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CRIMINAL VIOLATIONS OF ADMINISTRATIVE REGULATIONS

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The proper control of the use of the air as a medium of locomotion presents another set of those problems, rapidly increasing in number, requiring for anything like effective regulation close cooperation between the states and the national government. Such a method of control was not anticipated or provided for by the forefathers. The problem is here, however, and must be solved. Hoping that an amendment to the Federal Constitution will come along in time under which there can be adequate state and federal cooperation in the regulation and enforcement of rules governing air navigation, groups in both the state and federal governments are rapidly working out as satisfactory arrangements as possible under existing constitutional provisions. In the process the tenth amendment to the federal constitution is, as usual, receiving scant attention and "interstate commerce" is further extending its already over-extended tentacles and a new conflict between federal regulation of interstate commerce and state enforcement of police regulations arise.

To the difficulties involved in working out of the ancient statutes, the interstate commerce clause and its glosses, the requirements of control made necessary by the use of the airplane, must be added, apparently, the problems involved in the rule prohibiting the delegation of legislative authority. It has already been found necessary to make wide use of administrative regulations and it has been suggested by an eminent authority that the states should create commissions to keep state law and regulations abreast of the fed-

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eral between the biennial legislative sessions.[1] Already the federal government has provided for air traffic rules promulgated by the Secretary of Commerce[2] whose violations subject the airman to a penalty.[3]

As some possible assistance to those engaged in drafting air legislation, a review is here made of some of the more recent cases involving regulations the breach of which subjected the violator to criminal penalties.

That the air traffic rules do not amount to "legislation" and are, therefore, not violative of the inhibition against the delegation of the legislative power has been decided, at least, by dicta.[4] It may be confidently asserted, however, that these dicta represent the holding that may be expected when, if ever, the question reaches the Supreme Court, for that body has never held that Congress has delegated any of its legislative power.

United States v. *Eaton*[5] in a case upon which the non-delegationists have continually relied only to keep the Supreme Court busy distinguishing. In that case Eaton was convicted of failing to keep books as required by the regulations of the Commissioner of Internal Revenue. The act, however, prescribed penalties only for failure to do those things "required by law." The Supreme Court held that requirements by regulation were not requirements by law. Congress apparently never again made the same error.

The case of *In re Kollock*[6] involved a statute but slightly clearer than that in *United States* v. *Eaton,* but Kollock was remanded on a conviction for failure to mark packages of oleomargarine as required by regulations of the Commissioner of International Revenue when the statute made criminal the selling of that nefarious product unless in packages "as above described." The packages "as above described" was held to mean packages containing the markings prescribed by the regulations of the Commissioner.

In *United States* v. *Grimaud,*[7] the Supreme Court came very near to putting a stop to administrative definition of crime. In this case the trial court sustained a demurrer to an indictment for grazing sheep in a national forest reserve without the permission

1. *Fagg,* Incorporating Federal Law into State Legislation, 1 JOUR. OF AIR LAW, 199 at 204.
2. U. S. Cod. tit. 49, sec. 173 (e).
3. U. S. Cod. tit. 49, sec. 181.
4. *Smith* v. *New England Air Craft Co.* (1930) .... Mass. ....; 170 N. E. 385; *Swetland* v. *Curtiss Airports Corporation,* (1930) 41 F. (2d) 929.
5. (1892) 144 U. S. 677, 36 L. ed. 579; 12 Sup. Ct. 781.
6. (1896) 165 U. S. 526; 41 L. Ed. 813; 17 Sup. Ct. 444.
7. (1910) 220 U. S. 506, 55 L. ed. 563; 31 Sup. Ct. 480.

required by, and contrary to the regulations of the Secretary of Agriculture. At first, an equally divided court sustained the trial court;[8] but on rehearing a unanimous court reversed the trial court and found that the Secretary's regulations although they went so far as to prescribe a fee for the granting of permission to graze, did not constitute "legislation" and a violation of them for which the statute prescribed a penalty was indictable.

The question recurred again in *McKinley* v. *United States*[9] but the court very shortly affirmed a conviction of violating regulations of the Secretary of War against keeping houses of ill fame near army cantonments which regulations were made under an indeed broadly defined power of regulation.

Passing from the federal to the state constitution, it is found that the prohibitions against delegation of legislative authority are much more explicit in the state constitutions than in the federal constitution. On the whole, however, the State courts are found to be nearly as liberal as the Supreme Court in allowing the delegation of legislative authority, or, better, finding that regulations made by administrative officers and commissions are not "legislation." The difference, however, in attitude is well shown in two cases from the closely allied field involving the delegation of judicial authority. In *Union Bridge Co.* v. *United States*[10] the Supreme Court upheld the imposition of a penalty for failure to remove or repair a bridge found by the Secretary of War to be an obstruction to commerce. The Illinois Supreme Court, however, in *People* v. *Sholem*[11] condemned a statute as delegating arbitrary power to a fire marshal when it required an owner to demolish or repair a building found "for want of proper repair, or by reason of age and dilapidated condition, or for any cause [to be] especially liable to fire and [to be] so situated as to endanger other buildings or property . . . ."

As a preliminary to a discussion of the state cases it should be pointed out that however far a legislature may go in delegating regulation making power to official bodies, it cannot go so far as to rely on unofficial bodies however scientific and respectable. In *State* v. *Crawford*[12] a statute prescribed a penalty for violations of the "National Electrical Code," a set of regulations drawn up by a most respectable array of scientific societies and fire underwriters

8. (1910) 216 U. S. 614; 54 L. ed. 639; 30 Sup. Ct. 577.
9. (1918) 249 U. S. 397; 63 L. ed. 668; 39 Sup. Ct. 324.
10. (1906) 204 U. S. 364; 51 L. ed. 523; 27 Sup. Ct. 367.
11. (1920) 294 Ill. 204; 128 N. E. 377.
12. (1919) 104 Kan. 141; 177 Pac. 360.

associations, but the court held such a statute beyond the pale of legislative authority. This ruling is in line also with the cases referred to by Professor Fagg prohibiting the incorporation into state legislation of future changes of federal statute.[13] If, therefore, any state legislature should conceive the idea of providing a sanction for any code of conduct prescribed by unofficial association of airmen, its courts will probably make short work of the statute.

The varying attitude of the state courts on the validity of statutes providing for administrative regulations when violations are made penal by the statute may be seen from the following cases.

In *State ex rel Adams* v. *Burdge*[14] the state board of health was authorized and required to make rules and regulations to guard against the introduction of, to control, and to suppress contagious diseases. Pursuant to this authority, the board adopted a rule requiring the vaccination of children before admission to school. A writ of mandamus was awarded requiring the admission of the relator's children without vaccination. The court reasoned that the right or privilege of attending school was given by statute and while the state could place conditions on the enjoyment of such right or the exercise of such privilege since no statute prescribed compulsory vaccination and there was no epidemic of smallpox, the board of health could not limit this statutory right by regulation.

In sharp contrast with the attitude of the Wisconsin court stands the case of *ex parte McGee*.[15] In Kansas, the state board of health was authorized to "designate such diseases as are infectious, contagious or communicable in their nature and the state board of health is herewith authorized to make and prescribe rules, regulations and procedure for the isolation and quarantine of such diseases and persons afflicted with or exposed to such diseases as may be necessary to prevent the spread and dissemination of diseases dangerous to public health." The statute provided penalties for the violations of the rules of the board of health. In accordance with these rules the board declared venereal diseases to be infectious, contagious and communicable and provided for the isolation of both men and women at two of the state penal institutions under conditions which did not quite amount to, but came close to being incarceration. The part of the state penitentiary used for men was designated the "State Quarantine Camp for Men, at Lansing."

13. See: 1 JOUR. OF AIR LAW, pp. 202 ff.

14. (1897) 95 Wis. 390; 70 N. W. 347; 60 Am. St. R. 123; 37 L. R. A. 157.

15. 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831.

Several men were so isolated and made application for writs of habeas corpus. The applications were denied. The court said:

"While in this instance the terms of the statute are somewhat meager, it undertakes to protect public health by preventing dissemination of dangerous communicable diseases through isolation and quarantine measures, nonobservance of which is declared to be a misdemeanor; and the authority given the state board of health to specify such diseases as measure up to the standard of infectious, contagious, and communicable, and to prescribe appropriate control measures, is well sustained."[16]

In *Pierce* v. *Doolittle*,[17] a malicious prosecution case, the court found it necessary to pass upon a regulation of the state board of health requiring physicians to report cases of scarlet fever. The court upheld such a regulation adapted by virtue of a statute giving the board authority to make such rules and regulations "as it from time to time may find necessary for the preservation and improvement of public health." Violations of the rules and regulations were punished as prescribed by statute.

State v. *Atlantic Coast Line R. R. Co.*[18] comes to a startling, though proper, conclusion after a most complete and learned discussion of the subject of delegation of powers. The railroad commission was given by statute authority to fix freight and passenger rates and "to regulate the charges for storage, wharfage and demurrage under such just and reasonable conditions as said Commissioners may prescribe." Violations of the rules and regulations were subject to a penalty prescribed by statute. Demurrage rule 8, which was the subject of attack, provided:

"Cars detained or held for want of proper shipping instructions or by reason of improper or excessive loading (where loading is done by shipper) shall be subject to a demurrage charge of one dollar ($1.00) per car for each day or fraction of a day said car or cars are so detained or held. Likewise when cars are promptly loaded and shipping instructions given, the railroad agent must immediately issue the bill of lading therefor, and if said car or cars are detained or held and not carried forward within forty-eight (48) hours, except perishable articles which shall be moved within twenty-four (24) hours thereafter, said railroad shall be liable to said

16. An interesting dictum appears also in the opinion as follows: "Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated."

17. (1906) 130 Iowa 333, 106 N. W. 751, 6 L. R. A. N. S. 143.

18. (1908) 56 Fla. 617, 47 So. 969; 32 L. R. A. N. S. 639, See also: *Bailey* v. *Van Pelt*, (1919) 78 Fla. 337, 82 So. 789; in which the Florida court in another fairly elaborate opinion upheld rules and regulations of the live stock sanitary board violations of whose rules and regulations were made criminal by statute.

shipper for the payment of one ($1.00) dollar per car for each day or fraction of a day that said cars are thus detained or held."

Action was brought to recover the statutory penalty for the railroads failure to pay the shipper in accordance with the rule. In an elaborate opinion the court held both the statute and rule valid but concluded:

"While the order imposing the penalty upon which the action is brought is by the statute made prima facie evidence of everything necessary to create the liability or to require the payment of the fine or penalty as imposed, yet as the declaration shows affirmatively that the penalty was imposed for refusing to pay liabilities to the shipper incurred under the rule, which are acts of omission that are not penal violations of the rule, the penalty was not lawfully imposed and consequently no cause of action is stated."

In other words, the rule created a liability running from railroad to shipper but did not peremptorily require payment of that liability within any stated period or under any other stated conditions.

The case of *ex parte Leslie*[19] is in accord with *People* v. *Sholem*[20] and in sharp contrast with *Bailey* v. *Van Pelt.*[21] Leslie was convicted of failure to comply with an order of the live stock sanitary commission requiring him to dip his livestock. The statute provided:

"It shall be the duty of the Commission * * * to protect the domestic animals of the state from all malignant, contagious or infectious diseases of a communicable character * * *; and for the purpose it is hereby authorized and empowered to establish, maintain and enforce such protective measures and quarantine lines and sanitary rules and regulations as it may deem necessary, when it shall determine upon proper inspection that such diseases exist. It shall be the duty of said Commission to cooperate with the Live Stock Sanitary Commission and officers of other states, and with the United States Secretary of agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the livestock industry of this state against the fever-carrying tick * * *. It shall be the duty of the Live Stock Sanitary Commission of Texas to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle and other livestock from and into a quarantined district *****."[22]

The violations of the rules and regulations of the Commission were penalized. Under the statute the commission promulgated a

19. (1920) 87 Tex. Cr. R. 476, 223 S. W. 227.
20. (1920) 294 Ill. 204; 128 N. E. 377, above note 11.
21. (1919) 78 Fla. 337, 82 So. 789; above note 18.
22. Texas General Laws, 1917, ch. 60, sec. 1. The statute is not set out in the opinion at all adequately. Apparently one of the ways for a court to reach a result desired by it is to ignore disconcerting but pertinent statutes.

rule requiring the owners of livestock in certain counties to dip their livestock under the supervision of an inspector at times fixed by the Commission or the inspector. Leslie was notified on March 27 to dip his cattle between seven in the morning and one in the afternoon of March 29. The court of criminal appeal released Leslie on habeas corpus. It said:

"In conferring upon an instrument of government, such as the livestock sanitary commission, the power to make rules, the nonobservance of which constitutes a criminal offense, it is deemed necessary that the legislature define the power and place limitations upon the authority to promulgate rules, to the end that they may not be lacking in the essential elements of a law denouncing an offense * * *.

Assuming that the Legislature might make penal the failure to observe the order of the commission, it is necessary that it state in specific terms the substance of the notice in which the command was to be couched, and the time after its service within which the citizen might, by complying with it, avoid a criminal prosecution. * * * He can look to no provision of the statute, nor the proclamation, to determine whether the notice is a lawful one, but must at all times be prepared to obey it. No provision is made to accord him the right to a hearing, that he may protest against compliance with the order, or seek its modification. * * *

The noncompliance with this rule, we think cannot be made criminal. It does not state any dates or intervals when cattle shall be dipped, and delegates to its inspectors the privilege of determining such matters."

It thus appears that what fate any set of regulations will receive at the hands of the courts is difficult to prognosticate; and the varying interpretations which the courts give to rules already "established" by precedent must be exasperating to those who insist on the "rule of law."

To condemn the regulations in the first state case above discussed[23] the court relied on the rule preventing an administrative officer or body from changing existing law by regulation. This rule is fully supported by the Supreme Court of the United States.[24] Whatever this rule may mean, it is another one to harass those interested in regulating air navigation. It is hard to understand how any useful regulation, particularly those of the national government, can fail to change existing law. The body of federal law is entirely based on statute. The rights and duties protected and enjoined by

23. *State* v. *Burdge* (1897) 95 Wis. 390, 70 N. W. 347; 60 Am. St. R. 123, 37 L. R. A. 157, above note 14. See also, *ex parte Leslie* (1920) 87 Tex. C. R. 476; 223 S. W. 227, above note 19.

24. *Morrill* v. *Jones* (1882) 106 U. S. 466; 27 L. ed. 267; 1 Sup. Ct. 423; *United States* v. *George* (1912) 228 U. S. 14; 57 L. ed. 712, 33 Sup. Ct. 412. Compare: *Field* v. *Clark,* (1891) 143 U. S. 649; 36 L. ed. 294; 12 Sup. Ct. 495; *Hampton & Co.* v. *United States* (1927) 276 U. S. 394; 72 L. ed. 624, 48 Sup. Ct. 348.

federal law are entirely statutory. It is hard to see how any change introduced by regulation into this synthesis of federal right-duty relationships can fail to change existing law.

Consider an example. The Air Commerce Act gives an airman the right to fly in interstate commerce if he complies with that act and the air traffic rules just as, in Wisconsin, the children had the right to attend school. Would a regulation of the Public Health Service requiring certain sanitary devices on airplanes be void because they changed existing law? Let him answer who can.

From this review of the authorities certain observations on air regulations may be made.

Penalties for violations of regulations must be statutory. If a state commission conforms its regulations to changes in the air traffic rules and the state air statute prescribes the penalty as does the air commerce act, no difficulty will arise. If the state commission attempts to adopt changes in federal statute to state requirements and the federal statute prescribes a new penalty the state commission will be unable to conform.

Most state courts will support a state statute creating a commission with directions in it to adopt regulations to conform to federal statutes other than ones creating new penalties. It is conceivable, however, that some state courts will hold such a statute invalid on one or both of two grounds: (1) the statute does not fix a sufficiently definite rule to govern the commission in the adoption of the regulations; and (2) such a statute by a subterfuge delegates to the federal government the state's legislative power. Both of these grounds are untenable when understood; but they are just the sort of grounds that some state supreme courts seem to delight in adopting. They have the appearance of certainty, and give the courts a feeling that they are the bulwarks of constitutional liberty.

Great care must be used in drafting regulations to make them definite and certain. Since their violations will be penal, the certainty of criminal statutes will be required by the courts. All the contingencies of air navigation must therefore be carefully canvassed before adopting the regulations.

An adequate constitutional amendment providing for state and federal cooperation in the regulation of the use of the air as a medium of locomotion is urgently needed. In the absence of such an amendment, it is hoped that the collection of authorities here presented will assist in providing the necessary regulation under the existing constitution.