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THE INTERSTATE COMMERCE "BURDEN THEORY" APPLIED TO AIR TRANSPORTATION

GEORGE B. LOGAN*

Ladies and Gentlemen: I regret that the subject assigned to me is impossible of treatment without in a considerable measure encroaching upon the scope of the very splendid paper just delivered by Mr. Kintz, and is in some respect a duplication of it. I disavow any intention or ability of covering the some topics covered by Mr. Kintz with even approximate skill, but it is necessary in the discussion of my topic to cover some of the same ground.

As I view the regulation of flying, it involves two considerations, first, the regulation of the *act* of flying, and second, the regulation of the *business* of aerial transportation. As we understand our theory of the Federal Constitution, it is quite obvious that such things as places of flying, the height of flying, stunt flying, and the regulations thereof are based primarily on the hope, at least, of making flying safe for the fliers, their passengers and the public, and consequently such regulation is based upon the police power, and under our constitution the police power is vested solely in the states.

That may sound like treason to the aviation interests, who, despairing of uniform state regulation, recognizing the advisability of uniformity, have prayed for and consistently prayed for federal regulation. At the risk of appearing treasonable, I wish to start out with the statement that the regulation of the *act* of flying is primarily a state matter. The regulation of the *business* of flying, in so far as that business is not interstate commerce is also a matter of state regulation. The regulation of the *business* of flying in so far as it is interstate is, of course, as you know, purely a matter vested in the federal Congress by the federal Constitution.

It would seem simple to state, under those rules, that an air carrier operating between St. Louis and Kansas City is not subject to congressional action, and that an air carrier operating between Chicago and St. Louis is not subject to regulation either

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by Illinois or Missouri. But unfortunately one cannot so simply state the rules governing the combining, the shadow ground, the interlocking of federal, or rather, of interstate and intrastate commerce.

I would like to have you all believe that this paper comes entirely out of my head, and that I did not even look at a book for it, but I am not going to try to put that over. I am very much indebted to a splendid paper delivered last fall by Mr. Kenneth Burgess, General Counsel for the Burlington Railroad, and I am also indebted to a study of this subject by Mr. Abraham Fishman, appearing in the *Journal of Air Law*, for the formulation of the principles I wish to announce.

Intrastate commerce is for the regulation of states alone, and the federal government may not enter that field except (and the exception is of primary importance), where necessary to prevent interference with, or discrimination against, or interruption of, or burden upon, interstate commerce; or except where it is necessary, in the effective regulation of interstate commerce, to incidentally regulate intrastate commerce.

With respect to interstate commerce, there are two classes, if you please, of regulation. There is the broad national field of interstate commerce, where the states may not enter, and may never enter, even though congress may not have entered the field of particular regulation, because, it being a matter of national concern only, the courts have held that the very silence of congress is evidence of the fact that they want no regulation. But there is a portion of interstate commerce where the states may enter, and that is where there is a matter of local concern incidentally affecting interstate commerce, where the states may enter until Congress enters, providing always that such regulations of interstate commerce in such local matters do not constitute a burden on interstate commerce.

Hence you will see that the burden theory applies in two ways; first, to divest the states of their constitutional police power, and to permit the federal government to enter the field of intrastate commerce, and second, to act as a bar to the entrance of states into the field of interstate commerce, and to draw the line as to how far they may go in that field, namely, that they must stop when Congress enters, and must also stop when they have reached the point of creating a burden on interstate commerce.

Perhaps the best statement of the burden theory, as illustrated by the principles I have announced, is found in Robert's book on

"Interstate Commerce," which is: "Whenever there exists such an interblending and interdependence between interstate commerce and intrastate commerce that the freedom, well-being or safety of the former depends upon the latter, Congress, or an administrative body delegated with national authority may regulate intrastate commerce in so far as it is necessary to preserve the freedom, the well-being and the safety of the commerce exclusively within the federal control."

Please note the use of the words "in so far as is necessary," because that calls for a determination of fact in every case to determine whether or not the federal interposition of authority is necessary to regulate and preserve the well-being of interstate commerce.

The burdens which have been described by the federal courts, or rather, the things which have been described by the federal courts as constituting burdens on interstate commerce may be readily classified into three classes. First, there is the *physical burden*, and under that heading we have had the decisions with reference to the safety appliance acts, particularly the decision of *Southern Railway v. U. S.*, 222 U. S. 20, where it was held that the federal act specifying the use of safety appliances on cars engaged in interstate commerce must necessarily also apply to the same and similar cars used in intrastate commerce, the safety of interstate commerce being dependent upon the use of the same safety appliances throughout the system of transportation.

Second, there have been the *financial burdens*, and under that we have the famous *Minnesota Rate Cases*, 230 U. S. 352, and the *Shreveport* case, 234 U. S. 342, where it was held that federal power may intervene to prevent the establishment of intrastate rates, both freight and passenger, where the imposition of those rates on intrastate commerce would result in a financial burden to interstate commerce.

Third, we have the *administrative burden*, and under that heading we have the recent case of the *Atlantic-Pacific Stages v. Stahl*, 36 Fed. (2d) 260, where it was held a state may not require of an interstate carrier a certificate of convenience and necessity. In other words, the state was deprived of the right of determining the question as to whether or not this particular carrier should enter business within the state. We also have the case of the *Western Union v. Boegli*, 251 U. S. 315, where statutes penalizing the telegraph company for delay in delivering messages were held

to be unconstitutional, as imposing a burden on interstate commerce in that administrative way.

The latest decision we have is the decision in the case of the Colorado Public Utilities Commission, involving aviation, and that is found in the Public Utilities Report of 1928-E, Page 518. That is purely and simply a recognition by the Colorado Public Utilities Commission of the principles heretofore announced. An interstate carrier by air applied to the Commission for a certificate of public convenience and necessity to operate an air line from Denver to Kansas City. The court granted the certificate without an examination into the question as to whether public necessity or convenience required it or justified it, holding that, this being interstate commerce, the state law applicable to certificates of public convenience and necessarily did not, and could not, apply, and they were therefore required to issue the permit without further ado.

There has just come in the mail this morning the bare synopsis of a decision by the U. S. District Court of the Western District of Oklahoma in the case of *U. S. Airways v. Shaw, State Auditor*, holding that a gasoline tax on gasoline used by an air carrier engaged both in intrastate and interstate commerce, where the commerce was so intermingled that it was impossible to separate the usage of the gasoline, constituted a burden upon interstate commerce, and the tax was held to be void. That was a decision dated August 13 of this year. The question is whether or not the principles of regulation which I have announced do apply in their full import to the *act* of flying and the *business* of aerial transportation, and do apply in general to air business as they have applied heretofore to railroads and to water carriers.

The Air Commerce Act, referred to by Mr. Kintz, was not passed primarily as a regulation of interstate commerce, or indeed a regulation of commerce of any kind. The title of the Act is, "An Act to encourage the use of aircraft in commerce, and for other purposes." In a definition of the word "commerce" the word "interstate" is not used, nor the words "between the states," nor "between states and foreign countries."

The Secretary of Commerce, under Section 2, has put upon him the duty of fostering air commerce, with no specification as to whether it shall be interstate or intrastate. In granting the regulatory powers to the Secretary of Commerce he is given the authority to provide for registration, rating, licensing and so forth of airmen, aircraft, airports, and there is no restriction in the granting

of these regulatory powers as to interstate or intrastate commerce.

It might well be questioned as to whether there was any intention on the part of Congress to limit the regulatory scope of this act to interstate or intrastate commerce. In fact, it is very clear, both from what Mr. Kintz has told us, from what Mr. MacCracken told us yesterday and from the debates in Congress, that this act is a compromise, that it was originally intended to apply to all air commerce. Thus, we find a segregation made between interstate and intrastate commerce, which is Section 11, where there are penalties provided for violation of air traffic rules by all fliers, and there is no penalty provided for failure to register, failure to have an airman's certificate, or failure to do any of the other acts provided for by the law unless you are engaged in interstate commerce.

Now, first, is the Air Commerce Act valid? Second, is the application of Air Traffic Rules to all flying a valid exercise of congressional authority? In the case of *Smith v. New England Aircraft Company*, the act was first considered by any court in this country, and it was there held to be valid, although the constitutional attack was not on the ground that it was not a proper act under the interstate commerce clause, but the constitutional attack there was on the ground that if a right of flight was created by the act it was taking private property without due process of law and without due compensation; but in any event, to that extent the act as a whole was held valid.

In the case of *Swetland v. Curtiss Airport et al* the Air Traffic Rules were held valid as to interstate commerce, but, as pointed out by Mr. Kintz, the court dwelt on the fact that the State of Ohio, by legislating in such a manner as to evidence an intention that the Air Traffic Rules and the Air Commerce Act, insofar as intrastate commerce was concerned, were to be recognized as valid by the state of Ohio, also held that the Air Traffic Rules applied to intrastate commerce. One is left with a little suspicion of doubt as to whether or not the court would have held that the Air Traffic Rules applied to intrastate commerce in that state had it not been for the evident intention of the state of Ohio that they should so apply.

In *Neiswonger v. Goodyear Tire & Rubber Co.*, the court held that the Air Traffic Rules would apply to intrastate commerce if necessary. So, again, we come back to that same expression, "insofar as is necessary." Therefore, to determine whether or not the application of the Air Traffic Rules to all flying is valid, we

must determine the question of the necessity for the Air Traffic Rules as a measure of prevention of burden to interstate commerce. In fact the court, in the *Neiswonger* case, gave this expression: "It is not clear how intrastate flying at a height of less than five hundred feet will interfere with interstate flying at five hundred feet and above," raising a doubt, if you please, as to whether or not that particular Air Traffic Rule, namely, the minimum height regulation, was necessary to prevent a burden on interstate commerce.

Suppose Congress should at some time decide that because of the numerous grade crossing accidents we have had, that because of the large burden resulting to railroads by reason thereof, and because of the fact, which is perfectly obvious to any of you, that ninety-five per cent of all grade crossing collisions between railroad trains and automobiles are due to the failure of the drivers of the automobiles to exercise ordinary care, and that in ninety-five per cent of the cases the occupants recover nevertheless, suppose Congress should hold that to prevent that burden to interstate commerce they would pass a law requiring the operator of every automobile, whether engaged in intrastate commerce or any commerce at all, to stop at every railroad crossing, would that be a valid exercise of the right of Congress to prevent an undue burden to interstate commerce?

Suppose we go further and Congress should say that because of the increasing amount of interstate commerce carried by busses, both passenger and freight, and because of the crossing accidents and the collisions resulting in injuries to interstate passengers and resulting in damage to interstate freight, "we will now pass a law regulating all driving of pleasure automobiles, or automobiles engaged in intrastate commerce." Would that be a valid exercise of the power of Congress to prevent an undue burden on interstate commerce?

Are not those two questions rather analogous to the question that in order to prevent air accidents, collisions in the air, and so forth, Congress shall now specify rules regulating flying, pleasure or intrastate commerce?

I do not believe the answers to the first two questions determine the answer to the third. I am not prepared to say that the first two questions may not be answered in the affirmative; namely, that they would be a valid exercise of the authority of Congress to prevent an undue burden on interstate commerce. The time may come when that will be so held. I rather think that they will be

so held, particularly in the first case. In any event, the final determination of whether or not a particular law or regulation is necessary is up to the federal courts, and not to any jury or to any state court, and the federal court being dominant we might anticipate an affirmative answer to both of the first questions.

But the analogy between those two questions and the air question is not complete. In other words, your collision with a train may cause some damage. It is not likely to kill anybody on the train. It is not likely to destroy the cargo carried in interstate commerce on the train. But a collision in the air is almost bound both to be fatal to the interstate passengers and destructive of the interstate cargo carried. So, irrespective of how we answer the first two questions, I believe the answer to the third is that the imposition of Air Traffic Rules to apply on all flying is the valid exercise of the power of Congress to prevent a burden on interstate commerce.

Does that mean that all Air Traffic Rules are valid? I can well understand how the rule (and the rules cover a wide scope, as all fliers know), for instance, preventing stunt flying over a civil airway is absolutely essential to the preservation of interstate commerce. I cannot quite understand how the rule preventing stunt flying over a football game, which is one of the same Air Traffic Rules, is necessary to prevent an undue burden to interstate commerce. There are several other rules that have a similar lack of apparent application, but I believe that the federal courts, in considering the question which I have put, would look to the reasonableness of the scheme as a whole—do the Air Traffic Rules as a whole appear to be necessary to prevent an undue burden upon interstate commerce? If so, if they are part of a scheme necessary for the effective control of interstate commerce, I believe the single ones would neither be held to be singled out and held unreasonable, nor would the scheme as a whole be held to be invalid because one or two rules might not properly apply.

So far I have discussed the *act* of flying. We come now to the *business* of flying. The Air Traffic Rules are made applicable to flying, but there is no universal application as to intrastate commerce of the requirements of being a licensed pilot or the safety and airworthiness of aeroplanes, and of similar requirements in the manufacture of planes. For instance, there is no penalty for operating any kind of a ship by any kind of a pilot in intrastate commerce or in no commerce at all so far as the federal law is

concerned. Incidentally, that is one of the present failures of the Air Commerce Act, as I view it, and has given rise to this apparent and overwhelming demand for state regulation concerning the stated topic. In other words, Congress has not entered this field, but if Congress did enter this field and provide that it was unlawful for an unlicensed airman, a man not having a federal license, to fly anywhere any time, would it be valid? Suppose they should provide that it was unlawful for a plane that is not airworthy to fly anywhere any time. Would that be valid?

I believe that under the decisions, and more particularly under the tendency of the decisions, such a law would be held valid, as preventing an undue burden on interstate commerce. There are two difficulties in the way at present. In the first place, Congress has not entered this field, and in the second place the personnel of the Department of Commerce, Aeronautics Division, high in quality, is extremely low in quantity. There are not enough inspectors to go around to adequately enforce the Air Traffic Rules and the registration requirements and the airport rules that are now in effect. I am told there are three in the state of Illinois. I do not know how many are needed, but it would appear that they would need many more than that in the City of Chicago or Cook County alone. Therefore the field of normal police power, in so far as the business of flying is concerned, is still wide open. It is still perfectly competent for every state to require a license, federal if you please, or state if you please, of pilots, and proper qualifications, and to require a certificate of airworthiness of planes.

It is possible too, and doubtless effective, to have similar state laws concerning the act of flying, but obviously if the state laws concerning the act of flying, or state regulations concerning the act of flying, attempted to permit a violation of the federal regulations of the act of flying, they would be to that extent invalid.

It would seem to me that the enactment of state laws requiring a license for the pilot and a qualification for the plane would not only be valid at the present time but desirable; further, state laws imposing the same flying rules as federal laws would not only be proper, but desirable. They cannot conflict, but they would be desirable from the standpoint of adding an additional police personnel to the enforcement officials now in existence. It appears to me, further, that such legislation by the states as I now propose should never be in detail, because the art of flying, the engineering advancements of flying, may speedily solve some of the problems that we are now facing; and the law should neither hinder the

advance of the art of flying nor the business of flying, nor attempt to anticipate the future, because anyone who sets himself up as a prophet and says thus and so cannot be done is just as foolish as he can possibly be. I have long since gotten over saying it can't be done. I saw a little play the other day. The scene was laid in New York in 1820, and the young hero of the play had an ambition to become an inventor. The father of the heroine discouraged him from hoping to become an inventor. He said, "It might have been all right fifty years ago, but think of becoming an inventor now, when everything has been invented. That is perfectly absurd." I think an attempt to cover the future of aviation by legislative enactment is also the height of absurdity.

The business of flying within the state, it seems to me, needs corrective measures aside from those things I have already mentioned. The state should require a proper permit by a corporation engaged in carrying passengers with the state. The federal government has not entered that field. That requirement should include not only a qualification as to competency of the official personnel of the company, but solvency in one way or another, either by its actual invested capital or by some form of insurance or otherwise to protect the traveling public within the state. It might also be possible to have effective regulation for permits to operate an airport. The federal government now has ratings of the airports, and now has airport regulations, and a good many airports are unable to get proper ratings, but it does not prevent them from opening and operating, and it seems that might be a proper field for state regulation or entrance, if you please.

Of course, there can never be any state regulation affecting interstate commerce, by way of requiring a permit or a license, by way of requiring a publication of a schedule of rates, by way of fixing rates, by way of requiring an amount of capital or by way of limiting the profit to be made on the invested capital of air carriers engaged in interstate commerce. That is a field which has not been entered by the federal government but cannot be entered by the state government. The federal government has never entered the field of attempting to regulate interstate bus lines or interstate trucking lines, has never attempted to fix profits, require capital or financial strength of companies engaged in that form of interstate commerce, but the states cannot enter that field, and there are a good many decisions to that effect, so that is something beyond the power of the states, because it comes under the last principle of interstate commerce, namely, it is a matter of national concern,

and even though the state might require a license fee of only \$10 to permit a man to engage in interstate commerce within the boundaries of the state, that requirement is invalid.

In conclusion, it would appear that the state police power may be exercised fully with respect to the *act* of flying and with respect to the *business* of flying within the state borders, but whenever the state laws pertaining to the act of flying conflict with federal laws or regulations pertaining thereto, they will be held invalid, because the federal laws or regulations are necessary to effectively regulate interstate commerce and to prevent a burden thereon.

State laws with respect to the *business* of aerial transportation within their borders will be held valid unless they affect the business of an interstate carrier to such a degree as to burden interstate commerce. State laws which incidentally affect interstate commerce, such as requiring certain conveniences for passengers or on planes will be held valid unless they constitute a burden on interstate commerce, because that is a field which Congress has not yet entered, although it is interstate commerce, and the states may enter until they do, providing it is not burdensome.

In further conclusion, I wish to join in the prayer that has been constantly put up by the aviation interests, the prayer for uniformity of regulation and of laws. It is an open question as to whether aviation would be more seriously hurt by the black eyes given to our oft-proclaimed theory of safety by the unreliable, unregulated, unqualified and illegal flying, resulting in crashes, or whether it would be more hurt by an attempt to stop this unregulated, unqualified and illegal flying by unwise and conflicting state legislation. If the state legislation pertaining to prevent this type of air hazard may be intelligently passed and intelligently enforced, and may be broadly enacted rather than in detail, it offers great hope of assistance to the development of the cause of aviation. We want aviation to grow, and to grow it must grow safely and also in an untrammled manner, and the shadow ground between the too little and too much regulation calls for careful, loving care and judgment. (Applause.)

CHAIRMAN HADLEY: I am sure we are all very much indebted to Mr. Logan for this wonderful, able discussion on this most interesting question, and before we take up the general discussion of the questions of these two lectures this morning I wish to say to Mr. Kintz and to Mr. Logan that I am sure every person here appreciates your efforts and is grateful for the able and masterful manner in which you have presented this subject before the convention.

Now we would be very happy to have discussion from the floor on these questions that have been presented this morning.

MR. T. H. KENNEDY (California): There are a few points raised by Mr. Logan that I should like to ask further explanation on. In the first place, I might say that in part, and almost in whole, I agree with Mr. Logan's contentions. It seems to me that his position is one of what might be termed a strict constructionist. He has gone into the subject of the division of state and federal powers in an analytical fashion which I think is most helpful and necessary.

It occurs to me that in times past we have been a little bit too prone to use what has been termed as the inverted premise method of reasoning. We have found that we think we need uniformity of regulation and legislation, and therefore we have set about to use all manner of means and argument at our command to see if we can not get some basis for substantiating that claim or that need.

We have felt that federal legislation is absolutely essential, and therefore we must use all arguments to support the absolute domination of federal authority, and we have been a little bit too inclined to slough over the real legal reasoning behind the division of state and federal authority. However, Mr. Logan's analysis is most helpful, and I think we can not be too great in our praise of his work.

He makes certain statements, though, that I should like to ask him about. I believe at one point in his talk he made the statement that if a state permitted a violation of the federal regulation, such permit would be invalid. I think he referred to the Air Traffic Rules, and to use the example that he brought forward himself, that of regulation of flying over a football game.

Do I understand Mr. Logan to say that if the state permitted stunting over the football game, which would be in violation of the federal act and the federal regulations, such a state permit would be invalid, where there is no question whatever of an interstate air lane in the vicinity of the football stadium? That is one question I would like to hear discussed.

Then Mr. Logan also raised the point of the interacting area of state and federal regulation. A state can not enter certain phases of regulation of interstate commerce even though the federal government has not acted. That is certainly a very pregnant subject and one we must examine with the utmost care, because we can all see that this law that we are attacking here is absolutely new and unexplored; we have very few decisions, and we must work by analogy all the way through. To date we have a great field of interstate regulation that has not been occupied by the federal government. Is the state absolutely forclosed as to action on those points?

Mr. Logan has listed first, second, third and fourth certain subjects that the state can not act upon, even though the federal government has not acted. May we not examine those points a little more closely?

Another question, and it is a general question, are we justified in working by analogy? We have bus cases, we have railroad cases, we have maritime cases. Are they good law? Are they good law for air cases? That is the question we must always be confronted with from now until doomsday. Our precedents in other forms of all kinds of law business, are they good? Are the actual mechanical differences between the aeroplane, the

glider and the dirigible so great we can not use the analogy of the bus, the railroad and the steamship?

That is a subject, gentlemen, that we must give most careful attention to. There are certain things we know about aircraft that we know are not the same. They have certain attributes not to be found in any other mode of transportation. The speed of the thing, for instance; the mobility, the unity with which it operates, the fact that it has a three-dimensional method of operation, it is not confined to the surface—are those things, those characteristics, so different than other forms of transportation, other units used in transport service, that the law that has grown up around the other transportation mediums will be found inadequate of application and will it be impossible for us to use the precedents that our books are found to be filled with?

Those questions I think we must study very carefully, and I should like very much to hear from Mr. Logan a little more in detail on those points.

MR. LOGAN: I shall try to answer you, Mr. Kennedy. I want to state first that I have been talking up here for two weeks, and quite a number of the audience today is the same audience I have been talking to, so I have perhaps not repeated some things out of deference to them that I might well have explained in my talk.

First, with respect to the analogy. I quite agree with you that we can not accept analogies whole-heartedly, as a fish accepts bait, because they will not always apply, and I think I pointed out this morning that the analogy between the automobile and the railroad and between the automobile and air commerce was not necessarily an analogy to be followed. We can not accept analogies without a very careful study.

Now with respect to the field in which the state is foreclosed in its acts, I think we need not argue much about that, because the courts have laid down that definition, and that is, where the subject of interstate commerce is one of national concern, the states may not enter, and there are dozens of decisions along that line. I think, in addition to the case I cited, there is the case of *Bush v. Malloy*, and *Duke v. the Commissioners*, of Michigan, and several other cases prohibiting the states from making any legislation affecting interstate commerce which is of national concern.

With respect to the state law about stunting over a football field, let us assume that the federal regulation, and I think it does, prohibits stunt flying over a congregation of persons, and prohibits any flying at less than 2,000 feet over such congregations. Let us assume the state law permits the stunting and flying at 1,000 feet. I do not say that the state law is necessarily invalid, but it would certainly be ineffective to prevent a prosecution under the federal law for the violation of the same thing, because where the two laws exist covering the same subject, the federal law is bound to be the dominant one, providing the federal law under the circumstances which we have mentioned is necessary to prevent a burden on interstate commerce.

I think I pointed out to you that I do not see the clear necessity, but I do not believe the question of necessity will be determined by the one rule alone. It will probably be determined by the whole scope of the Air Traffic Rules and their necessity as a system, as a scheme, to prevent a burden on interstate commerce.

CHAIRMAN HADLEY: Are there any other questions? Is there any further discussion?

MR. JOHN M. VORYS (Ohio): I came here expecting to see a fight some place along the line, but these papers today, the wonderful paper Mr. Kintz read and the perfectly brilliant discussion of Mr. Logan, have either accorded with my views or persuaded me out of my views, so I do not see much chance for argument, and the silence here apparently gives unanimous consent to the views of these gentlemen.

There was one point not discussed, and which may be outside of the scope of the papers, but which I should like to raise and secure the opinion of these gentlemen upon. It has been pointed out that while the Traffic Rules, the licensing system, should be laid down by the federal government, that as a practical matter, and for some time to come, probably for all time to come, the federal enforcement authorities will be insufficient, and as flying increases our ordinary local officials will have to take care of the enforcement of certain of the Air Traffic Rules.

Now I wonder whether these gentlemen think that it would be sufficient to incorporate by reference the Air Traffic Rules into a state law, and then into a city ordinance, which would be very helpful in the matter of enforcement; that is, to prevent improper flying over a city, or would it be necessary in the one case to enact a statute or promulgate a state regulation, and in the other to enact a city ordinance?

I have heard a number of discussions on this, the one view being that whereas the state can require a certain standard which can be complied with only by getting a license from another authority, that is, from the federal government, because the license is something definite and the standards behind it are those which may be obtained and found out before you secure the license, yet on the other hand the state can not require compliance with a set of flying regulations which theoretically are written down some place in Washington and are not available within the state.

It would be a matter of great convenience and would simplify the problem for the states very much if, as a physical matter, they could simply pass a little short law requiring compliance with the federal Air Traffic Rules, and encourage each city to pass that sort of an ordinance, which many cities have done in Ohio, and then send out a lot of pamphlets of the Air Traffic Rules that we would get from Washington and expect everybody to comply with them.

I wonder what Mr. Kintz and Mr. Logan would think is the constitutional problem as to incorporating by reference the Air Traffic Rules for local enforcement.

CHAIRMAN HADLEY: Mr. Kintz will reply to that.

MR. KINTZ: Mr. Vorys, we have recommended a new suggested draft of state legislation which incorporates a paragraph or a section incorporating in the state law the Air Traffic Rules by reference. I think that is legal unless it is specifically prohibited by the state constitution, and there are some cases that bear that out.

On the other hand, if the state constitution specifically prohibits the enactment of any law or regulation by reference, then the authority created by the state law to enforce the state rules or regulations could be given the specific authority, with a specific prohibition against enacting any other

regulations than the federal regulations. In other words, you, as Director of Aeronautics, could be authorized and charged with the duty of enacting air traffic rules identical with those of the federal department, and could be further charged with the duty of keeping those air traffic rules current with the changes of the department, being specifically limited from enacting any other regulations or rules than those promulgated by the department.

It is in two forms. We have suggested that they enact the Air Traffic Rules by reference. In those states which specifically prohibit by the constitution enactment by reference we have suggested that a person in the state be appointed to enact air traffic rules by regulation identical with the Air Traffic Rules of the department.

MR. VORYS: What I wondered particularly about was what your opinion was of the matter of delegation of that portion of the police power.

MR. KINTZ: We are in favor of state enforcement.

MR. VORYS: Can you make a city ordinance to provide that violations of a federal Air Traffic Rule, promulgated by an administrative body under the federal government, shall be punishable by a fine?

MR. KINTZ: I would incorporate the Air Traffic Rules by reference, stating that they are hereby incorporated as though written in, and then your violation would be for the violation of the state law, rather than violation of the federal Air Traffic Rules, because you have incorporated them by reference, therefore they are a part of your state rules.

MR. LOGAN: That question was discussed and has been discussed quite frequently in the American Bar Association and its committee and there are two classes of decisions holding that incorporating a set of regulations in a state law is unconstitutional, the first class holding that incorporating any other state laws or regulations or federal laws or regulations is invalid, and the second class of decisions holding that it may be valid as to those regulations then in existence, but will be invalid as to any regulations subsequently passed, because you can readily see that is a delegation of the criminal authority of the state to another body, creating a crime by the violation of a regulation or rule which is not yet in existence.

There are also cases that hold that unless the constitution of the state forbids it, the incorporation of the regulations by reference is valid.

It would seem that the safest way is to require the regulating authority of the state to promulgate regulations which must be in conformity with the federal regulations. You do not then have to set out the regulations in the act, but the official will have to set out the regulations by some form of proclamation; requiring him to keep them always uniform accomplishes the same purpose and does not run the risk of the unconstitutionality of incorporating by reference.

MR. VORYS: Let me ask one question as to the physical way of doing that.

Would it be possible for a state official, under such a law, to promulgate a set of regulations, which would be identical with the federal regulations, and then, in order to save printing and in order to save himself and such officials in every state from the temptation to monkey a little bit with those regulations, if he would get a cart load of the Air Traffic Rules from Washington and send those out and say "This is an exact copy of what

I have promulgated in my office," would that be sound constitutionally? It would certainly be a convenient and safe way to do the thing.

MR. LOGAN: It sounds to me like a Scotch method, but I think it would work.

MR. KINTZ: In fact, I think one state actually did that.

LIEUT. HOWARD KNOTTS (Illinois): I should like to suggest that Mrs. Willebrandt be asked to discuss this matter. She for a long time has been a member of the Aeronautic Committee of the American Bar Association. (Applause.)

MRS. MABEL WALKER WILLEBRANDT: I am one of the members of the American Bar Association Committee on Aeronautics, and if I may be permitted to confess it, Mr. Logan is our most illustrious member. I subscribe to what Mr. Logan has said, and I think I could not add more to his statement of the discussion in the differentiation of the laws that are here under discussion at this time.

LIEUT. KNOTTS: I should like to ask Mr. Kintz one question. I have heard coming from the Department of Commerce from time to time, and I think I understood Mr. Kintz to say this morning and then he passed on, that when an aircraft leaves the ground it loses its intrastate character, and somehow, by getting into the third medium of transportation or conductivity for the craft it becomes interstate.

Would you please explain that theory a little bit?

MR. KINTZ: That is on the theory of analogy of Mr. Kennedy and Mr. Logan that we can not take too far, and with which I agree. Once a plane leaves the ground and has passengers for hire in it, ostensibly it is a short hop from the field, yet when that craft once leaves the ground the passengers may decide they want to travel interstate, so once it leaves the ground you can not tell whether it is going to engage in interstate commerce or a pleasure flight, or intrastate commerce.

The second theory is that all air space is navigable, and that you have no defined routes such as railroad tracks or rivers, but that once in the air, you are in an air lane through which any interstate operator may fly. It is analogous to the navigable streams, I think, because once on a navigable stream you may interfere with interstate commerce, and in that connection, in the *Maryland Oyster Boat Fishing cases* the court held that while traversing a navigable stream all ships, whether engaged in commerce, pleasure, interstate or intrastate trips were subject to the same set of rules, which were promulgated for the safety of all concerned, and even though traversing that navigable stream for pleasure, you might tend to interfere with interstate commerce.

Once again, when a plane leaves the air, it circles over the airport. There are no defined routes, consequently, due to wind conditions or weather conditions, and an interstate plane, that is, a plane engaged in interstate commerce, has to come into that port, therefore, even a pleasure flight wholly over the airport area might seriously impede or interfere with or hinder the particular interstate operation involved. The interstate pilot comes in. He does not know whether the plane is going on an interstate trip, getting ready to land or make a flight over the field or a test hop, consequently, once the ground is left you are in a medium of transporta-

tion, as I say, having no defined lanes, therefore all should be subject to the same regulations.

Does that answer your question?

LIEUT. KNOTTS: The navigability theory does, but not the question about changing your mind, because it might be changed while they are in the plane on the ground.

MR. LOGAN: Mr. Kintz, do you not think that renders it necessary to make a decision between the act of flying and the business of flying? The mere fact that a plane is in the air does not render it interstate in so far as the kind of business it is doing is concerned, and in determining the question whether a state body may regulate it as to its business and its rates and capital structure, but certainly it is interstate in so far as flying is concerned, to require compliance with the federal air rules. That is why we have to make a distinction between the act of flying and the business of flying.

MR. KINTZ: Mr. Frederic P. Lee has prepared very interesting memoranda on the history of the Air Commerce Act of 1926, and his theory is along that line, that once you leave the ground, leaving the super-incumbent air space, getting into what has been defined as navigable air space, you then lose the intrastate character of flying, and possibly not the business of flying, but certainly of the flying, and as I said before, there being no defined routes, all must be subject to the same regulations, because the routes are such that they may cross any time.

MR. LOGAN: Oyster boats on navigable waters are certainly subject to such rules and regulations Congress might impose with reference to interstate commerce, but they are engaged in intrastate commerce so far as their license to do business is concerned.

MRS. WILLEBRANDT: There is probably no state where the intrastate phases of flying are more acute and, I believe, no state that has, in view of the complex problems, kept itself any more free from conflicting regulations and yet done everything to promote safety in flying, as New York State. I think the delegate from New York started to speak a few moments ago and was not recognized.

MR. JOHN D. SULLIVAN (New York): My only comment was not to make a suggestion, but on a point raised by Mr. Vorys, simply to say in the State of New York we were faced with the same problem, the question of constitutionality, and we decided rather than have any doubt we would enact into the general business law all the regulations. We recognize the fact that the regulations in turn may have to be changed, but we also realize perhaps they will not require a great deal of changing year by year, and in no case will we be more than six months behind, and then only on a few regulations, and as we do it we make no reference whatever to the fact that the regulations come from the Department of Commerce. They are simply regulations, and they appear in the general business law of the State of New York.

If any interstate flyer in New York wants to know what rules govern him, in theory he goes to the general business law of the State of New York, but in fact he knows if he complies with the rules and regulations of the Department of Commerce he will not be in trouble in the State of New York, so they are not concerned with whether it is interstate or intrastate.

MR. LOGAN: Does your legislature meet once a year?

MR. SULLIVAN: Yes.

MR. LOGAN: In some states it is every two years.

MR. SULLIVAN: That is why I made no suggestion to any other state.

MR. KINTZ: The Chairman and the other members of the Conference have given me considerable credit for the paper I read. I want to disabuse your mind; it was prepared by Col. Clarence M. Young, Assistant Secretary of commerce for Aeronautics, and I had the honor to read the paper for him.

MR. ALAN A. BIRD (Maine): Mr. Kennedy suggested, I think, conditions covering certain states. In my state our conditions are different. We have very few landing fields there, but we want to have a uniform law. We are new in the game, and I should like to inquire what the names of those states are, in order that we may get some information relative to uniform legislation to our next legislature, which convenes every two years.

MR. KINTZ: We have a bulletin, Aeronautics Bulletin No. 18, which sets forth several suggested drafts of state legislation, one prepared by the Department and one prepared by the American Bar Association, and then there is a compromise, I think, between the two.

Then there are several publications on airport rating regulations, and suggested municipal, city and county ordinances, and if I may have the gentleman's name I will be glad to see that he gets the whole set of publications.

MR. BIRD: Has the American Bar Association promulgated any suggestions at all, or did they simply hold it over?

MR. LOGAN: They have held it open. Unfortunately the uniform law proposed by the Air Law Committee at Memphis was not approved by the committee, and the committee had only one meeting this year and did not approve of any uniform law, and has asked for more time.

The uniform law Mr. Kintz refers to is of two years ago, and also, he has a uniform law proposed by the Commissioners of Uniform State Laws, the Air Law Committee of Commissioners. I think that is the compromise bill.

MR. BIRD: I should like to inquire, Mr. Logan, do you approve of the suggestions made by the department, or is that a compromise, from your idea?

MR. LOGAN: I had never heard Mr. Kintz's paper. I did not know what was in it. I do not think we have any differences of opinion, so far as I can see.

MRS. WILLEBRANDT: Strictly speaking, I wanted Mr. Logan's statement that there is now no proposed uniform law proposed by the American Bar Association, because a year ago the Aeronautical Committee's report was not adopted, but was withdrawn by the conference, and this year the committee is making no report, so there is no other proposed uniform law that has received any endorsement save only that one from the Commerce Department.

CHAIRMAN HADLEY: We will have this matter discussed further this afternoon.