

1932

Prosecution of Unlicensed Flying Cases

Fred D. Fagg Jr.

Leo Freedman

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Fred D. Fagg Jr., et al., *Prosecution of Unlicensed Flying Cases*, 3 J. Air L. & Com. 515 (1932)
<https://scholar.smu.edu/jalc/vol3/iss4/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PROSECUTION OF UNLICENSED FLYING CASES

FRED D. FAGG, JR., and LEO FREEDMAN*

Forty-five states now require licenses for aircraft and airmen operating within their boundaries and, in a majority of the states, a federal license is required.¹ Unlicensed flying is made a misdemeanor and is punishable by fine, imprisonment, or both. A typical statutory provision requiring a federal license for all aircraft and airmen is that of Illinois,² as follows:

"Sec. 2. Aircraft: Construction, design, and airworthiness: Federal License: The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this State should conform with respect to design, construction, and airworthiness to the standards prescribed by the United States government with respect to navigation of civil aircraft subject to its jurisdiction, it shall be unlawful for any person to operate any aircraft within the State unless such aircraft has an appropriate effective license, issued by the Department of Commerce of the United States, and is registered by the Department of Commerce of the United States; *Provided, however,* that this restriction shall not apply to military aircraft of the United States, or public aircraft of any state, territory, or possession thereof, or to aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operation of such licensed aircraft.

"Sec. 3. Qualifications of pilots: Federal license: The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that a person engaging within this State in navigating aircraft in any form of navigation, shall have the qualifications necessary for obtaining and holding a pilot's license issued by the Department of Commerce of the United States, it shall be unlawful for any person to operate any aircraft in this State unless such person is the holder of a correct, effective pilot's license issued by the Department of Commerce of the United States: *Provided, however,* that this restriction shall not apply to those persons operating military aircraft of the United States, or public aircraft of any state, territory, or possession thereof, or operating any aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operating of such licensed aircraft.

*Mr. Freedman is a student at Northwestern University Law School.

1. *F. D. Fagg, Jr.*, "The Trend Toward Federal Licensing," 2 *JOURNAL OF AIR LAW* 542, and see also, *Fagg*, "A Survey of State Aeronautical Legislation," 1 *JOURNAL OF AIR LAW* 452.

2. An Act to Regulate Aeronautics, approved July 9, 1931; *Laws of Illinois*, Fifty-seventh General Assembly, 1931, p. 194; *Smith-Hurd Illinois Revised Statutes*, 1931, ch. 15½.

"*Sec. 19. Penalty:* Any person failing to comply with the requirements of, or violating any of the provisions of this Act, or the rules and regulations for the enforcement of this Act made by the Illinois aeronautics commission, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than ninety days or both."

While it is considered entirely desirable to adopt the federal standard, for reasons of uniformity and to effect a substantial saving in money and in administrative duties, most of the states require state registration of all federal licenses granted to aircraft and airmen operating within their boundaries—with the rather general exception of those operating in interstate commerce.³ The Illinois provision is as follows:

"*Sec. 11. Powers and duties of commission: Licenses:* * * * Within the same period (sixty days after the commission is created) all pilots and owners and/or operators of all aircraft shall register the Federal licenses of said airmen and of said aircraft in such manner as the commission may by regulation provide. * * *"

Such a requirement enables the state aviation commission to maintain its own record of licensed aircraft and pilots, for administrative purposes, and serves as a ready reference for the detection of violations. There are, however, certain problems which arise in connection with unlicensed flying operations and which flow from the adoption of the requirement of federal licenses.

Suppose, for example, that a report reaches the state aviation commission to the effect that John Doe has been seen flying a plane bearing no proper license number. A search of the commission records shows that he is not registered as a licensed pilot and that the plane identified as having been flown by him is also not registered. Assuming, of course, that the flight was purely of an intrastate character, it would appear at once that there has been a violation of the state law. There is certainly a violation of the provision requiring state registration; there may be a violation of the provisions relative to unlicensed flying.

Having examined its own files, the state commission would then get in touch with the proper district officer (usually the inspector) representing the Aeronautics Branch of the Federal Department of Commerce. If that officer reported that no effective license existed for either pilot or aircraft, the state aviation com-

3. See *E. F. Albertsworth*, "Constitutionality of State Registration of Interstate Aircraft," 3 JOURNAL OF AIR LAW 1.

mission would be under obligation to prosecute the party or parties involved for the violations mentioned.⁴

For the purpose of simplicity, let us assume that the case involves merely an act of flying by John Doe who does not possess an effective federal pilot's license, and that the plane which he uses is properly licensed and registered.⁵ The first step in the prosecution of such a case (assuming that no arrest had been made at the time of the flight) would be the filing of an information against the defendant. The information would not have to detail the specific acts constituting the offense, but would be sufficient if it charged the violation in the words of the statute.⁶ Thus, for

4. There is considerable difference in the mode of proof in federal cases due to the fact that federal suits are in the nature of admiralty proceedings, while the state statutes make violations a misdemeanor and so occasion criminal prosecutions.

According to the Air Commerce Act of 1926 (Pub. Acts—No. 254—69th Congress) Section 11a, it is unlawful "(2) to navigate any aircraft (other than foreign aircraft) in interstate or foreign air commerce unless such aircraft is registered as an aircraft of the United States; (3) to navigate any aircraft registered as an aircraft of the United States or any foreign aircraft without an aircraft certificate; . . . (4) to serve as an airman in connection with any aircraft registered as an aircraft of the United States without an airman certificate . . ." and Section 11b, "any violation of these provisions . . . shall subject the individual . . . to a civil penalty of \$500 . . . Any civil penalty imposed may be collected by proceedings in personam against the person subject to the penalty and/or in case the penalty is a lien (against the aircraft) by proceedings in rem against the aircraft. Such proceedings shall conform as nearly as may be to civil suits in admiralty . . ."

In the case of federal action to punish an offender who has failed to procure a license either for himself or for his aircraft, the prosecution would be hampered by no technicalities of evidence present in common law proceedings. The rules for the federal procedure are prescribed by the United States Supreme Court and approach the system of equity. Hence, the libel need not state a fact which constitutes a matter of defense, or a ground of exception to the operation of the law upon which the libel is founded. *Cargo of Brig. Aurora v. United States*, 7 Cranch 382 (1813). "In the cases of *The Samuel* (1 Wheat. 9) and *The Hoppet* (7 Cranch 389), it was observed by this court, that technical niceties of the common law, as to informations, which are unimportant in themselves, and stand only on precedents, are not regarded in admiralty informations; the material inquiry in the latter cases being, whether the offense is so set forth, as clearly to bring it within the statute upon which the information is founded." *The Merino*, 9 Wheat. 391 (1824).

5. It is to be noted that the Illinois Act makes the *operation* of unlicensed aircraft a misdemeanor. This is broader than the mere *navigation* of unlicensed aircraft in that, under the former terminology, it is possible to prosecute the *owner* of the aircraft as well as the *user*, and makes it possible to get at the party who is financially responsible.

6. In the case of practicing medicine without a license, an information charging "unlawfully and feloniously practicing a system of treating sick . . . without then and there having a valid unrevoked certificate authorizing him to practice . . ." was held sufficient without naming the particular persons treated or the place where the offense occurred: *People v. Cochran*, 56 Colo. App. 394, 205 P. 473 (1922); *People v. Raitledge*, 172 Cal. 401, 156

a violation within the City of Chicago, the information would state that on a certain specified date, "John Doe did unlawfully operate an aircraft within the limits of the City of Chicago, State of Illinois, without at the time being the holder of a correct, effective pilot's license issued by the Department of Commerce of the United States, in accordance with Section 3 of an Act to Regulate Aeronautics, approved July 9, 1931, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

At the trial, it becomes the duty of the prosecution to establish the evidence necessary to obtain conviction. At the outset, the act of operating aircraft by John Doe must be shown. The fact of operation could be proved from the testimony of witnesses—either civilian witnesses or a state police officer or officers. The defendant would be identified as the party doing the operating. The next obligation on the prosecution would seem to be to establish the unlawfulness of the operation—the fact that John Doe held no correct, effective pilot's license at the time the flight occurred. Therefore, it becomes necessary to consider how this fact can be shown by the prosecution, and to what extent, if any, proof is necessary. The fact to be demonstrated, if full proof be re-

P. 455 (1916); *People v. T. Wah Hing*, 47 Cal. App. 327, 190 P. 662 (1920); *People v. Mash*, 235 Ill. App. 314 (1925); *People v. Walden*, 317 Ill. 524, 148 N. E. 287 (1925); *People v. Frith*, 157 App. Div. 492, 142 N. Y. S. 634 (1913); *State v. Hickok*, 90 Wis. 161, 62 N. W. 934 (1895); *State v. Hopkins*, 54 Mont. 52, 166 P. 304 (1917). But see *People v. Devinny*, 173 N. Y. S. 623, 105 Misc. Rep. 555 (1919), which was reversed, upon appeal, in 227 N. Y. 397, 125 N. E. 543 (1919).

If any exceptions be contained in the statute, they must be negated in the information. *People v. Talbot*, 322 Ill. 416, 153 N. E. 693 (1926). No allegations need be made, however, concerning a proviso as that is a matter of defense. As expressed in *Elkins v. State*, 13 Ga. 435 (1853), "The Indictment must in its averments bring the accused within the operation of law for a violation" so that the defendant will be denied protection under the exceptions. Or, as in *State v. Smith*, 157 N. C. 578, 32 S. E. 855 (1911) where the court quoted *Joyce* on Indictments, Sec. 279, "The general rule as to exceptions, provisos, and the like is that when the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense." It is necessary to negative such descriptive exceptions, even though the burden of proof to establish them may rest upon the defendant: *People v. Devinny*, 227 N. Y. 397 (1919); *State v. Fenter*, 204 S. W. 733 (Mo. 1918); *State v. Kirkpatrick*, 88 W. Va. 381, 106 S. E. 887 (1921). Some cases hold that if the exception is contained in a separate clause of the statute they may be omitted in the indictment, but, in any event, the defendant must show his case comes within the exceptions to avail himself of its benefits: *United States v. Nelson*, 29 F. 202 (1886).

quired, is that the defendant was not the possessor of a proper license—which can be shown only by the non-existence of a license issued to the defendant, as determined by a search of the records and files. These records and files are maintained by the Aeronautics Branch of the Federal Department of Commerce at Washington and are in the custody of a Chief of Registration and a Supervisor of Files. The records maintained by the district representative or inspector—located, possibly, in the state in which the violation occurs—may or may not be complete. They cannot be considered as the final source of information. The proper source of information, then, is at the Washington, D. C., office. It is not feasible to bring the custodian of the federal records to Chicago, or elsewhere, to testify as to the non-existence of a license for John Doe. Consequently, it becomes important to determine whether or not the prosecution may offer as evidence a certificate from the federal official showing that no effective license is held by the defendant.⁷

Under common law principles, a custodian of records had no authority to certify that a specific document did not exist in his office, or that a particular entry was not to be found in a register.⁸ Instead, the testimony of the custodian, or the party making the

7. According to English common law, an authority to certify copies was not to be implied from the nature of a custodian of documents. Express authority was necessary, either by means of a special or general order or by statute. In the United States, however, a general principle was evolved to the effect that "the lawful custodian of a public record has, by implication of his office, and without express order, an authority to certify copies." *Wigmore*, Evidence (2nd Ed. 1923), Sec. 1677. Yet, "it was settled that no custodian had authority to certify any less than the entire and literal terms of the original,—and in short, a copy in the strict sense of the word." *Wigmore*, supra, Sec. 1678. In these cases, it is to be noted, the attempt is to show that a certain certificate is on record—not the absence of such a certificate.

To meet the difficulty of setting out the complete terms of the original, statutes have been passed which allow the certified copy to contain the substance of the original. Relative to federal documents, an important enactment provides that, "copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively shall be admitted in evidence equally with the originals thereof." *Rev. St. 1878*, Sec. 882, *Code of Laws of the United States* (1926), Sec. 661, p. 930. An Illinois statute contains a similar provision with respect to state or territorial records, *Smith-Hurd Illinois Revised Statutes*, 1931, Ch. 51, Sec. 56.

8. *Wigmore*, supra, Sec. 1678. There is, however, a minority doctrine, so far as certificates of the land-office are concerned, to the effect that certificates of the officers of the land office may be admitted to show that no warrant or survey, return of survey, or no patent has issued, nor can be found in their office. *Stokers v. Reese*, 4 Pa. 129, 131 (1846); *Ruggles v. Gaily*, 2 Rawle (Pa.) 236; and *Weidman v. Kohr*, 4 Serg. & R. (Pa.) 174 (1825). See, also, *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54 (1855).

search, was usually required. Such evidence, of course, might be contested as oral evidence as to the contents of a documentary original contrary to the hearsay rule. But since the assumption of a fulfilment of duty is the foundation of the exception to the hearsay rule, "it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur; or, to put it in another way, the record taken as a whole, is evidence that the matters recorded, and those only, occurred."⁹

"The certificate of a custodian that he has diligently searched for a document or an entry of a specified tenor and has been unable to find it *ought* to be usually as satisfactory for evidencing its non-existence in his office as his testimony on the stand to this effect would be; and accordingly by statute in a few jurisdictions custodians' certificates of this sort have been expressly made admissible."¹⁰ Thus, statutes have been passed in at least fifteen states which are either general or special in nature and which authorize the certification of non-existence of a record.¹¹

9. *Wigmore*, supra, Sec. 1633. "Convenience decrees the admittance of testimony by one who has examined records that no record of a specific tenor is there contained instead of producing the entire mass for perusal in the courtroom." Sec. 1230, and *Wharton*, Criminal Evidence, Sec. 160 a. These generalizations are substantiated by case decisions. In *Hill v. Bellows*, 15 Vt. 727 (1843), a certificate of the town clerk that a certain person had conveyed no land was held to be incompetent evidence. The proper proof would have been the statement under oath of the town clerk or some person who had examined the records. See, also, *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54 (1855), *City of Beardstown v. City of Virginia*, 81 Ill. 541 (1876) and *Mannus-Dewall v. Smith*, 139 Okl. 195, 281 P. 807 (1929).

In 22 C. J. at page 1006 it is said: "Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence." In Section 1283, the author further says: "That documents or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record, or, it is usually considered, by that of any other competent person. Some courts have held, however, that the custodian when accessible is the only competent witness." Quoted in *Mannus-Dewall v. Smith*, supra,

10. *Wigmore*, supra, Sec. 1678. Italics ours. See footnote 11 for list of state provisions.

11. COLORADO—(Public records).

"That the official certificate of the head officer or acting head officer or duly appointed deputy of any of the executive departments of the government of the State of Colorado as to the contents of or any fact or matter shown by its records in his department as well as to facts not shown by the records of said department and duly certified to as not existing in the records of said department shall be received and held in all *civil cases* as competent prima facie evidence of the facts contained therein, and of the non-existence of such facts as are duly certified to as

The majority refer to particular records and would possibly not authorize certification of the non-existence of aircraft or airmen licenses. None of the statutes have any specific reference to federal records. The existence of these statutes would by no means

not existing in the records of such department." (Italics ours.) *Compiled Laws of Colorado, 1921, Sec. 6551.*

IOWA—(Public records).

"Certificate of a public officer that he has made diligent and ineffectual search for a paper in his office is of the same efficacy in all cases as if such officer had personally appeared and sworn to such fact." (Italics ours.) *Code of Iowa, 1927, Ch. 494, Sec. 11301.*

MICHIGAN—(Legal custodian's record).

"Whenever any officer to whom the legal custody of any paper or document or record shall belong shall certify that he has made diligent examination in his office for such paper, document or record, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified in all causes, matters and proceedings in the same manner and with like effect as if such officer had testified to the same in the court or before the officer before whom such cause, matter or proceeding is pending." (Italics ours.) *Compiled Laws of Michigan, 1929, Ch. 266, Sec. 14176.*

MINNESOTA—(Legal custodian's record).

"The certificate of any officer to whom the legal custody of any instrument belongs, stating that he has made diligent search for such instrument and that it cannot be found, shall be prima facie evidence of the fact so certified to in all cases, matters and proceedings." (Italics ours.) *General Statutes of Minnesota, 1923, Sec. 9868.*

MISSISSIPPI—(Legal custodian's record).

"A certificate under his hand and official seal by an officer to whom legal custody of a record or paper belongs . . . shall be admissible in evidence . . ." *Mississippi Code of 1930, Ch. 28, Sec. 1566.*

NEBRASKA—(Public records).

Identical with Iowa provision, supra. *Compiled Statutes of Nebraska, 1929, Ch. 20, Art. 12, Sec. 1282.*

NEW YORK—(Legal custodian's record).

"Where the officer to whom the legal custody of a paper belongs certifies under his hand and official seal that he has made diligent examination of his office for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer personally testified to same." *Laws of New York, Official Ed. of Civil Practice Acts, 1921, Sec. 366.*

NORTH DAKOTA—(Board of Dental Examiners).

"A certificate of the secretary under the seal of the board stating that any person is or is not a registered dentist shall be prima facie evidence of such fact." *Compiled Laws of North Dakota, 1913, Art. 17, Sec. 513.*

OHIO—(State Medical Board).

"A certificate signed by the secretary of state medical board, to which is affixed the official seal of the said state medical board to the effect that it appears from the records of the state medical board that no such certificate to practice medicine or surgery, or any of its branches, in the State of Ohio has been issued to any such person or persons specified . . . shall be received as prima facie evidence of the record of such board in any court or before any officer of this State." *Throckmorton's Ann. Code of Ohio, 1930, Sec. 12694.*

RHODE ISLAND—(State Board of Pharmacy).

"A certificate of the secretary of the State Board of Pharmacy and registrar of pharmacists as to any matter of record of said board, as to which said secretary may be called upon to testify in his official capacity shall be admissible evidence in any court of this state of the existence or

eliminate the possibility of introducing oral evidence of the non-existence of a particular document. Instead, they make possible—in certain specified cases—an alternate method which may be selected according to the convenience of furnishing one or the other type of evidence.¹²

Realizing, then, the difficulty of proving the non-existence of a federal airman's license for John Doe by direct testimony of the custodian of the federal records, and realizing that, in Illinois and in the majority of the states, no statute permits the establishing of such proof by certification, it remains that we determine whether or not the prosecution has the duty to make such a showing, or whether, perchance, the burden of proof¹³ is upon the defendant in this particular. Since no cases exist which deal with aircraft or airmen licenses, resort must be had to cases dealing with other license questions.

The assertion, in the information, that the defendant operated an aircraft without possessing a proper license is clearly a negative averment. And, as this negative matter is a part of the

non-existence of such matter." *General Laws of Rhode Island, 1923, Tit. XVI, Ch. 169, Sec. 2367.*

SOUTH DAKOTA—(Board of Dental Examiners).

"Such records or a transcript . . . or a certificate of the secretary stating that any person is or is not a legally licensed or registered dentist . . . shall be prima facie evidence in all courts of this state of the facts therein." *Compiled Laws of South Dakota, 1929, Sec. 7749.*

TENNESSEE—(Public Records).

Identical with Iowa, *supra*. *Code of Tennessee, 1932, Sec. 9752.*

TEXAS—(Corporations).

"A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter." *Revised Civil Statutes of Texas, 1925, Art. 1535.* See, also, the penalty provision, *General Laws of Texas, 1925, p. 264 (H. B. 417).*

VERMONT—(Corporations).

"A certificate by the secretary of state that the records do not contain the name of an organized corporation . . . shall be prima facie evidence that such corporation ceased to exist." *General Laws of Vermont, 1917, Sec. 1050.*

WISCONSIN—(Legal custodian's records).

Almost identical with Michigan provision, *supra*. *Wisconsin Statutes, 1929, Ch. 327, Sec. .09.*

12. *State ex rel. Leonard v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (1905); *Jones v. City of Macon*, 135 S. E. 517 (Ga. App. 1926).

13. As to the double meaning of "burden of proof," see *Wigmore, Evidence*, Sec. 2485-2490; and *Chas. T. McCormick*, "Charges on Presumptions and Burden of Proof," 5 No. Car. Law Rev. 291, 305 (1927).

For additional text authority upon the subject of negative averments and burden of proof, see *Wharton, Criminal Evidence* (10th ed., 1912), Sec. 341-2; *Chamberlayne, Modern Law of Evidence* (1911), Sec. 982-4; *Bishop, Statutory Crimes* (3rd ed. 1901), Sec. 1051-3; *Greenleaf, Evidence* (15th ed. 1892), Sec. 79.

state's case against the defendant, it must in some manner be made to appear at the trial. The difficulty may be aided, in this respect, by presumption. Bishop has stated: "One of the presumptions is, that what is common continues; another, that a fact the existence of which is once shown, continues. Therefore, where the general law withholds from the mass of the people the right to make the particular sale in controversy, and permits it only to exceptional persons, of every one of whom it is certainly true that at some time he was not allowed to do it, the *prima facie* presumption is double: first, that the instance in controversy accords with what is general; and secondly, that as at one time the defendant had no license he has none now. Hence, if he has a license, he must show it."¹⁴ "To adopt the phraseology of the Supreme Court of Illinois, it has often been held that 'when a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact whether the proposition be affirmative or negative.' Thus where one is accused of doing an act which would be unlawful unless the doer has received a special authority permission of law, the government may properly allege that he has done the act * * * without license or authority in law. When the act itself is proved, it may then be required of the defendant that he himself exhibit and prove his license and authority;—the burden of evidence being shifted to him for that purpose. *The short reason for this requirement is that license or authority is a fact easy for him to prove and difficult for the prosecution to disprove.*"¹⁵

The typical air licensing statute is like that mentioned in the foregoing quotations. The act of operating aircraft is unlawful *unless* the craft and the airman be properly licensed. Hence, in the air license cases, it would seem that the burden of proving the existence of a license would be on the defendant.¹⁶ There

14. *Bishop*, supra, Sec. 1051. Relative to presumptions, see *Chas. T. McCormick*, "Charges on Presumptions and Burden of Proof," supra.

15. *Chamberlayne*, supra, Sec. 983. (Italics ours.)

16. By statute, in some states, the burden of proving the license is on the defendant. "In every proceeding under paragraph (a) of this section an averment that the defendant at the time of the alleged offense was without the required certificate of registration, shall be taken as true, unless disproved by the defendant." *State v. Etzenhouser*, 16 S. W. (2d) 656 (Mo. 1929—Practice of Optometry); and see *State v. Rosasco*, 103 Or. 343, 205 P. 290 (1922—liquor).

Court decisions, to the same effect, are to be found in *State v. Schmail*, 25 Minn. 370 (1879—liquor); *Durfee v. State*, 53 Neb. 214, 73 N. W. 676 (1897—liquor); and *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928—liquor).

are at least three reasons given for placing the burden on the defendant: (1) Since the act of flying is unlawful unless one be possessed of a license, anyone who operated aircraft would be *prima facie* committing an unlawful act and must demonstrate his special authority.¹⁷ (2) The subject matter of the negative averment—possession or non-possession of the license—lies peculiarly within the knowledge of the defendant;¹⁸ and (3) The difficulty of the state in proving the negative averment, especially when a public interest is involved.¹⁹ Objection has been made to the first reason advanced on the ground that, by a parity of reasoning it could be said to be unlawful for one to vote unless he were an American citizen. A most excellent statement of the rationale of the problem occurs in the case of *Rex v. Turner*,²⁰ wherein Bayley, J., says:

"I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative. And if we consider the reason of the thing in this particular case, we cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification. If, indeed, it is to be presumed, that he must be acquainted with the defendant, and with his situation or habits in life, then he might give general evidence what those were; but if, as it is more probable, he is unacquainted with any of these matters, how is he to form any judgment whether he is qualified or not, from his appearance only? Therefore, if the law were to require that the witness should depose negatively to these things, it seems to me, that it might lead to the encouragement of much hardihood of swearing. The witness would have to depose to a multitude of facts; he must swear that the defendant has not an estate in his own or his wife's right, of a certain value; that he is not the son and heir apparent of an esquire, etc.; but how is it at all probable, that a witness should be likely to depose with truth to such minutiae? On the other hand, there is no hardship in casting the burden of the affirmative proof on the defendant, because he must be presumed to know his own qualification, and to be able to prove it. If the defendant plead to the information, that he is a qualified person, and require time to substantiate his plea in evidence, it is a matter of course for the justices to postpone the hearing, in order

17. *Chamberlayne*, supra, Sec. 983, note 7.

18. *Greenleaf*, supra, Sec. 79. See criticism of this ground, *Wigmore*, supra, Sec. 2486.

19. *Rex v. Turner*, 5 M. S. 206 (1816—game-law), particularly the opinion of Lord Ellenborough; *People v. Ross*, 60 Cal. App. 163, 212 P. 627 (1922—concealed weapons); *Smith v. Commonwealth*, 196 Ky. 188, 244 S. W. 407 (1922—liquor); and *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 380 (1840—liquor).

20. 5 M. & S. 206 (1816—game-law).

to afford him time, and an opportunity of proving his qualifications. But if the onus of proving the negative is to lie on the other party, it seems to me, that it will be the cause of many offenders escaping conviction. I cannot help thinking, therefore, that the onus must lie on the defendant, and that when the prosecutor has proved everything, which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as matter of defense."

The state, of course, must prove the act of flying by the defendant²¹ but, having done that, the burden, according to the rule in the great majority of states, is upon the defendant.²²

21. *People v. Gillett*, 243 Ill. App. 41, 51 (1926—securities law); *Smith v. Commonwealth*, 196 Ky. 188, 244 S. W. 407 (1922—liquor); *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928—liquor).

22. FEDERAL—*Farone v. United States*, 259 F. 507 (1919—liquor).

ALABAMA—*Porter & Co. v. State*, 58 Ala. 66 (1877—dealers in pistols, bowie and dirk knives); *Isbell v. State*, 17 Ala. App. 465, 86 S. 169 (1920—two-horse wagon on street); *Samples v. State*, 19 Ala. Appl. 478, 98 S. 211, aff'd 210 Ala. 544 (1923—practicing dentistry).

ARKANSAS—*Clark v. State*, 155 Ark. 16, 243 S. W. 865 (1922—liquor).

CALIFORNIA—*People v. Boo Doo Hong*, 122 Cal. 606, 55 P. 402 (1898—practicing medicine); *People v. T. Wah Hing*, 47 Cal. App. 327, 190 P. 662 (1920); *People v. Goscinsky*, 52 Cal. App. 62, 198 P. 40 (1921—practicing medicine); *People v. Ross*, 60 Cal. App. 163, 212 P. 627 (1922—concealed weapon); *People v. Quarez*, 196 Cal. 404, 238 P. 363 (1925—concealed weapons by foreign-born).

ILLINOIS—*Noecker v. People*, 91 Ill. 468 (1879—liquor); *People v. Nedrow*, 16 Ill. App. 192 (1884—pharmacy); *Williams v. People*, 121 Ill. 84, 11 N. E. 881 (1887—practicing medicine); *Kettles v. People*, 221 Ill. 221, 77 N. E. 472 (1906—practicing dentistry); *Abbau v. Grassie*, 262 Ill. 636, 104 N. E. 1020, Ann. Cas. 1915 B. 414 (1914—contractor claiming mechanic's lien—cited for important dictum); *People v. Montgomery*, 271 Ill. 580, 111 N. E. 578 (1916—sale of drugs); *People v. Gillett*, 243 Ill. App. 41 (1926—securities law); *People v. Talbot*, 322 Ill. 416, 153 N. E. 693 (1926—liquor); *People v. Hollenbeck*, 322 Ill. 443, 153 N. E. 691 (1926—liquor); *People v. DeGeovanni*, 326 Ill. 230, 157 N. E. 195 (1927—liquor).

INDIANA—*Benham v. State*, 116 Ind. 112, 18 N. E. 454 (1888—medicine).

IOWA—*State ex rel. Woodbury Co. Anti-Saloon League v. Clark*, 189 Ia. 492, 178 N. W. 419 (1920—House of prostitution—want of knowledge).

KENTUCKY—*Smith v. Commonwealth*, 196 Ky. 188, 244 S. W. 407 (1922—liquor).

MASSACHUSETTS—*Commonwealth v. McCarthy*, 141 Mass. 420, 6 N. E. 102 (1886—billiard table).

MINNESOTA—*State v. Schmail*, 25 Minn. 370 (1879—liquor); *State v. Bach*, 36 Minn. 234, 30 N. W. 764 (1886—liquor).

MISSOURI—*State v. Liscomb*, 52 Mo. 32 (1873—liquor); *State v. Parsons*, 124 Mo. 436, 27 S. W. 1102 (1894—peddling); *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045 (1895—garbage removal); *State v. Quinn*, 170 Mo. 176, 67 S. W. 974 (1902—liquor); *State v. Etzenhouser*, 16 S. W. (2d) 656 (1929—optometry).

NEBRASKA—*Durfee v. State*, 53 Neb. 214, 73 N. W. 676 (1897—liquor).

NEW HAMPSHIRE—*State v. Simons*, 17 N. H. 83 (1845—liquor); *State v. McGlynn*, 34 N. H. 422 (1857—liquor); *Spilene v. Salmon Falls Mfg. Co.*, 79 N. H. 326, 108 A. 808 (1920—employer's Liab. Act). For mention of the

While the argument *ab inconvenienti* is a sound one,²³ there are some decisions which hold that it must be used sparingly.²⁴ That is, there is insistence upon the point that, where the proof is equally accessible to both parties, the state must furnish proof even if the defendant could more easily offer his evidence. However, it is recognized that the "convenience" rule is particularly applicable to prosecutions for practicing some profession or following some calling without the license provided therefor by law.²⁵

There exists, or has existed, some authority to the contrary

conflicting New Hampshire opinions, see *Wigmore*, Evidence, Sec. 2486, Note 4, and cases cited.

NEW JERSEY—*State v. City of Camden*, 48 N. J. L. 89, 2 A. 668 (1886—liquor).

NEW YORK—*People v. Rontney*, 4 N. Y. S. 235, aff'd. 117 N. Y. 624 (1889—pharmacy—dictum); *People v. Maxwell*, 83 Hun (N. Y.) 157, 31 N. Y. S. 564 (1894—liquor).

NORTH CAROLINA—*State v. Morrison*, 14 N. C. 299 (1831—liquor); *State v. Emery*, 98 N. C. 668, 3 S. E. 636 (1887—liquor); *State v. Morrison*, 126 N. C. 1123, 36 S. E. 329 (1900—selling pianos and organs); *State v. Valley*, 187 N. C. 571, 122 S. E. 373 (1924—procuring laborers); *Speas v. Merchants' Bk. & Trust Co. of Winston-Salem*, 188 N. C. 524, 125 S. E. 398 (1924—usury); *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928—possession of liquor, apart from license). See note on this last case by C. T. McCormick, in 7 No. Car. L. Rev. 41 (1928).

OREGON—*State v. Rosasco*, 103 Or. 343, 205 P. 290 (1922—liquor).

PHILIPPINES—*U. S. v. Gonzales*, 10 Phil. 66 (1908—opium smoking).

SOUTH CAROLINA—*Gueing v. State*, 1 McCord (S. C.) 573 (1822—liquor); *Information against Oliver*, 21 S. C. 318, 6 Am. Rep. 681 (1884—publishing newspaper); *State v. Deadwyler*, 133 S. C. 75, 130 S. E. 332 (1925—medicine).

TEXAS—*Bell v. State*, 62 Tex. Cr. R. 242, 137 S. W. 670, 36 L. R. A. N. S. 98, Ann. Cas. 1913 C. 617 (1911—liquor).

UTAH—*Salt Lake City v. Robinson*, 40 Utah 448, 125 P. 657 (1912—liquor).

WEST VIRGINIA—*State v. Horner*, 52 W. Va. 373, 48 S. E. 89 (1903—pharmacy).

WISCONSIN—*Piper v. State*, 202 Wis. 58, 231 N. W. 162 (1930—medicine).

ENGLAND—*Rex v. Smith*, 3 Bur. 1475 (1764—pedler); *Rex v. Hoseason*, 14 East 604, 606 (1811—liquor); *Rex v. Turner*, 5 M. & S. 206 (1816—hunting game); *Rex v. Hanson*, 4 B. & Ald. 519, 106 Eng. Rep. 1027 (1821—liquor); *Apoth. Co. v. Bentley*, Ry. & M. N. P. C. 159, 171 Eng. Rep. 978 (1824—apothecary).

"Onus of Proof of Being Licensed," 73 The Solicitors' Journal 183 (1929).

See note, 36 L. R. A. N. S. 98 (1911); *Jones*, Evidence, Sec. 497, note 8 for list of state cases, and *Bishop*, Statutory Crimes, Sec. 1052, for a fairly complete list of state authorities. Relative to license cases in civil actions, see note, 8 L. R. A. N. S. 1238 (1907).

The general rules, previously stated, do not apply where the state might establish the same fact by secondary evidence. *Wharton*, Criminal Evidence, Sec. 341.

23. See footnote 19, *supra*.

24. *People v. Frey*, 165 Cal. 140, 145; 131 P. 127, quoted in *People v. Quarez*, 196 Cal. 404, 238 P. 363, 366 (1925); *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 381 (1840).

25. *People v. Frey*, *supra*.

which places the burden, or some burden, upon the state. In Kansas, there are opinions to the effect that the state must establish a *prima facie* case and prove by competent evidence that the defendant had no permit at the time of the commission of the alleged offense.²⁶ The theory of these cases is that, since proof is equally available to both parties, there is no hardship placed upon the state. Thus, in one case,²⁷ the court says:

"It may be that, where the knowledge of the existence of the license, and the proof of the same, are peculiarly within the possession of the defendant, that the rules of evidence would require that the defendant should produce the license; but where the reason upon which such rule is founded fails, the rule itself must fail—that is, where the knowledge of the existence or non-existence of the license, and the proof of such existence or non-existence, can be obtained as easily by the prosecution as by the defense, it should certainly devolve upon the prosecution to produce such proof, whenever the non-existence of the license is essentially necessary to the case of the prosecution. This view of the question, we think, is in accordance with the later and better-reasoned decisions."

For some reason, probably based upon convenience, the old statute was amended in 1885 so as to place the burden upon the defendant. The new provision reads:

"In prosecutions under this act, by indictment or otherwise, . . . it shall not be necessary in the first instance for the state to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes . . ."²⁸

Since the legislative change, and the amendment has been upheld, it is no longer necessary in Kansas for the state to make out a *prima facie* case.²⁹

Commonwealth v. Thurlow,³⁰ a Massachusetts case, held that where the county commissioners were required by law to keep a record of liquor licenses and where the record was equally accessible to both parties, the state must produce evidence as to the non-existence of the license. Subsequently, a statute provided: "A defendant in a criminal prosecution relying for his justification upon a license, appointment, admission as an attorney at law or authority, shall prove the same, and until so proved the presumption shall be that he is not so authorized."³¹

26. *The Territory v. Reyburn*, 1 Kans. 551 (1860—ferry license); *State v. Kuhuke*, 26 Kan. 405 (1881—liquor); *State v. Schweiter*, 27 Kan. 499 (1882—liquor); *State v. Nye*, 32 Kan. 201, r P. 134 (1884—liquor).

27. *State v. Kuhuke*, supra, p. 409.

28. *Revised Statutes of Kansas*, 1925, Ch. 21, Art. 21, Sec. 2121.

29. *State v. Crow*, 53 Kan. 662 (1894—liquor).

30. *Commonwealth v. Thurlow*, 24 Pick (Mass.) 374 (1840).

31. *General Laws of Mass.*, 1921, Ch. 278, Sec. 7.

A dissenting opinion in a Texas liquor case strongly urged that the burden should rest upon the state,³² but the majority held otherwise. However, in a later case,³³ the court held that a statute did place the burden of proof upon the state. In that case, which involved the practice of medicine without a license, the statute provided:

"The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate."³⁴

In explaining its decision, the court said:

"There was no evidence introduced to the effect that appellant's authority had not been registered as required by the statute. It is not unlawful to practice medicine, but it is unlawful to do so without compliance with the statute. The offense is the practice of medicine without compliance with the statute, and the burden is upon the state to prove the offense. There will be found decisions of other states holding, under certain circumstances, the burden of making proof of authority to practice medicine is not upon the state because a fact within the peculiar knowledge of the accused. 30 Cyc. 1567. Such is not the case here, as the statute itself prescribes a rule of evidence making the absence of the record prima facie evidence of the want of such certificate, and requiring that the certificate be recorded in the county in which the accused is residing at the time renders it easy for the state to make the proof of records of the particular county. The failure to make the proof in this instance characterizes the evidence as insufficient."³⁵

The statute of itself imposes no obligation upon the state; it merely codifies the common law principle relative to oral evidence of the non-existence of a license. The theory of *Denton v. State*,³⁶ consequently, must be based, like the Kansas cases, upon the fact that no hardship is thereby placed upon the state. The *Denton* case does not mention *Bell v. State*,³⁷ decided by the same court in 1911, nor does it refer to the Texas statute which provides that

"When the facts have been proved which constitute the offense, it devolves

32. *Bell v. State*, 62 Tex. Cr. R. 242, 137 S. W. 670, 36 L. R. A. N. S. 98, Ann. Cas. 1913C, 617 (1911). Dissenting opinion of Davidson, P. J.

33. *Denton v. State*, 83 Tex. Cr. R. 67, 201 S. W. 183 (1918—medicine) followed in *Reum v. State*, 84 Tex. Cr. R. 225, 206 S. W. 523 (1918—medicine). See, also, *Dozier v. State*, 62 Tex. Cr. R. 258, 137 S. W. 679 (1911—liquor); *Miller v. State*, 77 Tex. Cr. R. 258, 178 S. W. 367 (1915—liquor).

34. *Revised Crim. Statutes of Texas*, 1925, Title 12, Ch. 6, Art. 739.

35. *Denton v. State*, supra, p. 184.

36. Note 33 supra.

37. Note 22, supra.

upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission."³⁸

The statute is obviously ambiguous, but was the basis for the earlier decision in *Bell v. State*. If the decision in the *Denton* case rests upon the "lack of hardship" theory, it could not serve as precedent for an unlicensed flying case because there the state has no easy method of presenting proof, due to the fact that the license records are maintained at Washington.

The early Wisconsin cases held that the state must show by presumptive evidence that the defendant had no license,³⁹ but, by dictum at least, the later cases are in line with the majority of states in placing the *onus probandi* upon the defendant.⁴⁰

There is an additional reason, in the aviation license cases, for placing the burden upon the defendant. The aviation statutes almost uniformly contain a provision which requires the possession and display of licenses. A typical statute reads as follows:

"Sec. 4. *Possession and display of licenses:* The certificate of the license required for pilots shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, or any peace officer of this State, any authorized official or employee of the Illinois aeronautics commission or any official, manager, or person in charge of any airport in this State upon which he shall land, or upon the reasonable request of any other person. The aircraft license must be carried in the aircraft at all times and must be conspicuously posted therein where it may be readily seen by passengers or inspectors; and such license must be presented for inspection upon the demand of any passenger, any peace officer of this State, any authorized official or employee of the Illinois aeronautics commission or any official, manager, or person in charge of any airport in this State upon which it shall land, or upon the reasonable request of any other person."⁴¹

It would, of course, be possible to prosecute for failure to properly display a license, but, if that were the only charge and if the defendant could show that he possessed a license but had

38. *Revised Criminal Statutes of Texas*, 1925, Title I, Ch. 3, Art. 46; *White's Annotated Penal Code of Texas*, 1901, Title I, Ch. 3, Art. 52, Sec. 81; *White's Code of Criminal Procedure*, 1900, Title VIII, Ch. 7, Art. 796, Sec. 1058, note 6.

39. *Mehan v. State*, 7 Wis. 670 (1859—liquor); *Hepler v. State*, 58 Wis. 46, 16 N. W. 42 (1883—liquor).

40. *Ex parte Kreutzer*, 187 Wis. 463, 204 N. W. 595 (1925—Blue Sky Law); and particularly *Piper v. State*, 202 Wis. 58, 231 N. W. 162 (1930—practicing medicine).

41. An Act to Regulate Aeronautics, approved July 9, 1931; *Laws of Illinois*, Fifty-seventh General Assembly, 1931, p. 194; *Smith-Hurd Illinois Revised Statutes*, 1931, Ch. 15½.

merely neglected to display or carry it, the court would be pre-disposed to be lenient with him. The display of licenses is required for general convenience, but the operation of aircraft without plane and pilot's licenses is the principal evil to be curbed. Consequently, it is desirable to base a prosecution upon the unlicensed flying rather than upon any technicality relative to display of license.

Since it is usually impossible to introduce a certificate of the non-existence of a license, and since it is virtually impossible to bring the federal custodian of aviation licenses into a case, it would seem desirable to obviate the difficulty by additional legislation—despite the fact that the great majority of states, in other license cases, place the burden of proving a license upon the defendant. An additional paragraph could be added to the "display" requirement, to read as follows:

"In any criminal prosecution under any of the provisions of this act, a defendant who relies for his justification upon a license of any kind shall have the burden of proving that he is properly licensed, or is the possessor of a proper license, as the case may be."