NOTES, COMMENTS, DIGESTS

Robert Kingsley
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NOTES

REGULATION OF INTRASTATE FLYING BY THE FEDERAL GOVERNMENT AND OF INTRASTATE FLYING BY STATE GOVERNMENTS.—
This subject of necessity involves an interpretation of the Commerce Clause1 and its relation to aviation. The trend of modern thought in interpreting the Commerce Clause results in the conclusion that if intrastate flying does in any way affect interstate flights it is subject to federal control. Does this preclude state action in invoking safety measures to protect its citizens from this instrumentality of commerce—which in its nature is inherently dangerous to person and property? The contentious problem of the curtailment of the police power by the Commerce Clause is thus raised.2

The recent attempts of the federal government show an out and out intention to cover completely the field of all flights—ousting the State of its control over intrastate flying for the obvious purpose of uniformity. The Secretary of Commerce, under the Air Traffic Rules promulgated under authority of Section 3e of the Air Commerce Act of 1926,3 in Section 73 of his Air Commerce Regulation states:

"In order to protect and prevent undue burdens upon interstate and foreign air commerce the Air Traffic Rules are to apply whether the aircraft

is engaged in commercial or non-commercial or in foreign, interstate or intrastate navigation in the United States and whether or not the aircraft is registered or is navigating in a civil airway."

It is upon this burden theory alone that control of the federal government of such intrastate flights can be upheld. The right of the State to regulate commerce in the absence of congressional legislation can no longer be stressed. The principles which control are: (1) that Congress may control intrastate commerce when the State's control becomes a burden upon, or unreasonably interferes with, interstate commerce; (2) that the State may incidentally affect interstate commerce; and (3) that it also may act concurrently with the federal government under either this police power or under an attempt to aid in the enforcement of the federal laws (i.e., by State adoption of the federal laws).

The question arises to what extent we are going to deny to the States the right to pass reasonable protective measures for the safety of their citizens under the police power. The answer to the question might be that we should so deny if under the existing federal laws the local safety measures are adequately embodied in the federal laws. That this is true to a large extent is shown by the fact that all that most States have done is to re-enact as state laws that which is aptly covered in the federal regulations. Even so, for the proper enforcement of the federal regulations it is highly desirable that State aid be enlisted, otherwise, "if it is found unconstitutional for a State to do so [relieve the federal government of prosecution of the numerous violations] the entire responsibility for enforcement will rest upon the shoulders of the Aeronautics Branch of the Department of Commerce without any aid from the various states." The probabilities of such state

5. See footnote No. 4, supra.
6. Consult: Harriman, "Federal and State Jurisdiction with Reference to Aircraft," (1931) 2 JOURNAL OF AIR LAW 299 (1931); Simon, Note, 2 Air L. Rev. 386 (1931). In this latter article, Mr. Simon classifies the cases on state and federal control. In one class are the situations in which the State may exercise its police power even though it incidentally affects interstate commerce, in the other are those in which the State may still do so, even though the subject matter is wholly federal, if Congress has refused to act. We have seen that the latter class of cases is not here pertinent, since Congress has acted.
regulation burdening interstate commerce are then minimized and the salutary result of complete safety outweighs its burden upon commerce (if it be a burden). The burden to commerce is at least the lessor of the two evils. What benefit is to be gained by barring the State of any jurisdiction when the end sought to be reached, a free and untrammeled commerce controlled uniformly, is rendered useless by lack of enforcement and undesirable by denying needed protection to the State's citizens under the police power?

Coming to the specific problem of the federal control over intrastate air commerce. This problem can be solved only by asking whether the Air Traffic Rules apply to such commerce. That they do apply if they are found necessary for the purpose of uniformity and so as not to burden interstate commerce cannot be doubted. Congress thereby enters the field of intrastate flying to remove any burden thereto and to preclude the State from going over the chalk mark, even though to a degree it does divest the State of its police power. Recent cases in other related fields have carried the burden theory to great lengths and as far as necessary to protect interstate commerce. As far as aviation is concerned, there have been to date only two cases on the subject: the Neiswonger case and the Katz case. The decision in the Neiswonger case

Air Law 423 (1930) (an address delivered at the First Legislative Air Conference, 1930).


In Railroad Comm. of Wis. v. Chicago, B. & Q. Ry., 257 U. S. 563, 588, 42 Sup. Ct. 232 (1922), Mr. Chief Justice Taft, speaking for the Court, said: "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulations by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority."


12. 35 F. (2d) 761 (D. C. Ohio 1929), discussed in: 8 N. C. L. Rev. 281 (1930); 78 Univ. Pa. L. Rev. 633 (1930) 43 Harv. L. Rev. 837 (1930);
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is partially dictum while that in the more recent case of People v. Katz has been severely criticized. In the Neiswonger case the burden theory was applied, the court saying:

“If the circumstances and conditions under which air commerce is carried on are such that it is necessary for the . . . [traffic rules] . . . to apply to and regulate intrastate flights in order to protect interstate movements, then it will so apply the same as to an interstate flight . . . It is apparent that all or nearly all of these rules must be applied to both intrastate and interstate craft in order to secure the safety of the latter, and that with respect to these matters the federal regulations must be paramount. Conflicting State rules could not be allowed.”

The force of this decision is materially defeated by the court’s dictum with reference to the height of flight rule:

“It is a little difficult to see in what respect interstate aircraft navigating at the above prescribed elevation can be endangered or interfered with by intrastate craft moving in a lower lane.”

The court decided that the violations of the act gave it jurisdiction as a federal matter and that whether the rules applied to an intrastate flight as being necessary to protect interstate traffic was merely a matter of proof, not affecting its jurisdiction over the case.

As mentioned above, the Katz case is anything but satisfactory. Like the Neiswonger case it involved a purely intrastate flight. The court says:

28 Mich. L. Rev. 756 (1930); 3 So. Cal. L. Rev. 422 (1930); 16 Iowa L. Rev. 106 (1930); 34 Law Notes 142 (1930); 33 Law Notes 201 (1930); 16 Va. L. Rev. 502 (1930); 1 JOURNAL OF AIR LAW 359 (1930); 1 Air L. Rev. 265 (1930).


14. Consult: 2 Air L. Rev. 386 (1931). The criticism is somewhat unwarranted when it is considered that the flight was not interstate, nor was it commercial, but was merely a pleasure flight wholly intrastate, so that any interference would be negligible. On the whole problem, consult, also: Tuttle and Bennett, “Extent of Power of Congress Over Aviation,” 5 Univ. Cin. L. Rev. 261 (1931).

15. 35 Fed. (2d) 761 (D. C. Ohio 1929).


17. Neiswonger v. Goodyear Tire & Rubber Co., 35 Fed. (2d) 761, 763 (D. C. Ohio 1929). In Swetland v. Curiss Airport Corp., 41 F. (2d) 929, 940 (D. C. Ohio 1930), this doubt was set at rest in the following words: “. . . while some doubt has been expressed upon the subject [referring to the Neiswonger case], we think it would be extremely difficult to enforce the minimum altitude rule of the national act if the state established a lower minimum altitude than that established by the national act.” The court therefore concludes that, insofar as the height of flight rules of the federal Air Traffic Rules are concerned, they are applicable to both interstate and intrastate commerce.

18. 140 Misc. 46, 249 N. Y. S. 719 (1931).

"That [commerce] which is completely internal and confined to a single state, and does not affect or extend to other states, is not open to constitutional objection . . . Until it is affirmatively shown that the statute . . . here challenged is a burden upon or an interference with interstate commerce or its elements, as it has been defined by the courts, it must be upheld as constitutional . . . The States have never surrendered their power reasonably to protect the public safety. The state law here neither obstructs, interferes with, nor discriminates against interstate commerce or any federal right."20

New York, under the decisions, would have had the right reasonably to protect the safety of its citizens,21 without the necessity of the extensive language of the Katz case.22 Further, had the court looked at their own State law and compared it with the Air Traffic Rules it would have found absolute uniformity—almost equivalent to the adoption of the federal rules on height of flight—and it could have easily said that no interference or burden upon interstate commerce was possible as there were no different regulations as was the case in the numerous cases where state regulations have been held to be at variance with federal regulations. The court had a wonderful opportunity to decide that state duplication or adoption of federal commerce regulations was valid and highly desirable to the end of uniformity.23 Had this been done

20. People v. Katz, 140 Misc. 46, 249 N. Y. S. 719, 721-722 (1931). The plane in this case was not, in any sense, engaged in commerce, either interstate or intrastate, nor was it a carrier of persons or property incident to interstate commerce. The whole question hinged upon the constitutionality of the state law and, as Mr. Simon says in 2 Air L. Rev. 386, 389 (1931), quoting from the opinion of Mr. Justice Lamar in Southern Ry. v. R. R. Comm. of Ind., 236 U. S. 439, 447, 35 Sup. Ct. 304 (1915): "The test . . . is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state has any jurisdiction at all over a subject over which Congress has exercised its exclusive control."

21. Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501 (1915); Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715 (1912) (existence of a federal act against misbranding did not forbid the State from requiring safeguards as to ingredients); Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92 (1902) (State could protect its cattle from communicable diseases). In the Katz case, Mr. Judge Freschi cites, as one of his authorities, MacAsbill, "State Regulation of Motor Vehicles Operating in Interstate Commerce," 17 Am. Bar Ass'n Jour. 87 (1931), in which are collated all the cases in which States, under the guise of the police power, have interfered with interstate commerce in automobile cases. Mr. MacAsbill, in this article, however, concedes that if the federal government were to begin to regulate such automobile commerce, these regulations would be invalid.

22. 140 Misc. 46, 249 N. Y. S. 719 (1931).

23. N. Y. Gen. Bus. Law (Cahill's Consol. Laws 1930, c. 21), § 245 (7), 1930 U. S. Av. R. 446, was an exact duplication of the wording of Air Commerce Regulations, § 74 (G), 1929 U. S. Av. R. 218, before the amendment of 1930. In effect, the present rules (1930 U. S. Av. R. 324), adopted to conform to the decision in Swetland v. Curtiss Airport Corp., 41
the decision would have been more satisfactory and would have
set at rest any possible adverse comments.

This suggestion raises the question as to the effect of the pass-
age of State laws requiring adherence to the federal Air Traffic
Rules, e.g., state adoption of federal regulations. The constitu-
tionality of such incorporation of the federal law into State regula-
tion is open to attack, on the grounds (1) that the power to make
law cannot be delegated and (2) that the States do not have any
jurisdiction over the subject once Congress had assumed exclusive
control. The prohibition laws which adopted the provisions of
the federal act do not help us much because concurrent jurisdiction
was provided for expressly. The courts of the States have held
uniformly that unless there is a constitutional law preventing it,
the legislatures may adopt a provision of the federal law or of the
law of another State. Senator Davis of Missouri goes even further
and asks: Where is the constitution which prohibits a State from

F. (24) 929, 1930 U. S. Av. R. 21 (D. C. Ohio 1930), as to interference
with property rights, do not, as far as this problem is concerned, alter the
similarity.

For further discussions of this problem, consult: Gurski, "The Right of
Congress to Regulate the Navigation of the Air," 14 Detroit Bi-Monthly
L. Rev. 1 (1930); Pheny, "Extent to Which the Federal Government May
Control Aviation within the State," 14 Detroit Bi-Monthly L. Rev. 127
(1931); Tuttle and Bennett, "Extent of Power of Congress Over Aviation,"
5 Univ. Cin. L. Rev. 261 (1931). Consult, also: Craig v. Boeing Air Trans-
effect that where the basis of the action is a violation of the air commerce
act, the case is removable to the federal courts).

1 JOURNAL OF AIR LAW 199 (1930); consult, also: Tuttle and Bennett, "Ext-

25. In reviewing the case of Southern Ry. v. Railroad Comm. of Ind.,
236 U. S. 439, 35 Sup. Ct. 304 (1915), and cases relying on it, or on which
it was based [Pennsylvania R. R. v. Pub. Serv. Comm. of Pa., 250 U. S.
566, 40 Sup. Ct. 36 (1919), and Erie R. R. v. New York, 233 U. S. 671,
34 Sup. Ct. 756 (1914)], we find that in all cases the state regulations ex-
cceeded or were at variance with the federal regulations. Hence, it reasonably
may be concluded that where identical regulations are adopted, the state
statute will be held to be constitutional. For a good case on the question
of state jurisdiction where there is no conflict with federal regulations,
consult: Atchison, T. & S. F. Ry. v. R. R. Comm. of Calif., 283 U. S. 380,
51 Sup. Ct. 553 (1931).

26. U. S. Const., Amend. XVIII, § 2: "The Congress and the several
States shall have concurrent power to enforce this article by appropriate
legislation." Consult: Ex parte Burke, 190 Cal. 326, 212 Pac. 193 (1923); People v. Frankovitch, 64 Cal. App. 184, 221 Pac. 671 (1923). But consult:
U. S. v. Lanza, 260 U. S. 377, 381-382, 43 Sup. Ct. 141 (1922), where Mr.
Chief Justice Taft points out that even without the provision for concurrent
power the States still could regulate, for the Amendment is not the source
of State power.
adopting the requirement of a certificate of airworthiness from the Kingdom of Siam if desired.27

But it would be an unconstitutional delegation of law-making power were the State to adopt future laws or future regulations.28 To make sure that uniformity will always be assured when the federal regulations have been added to or altered, it has been suggested that state commissions be set up to adopt as rules of that State the new state and federal rules as they are adopted elsewhere.29 That such a method would be constitutional seems fairly certain,30 providing that the statutes creating the commissions do not provide that the rules adopted by the State commission must be in conformity to the future rules of the federal government. As long as such laws passed by the legislature or rules adopted by such a commission correspond with existing laws and regulations of other States and of the federal government they can be said to meet the constitutional requirement of the various States as not delegating the legislative power; and if they are an exact duplication of the federal laws they come without the objection of Justice Lamar in Southern Railway v. Railway Commission of Indiana31 that the "State has no jurisdiction of a subject over which Congress has erected its exclusive control."32 Such state statutes if they follow the above restrictions and are identical do not obstruct or embarrass the execution of act of Congress but even greatly aid in the enforcement of the federal

28. People ex rel. Cant v. Crossley, 261 Ill. 78, 103 N. E. 537 (1913); State v. Vino Medical Co., 121 Me. 438, 117 Atl. 588 (1922); In re Opinion of Justices, 239 Mass. 606, 133 N. E. 453 (1921).
30. There is no constitutional objection to the delegation by a State of its administrative functions to a commission whose authority rests upon a broad statute, such as that authorizing a railroad commission: Douglas v. Nobel, 261 U. S. 165, 43 Sup. Ct. 303 (1923); Cleveland Macaroni Co. v. State Board of Calif., 256 Fed. 376 (D. C. Cal. 1919); Bailey v. Van Pelt, 78 Fla. 337 and 353, 83 So. 789 (1919); Craig v. O'Rear, 199 Ky. 553, 251 S. W. 828 (1920); Douglas Park Jockey Club v. Talbott, 173 Ky. 685, 191 S. W. 474 (1917); People v. Moynihan, 121 Misc. 34, 200 N. Y. S. 434 (1923).
statutes—an assistance without which the enforcement would be negligible.\footnote{33}

**Conclusion**

From the foregoing, the following is concluded:

1. That the States have the power to regulate intrastate flight, subject to the limitations that such control does not interfere with the federal regulation of interstate commerce.

2. That the federal government may regulate intrastate flight if it be deemed necessary to the proper regulation and control of interstate commerce that uniformity be attained.

3. That the determination of whether specific regulation of intrastate flight is necessary must lie with the federal courts and that they will so find in many cases cannot be doubted since the dictum in the Neiswonger case.\footnote{34}

4. That the desire for uniformity does not in itself give Congress the exclusive power to regulate; that uniformity is essential and unless the States lawfully embody the federal rules in their own to bring this about, enforcement of the air regulation will be rendered difficult by the numerous inconsistent state regulations being held to be a burden to interstate flying.

5. That, as suggested by George B. Logan (in an address before the First National Legislative Air Conference in August, 1930), further state regulation is advisable and the States constitutionally may regulate fields not yet regulated by the federal government, e. g., (a) the business of aviation as long as it does not so affect the business of a carrier as to be a burden; (b) other fields, such as special incorporation permits, regulation of construction and manufacture of aeroplanes, regulation of training schools, or fields, etc.; (c) probably the requirements of certificates of convenience and necessity when transportation is wholly within the State.

6. Lastly, it is earnestly urged that this new baby be not overindulged with too much regulation. To foretell the future of aviation by the extent of its regulation is futile. The present deplorable condition of the over regulated railroads while the bus


\footnote{34} 35 (2d) 761 (D. C. Ohio. 1929).

\footnote{35} Logan, “The Interstate Commerce Burden Theory Applied to Air Transportation,” 1 JOURNAL OF AIR LAW 433, 442 (1930).
companies and motor freight companies flourish makes us hesitant to urge too much concerning that bugaboo, regulation.

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COMMENTS

BAILMENTS—DUTY OF BAILEE—EVIDENCE—PILOT'S LOGBOOK AS OFFICIAL RECORD—ENTRIES IN COURSE OF BUSINESS.—[Ohio] Plaintiff was the owner of an airplane which was operated for him by Speer, an experienced pilot. Due to excessive cold, Speer was compelled to land his plane at defendant's airport, where, being unable to continue the flight due to the weather, he stored the plane and continued his journey by rail. Plaintiff claims that Speer informed defendant's manager that he had arranged with one Hay to fly the plane on when the weather cleared, but that this could not be done without permission from the plaintiff. Two days later, and without further notice either from Speer or from the plaintiff, defendant's officials allowed Hay to fly the plane, during which flight it crashed, was destroyed and Hay killed. To rebut evidence offered on behalf of plaintiff that no one except Speer was authorized to fly the plane, and that defendant knew this, and to contradict Speer's testimony that he had not made prior use of this airport, defendant offered in evidence log books, kept by Hay under the Air Commerce Regulations, showing previous flights of this plane by Hay, and a previous use of the port by Speer. Judgment for defendant, and plaintiff brings error. Held, (1) that the leaving of the plane in defendant's hangar constituted a bailment as a matter of law; (2) that defendant had violated its duty as bailee in permitting a flight by Hay under the circumstances; and (3) that it was not error to admit the log books, since they constituted "an official record of the matters required to be recorded therein"; and (4) that the court could take judicial notice of the departmental regulations requiring such log books to be kept. Judgment reversed and cause remanded. Ogden v. Transcontinental Airport, Inc., 39 Ohio App. 48, 177 N. E. 536 (1931).

The instant case decides two problems not hitherto decided by the courts:

(1) That an airport proprietor stands, toward those storing their planes in his hangars, in the same relation as does the operator of a commercial garage toward motorists storing their cars with him—namely, in the relation of a bailee for hire. Consult: Logan, "The Liability of Airport Proprietors," 1 JOURNAL OF AIR LAW 263 (1930).

(2) That the log books and other records, which pilots are required by Air Comm. Reg. 1931, Sec. 56, to keep, are admissible in evidence to prove the data recorded therein. The regulations of the United States Department of Commerce require every licensed pilot to "keep an accurate record of his solo flying time in a logbook": "Air Commerce Regulations," Aeronautics Bulletin No. 7 (1931), Ch. 5, Sec. 56. The court in the instant case refers to them as "official records." It is submitted that this is giving the wrong reason for a correct result. "Official records" is usually taken to refer only to records kept by, or under the direction of, public officials: Winkmore, Evidence (2d ed.) 384-385, Secs. 1630 & 1631. The circum-
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Substantial guarantees of trustworthiness are (a) the oath of the officer, and (b) the fact that, being open to public inspection, inaccuracies or falsities would be detected easily: 3 Wigmore, Evidence (2d ed.) 386-389, Sec. 1632. Neither of these guarantees applies to the records in question. However, it is submitted that, since these records must be kept in order for their keepers to retain the licenses under which they continue to do business, the books are "entries made in the regular course of duty and business by a deceased entrant," and admissible as such under an exception to the hearsay rule equally as well settled as is the one relating to official records: 3 Wigmore Evidence (2d ed.) 257-287, Secs. 1517-1533.

Robert Kingsley.

Common Carriers—Degree of Care—Assumption of Risk—Validity of Ticket Provision Exempting Carrier From Liability for Negligence—[Pennsylvania] Plaintiff sued under the Indiana Wrongful Death Statute to recover for the death of her husband, who had been killed while riding as a fare paying passenger on one of defendant's planes. The court (Kirkpatrick, D. J.), charged, among other things:

1. "... we first have to come to the question of whether or not the defendant in this case is a common carrier. Now that is a matter of fact, and you will have to determine that. You will take into consideration the evidence, undisputed I believe, of the Pennsylvania Railroad ticket agent, who testified that he sold the defendant's tickets generally to the public from his window without discrimination, except as to the overloading of planes, and you will also take into consideration the defendant's circulars by which it advertised the regular times of operating its planes; and, while the question is for you, I should think you would have very little difficulty in arriving at the conclusion that under the evidence in this case this defendant is a common carrier."

2. "If you find from the evidence that this defendant was a common carrier, then the defendant was bound to exercise the highest degree of practical care and diligence, and is liable for all matters against which human prudence and foresight might guard. ... While a carrier is not bound to anticipate unusual and unexpected perils to its passengers, yet its servants must be diligent at all times in protecting passengers from danger by the exercise of the highest degree of care which is practical. ... This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. ... These rules were laid down before airplanes were known, and were intended originally to apply to railroad transportation and transportation even earlier than that by stage coach, so when you come to determine what is the highest degree of practicable care and diligence you will have to remember that in dealing with travel by airplane you are dealing with a kind of transportation which is navigating a new element. There are many more factors which are unknown, unforeseeable, and not preventable arising in connection with an airplane journey than with a railroad journey." (Italics added.)

3. "No risks whatever are assumed by a passenger who goes up in an airplane except such as are usually attendant upon that form of locomotion—and you will remember that there are more risks attendant upon that form of locomotion than upon riding on horseback or in a carriage, or in an automobile—and under no circumstances does the passenger assume the risk that the plane may be improperly, carelessly or negligently operated. The passenger has the right to expect, and the airplane company owes him the duty of exercising the care and skill that properly are exercised in that
form of locomotion . . . One riding in a plane assumes the risk that storms may be encountered and that the plane of necessity must be brought from the sky to the earth under conditions of weather, lights, and landing field that involve unusual risk and dangers in landing. I think that is a risk that is assumed providing the meeting of the risk is not in any way due to the negligence of the defendant. In other words, storms which can be expected and avoided, and the extent of which can be calculated, do not come within the meaning of that rule. That only applies to sudden and unavoidable storms and weather conditions.” (Italics added.)

(4) “Assuming the defendant is a common carrier, it could not secure protection against the rules of its negligence by providing in the ticket issued . . . that the defendant should not be liable for the negligence of itself or its servants. Such a limitation of liability is contrary to public policy and of no effect . . .”


The instant case is of interest, not only because it is a square holding on the validity of ticket exemptions from liability (consult: Wikoff, “Uniform Rules for Air Passenger Liability,” 1 JOURNAL OF AIR LAW 512 (1930); Wikoff, “Proposed Uniform Passenger Contract,” 1 JOURNAL OF AIR LAW 228 (1930); Edmunds, “Aircraft Passenger Ticket Contracts,” 1 JOURNAL OF AIR LAW 321 (1930)), but also because of the clear recognition therein of the factual differences between the risk situations of air and land transportation. The statements on degree of care and assumption of risk (Charges to the jury No. (2) and (3) supra) seem to be the fairest application of the old rules to this new situation which have been made in any case to date.

ROBERT KINGSLEY.

GASOLINE TAX—COMMERCE—STATE SALES TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Federal] A New Mexico statute levied a tax of five cents per gallon on all gasoline used or sold in the state, excepting gasoline sold in the “original package”: Comp. Stat. N. M. (1929), secs. 60-101 and 60-203. Plaintiff operates an air transport service between Texas and Colorado, stopping at Albuquerque and Santa Fe, New Mexico, to pick up passengers, freight and express. It also operates an intrastate business between Albuquerque and Santa Fe. Plaintiff refueled at Albuquerque, and the distributor collected the New Mexico tax from plaintiff and remitted it to the state comptroller. After paying more than $3,500 on account of such tax, the plaintiff brought a bill to enjoin the state comptroller from further collection of the tax. Held, that statute as applied to plaintiff is unconstitutional and void as the tax is a direct burden on interstate commerce, and is wholly void because plaintiff's intrastate business is so interdependent and so commingled with its interstate business that the amount of gasoline employed in each cannot be determined and apportioned. Permanent injunction decreed: Mid-Continent Air Express Corporation v. Lujan, 47 F. (2d) 266 (D. C. N. M., 1931).

Where a tax on interstate commerce is invalid, the entire tax will be overthrown if the intrastate business cannot be separated from the interstate commerce: Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606 (1920). In the instant case it was said to be practically impossible to determine how much gasoline is consumed in each branch of the business.
This view appears erroneous. By simple mathematics the proportion of gasoline consumed in each type of commerce may be calculated. Several states have held the gasoline employed in intrastate commerce by an interstate air transport to be determinable: see decree in Western Air Express, Inc. v. Welling, 1931 U. S. Av. R. 146 (Utah, 3rd Jud. Dist. Ct., 1930); Opinion of Atty. Gen. of Illinois, 1931 U. S. Av. R. 172 (December 8, 1930).

Assuming that the gasoline taxed goes into interstate commerce, the courts are faced with their major problem. Is the tax such a burden on interstate commerce as to render it invalid? The instant case found it to be so, reaffirming the argument of United States Airways v. Shaw, 43 F. (2d) 148 (W. D., Okla., 1930); comment, 2 Journal of Air Law 600 (1931). These decisions are based upon the doctrine expounded by the Supreme Court of the United States: Helson and Randolph v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1928). In the latter case, a Kentucky statute imposed an excise tax on gasoline obtained without the state and used within the state. The plaintiff operated a ferry between Kentucky and Illinois. The gasoline was purchased in Illinois, but 75% of it was actually consumed within the confines of the state of Kentucky while making the interstate journey. 75% of the gasoline used by the plaintiff was taxed, and the statute was declared unconstitutional, the court saying, “Is not the fuel consumed in propelling the boat an instrumentality of Commerce no less than the boat itself?”: Helson and Randolph v. Kentucky, supra. Following the above decisions, the state of Michigan will not attempt to enforce its tax against instrumentalities of interstate commerce. The Attorney General of that state has endorsed the reasoning later employed in the instant case: Opinion of Atty. Gen. of Michigan, 1931 U. S. Av. R. 162 (December 17, 1930). However, the courts have not been unanimous in reaching the conclusion of Mid-Continent Air Express Corporation v. Lujan, supra. The Missouri motor fuel tax was sustained when one engaged in hauling freight between two states by truck attempted to enjoin the gasoline distributor from collecting the tax: Central Transfer Co. v. Commercial Oil Co., 45 F. (2d) 400 (E. D., Mo., 1930). The Helson case, supra, was held inapplicable because there the tax was on gasoline consumed within the taxing state but purchased outside its limits; whereas, here the tax was on a sale taking place within the taxing state. Moreover, argued the court, the consumer is not in a position to contest the constitutionality of a gasoline sales tax: Central Transfer Co. v. Commercial Oil Co., supra. No one will be heard to contest the validity of a statute unless he can show that its enforcement will result in direct and immediate injury to him: Hampton v. St. Louis, Iron Mt. & S. Ry., 227 U. S. 456, 33 S. Ct. 263 (1912). Yet, both the Central Transfer and the instant cases involve taxes on sales, as distinguished from consumption, and were initiated by consumers. It is true that the consumer cannot prove to a certainty that he is affected by the tax. Perhaps, the distributor is permitting the tax to come out of his profit. But, if the consumer cannot raise the question, who can? In another sales tax case it was held that the distributor was not in a position to contest the tax: Kentucky Independent Oil Co. v. Coleman, 236 Ky. 592. 33 S. W. (2d) 615 (1930). The mere intention of the purchaser, whether disclosed or undisclosed to the distributor, to use
the gasoline in an interstate journey, though coupled with the fact that it is consumed for that purpose, does not have the effect, so far, as the distributor is concerned, of converting the transaction into one of interstate commerce: Ibid. 

Helson and Randolph v. Kentucky, supra, was distinguished because it involved a tax on consumption and was brought by a consumer.

The best case for the proponents of the gasoline tax statutes was set forth in an opinion written by Judge Parker: Eastern Air Transport, Inc. v. South Carolina Tax Commission, 52 F. (2d) 456 (E. D., S. C., 1931). The facts were substantially the same as those in Mid-Continent Air Express Corporation v. Lujan, supra. Judge Parker argues that the sale is purely intrastate. What the buyer does with the fuel after its purchase is immaterial. It is not the intention of the purchaser, but the status of the property that governs the right of the state to tax. The state has as much power to tax sales consummated within the state as it has to tax production: Eastern Air Transport, Inc. v. South Carolina Tax Commission, supra. Assessments on production have been upheld: Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83 (1922) (anthracite coal); Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 S. Ct. 639 (1926) (natural gas); American Manufacturing Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522 (1919) (manufacturing).

Since the instant case merely followed United States Airways v. Shaw, supra, it must stand or fall with that case. The Shaw case has been called a misapplication of Helson and Randolph v. Kentucky, supra, and has been declared to be but a friendly suit: Opinion of Atty. Gen. of Florida, 1931 U. S. Av. R. 151 (November 25 and 26, 1930).

Where the soundness of the instant case has been recognized, the gasoline tax has been sustained as a charge for the use of public landing fields. An air transport line used two municipal airports in Wyoming. The Wyoming gasoline tax was upheld as applied to the airline because its proceeds were used to maintain the municipal air fields, and resulted in a direct benefit to the transport company: Boeing Air Transport, Inc. v. Edelman, 51 F. (2d) 130 (D. C., Wyo., 1931). The court was not faced with the problem of the tax falling upon a company not using the municipal airports. Michigan has recently attempted this solution of its gasoline tax problem: Public Act No. 160, Acts 1931, approved May 27, 1931. The Attorney General sanctioned the tax: Opinion of Atty. Gen. of Michigan, 231 C. C. H. 2161 (November 6, 1931). The tax levied on gasoline used by aeroplanes engaged in interstate commerce for the purpose of maintaining airports may be sustained on the same theory that similar statutes for the maintenance of public highways will be upheld as applied to automobiles engaged in interstate commerce. License and mileage taxes on motor vehicles engaged in interstate commerce have been sustained as compensation for the use of public highways: Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140 (1914); Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30 (1916); Liberty Highway Co. v. Michigan Public Utilities Commission, 294 Fed. 703 (E. D. Mich., 1923); Red Ball Transit Co. v. Marshall, 8 F. (2d) 635 (S. D. Ohio, 1925); Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702 (1926); Interstate Busses Corporation v. Blodgett, 276 U. S. 245, 48 S. Ct. 230 (1927); Johnson Transfer & Freight Lines v. Perry, 47 F. (2d) 900
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(N. D. Ga., 1931); Alkazin v. Wells, 47 F. (2d) 904 (S. D. Fla., 1931). Similar taxes have been overthrown because they were so unreasonably assessed that they could not be said to be charges for the use of highways: Sprout v. City of South Bend, 277 U. S. 163, 48 S. Ct. 502 (1928); Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 51 S. Ct. 380 (1931). A license tax of two dollars per annum for every pole that an interstate telegraph company had in the city was sustained as a reasonable charge for the use of the city streets: Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, 39 S. Ct. 265 (1918). "Even interstate business must pay its way—in this case for its right of way and the expense to others incident to the use of it": Ibid, 259. A charge for the use of a municipal wharf has been upheld: Transportation Co. v. Parkersburg, 107 U. S. 691, 2 S. Ct. 732 (1882). Similarly, a toll for the use of the locks on the Illinois River was sustained: Huse v. Glover, 119 U. S. 543, 7 S. Ct. 313. Judge Parker has even gone so far as to suggest that aeroplane companies engaged in interstate commerce should have to pay the gasoline tax because their business is greatly benefited by good roads leading to their airports: Eastern Air Transport, Inc. v. South Carolina Tax Commissioners, supra.

Several of the states tax the withdrawal of gasoline from storage within the state. The theory is that when gasoline is stored in the state, it is taxable as part of the general mass of property within the state. That it afterwards is used in interstate commerce does not render the tax a violation of the commerce clause of the Federal Constitution: Opinion of Atty. Gen. of Alabama, 1931 U. S. Av. R. 148 (December 17, 1930); see Heisler v. Thomas Colliery Co., supra; Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475 (1886). Contra, see Opinion of Atty. Gen. of Florida, 1931 U. S. Av. R. 155 (December 19, 1930).

The constitutionality of gasoline taxes will remain a much disputed question until an aviation case reaches the Supreme Court of the United States. Eastern Air Transport, Inc. v. South Carolina Tax Commission, supra, is now pending appeal to the United States Supreme Court: U. S. S. C. Docket No. 504, filed November 4, 1931, 231 C. C. H. 2160. The instant case misapplied Helson and Randolph v. Kentucky, supra. Where the revenues from the taxes on gasoline used in aeroplanes goes to build and maintain municipal airports, the taxes are clearly valid. Of course, such taxes will be upheld only where the taxed party uses the benefited airports. Should the instant case be sustained, the tax on withdrawal from storage may prove to be a valid substitute for the tax on sales. For a further discussion of the subject see Tell, "Taxation of Aircraft Motor Fuel" 2 JOURNAL OF AIR LAW 342 (1931).

RAYMOND I. SUEKOFF.

LIFE INSURANCE—INTERPRETATION OF "AERONAUTIC EXPEDITION."—[New York] The plaintiff was beneficiary of an insurance policy issued by the defendant company on the life of the plaintiff's son. Provision was made for double indemnity in case of accident "provided that death shall not be the result of or be caused directly or indirectly by military or naval service of any kind in time of war or by engaging as a passenger or otherwise in submarine or aeronautic expeditions." The
insured was killed while a passenger on a plane in regular service between
Albany and New York City operated by the Coastal Airways Incorporated,
an authorized air line. From an order of the New York County Supreme
Court denying plaintiff's motion for summary judgment plaintiff appealed.
The Appellate Division of the Supreme Court reversed the order and
granted plaintiff's motion: 231 App. Div. 119. Held, on appeal to the
Court of Appeals, the insured was engaged in an "aeronautic expedition"
within the meaning of the policy. Judgment reversed Gibbs v. Equitable
Life Assurance Society of United States, 256 N. Y. 208, 176 N. E. 144
(1931).

Hitherto courts have construed the word "expedition" to mean a march
or voyage of martial character or a journey with exploratory intent. Here
the Court of Appeals dismissed the idea that the makers intended to em-
ploy the word in its martial significance by calling attention to an excep-
tion made earlier in the same clause for "military or naval service in time
of war." This contrasts with the antecedent opinion of the Appellate
Division in the same litigation that, by reason of the maxim noscitur a sociis,
the word must have a military denotation. Nor, the Court of Appeals
decided, could the makers have had in mind an exploratory undertaking,
since passengers do not commonly go on voyages of exploration.

There are apparently no other cases which interpret the word "ex-
pedition" in a policy at all similar to the one under consideration. The
instant case should be distinguished from Pittman v. Lamar Life Ins. Co.,
17 F. (2d) 370 (C. C. A. 5th, 1927). In that case the exception was made
for death "while participating or as a result of participation in any sub-
marine or aeronautic expedition or activity . . . ." The insured was
killed by the propellor of the airplane in which he had just taken a ride
and the court decided that the word "activity" was broad enough to in-
clude this incident of an airplane trip. Contra: Tierney v. Occidental
Life Ins. Co., 89 Cal. App. 779, 265 Pac. 400 (1928). Courts have also
held that a passenger in an airplane was "participating in aviation":
Meredith v. Business Men's Accident Ass., 213 Mo. App. 688, 252 S. W.
976 (1923); Travelers' Ins. Co. v. Peake, 82 Fla. 128, 90 So. 418 (1921);
Bew v. Travelers' Ins. Co., 95 N. J. L. 533, 112 Atl. 859 (1921); Head v.
New York Life Ins. Co., 43 F. (2d) 517 (C. C. A. 10th, 1930). However
Jackson, 200 Ind. 472, 164 N. E. 628 (1929); Price v. Prudential Ins. Co.
Jackson, 200 Ind. 472, 164 N. E. 628 (1929); Price v. Prudential Ins. Co.
98 Fla. 1044, 124 So. 817 (1929); Benefit Ass. Railway Employees v. Hay-
den, 175 Ark. 565, 299 S. W. 495 (1929); Gits v. New York Life Ins. Co.,
32 F. (2d) 7 (C. C. A. 7th, 1929); Flanders v. Benefit Ass. of Railway
Employees (St. Louis Ct. of App., Mo. Decided Nov. 3, 1931) 231 C. C. H.
2161.

In the principal case what seems to have determined the court was
the consideration that in 1924 when the policy was written a trip in an
airplane was thought dangerous enough to be called an "expedition." The
court states that "the intent of the parties . . . grew out of and reflected
the general belief that presence on a trip or journey in a vessel or machine
of this type in regular transit constituted such a momentous adventure and
was accompanied by such unusual danger and extraordinary hazard that
neither party expected the policy to cover the risk of casualty."
But a great improvement has been made in airplane construction in the last few years and a flight today on an established air line far exceeds in safety a flight with the casual "barnstormer" of 1924. Might it not be argued that the conditions contemplated by the policy no longer exist and that a trip today in an airplane operating as a common carrier on regular schedule is not an "expedition" under the terms of the policy? Current statistics show that in the last one and a half years (up to July, 1931) there have been approximately 4,583,308 passenger-miles flown in scheduled air transport service for every passenger fatality: ^3^ Air Commerce Bulletin 141 (September 15, 1931). Obviously the framers of the insurance contract were considering no transportation of a high safety comparable to this. It is a legal platitude that in case of ambiguity an interpretation favorable to the insured will be adopted: Paskusz v. Philadelphia Cas. Co., 213 N. Y. 22, 106 N. E. 749 (1914); Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810 (1902). Life insurance policies often run for years and it seems hardly fair that an equivocal restriction of liability in the dangerous and haphazard years of an industry should be severely construed when the risks involved have been materially diminished and the importance of the industry immeasurably increased.

**George Ball.**

**Workmen's Compensation—Death of Theatre Manager in Airplane While Traveling to Advertise Theatre.—[Federal]** The manager of a theatre in Fort Worth, Texas, one of a series of chain motion picture houses, was killed in an airplane accident while flying to the opening of an airport in a nearby city for the purpose of advertising the theatre and promoting good-will as was the custom of theatre managers in that locality. The deceased was expressly directed to attend the opening of the airport by the general manager of the theatre chain, but the means of transportation was not specified and in the past the deceased had used both rail and air transportation. The Workmen's Compensation Act of Texas excepts from its operation employees "whose employment is not in the usual course of trade, business, profession, or occupation of his employer." Deceased's widow sued defendant Indemnity Company for compensation on ground that deceased was covered by compensation policy held by theatre company with defendant. From an adverse judgment, defendant appeals. Held, on appeal deceased was covered by compensation policy as traveling to nearby airport for the purpose of advertising theatre is within the usual scope of business of operating a chain of motion picture theatres. Judgment of Court below affirmed. Constitution Indemnity Co. v. Shylies et al., 47 F. (2d) 441 (C. C. A., 5th, 1931).

The court, in rendering its opinion in this case, glides over the question of the effect of the deceased using an airplane to reach his destination, but discusses at length the generally conceded proposition that an employee may be engaged in the usual trade or business of his employer within the meaning of the Texas Act and yet do incidental work at the time of the accident which is not directly connected with that business: Solar-Sturges Mfg. Co. v. Industrial Commission, 315 Ill. 352, 146 N. E. 572 (1925) (salesman injured crossing street on way to purchase cigars to give to customers whom he solicited). Nor is it necessary, the court explains, for the work

It would seem to be a controversial question whether the deceased voluntarily exposed himself to an extra hazard by traveling to the airport by airplane rather than by train or automobile and whether this exposure thereby removed him from the operation of the Compensation Act. It is to be noted that while the deceased was ordered to attend the opening of the airport, the means of transportation was apparently not designated although on several occasions the deceased had traveled by airplane in the course of advertising the theatre. The court mentions this problem when it says. "Whether an employee is covered by a compensation policy is determined by the statutes of the State, the terms of the policy, and the general nature of his employment, and not at all by the question of whether the particular thing he was doing at the time of his injury was more or less hazardous, and, if customarily engaged in, would have been subject to a higher rate of premium than the policy rate." It is doubtful to what degree the present change in means of transportation increased the hazard. As to the safety of air travel see 3 Air Commerce Bulletin 141 (Sept. 15, 1931) and 217 (Nov. 2, 1931). If an employee chooses a means of performing his duties which is unreasonable, dangerous and not the safest or usual means of performing those duties, then he has taken himself outside of the risk covered by Workmen's Compensation Acts: *White Star Motor Coach Lines v. Industrial Com.*, 336 Ill. 117, 168 N. E. 113 (1929) (bus driver, compelled by breakdown to return to company garage at late hour, climbed into bus for a few hours sleep while waiting for time to take another bus out, started motor to keep warm and was asphyxiated, held not to be within Compensation Act). Where the employee is not prohibited from traveling by automobile, and so travels instead of using a train which is the customary means of transportation under the circumstances, courts hold that the employee is still within the Workmen's Compensation Act: *Omaha Boarding and Supply Co. v. Industrial Commission*, 306 Ill. 384, 138 N. E. 106 (1923); *Bendett v. Mohican Co.*, 98 Conn. 544, 120 At. 148 (1923) (employee used automobile to visit branch stores instead of using train for which he received allowance, the use of automobile being known to employer, was held to be within Compensation Act); *Gibson v. New Crown Market*, 208 App. Div. 267, 203 N. Y. S. 355 (1924) (employee of meat market took order for meat in another town and to avoid being late went by automobile instead of train, was held to have been injured in the course of employment). The analogy of automobile travel and air travel is imperfect although the principle of law is somewhat similar. The issue resolves itself into a matter of degree; the following cases hold the employee to be within the course of his employment: *Terminal R. R. Assn. v. Industrial Com.*, 309 Ill. 203, 140 N. E. 827 (1923) (employee chose an unnecessarily dangerous way of going to work); *Republic Iron & Steel Co. v. Industrial Com.*, 302 Ill. 401, 134 N. E. 754 (1922) (employee directed to take street car to railroad station, walked down railroad track instead and was killed); *Bountiful Brick Co. v. Giles*, 276 U. S. 154, 48 Sup. Ct. 221 (1928) (facts similar to last case); *Imperial Brass Mfg. Co. v. Industrial
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Com., 306 Ill. 11, 137 N. E. 411 (1922) (janitor using acid for cleaning purposes contrary to express instructions).

If an emergency exists which places a premium on time, the courts will probably go further in allowing an employee to use an extra hazardous means of performing his duties to conserve time: See, Gibson v. New Crown Market, supra. Workmen's Compensation Acts make no express exemption of employees who choose more hazardous means of performing their duties than are usual. The courts assume this authority under their power to construe what comes within the course of employment, nevertheless their authority to do so has been questioned: Comment (1930) 24 Ill. L. Rev. 715. In the light of the above decisions, without doubt, the instant case was correct in holding that the theatre manager was within the course of his employment in flying to a nearby airport to advertise the theatre.

If the employee is authorized to travel by plane no question arises. The policy of the court is not to interfere where the parties voluntarily enlarge the hazard: Schonberg v. Zinsmaster Baking Co., 173 Minn. 414, 217 N. W. 491 (1928) (where a salesman of a baking company traveling by airplane distributed advertising matter and took customers for rides at the direction of the company, was injured while on a testing flight and held to be within the Act).

It is settled, of course, that a State Compensation Act will be applied where an employee is injured or killed while engaged in aeronautical pursuits in the regular course of his employment: Famous Players Lasky Corporation v. Industrial Accident Commission, 194 Cal. 134, 288 Pac. 5 (1924); Stites v. Universal Film Mfg. Co., 2 Cal. I. A. C. 653 (1923); Standard Accident Insurance Co. v. Arnold, Tex. Court of Civ. App. 1 S. W. (2d) 434 (1927); Soule v. McHenry, 286 Pa. 49, 132 A. 799 (1926); Schonberg v. Zinsmaster Baking Co., supra.

EDWARD G. NEDOW.

DIGESTS

CHATTLE MORTGAGE—PURCHASE AT JUDICIAL SALE.—[Kansas] An investment corporation, the insolvency of which was alleged, gave the plaintiff, a creditor and stockholder of the corporation, a promissory note for $350, secured by a chattel mortgage on the company's airplane properly recorded in December, 1929. In November, 1929, the defendant levied an attachment on the airplane. This attachment was dissolved, but again levied on January 10, 1930, that being the same day on which a third creditor levied an attachment on the airplane. Later the airplane was sold under the levy in favor of the third creditor to the defendant's agent, and the sale was made expressly subject to the chattel mortgage. Plaintiff brought replevin for possession against the purchaser at the judicial sale. Held, on appeal, the purchaser of property at a judicial sale, subject to a chattel mortgage, is estopped to deny the validity of a mortgage recorded before the levy under which the sale to him was made, and notwithstanding the fact that the mortgagor corporation was insolvent when mortgage was given and had other creditors besides the mortgagee. Judgment for plaintiff affirmed. Fleeson v. Whitcomb, 132 Kans. 213, 294 Pac. 988 (1931).

DAVID V. LANSDEN.

CONDITIONAL SALES—CHATTLE MORTGAGES—TENDER.—[Delaware] One Sabelli contracted with defendant for the purchase of an aeroplane, to be
built by defendant according to directions furnished by Sabelli, the plane to be used in a projected non-stop flight to Rome. Sabelli agreed to pay the purchase price, $36,800, in installments—the last, of $1,900, being payable sixty days after delivery. He further agreed to compete for an endurance record, paying defendant, as additional compensation, eighteen percent of all sums received by him from such flight. After the plane was completed, but before it was delivered to Sabelli, plaintiff loaned Sabelli $13,000, the consideration being plaintiff's inclusion in the crew of the plane on the trans-Atlantic flight. This loan was secured by a chattel mortgage on the plane. Thereafter, to secure delivery of the plane, Sabelli executed a conditional sales contract with defendant, in which defendant reserved title in itself. Neither the endurance flight nor the trans-Atlantic flight were ever made due to defects in the motors of the plane. Sabelli being in default in his final payment, defendant sold the plane under its conditional sales contract. Within the period for redemption, Sabelli tendered to defendant a sum of money which, it is found, was sufficient to cover all sums due defendant, except that there was no tender made to cover anything which might be due under the agreement concerning the endurance flight. The Chancellor held: That, since Sabelli was neither in possession of the plane, nor vested with title at the time of the execution of the mortgage to plaintiff, defendant's rights under the conditional sales contract were superior to those of plaintiff under the chattel mortgage: 149 Atl. 418. But on re-argument, that the tender made by Sabelli was sufficient, since defendant was not entitled to any compensation under the endurance flight provision: 150 Atl. 81. On appeal, the Delaware supreme court, deeming the questions raised on the first argument below to be no longer pertinent, held, affirming the ultimate order of the Chancellor: (1) That no tender was required under the endurance flight provision, since (a) no flight had in fact been made, and, therefore, there was no fund in which defendant was entitled to share, and (b) there was no liability for failure to make such a flight, inasmuch as this failure was caused by defects in the engines, which Sabelli was under no duty to remedy. And further held (2) that, since there had been a sufficient tender, plaintiff's lien on the aircraft was valid. Bellanca Aircraft Corp. v. Pisculli, 156 Atl. 508 (Del., 1931).

ROBERT KINGSLEY.

GASOLINE TAX—COMMERCE—STATE SALES TAX ON GASOLINE USED BY AIRPLANES ENGAGED IN INTERSTATE COMMERCE.—[Federal] Complainant operated air transport lines across the State of South Carolina. It made three stops in that state but carried no intrastate traffic. At such points it purchased gasoline for the use of its planes at a price which included a tax of six cents per gallon imposed by a South Carolina statute on all sales of gasoline within the state: S. C. Acts 1929, No. 102, p. 107. Complainant sought to enjoin the collection of this tax with respect to the gasoline sold to it, claiming that the tax was an unlawful burden upon interstate commerce. Held, that the tax was not unconstitutional, the court discussing but refusing to follow U. S. Airways v. Shaw, 43 Fed. (2d) 148 (D. C. Okla., 1930) and Mid-Continent Air Express Corp. v. Lujan, 47 Fed. (2d) 266 (D. C. N. M., 1931), since: (1) it was not a tax on the use of gasoline in interstate commerce, but merely on the sale within the State, the use to which it was put by the purchaser being immaterial, the court saying: "... the criterion by which the right of the State is to be judged is not the intention of the purchaser but the status of the property at the time of the transaction," and; "It is the use in interstate commerce which exempts the property from taxation at the hands of the State; and... this use cannot arise until after the sale is complete"; and (2) its proceeds were devoted to support roads, which are instrumentalities of the State used by the complainant (in that they provide access to its airports) and the tax, therefore, under the rule laid down in Boeing Air Transport, Inc. v. Edelman, 51 Fed. (2d) 130 (D. C. Wyo. 1931), even if levied on an

The instant case is now pending appeal to the Supreme Court of the United States: U. S. S. C. Docket No. 504, filed November 4, 1931, 231 C. C. H. 2160.

For a discussion of the cases on State taxation of motor fuel used in interstate planes, consult: Tell, "Taxation of Aircraft Motor Fuel," 2 JOURNAL OF AIR LAW, 342 (1931); Comment, 2 JOURNAL OF AIR LAW, 600 (1931); and Comment on the case of Mid-Continent Air Express Corporation v. Lujan, supra p. 132.

ROBERT KINGSLEY.

GASOLINE TAX—COMMERCE—STATE SALES TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Utah] The plaintiff purchased gasoline outside the State of Utah and shipped it into Utah for use as motor fuel in the operation of plaintiff's airplanes in interstate commerce. The State of Utah sought to tax this gasoline, and the plaintiff brought a bill to enjoin state officials from enforcing the tax statute: Laws of Utah 1923, ch. 23; as amended, 1925, ch. 40; 1927, ch. 41. Held: Injunction decreed upon condition that plaintiff continue to make monthly reports to the Secretary of State of the amount of gasoline imported and the amounts employed by it in interstate and intrastate business. The decree further provided that the defendants should be permitted to reopen the decree only in the event that the Supreme Court of the United States should alter the rule laid down in Helson & Randolph v. Kentucky, 279 U. S. 245; Western Air Express, Inc. v. Welling, 1931 U. S. Av. R. 146 (3d Jud. Dist. Ct., Utah. Decided Sept. 15, 1930).

For a discussion of this subject see Comment on the case of Mid-Continent Air Express Corporation v. Lujan, supra p. 132.

RAYMOND I. SUEKOFF.

GASOLINE TAX—COMMERCE—STATE TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Federal] The Wyoming gasoline tax statute provided that the tax received from gasoline used or sold at any municipal airfield be paid back to the city where such airfield was located and used for the maintenance and improvement of such field: Special Session Laws Wyo. 1929, Ch. 14. The plaintiff operated an air transport line between Chicago and San Francisco and made use of two landing fields owned by the cities of Cheyenne and Rock Springs, Wyoming. The plaintiff had contracted with both Wyoming cities to make improvements in the landing fields and to pay cash rentals for the use of hangars in return for the privilege of using the fields. The plaintiff segregated the gasoline it used in interstate commerce from that used locally and brought a bill to enjoin collection of the tax on the gasoline used in interstate commerce. Held, that the tax was not a burden on interstate commerce since the revenue from the tax was returned directly to the municipality for the maintenance and improvement of the airfields which the plaintiff was using, and in the end resulted in a benefit to the plaintiff. Injunction denied and bill dismissed. Boeing Air Transport, Inc. v. Edelman, 51 F. (2d) 130 (D. C., Wyo., 1931).

A state may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon: Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30 (1916). Here the court was prepared to say the tax on plaintiff was not fairly commensurate with the general purposes for which it was intended, namely, a charge for the improvement of municipal airports.

For further discussion of the subject see Comment on the case Mid-Continent Air Express Corporation v. Lujan, supra p. 132.

RAYMOND I. SUEKOFF.
INSURANCE—INTERPRETATION OF "ENGAGED IN AVIATION."—[Missouri]
The plaintiff sued the defendant insurance company to recover on a policy held by the plaintiff's son, who was fatally injured when an airplane in which he was riding as a gratuitous passenger crashed in landing. The policy contained a clause excluding liability for injury received by the insured "while engaged in aviation." On a trial without a jury judgment was given for defendant. Held, on appeal, the insured was not "engaged in aviation" within the meaning of the policy. Judgment reversed. Flanders v. Benefit Association of Railway Employes, 231 CCH. 2161 (St. Louis Ct. of Appeals, Mo., November 3, 1931).

This holding is consistent with the interpretation given the phrase "engaged in aviation" by other courts in similar cases. For further discussion of this question see comment on the case of Gibbs v. Equitable Life Assur. Soc., supra p. 135.

GEORGE BALL.

NEGLECT—INDEPENDENT CONTRACTOR—MOVING PICTURE STUNT INVOLVING AIRPLANE.—[California] Plaintiff, owner and pilot of an airplane, contracted with defendant motion picture company for $100 a day to use his airplane in a motion picture stunt consisting of taxiing his airplane toward an oncoming automobile and avoiding a collision at the last moment by "zooming" over the top of the automobile, which automobile was operated by its owner, a third person, and which carried defendant's cameramen in its tonneau. Plaintiff directed the details of timing and managing the stunt. On the second day and fourth attempt at filming, the airplane failed to clear the automobile and the two collided, damaging the airplane but not the pilot. Plaintiff sues for property damage to the airplane. Verdict directed for, defendant. Held, on appeal, plaintiff was an "independent contractor" who entered upon an inherently dangerous stunt and assumed the risks of damage to his airplane as incidental to the contract. Status of automobile driver as himself an independent contractor or agent of defendant held immaterial. Judgment for defendant affirmed. Montijo v. Samuel Goldwyn, Inc., of Calif., 65 Cal. App. 72, 279 Pac. 949 (1931).

Assumption of risk would appear to be the crux of the defense to the instant action, and not the defensive phrase, "independent contractor," which appears to be used rarely as a defense to an action for chattel damage: 19 A. L. R. 226, 1168; 20 A. L. R. 684. That the plaintiff himself is an "independent contractor" appears to be a defense allowable only in suits under Workmen's Compensation Acts for personal injuries: cf. Famous Players' Lasky Corp. v. Industrial Commission, 194 Calif. 134, 228 Pac. 5, 34 A. L. R. 765 (1924) (plaintiff pilot allowed award under Workmen's Compensation Act for personal injury arising from motion picture airplane stunt under the control and direction of the company, and court overruled contention that plaintiff himself was an independent contractor). Similarly: Stites v. Universal Film Manufacturing Co. and Royal Indemnity Co., 2 Calif. I. A. C. 653, 1928, U. S. Av. R. 312 (1915). The present court relies on such personal injury cases under Workmen's Compensation Acts. The instant case might better have been decided by finding the automobile driver, whose acts contributed to the accident, to be an "independent contractor" in his relation to the defendant, and hence the defendant company not responsible.

It is doubtful whether the contract price given the plaintiff was gauged by the risk of bodily harm to himself and to the chattel assumed the risk. If it were possible to work out a master and servant relation between the plaintiff and defendant, assumption of risk would enter as a defense: Mechem "Agency" (2nd ed., 1914), Sec. 1667. However, the court might well inquire into the question of liability of the principal for damages to personal property owned by his agent who used his chattel in furtherance of the principal's business: See, Mechem, supra, Sec. 1601.

DAVID V. LANSDEN.
SALES—Breach of Warranty.—[Georgia] Defendant purchased an aeroplane from plaintiff, giving a promissory note in payment. He alleges that plaintiff warranted that the motor was new, in good condition and with no defects undisclosed to him. On delivery of the plane he signed a document accepting the plane “as is on Candler Field.” In a suit on the note, defendant alleges that this warranty was breached, that the motor was not new, but that its parts were worn and that it leaked oil. Judgment for defendant, plaintiff’s motion for new trial overruled, and plaintiff brings error. Held (1) That, there being some evidence in support of defendant’s allegations as to the warranty and its breach, a verdict in his favor was justified; (2) That, since the “acceptance” was without consideration, it did not operate to relieve plaintiff from its liability under the warranty. Judgment affirmed. *Major v. Atlanta Flying Club*, 156 S. E. 723 (Ga., 1931).

ROBERT KINGSLEY.

UNAUTHORIZED USE OF PUBLIC HIGHWAY FOR AIRPORT—Action by Individual Property Owner.—[New York] The defendant Airport Company fenced off and excavated a portion of a highway, incident to the construction of an airport. A property owner, proximately situated, sought an injunction, suing in the capacity of an individual property owner, for the following purposes; to have the road restored; the fence removed; a retaining wall erected to preserve the remainder of the roadbed, and to restrain the construction activities which caused debris to be cast upon his house. Before trial the Board of Estimate and Apportionment passed a resolution closing the road to public use. On appeal the Supreme Court, Queens County, *Held*, Injunction denied, because plaintiff, as an individual, could not collaterally attack the Action of the Board, and because he had not shown any special or actionable damage, as he still had an alternative means of access to his property. Also, since the casting of debris upon his house had ceased, an injunction was unnecessary and he was allowed $250 for the damage to his house and the costs of his suit. *Kremer v. New York Air Terminals, Inc.*, N. Y. L. Jour. 928, 1931 U. S. Av. R. 239 (N. Y. Sup. Ct., Queens County, May 16, 1931).

LEO FREEDMAN.

WORKMEN’S COMPENSATION—Injury While Committing Misdemeanor—Scope of Employment.—[Pennsylvania] Deceased was employed to fly a monoplane for the carrying of passengers. His request to fly a bi-plane “for his own pleasure” was granted by defendant employer, and he was killed while acrobatically flying said bi-plane in violation of the Pennsylvania regulation: Laws of Pa. 724, Sec. 1402, St. of Ap. 25, 1929. Deceased’s widow claims workmen’s compensation. Referee disallowed claim. *Held*, on appeal, disallowance of claim for compensation affirmed since deceased was committing a misdemeanor at and during the time of his fatal accident and secondly since deceased was flying for his own pleasure, the injuries were not sustained in the “course of his employment.” Appeal dismissed. *Datin v. Vale*, 1931 U. S. Av. R. 175 (Pa. Dept. of Labor and Industry, decided Jan. 19, 1931).

LEO FREEDMAN.