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THE SCOPE OF STATE AERONAUTICAL LEGISLATION

CHESTER W. CUTHELL*

Mr. Chairman, Ladies and Gentlemen: It is a great pleasure to address you on such a sweeping title as "The Scope of State Aeronautical Legislation," and I understand that I am also requested to deal with the address which was scheduled for my partner, Mr. Hotchkiss, on "How Shall State Aeronautical Legislation be Enforced?" I suspect the fine Italian hand of Mr. Landis in the selection of these titles.

Well, you have just heard the list of my so-called activities. I see this thing, of course, perhaps from the wrong angle to lay down any fundamental principles. It is my job to be up against these problems every day as a matter of my practice. I always find that the man that has to deal with the facts gets a view that might be considered distorted by those who have no such limitations to their imaginations. This is particularly true with a subject like the enactment of state legislation affecting such a new thing as the control of aeronautics.

Let me see if I can amplify that statement so that you will not think I am captious, or possessed, perhaps, of a mean disposition. What is it that the states ought to do? What is the problem? How big is it? Is it something that should be done? Is it something that should be done now?

Well, by and large, relating to the other activities in our great country, aircraft is a trifle. Last year the figures show that we built in the United States perhaps five thousand aeroplanes. Some people figure it up as six thousand. I am very sure that the pragmatists in the companies are certain now that not more than 3,500 or 4,000 were actually purchased and paid for. I am very sure this year the number will not rise over 2,500. Contrast that, if you will, with the five million automobiles that are produced in the United States. I am not saying we ought to have legislation or regulation, or lack of it, in direct proportion to those figures, but it does give you an idea of the size of the problem. It is not yet an industry or a business, and transportation is a business, not an industry, that shrieks for regulation.

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My general thought on the whole subject is to let the parade go by for a while, not to attempt to reverse the proper order of enactment of laws, proper in a democracy. I agree entirely with Mr. Whitlock in that thought-provoking article of his in the Atlantic Monthly, that there is a big difference between a statute and a law. The law of the land is something everybody agrees should be the way things are done. If you do not have the support of the people it is not a law at all, it is just one of those things written on the books.

He points out the great law-givers of all time—Moses, Solon, Lycurgus. He says that they did not invent the laws, they did not conceive them and emit them and tell the people, "Boys and girls, this is the way you will have to live." They found out what the law was first, and then, with facility and commendable brevity, such as in the Ten Commandments, they stated what they found the law to be.

That is the problem before all of the state legislatures now, before groups such as this, and before the American Bar Association—shall we attempt to create statutes and laws, or shall we wait until there is a consensus of opinion, public opinion, developed, and then state it?

Of course, there are some portions on which we might say we can split the problem, some things like licensing. We ought to be able to sit down and write up licensing laws, but when you get into the larger realm of how high up does a man's property extend, I do not think any legislating, any fiat, any definition that your building can go up so high and stop, and you have no property rights in space beyond that, is going to hold water under our constitution. We do not want it either plus or minus as I see it. I think we have to let a lot of time go by before we can deal with that thing.

I just listened to the last end of the address about the uniform ticket. If you travel on the Transcontinental Air Transport planes, you will find in bold type on the face of the ticket, "Not a common carrier," and the contract is signed by the passenger. I admit the tickets are collected from the passengers after the plane leaves the ground, and when there is an accident the tickets vanish as well as the passengers, but we try to correct that.

I have to do that, from the practical point of view. I am not going to concede that we are common carriers and subject to all of the liabilities of common carriers unless and until we get some of the very great advantages that go with being a common carrier. That is fair, it seems to me. The railroads are common carriers,

and they have great liabilities imposed upon them for the safety of the passengers and freight, but they have the right of condemning your property if they need it, and if you take New Jersey as an example, the sole opinion of the Board of Directors of the Erie Railroad can take anybody's property, and they merely have to pay for it.

No one has risen yet to suggest that the air transport companies be given the right, for instance, of condemning a portion of this lake front here, which would be very convenient for our operations, and using that for an airport for the City of Chicago. We haven't that yet. I think we want to go very slowly about using phrases and words, and assuming all the liabilities that go with those words. It would be a very foolish thing for us to do.

Of course, in all new things dealing with our ancient profession we always have to realize that we are dealing with judges, sometimes with legislators, whose minds are rather static. They have been brought up to learn a great volume of things called "The Law." They are very loath to change. Every new thing that comes they try to harmonize with their old concepts. I do not know how many books have been written about the old idea of *cujus est solum*. Some old fellow five or six hundred years ago wrote that on an old case—the man that owns the ground owns up to the sky.

We are confronted with that. We have been confronted with it. It took us five years to get an act passed through Congress because the legislators, worried by the old-time lawyers (some of them my predecessors in the American Bar Association job), terrified them with the idea that property was inviolate and nobody could fly through the air space without committing a trespass. We are still up against that problem in many places. We are going to continue to be up against that until there is some recognition of the fact that aviation is here to stay, and that the old ideas have to be shaded down; there must be exceptions made; we have to be given a place in the sun.

But I do not want to see any state legislature come along, and just because there has been a decision in Ohio about five hundred feet being the property right, and nobody can fly below that, come in with some sweeping state law that one hundred feet, or fifty feet, or one thousand feet, is the limit. I do not want to see any state legislature do that.

I do not want to see any state legislature come in and christen us "common carriers." I will state, for the benefit of the American Air Transport Association, that the judges in two cases this year

have given charges to the juries that the Curtiss-Wright Flying Service, doing more flying every month than all of the transport companies put together, is not a common carrier. This is a new thing. Nobody is compelled to fly. There are alternative methods of doing it. It might very well be that the court of final conjecture, as one of the old friends of the American Bar Association used to call the Supreme Court, would say it was a joint venture, that there was an assumption of risk, going along the lines, perhaps, of the school of thought that wanted us to adopt the admiralty idea.

Those things are all to be determined. I do not think that a group such as this can attempt to deal with that type of problem at the present time, and I do not believe there is in existence now any group of men that you can turn to who are capable of drawing a uniform code. I know we have been struggling with that. I have lots of subjects to be covered. We are going to discuss them during the next few days. It simply is not the time to do it.

There are, however, some things that the state might very well do. It ought to take a real hold of this problem of purely intrastate flying, and that again is a very large portion of flying. You cannot get exact figures, but you must be on your guard all the time about calling all flying interstate. It isn't. These transport lines, of course, are prominent. We hope they are going to be successful, but at the present time they do not do any more than fifteen per cent, I am sure, of all the flying that is done. The great mileage, the great number of passengers carried, is done in purely intrastate work, and the federal government has to reach out a very long arm to reach those men.

The states have not yet any effective control of that flying. My thoughts on that are these, that there should be passed in each of the states (most have already done so), a licensing act that would reach those people who are devoting their attention entirely to the intrastate flying. I see no objection to either of the forms that have been under discussion. I personally have favored having a state license provided for even though there was a federal license also provided for, to be sure of reaching the type of flyer who causes many of the accidents. That is the boy in the hay lot with an old crate, never going over a county line, let alone a state line. There is nothing interstate in his commerce whatever, yet a great many accidents happen to him.

I should like to provide for that particular contingency so the states could stop that sort of thing. It would be a good thing if the states all got their minds on passing one or the other of those

forms. I know Mrs. Willebrandt strongly favors one form, where the states will make it a state crime to fly without a federal license, even though the movement is entirely intrastate. I do not think that is so good as the other idea, but nevertheless it is one or the other that should be passed and is sure to be found sound by the courts by and by.

That again is just a statute. What we really want is for the states to come in and really do something about that statute, and see that they are not content with merely licensing the pilot and the plane. What happens is, the plane gets a certificate that it is air-worthy, and it is turned loose. A year later there is an accident to it. Most of the accidents are happening in licensed planes now.

The same is true of the pilot. He qualifies, passes his tests, and takes too many people up in his plane. I think at major airports we are going to come to state or municipal traffic "cops." I do not agree that that should be done from Washington. I think it would be too difficult a problem of administration. That is the main job for the states to do. It would be just as foolish to have your traffic problem on the streets here regulated by federally appointed policemen. I think that analogy is fairly fair.

The next thing the states can do is to help this growing business by passing enabling legislation for the acquisition of airports. A good many have it. A good many are rather hazy. It is all right for the cities to do it, but most times we find the airport ought to be outside of the city, and that creates some difficulties. Many of the states, however, have in the last year or so, gone forward and passed the necessary legislation. That is a fine activity for the state, and the forward looking states are going to benefit enormously in the measure that they provide proper airports close to the large cities, so the speed gained in flying will not be lost in the taxicab coming from the airport.

To do that means giving rather sweeping authority, a bond to the municipality to get the airport proposition under way. Sometimes you find state legislatures are not particularly keen about proceeding with it. I think states all ought to have that statute on their books.

In going further on that, we have been considering whether the states ought not grant the power of zoning the neighborhood of the airport. You can say very easily that it is entirely sound to zone the neighborhood of an airport, strictly a public utility, and owned by a municipality or state. I am sure that would be sound legislation, because we have done it with high buildings, but when you go

further and zone the neighborhood of a private airport, I think you are going to dangerous ground at the present time. That, of course, is going to be very important, that there may be no question whatever of encumbering the neighborhood of an airport.

The subject of passenger liability—what is the liability of the aircraft-owning company to the passenger who is injured or killed in flight? You can cover that somewhat by ticket; I am not so sure that it is going to be possible to cover it entirely. I do not think we ought to go to the full limit of saying we are common carriers. We might have to straddle it and provide for compulsory insurance, that before a transport company could go into the business at all it would have to file the necessary bond with the state so as to recompense at least the injured parties. That needs a lot of study before we would dare suggest uniform legislation, and those of us who have to work for a living will find it is very difficult to get the time to put the thought required on these problems.

Again, as I have said in many another place, we have to look to the law schools, and the professors who are in the quiet atmosphere, the delightful surroundings such as these, for the time and the energy and the thought to evolve proper statutes along lines such as that. We find it in many branches of the law now, that the bar is turning to the professor in the law schools for working out that type of thing.

Mr. Knotts has suggested that I also make Mr. Hotchkiss' speech about "How Shall State Aeronautical Legislation be Enforced?" That is easy. I think, on the subject of enforcement, it is of vital concern that we should not encumber our books with a lot of statutes that are only casually enforced. That is the difficulty of operating entirely from Washington. For the most part the things that ought to be watched in flying are just the same things that ought to be watched with merry-go-rounds, amusement things with an element of danger. You have to have somebody near them to see that they are properly inspected, like the elevator inspection in these big buildings.

There I think the state should have very qualified men regularly engaged in inspection. I think the time will come before very long, in the major airports, where they will have particular concern about overloading of aircraft. Many of the major accidents have occurred because of overloading. I think it has to be enforced by state officials for the most part, this purely sight-seeing traffic.

I do not think there is any need of the states trying to regulate or enforce the laws in respect to the lines like the Transcontinental

or any of the large lines going out from Chicago to the south, the Aviation Corporation lines, or the United, because they are all responsible companies and in their own interests they adopt standards of safety far above the minimum provided in the statute. The need for enforcement, before we can save lives, is right on the flying fields, to see that there is no overloading, to see that it is a proper plane with proper motor and everything else, so they have at least an even chance.

Coming back to my own speech, I have spoken about zoning. The subject of passenger liability we have on the list. It might be possible, after a few more of the courts have functioned, to say what the liability is, what it should be, and that should be stated in the ticket. I am not prepared now to state what the liability is. I do not know, and I have tried to get a case where *res ipsa* is clearly indicated, and have it settled. As a general proposition, the judges on one side go off on an attempted proof of negligence. In one case this year we had an admission that it was a good plane and a fine pilot. They attempted to apply *res ipsa* and the judge would not let them do it, because they had introduced some proof of negligence.

We think there ought to be some of the old language about the jurisdiction of crimes. That is merely for the sake of completeness. It satisfies the lawyers' minds. I have never had any doubt that if I killed a man with a plane and I landed in Indiana that I could be tried in Illinois. However, laws often state the obvious; in fact, they are the best laws.

Generally speaking, then, I am in favor of the states functioning where they have not already functioned to adopt either one form or the other of this licensing law. I would like to see them move in sharply to take hold of the big airports, put traffic officers there, see to it that the planes are constantly kept in good condition. I am making that suggestion; I am doing no more than making the suggestion that we have traffic cops for the air, but their work would be largely on the ground.

I would like to see them all pass laws helping in the establishment of airports, and in that connection I think they might deal with the zoning proposition. Of course, states normally function by appointing a commission, and the commission tends to perpetuate itself. Once they do that they begin to try to do larger and ever larger things for aviation. That is what we have found in New York, anyway. They appointed a temporary commission there, and it has been doing splendid work. As they get into the problem, they see there is a need for lights, weather service and the other

things that ought to be done. They do not get statutes on it, but they do set necessary machines in motion so they get that assistance.

I am not suggesting every state have an Aviation Commission. Many cannot afford it; many do not need it. That will be about what will happen as they get into the problem. Every state will have to have somebody thinking over the problems of its own state aviation, and once they begin to think about it, they will begin to see they need airports, lights, weather service, and that they need constant inspection to see that the planes and the pilots are constantly in good condition.

I do not know, of course, how many wires I have cut in this talk, because I have not had the pleasure of being here before, but those are the ideas I want to leave with you, that it is not a burning problem at the moment. We are a small business. We do not need very much more regulation than we have. We do not want to see any more of the old maxims applied to our new problems. We want to let the show go on for a few more years before we do very many more things.

I would like to see the states confine their activities to the licensing, the watching of the development of the business, co-operating with the business, all to the end that we may have a truly national system of passenger transportation. (Applause.)

CHAIRMAN ZOLLMANN: I am sure we have all been very much delighted to hear the very practical and at the same time philosophical discourse of Mr. Cuthell, giving us the viewpoint as it exists from the vantage point of the industry itself.

There is one other paper that was scheduled to be read this morning—

LIEUT. HOWARD KNOTTS (Illinois): I have a problem to place before this conference with reference to that paper, and in doing so I want this body to feel as we felt in trying to get together this group, that it is your conference and not ours. We merely tried to do the work.

We had an acceptance from Mr. Lee to give the paper on "Flying Schools and State Legislation," but what has happened to Mr. Lee I do not know, but we have a memo communication from him, a letter, that Mr. A. G. Kintzmann would be here to give this paper. What has happened to Mr. Kintzmann I do not know, but I find, by messenger or act of God, Mr. Lee's paper in my hands. It has been here only a few minutes.

In glancing over it, I find it, certainly, on short perusal, to be very splendid. The conference ought to have it. I ask your suggestion as to how to obtain it.

CHAIRMAN ZOLLMANN: How would it be to have Mr. Knotts read it?

LIEUT. KNOTTS: Mr. Chairman, I had no idea, to use Mr. Vorys' expression, that the wheat would be so winnowed and you would get only the chaff, and I hope you will bear with me, as my perusal has been very brief. (Applause.)