased land values, possible danger, etc. It was decided just recently by the Virginia Supreme Court of Appeals.

The University of Virginia desired to qualify itself for the giving of the aviation training made possible by the C.A.A. training program. There was no available airport at Charlottsville, so the University secured an option on a farm nearby, the farm having been approved as a site by the C.A.A.

The University of Virginia, of course, is a state institution, being supported entirely by public funds. There was no money available for immediate purchase; hence, the use of the option. Pursuant to the promise made by the Governor, the money was appropriated at the next session of the Legislature as a deficiency appropriation and the land was purchased.

The Rector and the Visitors of the University of Virginia then made an application pursuant to the provisions of the Virginia Code to the State Corporation Commission for a permit for the establishment, maintenance, operation, and conduct of an airport and/or landing field for the landing and departure of civil aircraft engaged in *"commercial aviation."*

The granting of the permit was opposed by several residents and land owner surrounding the proposed airport site. The objectors nearest to the airport lived one-half mile away and the others lived at various distances up to five miles. The particular objections raised are herewith summarized:

> "1. That the section surrounding the proposed site is residential, closely settled for a rural community, and that some of the finest houses in Albermarle county are in the immediate vicinity;
>
> 2. That the great attractions to the neighborhood adjacent to the proposed airport are the hunting facilities and its suitability for growing pedigreed horses, cattle, and other live-stock, and that the Keswick Hunt Club draws not only visitors for the season, but many permanent residents, greatly improving the value of property throughout the section;
>
> 3. That the noise of planes close to the ground in warming up, ascending and landing would be most objectionable and greatly affect the comfort and peace of mind of residents in the neighborhood, and would lead to a deprecia-

tion of property values for a considerable distance from the immediate area of the field proposed, and this would be particularly true if used as a student flying school;

4. That the menace of accidents which would most probably be incident to a school for flying would be a hazard which would affect the desirability of living in the area, and, therefore, property values would decrease disastrously in case of those owning property in the immediate vicinity of Milton and Shadwell;

5. That not very far from the University of Virginia there were other locations available, far less thickly settled, where land values are not so high, which could be used for the purpose of establishing a school for flying and where it would not constitute so serious a nuisance nor affect property values so considerably to the detriment of so many property owners and tax returns to the State and county."

Judge Fletcher, the Chairman of the State Corporation Commission, found all of these objections to be not well taken and in so doing quoted from Swetland v. Curtis, 41 Fed. (2d) 929 and from Thrasher v. City of Atlanta, 173 S. E. 817, in both of which opinions it had been held that an airport was not a nuisance per se, and in which it had also been held that mere apprehension of injury or mere depreciation in value of surrounding land was not sufficient grounds for the enjoining of the operation of an airport—which was a lawful business.

Judge Fletcher also pointed out in his opinion that another objection of the objectors was that no aircraft should be permitted to engage in commercial aviation in a section where there were so many "historic shrines." In response to this point, he pointed out that airports were now in operation at Washington, D. C., within a stone's throw of Arlington, the former home of General Lee and now the national cemetery, the Lincoln Memorial, the White House, and the Capitol, within a few miles of the restoration of Williamsburg, and at Richmond, where planes actually flew over the capitol of Virginia and the former capitol of the Confederacy, the original building of which had been designed by Thomas Jefferson.

The objectors had finally made two legal points, namely, that the Commission had no authority to grant the University the permit applied for and that the University had no authority to operate an airport such as was contemplated, particularly a commercial airport.

As to these, the Corporation Commission held that the Virginia law provided no person could operate an airport unless the permit

should be issued by the State Corporation Commission; that the Commission, therefore, had direct and exclusive jurisdiction, and that if the University had failed to get a permit it could not lawfully operate the airport.

It is also pointed out that the University was a corporation and had all the powers possessed by other corporations of Virginia and that it not only had the powers expressly conferred but that it had the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.

As to this, it was within its express powers to give an engineering and training course in aviation—in other words, teaching a new and very necessary science.

It was obvious that a complete course could not be given without an airport. It was also obvious that the University itself, through its own employees, could not give the flying training under the C.A.A. program, for this flying training was provided by the C.A.A. through its own selected and authorized training school and instructors. This organization, while doing this work, was engaged in "commercial aviation."

All of the foregoing reasoning of the Corporation Commission was adopted by the Supreme Appellate Court of Virginia and it was held that the objections to the granting of a permit were not well-founded and the order of the Corporation Commission was affirmed.

HOLMBERG v. UNITED STATES,[9]

There is one case to which I wish to call your attention, not so much because of its value to aviation law, but because it seems to me a good defense to business which has so often been accused of an unwillingness to wholeheartedly cooperate with Government, with the national defense, etc.

Mr. John B. Holmberg, of Minneapolis, had bid on a contract for some aerial survey work. On September 20th, he was advised by wire by the Government, that his bid was the low bid and to proceed with the work. Under his contract he had ten days in which to get his plane to the airport ready for service, fourteen days in which to take the aerial photographs and fourteen more days in which to make delivery of the pictures.

On September 28th, he was advised by the Chief Photogrammetrist that, under executive order of the President, he would be required to accept the provisions of the Bituminous Coal Conserva-

9. U. S. Court of Claims, June 3, 1940; 235 C. C. H. par. 4015, p. 4029.

tion Act of 1935. We presume it took him some two days to find out what these provisions were, but in any event, on September 30, he wired to the Chief Photogrammetrist that he would accept these provisions. On October 8th, he had his plane on the ground ready for work, but was delayed starting because of weather. In the meantime, he wrote to the Chief Photogrammetrist to ask him what would be considered the beginning date of his contract, whether the telegram of September 20th or the exchange of telegrams which terminated on September 30th. The Chief Photogrammetrist advised him that his starting date would be deemed to be September 30th. He was, therefore, on the airport in time.

However, the contract which the Government was to award him never arrived and he decided to wait until the Government actually signed the contract. On October 18, the Government mailed him a contract—not signed by the Government. Mr. Holmberg received it on the 21st, immediately signed it and returned it to the Government. It was signed by all the Government officials by November 5, but was not mailed by the Government until November 26th.

Mr. Holmberg then completed the taking of his pictures in fourteen days and shipped the finished photographs in less than the fourteen days. His total bill under his contract price was $2576.00. Upon the completion of the work, he was sent a check which was short exactly $1160.00. He had been penalized eight days for not having his plane at the airport within ten days after he had been notified by wire and forty-five days for not having the work done within the "contract" time.

He promptly, of course, filed a claim in the United States Court of Claims and the Court of Claims held that he was under no obligations to begin work until the Government had signed and sent him a contract, which was on November 26th, exactly sixty-five days after the first telegram. Accordingly, the Court of Claims held that he was neither late in having his plane at the airport nor was he late in completing his work and ordered the Government to pay the $1160.00 which had been deducted. Of course, what it cost Mr. Holmberg in time, worry and lawyer's fees to collect this money from the Government is not set forth in this decision.

HARRY F. MILES, ET AL v. ADDISON W. LEE ET AL[10]

Both from the standpoint of the ingenuity and patriotism of the citizens of Louisville, Kentucky, and as an illustration of the pressure

10. Ct. of Appeals, Kentucky, Oct. 15, 1940; 143 S. W. (2d) 843.

of our defense program, I discuss this case, involving Bowman Field, Kentucky.

For some years the Louisville & Jefferson County Air Board (a body politic created by the Kentucky Legislature) which owned and operated Bowman Field, had considered purchasing a hundred acre tract adjoining the field. The price quoted (approximately $1,000. per acre) being considered too high, the purchase was not made.

The war department then prepared to erect hangers and barracks for housing two hundred officers and twenty-two hundred men if the Air Board would provide—at nominal rental, the necessary land. Desiring to aid the Government as well as to secure this cantonment the Air Board sought to bring it about.

Purchase was then impossible for the Air Board had no funds and the law prohibited the Air Board from borrowing money or mortgaging its property, and the State Constitution prohibited the Jefferson County Fiscal Court from pledging its credit beyond one year's revenue. (Taxes for 1940 had already been levied and were sufficient only for current needs).

Accordingly it was decided to condemn the land, which the Air Board conceededly had the power to do. However, condemnation awards, to give the condemnor title and possession, needed to be paid in cash. There was the rub.

It was probably Lieut. Al W. Near, Manager of Bowman Field, who worked out the plan which was followed, though this doesn't appear in the opinion.

The member banks of the Louisville Clearing House Association offered to pay the condemnation award to the land owners. The judgment in the condemnation proceeding was to direct that the deed to the Air Board reserve a lien in favor of the banks for this sum, with interest, all maturing in one year.

The members of the Air Board *individually agreed* to vote to cause the Air Board to request the Jefferson County Fiscal Court to levy taxes in 1941 sufficient to enable the Air Board to pay off the lien, and *individually* agreed that when the money was so received, to vote to pay it off.

The members of the Fiscal Court *individually* agreed to vote to levy a tax, if requested by the Air Board, in an amount sufficient to raise the money to enable the Air Board to pay off the lien.

It will be noted that neither body officially bound itself.

As soon as these agreements were made, and made public, the

condemnation suit was filed, and then followed the injunction suit to stop it all.

The injunction suit was filed by individual property owners who evidently objected to Bowman Field as a nuisance, and who objected to its enlargement and increased usage.

In addition to claiming that this elaborate scheme was after all and in fact a pledging of credit, and a creation of incumbrance, the plaintiffs claimed that the airport had become a nuisance and would soon be worse; and the extension should be located elsewhere. It was also alleged that the banks were violating the federal law, the state law, and their own charters in making a loan on unimproved real estate.

The holding of the Chancellor, and of the Appellate Court was, the Air Board had not mortgaged its property nor created a debt. It had simply acquired property subject to a lien. In effect it was an option to buy the land. The courts also held that the Fiscal Court had not pledged its credit—its members had simply "memorialized their intent". It was held that the judgment of the Air Board in selecting the site of Bowman Field also for its expansion, could not be questioned in this proceeding.

While a nuisance might be created it had been definitely authorized, as a matter of governmental policy by the act creating the Board.

If the banks were acting illegally or ultra vires this was not a matter in which the plaintiffs had no interest or standing in Court.

The order of the court was that the injunction suit be finally dismissed.

It is interesting to note that the agreement with the banks was made September 16, 1940, and the opinion of the Court of Appeals was handed down October 15, 1940. In the meantime the suit had been filed, heard by the Chancellor, decided, appealed from, briefed, argued, and decided by the higher court. This constitutes probably a new record for altitude of public enthusiasm and speed of performance.

KENTUCKY AERONAUTICAL ACT

During the 1940 session of its legislature the State of Kentucky entered the ranks of those progressive states which are putting the force of State Governments back of civil aviation development.

The Act creates the Kentucky Aeronautics Commission and directs it to "in general promote the progress of aviation in the Commonwealth".

The Commission is to be bipartisan, consisting of three members of each major political party plus the Governor as Ex-officio member, and is a body politic, with the right to acquire, own and operate real and personal property and the right to sue and be sued.

This is rather a novel and, apparently, an effective method of creating a State Aeronautics Commission.

The members of the Commission are non-paid, but provision is made for appointment, with compensation, of an Aeronautics Director who is to be the executive officer of the Commission.

The law requires that aircraft be licensed and registered by the U. S. Government and that pilots be likewise licensed and registered. The Commission is authorized to promulgate air traffic rules and these rules are required to be identical and kept current, with those of the Federal Government insofar as applicable.

Criminal prosecution is provided for violation of any provision of the law itself or for violation of any of the air traffic rules with a peculiar limitation—that is that no one may be convicted by the State of an act or omission which violates the laws or regulations of the U. S. Government but this fact must be proven as a defense. The negative is not required to be proven by the State, hence the defendant in a State prosecution who is guilty of violating the State law or a State air traffic rule can clear himself only by proving that he is likewise guilty of a Federal offense.

One very helpful provision of the law is that the Aeronautics Commission is authorized to give advice and assistance, including technical services, and even financial aid to cities and other political subdivisions to enable them to acquire, construct or operate airports, landing fields or to enable them otherwise to "the development of aeronautics wtihin their limits".

This is a very broad and forward looking provision.

The Commission is also designated as the State agency to receive financial or other aid from the U. S. Government in the matter of building and improving airports within the State. In other words, the future airport program of the U. S. Government will, in Kentucky at least, clear through the State Aeronautics Commission. It would seem that if this were the law in all States it would save the Federal Government a great volume of unnecessary pulling, hauling and political pressure by the individual cities. Eventually this process would decentralize the work of the Civil Aeronautics Bureau and in its ultimate perfection would reduce from many thousands to forty-eight, the communities now personally contacting the Civil Aeronautics Bureau.

RHODE ISLAND AERONAUTICS ACT

The Rhode Island Aeronautics Act, approved April 27, 1940, does not create an aeronautics commission, but sets up in the Department of Public Works an Aeronautics Advisory Board which functions as a unit independent of the Director of Public Works.

The Advisory Board consists of five qualified electors, at least four of whom shall have had practical knowledge of aeronautics or aviation. These members are appointed by the Governor for a five-year term, the first five being appointed for terms from one year to five, so that a new member is to be appointed for each of the next five years.

It is also provided that in the Department of Public Works there shall be an "Administrator of Aeronautics", who is to be a full-time official. The Administrator is appointed by the Director of Public Works, with the approval of the Governor. The real authority of the Act is vested in the Director of Public Works, who, with the approval of the Aeronautics Advisory Board, is to establish rules and regulations, air traffic rules, etc. It is required that these rules should be kept in conformity, as nearly as may be, with federal legislation and rules.

While the Act provides that the Director has the authority to promulgate these rules, and while the Act also gives to the Director "supervision of aeronautics within the state", the Act also recites that "said Administrator of Aeronautics shall exercise the powers and duties of the Department and Director relating to Aeronautics".

It is probably, therefore, correct to say that the authority of the Act is vested in the Administrator of Aeronautics.

Federal licenses are required both of pilots and of aircraft. Registrations of these licenses are required within the state.

In addition to supervision over aeronautics, the duty is definitely imposed upon the Director of Public Works to "foster aeronautics" within the state, and in so doing the Director is required to (a) encourage the establishment of airports and other navigation facilities; (b) make recommendations to the Governor and the General Assembly as to necessary legislation or action; (c) study the possibilities for the development of air commerce and the aeronautical industry and trade within the state and collect and disseminate information relative thereto; (d) advise with the Civil Aeronautics Authority and other agencies of the Federal Government in carrying forward research work and development work, etc.

The Act gives the Director power to conduct investigations not only of accidents occurring as the result of operation of aircraft,

but also concerning other matters covered by the provisions of the Act.

The duty is imposed upon the Director, and upon every state and municipal officer charged with the enforcement of state laws, to enforce and assist in the enforcement of the Act.

Authority is granted to inspect any premises, buildings, structures, aircraft, airports, schools, etc., wherever the Director deems such action necessary, and similar authority is given to close airports, schools, flying clubs, etc., until requirements laid down by the law have been complied with.

Penalties are provided up to $500.00, and imprisonment for not more than one year for violation of the Act.

The Act as a whole seems to be a very strong and effective means of aviation encouragement and development. Assuming that the real authority is invested in the Administrator of Aeronautics, who is required to be well-qualified in aeronautics, and assuming that there will be no conflict in authority between this officer and the Director of Public Works, who might not be so well-qualified, the Act seems to be well-suited to its purpose.

George B. Logan, 1940