BOOK REVIEWS


Already legal problems connected with the establishment and operation of airports are occupying the attention of courts and municipal law officers. In the years ahead new airports will undoubtedly spring up in great numbers all over the country, and with them will come a host of legal problems to be answered by city and county solicitors, and attorneys for owners of lands which are taken for airports or affected by their existence. To all such lawyers, as well as to the judges, Mr. Rhyne's little handbook will be a valuable aid.

A listing of the eight chapter headings gives an idea of the contents of the volume: (1) Airport Acquisition; (2) Condemnation of Property for Airport Purposes; (3) Airport Leases; (4) Regulations Governing Use of Airports; (5) Taxation of Airports; (6) Damage Claims Against Airport Owners and Operators; (7) Air Space Rights of Aviators and Landowners; and (8) Airport Approach Protection—Airport Zoning.

The book is not a scholarly work but within its covers are collected not only all the cases but also references to the many articles in periodicals dealing with the subject matter, and this material is set forth not only in the text but in an excellent set of indexes. The table of contents contains a detailed analysis of each chapter, which points the reader to specific problems. This is followed by full indexes of the titles of books cited, titles of articles in periodicals and a table of cases with complete citations for each case. These occupy twenty-seven pages and are a complete and invaluable mine of source material. Finally, a thirty-two page index in the back of the volume has been compiled so as to be of maximum help to the reader. The perplexed attorney who finds himself facing new and unfamiliar problems of airport law will do well to have this book at hand. Using it as a starting point, he will quickly become acquainted with the decisions and literature on the subject and will save many hours of initial spade work.

The same case is often discussed several times under different headings, and while this causes some "padding," it may be defended on the ground of making each chapter a full exposition of its particular problems.

Some forty-three per cent of the text (Chapter VII) deals with "Airspace Rights of Aviators and Landowners," and discusses the substantive tort law of trespass quare clausum fregit and nuisance. There is a constantly increasing amount of case authority and legislation which is gradually working out the extent of the rights of possessors of land whose land is in the vicinity of airports or over which airplanes fly. All of this material, as well as the literature of the subject, is mentioned either in text or footnotes. However, the reader should realize that Mr. Rhyne is arguing for a particular point of view. He believes in maximum freedom of action for airport owners and aviators and in little, if any, protection for landowners who are annoyed by the operation of airports or disturbed by the flight of airplanes overhead. He is convinced that an intrusion into the airspace above the surface of the land is not a trespass, that The American Law Institute erred in saying it was, and that Section 3 of the Uniform State Law for Aeronautics (which vests ownership of the airspace "in the several owners of the surface beneath") is bad law and should be repealed.
in the twenty-three states which have adopted it. The 1930 and 1942 decisions of the Supreme Judicial Court of Massachusetts which take a different view are met with the statement: "The Massachusetts Court then under the lash of criticism of its 'trespass' theory decided to be stubborn and stick to it." 1

Mr. Rhyne's conclusions are affected by this general point of view and will be challenged in quarters which do not concede that even in an aviation age the public interest requires the industry to be made a special darling of the law. For example, the statement that "Statutes fixing minimum altitudes for flights are mere police safety regulations and should not be dragged into the argument over air space rights because they are not intended to apply to such rights" 2 is certainly debatable. Many "police safety regulations" and statutory prohibitions crystallize existing common law standards or create new duties the violation of which involves civil liability as well as criminal punishment.

Mr. Rhyne thinks the choice is whether airplane flights over land at a height of 50 feet should be considered trespass or nuisance; and that the latter is the majority view because several cases grant relief on a nuisance theory. But the same series of acts, or even a single act, can be both a trespass and a nuisance. A trespass involves an invasion of the interest in exclusive possession of land while a nuisance involves an invasion of the interest in reasonable use and enjoyment of land. The same conduct can invade both of those interests, as, for example, by flooding the land. Some courts have called flooding cases trespasses and some nuisances. Both are right.

Sometimes, Mr. Rhyne's special pleading colors his analysis of a decision. He says that in the Smith case in Massachusetts the court "held that a property owner who complained of low flights . . . was not entitled to either injunctive relief or damages." 3 But the only relief prayed for in that case was an injunction and it seems clear from the opinion that a suit for damages would have resulted in an award of nominal damages (no substantial damages having been proved). The best social adjustment in some cases (particularly in an age in which insurance is so potent a factor in distributing risks of loss) may well be to recognize that the conduct is tortious and that damages are recoverable but that the public interest prevents the granting of an injunction.

Mr. Rhyne also frowns on a trespass theory, particularly the "possible effective possession zone," 4 because it leaves the question when there is a tort up in the air. But in much of tort law one cannot be sure in advance how far he can go without creating liability. When is an automobilist negligent? When is the privilege of self-defense exceeded? Many social adjustments in tort law must be made after the event and in the light of the particular circumstances, and that will continue to be so despite the natural desire of attorney and client to have a yardstick in advance.

The rules of Lord Coke's time may not have foreseen the problems of aviation today. The rules now crystallizing may not be adequate to answer the problem of a landowner who a decade hence may watch a jet-propelled plane sweep at fantastic speed and with little noise above his chimney in place of the swallows of yesteryear. If I am the landowner I hope that Mr. Rhyne will not have convinced the courts that "a just solution of the conflict over air space rights depends upon a frank recognition that all the

1. Page 142.
2. Page 118.
3. Pages 84-5.
4. Pages 159-160.
landowner is entitled to is protection against actual damage.” That is too simple a solution for a complex problem.

It is to be regretted that the book omits any consideration of liability for actual damages caused by a forced landing or by an object falling from a plane. On this one point it seems incomplete. But all in all the author has performed a real service to the Bench and Bar, and to torts teachers, in writing this book and it will be kept within this reviewer’s handy reach for future reference.

Laurence H. Eldredge.


In view of the enormous amount of the refunds of excess profits tax that have been claimed by corporations under the relief provisions of Sec. 722, since the enactment of that section in its present form in 1942, it is surprising that this is the first book that has been published on this important subject. It is a welcome addition to the tax literature, despite the author's decision to confine the present volume to Sec. 722 problems, foregoing consideration of other excess profits tax relief provisions and concerning himself exclusively with those cases where the excess profits credit otherwise determined is an inadequate standard of normal earnings.

The author, who is a member of the Bar of the District of Columbia and of the United States Supreme Court, has succeeded in presenting in the text of this book (one hundred and fifty-eight pages) an excellent summary and explanation of the provisions of Sec. 722, together with many helpful suggestions for the presentation and prosecution of claims under that section. Those who have occasion to familiarize themselves with this subject will find this book invaluable for the purpose. It does a commendable job of leading the uninitiated through the maze of related statutes, highlighting their implications in clear, readable language.

It has the added convenience of presenting in the Appendices (occupying the other two-thirds of the book) reprints of the pertinent provisions of the law and regulations, the reports of the Congressional Tax Committees, the application for relief (Form 991), with its related instruction sheet, and a reprint of the bibliography of sources of statistical data contained in the official Statistical Abstract of the United States—1942 of the Bureau of Censors, which affords helpful information concerning sources of primary statistical data.

The now famous Sec. 722 bulletin of the Bureau of Internal Revenue was not made public until some time after the publication of this book, which does not, therefore, comment on the many questions that have been raised by that bulletin. It is to the credit of the author, however, that a comparison of the book with the bulletin shows that he has in many instances anticipated the Bureau's views.

It is unfortunate that the present work does not comment upon, or even refer to, any of the numerous articles on the subject of excess profits tax relief (under Sec. 722 and the other relief provisions) that have appeared in legal, accounting and tax periodicals. Reference to these articles could have constituted a valuable feature of this book.

No one who has to deal with the practical problems involved in establishing the right to relief under Sec. 722, and the amount of tax relief, can afford to fail to obtain the benefits of the clear and logical analysis of the
provisions of that section, and the numerous helpful suggestions contained in this book. The author has displayed a great deal of imagination and ingenuity, as well as careful and thorough research in presenting methods to be followed and arguments to be used, in accomplishing these two difficult tasks. He has been careful not to attempt a "ten easy lessons" approach to this complex branch of tax practice, while succeeding in bringing light to a subject not too generally associated with illumination. The numerous examples given in the text will be found of great assistance to experienced practitioners, as well as to beginners, in following the reasoning of the author, and in applying the principles involved in the presentation of one's own claims.

Paul D. Seghers.


This volume is a collection of eighteen papers, read before a conference of the Tax Institute, February 7-8, 1944. An effort has been made to discuss in brief and incisive fashion the principal earmarks of inflation, inflationary potentialities of the public debt, fiscal devices for curbing inflation, the experience of Russia, Italy, Canada and England in curbing inflation through fiscal devices, and suggested tax action in the light of the possibilities of postwar inflation. This is a good deal of ground to cover in two hundred and forty-five pages of text, but the symposium was designed to give a panoramic view. The reader seeking light on possible fiscal devices which might be employed to retard inflation in this country will be primarily interested in the six papers devoted to retail sales taxes, the spending tax, excise taxes, the individual income tax, forced loans, and social security taxes as methods of inflation control.

Certain major facts of the struggle against inflation are reasonably clear and they show the difficulties of devising effective fiscal measures with which to deal with the problem. Inflationary income (i.e., income which creates increased demand for consumer goods and services) is to a very great extent received by individuals with annual incomes under $5000. Any fiscal measure sufficiently drastic "to siphon off" this income would create great hardship, particularly for individuals whose incomes have not substantially increased during the war. However, the fight against inflation could have been assisted by a greater use of fiscal powers than the government has been willing to undertake. Such action, to be most effective, would take the form of a number of measures, such as additional increases in excise taxes, social security taxes, income taxes in the lower brackets coupled with deductions for income invested in savings, adoption of a federal retail sales tax and possibly a spending tax, though the latter offers great administrative difficulties. The arguments pro and con on all of these measures are well summarized in this book.

The technical difficulties of controlling inflation are tremendous, but the highest hurdle is generation of the political will to take sufficiently strong action. To a substantial extent, this is a matter of public education which is aided by studies such as the symposium by the Tax Institute.

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