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CURRENT LEGISLATION AND DECISIONS

Torts — Admiralty Jurisdiction — Aircraft Crashes at Sea

Libellants brought suit in personam in admiralty in the United States District Court for the Eastern District of Pennsylvania as personal representatives of seven persons killed in the crash of an Eastern Airlines Electra into Boston Harbor shortly after take off from Boston en route to Philadelphia. Libellants did not allege that the aircraft crashed more than one marine league from shore. Therefore, the case is not within the purview of the Federal Death on the High Seas Act of 1920.[1] Instead libellants relied upon the maritime location of the crash plus a state wrongful death statute to invoke the jurisdiction of admiralty.[2] It was not disputed that the plane crashed into navigable waters. The libels alleged negligence in maintenance, operation and navigation against Eastern; negligence in design, manufacture and inspection of the aircraft and power plants plus failure to make necessary alterations and modifications, or to warn Eastern to do so, on the part of Lockheed Aircraft Corporation, the manufacturer of the plane, and General Motors Corporation, the manufacturer of the power plants. Breach of contractual warranty was alleged against all three libelees. The latter excepted to the libels on the ground that the claims were not within the jurisdiction of an admiralty court. The District Court dismissed both the tort and the contract claims on the ground that both must be maritime-connected to invoke the jurisdiction of admiralty and that such a maritime nexus was lacking.[3] *Held:* Revised in part, affirmed in part. The dismissal of the contractual claims was affirmed, but the dismissal of the libels in tort was reversed on the grounds that situs or location of the tort alleged is the sole test of admiralty jurisdiction is cases of tort and, if some maritime connection were necessary, it was here present. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 275 (3d Cir.), *petition for cert. filed*, 34 U.S.L. Week 3047 (U.S. July 16, 1963) (No. 275).

Courts of the United States derive their admiralty jurisdiction from the Constitution which provides in Article III, Section 2, that the judicial power of the United States shall extend to "all Cases of admiralty and maritime Jurisdiction." Congress has provided that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[4] As can readily be seen from the language quoted above, it has been the function of the courts to prescribe the meets and bounds of admiralty jurisdiction.

The locality test of admiralty tort jurisdiction was announced in its classic form by Mr. Justice Nelson in *The Plymouth* in 1865:

> The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring,

[1] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).
[2] The Hamilton, 207 U.S. 398 (1907).
[3] Weinstein v. Eastern Airlines, Inc., 203 F. Supp. 430 (E.D. Pa. 1962).
[4] 28 U.S.C. § 1333(1) (1952).

and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[5]

In 1903 in an action by a stevedore against his employer for damages for an injury sustained while unloading cargo, the United States Court of Appeals for the Ninth Circuit held that a maritime locality plus some maritime character—a relation to a vessel or its owners—was necessary to bring the tort within the admiralty jurisdiction.[6] The question of whether or not locality alone is sufficient to invoke the jurisdiction of admiralty courts was presented to the United States Supreme Court in 1914 in the case of *Atlantic Transp. Co. v. Imbrovek.*[7] This was also an action by a stevedore evolving from an injury incurred on board ship while loading cargo. The Court avoided the question saying, "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction."[8] In *London Guar. & Acc. Co. v. Industrial Acc. Comm'n,* the Supreme Court reaffirmed an earlier announcement[9] that "the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but rather upon it having been committed upon the high seas or other navigable waters."[10]

The principle objections to the locality test relied upon by the libelees in the present case are *McGuire v. City of New York,*[11] *O'Donnell v. Great Lakes Dredge & Dock Co.*[12] and *Campbell v. H. Hackfeld & Co.*[13] The *McGuire* case was an admiralty action for an injury to a bather at a public beach. District Judge Dawson, while doubting that the injury occurred in navigable waters, dismissed the case on the ground that "the basis for admiralty jurisdiction must be a *combination* of a maritime wrong and a maritime location."[14] This case was never appealed. The Third Circuit in the instant case disposed of *McGuire* in holding the weight of authority to be otherwise. The *O'Donnell* case was a Jones Act action by a seaman attempting to recover for injuries received in the line of work, but ashore. The Supreme Court allowed recovery viewing remedies under the Jones Act as a revival of the aged remedy of maintenance and cure, an incident of employment, which antedated the distinction between tort and contract jurisdiction in admiralty.[15] Under this interpretation *O'Donnell,* though indicating a necessity for a maritime connection (a recoverable injury must be related to maritime employment), cannot be used as authority for a similar nexus for other maritime torts.[16] The *Campbell*[17] case was clearly overruled by the *Atlantic* case discussed above.[18]

[5] 70 U.S. (3 Wall.) 20, 36 (1865).
[6] Campbell v. H. Hackfeld & Co., 125 Fed. 696 (9th Cir. 1903).
[7] Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).
[8] *Id.* at 61.
[9] The Plymouth, 70 U.S. (3 Wall.) 20 (1865).
[10] London Guar. & Acc. Co. v. Industrial Acc. Comm'n, 279 U.S. 109 (1929).
[11] 192 F. Supp. 866 (S.D. N.Y. 1961).
[12] 318 U.S. 36 (1943).
[13] Campbell v. H. Hackfeld & Co., 125 Fed. 696 (9th Cir. 1903).
[14] 192 F. Supp. 866, 868 (S.D.N.Y. 1961).
[15] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42 (1943).
[16] Forgione v. United States, 202 F.2d 249, 253 (3d Cir.), *cert. denied,* 345 U.S. 966 (1953).
[17] See *supra* note 6 and accompanying text.
[18] See *supra* note 7 and accompanying text.

The Federal Death on the High Seas Act of 1920 gives the personal representative of one killed on the high seas beyond one marine league from shore a right to tort damages in admiralty.[19] Courts have allowed recovery under the Act for deaths resulting from crashes of airliners at sea[20] and in at least one case for a tort committed in the airspace over the ocean with death occurring four days later on land.[21] At least one commentator has doubted the wisdom of these decisions,[22] but the trend now seems well established. The Act has been interpreted as creating a right of action and not a jurisdictional grant.[23] If this be true, it is difficult to envision a logical jurisdictional distinction between the crash of an airplane in navigable waters within and without the one marine league limit of the Act.

The weight of judicial authority at least gives lip service to the locality test for admiralty tort jurisdiction.[24] On the other hand, most text writers[25] and the few cases noted doubt that locality is an absolute test. The Third Circuit in the instant case followed the example set by the Supreme Court in the *Atlantic* case and held that, if a maritime nexus was required, it was present. Unfortunately the locality test seems never to have been declared absent some maritime related situation. In an age of air travel it seems likely that situations similar to those in the present case may reoccur. It is not entirely unlikely that a tort producing death could be committed in the airspace over navigable waters within one marine league of shore.

It is the opinion of the writer that the present case offers the Supreme Court an excellent opportunity to clear the judicial air of the recurring doubts surrounding the locality test and/or to make a clear determination of jurisdiction of the admiralty over aircraft-related torts occurring on or above navigable waters. Absent this, the instant case stands as a strong indorsement of the locality test and the jurisdiction of courts of admiralty over torts occurring in connection with airplane flights over navigable waters within and beyond one marine league of shore.

Ray Allen Goodwin

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[19] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

[20] Noel v. Linea Aeropostal Venezopana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); Noel v. Airponents, Inc., 169 F. Supp. 348 (D.N.J. 1958); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957); Higa v. Transocean Airlines, 124 F. Supp. 13 (D. Hawaii 1954), *aff'd*, 230 F.2d 780 (9th Cir. 1955), *cert. denied*, 352 U.S. 802 (1956); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Lacy v. L.W. Wiggins Airways, Inc., 95 F. Supp. 916 (D. Mass. 1951).

[21] D'Aleman v. Pan Am. World Airways, 259 F.2d 493 (2d Cir. 1958).

[22] See Comment, 41 Cornell L.Q. 243 (1956).

[23] D'Aleman v. Pan Am. World Airways, 259 F.2d 493, 495 (2d Cir. 1958); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94, 96 (S.D.N.Y. 1957).

[24] See Comment, *supra* note 22.

[25] *E.g.*, Benedict, American Admiralty § 127 (6th ed. 1941); Gilmore and Black, Admiralty 22 (1957).

Constitutional Law — Municipal Taxation — Situs

Plaintiff airline companies brought suit for a declaratory judgment and injunctive relief from taxes imposed pursuant to a proviso in a Missouri statute[1] rendering users of Lambert field, owned and operated by, but outside the corporate limits of defendant city, subject to taxation by the city as if such airport were within the corporate limits. *Held:* Injunction granted. Where there is no benefit or protection provided by the city to the air carriers or their aircraft in its governmental capacity, the levy and collection of municipal taxes is unreasonable, arbitrary, and violative of the due process clauses of the state and federal constitutions.[2] *American Airlines, Inc. v. City of St. Louis,* Mo. Sup. Ct. 368 S.W.2d 161 (1963).

A general tax, distributed in proportion to benefits received, is not indicative of arbitrary action and is not violative of due process.[3] Jurisdiction to tax land or chattels, as a general proposition, is exclusively in the state where they are physically located.[4] The old case of *Wells v. City of Weston*[5] was heavily relied upon in the decision of the instant case. The court in *Wells* stated that although it is true that the legislature cannot delegate its legislative power, but must exercise it itself under its appropriate responsibilities, the practice of creating municipal corporations —with subordinate legislative power over the local affairs of the inhabitants, and, as incident to this, authority to impose taxes upon the persons and things within the local jurisdiction in order to supply the local necessites—being firmly established, and daily practiced by our American governments when our constitution was adopted, must be considered as an ordinary legislative power, and one that the legislature may lawfully exercise. "But no instance, it is believed, can be found where these corporations have been clothed with the power to tax others not within their local jurisdiction for their own local purposes."[6] The state legislature should exercise this power itself. Hence, property can only be taxed where it is actually or constructively located, the farthest limits being where benefits reasonably appreciable of some sort are received by the person taxed, either in his person or in his property. The result is that there can exist a two-fold situs:[7] one which is actual, by common law principles, and one which is purely legislative; the latter stopping at the point where to

[1] Ann. Mo. Stat. § 155.050 (1959). This section reads in part:
> This apportionment shall be made on the ratio which the number of arrivals and departures of its aircraft within the political subdivisions of this state bears to the total number of arrivals and departures of its aircraft within this state during the immediately preceding calendar year; provided that, when any municipality in this state owns and operates an airport outside its corporate limits, the valuation determined hereunder shall also be apportioned to said municipality.

[2] Mo. Const. art. I, § 10; U.S. Const. amend. XIV, § 1.

[3] State *ex rel* Ross to Use of Drainage District No. 8 of Pemiscot County v. General Am. Life Ins. Co., 336 Mo. 829, 85 S.W.2d 68 (1935).

[4] Curry v. McCanless, 307 U.S. 357 (1938). By this:
> [W]e mean no more than that the benefit and protection of the laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others.

[5] 22 Mo. 384 (1856).

[6] Id. at 389.

[7] Chicago & No. W. Ry. v. State, 128 Wis. 553, 108 N.W. 557 (1906).

go further would be to pass into the realm of mere caprice or arbitrary action, in that it would have no basis in the nature of the mutual exchange of benefits between the source of the taxing power and the person upon whom the burden is cast.[8]

Translating this into the language of the *Wells* case, the limit to the exercise of the legislative discretion in the imposition of taxes can only consist in the distinction made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or some other form, the taking of private property without compensation, such an act by the state being violative of due process.[9] Due process requires some definite link,[10] or fiscal relation[11] between the two entities. The holding in the instant case stressed the contractual relation between the city and the airline companies with respect to the fees charged[12] for use of landing field, fire and safety facilities, and use of the terminal by passengers on plaintiffs' carriers. These facilities offered by the defendant were held, without question, to be a necessary supplement to the proprietary endeavor of fulfilling a contractual obligation. The main point of contention concerned several policemen who, although licensed by the county, were paid by the city to work extra-territorially at the airport. The issue before the court was whether an airport was a proprietary function and if so, does the extension of the above protection subject the users thereof to a benefit sufficient to establish the aforementioned definite or fiscal link. The court answered the question in the negative.

The power of a municipal corporation is derived solely from the laws of the state and must be conferred by its charter or the laws which created it, or by other laws, constitutional or statutory.[13] While in a sense any municipal function might be regarded as governmental, when properly applied, the term "governmental functions" should be limited to legal duties imposed by the state upon its creature, which it must perform at its

[8] Scandinavian Airlines System, Inc. v. Los Angeles County, ___ Cal. App. 2d ___ (Dist. Ct. App.), 6 Cal. Rptr. 694 (1960); The levying of personal property taxes by city and county of Los Angeles against certain airplanes, registered in Scandinavian countries and employed in foreign commerce, was challenged as being in violation of the due process clause, inquiry was whether property had acquired a situs in taxing jurisdiction through having sufficient contact with that jurisdiction; a further criterion was whether tax in practical operation had a relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See also *City of Dallas v. Overton*, 363 S.W.2d 821 (Tex. Civ. App. 1962), where the city charter limiting taxing power to within corporate limits of Dallas, the city failed in its attempt to establish an implied taxable situs for aircraft at an airport located outside the city limits but inside the county.

[9] Miller v. Schoene, 276 U.S. 272 (1928).

[10] Miller Bros. Co. v. State of Md., 347 U.S. 340 (1954), *rehearing denied*, 347 U.S. 964 (1954).

[11] Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897 (10th Cir. 1947). In *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435 (1946), where this test was applied, it was held that J. C. Penney was subject to a corporate income tax by Wisconsin by reason of the governmental benefits extended to the company, and its protection in doing business in Wisconsin. Note also Justice Frankfurter's dissent in *Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954), citing *Wisconsin v. J. C. Penney Co.*, that the court, "should focus on the process of interstate commerce and protect it from inroads of taxation by a state beyond opportunities which it has given . . . protection which it has afforded . . . [and] benefits which it has conferred by the fact of being an orderly civilized society."

[12] Bogart v. Westchester County, 185 Misc. 561, 57 N.Y.S.2d 506 (1945), *affirmed* 270 App. Div. 274, 59 N.Y.S.2d 77, *appeal dismissed*, 296 N.Y. 701, 70 N.E.2d 531 (1946): "a statute which imposes a fee for use of facilities furnished and maintained at public expense and exacted from all users alike is within the power of the state and is not violative of the interstate commerce restrictions of Article I, § 8, cl. 3 or of the due process clauses of federal or state constitutions."

[13] 62 C.J.S. *Municipal Corporations* § 107.

peril, and may not omit with impunity.[14] In its proprietary capacity it represents those proprietary interests "that appertain to it in common with other corporations. It . . . employs men, owns property, and transacts business in the same way as individuals and private corporations."[15] In its governmental capacity, the municipal corporation possesses the attributes of sovereignty which have been delegated by the legislative department of state government.[16] Among the powers generally held to be governmental rather than private are the construction and maintenance of streets,[17] conservation of public health,[18] extinguishment of fires and making arrangements therefor,[19] and power to legislate as to public utilities.[20] The determination of what are or what are not purely governmental duties can be settled only by the facts of each particular case.[21]

In *Dysart v. City of St. Louis*[22] it was stated that "[A]n airport with its beacons, landing fields, runways, and hangars, is analogous to a harbor with its lights . . . If the ownership and maintenance of one falls within the scope of municipal government, it would seem the other must necessarily do so." Although cited in the instant case, it was cited with reference to the acquisition of lands for the public purpose of constructing an airport and the charging of fees for the use thereof. The court's use of this authority necessarily restricts the *Dysart* influence to a situation concerning the maintenance of the finished improvement. This is also apparent in that the holding in the instant case is in accord with the decisions holding the opeation of an airport to be a proprietary function. Although some cases have held to the contrary,[23] this is the prevailing view.[24] Concerning the police protection afforded the plaintiffs, extraterritorial municipal

[14] 62 C.J.S. *Municipal Corporations* § 110(b).

[15] People v. Chicago, 256 Ill. 558, 100 N.E. 194, 196 (1912): "In this capacity it may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment." Rhyne, *Airports and the Courts,* Nat'l Institute of Municipal Law Officers (1944), states that although airports are a public purpose and therefore exempt from taxation themselves, they are not necessarily a public function.

[16] Higginson v. Slattery, 212 Mass. 583, 99 N.E. 523 (1912).

[17] City of Benwood v. Interstate Bridge Co., 30 F. Supp. 952 (N.D. W. Va. 1940).

[18] Curry v. City of Highland Park, 242 Mich. 614, 219 N.W. 745 (1928).

[19] Louisville & So. Ind. Traction Co. v. Jennings, 73 Ind. App. 69, 123 N.E. 835, 837 (1919).

[20] Chicago, St. P., M. & O. Ry. v. Black River Falls, 193 Wis. 579, 214 N.W. 451 (1927), *reversed on other grounds,* 215 N.W. 455 (1927).

[21] Waco v. Thompson, 127 S.W.2d 223 (Tex. Civ. App. 1939), *error dism'd, judgment correct.* It was held in this case that a storm sewer outside city limits was a proprietary function, yielding tortious liability.

[22] 321 Mo. 514, 11 S.W.2d 1045 (1928).

[23] Airport maintenance by city, under statute, held governmental in *Stocker v. City of Nashville,* 174 Tenn. 483, 126 S.W.2d 339 (1939). Here, however, a statute preventing tortious liability by reason of the governmental function of airport maintenance, was restricted to tort liability cases only in the face of a contention that the statute was unconstitutional by reason of its two-fold nature.

In *Abbott v. City of Des Moines,* 230 Iowa 494, 298 N.W. 649 (1941), where city operating an airport leased its hangar to third party and plane in hangar was destroyed by fire started by sparks falling from top part of hangar where city employee was welding tower supporting beacon light, city was exercising a governmental function and not liable for destruction of plane.

In *Mayor of Savannah v. Lyons,* 54 Ga. App. 661, 189 S.E. 63 (1936), municipal airport was held to be a governmental institution in the nature of a park, and the city was not liable for injuries caused by defective roadway.

[24] Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257 (1930); Miami Beach Airlines Service v. Crandon, 159 Fla. 504, 32 So. 2d 153 (1947); Dept. of Treasury v. City of Evansville, 223 Ind. 435, 60 N.E.2d 952, 956 (1945); Moore v. City of Beaumont, 195 S.W.2d 968 (Tex. Civ. App. 1946); Christopher v. City of El Paso, 98 S.W.2d 394 (Tex. Civ. App. 1936).

In the operation of an airport of a commercial nature for revenue purposes, a municipality acts in its proprietary capacity. Peavey v. City of Miami, 146 Fla. 629, 1 So.2d 614 (1941).

police jurisdiction as to municipal airports beyond municipal limits is common, as would be expected, the necessity thereof being obvious.[25] The power of the legislature is subject in its delegatory power only to the constitition. The legislature may authorize a municipal corporation, under the police power, to regulate and license within reasonable limit, outside the corporate limits. But the legislature is without power to authorize the levy of a tax for revenue on business or occupations not carried on within the corporate limits, as this would amount to taxation without representation and the taking of private property without due process of law.[26] The inadequate governmental benefit conferred having been merely ancillary to the maintenance of the airport, the municipal corporation was powerless to transcend the contractual relationship between itself and the plaintiffs, and the proviso was declared null and void as violative of due process of law.

Lee M. Schepps

[25] McQuillin, Municipal Corporations § 24.57 citing Elbrite v. Crawford, 215 Cal. 724, 12 P.2d 937 (1932), and Silverman v. Chatanooga, 165 Tenn. 642, 57 S.W.2d 552 (1933).

Sengstock, *Extraterritorial Powers in the Metropolitan Area,* 1962 Michigan Legal Publications, 45: "[S]ocial problems know no artificial political boundaries. To protect itself, a city must be able to extend the effects of its ordinances beyond its corporate limits." But the basic axiom that municipal powers are operative only within the corporate limits in the absence of enabling legislation to the contrary is still valid, such enabling legislation being subject to normal constitutional restraints.

[26] White v. City of Decatur, 225 Ala. 646, 144 So. 872 (1932), *cert. denied,* 225 Ala. 646, 144 So. 873 (1932).