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# PROPOSED LAW OF AIRFLIGHT\*

PAUL M. GODEHN, GERALD B. BROPHY, FRANCIS D. BUTLER  
AND HAMILTON O. HALE†

(Conclusion)

## III. QUESTIONS OF CONSTITUTIONAL LAW PRESENTED BY SECTIONS 2, 3, 5 AND 10 OF THE PROPOSED UNIFORM AVIATION LIABILITY ACT

### A. Constitutional Prohibitions Against Legislative Limitations on Amounts Recoverable for Death, Injury or Property Damage.

There are constitutional provisions in nine States which prohibit the enactment of statutes limiting the amount of damages recoverable for death, injury or property damage. In four States the prohibition is applicable only to death claims, in two States to injury and death claims, and in three States to injury, death and property damage claims.

The following tabulation shows the States involved, the constitutional provisions referred to, and whether the prohibition is applicable to claims for injuries or death or property damage:

<i>State</i>	<i>Reference to Consti- tutional Provision</i>	<i>Character of claims to which prohibition is directed</i>
Arizona	Article II, Sec. 31	Injury and death.
Arkansas	Article V, Sec. 32	Injury, death and property damage.
Kentucky	Section 54	Injury, death and property damage.
New York	Article I, Sec. 18	Death.
Ohio	Article I, Sec. 19 (a)	Death.
Oklahoma	Article XXIII, Sec. 7	Death.
Pennsylvania	Article III, Sec. 21	Injury, death and property damage.
Utah	Article XVI, Sec. 5	Death.
Wyoming	Article X, Sec. 4	Injury and death.

\* Criticisms and Suggestions Relating to the PROPOSED UNIFORM AVIATION LIABILITY ACT, UNIFORM LAW OF AIRFLIGHT and UNIFORM AIR JURISDICTION ACT Contained in TENTATIVE DRAFT No. 1 of the AMERICAN LAW INSTITUTE.

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The references in the report are directed to the pamphlet published by the American Law Institute entitled "Law of Airflight, Tentative Draft No. 1," under date of April 7, 1937. For convenient reference, the three proposed Acts have been printed as an appendix hereto.

† A Committee Appointed by Colonel Edgar S. Gorrell, President, Air Transport Association of America.

The caption to alternate Section 3 (pp. 20 to 23, lines 1 to 98) states that it is intended for use in States in which Section 3 would be unconstitutional because of a prohibition against legislation limiting "the amount of recovery for death" and thus ignores the fact that in Arizona, Arkansas, Kentucky, Pennsylvania and Wyoming, Section 3 would be unconstitutional as to injury claims, as well as death claims. Because of this difference in constitutional provisions, Sections 2 and 3 might be held to be wholly invalid in some of the nine States and only partially invalid in others. The unconstitutionality of Section 2 on this ground cannot be avoided by provisions such as are contained in alternate Section 3 because of the absence of any contractual relations between the owners of aircraft and persons on the ground.

Alternate Section 3 is designed to solve the constitutional obstacle to limited liability in the foregoing nine States. Kentucky is one of those states and its legislature may not have power to authorize limitation of the liability of common carriers by air pursuant to alternate Section 3, in view of Section 196 of the State constitution:

"No common carrier shall be permitted to contract for relief from its common law liability."

Alternate Section 3 probably will have the intended effect as to injuries or death occurring on trips wholly within any one of the remaining eight States. Even this however is not free from doubt. See *Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 170 S. W. 1166, holding that the Kentucky Workmen's Compensation Act of 1914 violated the Kentucky constitutional prohibition against limitations on damages recoverable for injuries, on the ground that the contract arising by implication under the terms of the Act was not a free and voluntary contract.

Air transportation for compensation is principally interstate and the application of alternate Section 3 to interstate trips will create many difficulties of interpretation and probable conflict with the federal constitution. Some of the questions which may arise in this connection are hereafter considered at pages 142 to 144.

#### **B. Liability Without Fault Under the Due Process Clauses of the Federal and State Constitutions.**

The question of whether Sections 2, 3 and 5 would be invalid under the due process clauses of the Federal and State constitutions is one of difficulty and we cannot within the time at our dis-

posal do more than suggest the principal contentions which will probably be made for and against the validity of the Act.

Cases involving other instances of statutes imposing liability without fault are far from conclusive upon our problem. The most important decisions of this character seem to be those involving workmen's compensation acts.

In *New York Central Railroad Co. v. White*, 243 U. S. 188, the Court upheld the New York Workmen's Compensation Act. The statute was compulsory both on employers and employees. It made the employer in certain hazardous employments absolutely liable for injuries to employees occurring in the course of their employment and limited the maximum amount of recovery to specific amounts.

In *Hawkins v. Bleakly*, 243 U. S. 210, the Court upheld the Iowa Workmen's Compensation Act which was elective as to both employer and employee. The defenses of contributory negligence, assumption of risk and the fellow servant rule were withdrawn from employers who rejected the Act. The Act also set up a presumption that an employer who rejected it was negligent. If an employee rejected the Act, there was no presumption and the common law defenses held.

The Arizona Employers' Liability Act passed on in the *Arizona Employers' Liability Cases*, 250 U. S. 400, made the employer liable without fault and for an unlimited amount of damage unless the employee was negligent. The employee, but not the employer, had a right to elect this form of liability or to sue under a Workmen's Compensation Act which created absolute liability but limited the amount of recovery. Employees had the further election of resorting to an action for negligence, with recovery unlimited, subject, however, to defenses such as assumption of risk and contributory negligence. An injured employee sued under the Employees Liability Act and it was held constitutional under the Fourteenth Amendment by a five to four decision.

In *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271, 94 N. E. 431, the Court held that the first New York Workmen's Compensation Act violated the due process clause of the State constitution. A constitutional amendment was subsequently passed permitting a workmen's compensation statute. Although subsequent Supreme Court cases brought the *Ives* case into disrepute, the possibility of the present statute being held a violation of State due process clauses must be considered. We have not made any investigation with reference to that subject.

Decisions upholding the validity of workmen's compensation acts are based largely on the relation existing between employer and employee. This was emphasized in *Crowell v. Benson*, 285 U. S. 22, where the Supreme Court upheld the longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424) providing in substance that where employees in maritime employment are disabled or die from accidental injuries arising in the course of their employment upon navigable waters of the United States, their employers shall pay reasonable compensation without regard to fault and be relieved from further liability. In its opinion by Mr. Chief Justice Hughes the Court said at pages 55 to 56:

"Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates."

The Court thus held the Act valid because of the relationship existing between employer and employee. There is clearly no similar relation or any relation at all between owners of aircraft and persons on the ground to sustain the validity of Section 2. As to Section 3 there is a contractual relation between owners of aircraft and passengers, but it is a radically different kind of a relationship than that of employer and employee, and a court might give little weight to such a relationship in passing on the validity of Section 3.

It has been suggested (July 1, 1935, issue of *Air Law Review*, pp. 207, 211) that the statement in the opinion in *Crowell v. Benson*, *supra*, that Congress had no authority to establish liability without fault "regardless of particular circumstances or relations," implies that the constitutionality of statutes imposing liability without fault may be sustained on the basis of "particular circumstances," as well as the relation of employer and employee; and that

the crash of an airplane for an unknown reason is such a "particular circumstance." This argument assumes that the causes of airplane accidents cannot be ascertained and that a particular case in which the validity of the proposed Act is tested will necessarily involve an accident, the cause of which cannot be determined. The assumption is contrary to facts. An examination of the Department of Commerce reports relating to aircraft accidents will disclose that the causes of airplane accidents are ascertainable (Air Commerce Bulletin, Vol. 8, No. pp. 189-90, Vol. 8, No. 11, pp. 234-235).

In our opinion the workmen's compensation decisions cannot be regarded as precedents establishing the validity of the proposed uniform act. Such decisions are based on the employer-employee relationship and the courts in upholding compensation legislation have been influenced largely by the social problem involved. In the opinion in *New York Central Railroad Company v. White*, 243 U. S. 188, Mr. Justice Pitney said that the statute was intended as a just settlement of a difficult problem involving one of the most important of social relations. In another opinion by Mr. Justice Pitney (*Mountain Timber Co. v. Washington*, 243 U. S. 219, 240) he said that employees injured in industrial employment might command the attention of the State as justly as soldiers wounded in battle. This thought does not seem especially apposite to aviation. A State certainly does not have a comparable interest in what happens to non-resident passengers engaged in interstate travel on an airplane which flies over the State.

In *Chicago, Rock Island & Pacific Railway Co. v. Zerneck*, 183 U. S. 582, the court upheld a Nebraska statute creating absolute liability against railroads for passenger injuries, except in cases where passengers were grossly negligent. The opinion is based largely upon the ground that because the Railroad was a corporation created by the State adopting the statute, the State had power to make the regulation in question.

The same Nebraska statute was upheld by the Eighth Circuit Court of Appeals in *Clark v. Russell*, 97 Fed. 900. The court said (italics ours) in its opinion:

"\* \* \* it is quite clear that a common carrier of passengers, who conducts its business by the powerful and dangerous agency of a railroad, *the right to use which is derived from the legislature of the state*, may be required by the State to compensate its passengers for injuries it inflicts upon them independent of any question of its own negligence."

The right to operate aircraft over a State on interstate trips is not derived from the States but from Section 10 (49 U. S. C. A. 180)

of the Air Commerce Act of 1926, which defines the term "navigable air space" and provides: "Such navigable air space shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this sub-chapter."

The power of a State legislature to impose liability without fault was also recognized in *City of Chicago v. Sturges*, 222 U. S. 313, where the Court upheld an Illinois statute imposing liability against municipalities to landowners for damages caused by riot. The ground of the Court's decision was that the State which creates subordinate municipal governments and vests in them police powers may impose upon them the duty of protecting property from mob violence.

*St. Louis & San Francisco Railway Company v. Matthews*, 165 U. S. 1, will undoubtedly be relied upon to sustain Section 2. The Court there upheld the validity of a Missouri statute which made railroads operating in the State liable, irrespective of negligence, for property injured or destroyed by fire communicated by locomotive engines. The ground upon which the Court upheld the statute is stated in the following sentence at page 26 from the opinion by Mr. Justice Gray:

"When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments."

In our opinion the foregoing decision does not establish the validity of Section 2. Only two parties were involved in the factual situation which created the damage sought to be recovered, namely, the railway Company whose engine discharged sparks and the person whose property was burned as a result. Airplane accidents may involve a third party who is at fault and is responsible for the accident. The decision in the *Matthew* case certainly does not hold that where a loss must fall on one of two parties who are not at fault, or on a third party who is at fault, the legislature may ignore the liability of the third party and place absolute liability, irrespective of negligence, on one of the other parties. Furthermore, flight of aircraft is not comparable to the discharge of sparks by a locomotive. One is uncontrollable and frequently causes damage whereas the other is controllable and seldom causes damage.

In *Western & Atlantic Railroad v. Henderson*, 279 U. S. 639, the Court passed on a Georgia statute which provided that the mere

fact of collision between a railway train and a vehicle at a grade crossing established a presumption that the railway company was negligent and that this presumption could be considered by a jury as evidence against the testimony of witnesses tending affirmatively to prove due care. In holding that the statute violated the due process clause of the Fourteenth Amendment, the Court said at page 642:

"Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. \* \* \*

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any negligence of the railway company or of the traveler on the highway or of both or without fault of anyone."

The Court then referred to *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, where the Court upheld a Mississippi statute providing that injury inflicted by locomotives should be *prima facie* evidence of want of reasonable care by the operator, and said at page 643:

"That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co. v. Brown*, 138 Miss. 39, 66, *et seq.* *Columbus & G. Ry. Co. v. Fondren*, 145 Miss. 679. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

The presumption raised by Sec. 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment."

If a State has no power to create a presumption of negligence against a railroad company on the basis of a grade crossing accident and give that presumption the weight of evidence to be considered by a jury with other evidence, it would seem to follow that a State has no power to create liability, even in a limited amount, against a common carrier, regardless of negligence, on the mere basis of the occurrence of an accident.

A further question presented by Sections 2, 3 and 5 and the definition of "owner" in Section 1(d), is whether or not absolute liability may be fastened upon one merely because his consent is necessary to the operation of an airplane. Whether the definition of "owner" is too broad depends upon the extent to which the idea



of operation with "consent" is extended beyond the ordinary limits of agency.

The Supreme Court held it proper for New Jersey to determine that a New Jersey owner is liable for injuries resulting to a *pedestrian* from the negligent driving of his automobile by another person in New York, where the owner had lent the car to the other person for the purpose of driving it in New York and where a New York statute made the owner of the car liable for negligent operation when the operator was driving with the owner's permission (*Young v. Masci*, 289 U. S. 253, 47 Harv. Law Review 349, 61 A. L. R. 866, 878, 83 A. L. R. 878, 884). On the other hand, in the case of a somewhat similar Ontario statute, it was held that a New York *passenger* injured in Ontario by a driver's negligence could not recover against the owner where the operator had used the car with a New York owner's permission, but where it did not appear whether there had been specific consent to operation in Ontario (*Scheer v. Rockne Motors Corp.*, 68 Fed. (2d) 942, Second C. C. A.). The opinions in these two cases illustrate some of the problems that may be expected to occur in dealing with the "consent" idea, and these problems will be more acute, where as here the liability goes beyond liability for negligent operation.

Section 3(a) contains the extraordinary provision that the owner is liable for all injuries *from any cause* short of the passenger's wilful *misconduct*. Alternate Section 3(a) contains the equally extraordinary provision that the owner is liable for all injuries *from any cause* short of the passenger's wilful *negligence*. These provisions carry the idea of liability without fault beyond anything ever suggested, for if the provisions be taken literally, the ordinary limitations of proximate cause are disregarded. Not only is assumption of risk or contributory negligence no defense, but apparently absence of proximate cause would not be a defense either. The workmen's compensation cases and other authorities relating to imposition of liability without fault lend no support to this cavalier treatment of causation.

### C. Liability Without Fault Under the Commerce Clause and Related Problems

The proposed Uniform Aviation Liability Act imposes liability as to interstate, as well as intrastate operations and thus raises the question of whether the imposition of this liability constitutes an unconstitutional burden on interstate commerce. The decisions previously referred to regarding liability without fault under the due

process clause do not raise the question of the validity of such legislation under the commerce clause.

The courts have held that in the absence of Congressional action (1) a State death act can apply to the death of a steamboat passenger traveling in interstate commerce (*Sherlock v. Alling*, 93 U. S. 99; Cf. *The Hamilton*, 207 U. S. 398); and (2) a State workmen's compensation act can apply to an employee engaged in interstate commerce (*Kulczyk v. Rockport Steamship Co.*, 8 Fed. Supp. 336; Cf. *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541 and see *New York Central R. R. Co. v. Winfield*, 244 U. S. 147); and (3) a State statute forbidding a railroad to limit its liability by contract can apply to persons or goods moving in interstate commerce (*Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133).

The foregoing authorities do not in our opinion establish the validity of the proposed Uniform Act as applied to interstate passengers or shippers and especially as to non-resident passengers injured on an interstate trip of an airplane flying over a State and as to non-resident shippers of air express in interstate commerce. The common law doctrine that the law of the place of injury determines tort liability has had great influence in constitutional decisions (*Young v. Masci*, 289 U. S. 253, 258), but that doctrine alone does not decide every question of a State's power to deal with injuries occurring within its borders. Residence and other factors may have something to do with the matter (*Bradford Electric Co. v. Clapper*, 286 U. S. 145). Moreover, the liability created by statutes imposing liability without fault is not ordinary tort liability; the courts have suggested that a different nomenclature would be more appropriate (*Bradford Electric Co. v. Clapper*, *supra*, at page 154; *Val Blatz Brewing Co. v. Industrial Commission*, 201 Wis. 474, 230 N. W. 622).

In the due process cases upholding workmen's compensation acts, the reasoning of courts has proceeded upon ground strikingly similar to that which is resorted to in cases of regulation of business. The Supreme Court in speaking of workmen's compensation statutes has said:

"\* \* \* the liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer." (*Alaska Packers' Association v. Industrial Accident Commission*, 294 U. S. 532, 541.)

If statutes of this type constitute regulations of the business

enterprises involved, rather than mere alterations in tort liability, it is necessary to find some local interest that will sustain a State's effort to effect the consequences of an interstate operation. (*Bradford Electric Co. v. Clapper*, 286 U. S. 145.) In the case of an interstate non-resident passenger on an airplane flown over a State by a foreign corporation, this interest seems remote. See pages 146 to 149 for a discussion of differences in legislative power of states with respect to interstate industries which use state highways as compared to interstate air lines which use Federal airways.

Another commerce clause problem arises under the decision in *Wabash, St. Louis & Pennsylvania Ry. Co. v. Illinois*, 118 U. S. 557, holding that a State cannot regulate interstate railway rates even as to the part of a shipment within its borders, regardless of whether Congress has acted. Section 3(b) and alternate Section 3(c) provide as to passengers carried for compensation that an owner may establish a higher schedule of liability than the statute provides, which may vary according to the rate of compensation paid. Section 5(b) provides that an owner may establish and collect rates varying according to the value of baggage, personal effects or goods, the minimum rate being based on a value of \$100. Query,—whether the relation of these sections to rates on interstate operations is so remote that they would not come within the rule of the *Wabash* case.

A problem not dissimilar to the commerce problem will doubtless arise under both the due process clause and the full faith and credit clause of the Federal Constitution in case the proposed statute is passed in some States and not in others, or is differently interpreted in different States.

Assume that a transcontinental shipment of air express originates in New Jersey, which has not passed the statute. Nebraska, which is on the route, has passed it. The contract of shipment is made in New Jersey. Can Nebraska say that the minimum rate for the shipment shall be based on a value of \$100.00? Can Nebraska regulate the New Jersey contract to the extent of permitting the owner to refuse to carry the goods unless the shipper specifies the actual value? This situation not only raises questions under the commerce clause but also under the doctrine of *Allgeyer v. Louisiana*, 165 U. S. 578, and subsequent cases dealing with the power of a State to regulate extra-state contracts (see *New York Life Insurance Co. v. Head*, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357).

Assume that a passenger is about to make a transcontinental

trip. Nebraska, which is on the route, has passed the uniform act. New Jersey, the State of departure, has passed a statute similar to the one applied to railroads in *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, forbidding contracts limiting liability. Both passenger and owner wish to agree to a maximum recovery of \$25,000 for injury in Nebraska at an accordingly higher rate as permitted by the Nebraska statute. The contract is made in New Jersey. Can New Jersey forbid it or does the passenger have to make a second contract after he leaves the State? And even if the Nebraska statute may be applied in a suit in Nebraska, despite the New Jersey statute, there remains for determination the question of whether the Nebraska statute would be applicable if suit were brought in New Jersey (*Alaska Packers' Assn. v. Industrial Accident Commission*, 294 U. S. 532).

Experience with State workmen's compensation laws indicates that in the absence of absolute uniformity, both of statutory terms and of interpretation, there is bound to be great confusion with respect to situations such as the hypothetical cases suggested above. Even if due process of law permits a State under all circumstances to regulate liability, as proposed in the Uniform Act, it does not follow that other States must give that law effect under all circumstances, even after judgment in the State where injury occurs (see Stone, J., dissenting in *Yarborough v. Yarborough*, 290 U. S. 202, 214-220; see also *Alaska Packers' Association v. Industrial Accident Commission*, 294 U. S. 532, 546; *Milwaukee County v. White Co.*, 296 U. S. 268, 273-274).

The validity of contracts of common carriers limiting liability for injuries incurred on interstate transportation is ordinarily determined by the law of the State where the contract is made and where transportation starts, and not by the law of the State where an injury occurs. In *Conklin, Administratrix v. Canadian-Colonial Airways, Inc.*, 226 N. Y. 244, 194 N. E. 692, the plaintiff's intestate purchased a ticket at Albany for transportation to Newark. The ticket contained a provision purporting to limit liability for injury or death. The airplane crashed in New Jersey. The Court of Appeals of New York, in holding that the validity of the contract of transportation was governed by the laws of New York, said:

"As a general rule the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place. American Law Institute, Proposed Restatement, Conflict of Laws, Chap. 9. The accident occurred in New Jersey. The law of the State of New York, however, governs this case. The validity of a stipulation

in a contract for the transportation of persons or property from one State to another limiting the carrier's common law liability is to be determined by the law of the place where the contract was made and the transportation commenced, without reference to the law of the place of destination. *Fish v. Delaware L. & W. R. R. Co.*, 211 N. Y. 374, 383."

Alternate Section 3 purports to change the general rule of law applied in the Conklin case. Alternate Section 3(b) provides that the owner of aircraft carrying passengers for compensation shall be conclusively presumed to have accepted the absolute but limited liability imposed by alternate Section 3 for injury to passengers "within this State," unless he notifies the passenger in writing prior to flight, "whether flight commences within or outside of this State," that he rejects such liability. A similar provision applicable to passengers is found in alternate Section 3(f).

Assume that New York, which has a constitutional prohibition against legislative limitations on damages recoverable for death, adopts alternate Section 3; that under the laws of New Jersey a contract made by a common carrier limiting liability for injury or death is invalid; that a passenger purchases a ticket at Newark, New Jersey, for transportation to Chicago; that neither passenger nor owner gives the other written notice of rejection of statutory liability under alternate Section 3 for death occurring in New York, and that the passenger dies as a result of injuries sustained in New York. Such a situation suggests numerous questions for judicial determination. If suit is brought in New Jersey to recover damages for the death in New York, will the courts of New Jersey enforce the implied contract limiting liability, even though such contract is contrary to public policy and illegal in New Jersey? If suit is brought in New York, will the courts of that State enforce the contract, even though it was illegal in the State in which it was made? If suit is brought in a third State, will the courts of that State apply the law of New Jersey or of New York? The decisions heretofore cited dealing with the application of workmen's compensation acts in cases where an employment contract is made in one State and an injury occurs in another, indicate the difficulties and conflicting decisions which may be anticipated in such cases under alternate Section 3.

Alternate Section 3 makes no provision for the contingency that an owner or a passenger might refuse to sign a receipt for a notice of rejection delivered to him by the other party pursuant to alternate Sections 3(b) or 3(f). In such event would alternate Section 3(g) or 3(h) be applicable?

Alternate Section 3 purports to obviate a difficulty arising under State constitutions by creating a contractual relation between passenger and owner. Can such a contract be imposed on a passenger who is an infant because of his failure to give notice rejecting the statutory liability?

#### D. Compulsory Insurance.

Our investigation has not disclosed any decision relating to the validity of State compulsory insurance of aircraft. There are, however, decisions dealing with the question of whether State statutes requiring owners of motor vehicles to carry insurance are valid under the commerce clause, the due process clause and the equal protection clause of the Federal Constitution.

The United States Supreme Court has held that a State may require compulsory insurance to be carried by operators of motor vehicles insuring their liability against damage to property of and injuries to third persons. In *Hicklin v. Coney*, 290 U. S. 169, the defendants were contract carriers of property by motor truck in interstate commerce. It did not appear whether or not the defendants were also engaged in intrastate commerce. The defendants contended that a statute of South Carolina requiring compulsory insurance, as applied to them, violated the due process, the equal protection and the commerce clauses of the Constitution. The South Carolina courts had determined that the statute did not require cargo insurance and the decision of the Supreme Court was therefore confined to a determination of the validity of compulsory insurance *for the benefit of third persons*. The Court said at page 171:

"It was competent for the State in exercising its control over the use of the highways to make reasonable regulations governing that use by private contract carriers. These regulations may require on the part of interstate as well as intrastate carriers the payment of reasonable license fees and the filing of insurance policies to protect the interests of the public by securing compensation for injuries to third persons and their property from the negligent operations of such carriers."

In *Continental Baking Co. v. Woodring*, 286 U. S. 352, the court held that a provision requiring automobile insurance against liability to third persons did not violate the due process or commerce clauses. The Court said at page 365:

"Requirements of this sort are clearly within the authority of the State, which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public

safety. Reasonable regulations to that end are valid as to intrastate traffic and, when there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce."

The Supreme Court has not directly passed on the question of whether a State may require insurance of cargo or passengers transported in motor vehicles in interstate commerce but its decisions indicate that such a requirement would be unconstitutional.

In *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, the court held that a private carrier of property could not be converted by legislation into a common carrier and required to furnish an indemnity bond covering cargo carried by it in interstate commerce. The Court said:

"Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far."

In *Sprout v. South Bend*, 277 U. S. 163, the Court, in passing on an Indiana compulsory insurance requirement said at page 172,

"Such provisions for insurance are not, even as applied to buses engaged exclusively in interstate commerce, an unreasonable burden on commerce, if limited to damages suffered within the State by persons other than the passenger."

In *Sage v. Baldwin*, 55 Fed. (2d) 968 (N. D. Tex.) and *Cobb v. Department of Public Works*, 60 Fed. (2d) 631 (W. D. Wash.), it was held that statutory requirements for automobile cargo and passenger insurance violated the commerce clause. The same ruling as to cargo insurance was made in *Johnson Transfer & Freight Lines v. Perry*, 47 Fed. (2d) 900 (N. D. Ga.). In *Red Ball Transit Co. v. Marshall*, 8 Fed. (2d) 635 (S. D. Ohio), a compulsory insurance requirement was held invalid under the commerce clause, but the opinion does not disclose the type of insurance involved.

In *Williams v. Denney*, 151 Wash. 630, 276 Pac. 858, the Washington Supreme Court specifically rejected the distinction made by the federal courts between insurance against liability to third persons and persons and property carried. It held both provisions good under the commerce clause. In *In Re Opinion of the Justices*, 251 Mass. 569, 147 N. E. 681 the justices of the Supreme Judicial Court held that Massachusetts compulsory insurance provisions were valid in their entirety. It is not wholly clear that insurance of passengers and property carried was required although the provision seems sufficiently broad to include it. In *In Re Opin-*

*ion of the Justices*, 81 N. H. 566, 129 Atl. 117 the justices of the New Hampshire Supreme Court gave an opinion that a New Hampshire bill then pending requiring compulsory motor vehicle insurance was constitutional. It is not clear from the opinion what kind of insurance was required. The opinion was cited in *Williams v. Denney*, *supra*, as holding passenger and cargo insurance valid.

It is our opinion that Section 10(b) of the proposed Uniform Aviation Liability Act requiring insurance to cover liability to passengers is unconstitutional as applied to interstate operations of aircraft.

We are further of the opinion that the decisions of the Supreme Court in *Hicklin v. Coney* 290 U. S. 169 and *Continental Baking Co. v. Woodring*, 286 U. S. 352, upholding the validity of compulsory automobile insurance against liability to third persons or their property, are not applicable to aircraft. The opinions in these cases disclose that the State's jurisdiction to require automobile insurance to protect third persons was based upon its control of highway facilities furnished by it. In the *Woodring* case, the Court said that the statutory requirement was clearly within the authority of the State "which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety."

Navigable air space is more nearly analogous to navigable waters than to highways or railroads. The difference in the power of States to legislate with reference to industries using state roads, as compared with industries using navigable waters, has been recognized. In *Moran v. New Orleans*, 112 U. S. 69, the Supreme Court held invalid a New Orleans ordinance requiring payment of a license fee by a person operating tow boats between the Gulf of Mexico and the City of New Orleans. The Court said at page 75:

"The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden, with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States."

*Railroad Company v. Maryland*, 21 Wall. 456, involved the validity of a provision in the charter of a railroad company requiring it to pay to the state of incorporation a portion of its earnings. The Court said at page 470:



"Commerce on land between the different states is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. . . . Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."

In the January, 1932, issue of the JOURNAL OF AIR LAW (Vol. III, page 1) there is an able article on the subject of "Constitutionality of State Registration of Interstate Aircraft," by Edwin F. Albertsworth, Professor of Industrial and Constitutional Law, Northwestern University School of Law. The author says at page 2:

"While, historically, as between railway regulations by the States and those now being placed upon air transport, there are similar stages in legal and constitutional development, it should be stated at once that the two types of business activity are not at all alike so as to make applicable to air transport analogous decisions relating to railways. Nor can similar analogies be drawn from motor bus operations between the States, or communication agencies, or Pullman service, or refrigerator transit by means of rail facilities. It is my judgment that some of the precedents that have come down to us on constitutional issues decided by the Federal Supreme Court relating to some of these types of activity in interstate or foreign commerce, are not pertinent to air transport. For carriage of passengers or goods by air is totally dissimilar in character from that by land, so far as State regulations and constitutional provisions of Federal control are concerned. In the case of air transport, *aircraft touch land only incidentally and temporarily, and require no artificial roadway, of any character.* No franchise is necessary to enable the aircraft owner or operator to use the air, for air is prepared by nature as a public or common highway for trade and intercourse. No grants are necessary from the State, either of land or subsidies, for carrying on the air transport business in interstate commerce, unless it be in the exceptional cases of airports."

After reviewing numerous authorities, the author reaches the conclusion that statutes of several States imposing registration requirements and charges upon aircraft engaged in interstate commerce cannot be sustained either as property taxes or privilege taxes or under the police powers of a State.

In *Di Santo v. Pennsylvania*, 273 U. S. 34, the Court passed

on a Pennsylvania statute requiring persons other than railroads or steamship companies, engaged within the State in the sale of steamship tickets for transportation to or from foreign countries, to procure a license by giving proof of moral character, paying a small annual fee and filing a bond as surety against fraud or misrepresentation to purchasers. The plaintiff in error was a ticket agent at Harrisburg, representing four steamship companies operating between the United States and Europe. He was convicted and fined for violating the State statute. In reversing the judgment of the Supreme Court of the State, the Court, in a six to three decision, said at page 36:

"The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. See *Davis v. Farmers Co-operative Co.*, 262 U. S. 312, 315. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 199, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. *Real Silk Mills v. Portland*, 268 U. S. 325, 336. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by *Texas Transport Co. v. New Orleans*, 264 U. S. 150, and *McCall v. California*, 136 U. S. 104."

A State statute requiring operators of aircraft in interstate commerce to carry insurance against either ground injury and damage or passenger liability or cargo liability, certainly imposes as great a burden on interstate commerce as the Pennsylvania statute involved in *Di Santo v. Pennsylvania* imposed on foreign commerce. The dissenting opinion in *Di Santo v. Pennsylvania* emphasized the fact that Congress had not adopted any legislation designed to protect purchasers of steamship tickets against fraud. It is also true that Congress has not legislated with reference to liability to persons injured or damaged by interstate operations of aircraft, but it has occupied the field to the extent of providing in the Air Commerce Act of 1926 (49 U. S. C. 180) that the navigable air space "shall be subject to a public right of freedom of interstate and foreign air navigation." Furthermore, the Air Commerce Act

of 1926, as amended (49 U. S. C. 171, *et seq.*) empowers the Secretary of Commerce to establish airports, civil airways and air navigation facilities and to establish air traffic rules. The Secretary of Commerce, under authority of the Air Commerce Act, has established airports, navigation facilities, civil airways and air traffic rules and, in so far as civil airways can be compared to public highways, they fall within the category of public ways established and maintained by the federal government.

We, therefore, conclude that Section 10 of the proposed Uniform Aviation Liability Act is unconstitutional in its entirety as applied to aircraft operated in interstate commerce.

#### IV. GENERAL OBJECTIONS TO THE PROPOSED UNIFORM STATE LEGISLATION WITH REFERENCE TO AVIATION LIABILITY.

Alaska and the District of Columbia and sixteen States have laws limiting the amount of damages recoverable for death by wrongful act, ranging from \$5000 in Maine and Colorado to \$12,500 in Wisconsin. Hawaii and Porto Rico and thirty-two States have no such statutory limitations. Aviation generally involves passage over State lines. Scheduled air transportation is principally interstate. The speed of air transportation is such that many States are frequently traversed during flights of short duration and the liability of an operator fluctuates from hour to hour on account of differences in State laws.

This undesirable variation of liability in different states will not be obviated by the proposed Uniform Aviation Liability Act. On the contrary, the submission of that Act to the states for adoption will result in new variations in liability and increased confusion. The Act will be adopted by some states and not by others, and important sections thereof will be held valid in some states and invalid in others. The chances are that many years will elapse before any considerable number of states adopt the statute. The Uniform Sales Act, which was prepared after experience and judicial precedents extending over many centuries, was submitted to the states in 1907 and after a lapse of thirty years has been adopted by thirty-two states.

The Uniform State Law for Aeronautics was adopted by the National Conference of Commissioners on Uniform State Laws in 1922 and after fifteen years has been adopted by twenty states, though the great majority of such states have made modifications in the text of the original act. The statute was adopted by seven

states in 1923, one in 1925, two in 1929 and one in 1931, and has not been adopted by any state since 1931. The proposed Uniform Aviation Liability Act, which repeals a substantial part of the Uniform State Law for Aeronautics, and in addition thereto incorporates the highly controversial provisions regarding passenger liability and compulsory insurance, can scarcely be expected to make better progress than the Uniform State Law for Aeronautics, and especially so in view of the fact that the enactment of the statute will in all probability be actively opposed and resisted by every branch of aviation.

Experience with reference to liability without fault and compulsory insurance as applied to automobiles indicates the difficulty which would be encountered in bringing about the general adoption of the Uniform Aviation Liability Act. Automobiles have been in use for approximately thirty-five years. There are nearly thirty million automobiles in use in the United States. They can be purchased in secondhand markets for prices as low as the amount of a state license fee, and innumerable cars are owned and operated by persons who are financially irresponsible and carry no insurance. They can be and are operated by anyone, including children, cripples and drunkards, and the number of deaths and injuries caused by their operation is appalling and is increasing from year to year. Nevertheless, no state has adopted legislation imposing liability without fault as to automobiles and only Massachusetts has provided for compulsory insurance as to private automobiles.\*

The fact that legislatures will not adopt measures such as proposed in the Uniform Aviation Liability Act with respect to automobiles indicates what their attitude will be with reference to the radically different situations presented by airplanes. They are costly and the number in operation is small. Owners and operators as a rule are financially responsible and commonly carry insurance. Airplanes cannot be operated for hire in interstate commerce, and in intrastate commerce in many States, without being authorized or licensed by the Department of Commerce. Licensed airplanes must be inspected and maintained by mechanics licensed by the Department of Commerce and cannot be operated except by pilots authorized or licensed by the Department of Commerce, and, in order to retain their licenses, pilots and mechanics must continue to maintain experience, and pilots must pass periodic physical examinations. (Air Commerce Regulations, Department

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\* See "Financial Protection for the Motor Accident Victim" in *Law and Contemporary Problems*, Vol. III, No. 4, page 505.

of Commerce, Aeronautics Bulletin No. 7.) Airplanes are carefully maintained and the number of injuries and deaths caused by their operation is insignificant when compared with the automobile.

The provisions of the Uniform Aviation Liability Act relate to matters which are the subject of great controversy and difference of opinion. States have radically different policies as to whether damages recoverable for death by wrongful act should or should not be limited and states having such limits differ as to the proper amount of the limitation. Certainly great difficulty can be anticipated in convincing the legislatures of Maine and Colorado that an air line causing death by an accident due to the malicious act of a third person, or a mistake of a Government employee in a traffic control tower, should be held liable for \$10,000, whereas a person who causes death by driving an automobile on the wrong side of the road while intoxicated should be held for only \$5000.

We, therefore, feel that we are warranted in predicting that the progress of the proposed statute in state legislatures will be exceedingly slow. It is possible that during the interval the extent of federal control over aviation will be increased. Airplanes, like radio and electricity, do not recognize state lines and federal control of aviation may be extended to include intrastate activities, as well as interstate commerce. (See *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563, 588.)

The reason generally advanced to support the theory that air transportation should be subjected to liability without fault and thus be treated differently from all other forms of transportation, is that claimants find it impossible to prove the cause of accidents. Department of Commerce records and the reports of litigated cases do not indicate that such impossibility exists. On the contrary, in most accidents, circumstantial, if not direct, proof can be produced to establish causes. In fatal accidents, the Department of Commerce publishes statements explaining circumstances and probable causes and these reports are available to claimants. In reported aviation cases, courts and juries have reached conclusions as to the causes of accidents and claimants have recovered in a majority of such cases.

Even if it were true that it is generally or frequently impossible to prove the cause of airplane accidents, the appropriate remedy would be to shift the burden of proof to the owner, instead of providing that he shall be subject to liability irrespective of neg-

ligence, unless the accident has been caused by the wilful misconduct of the claimant.

Miscellaneous flying would be greatly handicapped and retarded if the proposed Act were generally adopted. Miscellaneous flyers are not capable of bearing the financial burden that would be imposed by liability without fault and compulsory insurance. It is obviously highly desirable for the public welfare that private flying be encouraged.

Domestic air lines have thus far been unable to earn an adequate return on invested capital and should not be handicapped by the imposition of unnecessary costs. The Uniform Act would unquestionably increase their insurance rates and the public would derive no benefit whatever from the insurance requirement. Scheduled air lines now carry insurance far in excess of the requirements of the proposed statute and the only effect of the new legislation would be to increase rates.

In *Pokora v. Wabash Railway Co.*, 292 U. S. 98, the Supreme Court, in an opinion by Mr. Justice Cardozo, considered standards of prudent conduct which should be observed by persons in crossing railroad tracks. At page 105, the Court said:

"Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

Aviation has no background of experience out of which standards of conduct have emerged. The industry is new, but is making unprecedented progress. By the time the proposed statute has been approved by the American Law Institute, the National Conference of Commissioners and the American Bar Association, and has been adopted by a single state, the statute may be obsolete and wholly inappropriate because of progress that will be made by aviation during the interval. The facts to which the proposed law will be applied a few years in the future are not known and cannot be predicted. Liability in aviation cases should be left to courts and juries and should not be imposed from without by a statute which

will be only partially adopted by legislatures and partially sustained by courts over a period of many years.

The Committee has received a communication under date of August 14, 1937, from Dr. D. Goedhuis, Manager of the Central Office at The Hague, of International Air Traffic Association. Dr. Goedhuis states that he has examined a copy of the proposed Uniform Aviation Liability Act and points out that the theory of liability under that Act is completely different from the Warsaw Convention which was adhered to by the United States on October 29, 1934. He says in part:

"The fact that the U. S. A. have adhered to the Warsaw Convention proves in my opinion, that the U. S. A. also realizes the necessity of submitting the Air Carrier to a regime based on fault. The recognition of this principle in International carriage entails as an inevitable consequence the recognition of the same principle in National Air Carriage. The particular character of aviation makes a distinction between these two kinds of carriage impossible. To give an example: If a passenger traveling by air from Brownsville to New York suffers damage owing to the plane being struck by lightning, the carrier will, by virtue of the proposed Uniform State Law be liable; if however the passenger started his journey at Tampico, the carrier in the same case will not be liable because he will fall under the rules of the Warsaw Convention which stipulate that the carrier is not liable when he proves that he and his representatives have taken the necessary measures to avoid the damage.

As the tendency of countries all over the world is to apply the rules of the Warsaw Convention also to National Air Carriage, it is obvious that air carriers in the U. S. A. would be in a very unfavorable position as compared to air carriers in other parts of the world, if an absolute liability was imposed upon them."

Dr. Goedhuis submitted with his letter a report made by him in July, 1937, at the twenty-fourth meeting of I. A. T. A. at Paris, relating to the progress made in various countries with reference to the application of the rules of the Warsaw Convention to national carriage. This report contains the following summary:

"To summarize, there are thus three countries [Italy, Belgium and Holland] which have already applied the rules of the Warsaw Convention to their internal legislation.

In twelve countries [Brazil, Denmark, Finland, Norway, Sweden, Argentine, Esthonia, France, Germany, Hungary, Poland and Switzerland], the application of the rules of the Warsaw Convention to internal carriage is to be expected in the near future.

In eight countries [Austria, Bulgaria, China, Greece, Rumania, England, Australia and Ireland] the question is being studied at the moment.

In four countries [South Africa, Chile, Japan, Union of Soviet Socialist Republics] the application of the Warsaw Convention to internal

carriage is not being considered, and in one country [United States of America] we are without information on this subject."

The Warsaw Convention is applicable to flights between the United States and other countries which have ratified or adhered to the Convention. It is true that flights from foreign countries, other than Mexico and Canada, usually terminate at coastal points, but the range of aircraft has been increased to such an extent that this may not be true in the near future. Furthermore, many of the domestic airlines in the United States have inter-line agreements with foreign air carriers under which through tickets may be sold for transportation in the United States, as well as to and from foreign countries. Transportation under such through tickets for flight between countries which have ratified or adhered to the Warsaw Convention will be governed by the rules of the Convention and not by State law. Therefore, departure from the principles of the Warsaw Convention by State legislation will result in situations in which radically different rules of liability will be applied to different passengers on the same trip.

#### V. THE UNIFORM LAW OF AIRFLIGHT.

##### A. Lawfulness of Flight, Section 2, Pages 24-25, Lines 1 to 18.

"2. Flight of aircraft in this state is lawful:

(a) If in compliance with the laws of this state regulating aeronautics and, as far as applicable, with such laws of the United States; and

(b) If at a height permitted by the rules, regulations or orders adopted and promulgated by the state [Aeronautical Commission], and the applicable rules of the Department of Commerce of the United States; and

(c) Unless so conducted as to involve a substantial risk of harm to individuals or property on the land; or

(d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land or adversely affect the then existing value of the land and structures thereon."

Flight of aircraft in the United States is recognized as lawful by federal and state legislation, international agreements and conventions and court decisions (Section 10, Air Commerce Act of 1926, 49 U. S. C. 180; Section 4 Uniform State Law for Aeronautics, in force in 20 States; Article IV Habana Convention; *Smith v. New England Aircraft Company, Inc.*, 270 Mass. 511; 170 N. E. 385, 389; *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817, 819; *Swetland v. Curtis Airports Corporation*, 55 Fed.



(2d) 201, 6th C. C. A.; *Hinman v. Pacific Air Transport*, 84 Fed. (2d) 755, 9th C. C. A.; Section 194 of Restatement of the Law of Torts by American Law Institute). Further legislation providing for the lawfulness of flight in general, therefore, would only confirm existing law.

The lower limits to which flight of aircraft is lawful is the principal subject of controversy and although courts have passed upon this question in a few cases, it has not been adjudicated with sufficient finality to be considered free from doubt. In arriving at a legislative solution of the problem, it is not necessary to consider the various theories advanced as to the correlative rights of operators of aircraft and landowners.\* It is sufficient to know that controversies as to the lower limits of lawful flight arise and how the courts have dealt with them in the past.

Litigation affecting the right of flight has usually been instituted by landowners in the vicinities of airports where airplanes are necessarily flown low over adjacent property in taking-off and landing. In dealing with these cases, the courts have balanced the conveniences of the public and the interests of all parties concerned in arriving at their decisions, although some have indicated a hesitancy in recognizing this doctrine where extremely low flights are involved (see dicta in *Smith v. New England Aircraft Company*, 270 Mass. 511, 170 N. E. 385, 392, and in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817, 826). On the other hand, the Federal Circuit Court of Appeals of the Ninth Circuit has held that flights as low as 5 feet above the surface will not be enjoined in the absence of proof by the surface owner of actual damage. (*Hinman v. Pacific Air Transport*, 84 Fed. (2d) 755, 758.)

In *Smith v. New England Aircraft Company*, 270 Mass. 511, 170 N. E. 385, the owners of a country estate located near a privately operated airport sought an injunction to prevent defendants from flying over their lands and buildings in such manner as to constitute a trespass and nuisance and to prevent the use of the airport as a base for such flights. The plaintiffs did not seek a recovery of damages. The Court refused to grant an injunction and said at page 393:

"The finding of the master is express to the effect that the plaintiffs have not shown that they have sustained any damage to their property or its use, or have suffered material discomfort. The kind of land upon which the trespass is committed is also an important factor. As already

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\* For a discussion of these theories see "Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law," Edward C. Sweeney, 3 JOURNAL OF AIR LAW, 329, 535.

stated, that of the plaintiffs affected by flights at low altitudes is covered with dense brush and woods. It is uncultivated. It does not appear that any valuable use is made of it either for pleasure or profit. That might not be a factor of consequence in an action at law for the assessment of damages. See *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, 236, 237, 85 N. E. 446. But it is a factor to be taken into account with all the others in determining whether injunctive relief ought to be afforded. In view of all these conditions, injunctive relief is not granted."

In *Swetland v. Curtiss Airports Corporation*, 55 Fed. (2d) 201, 6th C. C. A., the owners of country residential property instituted suit to enjoin flights of aircraft over their property and the operation of a nearby private airport. The District Court (41 Fed. (2d) 929) enjoined the defendants from permitting dust to fly or drift in substantial and annoying quantities from the airport over the plaintiffs' property, from dropping or distributing circulars from airplanes as they passed over it and from flying or permitting airplanes under their control to fly over it at an altitude of less than 500 feet, this limitation being premised upon minimum altitudes prescribed by the United States Department of Commerce. Plaintiffs appealed from so much of the decree as refused to enjoin flights over their property entirely, and defendants appealed from that part of the decree which enjoined flights below 500 feet.

In discussing that part of the decree which enjoined flights below 500 feet, the Court said at page 203:

"As to the upper stratum which he [the land-owner] may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. His remedy for this latter use, we think, is an action for nuisance and not trespass. We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air space for himself. That height is to be determined upon the particular facts of each case. It is sufficient for this case that the flying of the defendants over the plaintiff's property was not within the zone of such expected use. We think the question is unaffected by the regulation promulgated by the Department of Commerce, under the Air Commerce Act of 1926 (49 U. S. C. A. Sec. 171 *et seq.*), and adopted by the State of Ohio, requiring aeronauts to fly in rural sections at a height not less than 500 feet above the surface, for in our view that regulation does not determine the rights of the surface owner, either as to trespass or nuisance."

The Court also held that the decree should be modified insofar as operation of the airport was concerned and said on that subject at page 204:

"It is true that there are cases in which the land-owner must submit

to great annoyance in the interest of the public. This is not that character of case, for there is no showing that this site is indispensable to the public interest; indeed, it appears that the defendants have already acquired another site and may acquire still another, if they desire it, either of which is as accessible to Cleveland as the present field. Considering, therefore, the balance of conveniences, the defendants are not entitled to use the property as they now contemplate. The record does not contain sufficient evidence to determine whether other parts of the property could be used without seriously interfering with the plaintiffs' enjoyment of their properties. That question we leave open for consideration by the trial court upon the remand of the case. It is sufficient for present purposes that the defendants should be enjoined from operating the airport as now located."

In *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817, plaintiff owned and occupied property near the Municipal Airport of the City of Atlanta. He instituted a suit against the City and several aircraft operators for an injunction and damages, claiming that the operation of the airport and flights over his land constituted a nuisance. The Supreme Court of Georgia reversed a judgment of the trial court, sustaining a demurrer to plaintiff's petition, but said with respect to the right of flight over plaintiff's property, at page 826:

"Perhaps the owner of the land may be considered as being in actual possession of the space immediately covering the trees, buildings, and structures affixed to the soil, so that the act of navigating a plane through this stratum could be condemned as a trespass; but that is not a question for decision in the present case, and obviously we should not here attempt to define the altitude at which aerial navigation might be considered as constituting such an offense. It is sufficient to say that the flight of aircraft across the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It might or might not amount to a trespass, according to the circumstances including the degree of altitude, and even when the act does not constitute a trespass, it could be a nuisance, as where it 'worketh hurt, inconvenience, or damage,' to the preferred claimant, namely, the owner of the soil, or to a rightful occupant thereof."

In the recent case of *Hinman v. Pacific Air Transport*, 84 Fed. (2d) 755, 9th C. C. A., the issue of right of flight was clearly presented. The plaintiffs filed a bill to enjoin the defendant air line from flying over their property and claimed damages in the total sum of \$90,000, computed on the basis of a charge of \$1,500 a month for previous use and occupancy of courses of flight over the plaintiffs' land. The Circuit Court of Appeals affirmed a decree of the District Court sustaining a general demurrer to the bill and certiorari was denied by the United States Supreme Court (300

U. S. 655). In its opinion the Court of Appeals said at page 758:

"We now consider the allegation of the bill that appellees' airplanes, in landing, glide through the air, within a distance of less than 100 feet to the surface of appellants' land, or possibly to a distance within five feet thereof, at one end of his tract. This presents another question for discussion. Whether such close proximity to appellants' land may constitute an impairment of his full enjoyment of the same is a question of fact. If it does, he may be entitled to relief in a proper case.

Appellants are not entitled to injunctive relief upon the bill filed here, because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of."

In *Cory v. Physical Culture Hotel*, 14 Fed. Supp. 977 (Dist. Ct. Western Dist. of New York) the court summarized numerous decisions relating to the law of flight and said at page 982:

"It is unnecessary to review in any detail the many divergent views of authors and textbook writers on the subject. Out of it all has grown the rule followed in the foregoing decisions and adapted to the economic and social needs of our times that the owner of land has the exclusive right to so much of the space above as may be actually occupied and used by him and necessarily incident to such occupation and use, and any one passing through such space without the owner's consent is a trespasser; as to the air space above that actually occupied and used and necessarily incident to such occupation and use, the owner of the surface may prevent its use by others in so far as that use unreasonably interfered with his complete enjoyment of the surface and the space above which he occupies, on the theory of nuisance."

*Tucker v. United Air Lines, Inc. and City of Iowa City* (Dist. Ct. of Johnson County, Iowa, Sept. 14, 1935), JOURNAL OF AIR LAW, Vol. 6, page 622, and Vol 7, page 293, involved the legality of obstructions by a landowner, as well as the right of flight. An owner of land adjacent to a municipal airport sued to enjoin flights over his property at low altitudes. The defendant air line sued to enjoin the landowner from maintaining poles and trees on his property near the airport boundary. The cases were consolidated. The Court enjoined the defendant air line from flying over plaintiff's property at altitudes of less than 30 feet at one location and at altitudes of less than 50 feet at other locations. The Court also found that the trees and poles were a hazard to aviation and enjoined the landowner from maintaining the same at heights in excess of 25 feet at points where flight below 30 feet was enjoined and 50 feet at other locations.

In the *Tucker* case the Court was confronted with a situation which necessitated a balancing of conveniences. The airport was public and owned by a municipality and had been used for many years in connection with the operation of a transcontinental air mail line. It represented a large capital investment. The air line was a common carrier of passengers and express, and carried mail for the United States Government. One effect of the decision was that the landowner erected a pole about 24½ feet in height at the end of a runway. As a result the air line, with the consent of the Post Office Department, eliminated Iowa City as an air mail stop. Distances cannot be measured with exactness from a rapidly moving airplane and there was a danger that pilots in their efforts to comply with the decree would fly at altitudes substantially in excess of those permitted and thus incur the risk of injury in landing. There was also danger of collision with the pole and the further danger that a pilot would have his attention diverted from operation of an airplane because of the necessity of avoiding the pole and maintaining an altitude complying with the court's decree.

A question somewhat similar to that in the *Tucker* case arose in *Commonwealth of Pennsylvania v. Von Bestecki*, (Court of Common Pleas, Dauphin County, Penn., March 15, 1937), where the court held that the erection of towers on land adjoining an airport.

"and the resultant menace to the public traveling on the civil airways, constituted a public nuisance, the recurrence of which may be enjoined by a court of equity."

Probably the circumstances in no two cases will ever be exactly alike. The answer as to what are the lower limits of lawful flight cannot equitably be determined in advance either by the courts or by legislation. If the land involved is vacant, a different rule should be applied to determine lawfulness of flight than if it is being used for a proper purpose. The extent of injury or interference with a surface owner's rights will always depend on the use that he is making of his property. On the other hand, airplanes must fly over private property. They represent a social and economic necessity, varying in importance according to the purpose for which flown. Also, they must land and take-off and in so doing it is unavoidable that they fly over adjacent property at rates of ascent or descent varying approximately from 7 feet to 12 or more feet laterally for every one foot vertically, depending upon the elevation of the airport above sea level, the wind velocity and the type of airplane used. (See United States Department of Commerce

Airport Rating Regulations, Sec. 4(b), effective Sept. 1, 1930; 1930 U. S. Av. R. 342, 346.)

In dusting operations flights are conducted at very low altitudes and the land to be subjected to such operations cannot be approached without flight at low altitudes over adjacent lands. For this reason, Iowa, essentially an agricultural State, incorporated in a statutory prohibition against flights (after take-off and before landing) at less than 500 feet, an exception reading: "except where indispensable to an industrial flying operation." (Code of Iowa, 1931, Sec. 8338-c7).

It has been suggested that larger airports be used in order that landings and take-offs can be made further in-field, so that flights over adjoining property will be at higher altitudes. This is impracticable. On July 1, 1935, there were 2343 airports and landing fields in the United States (Department of Commerce, Aeronautics Bulletin No. 1, page 20). A tremendous amount of land would have to be added to airports to carry out the suggestion and adjoining landowners would not benefit materially. Consider, for example, an airport measuring 3000 feet along each of its four sides, and assume a gliding angle of one foot vertically for every 7 feet laterally. If the airport were extended 700 feet from each side, an airplane would cross the boundary in landing approximately 100 feet higher than without the extension. The net result would be (1) more than 10,000,000 square feet of additional land would have to be acquired and maintained for an airport originally covering only 9,000,000 square feet; (2) an economic waste would result by reason of the land surface not being fully utilized; and (3) flights at low altitude over adjoining property would still be necessary. It should also be remembered that flights over property adjacent to airports are of exceedingly short duration, cover very small areas, and are made from time to time in different directions because of the necessity of landing and taking-off against the wind.

For the foregoing reasons, it is submitted that the proposed Uniform Law of Airflight should be so drafted as to recognize fully a right of flight at all altitudes and to permit adjudications by the courts as to what the lower limits shall be under the circumstances of particular cases, giving proper consideration to the character of flights, the conduct thereof, the use being made of underlying land, the amount of interference therewith by such flights, and the public interest involved.

Section 2 of the proposed statute does not make any exception as to public aircraft, though such an exception is made in Sec-

tion 3(c). Section 2 provides by implication that flight, contrary to its terms, is unlawful, but nevertheless the landowner probably would not have any satisfactory remedy if such unlawful flight were conducted by the Army or Navy or by the State.

Section 2(a) makes the lawfulness of flight dependent upon compliance with federal and state laws regulating aeronautics. This is unnecessary and not expedient because in almost every case non-compliance with laws regulating aeronautics will have no proximate connection with wrongs claimed by landowners to have been caused by flights over their property. Laws regulating aeronautics ordinarily contain enforcement provisions and often prescribe penalties for violations. For example, Section 3(a) of the proposed Uniform Law of Airflight prohibits operation of aircraft without the consent of the owner, and under Section 4 violation of this provision is punishable by fine and imprisonment. If Section 2(a) were in effect, a court might hold that a person operating an airplane without the consent of the owner was not only subject to such penalty, but also to civil claims by landowners, though there would be no relationship whatever between the offense and the wrong claimed by the landowner. Numerous similar examples could be mentioned, such as violation during flight of federal public health regulations and the failure of an operator to maintain lights on an airplane during a night flight, as required by federal regulations.

Dean John H. Wigmore, in commenting upon a similar provision in the Fourth Revised Tentative Draft of the Joint Committees, said:

"The 4th Draft, par. (a) and (b) requires 'compliance with the Federal and State laws and regulations' as a condition of lawfulness. But the only requirement should be the certification of airworthiness for the craft and of competence for the navigator. These alone should suffice for lawfulness. The Federal Air Commerce Act declares that 'a public *right* or freedom of transit through the airspace exists for every citizen.'

To make lawfulness depend upon compliance from moment to moment with *all* the laws and regulations both Federal and State is contrary to all analogies of law and is unpractical.

(a) In no other branch of traffic—pedestrian or vehicular or marine is any such legal principle recognized.

(b) There are hundreds of regulations for behavior during transit.

To suppose that a person's general status of lawfulness disappears the moment he is failing to obey any one of them would involve an intolerable burden and an unpractical result. A pedestrian is still lawfully on the highway even though he is violating an ordinance against

expectorating on the sidewalk or against carrying a concealed weapon. A truck-driver is still lawfully on the highway even though he is transporting a gambling-table or has failed to turn on his lights or is transporting a patent medicine illegally labeled. In all such cases the specific act may be a ground for prosecution. But nobody ever supposed that it took away the general lawfulness of the person's being in the highway.

Today, the extensive air traffic is conducted on the assumption that when the craft and the pilot hold duly issued certificates or licenses, they are deemed entitled to fly and to be lawfully in the air, without further condition. Last year the craft and the pilots of the scheduled air lines alone carried 1,140,000 passengers and flew 400,000,000 miles. Day and night they cross the land in every region. To assert that these men and craft are not to be deemed lawfully in the air until they can prove that they have complied with *every* Federal and State law and regulation would be preposterous. No such law could possibly be contemplated." (Comments and Redraft by John H. Wigmore, Jan., 1937.)

And in discussing the language of the present Section 2(a) he said:

"This section declares flight lawful *only* when done in compliance 'with the laws of this State' and of the U. S. and 'the rules \* \* \* of the State Aeronautical Commission' and the U. S. Department of Commerce.

Think of it! If transgressing any one of several hundred rules, the whole status of the aircraft becomes unlawful! And *the burden is on the craft to prove compliance* with all those rules!"

(Second Comment by John H. Wigmore—March 15, 1937.)

Dean Wigmore has suggested the following in lieu of Sections 2(a) and (b):

"Flight of aircraft in the airspace over the land of this State is lawful

(a) when made by an aircraft operated under a valid certificate or license or registration issued by the Federal Secretary of Commerce or by the State Aeronautic Commission of this or another State or Territory, or a District or insular possession of the United States.

(b) and navigated by a pilot holding a certificate or license or registration validly issued by such authority." (Comments and Redraft by John H. Wigmore, Jan., 1937.)

Such provisions are not objectionable, but they are not necessary because the subject is adequately covered by Sections 2 and 3 of the Uniform Aeronautical Regulatory Act adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in July, 1935 (See 1936 U. S. Av. R. 384). Section 2(a) therefore should be deleted from the proposed Uniform Law of Airflight.

The provisions of Section 2(b), that flight is lawful if at a



height permitted by the rules of the State Aeronautical Commission and the Department of Commerce, would result in confusion when applied to particular cases. Would the federal or state laws and regulations be applicable when they conflict? When regulations or laws do not specify minimum altitudes of flight, but refer thereto in general language, what meaning shall the courts ascribe to Section 2(b) which measures lawfulness by permitted height?

The Federal Air Commerce Regulations (U. S. Department of Commerce Aeronautics Bulletin No. 7) provide:

"(1) The minimum safe altitudes of flight in taking off or landing and while flying over the property of another in taking off or landing, are those at which such flights by aircraft may be made without being in dangerous proximity to persons or property on the land or water beneath, or unsafe to the aircraft.

(2) Minimum safe altitudes of flight over congested parts of cities, towns, or settlements are those sufficient to permit of a reasonably safe emergency landing, but in no case less than 1,000 feet.

(3) The minimum safe altitudes of flight in all other cases shall be not less than 500 feet." (Section 69.)

\* \* \* \* \*

"The air-traffic rules may be deviated from when special circumstances render a departure necessary to avoid immediate danger or when such departure is required because of stress of weather conditions or other unavoidable causes: *Provided, however,* That aircraft carrying passengers for hire shall not deviate from the air traffic rules pertaining to minimum altitudes of flight because of stress of weather conditions." (Sec. 79.)

\* \* \* \* \*

"The Secretary of Commerce may waive any of the requirements of these regulations when, in his discretion, the particular facts justify such waiver." (Sec. 82.)

Federal regulations governing scheduled operation of interstate air line services (Aeronautics Bulletin No. 7-E) provide, with reference to visual or contact flying in daylight:

"Authority to so operate may be granted, provided that; \* \* \*

(C) At no time is the airplane flown within 500 feet of the ground, the tops or sides of mountains, hills, or other obstructions to flight, except during landings and take-offs.

(D) A waiver of the 500-foot minimum altitude requirement of the air traffic rules may be granted when terrain and equipment permit and ceiling conditions make it advisable, provided that written approval is obtained from the Bureau of Air Commerce for the operating division concerned. When such permission by waiver has been authorized, the course of aircraft shall be directed so as to avoid populated areas of cities, villages and settlements. Under no circumstances will authority be granted for flights below 300 feet." (Ch. 8, Sec. 5.)

On occasions the Secretary of Commerce promulgates special rules. An example is a regulation approved December 5, 1936, effective to December 18, 1936 (1 Fed. Reg. 2100-2101) providing that during the Ninth Annual All-American Air Maneuvers:

"(a) Eastern Air Lines operating between Jacksonville and Miami will fly on all trips day or night, between 4,000 and 6,000 feet altitudes above sea level and will maintain courses as nearly as possible to the center of the Department of Commerce radio ranges between its points.

(b) National Airlines System operating between St. Petersburg, Daytona Beach, and Jacksonville will similarly remain under 1,000 feet altitude above sea level.

(c) All other aircraft will use the altitude from 4,000 to 6,000 feet only when climbing or descending through this level and remain in this line the shortest practicable period of time."

Compare the foregoing Federal regulations with the following statutory requirements of the State of Iowa:

"Exclusive to taking off from or landing on an established landing field, airport, or on property designated for that purpose by the owner, and except as otherwise permitted by this chapter, aircraft shall not be flown—

1. Over the congested parts of cities, towns, or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than one thousand feet.

2. Elsewhere at height less than five hundred feet, except where indispensable to an industrial flying operation." (Code of Iowa, 1931, Sec. 8338-c7.)

Section 2(b) would make flight unlawful if at a height lower than that permitted by state regulations and the applicable rules of the United States Department of Commerce. Under the foregoing regulations an interstate airplane might be flown in Iowa by an airline at an altitude of 400 feet in compliance with Federal regulations but not in compliance with regulations specified in the Iowa Statute. On the other hand under a special regulation, such as the one of December 5, 1936, referred to above, requiring particular interstate airline airplanes to operate at altitudes between 4,000 and 6,000 feet, an airplane of such airline operated at 1,000 feet would comply with the state regulations but would violate Federal regulations.

Variations in minimum altitude regulations as mentioned above indicate the impracticability of premising the right of flight thereon insofar as the interests of underlying landowners are concerned. An airplane flown for one purpose could under such a test fly lawfully at an altitude at which it would be unlawful for another

airplane to fly, yet both would have relatively the same effect with respect to underlying property. At extremely low altitudes, particularly with reference to taking-off and landing, the regulations do not attempt to define precisely the minimum heights permitted. In each such case the circumstances surrounding the flight must control, and this is the view—as we have suggested—that should be recognized in the proposed Uniform Law of Airflight with respect to flights at all altitudes.

The minimum safe altitude regulations not only vary according to conditions but bear very little relationship to the correlative rights of flight and the rights of owners of underlying land. The lack of relationship was recognized by the court in the *Swetland* case, *supra*, as previously noted herein, in the following language:

“We think the question is unaffected by the regulations promulgated by the Department of Commerce, under the Air Commerce Act of 1926 (49 U. S. C. A. Sec. 71 *et seq.*), and adopted by the State of Ohio, requiring aeronauts to fly in rural sections at a height not less than 500 feet above the surface, for in our view that regulation does not determine the rights of the surface owners, either as to trespass or nuisance.” (55 Fed. (2d) 201, 203.)

Minimum safe altitude regulations should not be used to measure the correlative rights of flight and the ownership of land because such regulations are promulgated primarily with a view to safety in aircraft operation and not for the purpose of defining the rights of surface owners. This is indicated by the following provision of the Air Commerce Act of 1926 (49 U. S. C. 173 (e)):

“The Secretary of Commerce shall by regulation—\* \* \* establish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft.”

There are very good reasons for requiring airplanes to operate above prescribed minimum altitudes. As long as an airplane is not in the close proximity to the ground or ground structures or other aircraft and is proceeding under proper control no harm is likely to result to anyone. But, should there be a motor failure requiring an immediate forced landing, the pilot will have more time and a larger area within which to land if he is flying high than if he is flying low. The reason for this is that without power but with control of his airplane otherwise, a pilot can glide in any direction or directions at a theoretical rate of descent in calm air at sea level of one foot for every seven feet of lateral travel. If he is 1,000 feet above the ground he can reach a point as far

away as 7,000 feet, and can possibly turn as much as 360 degrees in seeking a landing place. If he is at 500 feet he can glide 3,500 feet and possibly turn as much as 180 degrees. If he is at 100 feet he can glide 700 feet but can make only a very slight turn and possibly none at all. Therefore, the higher he is, the less likelihood of injury to himself or others in cases of forced landings. It is seldom, however, that the height of flight affects land directly underlying the airplane when it commences a forced landing; it will normally land elsewhere, particularly if it is flying low, because of the necessity of descending at an angle as described above.

Inasmuch as regulations relating to minimum altitudes of flight are promulgated under laws containing enforcement provisions, it is unnecessary to prescribe the lawfulness or unlawfulness of flights below such altitudes; and since such regulations vary under differing conditions of flight, are promulgated primarily with a view to safety in aircraft operation, and bear no necessary relationship to the reasonableness of flights over private property, Section 2 (b) should be eliminated from the proposed Uniform Law of Airflight.

Section 2 (d) provides in part that flight is lawful unless so conducted "as to constitute a substantial interference with the then existing use and enjoyment of the land." This provision unduly restricts lawfulness of flight because it does not take into consideration the reasonableness or unreasonableness of interference with the use of property on the ground. It does not recognize that conveniences should be balanced to the end that only those flights which unreasonably interfere with proper use of surface property should be held to be unlawful. As above pointed out, this is the rule that has been applied by the courts and represents a social policy as they have determined it. We see no reason for a legislative alteration in that policy. Accordingly, we suggest that the words "a substantial interference" in Section 2 (d) be changed to "an unreasonable interference," and in order to discourage the erection of unnecessary and "spite fence" obstructions to lawful flights, such as were involved in the *Tucker* and *Von Bestecki* cases, *supra*, the words "the then existing use" should be changed to "an existing and proper use."

The last part of Section 2 (d) reading "unless so conducted as to \* \* \* adversely affect the then existing value of the land," would encourage litigation and unfounded claims against operators of aircraft. It would not be difficult for land-owners to produce witnesses who would testify that flights even at altitudes of a thou-

sand feet or more adversely affected the value of particular land flown over.

In dealing with alleged nuisances, courts generally have held that diminution in the value of property is not alone sufficient to warrant injunctive relief. (*Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S. W. (2d) 776, 786; *Dallas Land & Loan Co. v. Garrett*, Tex. Civil Appeals, 276 S. W. 471, 474; *Rouse & Smith v. Martin & Flowers*, 75 Ala. 510, 515.) In the latter case, the Court said:

"The law is settled, on sound reasons, that the mere fact of the diminution of the value of complainant's property, or the increased risks from hazard of fire, occasioned by a structure erected by a defendant upon a lot adjoining the complainant's premises, without more, is unavailing as a ground of equitable relief.—2 Story's Eq. Jur. §925; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; 1 High on Inj. §788; Wood on Nuis. §511. This is one of the many risks and discomforts naturally incident to town or city life, which persons of prudence can not fail to reasonably anticipate.—*Ray v. Lynes*, 10 Ala. 63."

Evidence of diminution in value of property may be considered in determining whether a nuisance exists (*Conway v. Gampel*, 235 Mich. 511, 209 N. W. 562), but it should not be a sole test as to the lawfulness of flight. Therefore, the concluding clause of Section 2 (d), making the lawfulness of flight dependent upon the effect on land values, should be eliminated.

We have suggested the elimination of Sections 2 (a) and 2 (b) and the revision of Section 2 (d) of the proposed Uniform Law of Airflight. We appreciate, however, the desirability of legislation on this subject as an aid to the courts in determining correlative rights of operators of aircraft and landowners and to this end we suggest that Section 2 be revised to read:

"2. Lawfulness of Flight. Flight of aircraft, including taking off and landing at regularly established airports and landing places in this State is lawful, unless so conducted as to involve a substantial risk of harm to individuals or property on the land, or as to constitute an unreasonable interference with an existing and proper use and enjoyment of the land or structures on the land or space over the land."

**B. Unlawful Flight and Unlawful Acts During Flight, Section 3, Page 25, Lines 1 to 20.**

"It shall be unlawful:

"(a) For any person to operate an aircraft either on or over land in this state without the consent of the owner of such aircraft; or

"(b) For any individual while under the influence of intoxicating

liquor or of any drug, to operate or attempt to operate any aircraft either on or over the land of this state; or

"(c) For any person to carry on or over land in this state in an aircraft, other than public aircraft, without a special permit from the state (Aeronautical Commission), any explosive substance except such as may be reasonably necessary for the operation of the aircraft itself; or

"(d) For any person other than a peace officer or a member of the military or naval forces of the United States or of this state, in the performance of his duty, to discharge a gun, pistol or other weapon in or from any aircraft on or over the land of this state."

Section 3 is important not only because of the subject matter, but because of the penalty of fine and imprisonment imposed by Section 4. Section 3 is therefore a criminal statute and will be subject to strict construction.

The use of the word "consent" in Section 3 (a) may raise the question of whether a person having an owner's consent to operate an airplane on a particular trip, violates the statute if he flies to a place not specifically authorized.

Section 3 (b) assumes that all drugs are bad. If there is necessarily danger in the operation of an airplane by a person who has diabetes, the prohibition should be directed against the licensing of such pilots instead of against the taking of insulin. As laymen, we assume that a diabetic pilot is safer with insulin than without it. This is a subject which relates to the qualifications of pilots and should be dealt with by regulation rather than by statute (See Section 74B of Aeronautics Bulletin No. 7).

Section 3 (c) prohibiting the transportation of explosive substances without a special State permit makes only one exception, namely, substances necessary for operation of the aircraft. The Department of Commerce regulation on this subject (Section 74B of Aeronautics Bulletin No. 7) provides:

"The transporting of any explosives other than that necessary for signaling or fuel for such aircraft while in flight, or materials for industrial and agricultural spraying (dusting) is prohibited, except upon special authority obtained from the Secretary of Commerce."

Further exceptions to the prohibition against transportation of explosives should be made to cover flares carried to illuminate the ground at night in case of emergency landings, ammunition carried by crew members and other authorized persons, and explosives such as motion picture films, which are mailable under regulations prescribed by the Postmaster General (See Sec. 588 of Postal Law and Regulations, 1932).

Section 3 (c) is ambiguous, in that it does not definitely state against whom the prohibition is directed. If a passenger on an air line carried shot-gun shells or other explosives in his suit-case without the knowledge of any employee of the air line, would the passenger or the air line, or both, be guilty of violation of the Act?

Special authority obtained from the Secretary of Commerce under the above Section 74B for transportation of explosives on an interstate trip would probably obviate the necessity of a State permit under Section 3 (c).

Section 3 (d) prohibits the discharge of a pistol while in flight, except by a "peace officer." Officials, such as marshals, constables, policemen and sheriffs, would undoubtedly come within the meaning of the term, but a doubt might arise as to public or private detectives who usually carry arms when prisoners in their custody are being transported by air. What is more important, the term "peace officer" probably would not include pilots. Scheduled air lines, and especially those transporting United States mail, usually require their pilots to carry revolvers. This practice is considered advisable not only for the protection of the United States mail, but also because of the necessity of being able to preserve order among passengers while in flight. If a pilot is compelled to discharge a revolver in self defense or to avoid a crash, he certainly should not be subjected to a risk of fine and imprisonment for so doing.

## VI. THE UNIFORM AIR JURISDICTION ACT

### A. Jurisdiction Over Contracts, Section 1, Page 27, Lines 1 to 5.

"1. All contractual and other legal relations entered into by any persons in an aircraft while in flight in this state shall have the same effect as if entered into on the land beneath."

The necessity for Section 1 is not apparent as courts would undoubtedly apply the rule stated in the absence of any statutory provision.

### B. Jurisdiction Over Torts and Crimes, Section 2, Page 27, Lines 1 to 6.

"2. All torts and crimes committed by or against an owner or operator of an aircraft or by or against a passenger or other person or on or by means of an aircraft while such aircraft is in flight in this state shall be governed by the laws of this state."

This section also appears to be unnecessary. It adds nothing to existing law and might possibly create difficulties of interpreta-

tion as to torts which are governed by the law of a State where an act takes effect instead of where committed. (See Sec. 377 and illustrations cited thereunder in the Restatement of the Law of Conflict of Laws.)

### C. Presumption as to Jurisdiction, Sec. 3, Page 27, Lines 1 to 13.

"3. (a) In the absence of proof to the contrary it shall be presumed that any act or transaction in the air, involved in any proceeding in the courts of this state, was committed or occurred in the state from which the aircraft last took off previous to such act or transaction.

(b) If it be established that at the time of the commission or occurrence of the act or transaction, the aircraft had passed the boundaries of the state from which it last took off, it shall be similarly presumed that the act or transaction was committed or occurred in the state into which it next entered, and so on from state to state."

The speed of air transportation is such that great difficulty may be encountered in proving venue of crimes in particular cases. In criminal cases in State courts it will be necessary, in prosecuting crimes committed on aircraft, to prove not only the State but in some states also the county over which the airplane was passing when the offense occurred, unless the necessity for such proof can be obviated by a valid statutory provision.

The above quoted Section 3 deals with the problem of ascertaining the State over which an airplane is flying when a crime is committed therein, and in some cases it may do more harm than good. Section 3 assumes that crimes committed in aircraft will always be discovered as soon as the airplane lands and ignores the fact that there may be a succession of landings and take-offs between the commission of a crime and its discovery.

In *State v. Buchanan*, 130 N. C. 660, 41 S. E. 107, a passenger on a train was robbed while traveling from Atlanta, Georgia, to Hamlet, North Carolina. The train traversed Georgia, South Carolina and a part of North Carolina. The passenger was asleep during the trip and did not know where the theft occurred. The defendant was indicted and tried for larceny in North Carolina and filed a plea of not guilty. The Supreme Court of North Carolina applied the rule existing in that State, that if a criminal prosecution in the state is claimed to involve a crime committed in another state, the lack of jurisdiction must be proved as a defense under a plea of not guilty (*State v. Mitchell*, 83 N. C. 674). The court said at page 107:

"If the crime was originally committed in Georgia or South Carolina,



it was not an offense against the laws of this state, and the courts here have no jurisdiction of offenses against the laws of another state. While the defendant was entitled to have this defense under the plea of not guilty, it was still a matter of defense, and the burden was upon him (*State v. Mitchell*, 83 N. C. 674); and, while this is so, he was entitled to the benefit of any evidence introduced by the state proving or tending to prove that the larceny, if committed at all, was not committed in North Carolina."

In order to apply *State v. Buchanan*, *supra*, to aviation, assume that A and B are passengers on an airplane flying from Savannah, Georgia, to Raleigh, North Carolina, making a landing and take-off at Charleston, South Carolina, enroute. Somewhere between Savannah and Raleigh, A robs B, but B does not discover the robbery until the airplane reaches Raleigh. Assume further that it is possible to prove by circumstantial evidence that A did rob B, but that there is no proof to establish the State over which the robbery took place. In such an assumed case, conviction of the defendant in North Carolina would be possible under the rule of *State v. Buchanan* if the above Section 3 were not in effect. However, if Section 3 were in effect, it would raise a presumption that the crime occurred in either South Carolina or Georgia and the defendant would escape punishment in North Carolina. If Section 3 were also in effect in South Carolina and Georgia, the statutory presumption would not aid the authorities in either jurisdiction, because there would be just as good reason to presume that the crime occurred after take-off in one State as in the other. Section 3 (a) provides that there shall be a presumption that the crime was committed in the state from which the aircraft last took off "*previous to such act or transaction*," but this presumption would not be of any help in a case where there is no proof to show whether the crime took place after the take-off in Georgia or after the take-off in South Carolina.

With the advent of sleeper airplanes, it is certainly possible that crimes may be committed on airplanes making a succession of landings and take-offs during over-night trips and will not be discovered until the airplane arrives at destination the next morning. In such cases, Section 3, which provides that the unknown factor—the place of the commission of the crime—must be ascertained to determine the particular take-off which shall fix jurisdiction, would only create confusion and might prevent a conviction that would be possible under existing law.

The proposed statutory presumption that a crime was committed "in the State" from which an airplane last took off, will be

of no assistance with respect to flights which do not take off from any state, such as flights involved in the operation of United Air Lines and Canadian Airways from Vancouver, Northwest Airlines from Winnipeg, Canadian-Colonial Airways and Boston-Maine Airways from Montreal and Pan American Airways from Honolulu, Mexicala, Tampico and points in Europe, South America and the West Indies. Nor would the statute be helpful if occasion should arise to establish the place of an act during a trip by American Airlines between Buffalo and Detroit, where practically the entire flight is over the Dominion of Canada.

The establishment of the venue of a crime committed on an airplane in a particular State, by legislative presumption does not provide a solution of the more difficult problem of establishing venue in a particular county. There are 13 States\* which have constitutional provisions that in criminal prosecutions the accused shall have the right to a jury trial in the county or district in which the offense was committed. There are eleven States\*\* in which there are constitutional guaranties of a jury trial in the county in which the offense is "alleged" to have been committed. In the remaining States other constitutional provisions simply guaranteeing the right to jury trial without specific reference to a jury of the county may be construed to require a jury trial in the county where the offense is committed (see *People v. Brock*, 149 Mich. 464, 112 N. W. 1116).

Difficulties with such constitutional provisions have been encountered in cases relating to crimes committed on trains and other conveyances, and many States have statutes designed to solve this problem as to surface carriers. The validity of such statutes has been upheld in some States and denied in others. The Iowa statute on this subject refers specifically to crimes committed on aircraft. Section 13453 of the 1935 Iowa Code provides:

"When an offense is committed within the jurisdiction of the state on any railroad car while passing over any railroad, or any boat, raft, or vessel navigating a river, lake or canal, or lying therein in the prosecution of her voyage, or in any kind of aircraft while in flight, the jurisdiction is in any county through which it passes in the course of its trip or voyage, or in the county where the trip or voyage shall begin or terminate."

The above Iowa statute (as it existed prior to an amendment to include aircraft) was applied in *Nash v. State*, 2 G. Greene (Iowa

\* Alabama, Arkansas, Florida, Indiana, Louisiana, Minnesota, Mississippi, New Hampshire, Oklahoma, Oregon, Tennessee, Wisconsin and West Virginia.

\*\* Arizona, Colorado, Illinois, Kansas, Montana, Nebraska, New Mexico, Ohio, South Dakota, Utah and Wyoming.

1849) 286, but the constitutionality of the statute was not discussed. The Iowa Constitution (Art. I, Sec. 10) does not expressly require trial by jury in a particular county, but does guarantee the right to trial by jury.

In *State v. Reese*, 112 Wash. 507, 192 Pac. 934, a watch was stolen from a passenger on an overnight railroad trip from Tacoma to Spokane. Thereafter the defendant pawned the stolen watch in Spokane and was apprehended and convicted of grand larceny in Spokane County. A Washington statute provided that the route traversed by railway trains should be criminal districts and that the jurisdiction of all public offenses committed thereon should be in any county through which the train might pass, or in which the trip might begin or terminate. The Constitution of Washington guaranteed a trial by jury of the county in which "the offense is alleged to have been committed." In holding the statute unconstitutional, the Supreme Court of Washington said:

"Under this section of the Constitution, one accused of crime has a right to be tried in the county in which the offense is alleged to have been committed. It requires no argument to show that, the offense being alleged in a particular county, the proof must show that it was committed in that county. Comparing the provisions of the statute with the requirements of the Constitution, it appears that the statute goes beyond the constitutional limitation. Under the statute the route traversed by a railway train is made a criminal district, and an offender may be prosecuted in any county in such district. Under the Constitution, he can only be prosecuted in the county where the offense has been committed."

After the decision in *Washington v. Reese, supra*, the Constitution of Washington was amended to provide that routes traversed by railway trains or public conveyances and boats shall be criminal districts.

Similar statutes were held to be unconstitutional under less definite constitutional provisions in *State v. Anderson*, 191 Mo. 134, 90 S. W. 95, and in *People v. Brock*, 149 Mich. 464, 112 N. W. 1116.

In *Watt v. The People*, 126 Ill. 9, 18 N. E. 340, an express messenger, traveling on the Chicago, Rock Island & Pacific Railway from Chicago, Illinois, to Davenport, Iowa, was murdered. The murder was committed between Joliet in Will County and Morris in Grundy County, and it was impossible to determine in which the murder was committed. The defendants were indicted and convicted in Grundy County. In upholding the conviction, the Supreme Court relied upon a provision in the Illinois Criminal Code (Ill. State Bar Stats. 1935, Chapter 38, Sec. 729), providing that if it

is doubtful in which of several counties a homicide is committed, the accused may be tried in either county. The court found it unnecessary to rely upon a statute dealing specifically with crimes committed on railroads. The court said at page 16:

"Undoubtedly the right to a trial by a jury of the county in which the crime charged was committed is ordinarily a substantial and important legal right. It secures to the accused a trial among his neighbors and acquaintances, and at a place where, if innocent, he can most readily make that fact to appear. But it is difficult to see how that can be the case where the offense is committed on a railway train, and the circumstances are such that it can not be definitely located in any one of several counties through which the train passes. Those who are on the train are for the time being completely segregated from the communities through which they are rapidly passing, and there is ordinarily no circumstances which can make it more advantageous for a person accused of such crime to be tried in one county than in another. The right in such case to a trial in a particular county, if it exists at all, is at best a technical right, having no substantial importance or value to the accused.

Whenever the *locus in quo* of the offense can be precisely identified, under the provisions of the section of the statute first above quoted, the trial should of course be had in the county where it was committed, but when such is not the case a somewhat different rule must be applied or the offender can not be tried at all. When it can not be determined in which of two or more counties the criminal act was perpetrated, the offender must, *ex necessitate*, be tried in a county which can not be proved beyond a reasonable doubt to be the actual *visne* of the crime. If he can not be so tried the law is powerless to punish him. The evidence of his guilt may be ever so conclusive, but because of the impossibility of proving upon which side of an imaginary line the swiftly moving train happened to be at the instant the homicidal blow was struck, the murderer must be given complete practical immunity from all the penal consequences of this heinous offense. No court should adopt a construction of the law which would involve consequences of this character unless forced to do so by considerations which are insurmountable."

In *Watt v. The People, supra*, the Court also relied upon the fact that the Illinois Constitution of 1848 guaranteed a jury trial of the county "wherein the offense shall have been committed," whereas the Constitution of 1870 required a jury trial of the county "in which the offense *is alleged* to have been committed."

The following provision appears in the Code of Criminal Procedure, Proposed Final Draft April 1, 1930, of the American Law Institute:

"Section 249, *Offenses in or against aircraft*. Any person who commits an offense in or against any aircraft while it is in flight over this state may be tried in this state. The trial in such case may be in any county over which the aircraft passed in the course of such flight."

The weight of authority appears to be against the constitutionality of statutory provisions creating venues of criminal offenses in any county through which a conveyance operates. However, the reasoning in *Watt v. People, supra*, is persuasive, and the imperative necessity of such legislation with respect to aircraft might induce courts to uphold its validity. The greatest difficulty will exist as to cases where it is impossible to furnish proof as to either the state or county over which an airplane was passing at the time of the commission of a crime. In such cases the courts would probably be extremely reluctant to sustain a conviction obtained by invoking one statutory presumption to ascertain the State over which a crime was committed and a second statutory presumption to ascertain the county over which a crime was committed.

*Morrison v. California*, 291 U. S. 82, suggests a possible solution of the difficulty. The defendants were convicted of conspiracy to violate the California Alien Land Law, which prohibited the occupation or use of land for agricultural purposes by an alien who was neither a citizen nor eligible for naturalization, unless permitted by treaty. Section 9 (a) of the statute provided that in cases where the State proved the use or occupation of land for agricultural purposes by the defendant, the burden of proving citizenship or eligibility for citizenship should rest on the defendant. In discussing the question of whether the State could thus shift the burden of proof to the defendant, the Supreme Court said at page 88:

"The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, Secs. 2486, 2512, and cases cited."

In reversing the conviction on the ground that Section 9a did not satisfy the requirements of the foregoing rule, the Supreme Court said at page 90:

"Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation. *Yee Hem v. United States*, 268 U. S. 178, 183, 184; *Luria v.*

*United States*, 231 U. S. 9, 25; *Casey v. United States*, 276 U. S. 413, 418; *Mobile, J. K. & C. R. Co. v. Turnipseed*, 219 U. S. 35, 42, 43; *Bailey v. Alabama*, 219 U. S. 219, 233, 238; *Manley v. Georgia*, 279 U. S. 1; *People v. Cannon*, 139 N. Y. 32. 'The legislature may go a good way in raising [a presumption] or in changing the burden of proof, but there are limits.' *McFarland v. American Sugar Co.*, 241 U. S. 79, 86. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland v. American Sugar Co.*, *supra*; *Bailey v. Alabama*, *supra*; *Manley v. Georgia*, *supra*. There are, indeed, 'presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.' *Casey v. United States*, *supra*. Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance (*Yee Hem v. United States*, *supra*; *Casey v. United States*, *supra*), or, if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, Sec. 79. The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient."

In its opinion in *Morrison v. California*, 291 U. S. 82, the Court referred to the fact that Section 9 (b) of the same California law was before the Court in *Morrison v. California*, 288 U. S. 591, where an appeal was dismissed for want of a substantial federal question upon a statement as to jurisdiction. In its opinion in 291 U. S., the Court at page 87 explained the ground of its former ruling:

"This court in *Morrison v. California*, 288 U. S. 591, passed upon a controversy as to the validity of Section 9b of the California Land Law, which, though akin to Section 9a, has important elements of difference. This section (9b) provides in substance that, when it has been proved that the defendant has been in the use or occupation of real property, and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense. We sustained that enactment when challenged as invalid under the Fourteenth Amendment of the federal constitution. The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within

a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him."

Therefore, Section 9 (a) of the California law, providing that a mere allegation of alienage and ineligibility to citizenship should shift the burden of proof to the defendant, was held invalid, but Section 9(b), providing that the burden of proof should shift only after proof by the State that the defendant was a member of a race ineligible for citizenship, was held valid.

We suggest the following as a statutory provision within the rule of *Morrison v. California*:

"In any civil or criminal proceeding in this state relating to any crime or tort committed in an aircraft operated over two or more counties of this state or over this state and any other state, proof by the state or the plaintiff that the defendant in such proceeding had the means and opportunity to commit such crime or tort while said aircraft was in flight over this state, shall be sufficient to establish the venue of such crime or tort in the county charged by the indictment, information or other pleading by which such proceeding was instituted, unless the defendant shall prove as a defense that said crime or tort was not committed while said aircraft was in flight over said county."

It is our opinion that such a statutory provision would be upheld under the Federal Constitution. We are further of the opinion that it would probably be upheld against attacks based on State constitutional provisions to the effect that the defendant in criminal proceedings shall have the right to a jury trial in the county where the offense was committed.

It may be suggested that such a statute would violate limitations on State jurisdiction, as stated in the Restatement of the Law of Conflict of Laws at Sections 425, 427 and 428.

"425. Except as stated in Section 426 [jurisdiction to punish for an act of a national], a state has no jurisdiction to make an act or event a crime if the act is done or the event happens outside its territory.

427. No state will punish a violation of the criminal law of another state.

428. The law of a state determines whether an act done or event caused to happen within the state is a crime."

It is our opinion that the foregoing limitations as to State jurisdiction would not prevent operation of the statutory provision suggested in cases where it should be given effect. In such cases

there will be some proof of venue, plus a legislative presumption and the absence of adequate proof to establish that the tort or crime was committed elsewhere than in the county charged in the indictment. The statute might cause inconvenience and hardships to defendants in particular cases, but the problem is one of balancing conveniences and courts would probably apply the general rule that in order to make its regulation effective a State may cause hardship to perfectly innocent parties (*Rupert v. Caffey*, 251 U. S. 264; *Purity Extract Company v. Lynch*, 226 U. S. 192; *Silz v. Hesterberg*, 211 U. S. 231).

There are a number of objections which can be made to the statutory provision we have suggested. It is confined to crimes and torts and is not as broad as proposed Section 3, which deals with "any act or transaction in the air." Furthermore, the provision we have suggested is limited to crimes or torts "committed in an aircraft," and in a criminal case this language might impose on the prosecution the burden of proving that the crime was in fact committed in an aircraft. In cases of robbery occurring at some unknown point between point of departure and destination, it might be impossible to establish whether a theft from a passenger occurred in the airplane or at a stop where the passenger temporarily left the airplane.

The foregoing statutory provision, in so far as it relates to counties, would not be necessary or appropriate in States which do not require that the venue of crimes be laid in any particular county.

The greatest difficulty in establishing venue with respect to acts committed on airplanes while in flight may be expected to occur with respect to crimes such as robbery, which may not be discovered until a substantial time after the event occurs. In cases of torts and crimes involving violence, it usually will be possible either to produce eye witnesses as to the occurrence of the event or other testimony, such as the probable time at which death occurred, to establish venue. This anticipated difficulty with respect to robbery and similar crimes might be solved as to interstate trips by federal legislation. Section 409 of Title 18 of the United States Code provides in part:

"Whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, or from any passenger or from the possession of any passenger while on or in such passenger car, sleeping car, or dining car, when such car is a part of a train moving from one State or Territory or the District of Columbia, to another State or Territory or the District of



Columbia or to a foreign country or from a foreign country to any State or Territory or the District of Columbia, any money, baggage, goods or chattels, or who shall buy, receive, or have in his possession any such money, baggage, goods or chattels, knowing the same to have been stolen, shall in each case be fined not more than \$5000 or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed or in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels."

Section 410 of Title 18 of the United States Code provides that the above Section 409 shall not impair the jurisdiction of State courts and that a conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under Section 409.

In view of the fact that the greatest practical difficulties as to venue are apt to be encountered on interstate trips, we suggest that an amendment of the above federal statute to cover aircraft would be desirable.

Respectfully submitted,

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*September 3, 1937.*

## APPENDIX

### AN ACT

#### UNIFORM AVIATION LIABILITY ACT

Defining the liability of the owners and operators of aircraft for injury or damage inflicted thereby to persons or property; and to make uniform the law with reference thereto.

Be it enacted, etc.

§ 1. DEFINITIONS. Unless the context indicates a contrary intention, when used in this act:

(a) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(b) "Land" means the surface of the earth, and includes both ground and water.

(c) "Operator" means the individual (ordinarily the pilot) who is in direct physical control of the movement of aircraft during or incidental to flight.

(d) "Owner" means the person whose consent is necessary for the operation of an aircraft. The person in whose name an aircraft is registered with the Department of Commerce of the United States shall be prima facie the owner thereof. Unless he is the person actually causing the aircraft to be operated, the holder of the title shall not be deemed the owner during a bona fide lease or bailment to another, nor shall a mortgagee, conditional seller, trustee for creditors, or other person having a security title only, be deemed the owner. A person shall not be deemed the owner if the aircraft has been taken from his possession without his consent or acquiescence.

(e) "Passenger" means any individual in, on or boarding an aircraft for the purpose of riding therein or alighting from the aircraft following a flight or attempted flight therein excluding, however, any individual operating the aircraft as a pilot or serving as a member of the crew of the aircraft.

(f) "Person" means any individual or any corporation or other association of individuals.

(g) "Personal representative" means executor, administrator, dependent, guardian, or any other person entitled by statute to maintain an action for another's injury or death, or entitled, either at common law or by statute, to recover for damage to another's property.

(h) "Public aircraft" means an aircraft owned or operated by the government of a foreign nation, of the United States, of the District of Columbia, or any state, territory, or insular possession of the United States, while in use for an essentially governmental purpose.

(i) Unless the context indicates a contrary intention, the singular shall include the plural and the masculine gender shall include the feminine and neuter genders.

## § 2. LIABILITY FOR INJURIES TO INDIVIDUALS AND PROPERTY ON THE LAND.

(a) For injuries within this state to individuals or property on the land, the owner of any aircraft, except a public aircraft, shall be liable, regardless of negligence, to those, or to the personal representatives of those, injured in person or property, by the ascent or descent or attempt to ascend or flight or other movement of an aircraft, or by the falling or dropping of any object therefrom, unless the injury was caused by the wilful misconduct of the party injured in person or property, as follows:

(1) For personal injury or death, to the extent of the actual damage, but not exceeding ten thousand dollars (\$10,000) for injury to or death of any one individual, and not exceeding maximum amounts, varying according to the horsepower of the aircraft, for injury to or death of any number of individuals in any one accident, as follows:

<i>Horsepower</i>	<i>Maximum Amount</i>
200 or less.....	\$ 20,000
201 to 300.....	30,000
301 to 500.....	50,000
501 to 900.....	90,000
901 or more.....	100,000

(2) For property damage, to the extent of the actual damage, but not exceeding five dollars (\$5.00) for each pound of the weight of the aircraft

fully loaded, and not exceeding a maximum of one hundred thousand dollars (\$100,000).

(3) For the purposes of this Section, the horsepower or weight fully loaded of an aircraft as stated in the application for registration filed with the Bureau of Air Commerce of the Government of the United States shall be conclusive; and a photostatic copy, duly certified, of such application shall be received in evidence in the courts of this state. In order to limit his liability under this Section, the burden of proving the horsepower or the weight fully loaded of an aircraft shall be upon the owner thereof.

(b) This Section shall not impose liability for injuries to or death of passengers, or of employees of the owner of the aircraft, or for loss of or damage to baggage, personal effects or goods on the aircraft at the time of or immediately prior to the accident.

(c) Any person or his personal representative may elect, notwithstanding the provisions of this Section, to seek to recover from the owner of an aircraft for negligence resulting in injury to individuals or property on the land, but in any proceeding to impose liability otherwise than under this Section such person or his personal representative must prove affirmatively the cause of the accident and that it was caused by the negligence of the owner or of his agent.

§ 3. LIABILITY FOR INJURY TO OR DEATH OF PASSENGERS—AIRCRAFT CARRYING PASSENGERS FOR COMPENSATION. (a) Except as provided in Subsection (b) of this Section, the owner of aircraft carrying passengers for compensation shall be liable, regardless of negligence, in the following amounts, for injury within this state to a passenger or death resulting therefrom, from any cause, unless the injury or death shall be shown to have been caused by the wilfull misconduct of the passenger who or whose personal representative is making claim; and a passenger or his personal representative shall be limited in recovery, to the following amounts:

For death, permanent total disability, the total and permanent loss of the sight of both eyes, or permanent loss of the use of both hands or permanent loss of the use of both feet, or permanent loss of the use of one hand and one foot, or permanent loss of the use of one hand and the total and permanent loss of the sight of one eye, or permanent loss of the use of one foot and the total and permanent loss of the sight of one eye, ten thousand dollars (\$10,000);

For permanent loss of the use of one hand, five thousand dollars (\$5,000);

For permanent loss of the use of one foot, five thousand dollars (\$5,000);

For the total and permanent loss of the sight of one eye, three thousand dollars (\$3,000);

For temporary total disability or permanent or temporary partial disability, or disfigurement or any other injury except those occasioned by the loss of members or sight as previously specified, the injured party's actual loss not exceeding five thousand dollars (\$5,000).

(b) Any owner of an aircraft carrying passengers for compensation through or within this state may elect to establish a higher schedule of liabilities for injury or death which may vary according to the rate of compensation paid, and in such event the owner shall be liable, regardless of negligence, in the amounts stipulated in such schedule according to the

higher rate paid; but any agreement to lessen the liabilities imposed by this Section shall be void as applied to injuries within this state or death resulting therefrom.

(c) Any owner of an aircraft who has established a higher schedule of liabilities as provided in the preceding subsection, shall keep a record of the name and address of every passenger who pays a rate imposing liabilities exceeding those specified in this Section, and shall furnish to every such passenger written or printed evidence of the payment of such rate. Such record shall be open to public inspection and the original or a photostatic copy thereof shall be received in evidence in any action brought in this state to recover under this Section.

§ 4. LIABILITY FOR INJURY TO OR DEATH OF PASSENGERS—AIRCRAFT NOT CARRYING PASSENGERS FOR COMPENSATION. The owner of aircraft not carrying passengers for compensation shall be liable for injury within this state to a passenger or death resulting therefrom, from any cause incident to the operation of aircraft, if such injury or death was caused by the negligence of the owner or his agent, to the extent, if any, to which the owner of an automobile is liable for injury within this state to a passenger not for compensation or death resulting therefrom.

§ 5. LIABILITY FOR BAGGAGE, PERSONAL EFFECTS AND GOODS. (a) Before the commencement of flight, the owner of aircraft carrying passengers or goods for compensation, shall provide the passenger or the shipper of goods with a blank upon which the passenger or shipper of goods shall specify in writing the actual value of the passenger's baggage and the clothing and other effects on his person, or the shipper's goods, and the passenger or shipper shall not thereafter be permitted to claim that the baggage, personal effects or goods were of a higher value.

(b) The owner of the aircraft may refuse to carry any passenger unless the passenger specifies in writing on the form supplied to him for the purpose, the actual value of his baggage and of the clothing and other effects on his person; and the owner of the aircraft may refuse to carry goods unless the shipper similarly specifies the actual value thereof.

(c) Upon the failure of the owner to obtain from the passenger or shipper a specification in writing of the value of the baggage, personal effects or goods, there shall be no limitation upon the right of the passenger or shipper to prove the actual value of the baggage, personal effects or goods.

(d) The owner of aircraft may establish and collect rates varying according to the value of baggage, personal effects or goods, as specified in writing by the passenger or shipper, the minimum rate being based upon baggage, personal effects or goods of the value of one hundred dollars (\$100).

(e) For loss of or damage to baggage, personal effects or goods, the owner of aircraft shall be liable, regardless of negligence, in the amount of the loss actually proved by the person entitled to collect damages, but not exceeding the value specified.

(f) For delay in the delivery of baggage or goods, the owner of aircraft shall be liable for negligence, to the person entitled to collect damages, to the extent of the actual loss, not exceeding the value specified.

§ 6. COLLISION OF AIRCRAFT. (a) Except as otherwise in this Section provided, the liability of the owner or the operator of one aircraft to the owner, operator or passenger of another aircraft or his personal representative, for damage, injury or death caused by collision within this state on land or in the air, or to the owner or shipper of goods on another aircraft, damaged or destroyed by such collision, shall be determined by the rules of law applicable to collisions on land.

(b) If a collision within this state is due to negligence of two or more aircraft involved therein, the liability of the owner of each aircraft for damages caused to another aircraft, or to goods on another aircraft, or to individuals and property on the land, shall be in proportion to the degree of negligence shown; but if such proportion cannot be established, or if the degrees of negligence appear to be equal, the liability shall be shared equally.

(c) The owner of each aircraft carrying passengers for compensation involved in a collision within this state, shall be liable for injuries to or death of his own passengers in accordance with the provisions of this act relating to liability to passengers, but such owner may proceed against the owner of any other aircraft involved in the collision, for negligence, to recover the amounts paid to his passengers. His recovery in such case shall be in proportion to the degree of negligence shown, as in the preceding subsection.

(d) In a suit by such owner's passenger or his personal representative against the owner or operator of another aircraft to recover damages for personal injury or death, it shall be necessary for the plaintiff to prove negligence; negligence shall not be presumed from the happening of the accident; and in the event of a recovery, the defendant shall be credited on account of the judgment against him with the amount, if any, paid or payable under the provisions of this act to the passenger or his personal representative by the owner of the passenger's aircraft.

(e) This Section shall not require any plaintiff to proceed against the owners of colliding aircraft jointly, but if he proceeds against the owner of only one aircraft such owner may bring an action for contribution, in accordance with the provisions of this Section, against any or all of the other aircraft involved in the collision.

§ 7. ASSUMPTION OF LIABILITY. No owner shall operate or permit to be operated, an aircraft, except a public aircraft, over land in this state unless such owner assumes the liabilities imposed by this act; and assumption on the part of the owner of such liabilities shall be conclusively presumed from the fact of flight over the land of this state.

§ 8. SERVICE OF PROCESS ON NON-RESIDENTS. Every non-resident owner or operator of an aircraft is conclusively presumed by the fact of flight over land in this state to have constituted the [Secretary of State] his agent for the service of process in any action brought against him by any person to recover for injury, death or damage resulting from such flight within this state. But such service shall not be complete until the plaintiff shall have filed with the [Secretary of State] an affidavit that he has mailed to the registered owner of the aircraft at the address stated in the owner's registration a notice, of which a copy shall be attached, that suit has been instituted and that process is being served upon the [Secretary of State].

§ 9. PROCEDURE FOR ENFORCING LIABILITY REGARDLESS OF NEGLIGENCE FOR INJURIES TO PERSONS AND PROPERTY ON THE LAND. (a) The liability regardless of negligence imposed by this act for injuries to individuals and property on the land shall be enforceable only in an action instituted in the court, within the time, and in the manner, hereinafter in this Section specified.

(b) Unless all claims have been sooner settled, within sixty (60) days after the happening of any accident resulting in injury within this state to an individual or property on the land, the owner of the aircraft involved in such accident shall file in the court of [common pleas] of the [county] in which the accident happened, a statement setting forth the time and place of the accident, the name of his insurer, and the names and addresses, as far as he has been able to ascertain them, of the persons injured in person or in property, excluding passengers and employees of the owner on the aircraft at the time of the accident. A copy of the owner's insurance policy shall be attached to such statement.

(c) If the owner fails to file the statement as required by the preceding Subsection, any person injured in person or property on the land, as the result of such accident, may file such statement, but he shall not be required to attach thereto a copy of the owner's insurance policy.

(d) Upon the filing of the statement the court shall issue its summons in the names of the persons injured in person or in property or their personal representatives, as plaintiffs, and the owner and his insurer, as defendants, returnable as usual.

(e) The summons shall be served by the [sheriff] upon all plaintiffs and defendants, but inability to obtain service upon the owner's insurer or any other party shall not prevent the case from proceeding.

(f) Contemporaneously with the issuance of the summons, the court shall direct the publication by the [clerk] of an advertisement, notifying all persons, except passengers and employees of the owner, having claims against the owner for injuries to individuals or property on the land, arising out of the accident involved in the case, within forty-five (45) days to intervene as parties plaintiff.

(g) Not later than sixty (60) days after the first publication of such advertisement, every party plaintiff shall file with the court his statement of damage, and not later than seventy-five (75) days after such first publication the defendants may file answers. Thereafter the practice and procedure shall, except as herein otherwise provided, be the same as in an action for damages for negligence.

(h) Any party plaintiff may within the time allowed by this Section for filing his statement of damage, but not afterwards, give notice in such statement that he elects not to participate in any recovery in the action but to seek to recover for negligence in another action. Such party shall thereafter be precluded from any recovery in the action brought hereunder, but the court shall nevertheless proceed to assess the amount of damages which such party sustained.

(i) If the aggregate of all verdicts rendered against the owner, and of damages assessed by the court under the preceding Subsection, exceeds the aggregate of the owner's liability regardless of negligence, as limited by this act, the court shall reduce the verdicts and assessments of damage pro rata, to an aggregate amount equal to the owner's maximum liability.

(j) The owner or his insurer shall pay all costs of any action brought hereunder, exclusive of plaintiff's attorney's fees.

(k) Judgment may be entered as in other cases, on verdicts rendered in an action under this Section, and any party may appeal to the [Supreme] Court within the time allowed for appeals in other civil cases.

(l) Satisfaction by or on behalf of the owner, of the judgments in such proceeding shall discharge him in full from all claims for the liability regardless of negligence imposed by this act, for injuries to individuals and property on the land arising out of such accident.

§ 10. INSURANCE COMPULSORY IN CERTAIN CASES. (a) It shall be unlawful for any person to operate or to cause to permit to be operated an aircraft, except a public aircraft, either on or over the land of this state, unless the owner of such aircraft carries insurance against the liability imposed by this act regardless of negligence for injuries to individuals or property on the land.

(b) It shall be unlawful for any person to operate or cause or permit to be operated an aircraft carrying passengers for compensation either on or over the land of this state, unless the owner of such aircraft carries insurance against the liability imposed by this act regardless of negligence for injuries to or death of passengers.

(c) To comply with the requirements of this Section, a person must carry insurance written by an insurance company authorized to transact business in this state or in the state or country in which the owner of the aircraft is domiciled or in which his principal place of business is located.

(d) Every person required by this Section to carry insurance, shall carry in the aircraft which is being operated on or over the land of this state, a certificate issued by the duly authorized agent of his insurance carrier, evidencing valid insurance coverage as required by this Section.

(e) Any person who shall violate the provisions of this Section shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than one (1) year or both, in the discretion of the court.

§ 11. DISTRIBUTION OF AMOUNTS RECOVERED FOR DEATH. The distribution of amounts recovered by personal representatives under the provisions of this act, for death, shall be distributed as provided in the act approved the day of \_\_\_\_\_, one thousand \_\_\_\_\_, entitled "\_\_\_\_\_ " [the act applicable to recovery for death by wrongful act].

§ 12. CONSTITUTIONALITY. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

§ 13. UNIFORMITY OF INTERPRETATION. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 14. **SHORT TITLE.** This act may be cited as the "Uniform Aviation Liability Act."

§ 15. **REPEAL.** All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

§ 16. **EFFECTIVE DATE.** This act shall take effect [.....].

**Alternate Section 3, for Use in States in Which the Foregoing Section 3 Would be Unconstitutional Because of a Prohibition Against Legislation Limiting the Amount of Recovery for Death.**

§ 3. **LIABILITY FOR INJURY TO OR DEATH OF PASSENGERS—AIRCRAFT CARRYING PASSENGERS FOR COMPENSATION.** (a) The owner of aircraft carrying passengers for compensation may elect to be liable in the following amounts, regardless of negligence, for injury within this state to a passenger or death resulting therefrom, from any cause unless the injury or death shall be shown to have been caused by the willful negligence of the passenger who or whose personal representative is making claim:

For death, permanent total disability, the total and permanent loss of the sight of both eyes, or permanent loss of the use of both hands, or permanent loss of the use of both feet, or permanent loss of the use of one hand and one foot, or permanent loss of the use of one hand and the total and permanent loss of the sight of one eye, or permanent loss of the use of one foot and the total and permanent loss of the sight of one eye, ten thousand dollars (\$10,000);

For permanent loss of the use of one hand, five thousand dollars (\$5,000);

For permanent loss of the use of one foot, five thousand dollars (\$5,000);

For the total and permanent loss of the sight of one eye, three thousand dollars (\$3,000);

For temporary total disability or permanent or temporary partial disability, or disfigurement or any other injury except those occasioned by the loss of members or sight as previously specified, the injured party's actual loss not exceeding five thousand dollars (\$5,000).

(b) Unless the owner of an aircraft carrying passengers for compensation, notifies a passenger by a separate writing delivered to and receipted for by the passenger prior to the commencement of flight, whether flight commences within or outside of this state, that he rejects liability as heretofore specified, such owner shall be conclusively presumed to have accepted such liability for injury to the passenger within this state or death resulting therefrom.

(c) Any owner of an aircraft who carries passengers for compensation through or within this state may elect to establish a higher schedule of liabilities for injury or death which may vary according to the rate of fare paid; but any agreement to lessen the liabilities specified in Subsection (a) of this Section shall be void as applied to injuries within this state or death resulting therefrom.



(d) Any owner of an aircraft carrying passengers for compensation, who has established a higher schedule of liabilities under the preceding Subsection, shall keep a record of the name and address of every passenger who within this state pays a rate imposing liabilities exceeding those specified in this Section, and shall furnish to every such passenger written or printed evidence of the payment of such rate. Such record shall be open to public inspection and the original or a photostatic copy thereof shall be received in evidence in any action brought to recover under this Section.

(e) Any passenger of an aircraft carrying passengers for compensation may elect in lieu of his right of recovery at common law to accept for injury within this state, and to bind his personal representative to accept in case of his death resulting from such injury, the amounts heretofore in this Section specified, or the amounts provided in his contract of passage, not, however, less than those heretofore in this Section specified.

(f) Every passenger of an aircraft carrying passengers for compensation shall, unless he rejects the provisions of this Section by a writing delivered to and receipted for by the owner, prior to the commencement of flight, whether flight commences within or outside of this state, be conclusively presumed to have accepted for himself and his personal representative, the schedule of liabilities heretofore in this Section specified or such higher schedule as may be provided by his contract of passage, for injury within this state or death resulting therefrom.

(g) If any owner shall reject in the manner provided by this Section, the schedule of liabilities heretofore in this Section specified, he shall be liable for injury to or death of a passenger without regard to the limitations contained in this act; and in such case negligence shall be presumed from the mere happening of the accident and the burden of proof shall rest upon the owner to show the absence of negligence.

(h) If any passenger shall reject in the manner provided in this Section, the schedule of liabilities heretofore in this Section specified, he or his personal representative may recover in an action of law for injury or death without regard to the limitations contained in this act; but in every such case it shall be necessary for the passenger or his personal representative, to prove negligence on the part of the owner; and there shall be no presumption of negligence arising from the happening of the accident.

## AN ACT

### UNIFORM LAW OF AIRFLIGHT

**Regulating Flight by Aircraft and to Make Uniform the Law with Reference Thereto.**

Be it enacted, etc.

§ 1. DEFINITIONS. Unless the context indicates a contrary intention, when used in this act: (a) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(b) "Land" means the surface of the earth, and includes both ground and water.

(c) "Person" means any individual or any corporation or other association of individuals.

(d) "Public aircraft" means an aircraft owned or operated by the government of a foreign nation, of the United States, of the District of Columbia, or of any state, territory, or insular possession of the United States, while in use for an essentially governmental purpose.

(e) Unless the context indicates a contrary intention, the singular shall include the plural and the masculine gender shall include the feminine and neuter genders.

§ 2. **LAWFULNESS OF FLIGHT.** Flight of aircraft in this state is lawful:

(a) If in compliance with the laws of this state regulating aeronautics and, as far as applicable, with such laws of the United States; and

(b) If at a height permitted by the rules, regulations or orders adopted and promulgated by the state [Aeronautical Commission], and the applicable rules of the Department of Commerce of the United States; and

(c) Unless so conducted as to involve a substantial risk of harm to individuals or property on the land; or

(d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land or adversely affect the then existing value of the land and structures thereon.

§ 3. **UNLAWFUL FLIGHT AND UNLAWFUL ACTS DURING FLIGHT.** It shall be unlawful:

(a) For any person to operate an aircraft either on or over land in this state without the consent of the owner of such aircraft; or

(b) For any individual while under the influence of intoxicating liquor or of any drug, to operate or attempt to operate any aircraft either on or over the land of this state; or

(c) For any person to carry on or over land in this state in any aircraft, other than public aircraft, without a special permit from the state [Aeronautical Commission], any explosive substance except such as may be reasonably necessary for the operation of the aircraft itself; or

(d) For any person other than a peace officer or a member of the military or naval forces of the United States or of this state, in the performance of his duty, to discharge a gun, pistol or other weapon in or from any aircraft on or over the land of this state.

§ 4. **PENALTIES.** Any person who shall violate any of the provisions of Section 3 of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than one (1) year or both, in the discretion of the court.

§ 5. **CONSTITUTIONALITY.** If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

§ 6. **UNIFORMITY OF INTERPRETATION.** This act shall be so interpreted

and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 7. **SHORT TITLE.** This act may be cited as the "Uniform Law of Airflight."

§ 8. **REPEAL.** All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

§ 9. **EFFECTIVE DATE.** This act shall take effect [ . . . ]

## AN ACT

### UNIFORM AIR JURISDICTION ACT

#### Relating to Jurisdiction Over Acts and Transactions in the Air.

Be it enacted, etc.

§ 1. **JURISDICTION OVER CONTRACTS.** All contractual and other legal relations entered into by any persons in an aircraft while in flight in this state shall have the same effect as if entered into on the land beneath.

§ 2. **JURISDICTION OVER TORTS AND CRIMES.** All torts and crimes committed by or against an owner or operator of an aircraft or by or against a passenger or other person or on or by means of an aircraft while such aircraft is in flight in this state shall be governed by the laws of this state.

§ 3. **PRESUMPTION AS TO JURISDICTION.** (a) In the absence of proof to the contrary it shall be presumed that any act or transaction in the air, involved in any proceeding in the courts of this state, was committed or occurred in the state from which the aircraft last took off previous to such act or transaction.

(b) If it be established that at the time of the commission or occurrence of the act or transaction, the aircraft had passed the boundaries of the state from which it last took off, it shall be similarly presumed that the act or transaction was committed or occurred in the state into which it next entered, and so on from state to state.

§ 4. **UNIFORMITY OF INTERPRETATION.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 5. **CONSTITUTIONALITY.** If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

§ 6. **SHORT TITLE.** This act may be cited as the "Uniform Air Jurisdiction Act."

§ 7. **REPEAL.** All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

§ 8. **EFFECTIVE DATE.** This act shall take effect [ . . . ]