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Editorials

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EDITORIALS

AMERICAN LAW INSTITUTE TORTS RESTATEMENT

At the Eleventh Annual Meeting of the American Law Institute, held in Washington, May 4-6, 1933, the subject of aerial trespass was again under discussion as a result of Section 1038 of Tentative Draft No. 11. Section 1002, contained in Tentative Draft No. 7, has been referred to previously.¹

The proposed new section reads as follows:

"1038. TRAVEL THROUGH AIR SPACE.

An entry above the surface of the earth, on the air space in possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted

- (a) for a legitimate purpose, and
- (b) in a reasonable manner, and
- (c) at such height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it."

The presentation of the Reporters² explains that "the possessory interest in land, an unprivileged invasion of which is a trespass, includes not only the surface of the earth and the space beneath it, *but also the space above it.*"³ The Reporters also made clear that the members of the American Bar Association Committee on Aeronautical Law have objected to this statement as a statement of the common law, and that an opportunity will be afforded that Committee to present its objections to the group dealing with this portion of the Restatement of Torts.

The viewpoints of these two groups would seem to be so definitely opposed that little can be expected by way of another joint meeting.⁴ However, the Final Draft will be awaited with considerable interest.

F. D. F.

NORTH CENTRAL REGIONAL MEETING AT BISMARCK

The first regional meeting of the North Central Group of the National Association of State Aviation Officials was held in Bis-

1. See 2 JOURNAL OF AIR LAW 382.

2. Professor Francis H. Bohlen, University of Pennsylvania Law School, is Reporter for Torts and Professor Edward S. Thurston, Harvard University Law School, is Reporter for this particular chapter.

3. Italics ours.

4. The American Law Institute group seems to have relied almost entirely upon Professor Bohlen's article, "Surface Owners and the Right of Flight." Other valuable contributions on this subject, since 1931, have seemingly been overlooked by the Reporters.

marck, North Dakota, May 1 and 2, 1933. The meeting was called to order by Hon. Fay Harding, Regional Vice-President. Hon. A. P. Lenhart, Mayor of Bismarck and Colonel A. B. Welch, Postmaster at Mandan, extended a welcome to the guests on behalf of the "Twin Cities"—Bismarck and Mandan. Major Reed G. Landis, of Chicago, Illinois, very ably responded, elucidating upon the Objects of our organization.

Following is a brief synopsis of the addresses given:

HON. HERBERT F. SWETT, Representative, 35th Legislative District of North Dakota, Steele, North Dakota.

Subject: AVIATION FROM THE TAXPAYER'S VIEWPOINT.

Looking at aviation from the average layman's viewpoint, the speaker was somewhat fearful of monopolization of the air, although he believed that the air industry should not be over-regulated, stifled or thwarted by excessive and punitive taxation.

Airports should be public-owned and expenses borne jointly between the municipality and the air lines using the airport. Such airports to be open to all fliers, both private and commercial, and the regulation thereof to conform to all standards advocated by regulatory bodies so long as such organizations are imbued with the idea of public safety. There is a place for state supervision.

The public, in general, is concerned (1) with rapid and safe transportation, and (2) a reasonable cost for such transportation.

HON. GEORGE W. VEST, Supervising Aeronautical Inspector, Aeronautics Branch, United States Department of Commerce, Chicago, Illinois.

Subject: THE FEDERAL PROGRAM AND THE PLACE FOR STATE REGULATION.

A brief history of the development of the rules and regulations promulgated by the United States Department of Commerce, dating back to the passage of the Air Commerce Act of 1926 to the present time, was given. Mention was made of the advance of aircraft, pilot flying, operation, et cetera.

"Until there is concerted, uniform action by all the states, effective regulation of all aircraft is made more difficult." Attention was called to the number of states which are closely following the federal rules and regulations, believing it unnecessary for states to issue "approved type certificate." More attention should be paid to a "few wise rules than a variety of restrictive regulations."

The "aeronautical industry" was termed to be and is a self-regulating industry because of the fact "that all Federal regulations now effective were established only after conferences and discussions with representatives of the entire industry." Through this cooperation it has been made possible for the Federal Government to keep the number of regulations to the lowest minimum.

The necessity of coordination with the transportation industry and airport development was particularly stressed—such coordination being of prime importance—and should be in cooperation with neighboring states and the Federal Government.

The marking of airports should conform to Federal requirements and "every town should be marked by having its name painted on a prominent roof. The expense of such marking is not great, and its value to airmen and air passengers can hardly be measured in terms of money." The marking is to guide the pilot in the event of adverse weather conditions.

In closing, Mr. Vest said: "State aviation officials should have the respect, cooperation and confidence of the industry, and you know no undue burdens should be placed on the industry, especially where present facilities are adequate."

PROF. FRED D. FAGG, JR., Professor of Law, Northwestern University School of Law; Managing Director, Air Law Institute; Editor-in-Chief, *The Journal of Air Law*; Member, Illinois Aeronautics Commission; Secretary, National Association of State Aviation Officials, Chicago, Illinois.

Subject: THE TREND OF UNIFORM REGULATION THROUGHOUT THE UNITED STATES.

Mr. Fagg pointed out we should "now lay plans for the next few years in at least two directions: (1) you may plan on the operation and enforcement of the laws you now have, and (2) you may direct your attention toward a unified regulatory and encouragement program that will reach its consummation with the legislation of 1935." By that time this particular region should be prepared for the soundest program of uniform regulation.

Air transportation is a potential and actual competitor of every other form of transportation. As a business and as a sport, it gives rise to certain legal problems which call for an adjustment of conflicting interests. The parties concerned are private pilots—flying for pleasure; aircraft operators—conducting short trips; air transport lines, or air schools for profit; passengers—flying for business or pleasure; students—desiring to learn to fly; and the general public—potential customers for aviation's services. Behind all these interests lie those of the manufacturer of aircraft, instruments and supplies.

A brief resume of state aviation laws dating back to 1911, when Connecticut enacted the first state law, was given. All early state legislation was fragmentary and lacked all semblance of uniformity. Also, a resume was given of the passage and development of Federal air laws dating back to the first act passed in 1926.

Various state legislative enactments and proposed acts recommended by various organizations have passed through the formative state (some of which proposals and enactments have been repudiated). Mr. Fagg commented extensively upon the most recent and advanced state aeronautical legislation passed in the legislature of the State of Minnesota. The act provides (1) that the legislation should be entirely flexible so as to permit changes along with the development of the industry and permitting the regulatory body to do certain things without specifying in detail, and (2) that the regulatory body should have at least one member who is fully familiar with the technical problems of aviation. The longer aviation regulation can be kept from politics, the better it will be for all parties concerned.

Mr. Fagg was of the opinion that no state should be without an enforcement and encouraging body of some sort.

MR. S. RUSSELL HALLEY, President, Rapid Air Lines, Corporation, Rapid City, South Dakota.

Subject: REGULATION FROM THE OPERATOR'S STANDPOINT.

The regulation of aircraft, airports, et cetera, be it federal or state, hinges upon four factors:

1. The scope and frequency of inspection.
2. The degree of authority vested in the inspectors.
3. The personnel of the inspection department.
4. The degree of cooperation between the inspector and the inspected.

Mr. Halley spoke at length on each of the above factors.

HON. DAWES E. BRISBINE, Board of Railroad Commissioners, Pierre, South Dakota.

Subject: STATE REGULATION BODY, ORGANIZATION AND AVAILABLE FUNDS.

In speaking of the strong and healthy civil aviation Mr. Brisbine said, that it is still in its adolescent years, and "it is still young enough to merit a wisely limited bit of paternal support." Such support may be given by state regulatory bodies as an instrument of encouragement to aviation. Legislation and regulation should not unnecessarily limit the activities of aeronautics. Taxation should not be burdensome.

State regulation should be developed slowly in regard to the issuance of certificates of public convenience and necessity for the protection of the regularly established air lines, the issuance of which should be second only to the enforcement of the Federal rules of safety.

The problem of taxation should be carefully considered by the industry before it sponsors a plan for taxing its property. It would be better "wisdom to content itself with efforts to influence and guide the plans of others to tax into non-oppressive channels," such as gasoline tax, etc.

In speaking of the three modes of public transportation—highway, rail and air—Mr. Brisbine called attention to the highway and rail organizations stressing the necessity of an "aircraft league" for the purpose of combating adverse legislation in state and federal legislative bodies.

COL. L. H. BRITTIN, Chairman, Minnesota Aeronautics Commission, and Vice-President, Northwest Airways, Inc., St. Paul, Minnesota.

Subject: THE PART THAT STATES SHOULD PLAY IN THE DEVELOPMENT OF AIRWAYS.

Specific attention was called to the activities and aids on the part of the Federal Government in the past, what it is doing at the present time, and the prospect as to further aids and development, and the activities that may be expected in the future from the various states.

On illustrated maps it was pointed out that transportation lines are advancing into new territory rapidly, to be followed by lighted airways and other safety federal aids; also the absence of federal aid air lines in the North Central group of states.

The necessity of states banding together was stressed—a group of states being better able to aid in the extension of air lines in a particular territory.

The development of speedy aircraft and the efforts of the states to develop and regulate air transportation, as a unit, was a small part of air navigation. Suggestion was made that this region try to do this as one group, and at the same time cooperate in every respect with the Federal aeronautical department.

HON. FRED B. SHERIFF, Commissioner of Aeronautics for Montana, Helena, Montana.

Subject: AIRPORT MANAGEMENT.

An "understanding of human nature is absolutely essential to the maintenance of discipline in both airport and air line operation."

In the management, construction and maintenance of airports the most important thing is the anticipation of the underlying trends in aviation development and the attempt to anticipate the new mode of transportation ten and twelve years hence.

Public airports should be public meeting places provided with recreation facilities, and the arrangement of the grounds made attractive.

PROF. E. F. RILEY, President, State School of Science, Wahpeton, North Dakota.

Subject: MAINTAINING AIRWORTHY AIRPLANES.

During the dinner on the first day of the meeting Professor Riley addressed those present.

The importance of airworthiness of planes was stressed, especially with reference to privately-owned aircraft. Aircraft used in regular service, generally speaking, are well maintained. Future success of aviation depends largely upon the airworthiness of the privately-owned plane.

"An airplane station cannot be operated on the same kind of a basis as a garage." An approved air station for the repairing of aircraft requires specialists with experiences in the repairing of fuselages, wings, etc., also a specialist in aircraft engines competent to tear down and rebuild, and another specialist in battery and magneto connection; also a radio expert.

HON. J. L. TAYLOR, Secretary, Chamber of Commerce, Glendive, Montana.

Subject: AIRPORT DEVELOPMENT IN RELATION TO COMMERCIAL AVIATION.

Commercial aviation embraces two major factors: (1) the process of interchange by aerial locomotion, and (2) the evolution of harbors for the refuge, unloading and loading of the craft used in that operation. This in a broad sense is commercial aviation.

The evolution of transportation was described in a very interesting manner from the beginning of time to the present.

Speed in aviation with relation to interstate commerce, and government aid in the development of systems of airways, and the absence of that development in the north central region was stressed.

"Every airport established and maintained by tax monies for commercial use should remain a free port, available to all legitimate custom, and with exclusive franchise, right or privilege for none."

MR. P. O. SATHRE, Assistant Attorney General for North Dakota, Bismarck, North Dakota.

Subject: NORTH DAKOTA STATE LAWS AFFECTING AVIATION.

Mr. Sathre gave a very able and thorough synopsis of the state laws relating to aviation. Some of these laws were placed on the statute books as early as 1923, and may now be called obsolete owing to the development of aircraft.

An open forum was held for the purpose of discussing matters of interest to those present. Each of the speakers spoke of the Federal activities and complimented the United States Department of Commerce thereon. Also, each indicated a willingness to cooperate with the Federal department to the fullest extent.

Before adjourning, a permanent organization was established to comprise the following states: Montana, Wyoming, North Dakota, South Dakota, Nebraska, Iowa, Minnesota and Wisconsin. A constitution and by-laws were adopted, conforming generally to the constitution and by-laws of the National Association. Each state will appoint or elect an aeronautical officer (each state having one vote).

The Committee on Time and Place selected Billings, Montana, as the next meeting place, such meeting to be held during the first part of May, 1934.

The following officers were elected for the ensuing year: *Fay Harding*, of North Dakota, Chairman; *Fred B. Sheriff*, of Montana, Vice-Chairman; *Col. L. H. Brittin*, of Minnesota, Sec.-Treas.; *Fred D. Fagg, Jr.*, of Illinois, Legal Counsel.

FAY HARDING.

AERONAUTICAL PROGRAM OF THE FEDERAL BAR ASSOCIATION OF NEW YORK, NEW JERSEY AND CONNECTICUT

Aeronautical Night, recently conducted at the Hotel Commodore, New York City, by the Federal Bar Association of New York, New Jersey and Connecticut, Inc., was a unique event in the annals of bar associations. The organization to some extent assumed the role of a pioneer in sponsoring so novel an event. The rather ambitious program relating to the future of flying, aeronautical history, modern aerial navigation, military aviation, airships and aeronautical jurisprudence and concluding with the film, "The Story of the Autogiro" covered a field broad enough to satisfy the most exacting and to meet the interest of every one.

President Henry Ward Beer's stirring address on the future of flying, followed by an address by the writer on aeronautical history, served as a prelude to a talk by Mr. T. Park Hay on the development of modern air transportation. The fascinating and graphic charts which supplemented Mr. Hay's talk presented a convincing picture of the important activities of the large air transport systems. The important subject of air mail appropriations came in for its due attention through a resolution offered by the writer and adopted by the association. The resolution opposed any reduction in the air mail appropriations which would impair the efficiency or retard the development of the air mail service. New York State Commissioner of Aviation, John Dwight Sullivan's address on military aviation very wisely stressed the need for more flying time for both the active and reserved flying personnel of the Army and Navy. On the timely subject of giant rigid airships, Reginald M. Cleveland, Aviation Editor of the New York Times, reviewed the history of airships. It is regretted that in his very informative talk he did not take a stand in favor of the continued use of giant airships. The association's action in favor of dirigibles was the subject of favorable comment, which action took shape in form of a resolution offered by the writer and duly adopted in which the continued construction and use of dirigibles were recommended and the following improvements in their construction and equipment respectfully suggested: (1) two or more control cabins, one of which, if practical, should be on the top of the ship; (2) separate sets of controls in the nose and tail of the ship; (3) two independent sets of control cables to both the horizontal and vertical rudders; (4) Diesel engines or some form of injected fuel engine; (5) a full complement of light weight but effective life saving equipment such as inflatable jackets and rafts.

Aeronautical jurisprudence very properly received consideration following a talk by Prof. Alison Reppy, through a resolution offered by the writer and adopted by the association on the very important problem of damage liability of aircraft to persons and property on the surface. This acute and pressing question was covered in the resolution which advocated an equitable rule of liability of aircraft for damages to third persons and property on the ground and strongly opposed the so-called rule which attempts to impose liability on the aircraft irrespective of whether or not the damage is the result of the negligence of the aircraft. The resolution further recommended a rule of liability which would fully safeguard the rights of the public and yet at the same time

would not be so drastic as to threaten the very existence of aeronautics. This problem of liability of aircraft for damages to third persons is now before the delegates at the International Conference of Air Law at Rome and should engage the early attention of all students of aeronautical jurisprudence.

RESOLUTION FAVORING AN EQUITABLE RULE OF LIABILITY OF AIRCRAFT FOR DAMAGES TO THIRD PERSONS ON THE SURFACE

(Duly Adopted by the Association on April 17, 1933)

WHEREAS, Aerial navigation is now a part of our daily life and its existence and development is for the general enrichment of mankind, and

WHEREAS, The question of liability of aircraft for damages to persons and property on the ground is an acute and pressing problem, and

WHEREAS, Attempts have been made to impose a rule of absolute liability on aircraft for damages to third persons and property on the surface, irrespective whether or not the damage is the result of negligence of the aircraft, and

WHEREAS, Such absolute liability rule is archaic, inequitable, unscientific and destructive, and imposes such a severe burden on aerial navigation as to stifle its development and to threaten its very existence, and

WHEREAS, The Federal Bar Association of New York, New Jersey and Connecticut, Inc., through its Committee on Air Law, is cognizant of the existence of Section Five of the Uniform State Law of Aeronautics and the reasons advanced for imposing the absolute liability theory, and is further aware of the almost insurmountable difficulties that the problem presents, now be it

RESOLVED, That this Association strongly opposes the so-called doctrine of absolute liability of aircraft for damages to third persons and property on the land regardless of the existence or not of negligence on the part of the aircraft, now be it further

RESOLVED, That this Association through its Committee on Air Law shall undertake a thorough study of the problem with a view to finding a solution which will on the one hand fully protect the rights of the public, and on the other shall not impose a hardship and impossible burden on aeronautics, and now be it further

RESOLVED, That the Committee on Air Law of this Association is hereby delegated to transmit copies of this resolution to the American Bar Association, the New York State Bar Association, the New Jersey State Bar Association, the Connecticut State Bar Association, the New York County Lawyers' Association, the Association of the Bar of the City of New York, the National Conference of Commissioners on Uniform State Laws, the American Law Institute, the National Association of State Aviation Officials, The Air Law Institute, the American Academy of Air Law, and such other organization or vehicle of thought which the Committee shall deem appropriate.

JOHN A. EUBANK.

ILLINOIS AVIATION ENCOURAGEMENT AND THE
GAS TAX

The editor has received letters from several gentlemen¹ whose names and writings were used in the recent article by Major Landis, entitled, "The Illinois Plan of Aviation Encouragement," and published in the April issue of the JOURNAL. The desire of the writers was to make clear that, while they were in favor of the developmental program generally, they did not wish to be understood as endorsing a tax on aircraft motor fuel as a means of financing the proposed plan of encouragement. The editor is glad to acknowledge receipt of these letters and trusts that the careful arrangement of material, with appropriate sub-headings, made by Major Landis in the article,² has prevented any widespread misunderstanding.

F. D. F.

1. Letters received from John D. Peace, Jr., Pioneer Instrument Co.; Harry Schwarzschild, Publisher, Air Transportation; George F. McLaughlin, Editor, Aero Digest; G. E. Steiner, Scintilla Magneto Co., Inc.; and Thomas B. Colby, Manager, Aviation Division, Berry Brothers.

2. "I think you will see from a reading of my article on the Illinois Encouragement Plan that I not only carefully avoided misquoting you or anybody else, but that I went considerably out of my way to point out that there was a very distinct disagreement as to the advisability of providing the facilities and services contemplated by means of a gasoline tax." From a letter written by Major Reed G. Landis to Mr. Duane Stranahan, Champion Spark Plug Co., on April 13, 1933.