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purpose of any such transaction is to secure a tax advantage, the advantage will not be allowed.

I regret that due to time limitations I have been able only to highlight the subject. There exists an ever-growing body of case law on the problem and in my opinion, because of its intensely practical nature and because it represents a major battleground, it is one of the most interesting contemporary problems in the federal income tax field.

Random Comments on Aeronautical Law

BY LEANDER I. SHELLEY
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EDITOR'S NOTE: *The following is the text of an address given by Mr. Shelley, General Counsel of the Port of New York Authority, before the May 2 meeting of the Denver Bar Association. In the preparation of the text, Mr. Shelley wishes to acknowledge the aid and assistance of Mr. Daniel B. Goldberg, senior attorney of the law department of the Port Authority.*

Mr. Chairman, Officers of the Association, Honored Guests and Fellow Lawyers:

I speak in all sincerity when I say that I feel deeply honored at having the opportunity to address you today.

It is my impression that the people in your section of the country are in many respects more advanced than are we of the Eastern Seaboard. I am thinking particularly in terms of aviation. With your greater distances and greater spaces it is my impression that you accept air travel as a much more normal incident of your everyday life than we do. We in the East live in the small close country, and to many of us a trip by air takes on the atmosphere of an adventure. I am under the impression that the people of Denver and the surrounding country are apt to take a trip by air as casually as we take the subway.

If my impression is correct then aviation law should be a topic of direct and immediate interest to you all. With the increase in aviation there are bound to be many legal cases involving aviation law. I feel that the chances of you as lawyers in this city having cases in that field are much greater than are those of the lawyers on the Eastern Seaboard.

I trust that you will pardon me if I confine my remarks upon aviation law primarily to questions arising in connection with airports—since those are the questions with which I am most familiar.

At the outset let me say that it is an interesting thing that Congress has not established any regulatory body having control over the rates and practices of airports. The railroads, the motor trucks, the motor buses and to some degree the steamships are subject to the Interstate Commerce Commission. The airlines are subject to regulation by the Civil Aeronautics Board.

The Maritime Commission has jurisdiction over piers and wharves and to some extent over steamship lines. But there is no comparable federal regulation of airports.

I like to feel that this failure on the part of Congress to regulate airport rates and practices is due to some degree to the fact that airports are largely operated by the states and cities, and that the people actually managing them —the airport managers—are doing their best to do so in the public interest. An outstanding example of the type of airport manager which I have in mind—an airport manager who is doing a good and efficient job in the public interest—is the manager of the Stapleton Air Field, your own airport here in Denver—Mr. Charles J. Lowen. So long as men like him operate our air fields, there will be no need for setting up any federal regulatory body.

Airports Subject to Indirect Federal Regulation

While no federal regulatory body has been created, our airports are nevertheless subject to a certain degree of indirect regulation. The Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, both predicated upon the commerce clause, directly regulate aircraft operators. They indirectly control airports by refusing to permit aircraft operators to use airports which fail to meet federal safety requirements dictated under the Civil Aeronautics Act.

From this initial indirect regulation of airport safety standards the Federal Government proceeded under the Federal Airport Aid Act of 1946 to exercise certain indirect controls over the operating policies of airports. Federal grants were offered for development of airports, but the grants were contingent upon compliance with various conditions. In general the requirement is that the airport be operated as a public utility and without undue discrimination as between users.

The lack of direct federal regulation of airports should not be construed as resulting from a lack of power in Congress. Although airports in this country are generally owned by municipalities and private operators and not by the air carriers, it seems clear that airports are merely the terminal facilities at the ends of air routes just as wharves and piers are the terminals for water carriers. And in this related field of water transportation it is well settled that the terminal facilities are instrumentalities of interstate and foreign commerce and subject to federal regulation under the commerce clause, even though such piers and wharves are operated by independent wharfingers and not by the water carriers themselves.

In the case of piers and wharves, the Shipping Act, Sections 16 and 17, makes it unlawful for any operator thereof to give any undue or unreasonable preferences, and requires the wharfinger to establish, observe and enforce just and reasonable rates, classifications or regulations.

The federal regulatory power under the commerce clause applies to cities and other public agencies as well as to private corporations. This was settled

in two cases between the United States and the State of California. In the earlier case,[1] the Supreme Court upheld regulation of a belt line terminal railroad operated by the State of California in San Francisco. The state was required to observe the Federal Safety Appliance Act which applies to all railroads in interstate commerce. Although the terminal railroad was wholly within the State of California, its use as a link in the through transportation of interstate freight sustained federal regulation.

In the second California case,[2] the Supreme Court sustained the Maritime Commission's power under the Shipping Act to order the cessation by the state and the City of Oakland of certain practices in connection with public piers and wharves.

Airport Regulation by Treaty

While no federal regulatory body has been set up over airports, federal regulation of airports at the present time also exists to some extent by reason of treaties with foreign nations of which the most important is the "Convention on International Civil Aviation", commonly called the Chicago Convention, effective since April, 1947. Article 15 forbids discrimination against foreign carriers based on nationality.

The International Civil Aviation Organization, established under the Chicago Convention, is now considering the entire problem of landing fees at international airports. In September 1948 the Air Cordinating Committee of the C.A.A. submitted its draft of the proposed United States position on the subject. The principle was proposed that since the capital, operation, and maintenance costs of the landing areas are so large, charges cannot be expected to meet these costs in full, and, therefore, should be placed at levels that will only meet operating costs and yield nothing against capital costs.

We at The Port of New York Authority argued to the committee that no fixed and detailed formula for the computation of airport charges should be spelled out either by treaty or by I.C.A.O., but it should merely be provided in general terms that the charges imposed should be fair and reasonable under all of the circumstances of the particular case. The Port Authority feels that landing fees should include amortization of capital construction costs as well as covering costs of operation and maintenance. Indeed, any attempt by Congress to prevent airports from making compensatory charges might raise a constitutional question under the provision of the Federal Constitution forbidding the taking of property without just compensation.

The Port Authority also urged that if fair and reasonable airport charges might exceed the reasonable maximum ability of international air carriers to pay for the services, the difference should be covered by a federal subsidy rather than compelling the local agency to absorb the cost. I am hopeful that

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[1] *United States v. California*, 297 U. S. 175 (1936).
[2] *California v. United States*, 320 U. S. 577 (1943).

these principles will be advocated by the representatives of the United States at the next meeting of I.C.A.O. next month.

Who Owns The Air Space?

Let me now turn to one of the most vexing legal problems resulting from the Wright Brothers' invention. What right does your aircraft have to fly over my property? Or, contrariwise, what right do I, as a property owner, have to interfere with your flight operations by building on my property? Who owns the air space anyway? The law on this point has not yet crystallized.

Before air commerce became an actuality the courts repeatedly asserted by way of dictum that the owner of the land had unlimited ownership of all of the air space up to the heavens. This dictum is obviously inconsistent with the realities of aviation. It was rejected outright by the Supreme Court in the *Causby* case in 1946.[3] The modern rule is that there is a privilege on the part of the public, or perhaps an easement, for travel in a reasonable manner and at such height as will not interfere unreasonably with the land owner's use of the surface and the space above it.[4] On this point, there appear to be two variations. One group of cases appear to divide the air space into two horizontal zones, with ownership of the lower stratum only, being in the land owner, the public owning the upper stratum. The limit of this lower stratum is sometimes said to be determined by the area of "possible effective possession" on the part of the land owner. This theory is exemplified by a Massachusetts case,[5] in which it was held that flights at about 100 feet over a tract covered with dense brush and woods were within the area of effective possession and constituted a trespass. In a subsequent Ohio case (1932) it was stated that the land owner "has a dominant right of occupancy * * * of the lower stratum which he may reasonably expect to occupy himself."[6]

The other theory of air space ownership holds that so much of the space above ground is owned as is actually occupied or made use of in connection with the enjoyment of the surface. Under this view, harmless low flying does not constitute a trespass since "the air, like the sea, is incapable of private ownership except insofar as one may actually use it."[7] This view permits the land owner to expand his ownership of the air space by building higher at some future time; it rejects the idea that his failure to use it in the meanwhile may create an easement by prescription in the public. This view appeals to me as being more just to the land owner.

The Supreme Court opinion in the *Causby* case is consistent with either the potential or actual use theories.

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[3] *Causby v. United States*, 328 U. S. 256.
[4] See *Restatement of the Law of Torts*, Section 159, comment f; and section 194.
[5] *Smith v. New England Aircraft Corp.*, 170 N.E. 385 (1930).
[6] *Swetland v. Curtiss Airports Corporation*, 55 F. (2d) 201 (CCA6 Ohio 1932).
[7] *Hinman v. Pacific Air Transport Corp.*, 84 F. (2) 755 (1936).

Indeed, under any theory the land owner does not have to own the air space over his land to have a remedy against anyone actually interfering with his enjoyment of the surface as distinguished from mere technical trespass. Here the law of nuisance comes into play.

When Is An Airport A Nuisance?

There are many cases dealing with the question whether an airport constitutes a nuisance as against adjacent land owners.

The cases fall in two classes. The first class consists of those in which it is sought to enjoin the establishment of a new airport on the ground that an airport is *per se a* nuisance. The second class consists of cases against operators of existing airports complaining of the nature of the operation.

Of the five cases during the last decade in which it was attempted to enjoin the establishment of a new airport, not one granted such an injunction,[8] although an early case in 1932 did grant the relief.

Injunctions have been refused in Pennsylvania,[9] Ohio,[10] New Jersey,[11] Florida,[12] and Georgia.[13]

As the Pennsylvania court said:

> "There is nothing in the construction of an airfield, or in the necessary consequences of its normal operation in an agricultural district to create a nuisance."

The Florida court imposed a condition in its decree which required the city operating the airport to staff a control tower to enforce its rules and regulations.

Of course there is no such uniformity in cases complaining of airports in existence since in that case the question is whether the airport is so operated as to constitute an actual nuisance. Injunctions against injurious operations were granted during the last few years in New Jersey,[14] Arizona,[15] and Delaware.[16]

On the other hand a Pennsylvania court refused to grant such an injunction in a similar case,[17] stating:

> "In a sense, the science or business of aviation is a new and growing business, essential to the needs of the public for commercial as well

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[8] A 1932 case, quite ancient in this field, did grant such an injunction. *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (CCA 6 Ohio 1932).

[9] *Crew v. Gallagher*, 358 Penn. 541, 58 A. (2d) 179 (1948).

[10] *Antonik v. Chamberland*, 81 Ohio App. 465, 78 N.E. (2d) 752 (1947).

[11] *Oechsle v. Ruhl*, 140 N. J. Eq. 355, 54 A. (2d) 462 (1947).

[12] *Brooks v. Patterson*, 31 So. (2d) 472 (1947).

[13] *Elder v. City of Weider*, 40 S.E. (2d) 659 (1946).

[14] *Hyde v. Somerset Air Service, Inc.*, 2 Avi. 14,755 (1948).

[15] *Brandes v. Mitterling*, 2 Avi. 14,686 (1948).

[16] *Vanderslice v. Shawn*, 27 A. (2d) 87 (Del. Ch. 1942).

[17] *Rhoades v. Piacitelli*, 2 Avi. 14,658 (1948).

as military purposes. The courts have long adhered to the policy of adapting the law to the economic and essential needs of the times. While there is a contrariety of opinion on the point, we feel the public interest is a factor in the decision of this case."

The factual situations in all these cases varied. But almost all showed a tendency to balance the equities—to consider the extent to which the adjacent land owner suffered interference and the importance of the airport to the community. Most of the cases upholding charges of nuisance involved small air fields used not as commercial terminals for public use but for flying schools or clubs or the personal planes of the air field owner. The major airports used by air carrier transportation systems and open to public use have more successfully resisted nuisance actions against them.

Zoning For Airport Protection

Airport zoning is somewhat the reverse of the situations which have just been mentioned. It is an attempt to protect the airport against what may be called "the nuisance" of structures adjacent to it which imperil the operations of aircraft. As a matter of fact almost that very theory is being pressed in a pending case in the Federal District Court in New York.[18] The operator of a private airport on Long Island has brought an action to enjoin the construction of a water tower which would project into the airport approach zone established by the C.A.A. There is no airport zoning in the case, but the airport operator is arguing that the C.A.A. regulations and glide angles themselves constitute a regulation of the height to which adjacent land owners may build upon their land.

The constitutionality of airport zoning proper has not yet been passed upon definitely by the United States Supreme Court. A New Jersey court held by way of dictum that a city may not under the guise of an airport zoning ordinance constitutionally avoid paying for the property needed for the airport.[19]

An earlier Maryland case [20] squarely held an airport zoning ordinance unconstitutional where the regulations limited the height of structures to five feet in some areas of a particular tract. The court said that such regulations do not promote the general public interest, but only benefit those who use air transportation facilities.

A viewpoint in favor of the validity of such airport zoning regulation is suggested by a Federal District Court decision in Louisiana.[21] There the existence of an airport zoning ordinance was held to justify an award of "no dollars" in a federal condemnation proceeding to acquire an easement for air

[18] *Roosevelt Field, Inc. v. Town of North Hempstead.*

[19] *Yara Engineering Corp. v. City of Newark*, 132 N.J.L. 370, 40 A. (2d) 559 (1945).

[20] *Mutual Chemical Company v. Baltimore*, 1 Avi. 804 (Circuit Ct. Baltimore, 1939).

[21] *United States v. 357.25 Acres of Land*, 55 F. Supp. 461 (1944).

navigation ranging from twenty-five feet to forty-five feet above the land in question.

In conclusion I must emphasize that the law regarding ownership of air space and the respective rights therein of land owners and aircraft operators is still in the formative stage. Ultimately the controlling decisions will be made by the Supreme Court of the United States, but they have yet to be made. As lawyers, some of us now present may well have the opportunity of helping to formulate the principles of law which are ultimately adopted by the arguments which we present in future cases, whether on behalf of the aircraft operators, airport operators or private land owners.

I trust you will understand, therefore, that what I have said is not intended as an expression of definite opinion as to aviation law. Rather, I have attempted to suggest lines of thought which may prove of some value in cases which may arise.

Addendum To Report on General Assembly

By HUBERT D. HENRY
of the Denver Bar

The article appearing on page 105 of the May 1949 issue of DICTA was hastily prepared at the conclusion of the legislative session and contains a few errors.

H. B. 48, relating to gas conservation, was not passed as reported on page 110 but was defeated in the Senate. This reduces the number of bills passed from 264 to 263 and increases the number of printed bills killed by 1.

On page 112 at the bottom of the page is listed H. B. 578, providing for the issuance of free motor vehicle licenses to amputee veterans. This number is incorrect, the correct number of the bill being H. B. 958.

Nine bills passed by the two houses were vetoed by Governor Knous. These bills are: S. B. 218, eliminating the $5 a day statutory limit on expenses of district judges sitting outside their own counties, H. B. 709, increasing fees paid by barbers to the barber's board, S. B. 484, prohibiting discrimination in insurance rates in workmen's compensation and employer's liability insurance, S. B. 622, providing a new procedure for the removal of county seats, H. B. 909, permitting the motor vehicle department to issue a probationary license to a person who has been convicted of a first offense while driving under the influence of alcohol, H. B. 334, increasing the debt limit of school districts, S. B. 617, regarding the control of beaver, H. B. 949, giving to insurance passing in trust for designated beneficiaries the same exemption from inheritance taxation that it has if it passes directly to such beneficiaries, H. B. 674, permitting an assistant pharmacist to become a registered pharmacist after 8 years instead of after 10 years.