

# Journal of Air Law and Commerce

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Volume 3 | Issue 3

Article 6

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1932

## Notes, Comments, Digests

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### Recommended Citation

Robert Kingsley et al., *Notes, Comments, Digests*, 3 J. AIR L. & COM. 449 (1932)  
<https://scholar.smu.edu/jalc/vol3/iss3/6>

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# NOTES, COMMENTS, DIGESTS

Department Editors..... ROBERT KINGSLEY  
EDWARD C. SWEENEY

## NOTES

STATE SALES TAX ON GASOLINE USED BY INTERSTATE AIRLINES.—Ever since the inauguration of interstate traffic by airplane on a commercial basis, the constitutionality of the sales tax imposed by various states on the sale of gasoline purchased for use in such transportation business has been questioned. On one hand it has been contended that such a tax violates the commerce clause of the Federal Constitution, while the tax has been supported on various grounds, viz., that such a tax is an excise tax only indirectly and incidentally affecting interstate commerce, or that it is in the nature of a license tax, or that the sale of gasoline is purely an intrastate transaction, whatever may be its immediate use. This controversy has been productive of a great deal of litigation. Not only is there a divergence of opinion in the state courts but the federal courts as well have been divided among themselves. In the cases of *U. S. Airways v. Shaw*,<sup>1</sup> *Mid-Continental Express Co. v. Lujan*,<sup>2</sup> and *Boeing Air Transport v. Edelman*<sup>3</sup> such a sales tax was declared invalid because it was a direct interference with interstate commerce or imposed an undue burden thereon. In *Central Transfer Co. v. Commerce Oil Co.*,<sup>4</sup> and *Eastern Air Transport v. South Carolina Tax Commission*<sup>5</sup> the validity of the tax was sustained.

An anomalous situation existed in New Mexico in respect to the *Mid-Continental* case which was decided by the U. S. District Court for New Mexico. Prior to that decision a state District Court of New Mexico, in the case of *Transcontinental & Western Air v. Asplund*,<sup>6</sup> had declared such a tax invalid as violative of the commerce clause. This case was appealed to the Supreme Court of New Mexico where the District Court was reversed. It was held that the sales tax on gasoline sold in the state for use in airplanes engaged exclusively in interstate commerce was valid, but that the tax on the use of gasoline in such interstate business was void.

In order to avoid a direct conflict between the federal and the state courts in New Mexico, a motion for rehearing was filed in the Supreme Court, preparatory to an appeal to the United States Supreme Court, but in reality to preserve the status quo of that case, pending a decision by the United States Supreme Court in the *Eastern Air Transport* case, then in process of appeal to the Supreme Court. It was thereafter stipulated in the Supreme Court of New Mexico that the case therein pending should await the decision of the United States Supreme Court in the *Eastern Air Transport* case and abide by that decision should its scope be

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1. 43 F. (2d) 148 (1930).
  2. 47 F. (2d) 268 (1931).
  3. 51 F. (2d) 130 (1931).
  4. 45 F. (2d) 400 (1930).
  5. 52 F. (2d) 456 (1931).
  6. 8 F. (2d) 103 (1932).

broad enough to dispose of the New Mexico case. The present writer contended at the time, and has had no reason to change his opinion, that the *Eastern Air Transport* case did not necessarily involve the precise questions involved in the *Mid-Continental* case or in *Transcontinental & Western Air v. Asplund*, for reasons which shall hereinafter be stated.

On March 14, 1932, the U. S. Supreme Court rendered its decision in *Eastern Air Transport v. South Carolina Tax Commission*<sup>7</sup> sustaining the validity of the South Carolina so-called sales tax on gasoline. The court based its decision upon the proposition that such sales are purely intra-state transactions and that it is immaterial that the subject-matter of the sale was intended for use in interstate business. It referred to the similarity between such tax and a tax on coal to be used in the locomotives of an interstate carrier which, the court said has never been regarded as a direct burden on interstate commerce. The court also distinguished the case of *Helson v. Kentucky*<sup>8</sup> which involved an excise tax upon the use of gasoline in interstate transportation, saying, it is "manifestly different from a general property tax or a tax upon purely local sales."

With all due respect to this decision, it does not seem that the issues in this case necessarily involved a decision on the validity of a direct tax on the sale of gasoline to be used in interstate commerce. (It was held in *Panhandle Oil Co. v. Mississippi*<sup>9</sup> and *Indian Motorcycle Co. v. U. S.*<sup>10</sup> that such an excise tax is a direct tax.) In a recent decision of the United States Supreme Court, *The Pacific Co. v. Johnson*,<sup>11</sup> decided April 11, 1932, the writer finds authority for the view that the New Mexico cases, *Transcontinental & Western Air v. Asplund* and *Mid-Continental Co. v. Lujan*, may be distinguished from the *Eastern Air Transport* case.

In the *Eastern Air Transport* case, the question before the court was whether a statute was valid which imposed a license tax on dealers in gasoline, which license tax was measured and graduated in accordance with the volume of sales, being on the basis of six cents per gallon on all such sales. The Supreme Court held in *The Pacific Co. v. Johnson* that a corporate franchise tax (which in effect is no different from a license tax, such as that imposed by the South Carolina statute) was not invalid because in computing the amount or basis for such tax it "specifically includes income from tax-exempt bonds in the measure of the tax." Applying this decision to the *Eastern Transport* case a tax upon gasoline to be used in interstate commerce might be invalid as a direct tax upon an instrumentality of interstate commerce and yet such a tax might be indirectly imposed, as was done by the South Carolina statute, by exacting a license fee, the amount of which "specifically includes income from tax-exempt" business or the instrumentalities thereof. It would, therefore, seem that the South Carolina statute could have been sustained whether a direct tax on the sale of gasoline was held valid or invalid, hence a decision on the latter point was not necessary.

(Query: May it not be that the Supreme Court, following the well established principle, "The substance and effect and not the form controls

7. ....U. S. ...., 76 L. Ed. 470 (1931).

8. 279 U. S. 245 (1929).

9. 277 U. S. 218 (1928).

10. 283 U. S. 570 (1931).

11. ....U. S. ...., 76 L. Ed. 555 (1932).

the validity of the tax",<sup>12</sup> concluded that the South Carolina tax, although denominated a license tax by the statute, was in fact an excise tax and construed it as such? Otherwise how could the statute have been sustained, as a license tax, under the well established doctrine of *Sprout v. South Bend*,<sup>13</sup> and numerous other cases in the Supreme Court, holding that a license tax cannot be sustained unless it appears that the tax exacted was imposed as an incident of municipal regulation, that the proceeds thereof were to be applied to defray the expense of such regulation and that the amount of the tax was no more than was reasonably necessary for that purpose. The statute itself discredits the suggestion that the tax was imposed as a license tax, within the purview of the decisions referred to, because no regulations of the industry affected were specified and no part of the funds realized from such tax was set apart to defray the expense of such regulations, but all of the proceeds of the tax were allocated to the state highway or county road funds.)

The expressions of the Supreme Court in the South Carolina case, however, are so broad as to leave but little doubt that a similar decision would be reached in a case specifically presenting the exact question of the validity of a direct tax on the sale of gasoline to be used in interstate transportation business. The Supreme Court expressed definite and decided views; this question has been fruitful of litigation and has been of utmost importance to many interested parties because of the large amounts involved, and it may be as well to have disposed of it without making "two bites of a cherry". It is disappointing, however, that the question was not decided in a case more directly and necessarily involving the proposition, especially with the added feature of high test gasoline imported into the state expressly for use in interstate airplane transportation.

In the *Eastern Air Transport* case the Supreme Court seems to have given a narrow construction to the case of *Helson v. Kentucky*, supra. We find support for this thought in the quotation in *Helson v. Kentucky* from *Gloucester Ferry Co. v. Penn.*, viz:

"All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states."

If the purchase of gasoline en route is an act necessary to the completion of the interstate journey (and that fact was expressly stipulated in the record in the *Eastern Air Transport* case, as well as the case of *Transcontinental & Western Air v. Asplund*) then why is not a tax upon such purchase just as much a burden upon interstate commerce as a tax on the use of such gasoline in performing the interstate journey?

The Supreme Court also says, in the *Eastern Air Transport* case, that a tax on coal to be used in locomotives of an interstate carrier has never been regarded as a direct burden on interstate commerce, and yet in *Flannagan v. Federal Coal Co.*,<sup>14</sup> it was held that a license fee, which was an indirect tax, could not be exacted from a person who bought coal to be transported into another state, as the purchase for transportation was so

12. *International Paper Co. v. Mass.*, 246 U. S. 135 (1918).

13. 277 U. S. 163 (1928), and cases therein cited.

14. 267 U. S. 222 (1925).

intimately associated with the transportation itself that they should be considered one and the same. However, in view of the recent decision of the Supreme Court, in *Utah Power & Light Co. v. Pfost*,<sup>15</sup> it would seem that there is no "hard and fast rule" that one may rely upon, and that the doctrine of the *Flanagan* case has at least been somewhat shattered. In the *Utah Power* case the court held that the generation of electricity in Idaho for immediate transmission to Utah was not interstate commerce, as the manufacture and transmission were essentially separate operations and that interstate commerce did not commence until after the generating process was completed. It might just as well have been said in the "*Grain Elevator Cases*", the *Spaulding Bros.* case and other cases, hereinafter cited, that the interstate transportation did not commence until after the sale and purchase were completed. It is becoming more hazardous as time passes for a lawyer to presume to express a definite and final opinion upon any of the principles now under discussion as they seem to be on the "border line" where a slight and at times almost imperceptible variance in the facts completely changes and reverses the principles to be applied.

In the *Transcontinental & Western Air* case, we submitted the proposition that "The purchase of gasoline for use in interstate commerce, and the use thereof in interstate commerce, are substantially the same and should be controlled by the same principles", citing *Board of Trade v. Olsen*,<sup>16</sup> *Danke-Walker Milling Co. v. Bondurant*,<sup>17</sup> *Lemke v. Farmers Grain Co.*,<sup>18</sup> and *Spaulding Bros. v. Edwards*,<sup>19</sup> and many other cases from the Supreme Court. This point was further emphasized by the suggestion that airplanes use a "high test gasoline", which is expressly imported into New Mexico for the specific purpose of airplane use in its interstate commerce, and that such high test gasoline is not suitable for the use of ordinary motor cars. The court disregarded this suggestion because not fully presented in the record, and also disregarded the further suggestion that the court might properly take judicial notice of the fact that such high test gasoline was necessary in said air transportation business and was imported expressly for such use. The United States Supreme Court took judicial notice of a similar course of business or common practice in trade in *Di Santo v. Penn.*,<sup>20</sup> *Board of Trade v. Olsen*, and in the other Grain Cases also cited above. It is difficult to see how the New Mexico Supreme Court could have failed to give a great deal of weight to the fact that the gasoline involved in that case was of a special character, peculiarly adapted for use in airplanes and not suitable for other motor vehicles, and was imported into New Mexico expressly for airplane use, had those facts been more fully presented by the record. The present writer believes this point has merit and, while space will not permit of its discussion herein at length, he will briefly state the basis for such belief:

In *Shaffer v. Farmer Grain Co.*,<sup>21</sup> the court said:

"Buying for shipment and shipping to markets in other states, when

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15. Decided in May, 1932, but as yet unpublished.

16. 262 U. S. 1 (1923).

17. 257 U. S. 282 (1921).

18. 258 U. S. 50 (1922).

19. 262 U. S. 66 (1923).

20. 273 U. S. 34 (1927).

21. 268 U. S. 189 (1925).

conducted as before shown, constitute interstate commerce, the buying being as much a part of it as the shipping."<sup>22</sup>

In this case the Supreme Court held that the purchase is a mere "incident" in the course of a regular and consistent interstate business, and as stated by Chief Justice Taft in *Board of Trade v. Olsen*,<sup>23</sup> at 35: "It (The Supreme Court in *Swift & Co. v. U. S.*, 196 U. S. 375) refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such."

And so, in the instant case, the sale standing alone might be purely an intrastate transaction, but it ceased to be such when it became a mere incident in a great interstate movement, such as the transportation of passengers, mail and freight by airplanes. The writer is wholly unable to reconcile the decision of the United States Supreme Court in the *South Carolina* case, supra, or the decision of the New Mexico Supreme Court, supra, with the long line of decisions of the United States Supreme Court on the fundamental principles involved in and, it is believed, controlling the question. But the Supreme Court has spoken and the law on the general proposition is settled.

In *Transcontinental & Western Air v. Asplund* and in *Eastern Air Transport v. South Carolina Tax Commission*, supra, the facts were as follows: The complainants were engaged in the business of transporting passengers, express and mail by airplane between the various states, and in the former case such business extended from coast to coast; it was stipulated that gasoline was necessary to propel such airplanes, and that the purchase of gasoline in the various states en route on such transcontinental and interstate trips was absolutely necessary to the proper and efficient operation of such business. It was also stipulated that the various states through which said interstate transportation extended imposed taxes on the sale and purchase of said gasoline, in varying amounts. In New Mexico the sales tax was five cents per gallon and in South Carolina the license tax was on the basis of six cents per gallon, but in each of said states the tax against the single complainant would amount to several thousand dollars a year. It is obvious that the tax involved a substantial amount and consequently was a substantial burden on said business. It, therefore, would seem that gasoline purchased by such a transcontinental agency engaged wholly in interstate commerce is a necessary "instrumentality" of such interstate commerce, and that, as stated in *Grew-Levick v. Penn.*,<sup>24</sup> such a tax "operated to lay a direct burden upon every such transaction in commerce by withholding for the use of the state a part of every dollar received in such transactions."<sup>25</sup>

In the case last cited the court said the tax need not be "direct" but would be invalid if its necessary operation burdened interstate commerce.

Chief Justice Taft said, in *Board of Trade v. Olsen*: "Such transactions cannot be separated from the movement to which they contribute and

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22. *Acc. Lemke v. Farmers Grain Co.*, 258 U. S. 50 (1922).

23. 262 U. S. 1 (1923).

24. 245 U. S. 292 (1917).

25. "Interstate commerce cannot be taxed at all even though the same amount be laid on domestic commerce or that which is carried on solely in the state." *Western Union Tele. Co. v. Kansas*, 216 U. S. 1 (1910).

necessarily take on its character." In *Danke-Walker Milling Co. v Bondurant*, it was said:

"On the same principle, where goods are purchased in one state for transportation to another, the commerce clause includes the purchase quite as much as it does the transportation. Buying and selling and the transportation incidental thereto constitute commerce."

See also *Lemke v. Farmers Grain Co.*, where the court also said, "That such course of dealings constitute interstate commerce there can be no question."

In the *Spaulding Bros.* case, the Supreme Court held that the purchase for interstate transportation caused such products so purchased to become instrumentalities of interstate commerce and they could not be taxed by the state by any method whatever.

There have been cited here only a few of the long line of cases in the United States Supreme Court which seem clearly to sustain the contention that one may not isolate and separate one of the necessary elements or incidences of an interstate business and characterize it as intrastate when it is merely one of the elements or parts of a general interstate business. The writer cannot readily assent to the proposition that the purchase of gasoline is merely a local and intrastate transaction when it is a fact, and has been so stipulated, that the purchase of such gasoline is necessary and essential to the operation of such interstate business and so becomes one of its important and necessary instrumentalities.

The purchase of gasoline, en route, on the interstate transportation business is quite as necessary to such commerce as was the maintaining of a ticket office in *Norfolk & Western Railway Co. v. Pennsylvania*<sup>26</sup> or the landing and taking on of passengers in *Gloucester Ferry Co. v. Pennsylvania*<sup>27</sup> or the selling of steamship tickets in *Di Santo v. Pennsylvania*,<sup>28</sup> in all of which cases the imposing of taxes or license fees on such transactions was held to violate the commerce clause.

It may be interesting to further review the opinion in the *Eastern Air Transport* case. The court said, relative to the suggested distinction between a property tax and an excise tax, that so far as the present question is concerned, the distinction is not important. As a property tax on the goods sold its validity cannot be questioned because it would be a tax upon a part of the mass of property within the state, and hence subject to the state's taxing power, although actually used in interstate commerce.

It is the writer's understanding, however, that such a tax as a property tax would be insupportable because not "uniform and general throughout the state", and that "property shall be taxed in proportion to its value." This is a universal constitutional provision in the various states.<sup>29</sup>

A property tax of six cents per gallon on gasoline selling at twenty cents per gallon, exclusive of the tax, would hardly seem "equal and uniform" or "in proportion to its value", when the regular tax on general property in the state is seldom over five to six per cent ad valorem. The tax on gasoline, in the above instance, would be thirty per cent.

26. 136 U. S. 112 (1890).

27. 114 U. S. 196 (1885).

28. 273 U. S. 34 (1927).

29. *Thompson v. McLeod*, 112 Miss. 383, 73 S. 193, (1916).

The writer understands that it is characteristic of an excise tax that it need not conform to the rule of equality and uniformity in respect to the actual value of the subject matter of the tax.

The court then quotes from *New Jersey Bell Telephone v. State Board*<sup>30</sup> as follows:

"It is elementary that a state may tax property used to carry on interstate commerce."

But in that case the court held the statute void insofar as it attempted to tax earnings derived from interstate commerce, and said:

"A state may not tax, burden, or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

The several cases cited in Note 3 in *Eastern Air Transport*, such as *Adams Express Co. v. Ohio*, *Sonneborn Bros. v. Cureton*, are similar, in principle, to the *New Jersey Bell Telephone* case.

If, as the court says, "The sales are still purely intrastate transactions" (citing *Superior Oil Co. v. Mississippi*, 280 U. S. 390), the conclusion would follow that such sales may be taxed. But in the cases cited under Note 5, known as the "Grain Elevator Cases" the "purchase for interstate transportation" was held not to be "purely intrastate transactions" and in all of those it was held that the tax violated the commerce clause.

In *Superior Oil Co. v. Mississippi* the court was controlled by the peculiar facts in that case, saying:

"There was nothing that in any way committed it (the purchaser) to sending the oil to Louisiana except its own wishes. A distinction has been taken between sales made with a view to a certain result, and those made simply with indifferent knowledge that the buyer contemplates the results. The only purpose of the vendor here was to escape taxation. . . . Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion, by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

Could there be a more "manifest certainty" that the subject matter of the sales tax would be used in interstate commerce than the stipulated facts in the *Eastern Air Transport* and the *Transcontinental & Western Air* cases, and their regular and unquestioned course of business as therein expressly stipulated? In the *Superior Oil Co.* case, the court would doubtless have held the tax invalid except for the evident attempt to evade the tax, which the court charged in so many words.

The writer has not attempted to review at length the opinion of the Supreme Court of New Mexico in the *Transcontinental and Western Air* case, principally because that case is now of but small importance since the decision in the *Eastern Air Transport* case, but much that has been said in reviewing the latter case also applies to it.

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30. 280 U. S. 338 (1930).



## COMMENTS

AVIATION COMMISSION—ADMINISTRATIVE LAW—DELEGATION OF STATE POWERS TO FEDERAL GOVERNMENT.—[New Jersey] Defendant was indicted for violation of a regulation made by the State Aviation Commission. The New Jersey State Aviation Act, Section 1, declares its purpose to be (1) "For the regulation of aircraft in and over this state," (2) "To require that (such) aircraft \* \* \* shall conform in respect to design, construction, and airworthiness, to the standard prescribed by the United States Government," and (3) "To require the licensing of aircraft and airmen." Section 7 of the Act empowers the Aviation Commission established by the act to enact air traffic rules "which shall conform to and coincide with, insofar as practicable, the [Federal] Air Commerce Act of 1926 and all Acts amendatory thereof and supplementary thereto and not inconsistent with the provisions of this Act." It is further provided that the Commission "may encourage and effect, insofar as practicable, uniform field rules for airports." Violations of regulations made under the act are declared to be misdemeanors. On a motion to quash the indictment, *Held*: that the Act was unconstitutional (a) because the provisions of the Federal Act were incorporated into the state act merely by reference without being made part thereof as required by the New Jersey constitution, and (b) because the authorization of the Aviation Commission to pass "Uniform field rules" constituted a delegation of legislative power to a non-legislative body. *State v. Larson*, 232 C. C. H. 2025, Essex County Court of Oyer & Terminer, Feb. 5, 1932.

[A letter from Mr. G. R. Wilson, Director of the State Department of Aviation, reveals the information that the defendant's violation was in fact his failure to have a federal license. The court's ruling on the question of delegation of power may, therefore, be said to be *obiter*. Subsequent to the decision, the commission's regulations, including the requirement of a federal license, have been enacted as statute law: Laws of 1932, Ch. 51 (A. 140, 141). But the authority of the commission does not seem to have been altered.]

As to the first constitutional objection little need be said since the court intimates that it could be removed by the incorporation of the Federal act into the state act as seems to have been done in the Ohio Aviation Act ruled upon in *Swetland v. Curtiss Airports Corporation*, 41 F. (2d) 929, rev'd 55 F. (2d) 201 (1931). See *Fagg*, "Incorporating Federal Law into State Legislation," 1 JOURNAL OF AIR LAW 199. The phrase, "insofar as practicable" probably saves the provision from being unconstitutional as a delegation by the state of New Jersey of its legislative power to the federal government. Under this phrase the state's right of regulation remains, since the final word rests with the state commission. Were these words deleted and state conformity to the federal regulation made compulsory, there is very grave doubt as to whether the act could be upheld. We would then have a situation not far different from that created by state statutes incorporating *future* federal laws. Such statutes have repeatedly been held unconstitutional. *Ex parte Burke*, 190 Cal. 326, 212 Pac. 193 (1923); *In re Opinion of the Justices*, 239 Mass. 606, 133 N. E. 453 (1921). It has been suggested in an article by *Tuttle and Bennett*, entitled "Extent of Power of Congress

over Aviation," appearing in 5 U. of Cincinnati L. R. 261, 276, that delegation of *administrative* powers to the agencies of a foreign sovereignty stands in a different light from delegation of *legislative* powers. "There is no established constitutional principle that a state cannot delegate its purely administrative matters to whomsoever it so desires." There seems little reason to believe, however, that the courts will be disposed to permit greater latitude in the delegation of administrative than legislative power. They have evinced no such tendency when confronted with the question of allowing delegation of powers to unofficial state bodies. *State v. Crawford*, 104 Kan. 141, 177 Pac. 360 (1919) ("National Electrical Code"); *Wagner v. Milwaukee*, 177 Wis. 410, 188 N. W. 487 (1922) (Union wage scale; dissent); but see *Jones v. Brd. of Medical Registration*, 111 Kan. 813, 208 Pac. 639 (1922) (American Medical Assn's List of Class A Medical Schools; dissent); *Langeluttig*, "Criminal Violations of Administrative Regulations," 2 JOURNAL OF AIR LAW 151. Whether the power delegated to the federal government is legislative or administrative, the effect remains the same: Any future rule of action prescribed by the agencies of another sovereign become without more the rule of action for a state, without the exercise of any independent discretion, legislative or administrative, by that state.

The second objection to the Aviation Act is one of vital importance. It presents the first instance in which a direct blow has been levied at one of the aviation commissions which are now operating in a number of states.

It is scarcely a matter of doubt that the states may within their police power regulate aeronautics and appoint commissions for the promulgation and enforcement of regulations. *Swetland v. Curtiss*, supra, p. 938; *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930). Nor can it be doubted that the regulations of such commissions may be criminally enforced, provided the penalties are provided by statute. *U. S. v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1910); *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671 (1909); *Langeluttig*, supra.

The main qualification of the commission's power is that its authority must not involve the exercise of legislative power. This requirement in many states is based on specific constitutional provisions that the powers of the three departments of government be kept separate. In the federal courts the requirement is deduced from the nature of our government. See the language of Taft, C. J., in *Hampton & Co. v. U. S.*, 276 U. S. 394, 406, 48 S. Ct. 348, 351 (1928).

The mere fact of discretionary power being vested in an administrative officer does not indicate a delegation of legislative power so long as his action is referable to a "standard" set by the legislature. The requirement for a standard has been variously stated. The language in *Field v. Clark*, 143 U. S. 649, 693, 12 S. Ct. 495, 505 (1892) quoting from Judge Ranney of Ohio, has been frequently quoted:

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

A leading state case puts the criterion thus:

. . . . A law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that in form and substance, it is a law, in all its details, *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event. *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 74, 65 N. W. 738, 741, 31 L. R. A. 112, 115 (1896).

A Florida court uses a more liberal test :

. . . . where a valid statute, complete in itself enacts the general outlines of a governmental scheme or policy or purpose and confers upon officials charged with the duty of assisting in administering the law authority to make rules and regulations such authority is not an unconstitutional delegation of legislative power. \* \* \* A statute may be complete when the subject, the manner, and the extent of its operation are stated in it. *State v. Atlantic Coast Line Ry. Co.*, 56 Fla. 617, 623, 47 So. 969, 971, 32 L. R. A. N. S. 639, 650 (1911).

A few examples of actual delegation upheld and overthrown will, however, give a much clearer picture of the law than any of these abstract statements. The following are some administrative powers upheld :

The Secretary of the Treasury's power to decide that immigrants were afflicted with certain forms of "disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination." *Oceanic Navigation Co. v. Stranahan*, supra; the President's determination, upon advice of a tariff commission, whether duties fixed by the tariff act on certain articles equalized the cost of production of these articles abroad. *Hampton & Co. v. U. S.*, 276 U. S. 394, 48 S. Ct. 348 (1928); Interstate Commerce Commission's power to designate "the standard height of draw bars for freight cars" and "fix a maximum variation from such standard height." *St. Louis I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 S. Ct. 616 (1908); the power to make rules that oleomargarine packages be "marked, stamped and branded as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe." *In re Kollock*, 165 U. S. 526, 17 S. Ct. 444 (1897); the power of a police officer to determine what motion pictures are "immoral and obscene." *Block v. Chicago*, 239 Ill. 251, 87 N. E. 1011 (1909). See further illustrations *infra*.

The following are some of the instances represented by leading cases in which the authority given was held a delegation of legislative power :

The authority of a fire marshal to order the removal of "buildings, for want of proper repair or by reason of age and dilapidated condition, or for any cause" liable to fire, or buildings "so situated as to endanger other buildings or property, or so occupied that fire would endanger persons or property therein." *People v. Sholem*, 294 Ill. 204, 128 N. E. 377 (1920); the power of commissioners to "make such just and reasonable rules and regulations as may be necessary for preventing [excessive charges, unjust discriminations and preferences in rates]." *Atlantic Express Co. v. W. & W. R. R.*, 111 N. C. 463, 16 S. E. 393 (1892); the power of a mayor to grant, refuse, or revoke at will permits to engage in the jewelry business. *Samuels v. Cozens*, 222 Mich. 604, 193 N. W. 212 (1923) (But see license cases cited *infra*); the power given a license board of dental examiners to determine

what was "a reputable dental college." *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879 (1904) (But see *Douglas v. Noble*, 261 U. S. 165, 43 S. Ct. 303 (1923); the authority of a Secretary of State to approve bonds, within set pecuniary limits, to be posted by proposed securities dealers, the secretary being directed to consider proposed methods of transacting business, financial standing, experience, ability and general reputation for integrity. *People v. Beekman & Co.*, 347 Ill. 92, 179 N. E. 435 (1932). See Annotations, 12 A. L. R. 1435, 54 A. L. R. 1435; *Wickersham*, "Delegation of Power to Legislate," 11 Va. L. R. 183; *Cheadle*, "Delegation of Legislative Functions," 27 Yale L. J. 892 (1918).

Perhaps the insistence of the courts that some standard be set out by a statute authorizing administrative action is not to be found entirely in their ostensible fear that the administrative officers will abuse their unguided discretion or will in fact exercise powers which had better be exercised by the legislature. Their repeated approval of the most general standards, which could be of little aid to anyone's discretion, would seem in many cases to negative the supposition that such fears constituted the real rationale of the decisions. A very real reason for the requirement of a standard may be found in the fact that the existence of *some* standard, however broad and vague, enables the courts to exercise an effective check on the officials by declaring that a particular regulation falls outside the scope of the standard. Thus while the very broad standard of the federal tea inspection act was upheld in *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349 (1904), a regulation excluding any teas in which Prussian blue was an ingredient was held void in *Waite v. Macy*, 246 U. S. 606, 38 S. Ct. 395 (1918) as "not affecting the tea's purity, quality, or fitness for consumption." Where the act of the administrative officer cannot be attacked as being in excess of the standard there is, to be sure, still opportunity for judicial intervention but only upon a showing of passion and prejudice or such gross and arbitrary abuse of discretion as to indicate prejudice. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064 (1886); *In re Goldwyn Distributing Co.*, 265 Pa. 335, 108 Atl. 916 (1919); *Lieberman v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144 (1905).

Although the principal case cannot be said to be out of line with the general current of authority it should not be the cause of too much apprehension on the part of those who would like to see state aviation commissions upheld for the following reasons:

(1) The wording of the New Jersey statute empowering the board to pass uniform field rules is such as to make inevitable the decision that no standard of any kind was set. The word "uniform" could not by any strain of interpretation be said to imply a standard for the guidance of the commission since uniformity is a constitutional requirement of all enactments of any kind regardless of the wording of any enabling statute. The use of the word "uniform" merely indicated an intention that the field rules be identical as to all the airports in New Jersey. It would not be a matter of difficulty, however, to frame a statute which will contain a standard without in any substantial manner cutting down the commission's discretion or otherwise impairing the usefulness of the statute. The Illinois act is a good illustration of this type of statute. The enabling

clause reads: "The commission is further empowered to prescribe such reasonable air traffic rules and other regulations as it shall deem necessary for public safety and the safety of those engaged in aeronautics." Smith-Hurd Ill. Stat. (1931) Ch. 15½, Sec. 10; Cahill Ill. Rev. Stat. (1931) Ch. 5a, Sec. 10. It is to be hoped that courts will not force legislatures to go further into detail. It is undesirable to fetter the discretion of commissions operating in a relatively unexplored field like aviation in which the judgment of a group of experts is likely to be of much greater value than that of either a legislature or a court.

Broad clauses of the type used in the Illinois Aviation Act, which express the standard of discretion to be exercised in terms of the purpose of the regulations to be made, have often been upheld. For example, in *U. S. v. Grimaud*, supra, the Secretary of Agriculture was empowered to make "such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." In *U. S. v. Antikamnia Chemical Co.*, 231 U. S. 654, 34 S. Ct. 222 (1914) administrative officers were given power to "make uniform rules and regulations for carrying out the provisions" of an act penalizing the misbranding of goods. The test set down for illuminating oil inspectors in *Red "C" Oil Manufacturing Co. v. Board of Agriculture of N. C.*, 222 U. S. 380, 32 S. Ct. 152 (1912) was that the oils be "safe, pure, and afford a satisfactory light." Authority given to fish commissioners to "set aside and reserve any waters of this state for the purpose of fish propagation, and by order designate certain streams as trout streams" was upheld in *Schmidt v. Gould*, 172 Minn. 179, 215 N. W. 215 (1927).

Under these and similar cases it appears almost certain that the federal courts, and probable that most of the state courts, will sustain an enabling clause establishing some standard indicating the objects sought by the regulation. The attitude of a few states, however, e. g., Illinois as indicated in *People v. Sholem*, supra, *People v. Beekman & Co.*, supra, *Kenyon v. Moore*, 287 Ill. 233, 122 N. E. 548 (1919), and other cases gives ground for doubt on the point. Prior decisions, however, dealing with regulation in other fields should be accepted as precedents by the courts with great caution, and every doubt should be resolved in favor of upholding a wide grant of discretion in a field such as aviation in which expert opinion should be given the fullest weight possible. The recent case of *People v. Flaningham*, 347 Ill. 328, 179 N. E. 823 (1932) illustrates well how little concerned courts may be with cases, seemingly valid as precedents, dealing with different fields of regulation. This case, which appeared but a month subsequent to *People v. Beekman & Co.*, supra, concerned the authority given a Superintendent of Public Instruction to grant a certificate to a County Superintendent of Schools "if in the judgment of the Superintendent of Public Instruction his personality and general qualification other than scholarship fit him for the work the certificate shall authorize him to perform." This power was upheld in an opinion which did not even mention the *Beekman* case. The opinion, quoting from an earlier case, said of the task delegated: "It is similar in its nature to the acts of assessors in valuing property for taxation; of clerks and sheriffs in approving bonds taken by them; . . ." Yet authority given to the Secretary of State to approve bonds

had been declared a delegation in the *Beekman* case at the same term of court.

(2) It may be argued that aeronautics falls within that group of activities which justify regulation by administrative officers with little or no legislative or judicial check. It is often stated that where the discretion granted pertains to a matter which is in the nature of a privilege or is of potentially dangerous or injurious character the scope of discretion is widened. *State ex rel Lane v. Fleming*, 129 Wash. 646, 225 Pac. 647, 23 A. L. R. 500 (1924) (permit for gasoline station); *Brown v. Stubbs*, 128 Md. 129, 97 Atl. 227 (1916) (permit to erect or remodel motion picture theatres); *Rizzo v. Douglas*, 201 N. Y. S. 194 (1923) (license to operate taxi cabs); *Dwyer v. People*, 82 Colo. 574, 261 Pac. 858 (1927) (right to operate public dance hall); See dissent in *Shreveport v. Herndon*, 159 La. 113, 105 So. 244 (1925) (power to enact traffic rules). Most of the cases establishing this exception involve some officer's discretion in granting or withholding permits and licenses to individual applicants rather than the power to make rules for future conduct. It is therefore doubtful whether under the present cases the power to make air traffic and field rules would come within the exception; the power to license aircraft and airmen undoubtedly would. Still, this division is probably, in part at least, a matter of accidental development. The reasons for it are not developed in the cases, and there seems to be little basis for it as a matter of policy. A liberal court might therefore easily hold that an aviation commission can be allowed to operate without any legislative standard, especially since there are no exact precedents to the contrary.

(3) Even in the absence of a specific standard in the enacting clause the courts will sometimes imply one by a construction which limits the officers' discretion to the requirements found in the statute or ordinance under consideration. *Hughes v. Detroit*, 217 Mich. 567, 187 N. W. 530 (1922); *Grace Missionary Church v. Zion*, 300 Ill. 513, 133 N. E. 268 (1921). The same effect is obtained by zoning ordinances which provide for administrative departures, provided "the fundamental purpose and intent" of the ordinance is adhered to. Such statutes were upheld in *Spencer-Sturla Co. v. Memphis*, 155 Tenn. 70, 290 S. W. 608 (1927); *People ex rel Stevens v. Clark*, 216 App. Div. 351, 215 N. Y. S. 190. A provision in a zoning ordinance, however, permitting variations or modifications from the general scheme consistent with "the spirit of the ordinance" where "practical difficulties or unnecessary hardship" occurred, was overthrown in *Welton v. Hamilton*, 344 Ill. 82, 176 N. E. 333 (1930). Sometimes a court will uphold a statute delegating power by implying a standard of fairness and reasonableness or—what amounts to the same thing—by indulging in the presumption that officers will execute their duties faithfully and fairly. *People ex rel Lieberman v. Van De Carr*, 175 N. Y. 440, 67 N. E. 913 (1903) Aff'd 199 U. S. 552, 26 S. Ct. 144 (1905); *People ex rel Stevens v. Clark*, supra.

In view of these various devices which may be used by legislators in drafting and by courts in interpreting statutes delegating administrative powers the holding in the instant case should present no objection to the further creation and operation of state aviation commissions.

HENRY HEINEMAN.

NEGLIGENCE—COLLISION OF AIRCRAFT—INSTRUCTIONS.—[California] Plaintiff and defendant were engaged in the business of carrying passengers for hire and of giving flying lessons at the Long Beach, California, Municipal Airport. Part of this port (and the portion over which the accident happened) was outside the boundaries of the city. Plaintiff had made several student landings and take-offs and, at the time of the accident, was, as he claims, about to make a final landing. Defendant's plane (piloted by a servant of defendant) came down from above and behind plaintiff and the two planes collided in mid-air, both falling to the ground. The ordinance of the city provided as follows: § 10i: "Anything in this ordinance to the contrary notwithstanding, an aircraft *in the act of landing* shall always have the right of way" (italics added); § 10m: "In the case of aircraft approaching aerodromes or sea harbors for the purpose of landing, the aircraft flying at the greater height shall be responsible for avoiding the aircraft at a lower level and as regards landing shall observe the rules for an overtaking aircraft for passing." Another section of the ordinance provided: "Any motor driven aircraft overtaking any other aircraft shall so alter its course as to pass to the right of such overtaken aircraft and must not pass by diving. Every aircraft coming up with another aircraft *from any direction more than one hundred ten (110) degrees from ahead of the latter* or in such a position with reference to the aircraft which it is overtaking that at night it would be unable to see either of that aircraft's side lights, shall be deemed to be an overtaking aircraft and no subsequent alteration of the bearing between the two aircraft shall make the overtaking aircraft a crossing aircraft within the meaning of these rules, or relieve it of the duty of keeping clear of the overtaken aircraft until it is finally passed and clear."

Defendant contended: (1) That these ordinances were inapplicable, since the accident was not over the part of the port within the city boundaries. *Held*, that the city had extraterritorial power to regulate the use of and flying over any airport operated by it whether within or without the city limits.

(2) That an instruction based on the first two sections quoted, reading: "The court instructs you that if you believe from the evidence that immediately before the collision, the defendant \* \* \* was at a greater height than the plaintiff \* \* \* and that he was behind the \* \* \* [plaintiff's] plane and that the plaintiff \* \* \* was not taking off but was *preparing to land*, then you shall return a verdict for the plaintiff \* \* \* and against the defendant \* \* \*" (italics added) was erroneous. *Held*, that the instruction was bad, because it ignored the possibility of contributory negligence; and that the words "preparing to land" did not save the instruction, not being the same as the words "in the act of landing" in the ordinance and leaving open the possibility that plaintiff might have approached the ground "prepared" to land and then zoomed to gain a better position for landing (defendant's contention is to the facts here)—which would have constituted contributory negligence.

(3) That an instruction defining an overtaking craft, given in the exact words of the ordinance quoted *supra* was bad as ambiguous. *Held*, that the instruction was bad, since it was not understandable by an ordinary man. The court objected particularly to the words italicized above, point-

ing out that, as distinguished from the definition in Air Traffic Rules, § 74 (F), which the court impliedly approved, the ordinance "put the cart before the horse." *Ebrite v. Crawford*, 67 Cal. App. Dec. 832, 5 P. (2d) 686 (Nov. 20, 1931), hearing granted by the Supreme Court and case argued there March 10, 1932.

A discussion of the issues involved in this case will await the decision by the Supreme Court, and will appear in a subsequent number of the JOURNAL.

ROBERT KINGSLEY.

NEGLIGENCE—COMMON CARRIERS—RES IPSA LOQUITUR.—This case arose out of the same accident as that involved in *Ebrite v. Crawford*, 5 P. (2d) 686, 67 Cal. App. Dec. 832 (1932), supra. Defendant was engaged in the business of carrying passengers, for hire, on sight-seeing trips over the neighborhood, returning to the original starting place. Plaintiff had gone for a ride in defendant's plane at defendant's invitation, although he paid no fare. The trial court, in addition to the instructions given in the *Ebrite case*, instructed the jury that defendant was a common carrier and on instruction based on the theory that the doctrine of *Res Ipsa Loquitur* was applicable. *Held*: that (1) Defendant was a common carrier; (2) Plaintiff was a passenger; and (3) *Res Ipsa Loquitur* was applicable; but (4) the case must be reversed because, for the reasons pointed out in the *Ebrite case* the jury was not properly instructed as to what would constitute negligence on the part of the defendant. *Smith v. O'Donnell*, 67 Cal. App. Dec. 838, 5 P. (2d) 690 (Nov. 20, 1931), hearing granted by the supreme court and case argued there March 10, 1932.

(1) *Defendant was a common carrier.* The court referred to the case of *North American Accident Insurance Company v. Pitts.*, 212 Ala. 102, 104 So. 21, 40 A. L. R. 1171, 1928 U. S. Av. Rep. 178 (1925), and *Brown v. Pacific Mutual Life Insurance Company of California*, 8 F. (2d) 996, 1928 U. S. Av. Rep. 186 (C. C. A. 5th Cir. 1925), (the two cases involving the same accident), and distinguished them on the ground that in the situation there involved there was no holding out to the public generally, the court saying: "The essential difference between the instant case and the operations of Lieutenant Whitted [the pilot in the cases distinguished] is that here the appellant [defendant] maintained a regular place of business for the express purpose of carrying those who applied. Section 2168 of our [Cal.] Civil Code defines a common carrier as follows: 'Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.' Under the wording of this definition it is plain that Lieutenant Whitted was not a common carrier, and it is almost equally certain that the appellant was, the difference being found in the language, 'Everyone who offers to the public to carry, etc.'" The court then draws an analogy to scenic railroads and concludes with this dictum: "There can be no doubt under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. *The industry itself should be desirous of assuring the public that those who accept their*



*invitation to travel by air will be accorded that protection which may be afforded by the exercise of 'the utmost care and diligence for their safe carriage'. \* \* \** It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air today (and we do not say there are) who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service." (Italics added.)

(2) *Plaintiff was a passenger.* The court refers to previous cases holding that the carrier-passenger relationship exists whenever plaintiff is lawfully on the vehicle, even though no compensation is received by the carrier.

(3) *Res ipsa loquitur applies.* The court defines the doctrine: "The foundation or reason for the doctrine is based upon probabilities and convenience. 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 instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can most conveniently prove it raises a presumption of negligence which defendant must overcome by proof that there was in fact no negligence," and concludes that "*If the proper degree of care is used a collision in mid-air does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury.*" (Italics added.)

(4) *The instructions on negligence were erroneous.* For these instructions, consult the digest of *Ebrite v. Crawford*, supra.

A further discussion of the issues involved in this case will await the decision by the supreme court and will appear in a subsequent issue of the Journal.

ROBERT KINGSLEY.

WORKMEN'S COMPENSATION—SCOPE OF THE EMPLOYMENT—VIOLATION OF STATUTE PROHIBITING ACROBATIC FLYING—[Wisconsin] The manager of an airport, whose duties included taking up passengers for rides, was killed when in the course of such a flight he was unable to bring his plane out of a power dive. His wife petitioned for compensation under the state Workmen's Compensation Act. The employers contended that compensation should not be given since the deceased had removed himself from the operation of the Act, (1) by failing to collect tickets or fares before the flight, (2) by drinking intoxicating liquor before the flight, and (3) by engaging in acrobatic flying while carrying passengers for hire contrary to the statute. *Held*, (1) the failure to collect fares was within his discretion as the manager of the airport and did not remove the flight from the regular course of his duties; (2) the evidence was not sufficient to show intoxication since he was seen merely to drink from a bottle

which had the odor of liquor; but (3) in making the power dive, an act "unnecessary in the performance of his duty and one which in no manner did or possibly could have furthered the interests of his employer", he stepped out of his employment to gratify his own pleasure. An award of the Industrial Commission was vacated. *Sheboygan Airways Inc. v. Field*, 232 C. C. H. 2027 (Circ. Ct., Dane County, Wis., Feb. 15, 1932). The present case is now pending appeal to the Supreme Court.

The first two contentions of the employers merit little notice. Evidently there was insufficient evidence to show that the flight, in a plane of the defendant Airways Company and from its airport, was an independent enterprise of the deceased. It cannot be disputed that, where there is and has been employment under a contract express or implied under which the employer retains control of the work of the employee, who is paid a definite salary, a slight deviation from the usual manner of work, which in no way caused the accident, will not destroy the employment relationship. The court held that there was no evidence of intoxication. Even had there been, compensation would, under the Wisconsin statute, have been reduced rather than precluded: Wis. Stat. (1929 ed.) Sec. 102.09 par. 5 k. In the absence of statutory provision it is held generally that intoxication is not a bar to compensation unless it is the sole cause of the accident: *Southern Can Co. v. Sachs*, 149 Md. 562, 139 Atl. 760 (1926); *Evans v. Louisiana Gas and Fuel Co.*, 140 So. 245 (1932 La.); and see *Nekoosa-Edwards Paper Co. v. Ind. Com.*, 154 Wis. 105, 141 N. W. 1013 (1913).

The contention in regard to acrobatic flying has more weight. By statute in Wisconsin, aircraft operating within the state shall comply with air traffic rules "identical with those promulgated by the Department of Commerce of the United States": Wis. Stat. (1929 ed.), Sec. 114.21. Section 74 of the Department of Commerce Air Traffic Rules (1928 ed.) provided "1. Acrobatic flying means intentional maneuvers not necessary to air traffic." "2(d). No person shall acrobatically fly in an airplane carrying passengers for hire." (Same provisions, section 72, Air Traffic Rules effective Jan. 1, 1932.)

The English courts have held uniformly that accidents caused by violations of express statutory safety regulations are not compensable: *Barnes v. Nunnery Colliery Co.*, [1912] App. Cas. 44; *Moore v. Donnelly*, [1921] 1 App. Cas. 329 (both cases involved violations of safety statutes by miners).

In this country, to some extent because of variations in the compensation statutes, the decisions have not been uniform. Where the compensation statute excepts accidents caused by "wilful misconduct," compensation is not usually allowed for accidents in which safety statutes were violated: *Fortin v. Beaver Coal Co.*, 217 Mich. 508, 187 N. W. 352 (1922—coal miner violating safety statute); *Fidelity Co. v. Ind. Com.*, 171 Cal. 728, 154 Pac. 834 (1916—driving automobile in excess of speed limit); *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S. E. 208 (1929—violation of statute forbidding automobile to approach railroad crossing at speed greater than 10 miles per hour). Where the statute excepts only a "wilful failure to obey a statute," compensation is allowed unless the employer shows that the employee knew of the statute and purposely disregarded it: *King v. Empire Collieries Co.*, 148 Va. 585, 139 S. E. 478 (1927—miner violating safety

statute). Where there is no statutory exception for "wilful misconduct," the violation of a statute in some jurisdictions always bars compensation: *Wolcofski v. Lehigh Valley Coal Co.*, 278 Pa. St. 84, 127 Atl. 122 (1923—miner violating safety statute). In other jurisdictions, it does not bar compensation where the violation is customary and acquiesced in by the employer: *Union Colliery Co. v. Ind. Com.*, 298 Ill. 561, 132 N. E. 200 (1921—miner violating safety statute).

The Wisconsin Compensation Act suggests an exception for "wilful misconduct" only in Sec. 102.09 which states, at par. 5 j: "Where injury results from the employe's wilful failure to obey any reasonable rules adopted by the employer for the safety of the employed, the compensation and death benefit provided herein shall be reduced fifteen per cent." Certainly this would seem to apply only to a violation of a company rule and not to include a violation of a statute.

Decisions involving violations of *statutes* should not be confused with those in which an *ordinance* is violated or those in which a *company rule* is broken. Courts seem more willing to permit compensation awards on the basis of waiver of the regulation by the employer in cases involving ordinances, and company rules than in cases involving statutes: *Lemmler v. Fabacher*, 139 So. 683 (1932 La. App.—violation of traffic ordinance no bar to compensation); *Milwaukee Corrugating Co. v. Winters*, 197 Wis. 414, 222 N. W. 251 (1928—violation of company rule no bar to compensation). But see *Union Colliery Co. v. Ind. Com.*, supra.

There was raised in the *Sheboygan* case no question of the validity of Section 114-21 of the Wisconsin Statutes. Some cases have questioned the constitutionality of like statutes adopting rules promulgated by some external authority as improper delegations of legislative power. However since the section of the Air Traffic Rules in point was already in effect in 1929, when Section 114-21 was passed, it might be said to have been incorporated into the Wisconsin Statute. Then, too, under the "burden" theory the Air Traffic Rules of the Department of Commerce have been held to apply to all air traffic, whether interstate or intrastate, though the particular state has not itself adopted these rules. For a fuller discussion of the subject of State adoption of Federal Department of Commerce Rules see comment by *Heineman*, page 456 of this issue.

Nor was there raised, according to the report in this case, the specific question of the applicability of the rule prohibiting acrobatic flying "in an airplane carrying passengers for hire," where no tickets or fares had been collected before the flight began. It is probable that the failure to collect fares before the flight would be considered insufficient to show that the flight was not for hire, so that the statute would apply regardless of the exact time of collection.

If the purpose of Workmen's Compensation Acts is to secure the worker and his dependents against the dangers inherent in employment in a highly mechanized civilization, and not to award damages for the particular injury, the consistency of arbitrarily withdrawing this security because that worker violates some regulation made either by a government or by his employer may well be questioned. See opinion of *Brandeis, J.*, in *New York Central v. Winfield*, 244 U. S. 147, 37 S. Ct. 546 (1917). Where that regulation is, as the motor-vehicle acts are and perhaps the Air Traffic

Rules are, respected none too seriously by the average pilot, the problem increases in difficulty. Certainly when the legislative authority believes these regulations to be necessary, the other governmental departments should enforce them by fines and penalties. But should punishment for disregard of them be extended into the field of Workmen's Compensation? Where, as in the *Sheboygan* case, the penalty falls not upon him who broke the rule but upon those dependent on him for support, the harshness of adding to the risks for which the employer or his insurer must pay is outweighed by the injustice of leaving the dependents with nothing.

•R. F. W. SMITH.

## DIGESTS

AIRPORT—SAGGING WIRE—MUNICIPAL CORPORATION—LIABILITY.—[Oregon] The defendant city owned an airport which was managed by one Eyerley who was under contract to turn over all rentals to the city which also retained the right to sell or lease all profitable concessions. Advertisements were published offering flights at the airport at a rate of one cent per pound of weight of individuals applying. The plaintiff went to the airport and saw the crowds stepping over a sagging wire which blocked the approach to the scales used in weighing prospective passengers. Discovering no gap in the wire, plaintiff was in the act of stepping over it when someone gave it a jerk throwing her violently to the ground. Plaintiff charged negligence, in so maintaining the wire without adequate guards, that the plaintiff in the exercise of due care was injured. The trial court granted a non-suit based on the following grounds: 1) Failure to prove the city was operating the airport in a proprietary capacity; 2) Failure to show the city negligent in any manner contributing to the plaintiff's injury. *Held*, on appeal, that the plaintiff by setting up the defendant's contract with Eyerley had established a *prima facie* case showing the defendant to be operating the airport in a proprietary capacity. The plaintiff being an invitee, it was error to hold as a matter of law that the defendant was not negligent in maintaining the sagging wire to be crossed by the public, and that the defendant could not reasonably have foreseen that someone would flip the wire to the injury of one then stepping over it. These questions, as well as whether the plaintiff acted with due care, were properly questions for the jury. Judgment reversed and cause remanded. *Mollenkopf v. City of Salem*, 8 P. (2d) 783 (1932).

DAVID SAMPSELL.

BAILMENTS—DUTY OF BAILEE—TEST FLIGHTS.—[Ohio] Plaintiff's plane was wrecked while being flown by an employee of defendant airport. Plaintiff had entrusted the plane to one Speer, who was authorized to fly it. Because of extreme cold, Speer left the plane at defendant's airport, with instructions that one Hay, defendant's employee, was to fly it on to Cincinnati if (a) permission so to do was granted by the plaintiff and if (b) such permission was received by defendant by Wednesday night, January 16th. On Wednesday morning, although no permission had been received from plaintiff, Hay took the plane aloft, claiming that this was being done to test it before flying to Cincinnati. The plane fell, Hay was killed and the plane wrecked. At a first trial of the case, a verdict was returned for defendant, which was reversed: *Ogden v. Transcontinental Airport, Inc.*, 39 Ohio App. 48, 177 N. E. 536 (1931), discussed in Comment in 3 JOURNAL OF AIR LAW, 130 (1932). On the retrial, plaintiff recovered a verdict for the value of the plane and defendant appeals. *Held*, the verdict was proper. *Transcontinental Airport, Inc. v. Ogden*, 41 Oh. App. 48, 180 N. E. 737 (1932).

The sole question related to a refusal to charge in accordance with defendant's "second defense": That Hay was authorized to test-fly the plane. The court ruled that, under the facts as given above, there was no showing of such authority. The court said: "In the face of the positive direction of Speer that the plane was not to be flown by any one except himself without the consent of Ogden and that no authority had come from Ogden, they [defendants] had no right to fly the plane in order to determine whether it was in condition for a possible prospective trip \* \* \* If the contention of the airport company is correct, the owner of an airplane would be in a very unfortunate situation. \* \* \* What the owner sought to guard against was having anybody except Speer fly the plane for any purpose and the owner was entitled to that protection. A test flight would be as dangerous, from the standpoint of the owner, as any other flight" (pp. 737-8).

ROBERT KINGSLEY.

**GASOLINE TAX—STORING AND DISTRIBUTING—ULTIMATE USE IN INTER-STATE COMMERCE.**—[Federal and Tennessee] A Tennessee statute imposed a tax upon all persons, corporations, etc., engaged in and carrying on the business of "selling" gasoline and distillate in the State: Ch. 58, Act of 1923. An Act of 1925 amended this statute, increasing the tax and enlarging the scope of the law to include storers and distributors of gasoline, and providing that "stores and distributors shall compute and pay this tax on the basis of their withdrawals or distributions" and that the tax shall accrue whether this withdrawal is for sale or not: Ch. 67, Acts of 1925. The plaintiff is a non-resident corporation and common carrier transporting freight, passengers and mail by air in interstate commerce. Its planes stop at three fields in Tennessee to receive and discharge their cargoes and to refuel. The gasoline for this purpose is purchased outside the state, brought into Tennessee by rail, and stored in private tanks from which it is withdrawn only to supply the plaintiff's own aeroplanes. This is a hearing upon plaintiff's application for a temporary injunction to enjoin the collection of taxes. The defendant contends that the suit cannot be maintained because the plaintiff has an adequate remedy at law. *Held*, the remedy at law is not adequate because, while under the statute payment may be made under protest, this would result in a multiplicity of suits since the statute demands suit within thirty days of the payment under protest which must be made before the twentieth of the month succeeding the withdrawal. However, the injunction was denied on the ground that the statute does not impose a property tax on gasoline used in interstate commerce, and merely imposes a "privilege" tax upon the business of storing and withdrawing gasoline. This transaction is completed within Tennessee and is therefore an intrastate transaction. The power of a state to tax the conducting of a business within the state is clear. Injunction denied. *American Airways, Inc. v. Wallace*, 232 C. C. H. 2055 (U. S. Dist. Ct. Tenn. Decided Mar. 31, 1932).

In a bill brought under the Tennessee declaratory judgments law to determine whether the complainant was subject to this same tax upon storing and distributing gasoline the interstate commerce clause of the U. S. Constitution was again invoked. Defendant demurred, and the demurrer was sustained. *Held*, on appeal, that the Supreme Court of Tennessee was bound by the decision of the District Court in *American Airways, Inc. v. Wallace*, supra, which decision was rendered pending appeal in the instant case. Decree of the Chancellor affirmed. *Nashville, Chattanooga and St. Louis Ry. v. Wallace*, 232 C. C. H. 2056 (Sup. Ct. of Tennessee. Decided April 29, 1932).

For a fuller discussion of the constitutionality of a tax on gasoline used by interstate airlines, see note by Albert T. Rogers, Jr., page 449 of this issue.

DAVID SAMPSELL.

NEGLIGENCE—COMMON CARRIERS—RES IPSA LOQUITUR—[Massachusetts] Plaintiff was a passenger on a transport plane owned and operated by the defendant. Shortly after taking off, the right wing motor failed and the plane crashed into the water over which it was flying, causing damage to the clothing and personal property of the plaintiff. Plaintiff had signed a ticket providing, in part: "1. That the company is a private carrier . . . . 6. That the holder voluntarily assumes the ordinary risks of air transportation, and stipulates that the company shall not be responsible save for its own neglect of duty . . . ." Plaintiff testified that, while the engines were being tested prior to taking off, the right wing motor back-fired and emitted clouds of smoke and that it did not revolve at the same speed as the other motors. Defendant offered testimony to the effect that the motors were all operating properly before the take-off (explaining that the difference in revolutions of the motors was intentional, being a part of the operation of steering the plane on the ground) and that he had turned the plane over to inspectors after its previous trip, receiving it back from them just before the flight in question. There was no direct evidence that the plane had, in fact, been inspected, but only that it was the custom of the inspectors to do so. It did not appear whether the inspectors were employees of the defendant or independent contractors. The trial court found, as facts, that defendant was not negligent, and that defendant had failed to explain the failure of the motor within a few seconds after the take-off. The appellate division of the municipal court ruled against the plaintiff, on the ground that motor failure might have been caused by any one of a number of things not chargeable to defendant's negligence and, therefore, that it could not say that it was "a matter of common knowledge . . . that an airplane motor does not cease to function within a few seconds after 'taking off' unless some one in charge of it has been careless." *Wilson v. Colonial Air Transport, Inc.*, 1931 U. S. Av. Rep. 109 (1931). On appeal to the supreme judicial court, it was held that the decision below must be affirmed, since plaintiff had not made out a case to which the doctrine of *res ipsa loquitur* was applicable. *Wilson v. Colonial Air Transport, Inc.*, 180 N. E. 212 (March 14, 1932).

In view of the findings below, the plaintiff's case on appeal necessarily rested on the claim that the unexplained failure of the motor created a situation to which *res ipsa loquitur* was applicable. As to this, the argument of the appellate division seems persuasive.

The supreme judicial court, however, goes farther and, relying on the rule that *res ipsa loquitur* does not apply unless the instrumentality is within the exclusive control of the defendant and on the fact that it was not shown that the inspectors were employees of the defendant, rejects the application of the doctrine for that reason.

ROBERT KINGSLEY.

PROPERTY—CJUS EST SOLUM DOCTRINE.—[New York] Plaintiff sues to foreclose a purchase-money mortgage and defendant counterclaims for breach of covenant against incumbrances. The municipality had acquired by condemnation the right to build, and had built, a sewer across the property at a depth of over 150 feet. No right of access to the sewer from the surface of the property accompanied the sewer. Held, that (1) this is not an incumbrance; and (2) even if it were, it would entitle defendant to nominal damages only. *Boehringer v. Montalto*, 254 N. Y. S. 276 (Dec. 23, 1931).

The court cites *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. [N. S.] 920 (1906), and *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300, and says: "It therefore appears that the old theory that the title of an owner of real property extends indefinitely upward and downward is no longer an accepted principle

of law in its entirety. Title above the surface of the ground is now limited to the extent to which the owner of the soil may reasonably make use thereof. By analogy, the title of an owner of the soil will not be extended to a depth below ground beyond which the owner may not reasonably make use thereof. It is concluded that the depth at which the . . . sewer exists is beyond the point to which the owner can conceivably make use of the property, and is therefore not an incumbrance."

ROBERT KINGSLEY.

**WORKMEN'S COMPENSATION—EMPLOYER AND EMPLOYEE—INDEPENDENT CONTRACTOR—COURSE OF EMPLOYMENT.**—[California] Petitioner asks to have annulled an award of the California Industrial Accident Commission awarding claimant compensation. Petitioner purchased an airplane from a company in Missouri and was given a bill of sale, calling for a particular plane, bearing Department of Commerce license number "NC-10983." Claimant, a duly licensed pilot who was desirous of increasing his flying time, was recommended to petitioner as a reliable man to fly the plane from Missouri to California, and petitioner authorized the claimant to call for and accept delivery of the plane sold him and to fly it to Petaluma, California, where it was to be turned over to petitioner. Claimant was to receive no wages—his compensation being the increase in his "solo" hours—but was to be reimbursed for expenses. Petitioner made no attempt to control the time of starting the trip, the duration, the route to be taken, the number of place of landings or other details. When claimant called for petitioner's plane, he was told that it was not ready, but was offered another plane of the same model, license number "NC-10984." Without communicating with petitioner, claimant accepted this plane and started the trip. Before he completed delivery, the plane was wrecked and he was injured. *Held*, the award should be annulled, as the relation of employer-employee did not exist. *Murray v. Industrial Accident Commission*, 69 Cal. App. Dec. 216 (April 7, 1932).

The court reaches its conclusion that the relation of employer-employee did not exist on two grounds: (1) lack of control; and (2) that the agency was to fly a specific plane only and that, therefore, the acceptance and flying of another plane was outside the scope of employment.

(1) It is submitted that the first ground is wrong. To be sure, control of details is made a test by the act, and is regularly recognized, but it is submitted that the extent of such control must be considered in relation to the particular type of employment and that here the petitioner had as much control as was possible under the circumstances.

(2) On the second point, the decision would seem to be correct, under the facts as given. The court points out that "We are not here concerned with the question whether this substitution constituted a valid sale of the second plane to petitioner." This is correct. There is no showing that claimant was under any general employment to fly *all* of petitioner's planes, but, at most, that he was employed with reference to one specific plane.

ROBERT KINGSLEY.

**WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT.**—[Indiana] Claimant was employed by the defendant as a salesman in the sale of x-ray equipment. He was paid a salary and expenses. The expense items included 5c per mile for travel, irrespective of whether he traveled by airplane, auto or train. For some time he had been traveling by airplane. The employer had directed him not to use the plane without first securing a policy of *public* liability insurance. Three days before the accident, claimant, while landing at Grand Rapids, Minnesota, for the purpose of calling on a prospective customer, had damaged the propeller of his plane. On the day of the accident, claimant, having completed his business in Grand Rapids

(where he had secured an order) and a new propellor having been installed, went to the airport to fly to Brainerd, Minnesota, to call on customers there. Before starting on this trip, he took the plane up to test the new propellor. During this test the plane fell and caused the injuries to him for which compensation is claimed. *Held*, that the injury arose in the scope of, and in the course of, employment. *Hammer v. General Electric X-Ray Corporation*, 232 C. C. H. 2021 (Minn. Indus. Comm., Dec. 23, 1931).

The employer raised two objections: (1) The use of the plane was in violation of orders; and (2) The making of a test flight was not within the scope of employment.

(1) The Referee, and the Commission, found that the directions concerning securing an insurance policy were not intended to cover possible claims as between the employee and employer, but only those of third parties and that, in any event, the use of the plane (even if it be deemed a violation of orders not acquiesced in by the employer) was not such a violation of orders as to place the employee outside the protection of the Act.

(2) As to the other, and main, point, the Commission said: "On the question as to whether employee was outside of the scope of his employment in making the test flight, the Commission has adopted the view that the test of the plane for the purpose of ascertaining whether it was in condition for use was a proper precaution to be taken by employee before beginning his trip to Brainerd. It was to the interest of the employer that the plane operate properly so as to permit employee to go from place to place as rapidly as possible, thereby giving to employer the benefit of additional time to denote towards the sale of employer's goods. There was a causal connection between the making of the test flight and the work wherein employee was engaged. The Commission cited, among other authorities, the case of *Schonberg v. Zinsmaster Baking Co.*, 173 Minn. 414, 217 N. W. 491, 1928 U. S. Av. Rep. 306 (1928—where the salesman who was accustomed to take customers for rides in an airplane at the direction of the company was held not an independent contractor when injured by the fall of the plane in a test flight).

ROBERT KINGSLEY.

WORKMEN'S COMPENSATION—TERMINATION OF EMPLOYMENT—AIRPLANE TEST PILOT.—[Michigan] The defendant, Heath Aircraft Corporation had contracted with the Vertoplane Development Corporation of New York to manufacture an airplane known as a Vertoplane, designed to combine the characteristics of an ordinary biplane and of an autogiro. The deceased was a test pilot in the employ of the Heath Aircraft Corporation. In the course of his duties he made several flights testing the Vertoplane as a biplane. He was then offered by the Vertoplane Corporation a "bonus" of \$100 to test the machine as an autogiro. Just before making this final flight the pilot was told by the Vice-President of the defendant manufacturer: "You are fired as far as the Heath Aircraft Corporation is concerned." However, this officer testified at the hearing that the flight was made under his instructions, that the deceased was under his control during the flight, that in telling deceased that he was fired what he "had in mind was the bonus." The test was unsuccessful and the pilot killed. The "bonus" was paid by the Vertoplane Corporation to the defendant corporation and by the latter given to deceased's mother with his past due wages. The defendants answer this petition for compensation by asserting that deceased ceased to be in their employ and was employed by the purchaser of the plane, the Vertoplane Development Corporation of New York, for this flight. *Held*, The statement of the officer of the defendant company just before the flight in no way terminated deceased's employment relationship with the defendant corporation. Compensation awarded. *Lambert v.*



*Heath Aircraft Corporation*, 232 C. C. H. 2051 (Mich. Dept. of Labor and Ind., May 7, 1932).

This would seem to be a simple application of a recognized principle of Workmen's Compensation law to the facts of an aviation situation. When, at the time of the injury, it is claimed that the workman was loaned to another, the general test to determine by whom the workman was employed is to determine what party has control of the work—not merely with reference to the result to be reached but, rather, with reference to the method of reaching that result.

R. F. W. SMITH.