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Recent Decisions

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R. D. B.

J. E. N.

RECENT DECISIONS

Passengers — Transportation Contract Interference —Strike

This action arose after defendant, The International Association of Machinists, had commenced a lawful strike against an airline. The plaintiff had entered into a transportation contract with the airline in the form of a round-trip ticket from Denver to Hawaii. The strike made it impossible for the airline to return the plaintiff to Denver at the time of his request, so alternate transportation was secured by him at an additional cost of $52.19. Invoking the theory tortious interference with a contract, plaintiff brought an action against the union for damages suffered, and was awarded judgment by the district court after an appeal from the county court decision. *Held, reversed*: Third persons, who are damaged by a lawful strike of employees against their employer who consequently failed to furnish services, have no right of action against the union calling or maintaining the strike. *The International Association of Machinists v. William H. Southard*, 459 P.2d 570 (Colo. Sup. Ct. 1969).

The plaintiff was a third party to the airline, management-labor contract, and his contractual rights rested solely with the originally ticketed carrier. The court, therefore, reasoned that any relief obtained by the plaintiff would have to be *ex delicto*.

The court found that the strike was in no way illegal, and that the action of the union was in compliance with the applicable provisions of the Railway Labor Act.[1] Although the plaintiff argued that he had a right through his contract to be protected against a strike, the court reasoned that to give rise to a cause of action for tortious interference with contractual rights there must be a wrongful act or a legal act performed in an unlawful manner. The court emphasized the fact that the action of the union was not taken intentionally to prevent the air carrier from performing its contract with the plaintiff, but merely an exercise of its absolute right to strike.

In conclusion, the court alluded to the fact that a contra decision could have certain serious economic, social, and practical effects on unions acting in a lawful manner. Damages to third persons suffered through a lawful strike are too far removed from the union action to give rise to a cause of action.

J.H.L.

[1] Railway Labor Act §§ 1-10, 44 Stat. 577 (1926), *as amended*, 45 U.S.C. §§ 151-60 (1964).

Prejudgment Garnishment — Constitutionality — Bank Accounts

Multiple plaintiffs instituted actions for garnishment, under the Wisconsin garnishment statute[1] against several bank accounts of the Mueller Travel Agency, Inc. The initial garnishment action was commenced by Larson and Meyer (from whom the Mueller Travel Agency had been purchased by Feterston). The complaint alleged claims of indebtedness arising out of the agency sales transaction with Feterston. In each of these actions the Air Traffic Conference of America (ATC)[2] as well as Johnson and Parker (officers and directors of the travel agency) intervened as parties defendants, claiming that the funds in both garnished accounts were trust funds, not belonging to the Mueller Agency, and therefore, not subject to garnishment. The ATC group's claim was based on the trust provision stipulated in the original agency agreement signed with the Mueller Travel Agency. Johnson and Parker claimed an interest in the action because of their personal indemnity liability up to $50,000[3] for any defalcations of the trust by the Mueller Travel Agency, Inc. Simultaneously, in a separate action the ATC attempted to garnish the funds on deposit in both banks. Johnson and Parker again intervened as parties defendants and, in addition, cross-claimed against the Mueller Agency as well as Larson and Meyer who had been named along with Mueller Agency as parties defendant by ATC.[4] The Wisconsin circuit court ordered that the amounts on deposit in the two banks be applied to the entire debt owed Larson and Meyer with the remainder to be applied pro rata to the airlines. Complaints of Johnson and Parker were dismissed. Both ATC, and Parker and Johnson, appealed these respective judgments from the lower court. *Held, reversed and remanded*: The Wisconsin garnishment procedure employed in the instant case amounts to a taking of property without procedural due process that is required by the Fourteenth Amendment. *Larson v. Feterston*, 11 Av. Cas. 17,334 (Wisc. S. Ct. 1969).

The instant garnishments were commenced in accordance with Wiscon-

[1] Wis. Stat. § 267.18(2) (a).

[2] ATC represented several airlines (including Northwestern Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines, Inc., and North Central Airlines, Inc.). These airlines had transacted an agency agreement with Muller Agency would sell tickets for the several airlines with the stipulation that "all moneys received, less applicable commissions, shall be the property of the Carrier, and shall be held in trust by the Agent until satisfactorily accounted for to the Carrier . . ."

[3] The agency agreement between Mueller, Inc. and ATC required that the agents obtain a fidelity bond. Pursuant to this requirement a bond was procured from the Insurance Company of North America (ICNA) with the express understanding that ICNA would indemnify the ATC group for all defaults of the Mueller Travel Agency, Inc., up to $50,000, but with the requirement that Johnson, Parker, and Fetherston agree to personally indemnify ICNA, should such payment to the ATC group be required.

[4] The concern of ATC, and Johnson and Parker, is perhaps even more understandable in light of facts which were discovered by ATC shortly after the initiation of the action by Larson and Meyer. It seems that the Mueller Agency at some earlier date had negotiated a loan with a local bank and had pledged the accounts receivable of its ticket sales as collateral for the loan without informing the ATC group of the transaction. When the Agency later defaulted on its obligations under the loan, the bank terminated its relationship with the Agency and offset the outstanding loan against the Agency's then-existing deposit balance; the balance at that time being substantially composed of proceeds from the ticket sales. The funds retained by that bank are not the subject of this action.

sin garnishment procedure which permits the subject of the garnishment action to be "frozen" temporarily by the creditor, pending litigation outcome, without notice to the debtor and without any prior hearing.[5] However, the court concluded that the rule expressed by the United States Supreme Court in *Sniadach v. Family Finance Corp. of Bay View*[6] declared the Wisconsin "prejudgment" garnishment procedure unconstitutional.[7] The rule of *Sniadach* held that a "prejudgment" garnishment procedure is a violation of the recognized requisites of procedural due process. In that case, Mr. Justice Harlan pointed out that:

> Due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.

The respondents in the instant case contended that the decision in *Sniadach* is limited in applicability to only the particular facts of that case; *i.e.*, garnishment proceedings against an employee's wages in the hands of his employer.[8] Although it was granted that the opinion in *Sniadach* makes considerable reference of the unconstitutionality of the procedure upon the wage earner, the court was not persuaded by this limited application of *Sniadach* and held:

> We think that no valid distinction can be made between garnishments of wages and that of other property. Clearly, a due process violation should not depend upon the type of property being subjected to the procedure.[9]

Therefore, since the court found that the *Sniadach* decision was applicable to all garnishment actions regardless of the type of property being subjected to the procedure, the awarded judgments were ordered reversed with directions to dismiss the garnishment complaints.[10]

R.D.B.

Aircraft Insurance — Owner's Negligence — Failure To Read Policy

In September 1961, plaintiff purchased an aviation policy from defendant, an agent for Eagle Star Insurance Company (Eagle Star), to insure

[5] Wis. Stat. § 267.02 (1) (a) 1.

[6] 395 U.S. 337 (1969).

[7] It should be noted that the instant garnishments were commenced in accordance with Wisconsin statutory law prior to the *Sniadach* judgment ruling the statute in issue constitutional. The court in concluding that the rule of *Sniadach* was applicable pointed out that the instant case was before the court on appeal and thus had not been finalized; *i.e.*, a pending action. Therefore, a question of whether or not a rule of constitutional procedure is to be applied retrospectively was not at issue in this case. The *Sniadach* decision reached the stage of finalization while the instant case was still pending.

[8] 395 U.S. 337 at 343.

[9] *Larson* v. *Fetherston*, 11 Av. Cas. 17,336 (Wis. S. Ct. 1969).

[10] Because the judgments were reversed on the issue of procedural due process, the court did not consider the issue of whether the funds deposited in the garnishees' bank constituted trust funds not subject to garnishment.

his 1959 Cessna aircraft. The application stated that no coverage was required beyond 100 miles of the boundaries of Continental United States, excluding Alaska. On 4 March 1963, plaintiff wrote the defendant that he had purchased a different plane; that he would fly this aircraft to Alaska in June 1963; and that he would like a bid from the defendant on coverage. Thereafter, plaintiff telephoned defendant and was assured that he was insured for flying to Alaska. The defendant personally procured the information from the plaintiff by telephone, but mistakenly wrote in the application "No", to the question of whether coverage was requested for Alaska. Subsequently, he signed plaintiff's name to the application and procured a policy from Eagle Star. Upon the crash of the airplane in Alaska on 1 July 1963, plaintiff notified defendant promptly and was assured of coverage for the loss. Upon Eagle Star's denial of any liability on the policy, plaintiff, alleging false and negligent representation and interpretation of the Eagle Star policy, brought an action against the defendant. Upon a judgment for the plaintiff, defendant appealed. *Held, affirmed*: An agent who undertakes to procure insurance for another and negligently fails to do so will be liable in tort or contract for damages suffered by his client. Moreover, previous dealings with an agent gives an aircraft owner the right to rely upon the agent's skill. *Hall v. Charlton*, 11 Av. Cas. 17, 111 (Mo. Ct. App. 1969).

In defendant's appeal, he contended that the court erred in not: (1) Finding as a *matter of fact* that the plaintiff was contributorily negligent in failing to read his policy; and (2) ruling as a *matter of law* that plaintiff was contributorily negligent and thereby estopped to recover. Countering this argument, the plaintiff explained: (1) That he had no training interpreting the language of insurance policies; (2) that he had no legal training; (3) that he could read, but that he could not interpret and understand such language; and (4) that he habitually sought the services of a qualified insurance agent, explained what coverage he wanted, and relied on the agent's skill to procure it for him.

The court held that plaintiff had every right to rely on the defendant because of his previous experience with him, and because of the defendant's assurance that Alaska was included in coverage and the risk bound. In arriving at this conclusion, the court referred to *Kap-Pel Fabrics, Inc. v. R. B. Jones and Sons*[1] and the decision of *Harris v. A. P. Nichols Insurance Company*[2] where the law, pertaining to a broker's liability to his principal for negligent failure to perform, was thoroughly discussed. Relying on these decisions, the instant court held:

> Such action was not between an insured against insurer, but between a client and his broker; that the principal was entitled to rely upon and believe that, pursuant to the duties assumed by the agent, and under his instructions to proceed on the theory and belief that his agent procured such policy.[3]

In the defendant's claim of estoppel, the court, relying on the principal

[1] 402 S.W.2d 49, 53 (Mo. Ct. App. 1966).
[2] 25 S.W.2d 484 (Mo. Ct. App. 1930).
[3] *Id.*, at 488.

of law set forth in *Land Clearance for Re-development Authority v. Dunn*[4] which barred his defense, held:

> No man can set up another's act or conduct as ground for estoppel unless he has himself been misled or deceived by such act or conduct; nor can he set it up where he knew or had the same means of knowledge as to the truth as did the other party.[5]

J.E.N.

Preemption — Noise Abatement — Police Power

A complaint was filed against Stagg by the City of Santa Monica charging him with violation of a municipal ordinance which prohibits the takeoff of pure jet aircrafts between the hours of 11:00 p.m. of one day and 7:00 a.m. the next day.[1] The purpose of the ordinance is to alleviate noise problems resulting from the takeoff of these aircraft. Stagg entered a plea of not guilty and then filed a petition for a writ of prohibition seeking to restrain the municipal court from proceeding with the trial. The superior court granted the preemptory writ on the ground that the ordinance was invalid because its subject matter was preempted by state law.[2] From this judgment the City of Santa Monica appealed. *Held*: A municipal ordinance that prohibits jet aircraft takeoffs at the municipal airport during nighttime hours is a valid exercise of the municipality's police power, so long as the regulation does not conflict with any state or federal authority. *Stagg v. Municipal Court of Santa Monica*, 11 Avi. Cas. 17,404 (Cal. Ct. App. 1969).

It was argued by respondent that airport operations are a matter of statewide concern which require uniformity, and are, therefore, not a proper subject of municipal regulations.[3] Although the court implied that some types of airport operations might be preempted from municipal regulation by state interests, it rejected any contention that the hours during which municipal airport facilities are to be made available for jet plane service are of statewide concern. In support of its opinion the court cited that Government Code, section 50474 (f), which expressly authorizes a municipality to "regulate the use of the airport and facilities and other property or means of transportation within or over the airport."[4] Therefore,

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[4] 416 S.W.2d 948 (Mo. 1967).
[5] *Id.* at 951.

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[1] Takeoffs are approved during the prohibited hours for reasons of emergency.
[2] Stagg had also urged that the ordinance was an unconstitutional attempt to regulate a field preempted by federal law, but the court found it unnecessary to rule on the federal issue. The California Appellate court nevertheless did, in dictum, conclude that federal preemption was not applicable to municipal noise abatement regulations provided the ordinance is not inconsistent with federal safety standards. *See generally*, Loma Portal Civic Club v. American Airlines, Inc. 61 Cal. 2d 582, 394 P.2d 548 (1964).
[3] *Trans World Airlines, Inc.* v. *City & County of San Francisco* 228 F.2d 473 (1955).
[4] Cal. Government Code § 50474 (West 1966).

in the absence of any finding of conflict with existing state or federal legislation in the general field of aviation, the court concluded that the ordinance was a valid exercise of the municipality's police power.[5]

R.D.B.

Air Carrier's Liability — Limitation — All Services Tour

Plaintiffs instituted a negligence action against defendants, Swiss Air Transportation Co. Ltd. (Swiss Air) and Flying Mercury, Inc. (Mercury). Plaintiffs alleged in their complaint that while they were in the course of an "all services" tour of Spain, sold to them by defendants, they were invited by defendants to use certain rest room facilities. The complaint further alleged that one of the plaintiffs was injured as a result of the dangerous and defective condition of the rest room facilities. Swiss Air alleged as an affirmative defense . . . . "that the contract between plaintiffs and the tour operator (Mercury) contained a provision exempting 'The Airlines Concerned' of all responsibility for any act, omission, or event which did not take place while the passengers were on board the airline's planes or conveyances." It was undisputed that the accident in question did not take place on the defendant's planes or conveyances. Plaintiffs moved to dismiss this affirmative defense for insufficiency and appealed from an order denying this motion. *Held, order reversed*: A clause in a contract between passengers on an all services tour and the tour operator that purports to limit the liability of the air carrier solely to those occasions when the passengers are physically on board the aircraft is exculpatory in that it attempts to reduce the air carrier's duty of safe carriage, and is invalid absent an allegation that the passengers were afforded a choice of rates. *Gold v. Swiss Air Transportation Co., Ltd.*, 11 Av. Cas. 17,355 (N.Y. 1969).

The paramount question before the New York Supreme Court, Appellate Division, was whether an air carrier's liability can be expressly limited by contract to occasions when the passengers are physically on board the plane when the carrier does not offer the passengers a choice of rates. The court relied on *Seccardi v. Yonkers R. R. Co.*,[1] which stated that the legal relationship between the carrier and passenger, giving rise to a duty of care, continues beyond the mere physical presence of the passenger on board the conveyance. In discussing the extent of a carrier's liability beyond the passenger's presence on board the conveyance, the court cited a North Carolina case[2] which held that the carrier's duty of care continues when the passenger alights at an intermediate stop, at the expressed or implied invitation of the carrier, to employ rest room facilities. However, the court

[5] Art. XI, section 11 of the California Constitution empowers cities and counties to make and enforce "such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1] 190 N.Y. 389, 83 N.E. 31 (N.Y. 1907).

[2] Goodman v. Queen City Lines, 208 N.C. 323, 180 S.W. 661 (N.C. 1935).

declined to decide whether the duty of safe carriage extended to the rest room facilities in the instant case, preferring to decide only the most pertinent question regarding the validity of the contract clause. The court indicated that the contract clause limiting the carrier's liability could not conform with the public policy of the state unless the passengers were offered "a choice of rates"[3] so that full protection would be open to the passengers upon their payment of a higher rate. In the instant case defendant's failure to allege a choice of rates in his supporting affadavits was fatal.

G. W. A.

Railway Labor Act — Maintenance of Status Quo — Limit of Self-Help

On 17 January, 1969, three employees of National Airlines (National) were fired by their employer for their refusal to taxi an aircraft; the men apparently believed a recent National order to reduce the number of men used in taxiing from three to two produced an unsafe working condition. National's action precipitated a sitdown strike by other members of the International Association of Machinists and Aerospace Workers (IAM) at National's New York and Miami airport facilities. Prior to the sit-down, National and IAM had voluntarily invoked the operation of statutory mediation procedures available under the Railway Labor Act (RLA)[1] to resolve a dispute arising out of desired changes in their collective bargaining agreement. National immediately petitioned the U.S. District Court in Miami for injunctive relief against the strikers, alleging that the proceedings in process under the RLA imposed a requirement that both IAM and National maintain the status quo,[2] a condition violated through wildcat work stoppage by the union members. A preliminary injunction was issued, ordering the workers to end their strike, and to restore the status quo. National was ordered to reinstate the discharged workers. On 20 January, the strike was still in effect because of IAM's inability to persuade its members to honor the court order. A second hearing before the district court resulted in an order that "defendant advise their membership . . . that all men return to work by their next shift . . . [or] be subject to penalties which could include dismissal by National Airlines."[3] After further notice was given to the employees by National and IAM, and it became apparent that the workers would continue to disregard the court order, National discharged approximately 940 of the striking IAM union members. The union immediately requested an injunction ordering rein-

[3] Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (N.Y. 1935).

[1] Railway Labor Act §§ 2 Second, Seventh, 5 First (6), (10), 6, 44 Stat. 577, 580 582, *as amended*, 64 Stat. 1238, 63 Stat. 107, 48 Stat. 1197, 45 U.S.C. §§ 151a, 152, 155, 156 (1964).

[2] Railway Labor Act §§ 2 Seventh, 5 First (6)(10), 44 Stat. 577, 580, *as amended*, 64 Stat. 1238, 63 Stat. 107, 45 U.S.C. §§ 151a, 152, 155 (1964).

[3] 416 F.2d at 1001.

statement of the discharged employees. The District Court denied the union's application, and IAM appealed. *Held, reversed and remanded*: While the airlines under these circumstances might justify reasonable efforts to continue operations during a wild-cat strike, the wholesale discharge of the striking workers was not necessary to restore flight operation, and in so doing National violated its duty to maintain the status quo until the dispute was settled. *National Airlines, Inc. v. IAM*, 416 F.2d 998 (5th Cir. 1969). On remand, the court issued a preliminary injunction to enjoin National from using less than three men until either the National Mediation Board completed its services relative to the bargaining or the taxi crew issue was resolved by the System Board of Adjustment. *National Airlines, Inc. v. IAM*, 11 Av. Cas. 17, 347 (S.D. Fla. 1969).

The fifth circuit speaking through Judge Thornberry resolved all questions of the applicability of the RLA status quo provisions against National. Pointing to the voluntary imposition of the RLA remedies by the parties through the exchange of notices, the court indicated that the underlying dispute was clearly within the contemplation of § 6 of the RLA,[4] with the result that it was the duty of the disputants to refrain from further action until the procedures set in motion had run their course. The maintenance of status quo is an essential ingredient of the RLA, reasoned the court, for, unlike the NLRA, the primary interest reflected in the federal regulation of common carriers is continuance of the employer's operations and the employer-employee relationship.[5] Furthermore, National's duty to maintain the status quo remained even though the strike by union members was illegal and the union itself had failed to meet its obligation under the act.

The court does, however, indicate that some form of self-help was available to National in the circumstances of this case. Quoting from a recent Supreme Court decision, the court noted that a "justification for permitting the carrier to depart from the terms of the collective bargaining agreement *lies in its duty to continue to serve the public*."[6] This self-help is limited to the extent necessary to restore service, which could have been achieved by simply hiring replacements for the striking workers. The striking workers would not be permitted to compel National to discharge the replacements or employ them at their old jobs upon settlement, since the illegality of the strike forfeits their rights to reinstatement if their jobs have been filled. It was, therefore, unnecessary for the court to imply that discharge was a proper course of action for National to take in attempting to continue airline operations. Hence, National's action under the second injunction was improper.[7]

K. M. P.

[4] Railway Labor Act § 6, 44 Stat. 582, *as amended*, 48 Stat. 1197, 45 U.S.C. § 156 (1964).

[5] 416 F.2d at 1004; United Indust. Wkrs. of the Seafarer's Int'l Union, AFL-CIO v. Bd. of Trustees of Galveston Wharves, 400 F.2d 320, 29, 30 (5th Cir. 1968).

[6] Bhd. of Ry & S.S. Clerks, Freight Handlers, Exp. & Station Emp., AFL-CIO v. Florida E. Coast Ry., 384 U.S. 238 (1966).

[7] The court further noted that National acted too quickly in discharging the workers in eight of the permissive language in the injunction. The primary responsibility rested in the district court. National should have returned to the court for further advise before resorting to self-help.

Federal Aviation Act — Common Law Rights — Contract Recission

Philco Corporation contracted with Flying Tiger Lines, Inc. to transport expensive and extremely delicate electronic equipment. Flying Tiger agreed to employ only certain types of carriage facilities in order to assure that the cargo would be kept in an upright position at all times. Both parties were aware that storage in a horizontal position would result in extensive damage to the equipment. Both air bills of laden provided that the shipments were subject to the governing classifications and tariffs, and that, unless otherwise stated, the declared value of the equipment was set by the tariff on file with the Civil Aeronautics Board at fifty cents per pound. Philco made no higher declaration of value prior to shipment.

The first shipment arrived at its destination on 7 September 1963 in damaged condition as a result of being transported horizontally instead of in the agreed upright position. Philco immediately notified Flying Tiger of the damage and was assured that the following shipment would be properly processed. On 28 March 1964, the second shipment arrived in severely damaged condition. Again the damage was a result of horizontal transportation. As a result of the improper carriage, the equipment was damaged in excess of $49,000.00.

Philco instituted an action for recission of the air freight bills and an award of restitution. In the alternative, it sought relief for gross negligence in the methods employed to transport the equipment. In granting Flying Tiger's motion for summary judgment, the trial court held that the common law forms of relief sought by Philco were pre-empted by the tariff rate provisions of the Federal Aviation Act of 1958 (hereinafter Act).[1] Philco would be entitled to damages computed at the rate set by the tariff —fifty cents per pound or $1,001.50. From this adverse judgment, Philco appealed. *Held*: Section 1506 of the Act[2] preserved the common law remedies of shippers, provided that they are consistent with the statutory scheme of regulation. *Philco Corporation, et al. v. Flying Tiger Lines, Inc.* 11 Av. Cas. 17,278 (Mich. Ct. App., 1969).

The purpose of the tariff rate provision is to assure uniformity of rates and services to all shippers. The Act, however, did not intend to limit the liability of a carrier who materially altered or violated his contract of carriage. A contract can be rescinded if it is found that there is a material breach of such a nature as to completely change the terms or risks involved. It is up to the trial court to determine if a material breach has occurred. No fact finding was made in *Philco*, thus the case had to be remanded.

As to the issue of gross negligence, the court held that the remedy had been pre-empted by the Act since previous cases had denied such relief to shippers.[3] The trial court decision on this point was affirmed. *R. L. M.*

[1] Federal Aviation Act of 1958, 49 U.S.C.A. § 1373 (1964).

[2] Federal Aviation Act of 1958, 49 U.S.C.A. § 1506 (1964).

[3] Mitchell v. Union Pacific R.R. Co., 188 F. Supp. 869 (S.D. Cal., 1960); Tishmen & Lipp, Inc. v. Delta Airlines, 275 F. Supp. 471 (S.D. N.Y., 1967).

Aircraft Ownership — Co-Owners — Liability

Appellee and the father of a deceased minor were co-owners of an airplane. The father and his minor child were killed while the former was piloting the plane. The cause of the crash was the negligent flying of the pilot-father. As a result, the child's administrix sued the surviving co-owner on the theory that an airplane is a dangerous instrumentality and that a co-owner is vicariously liable.[1] From the trial court's adverse holding, the administrix appeals. *Held, affirmed*: While an aircraft may be classified as a dangerous instrumentality, one co-owner of an aircraft, who is not actively negligent, is not liable for the negligent operation of the aircraft by the second co-owner that results in the death of the latter's child while that child is in his custody. *Margaret Orefice v. Albert*, 11 Av. Cas. 17,248 (Fla. Dist. Ct. App. 1969).

The Florida Supreme Court has classified automobiles as dangerous instrumentalities.[2] Embracing the reasoning of that doctrine, the appellate court expressly extended this classification to include airplanes as well, while the trial court had refused to do so.

The remainder of the administrix's theory asserted that, if the airplane were a dangerous instrumentality, then, there was a vicarious liability. The trial court, basing its decision on other jurisdictions' holdings,[3] rejected this argument. The appellate court also rejected the theory but on the grounds of local Florida case law.[4]

The appellate ruling, however, did not foreclose the possibility of recovery for third parties killed in similar circumstances who are not minor children. In essence, the holding is fairly narrow: "[O]ne co-owner of an airplane who is not actually negligent is not liable for harm caused by the negligent operation of the airplane by a second co-owner *when* the action is for damages resulting from the death of the second co-owner's minor child while the child is in the custody of the second co-owner [Emphasis added.]"[5]

Therefore, it may well be that a co-owner is only insulated from liability in these particular circumstances. If the occupant were not a child of the negligent pilot, or if he were illegally within the parent's custody, a different result might follow.

R.H.G.

[1] The deceased child's mother filed an action for damages which was joined with this suit. The court, in affirming the trial court's grant of a motion for summary in the defendant's favor, held that the mother could not recover since the child was in the father's custody and control with her knowledge and consent.

[2] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920); Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917); Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353 (1940); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956); Shattuck v. Mullen, 115 So. 2d 597 (Fla. Ct. App. 1959).

[3] According to the trial court, New York, California, Louisiana, Massachusetts, Oklahoma, Arkansas, and North Carolina allow no recovery from an aircraft owner simply by reason of his ownership. Maryland, Rhode Island, Nevada, Mississippi (federal case applying state law), Iowa, and New Hampshire are to the contrary.

[4] Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955); Martinez v. Rodriguez, 215 So. 2d 305 (Fla. 1968).

[5] Orefice v. Albert, 11 Civ. Av. 17248, 17249.

Criminal Law — Concealed Weapon — Attempt To Board Aircraft

Defendant was checked in at San Antonio International Airport by an agent of Braniff International and admitted to the departure lounge where all passengers waited until flight time. An unknown person informed the agent that he saw defendant drop an object which appeared to be a weapon. An airport guard arrested and searched defendant finding a small caliber pistol carried in violation of federal law.[1] Defendant contended that he could not be charged with the crime of "attempting to board an aircraft while carrying a dangerous weapon" since he had never attempted to actually step on the plane. *Held*: The surrendering of the ticket at the agent's desk and entering the departure lounge constituted an attempt by the defendant to board the aircraft in violation of federal law. *United States v. Brown*, 11 Av. Cas. 17,427 (W.D.Tex. 1969).

The primary issue before the court was whether the act of entering the departure lounge after having been ticketed was sufficient to constitute an attempt. The court delineated the standard for determining attempt as "whether or not an effort or endeavor to accomplish the crime, amounting to more than mere preparation or planning for it, which if not prevented would have resulted in the full consummation of the act attempted."[2] The court reasoned that defendant's act amounted to more than preparation or planning and was an attempt to board an aircraft while carrying a dangerous weapon.

The defendant raised two other issues at trial; first, that his oral statements were inadmissible since he had not been given the proper *Miranda*[3] warnings before being questioned, and second, that the fruits of the search were inadmissible since the guard[4] had not obtained a search warrant. The court found that the *Miranda* warnings had not been given and all statements made by the defendant were improperly admitted into evidence. However, the court held that the search of the defendant was proper without a search warrant. The guard had probable cause to arrest the defendant and the search was incident to the lawful arrest.[5] The court found that even though the oral statements of the defendant could not be considered, there was sufficient evidence to sustain a finding of guilty made at the trial.

W.F.C.

[1] 49 U.S.C. § 1472(1), 76 Stat. 921 (1963).
[2] 11 Av. Cas. 17427, 17429.
[3] Miranda v. Arizona, 384 U.S. 436 (1966).
[4] The guard was an employee of the City of San Antonio and was exercising police powers in that capacity. *Vernon's Ann. Tex. Stat.* Art. 46d-7 (1969).
[5] Agnello v. United States, 269 U.S. 20 (1925); Weeks v. United States, 232 U.S. 383 (1941).

Inverse Condemnation — Air Navigation Easement — Date Of Taking

In March of 1963, the plaintiffs filed an inverse condemnation suit against the Jackson Municipal Airport Authority. The complaint alleged that the defendant-airport had appropriated to public use an air navigation easement "superadjacent" to the plaintiffs' lands, without the formality of eminent domain proceedings, and demanded compensation as provided by the Mississippi Constitution.[1] Due to unavoidable delays, the trial was not held until August, 1966, and a final decree was not rendered until 30 January, 1969. The lower court held that an air navigation easement was taken and that the enjoyment and use of plaintiffs' property had been substantially impaired. The plaintiffs were awarded compensation in the amount of $25,602.00, which the chancellor concluded to be just on the basis of values and conditions existing *at the time of the trial.* The defendant appealed to the Mississippi Supreme Court. *Held, affirmed in part, reversed and remanded in part*: The determination of the amount of compensation in an inverse condemnation proceeding is to be based upon the values and conditions which existed as of the date the suit was filed, not the date of the trial.[2] *Jackson Municipal Airport Authority v. Wright*, 11 Av. Cas. 17,422 (Miss. 1970).

Decisions rendered in conventional condemnation suits have held the general rule to be that compensation is calculated as of the date of taking, that is, the date the application or petition is filed by the condemnor.[3] It was further emphasized that the institution of an eminent domain suit gives binding notice to the landowner and the condemnor.[4] The Mississippi Supreme Court held that this rule should not be applied in inverse condemnation proceedings which are initiated by the owner-condemnee.

The court reasoned that to hold the trial date as the date of taking would be to ignore the fact that the actual taking must have occurred prior to the filing of the suit in 1963, since the cause of action does not accrue until after the taking. Such a decision would also allow economic fluctuations which have occurred in the interim, between the filing date and the trial date, to "affect the amount justly due as compensation for the property or property right taken."[5] Justice Smith speaking for the court in *Wright* said:

> As the owner's right to claim compensation is immediate, use of the date of filing as the date of taking is more realistic and definitizes both as to the

[1] Miss. Const. art. 3, sec. 17 (1890).

[2] The decree as affirmed except as to the amount of the award, which was reversed and remanded for the purpose of ascertaining the amount of compensation in light of this opinion. Moreover,(the court held that air navigation easements obtained in former eminent domain proceedings do not bar inverse condemnation proceedings by the property owners in the event of further invasion of the air space over the remainder of the property.

[3] Pearl River Valley Water Supply District v. Wright, 186 So. 2d 205, 206 (Miss. 1966); Pearl River Valley Water Supply District v. Brown, 182 So. 2d 384 (Miss. 1966); Mississippi State Highway Commissioners v. Hemphill, 176 So. 2d 282 (Miss 1965).

[4] Pearl River Valley Water Supply District v. Wood, 252 Miss. 580, 595, 172 So. 2d 196, 202-203 (1965).

[5] Av. Cas. at 17, 425.

nature and extent of the taking and as to the amount of the compensation due.[6]

By adhering to this pragmatic and realistic approach to the problem, the Mississippi Supreme Court concluded that constitutional compensation for inverse condemnation, as for conventional condemnation, should be based on values and conditions which existed at the time the suit was filed.

P.J.P.

Warsaw Convention — Wrongful Death — Right of Action

On 4 March 1966 a Canadian Pacific aircraft crashed while attempting to land at Tokyo Airport, killing all passengers. An action for wrongful death was brought in a New York state court on 3 March 1967 by Perry Zousmer on behalf of two New York passengers, Jesse and Ruth Zousmer. The executors of three Canadian passengers joined in the action. The complaint, charging negligence and breach of warranty, was brought against three defendants: Canadian Pacific Air Lines, Ltd. (CPA), a Canadian corporation; Douglas Aircraft Co., Inc. (Douglas), a Delaware corporation; and Kollsman Instrument Corp. (Kollsman), a New York corporation. Douglas and Kollsman answered the complaint, and CPA moved to dismiss the action brought on behalf of the Canadian decedents on the grounds of lack of jurisdiction under Article 28 of the Warsaw Convention and *forum non conveniens*. After an amended complaint adding a sixth cause of action on behalf of another Canadian decedent was served, Douglas and Kollsman moved to dismiss the entire amended complaint because of improper service. The motion was granted.[1] The court also granted CPA's motion and dismissed the Canadian decedents' action against it on the merits.[2] At the same time the court ordered Zousmer to serve a second amended complaint stating any claims to be asserted against CPA. On 18 April 1969 Zousmer complied with the order and alleged claims against CPA based entirely on the Warsaw Convention.[3] CPA filed a petition removing the action to the United States District Court, Southern District of New York.[4] *Held, remanded*: The Warsaw Convention does not in and of itself create an independent cause of action to recover for wrongful death, and a claim grounded on the Convention does not present

[6] *Id.* at 17, 426.

[1] A New York statute provides: ". . . . a subsequent pleading asserted new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. . . . ." *N.Y. Civ. Prac. Law & Rules* § 3012(a) (McKinney 1961). Since the plaintiffs did not comply after adding the sixth cause of action, the entire amended complaint was dismissed.

[2] Douglas and Kollsman were still proper parties with respect to Zousmer's claim of negligence and breach of warranty. See *infra* note 5.

[3] The plaintiff alleged that the airline tickets did not comply with the notice requirements of the *Unification of Certain Rules Relating to International Transportation by Air*, 29 Oct. 1934, 49 Stat. 3000, E.T.S. No. 876, otherwise known as the Warsaw Convention.

[4] 28 U.S.C. §§ 1441(a), 1446(b) (1948).

a claim or right arising under a treaty of the United States or a separate and independent claim that would be removable to the federal courts.[5] *Zousmer v. Canadian Pacific Air Lines, Ltd.*, 11 Av. Cas. 17381 (S.D.N.Y. 1969).

Applying the test of *Gully v. First Nat'l Bank*,[6] the court stated that for an action to be removable the treaty in question must clearly create an actual right in the plaintiff, and the right must be an essential factor in his case. The Warsaw Convention and the rules promulgated thereunder create, at most, the standards and presumptions of liability and thus merely outline the "operative limits" of the cause of action granted the plaintiff by local law.[7] The court reasoned that essentials such as the description of the person or persons who may bring the suit or the person or persons who have a right or interest in the suit, traditionally considered vital to the creation of a new right of action, were lacking. Even though the Convention does include provisions with respect to venue, presumptions of liability, limitations on liability, and contributory negligence, the court concluded that it does not create a cause of action. The court submitted that any federal court which presumed to grant removal jurisdiction to Warsaw claims would find itself "hopelessly lost in a no man's land of undeveloped law."

The court also rejected the defendant's argument that Zousmer's claim constituted a separate and independent claim and was thus removable. In holding that Zousmer had asserted a valid cause of action for the wrongful death of the New York decedents against all three of the defendants,[8] the court found that the complaint against CPA was not separate and independent from the claims against Douglas and Kollsman. Zousmer simply asserted wrongful death claims against all three defendants to recover for a single wrong to each of the decedents. When a pleading alleges but one wrong, for which a single relief is sought, there cannot be a separate and independent claim for removal purposes. Differing theories of negligence, breach of warranty, and the Warsaw Convention does not lend "separate and independent" status to any one of them. Nor was there a finding of "separate and independent" simply because Zousmer's claim against CPA was based on a treaty of the United States. As noted above, the court indicated that the effect of the Warsaw Convention was only to create a presumption of liability, leaving it for New York to grant the right of action.

In remanding the action the court admitted the uncertain state of the law regarding the Warsaw Convention and its relationship to removel

[5] CPA alleged as separate grounds for removal diversity of citizenship pursuant to 28 U.S.C. § 1332 (1964) and 28 U.S.C. § 1441(a) (1948), contending that the service of the last amended complaint constituted the sole and determinative pleading and as such involved only a New York plaintiff and a Canadian defendant. The court rejected the argument holding that since the involuntary amendment of a complaint, to clarify the issues, did not supersede the original complaint, all parties listed were still parties to the action. Kollsman was a New York corporation, and since Zousmer was a New York citizen, the requisite diversity was lacking.

[6] 229 U.S. 109 (1936).

[7] New York law creates an action for wrongful death. *N.Y. Dec. Est. Law* § 130 (McKinney 1949).

[8] See *supra* note 5.

jurisdiction. Even though it recognized the need for a uniform body of federal law involving international aviation matters based on the Warsaw Convention, the question remains whether the court will, without Congressional action, hold that the violations of the Warsaw Convention in and of themselves create a case arising under a treaty of the United States.

L.G.A.