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AERONAUTICAL LAW REVIEW—1936*

GEORGE B. LOGAN†

FEDERAL LEGISLATION

The year 1936 has been chiefly remarkable in that there has been no federal legislation of importance concerning aviation. It might seem prejudiced to suggest that aviation has been fortunate in that Congress gave it a breathing spell.

It should be noted, however, that this last year has seen the first effort to break the straight-jacket imposed upon air lines by the Air Mail Act of 1934, as amended in 1935.

You who were "fortunate" enough to hear my last year's review will recall that my remarks concerning this legislation were just a trifle off the complimentary side. The chief objection was to Section 15, which froze the schedules as of July 1, 1935, and which provided that the "off-the-route" operations of an air mail carrier might be enjoined and suspended upon complaint of the Postmaster-General or any interested party, if these "off-the-route" operations "tended to increase the cost of air mail transportation." This Section 15 also provided that the Commission could, after hearing, permit the institution and maintenance of additional service or schedules.

It should be noted that there was no provision in the law requiring the consent of the Commission for any air mail carrier to inaugurate service, even though it might be a competitive service to an air mail contractor and even though it might be inaugurated by another air mail contractor. The power of the Commission was apparently limited to stopping, or authorizing services after they had been inaugurated, and this power was, in addition, limited to stopping or authorizing the services of air mail contractors.

It is quite evident from the Act that an independent company, having no air mail contract, may inaugurate competitive services to an air mail contractor at any time. This does not require the consent of the Commission, nor does the Commission have power to abate such competition. The Commission's power to abate is limited only to the competition that is inaugurated by another air mail contractor.

* Address delivered at the Sixth Annual Meeting of the National Association of State Aviation Officials, Hartford, Connecticut, September 24, 1936.

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It was in this status of the law that the Transcontinental and Western Air decided to ask permission to send some of its planes to San Francisco from Albuquerque.

As all of you know, Transcontinental and Western Air has an air mail contract from Newark to Los Angeles, by way of Philadelphia, Pittsburgh, Columbus, St. Louis, Kansas City, Wichita, and Albuquerque.

As all of you also know, United Air Lines has the air mail contract from New York to San Francisco, by way of Cleveland, Chicago, Omaha, Cheyenne, and Salt Lake City. United furnishes transfer transportation to Los Angeles by connection with Western Air Express at Salt Lake City.

The Transcontinental and Western Air decided to furnish direct and through transportation to San Francisco by way of Albuquerque. It accordingly filed with the Interstate Commerce Commission, on August 30, 1935, an application for permission to inaugurate this service, consisting of not more than two transcontinental round trips daily. The petition was filed with the Interstate Commerce Commission, although the petitioner suggested that permission was not necessary and asked the Commission, first, to pass on the question of jurisdiction.

The United Air Lines, on September 21, 1935, intervened with the allegation that this competitive service would compete with its service from New York to San Francisco and would also interfere with its passenger revenue on the route between Seattle and San Diego through San Francisco.

On October 14, 1935, the Postmaster-General intervened and raised the point that, first, the Commission had no authority to entertain the application and, second, that the cost of carrying the mails between New York and San Francisco, and the cost of carrying the mails between San Diego and Seattle would be substantially increased. The Postmaster-General also suggested that the American Airlines and the Western Air Express be given notice of the proceedings so that they might intervene. Both of these companies intervened.

The American Airlines, as you all know, operates the Southern Transcontinental Line through Washington, Knoxville, Nashville, Memphis, Dallas, Tucson and Phoenix to Los Angeles. The Western Air Express operates between Salt Lake City and Los Angeles.

All of the intervenors contended, in substance, that their passenger and express revenue would be decreased and the inevitable result would be to increase the cost of carrying the mails.

The question was first heard before the Commission on the matter of jurisdiction. This argument was had on December 13, 1935, before Division No. 3 and the division held that the Commission should entertain and hear the application. The matter was reargued on February 19, 1936, before the full Commission, and the decision of Division No. 3 was affirmed and a petition for rehearing denied. The application then came before the examiners on the merits of the application on June 2, 1936, and continued until June 11.

Evidence was introduced, first, as to the question of public convenience and necessity, as specified by the latter half of Section 15 of the Air Mail Act, and second, on the question as to whether or not these schedules, if inaugurated, would tend to increase the carrying of the mail.

The abstracts of the evidence and the briefs on the part of T. W. A. have been filed, but not the opposing briefs.

Your general counsel was one of the witnesses summoned, as Chairman of the St. Louis Air Board, to testify before the Commission, and took the position, which was universally taken by persons living along the center of the United States, that this schedule would give direct service to San Francisco, where no direct service now exists. From St. Louis, we must either go to Chicago and thence southwest to San Francisco, or we must go to Los Angeles and thence north to San Francisco. The new service, even eliminating the usual hazards of missing connections, which in itself would be an improvement, shortens the time to San Francisco by approximately two hours.

The decision of the Interstate Commerce Commission on this point will be of great significance. It will determine whether Congress has been successful in its attempt, intentional or otherwise, to freeze the picture of air transportation in the United States, or whether, unwittingly or not, it has created in the Interstate Commerce Commission an instrumentality which has the power to, and will, permit the inauguration of additional services and schedules. The decision of the Commission on this point will be eagerly awaited.

THE COPELAND SAFETY INVESTIGATION

While it does not come exactly under the head of legislation, it appears, nevertheless, worthwhile to mention the hearings conducted by the sub-committee of the Senate Committee on Commerce under Senator Copeland, engaging in investigating safety in air

transportation, largely as a result of the death of Senator Cutting near Kirksville, Missouri. Many of our state aviation officials, including our President, Fred B. Sheriff, Gill Robb Wilson, Fred L. Smith, Floyd E. Evans, and your counsel, testified at these hearings.

A great deal of diverse and divergent testimony was received. Air accidents were attributed to everything from acts of God to engine failures, including within this broad gap, lack of up-to-date radio facilities, inaccurate and insufficient weather reports, insufficient number of Department of Commerce inspectors, inefficient ground services, inadequate fostering of aircraft development, lack of coordination among the government's departments, failure of the government to encourage inventors, etc., etc. Testimony was introduced concerning new and possible inventions tending towards safety, including parachutes to bring down the ship cabin and parachutes to bring down the entire ship. The testimony taken covers two volumes and it is, of course, impossible to predict the net result of this mass of testimony upon the minds of the senators and further impossible to predict what legislation, if any, may be suggested as a result of these hearings.

One thing upon which the witnesses did not seem to be in dispute was that the air mail acts of 1934 and 1935 had imposed a hardship upon the air carriers and a serious restriction upon their future.

Col. Harold E. Hartney acted as technical aviation advisor for the Commission and was largely responsible for the thoroughness of the investigation and for the breadth and scope of subjects encompassed.

It is to be hoped that the Senate Committee will, as a result of this investigation, evolve and propose helpful legislation, and it is further hoped that Congress, in such an event, will follow the recommendations. The disappointment to all aviation of the fruitlessness of the splendid work of the Aviation Commission and the expenditure of \$100,000.00 in its work, when the President disapproved of the most significant finding of his own Commission and when Congress disapproved of the rest, is still rankling as a sore spot.

STATE LEGISLATION

In the first place, few state legislatures met in the year 1936. Most legislatures convene in the odd years. In the second place, those legislatures which did meet in the year 1936 did nothing of

moment to aid or hinder the aeronautical picture. Hence, the review of state legislation is over.

IMPORTANT DECISIONS

United States v. Northwestern Air Service, Inc.¹—Our old puzzling question as to when a vessel is not a vessel and when a plane is not a plane was before the United States Court of Appeals of the 9th Circuit on December 20, 1935, in the case of *United States v. Northwestern Air Service, Inc.*

A Fairchild Seaplane had apparently been used in smuggling or other illegal operations and the government brought suit to impose penalties for violations, not only of the tariff acts, but of the Air Commerce Act. It seems, though, that before the government brought its suit to impose these penalties, the sea plane had been removed from the water and placed in an airplane hangar of the Northwestern Air Service for repairs.

When the government sought to impose its penalties, aggregating \$2100.00, the Northwestern Air Service intervened for its repair bill of \$1268.00 claiming a maritime lien for these repairs. The District Court held that this being a sea plane, admiralty law applied and the maritime lien was good. In this, the District Court followed the decision in *Reinhardt v. Newport Flying Service*,² which held that a sea plane while afloat on navigable waters, was a vessel. The Court of Appeals, however, followed the decision in *Crawford Bros. No. 2*,³ which held that a seaplane, while stored in a hangar on dry land, is not a vessel. It consequently held that the maritime lien would not apply and that the lien of the government for penalties was superior to the lien of the repair man.

In this holding, the court also followed the decision of *United States v. Batre*,⁴ decided by the same court of appeals in March, 1934, which held that a penalty imposed on an airplane making an illegal flight into the United States from Mexico was superior to the lien of a chattel mortgage. In this latter case, the court held that to hold otherwise would permit a complete evasion of penalties by the device of chattel mortgages.

Neither of these cases seemed to take into consideration the common law lien which every repair man has on the personal property, of which he has not surrendered possession, and which in this latter case, at least, had greatly enhanced the value of the

1. 80 F. (2d) 804 (C. C. A. 9th, Dec. 20, 1935); 7 JOURNAL OF AIR LAW 292.

2. 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324 (1921).

3. 215 F. 269 (1914).

4. 69 F. (2d) 673 (1934); 5 JOURNAL OF AIR LAW 495.

property on which the government was asserting its lien. It would seem to the writer that where a damaged airplane is repaired and its value enhanced by the repairer, innocent of the plane's misconduct and unaware of pending penalties, some consideration should be given to the repair man by virtue of the fact that he has made valuable the very thing on which the government asserts its lien. As yet no such case has come to my knowledge.

Day v. Equitable Life Assurance Society⁵—We have had another life insurance decision which leaves the question of the exact meaning of the words “engaged in aviation” and “aeronautic expeditions” in perhaps just as much of a muddle as it was before. This was a suit on a life insurance policy which promised to pay an additional \$5,000.00 if death was the result of an accident, but excluded a death caused by “engaging as a passenger or otherwise in submarine or aeronautic expeditions.”

Mr. Day was killed while a passenger on a sight-seeing trip with a friend near Denver. He was a guest only, had no part in handling the plane, and was not a fare-paying passenger.

The court first held that a simple flight such as this was not an “aeronautic expedition,” that “expedition” was an inapt word if used to describe an ordinary airplane flight and portended something more important, or a journey for a definite purpose, and cited definitions of the word “expedition” in various dictionaries as proof that this sort of a flight was not an “expedition.”

In its decision, the court followed the case of *Gregory v. Mutual Life Insurance Co. of New York*⁶ and *Head v. New York Life Insurance Co.*,⁷ also *Gits v. New York Life Insurance Co.*⁸ It should be noted that in these three cases, while the insurance policy used the word “engaged,” it did not use the words “as a passenger or otherwise.” It should also be noted that where the words “aeronautic operations” instead of “aeronautic expeditions” were used in conjunction with the words “as a passenger or otherwise,” the company was not held liable in *Mayer v. New York Life Insurance Co.*,⁹ and in *Goldsmith v. New York Life Insurance Co.*¹⁰

There are two state courts which have had before them the exact language of this present policy, namely, “engaging as a passenger or otherwise in aeronautic expeditions.” One case was *Gibbs v. Equitable Life Assurance Society*,¹¹ and the other was

5. 83 F. (2d) 147 (C. C. A. 10th, Apr. 7, 1936); 7 JOURNAL OF AIR LAW 420.
 6. 78 F. (2d) 522 (1935); 6 JOURNAL OF AIR LAW 626.
 7. 43 F. (2d) 517 (1930).
 8. 32 F. (2d) 7 (1929); cert. denied 280 U. S. 564.
 9. 74 F. (2d) 118 (1934); 6 JOURNAL OF AIR LAW 278.
 10. 69 F. (2d) 273 (1934); 5 JOURNAL OF AIR LAW 504.
 11. 256 N. Y. 208, 176 N. E. 144 (1931); 3 JOURNAL OF AIR LAW 135.

Provident Trust v. Equitable Life Assurance Society.¹² The New York court held that it was not liable and the Pennsylvania court held that it was liable.

In the present case, the decision was divided, two judges being in favor of the policyholder and one in favor of the company. Our recommendation as to the weight of authority in this case is to consult your own lawyer, pay him a retainer fee in advance, and then toss a coin.

Metropolitan Life Insurance Co. v. Halcomb¹³—Another interesting insurance company case was decided last November by the U. S. Court of Appeals for the 9th Circuit, the same one which wrote the admirable opinion on ownership of air space hereafter to be referred to.

In this case, the policy provided that the policyholder would be protected in the event of accidental death resulting from an airplane, provided he was a fare-paying passenger. Recovery was forbidden if the death resulted from "participating in aeronautics," except as a fare-paying passenger. In this case, the passenger was flying with the pilot who had a private license only and was forbidden to carry passengers for hire—hence, the policyholder could not have been a fare-paying passenger.

The court held that the company was not liable, but it does not seem to have discussed the question as to whether the passenger in this case was "participating in aeronautics."

It will be remembered that in the case of *Gregory v. Mutual Life Insurance Co. of New York*,¹⁴ the court held that a father riding with his son as a guest was not "participating in aeronautics." These two decisions seem to be distinctly and diametrically opposed to each other, provided the question of "participation" was raised in the *Halcomb* case, which does not appear clear.

Casteel v. American Airways, Inc.¹⁵—A new and novel case was before the Court of Appeals of Kentucky and decided in December, 1935. This was a suit brought by the widow of one Casteel against the American Airways for damages for breach of contract of carriage, first, because the trip was not completed, and second, because it was conducted in a negligent and careless manner.

It appears that Casteel was taken on as a passenger on American Airways at El Paso bound for Louisville, Kentucky. He was afflicted with tuberculosis and was quite ill and was permitted to travel in pajamas and a bath robe.

12. 316 Pa. 121, 172 A. 701 (1934).

13. 79 F. (2d) 788 (C. C. A. 9th, Nov. 4, 1935); 7 JOURNAL OF AIR LAW 143.

14. *Supra*, note 6.

15. 88 S. W. (2d) 976 (Dec. 20, 1935); 7 JOURNAL OF AIR LAW 288.

The carrier sold the tickets with full knowledge of Casteel's condition. At Fort Worth, where a change of planes was necessary, a physician examined Casteel and advised that he should not continue by plane. Both Casteel and his wife protested and both insisted that they be permitted to go by plane. The company refused, took up the tickets and made a cash refund representing the unused portion. The company took Mr. and Mrs. Casteel to a first-class hotel and bore all expenses, purchased the railway tickets and furnished transportation to the station. The couple traveled in the pullman drawing room and were required to change trains only at Memphis. They arrived at Louisville 29 hours later than they would have arrived by air. Casteel stayed in Louisville five days and was then taken to his home 150 miles distant by automobile and died a week later of tuberculosis.

The court held that the defendant was clearly a common carrier and in that respect cited *Curtiss-Wright v. Glose*,¹⁶ and *Conklin v. Canadian-Colonial Airways, Inc.*¹⁷ It was further held that among other obligations of a common carrier, it was bound to accept all persons who desired to become passengers, but that this duty was subject to the duty owed to all of its passengers, and that this duty could not be lost sight of; that where a passenger's condition was such as to cause danger to other passengers, it was the duty of the carrier to exclude him. If it became the duty of the company to remove him, this duty was in turn hedged about with limitations requiring considerate treatment, etc.

The court held in this case that as to Mr. Casteel the carrier was within its rights in refusing to continue the trip, but as to Mrs. Casteel it appeared that she had elected to remain with her husband and even if her discharge from the plane had not been voluntarily accepted by her, no damages were shown and that the court had properly directed a verdict for the defendant.

The original claims that the trip was intentionally rough and that the pilots intentionally "bumped" the plane, seem to have been lost somewhere in the opinion.

Adamowski v. Curtiss-Wright Flying Service, Inc.¹⁸—An interesting case of last year was a suit which decided the question as to whether or not instructions in flying were necessities for which an infant could be held liable on his contract.

In 1929, Adamowski contracted for a course as a private pilot, the course was completed, and for this he paid \$300.00. In 1930,

16. 66 F. (2d) 710 (1933); 5 JOURNAL OF AIR LAW 154.

17. 266 N. Y. 244, 194 N. E. 692 (1935); 6 JOURNAL OF AIR LAW 284.

18. Third District Court, Massachusetts (Feb., 1936); 7 JOURNAL OF AIR LAW 291.

he contracted for a further course as a limited commercial pilot, the course was completed, and for this he paid \$1300.00. Later he contracted for a course as a transport pilot and agreed to pay \$3200.00. At all times he was a minor. He withdrew from the transport pilot-course in May, 1930, and attained his majority on July 20, 1930, at which time he was informed that he owed a balance of \$48.55 on account of the instruction received under the third contract.

The Curtiss-Wright Co. sued him in 1931 and, on July 11, 1931, he disaffirmed his contract and filed a counter-suit or cross-action for the recovery of the \$1600.00 paid, with interest from the time paid. The evidence showed that the young man had worked since he was sixteen, had apparently been self-supporting, and took these flying courses as a means to learn a new trade and earn a better living. Although he had completed both courses of private pilot and limited commercial pilot, he was unable to pass the Department of Commerce examinations and had failed to qualify. He had been unable to obtain any work in commercial flying as a result of having taken the two courses.

The court held that these courses of instruction were not necessities and consequently the minor was entitled to disaffirm his contracts and that he had disaffirmed them within a reasonable time and returned judgment in his favor against the Curtiss-Wright Company for the full amount he had paid with interest. This case is pending on appeal and it will be interesting to note what the final decision is, inasmuch as the contracts of a minor for education have, in several instances, been held to be necessities for which a minor could be held liable. It may be that his failure to pass the examinations and hence his total failure to benefit himself financially as a result of these courses had a lot to do with the decision.

Parker v. Granger¹⁹—Last fall, in reviewing aeronautical law, I discussed with you the case of *Parker v. Granger*,²⁰ which had then been just decided by the Court of Appeals, second district of California. The case has now been decided by the Supreme Court of California. This is the case which involved a collision between two Stinson planes being operated in the filming of a picture of a parachute descent into the Pacific Ocean.

You will recall that Capt. Roscoe Turner was flying a Lockheed Vega from which the parachute jump was made, and that it was being filmed by directors and photographers of the Fox

19. 80 Cal. Dec. 475, 52 P. (2d) 226 (1935); 7 JOURNAL OF AIR LAW 275, 283.
20. 39 P. (2d) 833 (1934); 6 JOURNAL OF AIR LAW 289.

Film Company following in two Stinsons. The two Stinsons collided and eight persons were killed as the planes fell into the Pacific Ocean. Eight suits were filed and they were all consolidated in one action. The suits were filed against Granger & Co., Inc., which company rented the planes to the Fox Film Company and provided the pilots.

The points raised in the lower court and in the court of appeals were that the rule of *res ipsa loquitur* applied in the case of injured persons where there was no evidence as to the cause of the accident. Another point raised was that the court should have permitted in evidence the air traffic rules of the Department of Commerce.

The Supreme Court of California held that the *res ipsa loquitur* rule did not apply in this case, because the planes each had dual controls and that at one of the controls in each plane was the pilot and at the other was an assistant director of the Fox Film Company and hence it was not shown that the defendant Granger, Inc., through its agents, the pilots, were in exclusive control of the planes at the time of the accident. In other words, inference was left that the assistant directors might have been piloting the planes at the time of the collision.

Of much more significance is the holding of the California Supreme Court that under the Federal Constitution the air traffic rules could not apply to intrastate flying in California; that this was intrastate flying and the legislature of California had imposed no air traffic rules and hence the air traffic rules of the Department of Commerce were not applicable.

This is the first decision of a high court that the air traffic rules, which are clearly intended by the Air Commerce Act to apply to all types of flying, on the theory that it is necessary to regulate all types of flying in order to protect interstate commerce, do not, in fact, apply to intrastate flying.

If this holding is followed by other high state courts, it is obvious that this Association and all others should bestir themselves to see that air traffic rules are put into effect in each state by state legislation. If the federal air traffic rules do not apply to intrastate flying and there are no state rules, then there is no means by which miscellaneous flying may be controlled, and we are all well aware of the fact that miscellaneous flying in air miles is greater than all interstate flying, and has heretofore been, and, unregulated, will continue to be, the greatest source of air accidents.

Budgett v. Soo Sky Ways, Inc.²¹—That the California court

21. 266 N. W. 253 (March 30, 1936); 7 JOURNAL OF AIR LAW 420.

was right in holding that the *res ipsa loquitur* rule should not apply where there was a possibility of more than one person being at the controls is made more clear when we examine the case of *Budgett v. Soo Sky Ways*, decided in 1936.

In this case, one Budgett and his friend, Schmidt, both licensed pilots, went to the airport near Sioux Falls, for the purpose of buying a ship. The defendant company sent a pilot, Jack Hollister, to demonstrate a Travel-Air open cockpit model. The plane had two cockpits, the front one, designed for two passengers, and the rear for one passenger, and the cockpits were equipped with dual controls, hooked up. Hollister demonstrated the plane and was in the rear cockpit and Budgett and Schmidt were in the front. While flying over the airport, the plane, in some manner, got out of control and crashed to the ground and both Budgett and Schmidt were killed. At the trial, the plaintiff relied, first, on the fact that the Department of Commerce rule was being violated by having both controls hooked up, but the defendant contended that Budgett, being a licensed pilot and familiar with the regulations, was negligent in riding in a plane with the controls hooked up, contrary to the regulations.

The court held, first, that there was no evidence that this negligence was the cause of the injury, but more importantly ruled that the *res ipsa loquitur* rule did not apply to this case, because there was no evidence that the plane was in the control of Hollister, the defendant's pilot. It was not more probable that the ship was being flown by Hollister than by Budgett or Schmidt.

These two cases only follow out the general law that the rule of *res ipsa loquitur* does not apply unless it is clearly shown that the defendant is in charge of the instrumentality causing the injury.

Krenwinkle v. City of Los Angeles²²—We have frequently discussed at our meetings the question as to whether or not a city, in operating an airport, is engaged in a commercial enterprise or in the performance of a governmental function and have also frequently discussed the liability of the city in so operating an airport as controlled by the question as to whether it was or was not performing a governmental function.

We have had some light thrown on this question by the decision in the case of *Krenwinkle v. City of Los Angeles*, decided by the Supreme Court of California in November, 1935.

In this case an individual taxpayer brought a suit to restrain the city of Los Angeles from operating a municipal airport, con-

22. 51 P. (2d) 1098 (Nov. 20, 1935); 7 JOURNAL OF AIR LAW 290.

tending, first, that the rental which the city was to pay for the land, over a long period of years, constituted an indebtedness in excess of the charter authority of the city for the current year. The court, of course, held as to this that only the current year's rental should be considered an indebtedness in determining the aggregate indebtedness of the city for the year. The second point urged by the taxpayer that the charter of the city of Los Angeles prohibited the city from engaging in any "purely commercial or industrial enterprise."

The court in this case held, first, that the state of California had, by statute, authorized the acquisition and maintenance of airports by municipalities. Secondly, the court held that this was not a purely commercial or industrial enterprise, but a "public enterprise."

In this decision, the court cited for approval the case of *Hesse v. Rath*,²³ which was an opinion of the Court of Appeals of New York written by Mr. Justice Cardozo.

The California Court might also have cited the case of *Wichita v. Clapp*²⁴ and the case of *Dysart v. St. Louis*²⁵ and several other cases.

It must not be thought, however, that this decision is in any way an authority for the proposition that a city, when operating an airport, is not just as liable as an individual. A city may, by legislative enactment, and by public charter, be authorized to engage in activities which are beyond the scope of what we call "governmental functions."

A city is clearly acting within its governmental function when it maintains a police department, but it is not within its governmental function when it is maintaining an ice plant for the purpose of selling ice to the poor. Both activities may be legal and both activities may be proper spheres in which to spend public money, but in the one case the city may not be liable for the negligence of its policemen, but may be liable for the negligence of employees of the ice plant.

We all recall the case of *City of Mobile v. Lartigue*,²⁶ in which the city was held liable for damages resulting from the method and manner in which it had constructed its municipal airport by throwing water on to the plaintiff's land.

We still anticipate that a decision will some day be handed down in which a city is held liable for defects in, or defects in the management of, a municipal airport.

23. 249 N. Y. 435, 164 N. E. 342 (1928).

24. 125 Kan. 100, 263 P. 12 (1928).

25. 321 Mo. 514, 11 S. W. (2d) 1045, 62 A. L. R. 762 (1928).

26. 23 Ala. App. 479, 127 So. 257 (1930); 1 JOURNAL OF AIR LAW 365.

DeVotie v. Camêron²⁷—An interesting case involving the application of air traffic rules of the Department of Commerce under the provisions of the Air Commerce Act was before the Supreme Court of Iowa in *DeVotie v. Cameron*, decided March 10, 1936.

One queer thing about this case is that the function of the defendants, Cameron, et al. was not shown. We assume that he was one of the members of the State Fair Board.

On August 28, 1930, a state fair was being given and the Curtiss-Wright Flying Service had, under contract, furnished three airplanes for an exhibition. Two of the planes collided and one fell to the ground, fatally injuring DeVotie. Mrs. DeVotie first sued the Iowa State Fair Board as an entity and the Supreme Court of Iowa held in that case,²⁸ that the State Fair Board, being a governmental body, could not be sued. This new suit was, therefore, filed against Cameron, et al., who, we assume, were the individual members of the Board.

The petition charges that the individual members had conspired to do illegal acts, namely, to violate the air traffic rules and the state statutes of Iowa imposing air traffic rules. Among other things, it was alleged that the flight took place at less than 500 feet, at less than 1,000 feet over an open air assembly of persons, and that acrobatics were indulged in at less than 2,000 feet over an assembly of persons.

The court held that the air traffic rules were not binding on a sovereign state in its sovereign capacity and that the conducting of a state fair and giving of exhibitions was nothing more nor less than the discharge of the state's sovereign political functions by an agency selected by it for that purpose.

In this case the court followed the case of *Morrison v. Fisher*,²⁹ which is identical with this case, inasmuch as it involved the death of a spectator at the Wisconsin State Fair at Milwaukee many years ago in an exhibition flight given by the famous old-time pilot, Arch Hoxsey.

Hinman, et al., v. Pacific Air Transport and United Air Lines Transport Co.³⁰—It seems as if we at last have a decision which clearly and definitely settles the question of trespass in air space. This is a decision in the case of *Hinman, et al. v. Pacific Air Transport and United Air Lines Transport Co.*, decided July 20, 1936, by the United States Court of Appeals for the 9th Circuit in a case which arose in the Southern District of California.

27. 265 N. W. 637 (March 10, 1936); 7 JOURNAL OF AIR LAW 419.

28. 249 N. W. 429.

29. 160 Wis. 621, 152 N. W. 475 (1915).

30. C. C. A. 9th, July 20, 1936.

Other cases such as *Smith v. New England Aircraft Co.*,³¹ *Swetland v. Curtiss*,³² and *Thrasher v. Atlanta*,³³ left much to be desired on the express proposition as to whether or not a land owner actually owned unoccupied, unused and unenclosed air space above his land. The American Law Institute, in restating the law of trespass, held, over the protests of the members of the American Bar Association Aeronautical Law Committee, to the explicit doctrine that the owner of the land did, in fact, own the air space and that a flight through this air space was trespass, unless "privileged." The American Law Institute then went to a great deal of trouble to define the circumstances under which flight would be "privileged."

Your legal counsel in 1930 took the position that there was no such thing as ownership of unenclosed air space. Dr. Arnold G. McNair of England, some three years later, in his book on air law, also announced the doctrine that ownership of mere space was abhorrent to the common law. Mr. John C. Cooper, Jr., when chairman of the Aeronautical Law Committee, personally appeared before the American Law Institute and argued that there could be no such thing as ownership of air space.

In the case which arose in California, the plaintiffs, who owned the property adjoining the airport in the City of Burbank, filed a petition in which they alleged that they owned 72½ acres of real estate, "together with a stratum of air space sub-adjacent to and overlying said tract and extending upwards to such an altitude as plaintiffs may expect now or hereafter to utilize, use or occupy."

Without limiting themselves as to upward limits, the plaintiffs stated that they "may reasonably expect now to use and occupy said air space to an altitude of not less than 150 feet."

The plaintiffs then went on to allege that airplanes were being flown through this air space below the height of 150 feet, alleged that the value of the use of this air space by the defendant companies was \$1500.00 per month, and asked for \$90,000.00 covering sixty months.

The plaintiffs also alleged that the airplanes followed one of two courses in landing and departing over their land, described the courses and stated that repeated use would tend to create an easement and would tend to deprive them of their property in time. They asked for an injunction and asked for the value of the user.

The court first considered the old *ad coelum* formula, which

31. 269 Mass. 639, 170 N. E. 385 (1930); 1 JOURNAL OF AIR LAW 367.
 32. 41 F. (2d) 929 (1930); 55 F. (2d) 201 (1931); 2 JOURNAL OF AIR LAW 82.
 33. 173 S. E. 817 (1934); 5 JOURNAL OF AIR LAW 332.

you have all heard me talk about and which has been construed to mean that the owner of the land owns from the surface to the zenith. And the court frankly said that if it could adopt this formula as being the law, it would simplify the solution of the case, but said: "We reject that doctrine. We think it is not the law, and that it never was the law." The court, however, then pointed out that the plaintiffs did not claim an absolute and exclusive title upward to the sky, but that they did claim a present and absolute title to the space to such height as is or may become useful to their enjoyment of the land and claimed title to at least 150 feet. In solving this problem, the court said: "The first and foremost principle is that the very essence and origin of the legal right of property is *dominion over it*. Property must have been reclaimed from the general mass of the earth and it must be capable by its nature of exclusive possession. *Without possession*, no right in it can be maintained."

The court then went on and said: "The owner of land owns so much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."

The court said, however, that if the facts should show that the method of flying over the plaintiffs' land constituted an impairment of his full enjoyment of the land, they would be entitled to relief in a proper case. It so happened in this case that the plaintiffs did not allege any damages to their land, but simply claimed a damage to their air space.

The District Court of Southern California had previously dismissed the petition and the Circuit Court of Appeals affirmed its action.

It is interesting to note also, before we leave this case, that the court held that it is not legally possible to obtain an easement by prescription through air space. The court did not elaborate on this feature of the case, but it is evident, of course, that if the land owner does not own the air space, the use of it is not adverse, and no rights may be obtained by use, no matter how long or continuous or definite.

It is to be hoped that this decision, clarifying the situation with respect to air space, will remain final and be universally accepted. The tendency of all decisions has been in this direction. This leaves the land owner fully protected. Whenever flying is so conducted as to harm him, it may be enjoined. When it does not harm him, it should not be enjoined. In any event, it leaves the land owner free, at any time in the future, to improve his property in a proper manner to any height he sees fit, and the fact that air-planes have traveled over it in a given line for years and years does

not mitigate against this right, nor create any rights in favor of the airplanes.

It would seem that those advocates who have insisted that the land owner owns the air space have been short-sighted in this regard. If air space is owned, the air companies might, by flying through it constantly on the same line and at the same height, acquire a prescribed right, which some day in the distant future would prevent the land owner from building at that particular spot. The doctrine of non-ownership of air space gives him better protection in the long run than the doctrine of ownership.

City of Iowa City v. Tucker⁸⁴—Another case involving the allegedly conflicting rights of adjoining land owners and the rights of airports and the users of airports, was the case of *Iowa City and United Air Lines v. Tucker*, decided by the District Court of Iowa in Johnson County, Iowa, on September 14, last.

In this case, the adjoining land owner, Mr. Tucker, objecting to the flight of aircraft, had planted trees and erected poles along the boundary line of his property, which seriously interfered with the use of the airport.

The court held that every land owner was entitled to the "proper" use and enjoyment of his land, but that trees and poles along the boundary line which would attain a height of over 25 feet would not constitute proper use and enjoyment of his land and the defendant was, therefore, enjoined against the permitting or planting or erecting of such poles and trees. This case, if appealed from, as to which I am not informed, has not yet been decided by a higher court.

The year, in summary, has settled the question of air trespass. It has not settled the correct and final definition of "participating in aviation" and not finally the meaning of aeronautic expedition. Some clarifying of the rules of *res ipsa* has been had, and some clarifying of the status of amphibians as vessels.

The serious blow that has been dealt is the California decision that the United States air traffic rules do not apply to intrastate flying. This will ham-string the Department of Commerce in those states where there are no state rules, or where there are state rules but no machinery for or enthusiasm for state enforcement.

I cannot help but feel that the Federal Courts will take a different view. My recommendation to the enforcement division of the Bureau of Aeronautics would be to make a test case and take it to the U. S. Supreme Court before too many of the state courts follow the lead of California and build up a formidable body of case law.

84. Johnson County District Court of Iowa (Sept. 14, 1935); 6 JOURNAL OF AIR LAW 622; 7 JOURNAL OF AIR LAW 293.