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STANDARDS IN AVIATION LEGISLATION

Albert Langeluttig*

In accordance with the modern tendency, aviation legislation in many of the states and in the federal government has delegated to individuals or commissions the power to make regulations governing aircraft, airmen, airports, air instruction and other accompaniments of aviation. In so doing, the legislatures, in the performance of their non-delegable functions, have adopted various standards to govern the officers or commissions in the adoption of rules or regulations. In one state, these standards have been held too indefinite, and the same problems will be presented to other courts as the regulatory bodies become more aggressive in enforcing the rules which they adopt. A survey, therefore, of the standards adopted by the various states and the application to them of the rules of law developed by the courts to govern the legislatures in delegating regulatory power to administrative tribunals may serve to prevent difficulty in the future.

I. THE STANDARDS

Only one state has so far failed to adopt some sort of regulations for aviation. This one state is Georgia. Of the remaining 47 states, however, twenty—namely, Arizona, California, Delaware, Florida, Iowa, Kansas, Mississippi, Missouri, Montana, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, Wis-

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4. Laws 1929, Ch. 190, 1929 U. S. Av. R. 701.
consin, and Wyoming—content themselves with the simple requirements that airmen and aircraft flying over their territory shall have federal licenses from the United States Department of Commerce under the Air Commerce Act. Indiana adopts the same requirements but does have in addition provision for municipal airport commissions to construct airports and adopt rules and regulations for their government. Three of these states, namely, Rhode Island, Washington and Wisconsin, add the requirement that aircraft operating in the state shall comply with the Air Traffic Rules of the Department of Commerce.

In these cases, of course, except possibly the last three states mentioned, the problem of delegation of legislative power does not arise. In the remainder of the states, however, some officer or commission is given power to adopt rules and regulations to govern aviation and some or all of its concomitants. In connection with these, the question arises: are the legislative standards adopted sufficiently definite to avoid the charge that they delegate legislative power to the administrative officers or commissions or that state they delegate arbitrary power to them.

Thirteen states and one of the territories have adopted a standard definite enough but one which gives rise to another aspect of the dictum against delegation of legislative authority. They refer their administrative authorities to the federal government with the injunction that they adopt rules and regulations embodying the federal statutes and regulations and the amendments thereto. This procedure is followed in Alabama, Arkansas, Idaho, Maine, Maryland, Minnesota, New Jersey, New Hampshire, New Mexico, North Dakota, Ohio, Vermont, Virginia and Alaska. The purpose of such legislation is to keep state regula-
tion of aviation uniform and in conformity with federal regulation at all times, in spite of the infrequency of state legislative sessions. The adoption of such a standard, however, raises the question of delegation of state legislative authority to the federal government and, under some state constitutions, the question of incorporation of statutes by reference. On this last ground a nisi prius court in New Jersey held the aviation act of that state invalid.

The following state legislatures have indicated that their aviation authorities should follow the federal lead, but have added other standards as well to guide their administrative authorities in the adoption of rules and regulations.

Colorado directs its Commission of Aeronautics to foster air commerce and to make regulations "not in conflict with the Air Commerce Act"; to cooperate with the federal Department of Commerce; to provide for the rating of aircraft and to provide for the periodic examination of airmen "as to their qualifications for such service." "Licenses may be revoked or suspended . . . for violations of regulations promulgated by the Commission or of the federal regulations." The Commission, thus, regulates only airmen and aircraft. Unless the court finds that the statute refers that body to the federal statutes and regulations for rules, there is no standard set in adopting the rules for rating aircraft. The standard set down to govern the Commission in establishing the rules for licensing airmen, in addition to following the federal lead, is to establish tests of their "qualifications." The act is poorly drawn and is open to attack based upon the rule against delegation of legislative authority. The act provides that its Commission's regulations must not be in conflict with the federal act; it fails to direct that they must conform thereto.

While the Illinois act needs some change in other details, the legislative standards set for its commission are clearly set forth and probably as definite as the nature of the subject matter of regulation permits. It is distinctly provided that the regulations of the Commission "shall be consistent with, and conform to" current federal statutes and rules. In addition to this direction, standards are set for each subject of regulation. The standard for airports is "public safety," for air schools "health and safety of students" and "public safety," for air markings and facilities and traffic rules, "public safety and the safety of those engaged in aero-

41. Acts 1927, Ch. 64, Sec. 4, 1928 U. S. Av. R. 454.
Aircraft and airmen are required to have federal licenses. Safety should probably not be the only standard set; promotion of aviation and possibly other standards might be added. This much can be said for Illinois: no state exceeds its aviation legislation in the definiteness and clarity of its design.\textsuperscript{42}

\textit{Kentucky} requires its aircraft and airmen to have federal licenses. It directs its Air Board to adopt traffic rules in conformity with the federal rules and to inspect airports “for the purpose of determining the safety and adequacy of such facilities for the operation of aircraft.”\textsuperscript{43} Here again, so far as airports are concerned, the legislative standard is safety. The standard for traffic rules is definite enough but the same aspect of delegation of legislative power is presented as is presented by the states above referred to which direct their commissions to the federal government for all of its rules.

The effect of the \textit{Michigan} legislation is substantially similar to that of Illinois. The statute is, however, not so well drafted. \textit{Michigan} requires its airmen to have federal licenses. Applications for aircraft registration must give the same information as is required by federal authority and the commission is authorized to make regulations governing aircraft and parachute inspection as dictated by “public safety and for the safety of aircraft and airmen.” The commission is further authorized to regulate airports and schools in the interest of “public safety,” and the schools in the interest of the health, safety and welfare of the students, and is directed to enforce the federal legislation and regulations. To this direction is added a proviso which prevents the charge that \textit{Michigan} is surrendering her “sovereignty” to the federal government. The commission is authorized to deviate from federal rules in the interest of public safety and the safety of aircraft and airmen.\textsuperscript{44}

In \textit{Nebraska}, the Railway Commission regulates aviation. Airmen and aircraft must have federal licenses. The Commission is directed to promulgate regulations in conformity with federal law and regulation and in the interest of “convenience and safety in the aircraft navigation.”\textsuperscript{45}

\textit{Pennsylvania} has created an Aeronautics Commission and subjected to its regulation everything connected with aviation in a redundant statute which takes the proverbial Philadelphia lawyer

\textsuperscript{42} Laws 1931, p. 194, 1931 U. S. Av. R. 342.
\textsuperscript{45} Laws 1929, Ch. 34, 1929 U. S. Av. R. 660.
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to decipher. Air traffic rules must conform to the federal rules.\[46\]
In addition, traffic rules, airmen, aircraft, airports, mechanics,
schools, markings and facilities are subject to regulation in the
interest of "safety, adequacy and sufficiency" and of the "safety
of patrons, employees, and the public."\[47\]

Tennessee requires its airmen and aircraft to have federal li-
censes, or licenses issued by its own Division of Aeronautics, under
rules which conform, "so far as possible," to federal legislation
and regulation. Airports are licensed and governed under regu-
lations promulgated "to protect property and life."\[48\]

In West Virginia, airmen and aircraft must have federal li-
censes. Its Board of Aeronautics are enjoined to adopt and enforce
the provisions of the Air Commerce Act and to regulate airports
in the interest of public safety and air schools in the interest of
the health and safety of students as well.\[49\]

As pointed out above\[50\] California simply requires that its air-
men and aircraft have federal licenses. Foreseeing the possible in-
validity of this provision, however, the act provides that in such an
event the Governor shall appoint an aviation commission which
shall adopt regulations to determine the airworthiness of craft and
skill, experience and qualifications of airmen in conformity with
federal statute and regulation.\[51\]

Likewise, Indiana requires federal licenses for airmen and air-
craft.\[52\] In addition, its statutes authorize municipalities each to
have boards of aviation commissions to regulate airports. They
may make rules and regulations not in conflict with state law and
federal law and regulation to govern their airports, but no stand-
ard is otherwise set for the rules and regulations.

Oregon requires a federal license for aircraft.\[53\] Airmen must
have either a federal or a state license.\[54\] The Board of Aero-
nautics may adopt a schedule of educational and physical require-
ments for an airman's license\[55\] but the physical and education re-
quirements for a license have been set forth in the statute specific-
ally and never repealed.\[56\] The only regulation of airports is by

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\[46\] Laws 1929, Act 316, Sec. 901, 1929 U. S. Av. R. 777.
\[47\] Laws 1929, Act 316, 1929 U. S. Av. R. 753; Laws 1931, Act 277,
\[48\] Acts 1929, Ch. 5, 1930 U. S. Av. R. 499; Laws 1931, Ch. 73, 1931
U. S. Av. R. 484.
\[49\] Laws 1929, Ch. 61, 1929 U. S. Av. R. 866; Laws 1931, Ch. 4, 1931
U. S. Av. R. 468.
\[50\] Note 3.
\[51\] Note 23.
\[52\] Stats. 1929, Ch. 850, Sec. 11, 1929 U. S. Av. R. 421.
\[53\] Laws 1931, Ch. 244, 1931 U. S. Av. R. 433.
\[54\] Laws 1929, Ch. 352, Sec. 4, 1929 U. S. Av. R. 731.
\[56\] Laws 1929, Ch. 352, Ch. 6(b), 1929 U. S. Av. R. 731.
the Highway Commission who can designate parts of the "beach" as an airport and in so doing prescribe conditions in "the best interest of the general public" and "for the safety of the general public." The Oregon legislation has not been carefully drawn and is ambiguous in many respects. It goes too far in the regulation simply of airmen and aircraft and omits altogether the regulation of airports, air schools, markings and facilities which is peculiarly the function of the state.

Two states and one territory regulate aviation without reference to federal regulation. These are Massachusetts, Connecticut and Hawaii.

The Connecticut legislation comes perilously close to giving to its Commissioner of Aeronautics carte blanche in his regulation of aircraft. Unless the standard of safety can be spelled out of the statute, no standards are set for regulations. Air schools are not regulated. Section 8 gives the Commissioner power to make regulations governing airmen, aircraft, flying, airports, landing fields and airways. The rule of safety is prescribed for devices. Aircraft receive licenses by filing applications giving the information required by the Commissioner and presenting a certificate of "safety" signed by an inspector. Such licenses may be revoked or modified as dictated by the safety of the public. For a license, airmen must have an application, giving such information as the Commissioner wants, approved by an inspector of aviation. What inducements are necessary to get the inspector's approval are not specified. "Training" and "competency" are the only standards which can be suggested as applying to airmen, except that they must submit to a physical examination. Airports must have the approval of the Commissioner, but there is no standard whatever governing his grant of approval. The Commissioner may also adopt "safety-zoning regulations governing the area adjacent to an airport." The entire act is probably vitiated by the unlimited power given the Commissioner to waive the provisions of the act.

In Massachusetts, the State Registrar licenses airmen and airports. He is assisted by an advisory board of aeronautical experts. He is authorized to adopt rules and regulations consistent with the aviation statutes "governing the use, operation and regis-

59. Secs. 9, 13, 14.
60. Secs. 16, 17, 18 and 19.
61. Sec. 37.
tration of aircraft and the licensing of pilots.” The statutes may, however, be searched in vain for any very definite standards, if any at all. The Registrar “may” license “competent” and “proper” persons as pilots and register “suitable” aircraft. The “competency” of persons as pilots is determined by the advisory board from a flight made by the applicant, and the “suitability” of aircraft for registration is determined by the board by a flight and ground inspection.64

In Hawaii, an aeronautical commission is given power to make regulations governing aviation and all allied activities. No standard is set for these regulations and none can be spelled out of the other provisions of the Act.65 If the territorial legislature is limited by the same doctrines as limit the state and federal legislatures, the regulations of the Hawaiian commission have no valid legal foundation.

Since the Supreme Court has never taken seriously the injunction against delegation of legislative authority, a study of legislative standards in the Air Commerce Act becomes a matter of academic interest. The Supreme Court has never voided either state or federal legislation on the ground of improper delegation of legislative authority to administrative officers. There is much to be said against this liberality towards the bureaucracy, but such criticism cannot well be directed at the Air Commerce Act. By this act, the Secretary of Commerce is authorized to promulgate regulations governing aircraft, airmen, facilities and schools, and adopt air traffic rules. The secretary of the Treasury is authorized to extend customs and public health laws and regulations to aircraft, and the Secretary of Labor immigration laws and regulations. In granting registration to aircraft, the Secretary may require “full particulars of the design and of the calculations upon which the design is based and of the materials and methods used in the construction.” For airmen, the regulations are to provide for periodic examinations to determine their “qualifications.” The regulations for air schools are to provide ratings “as to the adequacy of the course of instruction, as to suitability and airworthiness of the equipment, and as to the competency of the instructors.” Air traffic rules are to govern “navigation, protection, and identification of aircraft . . . safe altitudes of flight . . . prevention of collisions.” With the exception of the standard set for the regulations governing the rating of airmen, little could be added to the

legislative standards set for the regulations promulgated by the Secretary of Commerce in connection with aviation.

II. AIRMEN

In setting standards for the regulation of airmen, the legislature must first foresee if the courts will class theirs as a profession or just an occupation. If aviators form a profession, the standards fixed by the legislature may be of the most general sort; if they are classed with artisans, the legislative standards will probably have to be a bit more definite.

The licensing of the professions is usually entrusted to boards made up of persons engaged in the profession. The legislatures, in view of this fact, are required to fix only the most general standards. The Supreme Court of California has said:

"The legislature, notwithstanding it may do things itself, may nevertheless authorize them to be done by ministerial officers or boards when it believes that they can do them more conveniently and effectually than it can itself. Especially may this be done when it is deemed proper by the legislature to regulate in the interests of the public, through public commissions or boards constituted for that purpose, the pursuit of particular professions or occupations, as, for example, that of physicians, dentists, druggists, engineers, architects, and others which involve the exercise of skill and the possession of special knowledge and experience. Such commissions or boards are composed, as under this act the board of architects necessarily must be, of persons technically skilled and trained in their profession or occupation, and who are usually better able to determine whether an applicant for a license or certificate to practice a given profession or occupation is competent to do so, under reasonable rules and standards adopted by them, than under those which might be prescribed by the legislature. And, if in its wisdom, the legislature authorizes such a technically trained commission or board to prescribe reasonable rules or fix a fair standard for determining the proficiency of applicants for a license or certificate, it cannot be said that a delegation within the constitutional inhibition of authority to make laws is conferred, or any other authority given, than the power necessary to be exercised by them to the end that the law, as completely enacted by the legislature, may properly be carried into effect."

The court held that requiring architects to pass a "satisfactory examination" given by the board established a sufficiently definite standard. A similar result was reached in Rhode Island in the case of dentists, and in Illinois in the case of teachers in the public schools. The requirement that persons applying for licenses

66. Ex parte McManus, 151 Cal. 331, 90 Pac. 902 (1907).
68. People v. Flannigan, 347 Ill. 328, — N. E. — (1925). In addition to passing a satisfactory examination, the Superintendent had to pass on the applicant's personality. The case involves, of course, public employment to
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in the professions must be graduates of "reputable colleges" has been repeatedly approved by the courts as laying down a sufficiently definite guide for the licensing authorities. Similarly, the licensing of persons from other states who are "reputable dentists of good moral character" has been approved. The revocation of licenses "for gross incompetency and recklessness," "for any unprofessional conduct," "for misrepresentation or fraud . . . or unfit or incompetent," and "other grossly unprofessional and dishonorable conduct of a character likely to deceive or defraud the public," has been approved as sufficiently definite.

The courts are not so liberal with legislative power when it comes to the occupations. The Illinois court could hardly have upheld an act which gave the Board of Pharmacy power to issue licenses to sell patent and proprietary medicines "under such restrictions as the Board may deem proper" against an attack that the act gave the Board arbitrary power; but the Ohio court was unduly strict when it declared invalid a statute which authorized an examiner to issue licenses to steam engineers found upon examination to be "trustworthy and competent." Going almost to the point of putting private detectives in a class with the professions, and in spite of the fact that the licensing was done by the Secretary of State instead of a professional Board, the Wisconsin court upheld a statute which authorized a license if the applicant was found to be of "good character, competency and integrity"; and the Oregon court seemed to take the prohibition against non-delegation of legislative power as lightly as the Supreme Court of the United States when it upheld a barbering act which defined what constituted barbering and left the licensing itself, without any standard whatever, to the State Board of Examiners, saying:

"The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical knowledge and learning in order to designate accurately the qualifications which should be pos-
The licensing of automobile operators comes closest to that of airmen. A Virginia ordinance provided that automobile operators must obtain licenses from the Chief of Police upon examination “as to his or her ability to safely and properly operate motor vehicles . . . and as to . . . knowledge of the traffic laws . . . and no permit shall be issued to such person unless such examination shall disclose that he or she possesses such ability and knowledge or in the judgment of the Chief of Police qualifies such person to receive such permit.” Thus far, the ordinance was upheld. It continued, “the Chief of Police is authorized and directed to revoke the permit of any driver who, in his opinion, becomes unfit to drive an automobile on the streets of the city.” An appeal was provided to the courts. The court laid excessive stress on the phrase “in his opinion” and rejected that part of the ordinance as granting arbitrary power to the Chief. In California, on the other hand, a statute was upheld which provided for the revocation of automobile licenses if it be found that the licensee “is incompetent or unfit to drive for any reason authorizing the refusal of a license or by reason of negligent or reckless driving which has endangered life, limb, or property.” The attack made against this state was based upon non-delegation of “judicial” power, whatever that may mean, but the court treated the matter the same as if it were the legislature trying to dodge its responsibility.

It would seem, therefore, that airmen are to be licensed by a commission of airmen, and if the courts agree that they are professional in character, standards of the most general character will suffice to satisfy the legislative duty. Requiring airmen to pass “satisfactory” examination is enough and if to this is added the requirement that they be graduates of “reputable air schools,” real control of the schools may be exercised by the commission. If, on the other hand, the courts find that airmen are not professional but fall more nearly into the artisan class, more definiteness may be required, such as designation of the subjects in which they must

78. State v. Briggs, 45 Ore. 366, 375, 77 Pac. 750 (1904). It might be remarked that the alleged ignorance and incapacity of the Legislature was not so bad as it might seem. One may feel sure that he may get accurate and adequate assistance in the drafting of any statute however technical.


be proficient and the amount of experience to be required. A statute which approaches these requirements is found in Oregon.\footnote{Note 56.}

III. Air Instruction

The direct regulation of private education by the commissions charged with licensing the product is apparently only to be found in connection with aviation. The purpose of such regulation is to protect the public both during and after instruction from the result of ignorance and the student from fraud and incompetence. The problem is not a little complicated by the manner in which flying instruction is given. Every airman who has once taken a plane from the ground assumes he is able to impart to others a full knowledge of the art of flying. The organized schools which hold themselves as such are not as hard to supervise as the individual who uses his own or his employer's plane to increase his income in his spare time. The source of even greater trouble comes from the flying clubs. A group of prospective flyers associate themselves with a flyer, usually of too little experience, and invest in a plane in which the one member who can fly is expected to give all the others instruction. Aviation, just as automobiling, is safe; it is the incompetent operator which introduces nearly all the hazard into the enterprise, and the hazard is greater in the air.

One situation somewhat analogous to the problems presented by the regulation of instruction is presented by the women and children labor legislation. Wisconsin, a statute, providing as a standard to govern regulations made to protect females, that "no female shall be employed or permitted to work . . . for such . . . periods of time . . . as shall be dangerous or prejudicial to the life, health, safety, welfare of such female," was upheld.\footnote{State v. Lange Canning Co., 164 Wis. 228, 157 N. W. 777 (1916). See also Squires v. Brown, 170 Wis. 165, 174 N. W. 548 (1919).} The Oregon Legislature created an industrial commission to declare what "are unreasonably long hours" of employment for women or children, "what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women or of minors," what wages are inadequate to supply the necessary cost of living to any such workers and to maintain them in good health," and "what wages are unreasonably low for any such minor workers." While, of course, the minimum wage regulation was later declared invalid on other grounds,\footnote{Adkins v. Children's Hospital, 261 U. S. 525 (1923).} the Oregon court held
that each of the standards laid down was sufficiently definite. Likewise in Minnesota, a minimum wage statute was held to establish a sufficient standard which authorized a commission to declare a minimum "living wage" which was defined to be a wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."88

Problems somewhat similar to those presented by instruction may be found in the "Blue Sky" and banking legislation designed to protect the public against fraud. The standard set for the licensing of dealers in securities is "good business repute." This has repeatedly been approved.86 In Wisconsin, the securities commission was required to issue licenses to applicants if the commission were "satisfied as to his good business reputation and conduct." In upholding this statute, the court said:

"The Legislature might have added language prescribing in great detail the qualifications of applicants for permits and the mode of ascertaining those qualifications, but it is a question which such details would have tended to confuse rather than enlighten."87

A California case illustrates a method adopted by some courts to make definite standards which appear at first to give uncontrolled and arbitrary power to the administrative authority. In the words of the court:

"The provisions of the Corporate Securities Act which allow the Commissioner of Corporations to issue a permit authorizing the applicant to sell securities 'upon such terms and conditions as the Commissioner may in said permit provide' must be read in connection with the context which provides that the Commissioner must inquire into the methods of doing business and shall ascertain if the same are fair, just and equitable and that the methods used in disposing of them would not work a fraud upon the purchasers thereof."88

The banking acts usually provide for the bank commissioners or other administrative authority to take over banks if it be unsafe for a banking corporation to continue business. This has been held a sufficient standard.89 Likewise, in Illinois, the Department of Trade and Commerce may require an additional bond if the existing bond "is insecure, exhausted, or otherwise doubtful" and this

84. *Stettler v. O'Hara*, 69 Ore. 519, 123 Pac. 743 (1914).
standard has been held sufficiently definite. In Pennsylvania, the Small Loan Act requires a license of lenders which is granted if the Commissioner is satisfied that "the character and general fitness is such as to warrant the conclusion that the business will be honestly conducted," and it has been held that this is a sufficiently definite standard. All courts, however, have not been so liberal in dealing with standards fixed to prevent fraud. The Supreme Court of Illinois invalidated one section of the securities act for leaving unlimited discretion to the Secretary of State in fixing the terms, conditions, and amount of the bond required. The statute was amended to read:

"In fixing the penalty of such bond, the Secretary of State shall investigate and take into consideration the proposed method of transacting business and the financial standing of the applicant for registration, and the experience, ability and general reputation for integrity of such applicant . . . and shall fix such a penalty as in his opinion will protect from loss persons dealing with such applicant, if registered."

The court found, however, that this standard was not sufficiently definite. With these should be compared a New York statute which required milk dealers to obtain a license and give a bond. The bond, however, was dispensed with if the applicant were a person of domestic corporation, if the Commissioner of Agriculture were "satisfied from an investigation of the financial condition of such person or domestic corporation that such person or domestic corporation is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors." The New York Court of Appeals approved of this statute.

In licensing air instruction, the very novelty of this sort of regulation makes it desirable to leave as much discretion as possible with the administrative authority. On the whole, the cases warrant the adoption by the legislatures of only general standards. The cases last cited, however, indicate that, wherever possible, standards should be made definite so as to avoid discrimination. In drafting legislation for air schools, it would be acting on the side of wisdom to establish some more definite standard than "safety." It would be wise to prescribe some rule for the experience of instructors and for the curriculum and equipment in general. While this would not limit the essential power of the com-

90. People v. Stokes, 281 Ill. 159, 118 N. E. 87 (1917).
See also Klein v. Barry, 182 Wis. 256, 196 N. W. 457 (1923).
missions any more than present standards do, it would give the courts more excuses for stepping in when they found arbitrary action on the part of the administrative authorities and so they would be more likely to approve of the legislation.

IV. AIRPORTS AND LANDING FIELDS

The regulation of airports and landing fields presents to the administrative authorities, the courts, and the legislatures some of the most difficult problems in adjusting the various interests involved. If the fields be public property, it must be determined whether they are to be treated as the property of the state to do with as it wishes or as common property of the citizens which each has a right to use under proper regulations. If the fields be privately owned, the rights of absolute ownership guaranteed by the constitution must be adjusted to necessary regulation in the interest of public health, morals, safety and convenience.

It is not likely that the publicly owned flying fields will be treated simply as the private property of the states. If they are so treated, the standards may be such as the legislature determines. The state may bestow its bounty under such conditions as it pleases. Thus, South Carolina permitted the taking of phosphate rock from its streams by licenses granted in the discretion of the administrative authority if they deem it "best for the interests of the State and the proper management of the interests of the State in such deposit." A federal statute permitted the felling of trees on public lands "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the undergrowth . . . and for other purposes." This standard was upheld by the Montana territorial court. Another federal statute creating forest reservation from public lands authorized the Secretary of Agriculture to "make such rules and regulations . . . as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." This standard was approved by the United States Supreme Court. The navigable waters of the United States have been treated as proprietary by the federal government. Obstructions to free navigation of them must have the approval of the Secretary of War and bridges must be changed if they constitute "unreasonable ob-

96. U. S. v. Williams, 6 Mont. 375, 12 Pac. 851 (1887).
structions." This standard has been approved by the Supreme Court.98

The airports and landing fields, however, should be treated like the streets and other common property to which all citizens have access of right under regulations made by public authorities under very definite standards. Indefinite standards vesting arbitrary power in administrative authorities will not do. In Arkansas, the State highway commission was given power "to make all necessary and reasonable rules" to carry out the provisions of the State Highway Act and "to regulate the traffic." The commission adopted a rule requiring pedestrians to travel on the left hand side of the road. The rule was held unauthorized and the statute indefinite.99 In Connecticut, an ordinance requiring a license to make speeches on sidewalks or in squares or parks had to be obtained from the Chief of Police. This ordinance was held invalid because no standard whatever was laid down100 although it could have been held that the public peace was the standard to be ascertained from the nature of the regulating officer. Likewise, an ordinance requiring permission of the Board of Trustees to drive heavy vehicles on boulevards was held bad in Illinois as granting arbitrary power.101 These last two cases were considered very loose legislation, but the ordinances might have been upheld by looking to the scheme of the legislation. They indicate that regulations governing the use of airports and landing fields, if they are treated like other places of popular recourse like streets, parks and commons, will have to be drawn under rather definite standards established by the legislatures so as to prevent the administrative authorities from discriminating unjustifiably between the users of the fields.

The right of a state to regulate the use of private property must rest upon the state's police power to legislate in the interest of public health, morals, safety and convenience, and regulation must stop where these stop. The standards set up must clearly limit the regulating body to these ends.

Where the use of private property involves the privilege of using public property, as railroads crossing public highways, the standards have been vague enough. The uniform rule is "public

100. State v. Coleman, 96 Conn. 190, 113 Atl. 385 (1921).
101. Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758 (1898).
safety." Grade separations must be made if "public safety" requires.\textsuperscript{102}

The sorts of standards which have been upheld, although private property is involved, are illustrated by the following cases. A statute requiring licenses for clothes cleaning establishments provided that licenses were to be refused if upon investigation it appeared that "the establishment, plans, specifications, premises, or character or ability of such applicant are not in compliance with the law" or "in any manner jeopardizes the public welfare" or if in the opinion of administrative authority the proposed establishment would be "a menace to the public welfare and safety."\textsuperscript{108}

In Wisconsin, the "good order of the city" was considered sufficiently definite to govern the licensing of junk shops.\textsuperscript{104} In Illinois, a laundry licensing ordinance was upheld which fixed the standard as "dangerous or detrimental to the health of the city or the health of the persons employed therein." The standard was sufficiently definite when read in the light of the entire ordinance.\textsuperscript{105}

On the other hand, statutes setting standards which appear to be definite as compared to most of those which have gone before have been considered too vague when private property was involved. The concept of what is a nuisance has been pretty well established by the courts over many centuries, yet a statute giving a health commission power to declare what is or is not a nuisance was held void.\textsuperscript{106} In Illinois, an ordinance requiring a permit to change an apartment house into a "rooming house" was declared too indefinite\textsuperscript{107} and a statute which provided:

"Wherever any of said officers shall find any building or other structure which, for want of proper repair, or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and which is so situated as to endanger other buildings or property therein . . . they shall order the same to be removed or remedied,"

was held to be vague and indefinite.\textsuperscript{108}

In licensing and regulating airports, it appears that no definite and clearly understandable rule may be gleaned from the cases to guide the legislatures to establishing standards. Regulation of property, public or private, is involved and that is sacred to the courts.


\textsuperscript{103} Carter v. Stevens, — Cal. —, 294 Pac. 28 (1929).

\textsuperscript{104} Milwaukee v. Ruplinger, 155 Wis. 391, 145 N. W. 42 (1914).

\textsuperscript{105} Hoy v. Chicago, 309 Ill. 242, 140 N. E. 846 (1923).


\textsuperscript{107} Chicago v. Matthies, 320 Ill. 362, 151 N. E. 248 (1926).

\textsuperscript{108} People v. Sholem, 294 Ill. 204, 128 N. E. 377 (1920).
Regulations governing aircraft and facilities may be of two sorts. They may be adopted in the interest of health or in the interest of safety. In adopting standards for public health regulations, the legislatures have substantially abdicated in favor of the doctors. Food and drug acts have stopped with directing the health authorities to fix "minimum standards of foods and drugs" and these have been sustained. Likewise, the Secretary of the Treasury has been authorized to fix "uniform standards of purity, quality, and fitness for consumption of all kinds of teas." In Washington, a statute giving its board of health power to define contagious diseases was upheld, and one giving its commission of agriculture power to specify which diseases and pests of trees are "injurious" was approved. A Texas statute which authorized its Live Stock Commission to "establish such quarantine lines and sanitary rules as it may deem necessary" was upheld. In Michigan a statute authorizing the detention of persons and property "exposed to disease" or "likely to carry infection" was considered to be sufficiently definite.

With these cases should be compared a California statute which was held invalid. It provided:

"If, in any factory . . . any . . . work is carried on by which dust, filaments, or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein, and it appears to the Commissioner of the Bureau of Labor Statistics that such inhalations could, to a great extent, be prevented by the use of some mechanical contrivance, he shall direct that such contrivance shall be provided."

Turning from health to contrivances for safety, the same diversity appears. In Ohio, an ordinance provided for the licensing of laundries. Licenses were to be granted if ventilation were "adequate" and if location, construction, ventilation and sanitary drainage were "sufficient to properly protect the public health." This statute was upheld with the declaration that it was impossible to fix a more definite standard. In Massachusetts a statute was upheld which directed its Board of Labor and Industries "to investigate employments and places of employments to determine

111. State ex rel v. Superior Ct., 103 Wash. 409, 174 Pac. 978 (1918); see also People v. Robertson, 302 Ill. 422, 134 N. E. 815 (1922).
112. Carstens v. De Sellem, 82 Wash. 643, 144 Pac. 918 (1914).
what suitable safety devices and other reasonable means and requirements for the prevention of accidents should be adopted, and to make reasonable rules, regulations and orders the prevention of accidents.”

Public utility appliances are uniformly left to the railroad commission with only general standards. For instance, an Indiana statute authorized its commission to determine “what would be the most practicable and efficient headlight for all purposes” and required railroads to adopt this light. The statute was held to fix a sufficiently definite standard.

The United States Supreme Court, of course, upheld a North Carolina statute which provided that all illuminating oils used for sale shall be subject to inspection by the Commissioner of Agriculture who was authorized to make rules and adopt standards of “safety, purity or absence from objectionable substances and luminosity.” The Commissioner was authorized to forbid the sale of oil “either unsafe or of inferior illuminating quality.”

With these cases may be compared a statute of Texas which regulated fire escapes in painful detail and then was declared invalid because of certain discretion given to the State Fire Marshall. The statute required each building to be equipped with an “adequate fire escape.” The statute defined what is an “adequate fire escape” in terms of materials, types, and strengths. The statute then continued:

“It is hereby made the duty of the State Fire Marshall to prepare and promulgate minimum specifications for the construction and erection of each type of fire escape authorized by this act, which specifications shall be based upon a working stress of not less than sixteen thousand pounds to the square inch for steel, twelve thousand pounds for wrought iron and seven hundred for concrete, provided that interior fire escapes be enclosed with non-combustible material, and that all door and window openings be properly protected with self-closing fireproof shutters, and that all stairway escapes, interior and exterior, be continuous and suitably connected with the roof of the building.”

Another Texas statute which permitted its highway commission to authorize the carrying of heavier loads than provided in the statute on roads “of sufficient construction to carry without material injury” the larger load was held invalid.

Here again some direction may be found for standards in

119. Red C. Oil Co. v. Bd. of Agriculture, 222 U. S. 380 (1911). It is always wise if possible to bring a doubtful standard before the Supreme Court of the United States first.
121. Ex parte Faisan, 93 Tex. Cr. 403, 248 S. W. 343 (1923).
regulation of air navigation facilities. Health measures may be adopted with general standards. More care must be taken to fixing standards for devices. The standards for airships are probably most closely analogous to the cases above discussed regarding facilities. The general regulation of this mode of transportation presents problems which have few analogies. No other means of transportation is thus regulated.

VI. GENERAL

Before turning from the problem of standards involved in the regulation of aeronautics by administrative authorities to the problem of delegation of state legislative authority to the federal government, a few interesting cases on legislative standards in general might be interesting and applicable to various problems that may arise in connection with aeronautics.

A Massachusetts statute provided that the commissioners of pilots for the harbor of Boston might recommend to the Governor and council such changes or modifications of the pilotage regulations as they deemed proper and such changes when approved by the Governor and council should have the force of law. This statute was held to be a police regulation and did not constitute an invalid delegation of legislative authority. ¹²²

A Washington statute authorized the Department of Labor and Industries “to declare any occupation or work to be extra hazardous.” The court upheld this statute declaring the word “extra hazardous” defines itself. ¹²³

A Massachusetts statute directed the building of a sewerage system to serve a part of the state containing several cities. The act provided that certain commissioners should apportion the cost of the system among the several cities “in such manner as they deemed just and equitable.” The statute was attacked on the ground that “no standard or rule is prescribed.” The statute was upheld. The courts said “it is difficult to see how anything like an exact rule or standard of apportionment can be fixed ... all that can be done by any tribunal would be to take in to view all the various elements and considerations that might appear.” ¹²⁴

This case is interesting because it asserts the principle that where standards are hard to establish they need not be set up.

A recent Vermont case is interesting because it involves a

subject of regulation very close to aviation. An act providing for
the regulation of motor carriers in the state by a commission set
as the standard "the general good of the state." The Supreme
Court of Vermont upheld this statute saying "that [standard] is
the pole star by which the commission is to be guided in the dis-
charge of the duties imposed upon it . . . None other is re-
quired."125 About this case it may be remarked that if the other
forty-seven states follow the lead of Vermont, the problem of
standards in aviation legislation is a simple one.

A Wisconsin statute directed its Railroad Commission to regu-
late the height at which water must be maintained in reservoirs
operated by reservoir companies. The standards set were "in the
interest of the public rights" and "to promote safety and protect
life, health and property." The standards were approved.126

It may be said about the aviation legislation above discussed
that the legislative standards thereby adopted were none too definite.
The generality of the standards, however, finds support in most of
the cases presented to the courts. Here and there are found
cases which should give pause to the abdication of the legislatures
to the bureaucracy. The only generalization that may be drawn
from all the cases is that the courts will approve of general stand-
ards when the administrative authorities for whose guidance the
standards are set up are likely to act wisely and judiciously. The
courts will not, however, approve of any scheme of legislation
which delegates too broad and arbitrary powers to administrative
authorities who are likely to abuse those powers, especially if the
rights of private property are involved. It may be said of the
aviation legislation that the aviation administrators in the various
states are worthy of respect, and that, in the evolution of a proper
scheme of regulation for this comparatively new activity, wide
discretion should be allowed to these authorities. It may be that
as the problems involved in the regulation of aviation become better
understood the courts will become more strict in their scrutiny of
the legislative standards set up.

VII. Conformity

There remains to be discussed in conclusion the problems pre-
vented by the almost universal purpose asserted in the aviation
legislation that state regulation should conform to federal.

126. Chippewa Improvement Co. v. R. R. Comm., 164 Wis. 105, 159 N. W.
739 (1918).
In this field is found the only case in which the Supreme Court has applied the prohibition against the delegation of legislative authority to invalidate an act of any legislature, state or federal. Congress provided that the federal district courts should have exclusive jurisdiction of all civil cases within the admiralty and maritime jurisdiction "saving . . . to all claimants the rights and remedies under the Workmen's Compensation law of any state." By a five to four decision in an opinion by Mr. Justice McReynolds the Supreme Court declared the "saving clause invalid as a delegation of Congress' legislative authority."\(^{127}\) The decision is incomprehensible and entirely out of line with cases decided by the Supreme Court both before and since. It finds some support, however, in an early Kentucky case which held that Congress was not to be considered to have adopted legislation of that state enacted subsequent to the act of Congress which provided that prison bounds for Federal prisoners should be the same as those for state prisoners in the same institutions.\(^{128}\)

In a somewhat earlier case the Supreme Court of the United States approved a delegation by Congress even to an unofficial body. The Interstate Commerce Commission was directed to adopt as the standard height of drawbars for freight cars that designated by the American Railway Association.\(^{129}\)

The states have likewise approved similar legislation. In California a statute providing that a board of architects should be appointed from the American Institute of Architects was held valid.\(^{130}\) Statutes requiring the applicants for registration as physicians and surgeons to present diplomas issued by a medical school having the requirements by the Association of American Medical Colleges have been upheld.\(^{131}\) It was held in Alabama that no improper delegation of legislative authority was involved in a statute which directed the trustees of the state university to remove its medical school from Mobile whenever the Council on Education of the American Medical Association informs the trustees that the Association proposed to lower the classification of the Medical School.\(^{132}\) On the other hand, a Kansas statute was held invalid which provided "all electrical wiring shall be in accordance with the national electrical code,"\(^{133}\) and a California statute was held

\(^{129}\) *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281 (1908).
\(^{130}\) *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702 (1907).
\(^{131}\) *Arwine v. Bd. of Medical Examiners*, 151 Cal. 499, 91 Pac. 319 (1907); *State v. Bonham*, 93 Wash. 489, 161 Pac. 377 (1916).
\(^{132}\) *Stevens v. Thames*, 204 Ala. 487, 86 So. 77 (1920).
\(^{133}\) *State v. Crawford*, 104 Kan. 141, 177 Pac. 360 (1919).
invalid which provided for the appointment of a brand and live stock inspector upon the request of the Cattle and Horse Raisers Association.\textsuperscript{134}

In the field of prohibition of intoxicating liquors aviation gets one of its precedents for a widespread attempt to bring state legislation and regulation into conformity with federal law. In the days before national prohibition the Webb-Kenyon act which prohibited the importation of intoxicants into dry states was upheld, even though the states became dry subsequent to the enactment of the Webb-Kenyon Act.\textsuperscript{135} When national prohibition came, the courts of the states uniformly held that their legislative authority could not be delegated to Congress by acts which attempted to adopt future definitions of intoxicating liquors made by the federal Congress or the Supreme Court of the United States.\textsuperscript{136} It is to be noted, however, that the future amendments of the acts of Congress were adopted in these cases by the statutes themselves.

The states also look to the federal government for leadership in the adoption of pure food legislation. In Pennsylvania, an act by which the legislature attempted to adopt the federal Pure Food and Drug Act together with the rules and regulations promulgated thereunder was held invalid, both as a delegation of legislative authority and also as contrary to a provision of the state constitution forbidding the incorporation of statutes by reference to title only.\textsuperscript{137} In California, however, a federal court upheld an act of the legislature which adopted the standards of purity for food products filed by the Federal Department of Agriculture.\textsuperscript{138}

In a number of states pure food laws which have adopted the standards of the United States, Pharmacopoeia, the National Formulary or the American Homeopathic Pharmacopoeia have been interpreted to refer to editions in existence at the time of the enactment of the law, and, in spite of the unofficial sources of these works, the acts have been upheld.\textsuperscript{139}

The federal bankruptcy act of 1898 recognized the exemption

\begin{itemize}
  \item \textsuperscript{134} State v. Hines, 94 Ore. 607, 186 Pac. 420 (1920).
  \item \textsuperscript{136} Maine v. Gauthier, 121 Me. 522, 118 Atl. 350 (1922); State v. Weber, 125 Me. 319, 133 Atl. 738 (1925); Ex parte Burke, 130 Cal. 326, 212 Pac. 193 (1923); In re Opinion of Justices, 239 Mass. 606, 133 N. E. 453 (1921).
  \item \textsuperscript{138} The second reason relied upon by the court was used in New Jersey to invalidate their aviation act; see below note 141.
  \item \textsuperscript{139} Cleveland Macaroni Co. v. Bd. of Health, 55 Ohio St. 364, 45 N. E. 319 (1896); State v. Holland, 117 Me. 277, 104 Atl. 169 (1918).
\end{itemize}
laws of the several states then in force and subsequently adopted and the act has been upheld. 140

There must be discussed finally the only case which has considered standards in aviation legislation. 141 A nisi prius court held that in authorizing the commission to adopt uniform field rules for airports, no standard whatever was set up to guide the actions of the administrative authority. It seems that this holding shows undue blindness on the part of the court. The very term, field rules, includes its own standard. 142 The court then went on to hold that while it was proper for the legislature to adopt "as its own the federal public policy" the provision of the state constitution providing "no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act" made invalid the incorporation of the federal statutes by reference to their name only, and that, without this reference, no standard whatever was fixed to guide the state Aviation Commission. The least that can be said of such a decision is that the court displayed an unusual amount of obtuseness. The statute did not purport to adopt the federal legislation and regulations as a part of the New Jersey act; it simply referred the Aviation Commission to Washington for its guiding rule. Such a standard is much more definite than usually approved even in New Jersey.

The Larson case is the only case which has, so far, passed upon the aviation statutes which refer their aviation administrators to the federal government for their guidance. Aviation is of such a nature that uniform regulation is essential. It was indeed a brilliant innovation for the states to adopt simply uniformity as a general standard and to direct their administrative authorities to keep state regulation of intrastate flying abreast of the comprehensive federal regulation of interstate flying. It is to be hoped that when the highest courts of the state come to pass upon the question, statesmanship rather than pedantry will motivate the decisions.

142. See note 123.