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REVIEW OF 1935 AERONAUTICAL LAW

GEORGE B. LOGAN*

This review should be prefaced with the remark that it is not intended to review either all of the decisions concerning aviation or all of the legislation concerning aviation, but only those which have some earmark of news or phase of special interest.

The volume of litigation as well as the amount of legislation each year has grown to the point where it would be impossible to touch on all of it. If, therefore, legislation in your own state is not discussed or if a case in which you are particularly interested is not mentioned, I would request that you charitably ascribe it neither to ignorance nor to partiality.

State Legislation:

The first thing I have to report is to regretfully announce the passing of the Aeronautics Department of Arkansas. Legislation has been enacted repealing all prior legislation and there is now no Department of Aeronautics. It seems that it was a great mistake from the standpoint of Arkansas, although the Federal government was the gainer, to remove Col. Carroll Cone from his native sphere of influence. Arkansas now joins its backward and benighted neighbor, Missouri, in having no Aeronautics Department.

California has removed constitutional doubts as to the ability of a municipality to lease its airport. It was feared for a while not only in California but also in other states that, while a city could issue bonds for and build and operate an airport, it could not do this where the airport was to be leased or otherwise used for private operation. This question has been put at rest in California at least.

It should be added in passing that other states besides California have specifically authorized leasing of airports, notably Illinois, and two recent cases have held that even in the absence of such authorizing statute, it was proper for an airport to be leased.

In City of Ardmore v. Excise Board of Carter County, the

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1. 156 Okla. 126, 8 P. (2d) 2 (1932).

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Supreme Court of Oklahoma held that the City of Ardmore could be a lessee and that rentals paid were proper municipal expenditures. In *Wentz v. City of Philadelphia*, it was held that the airport acquired by the municipality could be leased to an individual or corporation for airport purposes.

In Connecticut we find that Charles Morris and his friends have overhauled the rigging of their 1933 ship of aeronautical law and have revised their definition of aeronautical terms. The word "rigging" is used advisedly because one of the terms defined is that of "parachute rigger" and it is provided that no one may use a parachute unless maintained by a licensed parachute rigger. Live and learn. I was glad to read the definition. I am still wondering what it is. I can well remember my surprise when I first learned that a tuck-pointer was not a cross between a dressmaker and a bird dog. Of chief importance among the amendments in Connecticut is the grant to the Commissioner of Aeronautics, his deputies and salaried inspectors, of police authority with respect to criminal offenses in the line of their duties, equal to that of sheriffs and constables. Likewise of interest is the legislative rule, prohibiting the operation of aircraft by persons under the influence of intoxicating liquors or drugs.

Florida has definitely exempted aviation gasoline from the gasoline tax and the act is headed, "An Act to Encourage Aviation." In view of the fact that the tax on gasoline was 7¢ per gallon, the encouragement is substantial. There is a tremendous movement on in Florida for the building and improvement of airports, some assistance having been supplied by PWA funds, and we find that the state has elaborated the general laws relating to public and municipal airports. Cities may now acquire, construct and operate airports and may grant exclusive franchises for privately operated airports, fixing, of course, the schedule of charges. In addition, the right of eminent domain has been given to cities in acquiring airports, and presumably this same right may be exercised by private corporations holding airport franchises.

Illinois has amended its act to regulate aeronautics so as to conform word for word with the Uniform Regulatory Code, as approved by this Association at Cheyenne. My informant on this bit of information, Mr. Elwood Cole, naively tells me that very little amendment was necessary because, after all, the original Illinois law was the model for the model. (Will the Aeronautical Law Committee of the American Bar Association and the Na-

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The law has also been amended to permit the commission to fix the salary of its executive secretary, presumably more friendly than the legislature; and to permit the maintenance of an office at the Springfield airport instead of in the Capitol building. Another law has been an enabling act to permit the City of Chicago to build a lake front airport. All that now remains is for Chicago to say, "I will."

In Iowa the legislature has created a commission of aeronautics of three members to serve without compensation, and whose duties and powers are rather limited. Their chief function is to investigate aeronautical matters, primarily accidents, and for this purpose they are given the power of subpoenaing witnesses and records and of punishing for contempt. A valuable provision of this law is that directing the commission to instruct the highway police and other police officers with reference to aviation matters and securing their cooperation in enforcing the aeronautical laws of Iowa. The 1931 law, however, which promulgated regulations by legislative enactment instead of by the commission, still remains.

Massachusetts has passed amendments to its general regulatory code of 1928, putting into effect the definitions and licensing provisions substantially similar to those in the Uniform Code approved by this Association at Cheyenne. Massachusetts has also inserted in this act a definition of navigable airspace, taken practically bodily from the Federal Air Commerce Act of 1926, and the regulations thereunder, and has made flying in the navigable airspace lawful. If this had existed in 1929, before the case of Smith v. New England Aircraft Company, we probably would never have had such a lawsuit or the illuminating decision therein.

In addition to defining the navigable airspace, the Massachusetts law definitely, by Section 48, states that the flight of aircraft within the navigable airspace is lawful, using the exact wording found in Section 1 of the Code on the lawfulness of flight, as prepared by the Committee on Aeronautical Law of the American Bar Association in its report in 1931.

Under the new Massachusetts law, regulations are to be promulgated by the Registrar and not by the legislature, and the rules and regulations so promulgated are to conform to those of the Federal government. Massachusetts has also attached to its aeronautical code the non-resident-process provisions taken from its motor vehicle law. Anyone operating aircraft over Massachusetts

is conclusively presumed to have appointed the Registrar as his attorney-in-fact, upon whom valid service may be had in any action arising out of any accident occurring in the state.

Michigan has amended its act of 1929 by imposing a specific tax on all gasoline used in aircraft and denominating it a privilege tax for the use of public airports. The state refunds one-half of the tax to interstate commerce carriers.

Nebraska has passed a new law creating the "Nebraska Aeronautics Commission," consisting of five persons to be appointed by the Governor and to serve without compensation. The commission may have a paid secretary, if the gasoline fund is sufficient. The fund arises from a tax of 4c per gallon on aviation fuel. This law provides that pilots must have a federal license but does not require the craft to be federally licensed. However, the commission, which is authorized to issue rules and regulations, must conform to the rules and regulations of the United States and presumably a license for the aircraft itself is to be required because the commission is authorized to inspect all aircraft not licensed by the federal government.

Under this new law the air above Nebraska is declared to be free for the use and operation of aircraft, and, what is much more important, the commission is authorized to proceed by actions at law or in equity to remove obstructions to flight, surrounding airports and such obstructions are declared to be hazards to human life and property. We look forward interestedly to litigation which may arise under this section. Whether or not the police power of a state is broad enough to require the destruction of property without compensation (not merely restricting its use as in zoning statutes), is a much mooted question. This will be particularly true where airports have been established in the vicinity of pre-existing structures, which may be classified under this law as hazards to human life and property.

There has been a significant amendment to the general business laws of New York. This amendment, added to those sections relating to municipal corporations, gives to cities, towns, villages and counties the right to acquire by purchase or condemnation buildings and other structures constituting a hazard about airports. You will note the difference between this and the Nebraska statute. The New York statute contemplates action by a body corporate and contemplates payment. The Nebraska statute contemplates action by the commission and does not contemplate payment.

Ohio, which formerly had a statute making it a misdemeanor
to operate an aircraft contrary to the regulations of the U. S. Department of Commerce, has amended this provision to make it also a misdemeanor to operate an aircraft contrary to the regulations of the Director of Aeronautics. It is obvious that regulations promulgated by a state director or commission may contain provisions not contained in the Air Commerce Regulations, but not inconsistent therewith, and evidently, in order to include such regulations, our President, Mr. Fred L. Smith, caused this amendment to be made.

Pennsylvania has adopted a new statute regulating aeronautics and putting the administration of the act into the hands of the Department of Revenue, and abolishing the State Aviation Commission. This legislation actually took effect in 1933, but has not heretofore been commented upon. The new act has in substance adopted the regulatory provisions of our own uniform code, and has also adopted the common law provisions of the uniform code proposed by the Committee on Aeronautical Law of the American Bar Association in its report in 1931. The ownership of airspace is declared to be vested in the property owners but is declared to extend only so far as is necessary to full and complete enjoyment of the surface. This law also fixes the rule of liability for damage by aircraft to persons and property on the ground as absolute, thus joining the 18 states which have heretofore adopted that rule.

Pennsylvania has also added to its non-resident automobile vehicle statute the provision for service on non-resident aircraft operator similar to the one in Massachusetts, providing for service on the Secretary of Revenue in all suits arising out of accidents in Pennsylvania.

South Carolina has passed the Uniform State Aeronautical Regulatory Act with one exception. A non-salaried commission of three members is created and it is given power to promulgate rules and regulations which must be consistent with those of the federal government. The commission has broad powers of promotion and investigation. The exception is that unlicensed pleasure aircraft are exempted from the provisions of the act. This exception is so broadly worded that it appears that purely pleasure aircraft need not be licensed nor need the pilots of such aircraft be qualified.

In view of the fact that South Carolina had in 1930 provided that all aircraft operated in the state should have a federal license, it is difficult to understand the meaning of the section which I shall quote. Bear in mind that paragraph 2 of the new act recites: "It shall be unlawful for any persons to operate or pilot or navi-
gate or cause to be operated, piloted or navigated any aircraft within the state unless such aircraft has an appropriate effective license issued by the government of the United States."

Section 23a is headed "Exemptions" and reads: "The term and provisions of this act shall not apply to unlicensed aircraft engaged entirely in private flying and which do not engage in flying for hire in any way."

We announce that we think we have discovered a new thing in aviation law. South Dakota has in its legislature not only the usual standing committees on "ways and means," "criminal jurisprudence," "civil procedure," etc., but has a Joint Committee on Highways and Aviation. To my knowledge, this is the first legislative committee on aviation. Perhaps we may get a standing committee on aviation in the House or in the Senate, and thus prevent our aviation bills being passed down through committees on post offices and post roads, army, navy, interstate commerce, etc., etc. However, to go on, South Dakota has passed substantially the Uniform Regulatory Code. A Committee of three non-paid members has been provided for and $5,000.00 has been appropriated for expenditures. Federal licenses are required for aircraft and pilots and rules and regulations are to be promulgated, not inconsistent with those of the U. S. Department of Commerce. The commission is strongly directed to foster and encourage aviation and in enforcing the act is given strong investigatory powers and its members and employees police powers. The police force of the state, including sheriffs and constables, are directed to assist the commission and the commission is authorized also to proceed by injunction to restrain violations of the law and its rules and regulations.

Tennessee has also adopted the uniform regulatory code, indicating, doubtless, that Mr. Boutelle still has a large arm of influence. Its commission consists of the commissioner of highways, the adjutant general and three appointees. These serve without pay but, upon recommendation of the commission, the Governor may appoint a Director of Aeronautics. A director has been appointed. The funds for the office come from the general highway fund under previous law. The rules and regulations must coincide with those of the federal government and the commission is authorized to conduct investigations of accidents and subpoena witnesses and has adopted the policy of the Bureau of Aeronautics of the Department of Commerce in making its investigators and the testimony unavailable for court use.
West Virginia has amended its law to continue a non-paid Board of Aeronautics but including the state road commission, and by requiring federal licenses for aircraft and pilots instead of state inspection of both.

Wisconsin has amended its law of 1929 to provide a definition of identified aircraft as being those which have received a distinguishing number from the Department of Commerce, but have not been licensed, and to provide a penalty for operating such identified aircraft except as permitted by the inspectors of the Department of Commerce in making tests for licensing and qualification.

Wisconsin has also provided for a lien for the amount due to any airport, hangar or service station for storage, repairs and care. This is but an enactment of the doctrines of the common law, which have been in existence insofar as claims for storage and repair are concerned, but the word “care” may include the providing of gasoline and oil, in which event it is an enlargement of the common law rule.

One more notation and I am through with state statutes. You are all doubtless familiar with the guest laws of several states as pertaining to automobiles. These laws provide that the operator of an automobile shall not be liable to his guest passenger except in cases of intentional or willful acts, or reckless disregard of his rights, or intoxication. South Carolina has, by an act approved last May, added “airship” to automobiles. We assume that it was intended by that to mean or at least to include “airplane” although we use the term “airship” in a limited sense in strictly technical aviation circles—of whom I am which.

Federal Legislation:

So much for state legislation. There is a piece of federal legislation which I now wish to discuss and, at the risk of being tedious, give you a bit of background with which you are all doubtless familiar. On February 9, 1934, Postmaster General Farley announced to all of the air mail contractors that their contracts had been cancelled under a statute passed in 1872 authorizing the Postmaster General to cancel mail contracts in the event he found there had been conspiracy to prevent free bidding, or any other collusion to prevent the government from obtaining a fair contract. This statute also imposed a penalty of prohibiting such a mail contractor from becoming an eligible bidder again within a period of five years.
This message, as you all know, was sent to each air mail contractor without exception. There had been no hearing. The contracts were cancelled as of ten days after the date of the telegram. I will discuss later the court cases which followed these cancellations.

The army was called upon to carry the air mail in the emergency and on June 12, 1934, a new air mail act was passed. You must remember that the air mail contracts existing prior to that time were those created under the Watres Act of 1930. In brief, the Air Mail Act of 1934 provided for a limitation by Congress of the rate of pay per mile of 33\(\frac{1}{3}\)c for a 300-pound load, with small additions in the event of a larger load but an outside maximum of 40c per mile. It provided that there could be not more than 29,000 miles of air routes and not more than 40,000,000 airplane miles per year. It provided that the Postmaster General could designate certain routes as primary routes and no carrier could hold the air mail contract on more than one primary route. The primary routes were to include the four transcontinental routes and the two coastal routes on the east and the west coast. In addition to the primary route the air carrier could hold only two other contracts on non-primary routes.

The Act also provided that the Postmaster General could extend a route without bidding for not more than 150 miles at the same rate as the route which was being extended. There was a very stringent provision that the Interstate Commerce Commission should have authority, and must at least once each year, examine into the books and records of all air carriers to determine whether or not there was an unreasonable profit being made. There was also a provision that the Interstate Commerce Commission could increase the rates within the limitations but the burden of proving that the price was inadequate was put upon the carrier. In determining whether or not there was an unreasonable profit the Commission was to take into consideration all other sources of revenue of the air contractor—not only that derived from the air mail contract. This was the 1934 structure.

A new Air Mail Bill was passed amending the 1934 act, on August 14, 1935. It is perhaps fair to call it the Mead Bill although several bills were introduced in the Senate and the House along the same lines and the act as finally passed was the outgrowth of these various offerings. The Mead Bill in some places loosened the straight jacket and in other places tightened the straps.

Extensions of air mail contracts up to 250 miles were per-
mitted, air mail routes could be established up to thirty-two thousand and air miles to forty-five million per year. As to the designation of primary routes, Postmaster General was required to designate only three primary routes and one of these was picked for him, namely, the southern transcontinental route described as operating from Boston via Newark, Washington, D. C., to Los Angeles. The route from Newark to Miami and the route from Seattle to San Diego were specifically named as not necessarily being primary routes. The Interstate Commerce Commission was given authority to review these designations and apparently to set them aside.

In tightening the straps the air carriers were required to keep books and records in such manner as shall be designated by the Postmaster General or by the Interstate Commerce Commission. In determining whether or not a profit was being made the Interstate Commerce Commission was directed to consider revenue from all sources and was directed to disregard losses of the operators resulting from the operation of non-mail schedules. Not only were the air carriers prohibited from having more than one primary contract but they were also prohibited from operating passenger schedules off of the routes on which they had air mail contracts, provided, however, that they could continue operating schedules which existed prior to July 31, 1935, with the same stops and number of flights. However, the Interstate Commerce Commission was authorized upon the complaint of any person to investigate the operations of any air contractor off of his route and if they found that such operations or any practices by such off-the-beat operator tended to compete with or tended to increase the cost of operations of another air mail carrier the Interstate Commerce Commission was authorized to order such air mail carrier, the offending one, to cease and desist and to withhold payments due under his air mail contract as long as he failed to comply with the order.

Both the 1934 and the 1935 acts provided that all air mail contractors were required to pay to all employees such wages and to comply with such other orders with respect to hours and conditions of work as should be required by the National Labor Board provided, however, that such requirements should not be a bar to the employees, by collective action, bargaining for additional wages. Perhaps it would be best for me to stop here and gracefully retire to bomb-proof shelter. I occupy the enviable position of knowing nothing about the reasons for the enactment of this legis-
lation. I have no way of knowing who was for it or who was against it. I do not know whether it was the result of a grand and gorgeous grouch created by either fact or fancy at the alleged abuses under the Watres Act. I do not know, for instance, whether the holder of the primary route from Boston by way of Newark and Washington to Los Angeles wanted this route to be designated as primary, or whether it was designated as primary to make the air carrier keep that route and give up its others. I do not know why the eastern coastal line and the western coastal line were originally required to be designated as primary routes and now are not. I do not know what the fourth route was which was intended to be designated under the 1934 act nor why the fourth route was dropped in the 1935 act. In fact, there are so many things about it that I do not know, that I feel perfectly qualified to speak, being in the advantageous position of a spectator in the grandstand who can see the ball better than the player who has his eyes full of dust from sliding into second!

But, from this grandstand seat, certain things I can see. I can see that Congress has designated itself as the all-seeing prophet and has predicted the maximum future of air mail by limiting it to so many miles of route and so many million miles per year. The Congress of 1905 was probably just as smart as the Congress of 1935 (it would be slander to say otherwise), but I wonder if it could have then predicted the future of the air mail for the next thirty years. Neither a prophet nor all seven sons of a prophet can predict the future of aviation for the next thirty years, the next twenty years or the next ten years.

The President’s Federal Aviation Commission in its report was careful to point out our total lack of soothsaying qualities, and was careful to say that there should be no limitation either upon the number of routes, the miles of route, or the air miles per year.

I know that in addition to this arbitrary limitation Congress has forever frozen the development of passenger traffic by air. No business man will take a chance of putting on additional passenger schedules, or of reaching additional cities, when he knows that in addition to the ordinary hazards of business which he must face, he faces also the prospect that his profits, if any, may be taken from the revenue received under his air mail contract by the Interstate Commerce Commission.

I know that the effect of this legislation is to give a monopoly in passenger and express business between any two cities to the man who has the air mail contract, and to prohibit forever any
competition. I also know that monopoly does not tend to scientific research or forward looking development. When we firmly anchor and tie down the development of commerce by air, we also firmly hamstring the manufacturing of planes and plane parts, because the air carriers and the government constitute practically the only customers of these manufacturers. When we have done that we have definitely limited the reserve of air manufacturers who are going to provide us with planes and their parts in times of national emergency.

If all of this legislation was with the definite view of the government ceasing its subterfuges about subsidies for air mails, and also with the definite view of paying for air mail service just what it was worth, and then making a frank grant of subsidy to aviation companies, my criticism would be uncalled for, but the Act of 1935 further provides in addition to limiting the rate per mile, the number of miles, and the airplane miles per year, also limits after July 1, 1938, the amount expended under all of the air mail contracts to the amount received for air mail postage.

All of this has been done in the face of the President's Aviation Commission's report that operating costs of first class lines run from 55c per mile to 75c per mile. The government is apparently determined that it will pay no more than 33½c of this cost, possibly 40c under the best of circumstances, and apparently is also determined that if the air carriers can get the remaining revenue out of passengers, express, investments or any other form of income, the government will take it back by reducing the price paid for air mail.

Since writing the above, it has been called to my attention that some of the foregoing arguments are unsound. The argument presented, as understood by me, goes along the following lines:

"It is unfair to the air-mail contractor who has made his investment and his bid for air mail on the expectation of carrying an expected number of passengers, to have a competitor who also has an air mail contract somewhere else, come in and take away part of these passengers.

"It tends to increase the cost of carrying the mail.

"Likewise, it is not right to permit an air mail contractor, enjoying a subsidy from the government, to fritter away that money on operating passenger schedules off his mail route.

"This also tends to increase the cost of carrying the mail.

"The air mail contractor has, in most cases, pioneered his route,
made large investments, suffered heavy losses, and should be protected from competition."

Some of these arguments sound reasonable, especially if viewed solely from the standpoint of the air mail contractor who desires protection. But viewed from the standpoint of the public, they will not stand. Such an argument would have prevented the operation of trucks and buses in competition with railroads carrying the mails, and would have left the development of the commerce of the country to railroads alone. Indeed, such an argument would have prevented the very establishment of air lines themselves—for they do compete with railroads.

Another thought is that the present air mail carriers would not necessarily get the passengers now being carried by their competitors. That is a question of schedule, cities served, and equipment.

But suppose they would get all the passengers. Suppose two planes leave at the same hour in Chicago, bound for New York. Each plane has a capacity of fourteen passengers and each has ten passengers. Twenty passengers cannot be carried on one plane. If one carrier quits, the other must operate both planes—both with empty seats—and the carrier is no better off. Or, if the carrier operates just one ship, filled, six passengers are disappointed and the public loses by losing the service.

Would the air mail contractor in this case put on enough additional schedules to accommodate the public? If he did not, there is a loss in public service. If he did, he might lose money. He might make money, but if he made money, it might be taken off his air mail contract. The answer is that he wouldn't. The great development of passenger service, heretofore due to active competition, would stop right where it is—and has.

Another thought that occurs to me is that these arguments proceed upon erroneous grounds when they speak of "enjoying a subsidy" from the government. It is safe to say that very few of the air mail contracts of today are "subsidies." The contract prices are low. In most cases, the contractor does not get enough to cover half the cost of bare plane operation—the rest of the cost plus all other expenses must be met out of passenger and express revenue, or out of pocket.

On transcontinental lines, where this question of competition seems most acute, it is probably true that the air mail postage equals the air mail contract payments. "Subsidy" nowadays exists chiefly in theory and not in fact. By 1938, all cost of air mail shall be
within the total air postage. There will then be no subsidy. Will the government then take off the heavy hand which now limits competition with its air mail contractors?

Further, it is impossible under this law to "take government mail subsidy on one line and fritter it away on operating another." The Interstate Commerce Commission will ignore these losses in fixing air mail contract prices, and will acutely notice these operations if profitable. While this is an answer to the argument as made, it is utterly illogical. Assuming X Company has an air mail contract between Chicago and New York, and assuming the price is fair (it had to be the lowest bid), what difference should it make to the government if X Company earns a half million dollars a year operating a passenger service between Chicago and Miami? The government is no party to this latter service. If it was unprofitable, the government very properly should refuse to increase the Chicago-New York mail price. If profitable, why decrease the Chicago-New York price?

Finally, it appears that an air mail contractor who has the air mail revenue, which his competitor does not have, who cannot stand competition with this heavy advantage in his favor, is somewhere failing in his business acumen or courage.

The air mail operator who can operate profitably on passengers and express alone is, indeed, rare. It must be that he has something the public wants and will pay for. It hardly seems equitable that the government should stop him. He employs men and buys materials. He contributes to the general welfare. Unless efficiency is to be penalized, he should be allowed to continue.

Some of the air carriers realize what has happened, and their protests were apparently unheeded. Others seem pleased. Others say nothing. Either they are oblivious to their danger, or they must be resigned to their fate.

Court Decisions:

Our old friend, the ticket, with its limited liability which is signed by the passenger, has come before the courts again and has received its usual slap in the face in the case of Conklin v. Canadian Colonial Airways, decided in February of this year by the New York Court of Appeals, highest court of that state. In this case, Conklin boarded an airplane at Albany bound for Newark. He inquired the fare, paid what was asked, received the ticket, a form was presented which he signed, and the trip com-

menced. It ended in a crash over Newark in which the ship and all passengers were lost. By examination it developed that the ticket carried language to this effect:

“The holder voluntarily assumes the ordinary risks of air transportation and stipulates that the company shall not be responsible save for its own negligence of duty and that the liability of the company to the holder or his legal representatives in any event and under any circumstances is limited as follows: Class A Contract, minimum rate $5,000.00; Class B Contract, double rate, $10,000.00; Class C Contract, triple rate, $15,000.00. This is a Class A contract.”

The jury returned a verdict for $50,000.00 which was reduced by the Appellate Division to $40,000.00 and was appealed to the New York Court of Appeals. On this appeal the defendant raised no point except that the contract was binding, and there having been no evidence of negligence or breach of duty, the plaintiff was either entitled to no recovery or at best to a limit of $5,000.00. The court very simply said that the question raised was this:

“It is the law of this state that a common carrier of passengers for hire cannot refuse to carry them unless they stipulate or contract that the carrier shall not be liable for its own negligence or that of its own employees. This state has never gone that far.”

The court also said that the cases have held that a common carrier could not even limit its liability for negligence. The judgment was affirmed for the full amount and the court in this case specifically referred to and approved the case of Glose v. Curtiss-Wright Flying Service, which arose in New Jersey on a similar ticket and which I have discussed with you before, but which since then has gone to the United States Court of Appeals for the Third Circuit and to the United States Supreme Court, where the writ of certiorari was denied.

In Mayer v. New York Life Insurance Company, decided by the United States Circuit Court of Appeals for the Sixth Circuit, on December 7, 1934, we again meet our old and familiar friends “participating in aviation” and “engaging in aviation.” The question involved was whether or not there could be recovery for the death of a passenger under the double indemnity provisions of a life insurance policy which excluded a death resulting from “engaging as a passenger or otherwise in aeronautic operations.” The court reviewed the many decisions which have now come to be

5. 1933 U. S. Av. R. 228 (1932—Not officially reported).
6. 74 F. (2d) 118 (1934).
pretty well classified into two sides. Participating in aeronautics
does include a passenger. But "engage in aeronautics" or "engage
in aviation" does not include a passenger. The question, there-
fore, was whether adding the words "as a passenger or otherwise"
to the word "engaged" made it clear enough that the ordinary
passenger was meant to be included.

A year ago in a decision of the United States Court of Appeals
going up from St. Louis (Goldsmith v. N. Y. Life),\footnote{7} the court
held by a divided court of two to one that "engaging as a pas-
senger or otherwise" in aeronautic operations forbid a recovery
for the ordinary passenger. It was strenuously contended in that
case and in the case which I am now discussing that there are
passengers who are engaged in aeronautics, such as officers, em-
ployees and the like, and there are passengers who are not engaged
in aeronautics, to-wit, the ordinary traveling salesman. It was con-
tended that the insurance company by using the words "engaged
as a passenger or otherwise" meant only the passengers who were
actually engaged in aeronautics. The court held, however, that
the words "or otherwise" were not meaningless; that the clear in-
tent of the phrase was to exclude from the benefits of the policy,
deaths resulting from aeronautics either as a passenger or in any
other manner.

In the case of\footnote{8} Sneddon v. Massachusetts Protective Associa-
tion, the New Mexico Supreme Court had before it an insurance
clause which did not have the words "as a passenger or
otherwise" but merely used the words "participating in aviation." The
court very carefully reviewed the authorities and came to the
conclusion that a passenger was participating in aviation and found
that the weight of authority was in favor of that view and refused
to permit Mrs. Sneddon to recover under an accident policy which
barred death resulting from participation in aviation.

With this conclusion of the court it is a little difficult to agree,
although the majority of cases indicate some degree of difference
in the meaning of the word "participate" and the meaning of the
word "engage." I have always felt that the difference was not
great enough to make a distinction, and that a passenger was
neither "participating" nor "engaging" in aviation. Naturally,
when the words "as a passenger" are added, the intention of the
excluding clause can no longer be doubted.

We have had a new decision on the question of \textit{res ipsa loqui-}
\footnotesize{\textsuperscript{7}}. \textit{69 F. (2d) 273 (1933).}
\footnotesize{\textsuperscript{8}}. \textit{— N. M. —, 39 F. (2d) 1023 (1935).}
tur. This is the case of Herndon v. Gregory, decided by the Arkansas Supreme Court, April 22, 1935. The two Gregories, father and son, invited Mr. Herndon to accompany them on a pleasure trip to St. Louis. Not far from St. Louis, in Illinois, the plane crashed, was burned, and all three perished. A suit was filed by the widow of Herndon against the estate of both Gregories for the damages caused by the death. The petition alleged that the Gregories, the father who was owner and the son who was pilot, were negligent and that their negligence caused the death of Herndon. The petition further stated that the plaintiff was unable to specify the negligence and the manner of it because the instrumentality was at all times under the control of the defendants. The question, therefore, was, assuming the facts to be true, was the plaintiff entitled to recover.

The rule of res ipsa loquitur is usually applied to accidents which occur in an unexplainable manner and where the defendant was in charge and control of the thing causing the accident and where, but for the existence of negligence, no such accident would have occurred.

We have had several other cases of this type and the argument of the operator of the ship or the owner of the plane has always been that many things besides negligence can cause an airplane to fall; that the art has not so far developed, that instruments are not so far perfected, that aerodynamics are not so thoroughly understood, that one can say with any degree of conviction that an aviation accident is necessarily preceded by negligence of the owner or operator. The Arkansas Supreme Court accepted this latter view and held that Mrs. Herndon could not recover. The decision was a four-three decision. That is to say, that three of the judges disagreed with the majority of the court.

This decision of the Arkansas Court is contrary to the decision in the case of Seaman v. Curtiss Flying Service, where the court held that where an airplane left the ground in perfect condition and crashed shortly after the take-off the doctrine of res ipsa loquitur applied, and that the jury should have been given an instruction to the effect that a presumption of negligence was created by the circumstances requiring an explanation by the defendant.

An instruction on the doctrine of res ipsa loquitur was likewise given by the court in the case of Stoll v. Curtiss Flying Serv-

in the Trial Division of the New York Supreme Court, on June 13, 1930. The court in its instruction used the following language:

"The second point which I am submitting for your consideration is the doctrine of res ipsa loquitur, meaning that the thing speaks for itself, that the falling of the plane itself without any other explanation on the part of the plaintiff creates what is known in law as a presumption of negligence."

In the Supreme Court of Washington in January, 1934, we have the case of Genero v. Ewing. The pilot had swung his propeller and started his motor without chocking the wheels. In some unexplained manner the throttle opened wide and the plane dashed across the field and injured the plaintiff. The court held that in this case the doctrine of res ipsa loquitur applied. This, by the way, was a unanimous opinion of the Supreme Court of Washington.

The doctrine of res ipsa loquitur was very definitely applied by the Supreme Court of California in 1932 in the case of Smith v. O'Donnell. The court evidently took a different view in this case of the experience of air carriers, even as early as 1932, because the court said:

"When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the transportation, the law, operating upon the probabilities and the theory that if there were no negligence the defendant can most conveniently prove it, raised the presumption of negligence which the defendant must overcome by proof that there was in fact no negligence."

The only real authority for the position of the Arkansas Supreme Court, aside from the text book of W. Jefferson Davis, which the court cites with approval, is the case of Wilson v. Colonial Air Transport, decided by the Massachusetts Supreme Court, also in 1932, in which the court held that where the engine of a passenger plane suddenly stopped shortly after the take-off, the plaintiff cannot recover unless the plaintiff can prove what caused the stopping of the engine. The court held there:

"It is to be observed that the doctrine will not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all."

12. 176 Wash. 76, 28 P. (2d) 416 (1934).
The same point was before the Illinois Court of Appeals in the case of *McCusker v. Curtiss-Wright*. In that case the plaintiff, however, had attempted to get in court both by the front door and by the back door. The plaintiff had pleaded both specific negligence and the rule of *res ipsa loquitur*. Evidently, this method was successful as to one of the entrances for a verdict of $10,000 was sustained by the court but the court held that the question of *res ipsa loquitur* was not before it in view of the fact that the plaintiff had pleaded specific negligence and the evidence has been sufficient to establish it.

One of the most interesting cases of the past year was a decision of the Court of Appeals for the Southern Division of California handed down December 31, 1934. This decision involves not only the *res ipsa loquitur* rule which we have been discussing but also involves the much mooted question as to the validity of the Federal Air Traffic Rules when applied to strictly intrastate flying. It seems that the Fox Film Company arranged to rent at so many dollars per hour from Granger, Inc., one Lockheed and two Stinson planes properly supplied with skilled pilots. The purpose was to film an air picture over the Pacific Ocean ending in a parachute drop into the ocean.

According to the contract between Fox Film and Granger, Inc., the flying was to be done under the direction of Kenneth Hawks, Director and Max Gold, Assistant Director of the Fox Film Company. The Granger Company had the Lockheed but did not have the two Stinsons and engaged these from the Tanner Motor Livery Company.

The Lockheed was piloted by Colonel Roscoe Turner. One of the Stinsons was piloted by Hal Rouse and the other by Ross Cook. When the picture-making started, the Lockheed went ahead with the parachute jumper. It was followed by one of the Stinsons to the left, to the rear and above the Lockheed. In this was the pilot, Rouse, Kenneth Hawks the Director, and three technicians, employees of the Fox Film, including camera man. The other Stinson was also to the left, to the rear and below the Lockheed. In this was the pilot Ross Cook, the Assistant Director Max Gold, and three more technicians.

In accordance with the pre-arranged plan the Lockheed after flying a certain distance slowed down to permit the Stinsons to pass it, one above it and one below it, and the Lockheed then turned

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15. 269 Ill. App. 502 (1933).
back to the shore. The two Stinsons also turned back to the shore but for some reason collided with each other. There was an explosion, both planes fell into the ocean and the ten occupants of the two planes were killed. Eight suits were filed, being by the representatives of everyone except the Director and the Assistant Director. The cases were all consolidated under the name of Parker, one of the complainants.

At the trial the plaintiffs offered to introduce the air traffic rules of the Department of Commerce and the trial court refused to permit their introduction. After the evidence was all in the plaintiffs moved for a judgment because the defendant had in no wise explained the accident and therefore the res ipsa loquitur rule, which created a presumption of negligence, entitled the plaintiff to judgment. The defendant also moved for judgment and a dismissal of the action on the grounds that the plaintiff had established no negligence. Both motions were overruled. The jury found a verdict for the defendants.

On appeal there were only two questions before the court. First was whether or not the air traffic rules should have been introduced in evidence. The court held that the air traffic rules did not apply to intrastate flying and even if they did apply to intrastate flying, the trial court could take judicial knowledge of the rules and could instruct the jury upon proper request with reference thereto, if the rules had any application to the flying involved; but held that the rules did not have and could not have any application to the flying in this case.

In this connection the court undoubtedly went contrary to the decision in the case of Nieswonger v. Goodyear where the court held that air traffic rules of the federal government reasonably necessary to regulate and protect interstate commerce were valid as to intrastate flying.

The second point before the court was the instruction given with reference to the res ipsa loquitur rule. The court instructed the jury that the very occurrence of the accident was prima facie evidence of negligence, this instruction being at the request of the plaintiff. However, the court also instructed the jury at the request of the defendant, that if the jury found from the evidence that the defendant did not have any information as to what caused the accident so as to explain its occurrence, or if the jury found that the plaintiff and defendant were equally in possession of all

17. 35 F. (2d) 761 (1929).
the facts concerning the accident, then the *res ipsa loquitur* rule did not apply.

This ruling the appellate court held was error and the case was reversed for that reason. The appellate court held in effect that a presumption which could be met with a simple answer, "I don't know," was no presumption. The court also pointed out very clearly what has frequently been overlooked and that is that the rule of *res ipsa loquitur* applies in two situations, not only in one. It applies first when the occurrence of the thing itself is of such a nature that in all probability it would not have occurred but for negligence of the defendant. It applies second where the instrumentality which caused the injury is wholly in the possession of the defendant, is unexplained, and the defendant is in a better position to explain and to exculpate himself than the plaintiff is to allege and prove specific acts of negligence. It was the first of these which made proper the giving of the instruction in the first instance, not the second; and hence the instruction given for the defendant was erroneous. As far as we know this case has not been retried.

There was an opportunity for the United States Court of Appeals in the case of *Allison v. Standard Air Lines*\(^8\) to give its expression on *res ipsa loquitur*. But that case was decided on the question of appellate procedure and the doctrine of *res ipsa loquitur*, which had been raised by the plaintiff, was not discussed.

Two years later, however, there was a fatal accident which occurred in the same dangerous pass in the mountains near Yucaipa, California, resulting in the trial of the case of *Thomas v. American Airways*.\(^9\) In this case the Federal District Court for the Southern District of California gave an instruction on *res ipsa loquitur* in which the court said:

"This imports what is called the rule of *res ipsa loquitur* which means that the happening speaks for itself by indicating that some negligence must have produced the damaging result."

I have gone this far into the discussion of this point because this is an exceedingly live question and the time must come when it is definitely settled by the weight of authority being preponderantly one way or the other. There are really very few airplane crashes out of which there are survivors who are able to tell precisely what occurred. Even if there are survivors, the evidence

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18. 65 F. (2d) 668 (1933).
is likely not to be in the possession of the plaintiff and, therefore, the rule of *res ipsa loquitur* must play an important part. In my own opinion there is already a preponderant weight in favor of the rule that *res ipsa loquitur* does apply in unexplained air accidents. Incidentally, Georgia passed a statute in 1933 making the proof of any aircraft injury a presumption of negligence.

Now arising out of the cancellation of air mail contracts there have been two very interesting lawsuits. The first was a suit brought by Transcontinental and Western Air against Postmaster General Farley and New York Postmaster Kieley in the Federal Court of New York. The suit was brought to enjoin Postmaster General Farley from carrying out his order of cancellation of February 9th and to enjoin the Postmaster at New York from delivering the mail to army planes instead of to Transcontinental and Western Air. The petition for injunction set out the cancellation order of the Postmaster General and President Roosevelt's order to the Secretary of War to provide the planes, pilots, etc. It also set out that no hearing had been had and no opportunity had been given to plaintiff to disprove the facts of the alleged findings and alleged that the cancellation of its contract, behind which millions of dollars had been invested, and the disqualification for five years, would result in ruin to the plaintiff company.

The District Court denied the prayer for the temporary injunction and dismissed the bill. The U. S. Court of Appeals, upon appeal and in an opinion by Judge Manton confirmed the action of the trial court, holding as follows: First, that there was no proper service on Postmaster General Farley, he having been served in Washington, D. C., and, under equity rules of the Federal Court he could not be served beyond the District of New York; second, that the suit, although against the Postmaster of New York, apparently against an individual, but was in fact and in truth, against the U. S. Government and that it was beyond the power of a Federal Court to interfere with the actions of executive officers in the performance of their executive functions.

A second suit was brought in the Supreme Court of the District of Columbia. In this suit the National Air Transport, Pacific Air Transport and the Varney Line were plaintiffs. This suit was brought after the Air Mail Act of 1934 had been passed. In this suit these three companies alleged practically the same matters as had been alleged in the suit by Transcontinental and

20. 71 F. (2d) 288 (1934).
Western Air. The petition was dismissed by the Supreme Court and went to the Court of Appeals for the District of Columbia.

That court held that the statute giving Postmaster General Farley the right and authority to cancel mail contracts, while not specifically requiring a hearing, impliedly required a hearing and that the action of the Postmaster General constituted a clear breach of contract between the plaintiffs and the United States Government. The opinion held that ordinary rules of law applicable to contracts applied to contracts of the United States Government the same as to individuals, with the exception of the fact that the United States Government could not be sued without its consent. The court pointed out that it would not, as the New York Court of Appeals did not, enjoin federal officials in the performance of their executive duties and in this case would not entertain the prayer for equitable remedies because the air mail act of 1934 had created a legal remedy. The bill was thus dismissed.

The legal remedy thus referred to is the provision in the Air Mail Act of 1934 that any air carrier feeling that he had a claim against the United States Government by reason of the cancellation of his contract could file a claim therefor in the United States Court of Claims, providing it was done within one year. As far as I know no such suit has been filed.

There is one remaining case to be discussed, a case in which I am sure you are all interested and that is the litigation concerning our good friend Bill MacCracken, the First Assistant Secretary for Commerce of Air, and which case resulted from or arose out of the cancellation of the air mail contracts which I have mentioned. On January 31, 1934, the Senate Committee investigating air mail and ocean mail contracts issued a subpoena duces tecum to MacCracken ordering him to appear before the Committee and to bring with him all records, documents, books, papers, etc., which were in his possession which pertained to air mail or ocean mail contracts.

The following day MacCracken appeared before the Committee and explained to the Committee that he would produce to the Committee all such papers that were his property, but that he had in his possession a large number of papers which were the properties of his clients, and which contained communications made to him by his clients and to him as their attorney; that he was not privileged to deliver to the Committee such papers without the consent of his clients. He gave the names of his clients to the Committee and upon the Committee's request wired to each of them request-
ing their permission to deliver the papers to the Senate Committee.

On the following day, on February 2nd, he appeared again before the Committee and explained that he had received permission from all of his clients, save two, to deliver their papers, and did so. He also explained to the Committee that representatives of two of his clients, the Western Air Express and the Northwestern Airways, had called at his office and with his permission had examined their files of correspondence. It seems that one was with his permission and one was with the permission of his partner, Mr. Lee; that each of these gentlemen had explained to him that they had removed from the files certain papers which they stated did not relate to air mail contracts.

Shortly after Mr. MacCracken left the Committee on February 2nd, the Committee reached the conclusion that none of the papers could be withheld because of the confidential nature, etc., and that he was required to produce all papers. On February 3rd Mr. MacCracken appeared before the Committee and advised the Committee that one of the gentlemen had returned at his request all of the papers which he said he had taken from the files. The other gentleman had destroyed the papers which he had removed. MacCracken thereupon delivered all of the papers remaining to the Committee.

The Committee then voted to cite MacCracken for contempt and to bring him before the Committee to show cause why he should not be punished for contempt in failing in the first instance to bring in all of the papers, and issued an order for his arrest by Mr. Jurney, Sergeant-at-Arms of the Senate.

Mr. MacCracken surrendered to Mr. Jurney, and his attorney immediately applied for a writ of habeas corpus in the Supreme Court of the District of Columbia. This court held that his arrest was proper and dismissed the writ. MacCracken appealed to the Court of Appeals of the District of Columbia and this court, by a divided opinion of three to two, held that MacCracken was improperly in custody, and that the Senate Committee had no authority to proceed further in the contempt proceedings. The government asked for a writ of certiorari and because of the divided opinion, and because of the importance of the case this writ was issued and the Supreme Court handed down its opinion on February 4, 1935. Mr. MacCracken's point was that the Senate Committee doubtless had authority to punish for a disobeyance of its orders, when such punishment or the threat thereof would produce a compliance with the Committee's orders; but that in view of the
fact that he had already produced all of the papers which could be produced, before the contempt citation was issued and nothing further could be done by him in the matter, the Committee was simply attempting to punish for the sake of punishing, and not in the conduct of the inquiry in which it was engaged.

The Supreme Court held, however, that the Committee had ample authority to proceed with the contempt proceedings even though it would no longer be furthering the efforts of the Committee; that Mr. MacCracken’s suggestions might well be directed to the Committee to prevent or minimize his punishment but that the Committee could proceed and the decision was up to the Committee. The Committee, as you will recall, sentenced Mr. MacCracken to ten days in jail, which he served.

I am about through. Those who have bricks prepare to throw them now.

Perhaps some of the anger and heat engendered by the MacCracken affair had something to do with the Postmaster General’s order of February 9th. Perhaps the anger lasted through, and continued until the Air Mail Act of 1934 was passed. It seems though that in a full eighteen months period good judgment should have taken the place of indignation whether righteous or unrighteous.

I can only say that I am glad that commercial aviation had developed as far as it did before this happened. It is unfortunate that many cities are still off the airways. It looks as if they will continue to be. Unless the legislation is changed, the air mail picture, and the air passenger picture is crystallized. It cannot change for the better.