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CIVIL AVIATION—THE RELATIVE SCOPE OF JURISDICTION OF THE STATE AND FEDERAL GOVERNMENT

By MRS. ROYAL B. BINZER*

INTRODUCTION

The law of aviation, while becoming highly specialized, is closely related to other fields of law. Laws govern human conduct. Flying is one of man's most complex activities, and the conduct he displays therein affects his other activities, civil, military, municipal, federal, international—all various fields of law.

This paper is a study of the jurisdictional spheres of the several states and the Federal government. Today the trend seems to be toward greater, almost exclusive power of the Federal government, but in order to understand this trend one must go back to the early days of aviation and follow through the legislative development.

HISTORICAL BACKGROUND OF AERONAUTICS

In modern times, many pioneer experimenters have endeavored to develop powered flight. One of the earliest, Sir George Cayley (1809-10), wrote of his plans to develop dynamic flight on a scientific basis. By the end of the 19th century, there were two distinct schools of thought—the exponents of gliding flight, including Otto Lilienthal, Octave Chanute and J. J. Montgomery, and the second school, which sought to develop powered flight. This group was led by Clement Ader, Sir Hiram Stevens Maxim and Samuel Pierpont Langley. Clement Ader was the first to construct an airplane that would carry a man, but when experiments failed, the French government withdrew its support.

The Wright brothers, Orville and Wilbur, after studying all the then known theories of flight, finally achieved the first powered flight of a heavier-than-air machine on December 17, 1903.

During World War I, knowledge of aeronautics was confined to the military types of planes. This brought about the

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development of armored bodies (prior to that time planes were of wood construction), but it was not until Fokker exhibited his welded steel fuselage in 1922 that metal construction came to the fore in America. The use of metal has fostered the rapid growth of aviation because of its safety and durability.¹

After the war, the first aerial passenger lines began to be established on several routes, and in 1917 aerial mail service was inaugurated. The Atlantic was crossed in a non-stop flight in 1919, and in 1923 American Army officers made the first non-stop coast to coast flight from Mineola, Long Island, to San Diego, California. In 1924, American Army officers flew around the world. In 1927, Charles Lindbergh flew a non-stop solo flight from New York to Paris and the world recognized that aviation had become an established fact.

Comparative figures of speed and distance show an interesting picture: the Wright's long distance record was 77.5 miles; in 1933 Codor and Rosie flew non-stop from New York to Rayak, Syria, a distance of 5,653 miles; Wright's maximum speed was 30 m.p.h.; today's maximum speed of military planes is, of course, a military secret, but in 1934 a sea plane established a record of 440 m.p.h., and a few days ago, two planes flew from coast to coast in approximately six hours. Commercial air lines have already set up schedules and rates for week-end trips to spots all over the world for our post war vacations, and it must be kept in mind that this has all been developed in a space of 25 years. For while it is 40 years since the Wrights first flew at Kitty Hawk, it is only 25 years, and since the end of World War I that commercial flying and air mail service routes started.

HISTORICAL BACKGROUND OF LEGISLATION

In 1911, when flying was truly in its infancy, the Committee on Jurisprudence and Law Reform of the American Bar Association was offered a resolution by Judge Simeon E. Baldwin,² which contained the following points: (1) that no one ought to be allowed to fly without having passed an examination given by some public authority, nor without having filed some

¹ Today with the development of plywood construction, wooden fuselages are becoming more practical and widely used even in military planes, such as the "Mosquitoes."

² American Bar Assn. Report, 380 et seq.; see also Baldwin, *Liability in Aerial Navigation* (1910) 9 MICH. L. R. 20.

bond to answer for any damage he might inflict; (2) that each state should regulate this testing and bonding by statute in respect to intrastate traffic and as respecting police regulation of all flights over its territory; (3) that Congress, under its commerce powers, should regulate interstate and foreign air traffic.

The Committee refused to recommend adoption of the resolution on the basis that the policy of the Association "is not to propose legislation unless it is on a subject of general interest" and therefore necessary. Commerce by air, at that time, had not grown sufficiently to be of general interest.

Judge Baldwin, as Governor of Connecticut, persuaded his legislature to pass an air navigation bill in 1911. This was the first regulation of aviation in America.³ In 1913, Massachusetts enacted an aviation law,⁴ and in 1919⁵ passed a new law, establishing a commission to regulate the actual flying.

In 1913 Senator Penrose and Congressman Vare introduced companion bills⁶ for regulation of all flight everywhere by the Federal government. These were not passed.

The increasing tendency toward piecemeal state legislation grew apace in 1917-1919. Several states passed such statutes, among them being California, New York, Texas, Washington and Wisconsin.

In September, 1919, the Conference of Bar Association Delegates⁷ adopted a resolution on motion of Mr. William V. Rooker which stated that "aeronautics should properly lie within the admiralty jurisdiction, that a committee representing each state be appointed to make further inquiry into the question; . . . that the proper communication be made to the Congress of the United States and appropriate legislation extending remedies to the aggrieved at common law may be enacted."

The Committee was appointed and submitted two reports, January 5, 1920, and July 1, 1920, in which Federal legislation upon aviation under the admiralty power was strongly urged. Hydroplanes had been classed as "vessels" by the Department

³ Gen. Statutes 1919, Chapter 176, Secs. 3107-3117.

⁴ L. 1913, Chapter 663.

⁵ Gen. Acts 1919, Chapter 306.

⁶ S. 1295 and H. R. 3916.

⁷ 6 American Bar Assn. Journal 42, January, 1920.

of Commerce⁸ and so subjected to Federal water navigation laws.

During all this time there had been an unofficial regulation of aviation by the Aero Club of America which had examined and licensed a large number of balloonists and aviators.

An act of Congress, approved March 3, 1915, had established a National Advisory Committee for Aeronautics, with twelve members, representatives of the Army, Navy and scientific men, but there was no member especially qualified to pass upon legal questions. This committee had given several annual reports.⁹

During World War I, a presidential proclamation forbade flying in the war zone of the United States without a license from the joint Army and Navy Board.¹⁰ The whole of the United States, its territorial waters, insular possessions and the Panama Canal Zone were designated as the zone of military operations.¹¹

A Federal bill was introduced by the government authorities in 1919,¹² prohibiting civil interstate or international flying without a license from the Secretary of Commerce. The bill was not pressed due to the desire to await the report of the International Aeronautic Commission, then sitting in Paris.

Since that date a number of unsuccessful bills have been introduced in Congress, including one by Mr. Cordell Hull, which provided for the Department of Aeronautics.¹³ These bills all attacked the problem from different angles and views.

On May 20, 1926, the Air Commerce Act was passed. This was the first Federal legislation on aeronautics. Several amendments and corrections were added from time to time, and

⁸ Opinion of Solicitor for Department of Commerce, February 17, 1914.

⁹ The report for 1921 urged Federal legislation: ". . . is of the opinion that state legislation should follow and be in accordance with national legislation on the subject of air navigation and for this reason believes it would be wise for the various states to withhold independent action, pending the enactment of Federal legislation on the subject." No action developed from this. Law Memoranda on Civil Aeronautics, Legislative History of Air Commerce Act, pp. 81-82.

¹⁰ WOODHOUSE, TEXTBOOK OF AERIAL LAWS (1920) p. 141.

¹¹ Today the restrictions are contrastingly lighter; civilian flying has continued except in coastal areas and over certain designated military areas.

¹² WOODHOUSE, TEXTBOOK OF AERIAL LAWS (1920) p. 89.

¹³ January 29, 1920, H.R. 12134; Winslow Bill 1925, H.R. 13715.

in 1938 the Civil Aeronautics Act was passed enlarging the Federal powers. There is now pending the Lea Bill, which is causing considerable debate because of its still greater enlargement of Federal power.

PROBLEMS TO BE SOLVED

In determining the form which the laws regulating aerial navigation should take, several fundamental problems must be solved. There are two underlying problems: (1) Can there be private property rights in the air? and (2) Who has sovereignty of the air? Then the constitutional problems: (1) The basis of the Federal power; (2) The extent of the Federal power; and (3) The extent of the state power.

PRIVATE PROPERTY IN AIR SPACE

The property of the individual and the sovereignty of the state are two distinct concepts.¹⁴

The three essential attributes of property are: (1) The right to use and control; (2) The right to enjoy and receive the income; and (3) The right to alienate and dispose.¹⁵ These attributes result from the ability of man to take physical possession of land. The earth has that characteristic, while air, from its nature, is not readily appropriated.

Does the landowner own the space above his land in the same sense that he owns the soil? That is, is he entitled to exclusive possession of such space; is he entitled to exclude others even though he would suffer no damage from their use of it?

This view of space ownership derives from the common law maxim¹⁶ "Cujus est solum ejus est usque ad coelum," derived from the Roman law and which is also found in the Code Napoleon, Sec. 552, but a qualification of it has been accepted in most continental and Latin American countries. "The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. Howsoever the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion." (That is, beyond the bounds in which the owner has effective possession or use.)

¹⁴ WESTLAKE, COLLECTED PAPERS, p. 131.

¹⁵ FIXEL, LAW OF AVIATION (1927) p. 68.

¹⁶ COKE ON LITTLETON, Sec. 4a: "he who owns the earth owns the heavens."

It is believed that "an examination of the cases will show that 'cujus est solum' is not law, but is merely a nice theory, easily passed down from medieval days, because, until recently, there was no occasion to apply it to its full extent.¹⁷ Despite the persistence of "cujus est solum," its application to the space not immediately adjacent to the soil is wanting. All the decisions are regarding intrusions into the space near the surface, where the actual use of the soil by the surface occupant was disturbed.¹⁸

It thus appears that the only rights in space which have actually been protected by the courts have been rights in space immediately adjacent to and connected with the surface. There are no decisions to the effect that it is a wrong against a landowner to interfere with the space over his land at such a height that the use of the surface is not affected in the slightest degree.¹⁹

Leading text writers agree in substance that, in the words of Pollock, "the scope of possible trespasses is limited by that of possible effective possession." Many of them have agreed that a "natural easement" or right of passage should be granted to aircraft and that flight over land at such a height as not to interfere with the use to which the land is actually put should not of itself constitute a trespass.

These questions go to the essence of aviation law. If the air space is owned absolutely by the surface owner, then all

¹⁷ Law Memoranda on Civil Aeronautics, Legislative History of Air Commerce Act (1926) p. 36.

¹⁸ In *Butler v. Frontier Telephone Co.*, 186 N.Y. 486 (1906), it was held that ejectment would lie for the space occupied by a telephone wire strung across plaintiff's land at a height of 20 or 30 feet.

In a French case (1912) aviators were held liable for flying at low heights over land, whereby animals and workmen were frightened. This was held to be an interference with the use of the surface, although there was no contact. Law Memoranda on Civil Aeronautics, p. 89.

In the case of *Guille v. Swan*, 19 Johns 381, 10 Am. Dec. 234 (1822), Guille ascended in a balloon and descended into Swan's garden, dragging over 30 feet into the vegetable plot. Over 200 people broke into the premises, ruining the gardens. The court held that, while the ascension per se, is not an unlawful act, if the descent would ordinarily draw a crowd of people from curiosity or to rescue him from a dangerous situation, he must be held responsible for the damage done.

¹⁹ POLLOCK, *TORTS* (3rd ed.) 364; SALMOND, *TORTS* 163; CHAPIN, *TORTS* 349; Baldwin, *Airship Law* (1910) 4 AM. J. INT. LAW 95; HAZELTINE, *LAW OF AIR*, Chap. 2, 194; Zollman, *Government Control of Aircraft* (1919) 53 AM. L. R. 711.

flight is a trespass and a constitutional amendment might be necessary, by which the people would give up their property rights in air space and allow an easement of passage.²⁰ Such an amendment was proposed.

Another means to accomplish the same end would be the use of the right of eminent domain, by which the state could declare that such airways were essential for the good of the general public. This method could be carried out on the analogy that airplanes are means of travel owned by private companies but serving the public. Even if the difficulty of condemning an easement through unmarkable air could be overcome, the analogy breaks down on the issue of the private flyers. The right of the private flyer to use of air space would still have to be established, or he would be constantly liable for trespass. This would be an unsatisfactory, incomplete solution.

To retain the doctrine "usque ad coelum" in its entirety would be fatal to civil aviation; but to allow unrestricted flying over private property at all altitudes would interfere with the reasonable rights of landowners, either as a trespass or a nuisance. Therefore the Committee (formulating the Civil Aeronautics Bill, 1926) recommended that the action for trespass would lie only for material damage done, and an action for nuisance should lie for damages only, and then only if a breach of flying regulations is proved. This doctrine is now accepted; the individual property owner is not the absolute owner of his superadjacent air space. This has been affirmed by both Federal statute and International agreement.²¹

²⁰ Major Johnson, in brief to Director of U. S. Air Service, p. 29.

²¹ Fed. Air Act, sec. 3.

In the *Swetland* case, *Swetland et al. v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C.C.A. 6, 1932), it was held that the act of aircraft passing over plaintiff's land at low altitude is a trespass, but the court refused the permanent injunction prayed for; "apart from the matter of state sovereignty in air space, a landowner's rights in the space above his land are not unlimited and extend only to the point of reasonable possibility of use."

See also *Smith v. New England Aircraft Co., Inc.*, 270 Mass. 54, 170 N.E. 385 (1930); 1 *Jour. AIR LAW* 338, July, 1930, in accord with this holding.

In *Thrasher v. City of Atlanta*, 17 Ga. 518, 173 S.E. 817 (1934), it is said:

"A distinction has been made between the air space up to a height to which the owner may be reasonably expected to occupy it, and that beyond *** possibility of man's occupation and dominion, although as respects the realms beyond, the owner of the land may

STATE SOVEREIGNTY

The second basic problem is the extent of exclusive control one sovereign power can exercise over air space as against other sovereign powers.

In Hall's "International Law," three views on the sovereignty in air space are given: (1) That the air is free to the circulation of all, except that subjacent states are entitled to make regulations safeguarding their territory; (2) That each state possesses the same rights of sovereignty over the air space above its territory as it possesses over the land itself, and by virtue of this sovereignty states are entitled to take such measures as they may deem necessary to prevent any visitation by foreign aircraft; (3) That the subjacent state has sovereignty restricted by a servitude of free passage for foreign aircraft.

The question of jurisdiction over torts and crimes committed in the air, and contracts made therein, comes within the bounds of this question of sovereignty of air space.

The tendency of continental jurists has been to apply the theory of extraterritoriality and provide that the legal relations between persons in the aircraft are governed by the laws of the state in which the craft is registered, not by the laws of the state flown over;²² that is, an assault committed by an Ohioan upon a New Yorker, flying over Massachusetts in a Connecticut plane, would be controlled by the laws of Connecticut.

In the United States, the natural rule is to apply the law of the subjacent state;²³ a contract made between persons flying over Illinois would be treated as made in Illinois. A crime committed during a flight naturally affects the safety of the

complain of any use tending to diminish the full enjoyment of the soil beneath."

The case of *Johnson v. Curtis Northwest Aeroplane Co.*, (Minn. 1923) (District Court), was decided on state legislation which forbade aerial acrobatics or any flight lower than 2,000 feet over a city of the first class. Here there had been a forced landing on plaintiff's land; he sought damages and a permanent injunction restraining aircraft from passing over his land. The court held that the act impliedly recognizes the rightful existence of air usurpation. Therefore no injunction was granted; if it was granted it would be a hindrance to progress.

Sec. 3, Public Act 254, 69th Congress.

Pan-American Aeronautics Federation, March, 1916, WOODHOUSE, *TEXTBOOK ON AERIAL LAW* (1920) p. 12.

²² This rule is more in accord with the first view.

²³ Second view.

state's citizens and their property, and that protection comes under the state's police power.²⁴ Under modern conditions the air space is actually within the control of the subjacent state by police aircraft and by guns.

The state itself is restricted in its sovereignty by reciprocal claims and demands upon it by the other sovereign states.²⁵ While "the domain of a state includes the land within its frontiers, the waters enclosed thereby and the atmosphere above,"²⁶ such domain is not absolute, but qualified by such demands as are made on it by the comity of foreign relations and domestic necessity.

The Uniform State Aeronautics law which was adopted by several states and territories declared, in Sec. 2, "That sovereignty in the air space above the lands and waters of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this state."

This assertion either implies (1) that the states had sovereignty over the air space above their lands and waters prior to their admission to statehood and retained that sovereignty, except as delegated to the Federal government by the Constitution, or else (2) that the states acquired such sovereignty since their admission and retained the sovereignty so acquired, except as the Constitution provided for the delegation to the Federal government.

To the former implication the answer seems clear. If the state had such sovereignty, it was because the air space had been previously acquired as a part of its domain. This is based on the second view, which is a transfer to the problem of sovereignty of the private property rule of "cujus est solum," which seems applicable under modern conditions to this phase of the problem, even though it is outmoded in private property rights.

Therefore, the second view is the soundest one on which to base sovereignty of the states with the needed reservations for

²⁴ Kuhn, *Beginnings of Aerial Law* (1910) 4 AM. J. INT. LAW 109, recommends that the state of the aviator's nationality and the state over which the crime is committed should have concurrent powers. (This could give rise to interesting problems on conflicts.)

²⁵ OPPENHEIM, *INTERNATIONAL LAW* (3rd ed. 1920) 332 ff.

²⁶ Third view.

foreign comity and domestic necessity. Our states are sovereign powers and sovereignty is a balance between two equals (two states or two countries). It would be unthinkable if the state of Michigan should decide that no plane from Indiana could fly over Michigan. However, in our system of Federal government, these needed reservations can be provided for, by the exercise of the supreme Federal power.

That is, in a question of more than local effect, the state has power only to the extent that the Federal government has not occupied the field. In such a case, it is not a question of sovereignty but the power granted to the Federal government by the Constitution.

CONSTITUTIONAL SOURCE OF FEDERAL POWER

INTRODUCTION

This problem, the Constitutional source of Federal power, has been raised in the past legislation on civil aviation, but has never been definitely answered.

The declaration in the Air Commerce Act of 1926, Sec. 6a, fails to answer the problem, for it is in respect of the international relations of the United States. The Committee report of the Committee on Interstate and Foreign Commerce of the House of Representatives on the 1926 Act states: "This section in no wise affects the sovereignty as between the several states and the United States; but only as between the United States and the rest of the world."

The Civil Aeronautics Act of 1938 did not answer this question either. In the pending Lea Bill, Title I, Sec. 4 "National Sovereignty of Air Space," is a proposed new section in which it is stated: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above these portions of the adjacent marginal high seas, bays and lakes, over which by international law, treaty, convention, or otherwise, the United States exercises national jurisdiction."

Debate on the Bill is still going on. Proponents of the Bill claim that, as set up in other articles in the Bill, it does not exclude state regulation of civil flying, other than point-to-point transportation for hire; if the state regulations are consistent

with the Federal, and if the state regulations do not burden interstate flying in any way.

Therefore, it seems that state rights prevail over the private rights of land owners, and state regulatory legislation is valid if it can be construed as applying solely to flight within the state's own domain; that is, as long as it is not in regard to a matter which is of national concern.

To decide whether or not such a proposal would be constitutional, it is necessary to go back and study the constitutional basis of the previous legislative enactments.

There was unanimity that a very important part of any code regulating aerial navigation should be concerned with protecting the occupants of the surface; that it should include registration of the craft, identification and proof of ownership, inspection of the machines, certificates of airworthiness, compulsory examination, and the examination and licensing of pilots, the restriction or prohibition of trick flying, and restricted zones, and rules of the air.

All were anxious for uniformity of legislation and wished to avoid conflicting local codes. For these reasons many writers advocated exclusive national legislation, but it remained to be seen if it were constitutionally sound.

At least four clauses of the Federal Constitution have been assigned as authority for this exclusive Federal power: (1) the Admiralty clause, (2) the war clause, (3) the Treaty-making clause, (4) the Interstate commerce clause.

1. *The Admiralty Clause*

The law of aviation is closely allied to and was considered analogous to admiralty law. In 2 C. J. 299, published in 1915, is the statement: "In the absence of express statute or international regulation by treaty, the principles and analogies of the common and maritime law must furnish the rule of decision."

Admiralty jurisdiction is essentially connected with the sea and navigable waters and with navigable things floating thereon. It does not include all water navigation, for craft operating on inland waters which have no navigable outlet and so are useful only in intrastate traffic, are not subject to courts of admiralty.²⁷

²⁷ *The Daniell Ball*, 10 Wall. 557 (1870); *Stopp v. The Clyde*, 43 Minn. 192 (1890).

In 1922, in a case based on a New York statute of 1913, which required a marine engine to have a muffler, the court held that a hydroplane was a floating structure within the meaning of that Act.²⁸ This decision was reversed in 1929.

In a case to libel an aeroplane for repairs, the court held "aeroplanes are not subjects of admiralty jurisdiction, for they are neither of the land nor sea, and not being of the sea or restricted in their activities to navigable waters, they are not maritime."²⁹

Justice Cardozo held that a hydroplane while in the air is not subject to the laws of admiralty, but while it is in the water it is so subjected.³⁰ The location and function stamp it as a means of water transportation even though that is auxiliary and a secondary function. The Treasury Department requires seaplanes to be registered, as vessels, in navigating the water; they are subject to "the rules of the road."³¹ Hydroplanes are also held to be vessels within the meaning of the Tariff Law.³²

While it is true that there are many similarities between marine and aerial navigation (the fluidity of movement in the water and air and the dependency on currents and windshifts, the necessity of anchorage, docks and airports; the necessity of guideposts, buoys and light beacons, and the strict licensing of operators), it can not be maintained that admiralty jurisdiction includes aerial navigation.

Only by maintaining that admiralty jurisdiction includes all transportation can it be rationally argued that it covers aerial navigation, which would place railroads and all land carriers under admiralty.

Congress cannot confer on agencies of the Federal government powers not granted to them by the Constitution.³³ Nor can Congress, by calling aviation law "admiralty," make it

²⁸ *People ex rel Cushing v. Smith*, 196 N.Y.S. 241 (1922).

²⁹ *Foss v. The Crawford Bros.* No. 2, 215 Fed. 269 (1914).

³⁰ *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 18 A.L.R. 1324 (1921).

³¹ Treasury Decision No. 36156.

³² Uniform State Laws of Aeronautics and Opinion of Solicitor for Department of Commerce, Feb. 7, 1914, Sec. 1.

³³ *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803).

so.³⁴ It cannot make admiralty jurisdiction broader than the judicial power may determine it to be.

2. *The War Clause*³⁵

It was the theory of some members of Congress that the power of that body to raise and regulate an Army and Navy gives the Federal Legislature the right to assume exclusive control over civil aviation.³⁶

If a supply of pilots and aircraft for war purposes could not be obtained except through civilian aviation, and if civilian aviators would not flourish except under the exclusive Federal regulation, the proponents of this line of thought would have had a stronger position. So far, neither of these suppositions seem correct. Motor transport on land is equally essential to a successful army, yet the Federal government has not felt that such control was necessary to the production of a sufficient quantity of trucks, cars and drivers. There appears to be no decision of a Federal court pertaining to this theory.

Under the Air Commerce Act of 1926, the President was authorized to provide by executive order for the setting apart and the protection of air space reservations in the United States for national defense or other governmental purposes.³⁷ (As was mentioned earlier, today's designated restricted zones have not been so all-inclusive as during World War I.) This provision is also in the Civil Aeronautics Act of 1938; in this Act, too, is the provision for the setting up and functioning of the Civilian Pilot Training program. From this, it seems that only when necessary can civilian aviation be encouraged, controlled or curtailed for national defense.³⁸

3. *The Treaty Clause*³⁹

It is well-known that the Federal government has exclusive power to make treaties with foreign governments. And it was

³⁴ Steamer *St. Lawrence*, 1 Black. (U. S. 1861) 572.

³⁵ Constitution, Art I, Sec. 3.

³⁶ Sec. 3348 Sen. New Act (1919).

³⁷ 33 C. J. 409: "In time of war, the Government may prohibit all private aircraft."

³⁸ *Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907): "The state has an interest . . . in all the earth and air within its domain, implying the power to control it as may be deemed necessary for the public welfare."

³⁹ Constitution, Article II, Sec. 2; Article I, Sec. 10.

held that where the execution of such a treaty requires Federal legislation, such legislation will be upheld even though it interferes with the internal affairs of a state, not otherwise subject to national control.⁴⁰ Some advocates⁴¹ of this theory urged that if the International Air Navigation Convention was ratified by the United States, the Federal Legislature would then be under a duty to enact laws to ensure the carrying out of that convention and could, on that ground, assume control of all aviation in the United States.

Recently Great Britain has consented to attend a New Aeronautics Convention to be held in Washington in the near future, to plan for post-war civil aviation.⁴² It will be important to follow the developments of this Convention. Under the treaty powers, the Federal government may exercise all-controlling power. That is, if there should develop a treaty with Russia for commercial flying from Moscow to Chicago, the Federal government would have the right to regulate all flying within the area of the Chicago airport.

4. *The Commerce Clause*⁴³

The Commerce Clause of the Constitution states: "The Congress shall have power to . . . regulate commerce with foreign nations and among the several states and with the Indian tribes."

Under the broad construction of this clause, two general problems remain to be solved: (1) How far does the regulating power of Congress extend? (2) What commercial regulations are left to the states?

1. *Extent of Federal Power*

In *Gibbons v. Ogden*,⁴⁴ the principle was laid down: "Commerce is traffic . . . it is intercourse. It means every species of commercial intercourse between the United States and foreign

⁴⁰ *Missouri v. Holland*, 40 Sup. Ct. 382 (1920).

⁴¹ Davis, *Laws of the Air* (1920) 4 U. S. AIR SERVICE 17; Memo, JAG Office to Sen. Spencer, December 17, 1920, H.R. 14061, printed in the Report of Nat. Adv. Committee for Aeronautics; H.R. 14137.

⁴² It was suggested that the London Radio Telegraph Convention (1912) and the Act of Congress passed to give effect to that Convention furnish an analogy (U.S. Statute 302).

⁴³ Constitution, Art. I, Sec. 8.

⁴⁴ 9 Wheat, Wheat 1 (1824).

nations, and has always been understood to comprehend navigation."⁴⁵

2. *Federal Power, Extent Over Elements*

The power of Congress to control the elements which are used in commerce, that is, waterways, air waves and ether waves, was one of the problems that had to be solved.

The Constitution does not expressly state that Congress may regulate the use of airspace—nor of the navigable waters; it is the power to regulate commerce among the states. In *The Daniell Ball*⁴⁶ the court said: "Such waters as are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel may be conducted."

Having asserted that the navigable waters are highways which are used for commerce, the courts have gone further and have asserted that Congress has full power to regulate any use of such waters.

The court held that this power under the Commerce Clause exists whether or not the particular waterway is actually used for the flow of interstate traffic if it is susceptible of such use.⁴⁷ "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements." "The point is that navigable waters are subject to national planning and control."⁴⁸

The ether waves used in communication by radio are also subject to the regulatory power. "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities . . . By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection and subject to the control of the commerce clause."⁴⁹

⁴⁵ *Pacific Mail Steamship Co. v. Jolliffe*, 2 Wall. 450 (1865). Power of Commerce extends to all the subjects of commerce and embrace traffic navigation and intercourse.

⁴⁶ 10 Wall. 557 (1870).

⁴⁷ *U. S. v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291 (1940).

⁴⁸ *Oklahoma v. Atkinson*, 313 U.S. 508, 61 S. Ct. 1050 (1941): "It is within the power of Congress to construct dams even upon streams if the condition of such stream affected the navigability of another's stream."

⁴⁹ *Fed. Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 53 S. Ct. 627 (1933).

In 1925 and again in 1926, the House Committee on Interstate and Foreign Commerce said: "The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts, what constitutes navigable or non-navigable waters."

From the holdings cited above, it is now apparent that Congress has the power to regulate the use of air space—simply because the air space is used or is susceptible of use as a medium of commerce among the states.

EXTENT OF POWER OVER INSTRUMENTALITIES.

As one of the major interests of the Federal government is to promote interstate commerce, it has power to regulate the instrumentalities of commerce. The extent of that power has been the subject of much litigation concerning rates, both interstate and intrastate, safety problems, and economic stability.

(a) Rates.

It is well established that the rates for interstate transportation may be fixed by Congress or by a Commission upon which Congress has conferred the power to do so.⁵⁰

Congress can also regulate intrastate rates in some cases, as was said in the Shreveport Rate Case:⁵¹ "Congress has complete and paramount power to regulate commerce among the several states. Where this power exists, it dominates . . . Its authority extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic, that control is essential to the security and maintenance of that traffic . . . Wherever the interstate and intrastate transactions are so related that the government of one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule."⁵²

⁵⁰ *St. Louis Northwestern Ry. Co. v. U. S.*, 245 U.S. 136, 32 S. Ct. 49 (1917); ROTTSCHAEFFER, *CONSTITUTIONAL LAW* (1939) p. 251.

⁵¹ *Houston East and West Line Ry. Co. v. U. S.*, 245 U.S. 342 (1914).

⁵² See also: *Railroad Commission v. Chicago B. & O. Ry. Co.*, 257 U.S. 573, 42 S. Ct. 232 (1922).

From this basis it is reasonable to see that the Federal government has the power to regulate interstate air traffic rates and also those of the feeder lines where necessary to protect interstate air commerce.

(b) *Safety Devices.*

A recognition that Congress can step into the field of intrastate commerce when it is necessary in order to protect adequately or to promote interstate traffic is also found in the cases relating to the Safety Appliance Act. Under that Act the court held that it was constitutional to prescribe the safety appliances on railroad cars moving solely in intrastate traffic, since interstate cars would move over the same railroad.⁵³

Nor is it necessary under the Constitution that Congress confine its regulations to particular activities which are shown actually to endanger commerce among the states. Congress may so control intrastate activities as to assure the elimination of potential damages.⁵⁴

Since it has been held constitutional for the Federal government to regulate on safety questions regarding railroad transportation, it is even more obvious why centrally controlled safety measures are necessary in the case of air commerce, than in the case of rail traffic. The speed and distance factors of air traffic bring the inter- and intrastate flights into one component whole in their interdependency for safe travel. The power of Congress in the field of safety regulation is undoubtedly complete.⁵⁵

(c) *Economic Stability.*

It is, of course, quite true that the finest safety regulations will not assure safety if the operators are in an unsound economic condition.

In promoting safe and continuous operations in commerce among the states, it is quite appropriate that Congress take action assuring that interstate operation will have a sound financial basis. This was shown in the *Dayton, Goose Creek Ry. Co. v. U. S.*,⁵⁶ which upheld the power of Congress to authorize

⁵³ *Southern Ry. Co. v. U. S.*, 22 U.S. 20 (1911).

⁵⁴ *People v. Katz*, 249 N.Y.S. 719 (1931).

⁵⁵ *Rosenhan v. U. S.*, 131 F. (2d) 932 (C.C.A. Utah, 1942).

⁵⁶ 263 U.S. 456, 44 S. Ct. 169 (1924).

the Interstate Commerce Commission to control, as provided in the recapture clause of the Transportation Act, 1920, the earnings of the railroad above a fair return on the value of the property: “. . . the Act seeks affirmatively to build up a system of railroads prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railroads an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden.”

The power of the Federal government to regulate intrastate commerce is not restricted to prescribing rates therefor.⁵⁷ It may, in order to relieve interstate commerce from undue and unjust burdens, authorize the complete abandonment by an interstate railroad of unprofitable branch lines although this necessarily involves their abandonment of intrastate services. A state has no constitutional authority to compel such carrier to continue intrastate commerce on such branch lines, if the Federal government has authorized their abandonment.⁵⁸

The necessity of economic stability in transportation systems was applied and reemphasized by the Senate Committee on Commerce (1935) when it reported: “It should be unnecessary to point out that a profitable operation is essential to safety. It is bad enough for ordinary corporations to be harassed by losses, but in the case of the air vehicle when safety depends on expensive equipment there must be ample funds or the ships must be grounded. There must be profits, if adequate and timely improvements are to be provided. Because a few persons make abnormal profits from speculative activities should not obscure the truth that safety and efficiency demand reasonable profit in operation.”

In view of this great need in air transport for economic stability, to provide continuous and safe service, it is apparent that Congress can enact broad measures of financial control over airlines.

LOCAL ACTIVITIES AFFECTING INTERSTATE COMMERCE.

Recent decisions of the Supreme Court reflect the trend of ever-widening control under the Commerce Clause.

⁵⁷ ROTTSCHAEFFER, *CONSTITUTIONAL LAW* (1939) pp. 254, 255.

⁵⁸ *State of Colorado v. U. S.*, 271 U.S. 153, 46 S. Ct. 452 (1926).

In *N. L. R. B. v. Jones and Laughlin Steel Corp.*,⁵⁹ it was said: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

Again, in *Kirschbaum v. Walling*,⁶⁰ service employees of a building, portions of which were leased to businesses engaged in interstate commerce, were held to be "engaged in the production of goods for commerce," and therefore subject to the provisions of the Fair Labor Standards Act of 1938.⁶¹

SUMMARY OF EXTENT OF FEDERAL POWER.

From the foregoing it is seen that under the Commerce Clause, the Federal power may control the channels of commerce; the instrumentality used by control of its rates, safety regulations and economic stability; and even non-commercial or local activities which affect commerce. In the aviation field, this includes control of the air space, the planes used, the rates that may be charged on interstate flights and on intrastate feeder lines, the safety precautions used, and safety improvements that may be forthcoming, the economic soundness of the airlines, and under the rulings of the *Jones and Laughlin* case and *Kirschbaum v. Walling*, the control might well extend to the employees of the building housing the cars which take the passengers to and from the airport.

EXTENT OF STATE POWERS.

It is clear that a Federal Act is superior to a state law on the same subject, and where repugnancy exists, that authority which is supreme must control. To determine the rights of the state, it must first be understood that there are two types of situations in which the question may arise: (1) Regulation of a matter that is national in scope, and (2) Regulation of a matter that is local in scope.

⁵⁹ 301 U.S. 1, 57 S. Ct. 615 (1937).

⁶⁰ 62 S. Ct. 1116 (1942); Note (1942) 41 MICH. L. R. 340.

⁶¹ See also *U. S. v. Darby Lumber Co.*, 312 U.S. 100, 115 (1941).

(a) National in Scope.

In this first situation, whether Congress has enacted legislation or not, the states cannot touch the problem. The general rule is stated, regulation of a subject-matter which the National Government might regulate under one of its concurrent powers is excluded from a state's reserved powers whenever the National Government has indicated its intention to exclude it therefrom. This may be done either by affirmative action, or by non-action. If it is national in scope and requiring uniform legislation, then non-action shows an intent to exclude state regulation.

*Cooley v. Board of Past Wardens*⁶² was the first definite formulation of this theory. "When the subject-matter is national in scope, that is, when uniform legislation is necessary in order to promote and maintain interstate commerce, Congress alone may enact the needed legislation" referring to the regulation of navigation and navigators.

In *Wabash, St. Louis and P. Ry. Co. v. Illinois*,⁶³ a case involving the question of freight rates, the court said: "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

The question, to sum up, is whether the state action would conflict with the exclusive power of the National Government.⁶⁴

In air commerce, such problems, of national scope, would include air-worthiness certification of the planes, certification of the operators, rules of the road, (air) rates, and beacon signals.

(b) Local in Scope.

In this second type of situation, the state may regulate matters that concern only the state. "The states may regulate in those fields where national uniformity is not essential."⁶⁵

A state may promote public convenience and safety, by

⁶² 12 How. 299 (1851)

⁶³ 118 U.S. 557, 7 S. Ct. 4 (1886).

⁶⁴ *Leisy v. Harden*, 135 U.S. 100, 10 S. Ct. 681 (1890); *Bowman v. Chicago & N. W. Ry. Co.*, 125 U.S. 465, 8 S. Ct. 689 (1888); *Chirac v. Chirac*, 2 Wheat. 259 (1817)—a uniform rule of naturalization; *ROTTSCHAEFFER, CONSTITUTIONAL LAW* (1939) pp. 90, 91.

⁶⁵ *Cloverleaf v. Patterson*, 315 U.S. 148 (1942).

prescribing reasonable routes and fixing terminals for interstate buses operating over the public streets of a city.⁶⁶

A state may by reasonable quarantine regulations prevent the introduction into it from other states or foreign countries of goods and persons,⁶⁷ or the transportation through it, so far as reasonably necessary for the protection of its health, safety or welfare.⁶⁸ The theory on which state quarantines are sustained is not that they do not directly regulate and burden interstate commerce, but that the burden is one that interstate commerce may reasonably be made to bear in order to protect important state interests.⁶⁹ It is local in scope, and Congress by its silence has shown an intent that the states may regulate.

(c) *Occupation of the Field.*

When matters are local in scope, the states can regulate until the Federal government "occupies the field."⁷⁰ When the field is occupied, this shows an intent that the state regulation shall be excluded.

In *Oregon-Washington R. & N. Co. v. Washington*,⁷¹ it is said: "the rule is that there is a field in which the local interests of states touch so closely upon interstate commerce that, in the silence of Congress on the subject, the states may exercise their police powers. But when Congress has acted and occupied the field, the power of the states to act is prevented."

An important problem comes up when the Federal government has not occupied the field wholly. This is shown clearly in cases arising from highway safety and conservation measures.

A state has broad powers to regulate the actual operation of motor vehicles using its highways for interstate transportation. In *South Carolina State Highway Dept. v. Barnwell Bros.*,⁷² the state had passed a statute restricting the use of

⁶⁶ *Phillips v. Moulton*, 54 F. (2d) 119 (D.C., 1931)—duty to permit adequate terminal for interstate ferry; *Mayer, etc. of Vandalia v. McNeely*, 274 U.S. 676, 47 S. Ct. 758 (1927).

⁶⁷ ROTTSCHAEFFER, CONSTITUTIONAL LAW (1939) p. 290.

⁶⁸ *Smith v. St. Louis & S. W. Ry. Co.*, 181 U.S. 208, 21 S. Ct. 53 (1900); *Hannibal R. Co. & St. Joseph Ry. Co. v. Husen*, 95 U.S. 465, 24 L. Ed. 527 (1877); *Chylung v. Freeman*, 92 U.S. 275 (1875).

⁶⁹ ROTTSCHAEFFER, CONSTITUTIONAL LAW (1939) pp. 292-3.

⁷⁰ *Clark Distillery Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S. Ct. 80 (1917).

⁷¹ 270 U.S. 87, 46 S. Ct. 279 (1926)

⁷² 303 U.S. 177, 58 S. Ct. 510 (1938).

highways by trucks above a specified width. This necessarily applied to trucks engaged in interstate as well as intrastate traffic. The court held: "The present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate . . . But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

Recently, in 1942, in *Cloverleaf v. Patterson*,⁷³ an Alabama statute gave state officials power to seize packing stock butter (prior to its processing), which did not come up to the standard. Petitioner brought suit to restrain the state officials from seizing his butter on the ground that the law was invalid as being repugnant to Federal laws, by which the field had been occupied.

In the majority opinion by Justice Reed, holding the law repugnant, is stated the formula that ". . . where this power to legislate exists, it often happens that there is only a partial exercise of that power by the Federal government . . . But where the United States exercises its power of legislation so as to conflict with a regulation of the state, whether specifically or by implication, the state legislation becomes inoperative and the Federal legislation is exclusive in its application."

Until the most recent cases, the courts have tried to uphold the states' rights.⁷⁴ The court construed the scope of the Federal enactment strictly to save the state law.

AIR TRAFFIC RULES.

Up to the passage of the Air Commerce Act in 1926, seventeen states had enacted regulatory acts providing, in general, for registration of aircraft, certification of airworthiness, certification of pilots and the prescription of air traffic rules.

⁷³ 313 U.S. 148, 62 S. Ct. 491 (1942).

⁷⁴ *Townsend v. Yeomans*, 301 U.S. 441 (1937); *N. W. Bell Telephone Co. v. Nebraska State Ry. Commission*, 297 U.S. 471, 480 (1936); *Smith v. Ill. Bell Telephone Co.*, 282 U.S. 133, 160 (1930).

The Federal government, under the Act of 1926, granted power to the Secretary of Commerce to prescribe the air traffic rules applicable to all air navigation, whether the craft is engaged in intrastate, interstate, or non-commercial flights.⁷⁵ An aircraft must necessarily engage in navigation that is not wholly within the domain of the state. It must navigate, in part, in the upper strata of air space, which is without the domain of the state, and therefore not intrastate flight.⁷⁶

"It is apparent that all or nearly all of the many air traffic rules must be applied to both interstate and intrastate craft in order to secure the safety . . . the Federal regulations must be paramount."⁷⁷

In *People v. Katz*,⁷⁸ the court held that Article I, Sec. 8 of the Constitution empowered Congress to regulate commerce among the several states and that the air traffic rules (here the altitude restrictions) were constitutional.⁷⁹

While the provisions of the Act of 1926 do not expressly apply to aircraft and pilots engaged in non-commercial navigation, the necessity for nationwide uniformity in air traffic rules seems too obvious to be argued in these days of tremendous speed and power in planes and in the great increase in air traffic.

The only provision of the bill applying expressly to intrastate commerce is that in regards to safety inspections, and this is identical with the application of the vessel registration and inspection laws which have, since 1789 and 1838, applied to all craft upon navigable waters, interstate or intrastate, or on pleasure operations only.

The purpose of the safety regulations, as stated in the declaration of the Acts, states that: "No aircraft shall operate in a designated civil airway without having currently in effect, an airworthiness certificate, evincing Congressional judgment that such an operation is detrimental to safety and such an operation is a violation."⁸⁰

⁷⁵ See also Law Memoranda upon Civil Aeronautics, Public Act 254, 69th Congress, Air Commerce Act, Sec. 2c (1926).

⁷⁶ *Lord v. Goodall Steamship Co.*, 102 U.S. 541, 544 (1880).

⁷⁷ Information Bulletin 7, Department of Commerce.

⁷⁸ 249 N.Y.S. 719 (1931).

⁷⁹ In 2 JOURNAL AIR LAW, p. 602 (1931) it was stated in the report of a case: "The air commerce act is assumed to be constitutional rather than decided."

⁸⁰ Sec. 55-2-3 CAA (1938).

In the *Rosenhan case*,⁸¹ the court held it to be a violation "notwithstanding that at the time of such operation no other aircraft was within dangerous range and there was no actual danger to interstate commerce."

The Act of 1926 was amended and in Sec. 402 of the Act of 1938 it is stated: "it is to assure the highest degree of safety" in air travel.⁸² Sec. 401 reads: "Any citizen of the United States who undertakes . . . to engage in air transportation . . . which directly affects or which may endanger safety in interstate, overseas or foreign air commerce."⁸³

Between 1938 and 1942, traffic, even on our present civil airways, increased 800%. It has been estimated that by 1950 it will amount to 60,000,000 movements a year.⁸⁴ The airways of today will decrease in relative importance due to civilian use of radar, direction finders and new flying techniques. Traffic will be moving at various elevations, and speeds are almost unpredictable. With these developments coming apace, there surely can be no sound arguments against having these safety precautions uniform in development and in enforcement. The Lea Bill defines clearly the status of commercial planes and private flying. Both would remain under strict control as to safety measures, as they certainly should.⁸⁵

AIRPORTS—REGULATION, DEVELOPMENT AND PROTECTION.

The Lea Bill, like the present law, leaves the regulation of airports to local and state authorities.⁸⁶ The Bill does provide that where Federal funds are expended on an airport, the Administrator has power to require that the contracts and agreements be made giving assurance that the public use, operation and protection of the airport will be provided by the local owners, usually the municipalities.⁸⁷ Under the present law, there is no definite requirement for proper airport planning to assure against waste of funds.

⁸¹ *Rosenhan v. U. S.*, (CCA, 1942, Utah) 131 Fed. 932 (1942).

⁸² *Neiswonger v. Goodyear Tire*, 35 F. (2d) 761 (1929); *Sheboygan Airways v. Ind. Comm.*, 209 Wis. 352 (1932).

⁸³ *Civil Air Board of CCA v. Canadian Colonial Airways*, 41 F. Supp. 1006 (1941).

⁸⁴ Hearings on H. R. 1012 and 3042 Lea Bill.

⁸⁵ Hearings on H. R. 1012 and 3042 Lea Bill.

⁸⁶ Public Act 254—69th Congress.

⁸⁷ Only one civil commercial airport is owned by the Federal government—Washington National Airport.

Federal legislation has recognized that landings and taking off are functions more properly regulated by local authority, under ordinary conditions.⁸⁸ Municipalities may enact ordinances pertaining to the lives, health and property of their residents, as long as those laws do not unduly burden interstate commerce or air mail service.

In the Civil Aeronautics Act, the Administrator, in Sec. 452, is empowered to acquire, in whole or in part, air navigation facilities at and upon any municipality owned or other landing area that is approved (by him) and to direct and make plans for development of such areas as will best meet the needs and safety of civil aeronautics.

It is interesting to see how in the early days of civil aviation (not so long ago) it was necessary for the courts to decide whether or not an airport served a public purpose. In *Hesse v. Roth*,⁸⁹ there was a state statute authorizing cities of New York to establish and operate airports; the local legislative body may regulate the use and establish fees and charges. Cardozo, J., in the decision, held that such a statute was constitutional, that the airport would serve both a public and municipal purpose, and therefore the city was allowed to incur indebtedness for this purpose.

Anderton v. Watkins says:⁹⁰ "Obviously a plane cannot be allowed to use the public streets as a parking place." (Perhaps in the near future they may.)

The Supreme Court of Kansas held:⁹¹ "The airway is essentially a free highway. It is a material and permanent way, through the air, laid out with the precision and care of an engineer . . . As such it is open to all qualified aircraft. It is rightly therefore a Federal undertaking to lay out and equip airways. The maintenance of airports, however, comes legitimately within the scope of the municipality in much the same manner as docks and harbors for marine shipping."

⁸⁸ *Barbier v. Connelly*, 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1884); *Patterson v. Kentucky*, 97 U.S. 501, 24 L. Ed. 1115 (1878).

⁸⁹ 249 N.Y. 486, 164 N.E. 342 (1928).

⁹⁰ 122 Me. 246, 120 Atl. 175 (1923).

⁹¹ *City of Wichita v. Clapp*, 123 Kan. 100, 263 Pac. 12 (1928).
Accord: St. Louis v. Baskowitz, 273 Mo. 543 (1918); *Halbruegger v. City of St. Louis*, 302 Mo. 573 (1924).

Many courts have had occasion to hold that the acquisition and control of municipal airports is a public purpose within the provisions of the constitutional purpose.⁹²

Airports may not be established when they will prevent the use of neighboring property.⁹³ A municipality may use the right of eminent domain to acquire land for airports only if that power has been conferred by a state statute, specifying that the taking is for a public use; the land may be outside its corporate limits.⁹⁴

CONCLUSION.

From the survey, it will be readily seen that in the short space of forty years aviation has grown from one fragile machine to an industry that has tremendously affected our lives, thoughts, topography and laws.

It has been shown that, because of the development of aerial navigation, it has been necessary to determine that (1) man no longer owns his land and surrounding air space to the sky, but only to the limits of effective possession; that (2) the states have sovereignty over their domains limited by the necessities of foreign comity and domestic needs; that (3) the Federal government, under the right of the Commerce Clause, can regulate the channels, instruments, protection and effects of air commerce; that (4) under the treaty clause that power may become even greater; that (5) the states under recent decisions may regulate air travel only to the extent in which the Federal government has not occupied the field.

It has also been shown that, by necessity, Federal air traffic rules must protect all aviation, but that airports may be regulated, to some extent as yet, by the municipalities in which they are located.

By tracing the development of these decisions along with the concurrent development of civil aviation, it becomes readily understandable that flying is no longer a private sport, but a major means of transportation which must necessarily be uniformly regulated and controlled.

⁹² State ex rel City of Lincoln v. Johnson, 220 N.W. 273 (1928); State ex rel Hile v. City of Cleveland, 160 N.W. 241 (C.C.A. Ohio, 1927); Read v. New York City Airport, 259 N.Y. 245 (1932).

⁹³ Swetland case, *supra*, note 21.

⁹⁴ Bremerton v. North Pacific Public Service Co., 243 F. 980 (1917); Western Union v. Pa. Ry. Co., 120 Fed. 362 (1903).

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