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George B. Logan

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RECENT DEVELOPMENTS IN AERONAUTICAL LAW (1934)

GEORGE B. LOGAN*

In discussing with you the developments in aeronautical law during the past year, the first thing to be mentioned is our old friend, the right of flight. I am sure you have listened to me talk about the non-ownership of airspace until you are tired to exhaustion. In my own opinion and in the opinion of most lawyers who are conversant with the topic, this question has been definitely settled, but not in the opinion of many distinguished lawyers, who have unfortunately not devoted concentrated study to the subject.

For some years the American Law Institute has been engaged in the monumental work of restating the common law. Among other subjects to be restated was the subject of torts, and a sub-section of that subject was trespass, especially trespass on land.

Beginning several years back, the persons in charge of this particular division of the work made the statement that trespass against the owner or occupant could be committed by flying in the airspace above the earth, as well as by touching the land.

The Aeronautical Law Committee of the American Bar Association protested against this view, both orally at the annual meetings of the American Law Institute in Washington, and by written briefs filed with the reporters for this sub-section and with the Executive Council. In spite of these protests and arguments, the final draft of the subject appeared early this year as Section 1002, which stated that trespass may be committed on, beneath and above the surface of the earth and particularly it was stated:

An unprivileged intrusion in the airspace above the surface of the earth at whatever height above the surface is a trespass.

You will note that this states an "unprivileged" intrusion. In order to make this clear, the American Law Institute stated that "a temporary invasion of the airspace by aircraft for the purpose of travel through it, if done in a reasonable manner and at such a height so as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the airspace above it, is privileged."

*Legal Counsel, National Association of State Aviation Officials; Member, American Bar Association Committee on Aeronautical Law.

We would have had no particular objection to the wording of the preceding paragraph, although we think it contains a fundamental error, (because we think that trespass may not be committed by flying through airspace), provided the privilege had not been so limited in its scope. The definition of privilege contains two erroneous concepts. In the first place, you will notice that it is available only for "travel." This would seem to eliminate racing, exhibition flying, test flying, crop dusting operations, surveying, military observations, and other similar use of the airspace by airplanes, which would not be included within the narrow scope of "travel." Secondly, this definition of privilege contains the concept of the "possession of the airspace above," it being, of course, our belief that the landowner does not possess the airspace unless he has in fact taken possession of it by structures, improvements, or otherwise.

This final statement of the law was thoroughly argued by members of the Aeronautical Law Committee of the American Bar Association, including Mr. John C. Cooper, one of your Vice-Presidents, Mr. E. Smythe Gambrell, who is on our program for this meeting, and by your general counsel. In the argument, we were aided by other distinguished lawyers, including Dean-Emeritus Wigmore of the Northwestern University School of Law.

The American Law Institute, however, by an overwhelming vote adopted the view of its reporters and consequently in the new text book on Torts, soon to be issued, the statements above will appear. Fortunately, however, that does not tell the story of the year 1934, for during this same year there have been two additional decisions handed down, involving the question of aerial trespass, and courts always speak more authoritatively, and finally, than any ex parte experts.

The first decision was that given in the case of *Rochester Gas & Electric Co. v. Dunlop*.¹ In this case, the Rochester Gas & Electric Company was the owner of an electric transmission line, carried along its right-of-way on steel towers approximately fifty feet high. One of these steel towers was in Brighton, New York. The defendant Dunlop, while operating his airplane, crashed into the tower about 10:00 o'clock at night. Fortunately, the accident was not fatal, but the damage done to the tower amounted to \$545.00 and the damage done to the airplane amounted to more. The Gas & Electric Company sued Dunlop for its damages, alleg-

1. 266 N. Y. S. 469.

ing that he was guilty of negligence in permitting his plane to strike the tower and that he was guilty of trespass, and, in either event, liable for the damage. The aviator counterclaimed for his damages, but unfortunately the theory of his claim is not preserved in the report, and we do not know whether it was based on the theory that the Gas & Electric Company was maintaining an obstruction in the navigable airspace or failed to light the tower or what not.

At the trial of the case, in the first instance, the evidence was developed that Dunlop had been flying to Rochester at a height of about 3,000 feet, when engine trouble developed, and he was forced down and was attempting to make a landing when he struck the tower. There being no evidence that he was negligent, the court dismissed that portion of the plaintiff's case. The court also dismissed the defendant's counterclaim, and the case went to the jury solely on the question as to whether or not the pilot was guilty of trespass. The jury found a verdict in favor of the pilot. This case was appealed by the Gas & Electric Company on the ground that the question of trespass should not have been submitted to the jury because the facts being undisputed, it was purely a question of law, and the court should have found that the pilot was guilty of trespass. The higher court sustained this contention that it was a matter of law, and not a question of disputed fact to be determined by the jury, the facts being all admitted. The court then considered the question of trespass from two sides, first, was Dunlop guilty of trespass merely by flying over the land of plaintiff, and second, was he guilty of trespass by reason of striking the tower.

As to the first, the court said:

This involves the ancient maxim, "*cujus est solum ejus est usque ad coelum et ad infernos*." Not to go beyond the necessities of this case, if that maxim ever meant that the owner of land owned the airspace above the land to an indefinite height—it is no longer the law.

The court did hold, however, that absent the use of the police power, no rule of law had ever been made or could ever be made, which would abridge the right of the owner of land to the use of the space above it to such height as he may build a structure on the land and that, when the airplane came into contact with the tower, the rights and responsibilities of the parties were the same as if the airplane had come into contact with the ground.

The court then considered the question as to whether or not an aviator was liable for an accidental trespass. The defendant in pleading to the question of negligence had made the point that this was not a *res ipsa loquitur* case, that is to say that the mere fact that the plane had struck the tower did not tend to prove negligence, because there were many causes other than negligence which would bring an aircraft to the ground. The court agreed with that contention and agreed that in the general knowledge of aviation, of which the court took judicial cognizance, there were many causes, besides negligence, for an involuntary descent. But the court held that if it was not a matter of negligence, then it was a matter of intention; and when a pilot put the plane into the air, knowing that there were many causes which would bring it down which were beyond his control, he must be liable for the so-called accidental trespass. In other words, in cases of that sort, trespass was not accidental but was the result of the original intentional takeoff.

This appears to me to be a well-reasoned case on all points and particularly on the point that the owner of the surface does not own the airspace.

The case I have just discussed was decided in February, 1934. The second case was that of *Thrasher v. City of Atlanta, et al.*,² decided by the Supreme Court of Georgia. Our distinguished friend, Mr. E. Smythe Gambrell, was the leading counsel in this case, and to tell about it, rather than have him do it, is something like another violinist playing Kreisler's Caprice Viennois.

In this case, Mr. Thrasher, who lived near Candler Field at Atlanta, and whose home had been built before the airport, brought suit to enjoin the city and all other users of the field from using it, alleging nuisance created by many causes and finally alleging a trespass by flying over his home. The trial court sustained a demurrer to the petition and the plaintiff appealed to the Supreme Court. Therefore, all that was before the Supreme Court was whether or not the petition stated facts sufficient to constitute a cause of action or, in this case, to justify the relief prayed for. The opinion is long, because the petition was very long, but I desire to call your attention only to that portion of it, which considered the allegation of trespass by flying over the plaintiff's property.

With reference to this, the court said:

2. 173 S. E. 817.

The space in the far distance above the earth is in the actual possession of no one. And, being incapable of such possession, title to the land beneath does not necessarily include title to such space.

Although this decision was rendered prior to the meeting of the American Law Institute in May, the reporters evidently ignored it in referring to the "possessor of airspace."

The court went on and said:

The maxim to which reference has been made is a generalization from old cases involving the title to space within the range of actual occupation, and any statement as to title beyond was manifestly a mere dictum.

For instance, a court in dealing with the title to space at a given distance above the earth could make no authoritative decision as to the title at higher altitudes, the latter question not being involved. * * * Accordingly, the maxim imported from the ancient past consists in large measure of obiter dicta, and to that extent cannot be taken as an authentic statement of any law.

Accordingly, the court held that Mr. Thrasher's petition did not state any facts justifying him to any relief on the ground of trespass, although incidentally they did hold that upon proper proof he might have made out a case as to nuisance by noise and dust.

As this phase of the law now stands in this country, we have five cases—*Smith v. New England Aircraft Co.*, in the Supreme Court of Massachusetts; *Swetland v. Curtiss*, in the federal courts; *Gay v. Rush Hospital*, in an inferior court in Pennsylvania; *Rochester v. Dunlop*, in an inferior court in New York; and *Thrasher v. Atlanta*, in the Supreme Court of Georgia, all repudiating the theory that the owner of land is the owner of the airspace above it.

Since our last meeting, a new text book on air law has appeared, written by Dr. Arnold G. McNair, a distinguished English lawyer, who was honored by being asked to deliver the Tagore lectures at Calcutta University in India on the subject of air law. By accepting this honor, Dr. McNair was required to publish these lectures in book form, and in them he repudiated the doctrine of ownership of airspace by stating that "the idea of the ownership of mere space is repugnant to the common law."

We believe in the future that, in spite of the action of the American Law Institute, it will become well and definitely settled that mere flying over land does not create a cause of action in favor of anyone, but that it must always be borne in mind that,

dependent upon the use and occupation of the land beneath, which includes not only the question of the height of structures but the nature of the use, a flight may be a nuisance and enjoined as such.

You will recall that last year we discussed the trend of decisions by the courts, involving insurance in aviation cases, and we had come to the conclusion that where a policy barred recovery, if the death or injury was the result of being "engaged in" aviation, a mere passenger would not forfeit his insurance. The courts had held that a passenger was not "engaged" in aviation. We pointed out that there was a long string of cases, beginning with *Bew v. Travelers*, which held that the phrase "participating in aeronautics" would include a passenger. The distinction between the two phrases, "participating in" and "engaging in," has apparently been abolished, at least by the decision of the Arkansas Supreme Court in the case of *Missouri State Life Ins. Co. v. Martin*,³ decided in February, 1934.

It seems that Mr. Martin, who was the Mayor of Augusta, Arkansas, was invited to go to St. Louis with a Mr. Gregory as a guest in his airplane on a pleasure trip only. The plane crashed in Illinois, about thirty miles south of St. Louis, and Martin was killed. His insurance policy in the Missouri State Life Insurance Company provided for double indemnity in case of accidental death, but not if the accidental death had resulted from "participation in aviation." The Arkansas Supreme Court reviewed all of the cases, which made the distinction between "participation" and "engaged," and held that the company was liable for the double indemnity, using this language:

The distinction thought by the courts to exist between "engage in aviation" and "participate in aviation" may be apparent to, and approved by, those learned in the niceties of language and accustomed to its precise use, but it is to be doubted whether these hairsplitting and subtle distinctions would occur to, or be understood by, the majority of the thousands of persons who seek insurance against the many hazards to life and limb which are likely to occur to the most prudent and fortunate.

The foregoing sounds like reasonable logic, and it was approved by all members of the court except one. Yet the dissenting opinion sounds also very logical. This judge, in his dissenting opinion, said:

If the tradesman, artisan or farmer, to whom the majority refer, had promised his wife, before leaving home, that he would not participate in

3. 69 S. W. (2d) 1081.

aviation while gone, he would probably have had trouble convincing her, upon his return, that he had kept his word, if he admitted that a part or all of his journey had been made in a flying machine.

Without attempting to determine the merits of these two arguments, it is sufficient to say that the almost unanimous decision of the Arkansas Supreme Court is that there is no difference, and in neither case does the passenger forfeit his insurance.

The Federal Circuit Court of Appeals for the Eighth Circuit, which includes Missouri, had before it a similar case, that of *Goldsmith v. New York Life Insurance Company*,⁴ decided the day after the Martin case. Mr. Goldsmith carried \$30,000.00 of life insurance with the New York Life Insurance Company, with double indemnity for accidental death, which was not payable if death resulted from "engaging as a passenger or otherwise in submarine or aeronautical operations." Goldsmith was killed while a passenger in a common carrier airplane. After reviewing all the insurance cases, to which we have heretofore referred in many probably boresome speeches, the court reached the conclusion that the word "participating" did include a passenger; that the word "engage" did not include a passenger. The question, therefore, was whether or not adding to the word "engage" the phrase "as a passenger or otherwise" was sufficient to bring the passenger into the exclusion of the policy. The court held that while the word "engaged" still connoted an employment or avocation, nevertheless when the words "as a passenger or otherwise" were added, it was clear that the company meant to exclude passengers as well as employees. This was a divided opinion, however, Judges Sanborn and Van Valkenburgh concurring, but Judge Stone dissenting in a vigorous opinion, in which he insisted that having used the word "engaged," the company meant to exclude only those who were employed or whose avocation was in aeronautical operations, and that the addition of the words "as a passenger or otherwise" was merely for the purpose of excluding executives, office employees, mechanics or others, who were engaged in aeronautics and happened at the time to be passengers.

Another interesting case on insurance aviation law, which has been decided in the past year, although not a portion of these controversies, was the case of *Monroe v. Federal Union Life Insurance Company*,⁵ decided by the Kentucky Court of Appeals. This was one of these policies, which I, perhaps with undue

4. 69 F. (2d) 273.

5. 65 S. W. (2d) 680.

facetiousness, designate as a trick policy. The annual rate was only \$1.25 per year and yet the policy provided for benefits of up to \$10,000.00, provided the accident happened in a certain specified manner. One of the accidents specified, and which called for the payment of \$2,750.00 in case of death, was:

By the wrecking or disablement of any automobile or motor driven car (motorcycles and railway cycle cars excepted), or horse drawn vehicle not plying for public hire in which the insured is riding or driving or by being accidentally thrown from such wrecked or disabled automobile, or vehicle.

In this case the policyholder had been killed by the double cause of being in an airplane when it was wrecked and by being thrown therefrom at the same time. It was contended by the administrator of his estate that he was in a "motor driven car," which was neither a motorcycle nor a railway cycle car, and consequently the estate was entitled to \$2,750.00. The question was, therefore, whether or not an airplane is a motor driven car.

The court held that "car" was practically a synonym for "automobile;" that in a decision of the Louisiana Supreme Court, 161 La. 933, it had been held that a motorcycle was not a "motor driven car;" and that in a Maryland decision, 159 Md. 207, it had been held that a motorcycle with a side car was not either a private automobile or a "motor driven car."

In view of these two decisions and especially in view of the fact that both the motorcycle, and the motorcycle with the side car, operated on the ground and propelled by motor, were held not to be motor driven cars, then certainly an airplane should likewise be held not to be a "motor driven car," within the meaning intended in the context. The plaintiff's petition was, therefore, dismissed.

We have had two decisions during the year involving the liability of a carrier to its passenger and with different results. The first case to which I call your attention is that of *Curtiss-Wright v. Glose*,⁶ decided by the United States Circuit Court of Appeals for the Third Circuit. In this case Mr. Glose was a passenger of the Curtiss-Wright Company, flying from Miami to Tampa. He was the only passenger, the plane being simply a two-seater. When the plane left Miami, the weather was fair, but when it approached Tampa, there was a fog and, in spite of the fact that another plane accompanying this one detoured around the fog and landed safely at Tampa, this particular plane, when

6. 66 F. (2d) 711.

within about six miles of the city, attempted to land on a small field adjoining a chemical factory. When about twenty-five feet from the ground, the pilot attempted to bank, tilting the left wing downward, and the ship sideslipped to the ground and both the passenger and the pilot were killed. The passenger's widow filed suit, contending that the company was negligent, first, because the pilot was flying at less than 500 feet; second, because he was landing on a dangerous landing field in the absence of any emergency requiring it; and third, because he had attempted to make a short bank while at a low altitude.

The company's defense was first, that the engine had quit and that there was an emergency, justifying the attempt to land and that this was not negligence; second, that there was no evidence to show what had caused the sudden bank and sideslip and that many things might cause it, other than a deliberate negligent act on the part of the pilot; third, that the relation between the company and the passenger was not that of passenger and carrier but that of charterer and charteree, and hence the company was required only to furnish a fit plane and a skilled pilot, both of which it had done; and fourth, that in any event, by reason of the terms of the ticket issued and which the passenger had signed, the recovery could not exceed \$10,000.00. The judgment of the trial court was in excess of the \$10,000.00 limitation under the ticket.

The third contention is something novel in the history of airplane litigation and probably arose out of the fact that Mr. Glose was the only passenger on this particular trip. The court disposed of this contention, however, by pointing out that the ticket, which Mr. Glose held, for which he had paid \$164.50 for a one-way trip, was inconsistent with the usual provisions of a charter party, for in the first place it denominated the sum of \$164.50 "fare paid;" in the second place, it recited that the "ticket" was valid only on the date stamped, weather permitting; and, in the third place, it had various provisions referring to "passenger."

I neglected to state also that the ticket carried provisions stating that the company was not a common carrier, this being one of the conditions apparently accepted by the passenger when he signed. The court held as to this that the company did everything that a common carrier did, in that it advertised for passengers, maintained scheduled flights and accepted the public generally at a fixed regular rate; that the test of a common carrier

was not what it called itself but what it actually did. Having reached this conclusion, the court then went further and stated that a common carrier could not impose conditions upon its passengers and could not limit either the causes for which it would be liable or the amount of its liability.

The court further held that there was evidence from which the jury was justified in finding that the pilot had been negligent; the evidence of this negligence apparently consisting, first, in the fact that he attempted to land on a field which was small, bisected by a ditch and surrounded by overhead wires and structures; second, in the fact that his emergency did not justify this, because the tank contained an ample supply of gasoline; and third, because the other pilot flying with him had reached the port of destination. There was also evidence that making a sharp bank at a low altitude was an extremely dangerous manoeuvre, and the judgment in excess of \$10,000.00, which had been rendered in favor of the widow, was affirmed.

The other case to which I want to call your attention was that of *Allison v. Standard Air Lines*, also a decision of the United States Circuit Court of Appeals, but in this case that of the Ninth Circuit. The suit was brought by Mr. Allison as administrator of the estate of a Mr. Kelly, who was a passenger in a tri-motored passenger plane from Los Angeles to El Paso. In this case the passenger plane had struck the top of a mountain near Banning about twenty feet from the top, and the pilot and all passengers were killed. The evidence was that there was a fog, which, according to witnesses, came down to within 150 or 500 feet of the ground. The plane had circled around in the near vicinity of the accident several times and at times as close as twenty feet to the ground, apparently in search of a landing place. There was evidence that there was a 400 acre open field, over which the plane had circled, at a low altitude, on which it could have landed with safety. There was also evidence that the Tri-City Airport was just twenty miles away. After circling about near the ground, the plane climbed again and was climbing when it struck the crest of a hog-back mountain about twenty feet from the top. The plaintiff contended that under these facts he had made, first, a case of *res ipsa loquitur*, and, second, that the evidence established negligence on the part of the pilot. The jury found a verdict for the defendant, and the plaintiff appealed on the ground that the evidence did not justify or sustain the verdict.

The United States Circuit Court of Appeals held that in the

first place the rule of *res ipsa loquitur* did not apply because there were many things which would cause a plane to fall, or in this case, to crash into the mountain, other than negligence of the operator; and the court held in the second place that the verdict of the jury was justified because no evidence of negligence had been shown. The parties had admitted that the plane was in good condition when it left Los Angeles; had been properly fueled, oiled and inspected; and that the pilot was experienced and skillful and had been over the route several times before. The court held that the plaintiff had failed to show any evidence of negligence.

Apparently the reasoning processes of the two courts were not similar. Granting that the fog in this case created an emergency, it would seem that the pilot, after circling the ground two or three times at a low altitude, could have or should have seen the 400 acre field that would have furnished a safe landing place. He should have known that there was a regular landing field within twenty miles, which would be not over fifteen minutes away and he had ample fuel to cover that distance. He should have known of the existence of mountains and elevations, and that to rise into the fog in that vicinity was dangerous. At least this conclusion might be drawn, if we follow the reasoning of the Circuit Court of Appeals for the Third Circuit, instead of the reasoning of that for the Ninth Circuit.

We have had decided during this year an interesting case involving the liability of an airport proprietor and the care required of an airplane pilot. This was the case of *Davies v. Oshkosh Airport*, decided by the Supreme Court of Wisconsin on February 6, 1934. The plaintiff Davies, a guest, and the pilot Clyde Lee had been flying in Wisconsin and were making a landing at the Oshkosh Airport at about 8:00 o'clock in the evening in early summer. The sun was still shining but was just about setting on the western horizon. The wind being from the west, the plane came in from the east to make its landing against the wind and struck a hay rake on the field, which, because of the sun in his eyes, the pilot did not see. The pilot was killed and Davies was injured and brought suit against the airport for his injuries and the loss of his plane. Of course, the charge was negligence because of leaving the hay rake in a position where it would be an obstruction to landing planes. The defense was the contributory negligence of the pilot.

In order to understand this decision, you must understand that

this is the same court which decided *Gruenke v. North American Airways*.⁷ The *Gruenke* case was a case where the pilot, on landing, had struck another airplane, which was on the runway. You are all aware of the fact that it is a violation of the Department of Commerce regulations to leave a plane standing on the runways. In the *Gruenke* case, the North American Airways plane had been left on the runway because the engine had stopped and the pilot had gone to get help to remove it when the accident happened. The defense there was also that of contributory negligence of the incoming pilot and the case was decided in favor of the defendant. The case was reversed by the Supreme Court, because the trial court had given an instruction that the pilot of the landing plane must exercise the "highest degree" of care. Wisconsin had adopted the uniform law of aeronautics, recommended by the American Bar Association's Committee some years ago, and this uniform state law carried the statement that collisions between airplanes in the air or on land should be governed by the law of torts on land. The law of torts on land requires only "ordinary care," and consequently the case was reversed and sent back for a new trial. What its ultimate disposition was, we do not know.

In considering, therefore, in the *Davies* case the plea of contributory negligence, the point made by the plaintiff was that his pilot, in landing, was required to exercise only "ordinary care" and, if he was blinded by the setting sun so that he could not see the hay rake, then his failure to see it was not contributory negligence. In the trial court the plaintiff recovered, but the Supreme Court took a different view. The Supreme Court held that it was true that only ordinary care was required; that ordinary care was the conduct of ordinarily or reasonably prudent persons under the same or similar circumstances; that a reasonably prudent person, however, would not land on an airport where a setting sun blinded him from seeing so obvious a thing as a hay rake, which, incidentally, had a color scheme of red and yellow. In fact the court went further and said it was the duty of the pilot to circle the field a sufficient number of times so that, irrespective of the position of the sun, he could have a complete view of everything on the field; that ordinary care was always commensurate with the extent of the danger; that it was dangerous to land while blinded; and, hence as a matter of landing, the pilot was guilty of contributory negligence and the plaintiff could not recover.

7. 201 Wis. 565.

We have had an interesting and as far as I know the premier debut of an old fire insurance rule intruding itself into aviation. Every fire insurance policy, which has been issued on personal property for the last fifty years, has contained a clause that the policy is void unless the policyholder is the "sole and unconditional owner" of the property insured. In *Newman v. North River Insurance Company*, decided by the Pennsylvania Supreme Court on March 19, 1934, this clause, as applied to an airplane, was before the court. It seems that Newman was a pilot and one Bortee was the proprietor or at least the owner of all the stock of the Lake Ariel Park & Amusement Company, a summer resort. Newman conceived the idea of adding as an attraction to the park the taking up of passengers in an airplane and broached the idea to Bortee. Bortee advanced \$5800.00 to buy the plane and both parties testified that the agreement was that Bortee was first to get his money back and then they were to divide the profits fifty-fifty. There their agreement stopped and disagreement began. Bortee insisted that he understood that the plane was to be his until paid for, while Newman insisted that he understood the plane was his all the time, but he was obligated to Bortee for \$5800.00.

The bill of sale had been made out by the manufacturer to Newman, and the Department of Commerce license had been issued to Newman and the State of Pennsylvania license had been issued to Newman. These latter two licenses were placed in a conspicuous place in the cabin of the plane and remained there from July 4, 1929 to 1931, when the plane burned. As stated before, when it burned, the company refused to pay, stating that Newman was not the sole and unconditional owner.

The court held that, in view of the evidence, the testimony of Bortee that he had a title interest was not to be believed; Bortee had been in the cabin of the plane many times and had of necessity known that the licenses were issued to Newman; he must of necessity have known that no title papers had been delivered to him; and his rights, therefore, were simply to receive the money advanced to Newman in accordance with their agreement.

This, of course, is not a case in aviation law, but simply an application of insurance law to an airplane.

The federal courts have put one more nail in the taxation lid on aviation gasoline. You will recall I am sure that for some time it was made plain in the decisions of the various courts that

while a tax could be levied upon the sale, storage or withdrawal of gasoline used in interstate commerce, a tax could not be levied upon the use of gasoline in interstate commerce. The case of *Boeing v. Edelman*, originating in Wyoming, where the tax was against gasoline "sold or used" in the state, had an interesting career. In the original instance, the federal court upheld the tax upon the ground that the tax was a proper charge for the use of the facilities, the proceeds going back to the cities of Cheyenne and Rock Springs for the maintenance of their airports. The United States Circuit Court of Appeals, however, held that there could be no tax on gasoline purchased outside the State of Wyoming and brought into that state and used by the Boeing Company in its airplanes engaged in interstate commerce.

This case was taken to the United States Supreme Court and there the Court held that irrespective of the language used, that is to say, irrespective of the fact that the tax was upon the "sale or use," the practice of the taxing commissioners in fixing the amount of the tax on the amount of gasoline withdrawn from storage made it in fact a tax on the privilege of storing and withdrawing; that the tax had in fact been completed before the use in interstate commerce began; and, hence, held that the tax was valid.

In a more recent case, *American Airways v. Grosjean*, decided by a special court of three federal judges sitting in the District Court in the Eastern District of Louisiana, the statute of Louisiana provided for a tax of five cents per gallon on all gasoline "sold, used, or consumed in the State of Louisiana." The point was made by the American Airways that this was in fact a tax on the use of an instrumentality of interstate commerce and hence beyond state power. The gasoline in question had been purchased in Texas and placed in storage tanks in Shreveport and New Orleans and pumped into the airplanes there, and was not sold or used for any other purpose. The court held that the "use" which was here being taxed was the "use" to which the gasoline was put in withdrawing it from storage and that it was at the time of withdrawal alone that the "use" was measured, and the stored gasoline was, therefore, deemed to be "used" as soon as withdrawn. Naturally, the Court, in arriving at this decision, followed the *Boeing-Edelman* decision, and the two cases are absolutely identical, with the exception that the Louisiana statute added the word "consumed" and made it perfectly plain

that the statute was intended to tax gasoline wherever purchased or wherever withdrawn from storage, providing it was used or consumed within the state.

In my own humble opinion, these two statutes, that is to say, the Wyoming statute and the Louisiana statute, insofar as they have been made applicable to gasoline "used" in interstate commerce, run afoul of the decision in *Helson v. Kentucky*, the ferry boat case, which you have heard me discuss heretofore. I cannot see the theory expounded by our highest court that gasoline is "used" when it is withdrawn from storage. Neither statute imposes any tax upon storage or upon the privilege of withdrawing from storage. Both statutes impose a tax upon *sale* and *use*, and the Louisiana statute in addition imposes a tax upon consumption. It now seems that the only way in which an airplane company can avoid a tax of this sort is to avoid refueling its airplane tanks within the state.

One more mention of the development of aviation law during the past year and I am through. I think you are all aware of the fact that we are not far off from international transportation by heavier-than-air vehicles. Our former Vice-President and most distinguished friend, John C. Cooper, Jr., is now one of the counsel of Pan American Airways and there has been delegated to him the duty of legally preparing the way for trans-Atlantic flights by that company. The time has come, therefore, when we must have not only uniformity of law between the states but uniformity of law between the nations.

European nations have been working for many years towards uniformity of aeronautical law. In addition to the Air Convention of 1919, signed at Versailles at the same time as the world war peace treaty, and incidentally which the United States signed but did not ratify, there has also been created the C. I. T. E. J. A., a body of aeronautical law experts. These men have been working for years and until May, 1933, the United States had taken no part. In May, 1933, the United States for the first time appointed delegates and John C. Cooper, Jr. and John Jay Ide attended the conference at Rome. This conference agreed upon the rules of liability as between air operators and persons on the ground. This agreement takes the name of the Rome Convention. I will not attempt to go into all the details of the rules of liability therein established, except to say that these rules, as agreed upon, were in a measure a compromise between the views of the many differ-

ent nations and to further say that John C. Cooper, Jr. is largely responsible for bringing these rules to their present condition.

The most important fact to be told you, however, is that in 1934 President Roosevelt sent this Rome Convention to the United States Senate, with a request that this treaty be ratified. If ratified, by the Senate, this treaty will fix the rules of liability to persons on the ground for all persons engaged in foreign commerce and will supersede whatever different rules there may be in any state in the union. Whether these rules will ever be made applicable to interstate commerce, as well as foreign commerce, or to intrastate commerce, remains to be seen, but with international air transportation in the near future, we may well look to the treaty making powers of the federal government as furnishing the brightest hope for absolutely uniform aeronautical law.