Journal of Air Law and Commerce

Volume 10 | Issue 4 Article 6

1939

Notes, Comments, Digests

NOTES, COMMENTS, DIGESTS

COMMENT

Municipal Airport—Establishment of Airport Jointly by Two Cities.— [Arkansas] Taxpayer's suit to enjoin the city of Helena, Arkansas, from issuing $16,000 in bonds toward the establishment of an airport jointly with the city of West Helena—the latter city to participate to the extent of $4,500. A demurrer to the complaint was sustained and the suit dismissed. From this action the taxpayer took an appeal contending (1) that the constitution does not authorize Helena to establish an airport jointly with a neighboring city; (2) that a municipality cannot hold property jointly.

The applicable constitutional provision (Amendment No. 13) authorized cities of the first and second class to issue bonds, after referendum, "for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality." In 1939, the legislature expressly granted authority to any two or more municipalities "to own and hold in joint tenancy . . . lands for use as airports or flying fields which may be located either within or without their corporate limits; . . ."[1] *Held:* The constitution was not violated by providing for the development of an airport by two municipalities and, further, nothing in the constitution prohibits two cities from owning property as "tenants in common."[2]

The result reached is beyond dispute; however, it may be noted that the court failed to answer appellant's contentions directly. He contended cities could not hold property jointly, viz., in joint tenancy. The controlling statute only grants authority to hold airport property in "joint tenancy," yet the court disposed of the contention by deciding that nothing in the constitution prohibits two cities from holding property as "tenants in common."

The problem of the joint ownership and management of municipal property has rarely been considered by the courts. There is authority for the position that municipalities cannot hold property in joint tenancy.[3] These authorities are apparently not based upon constitutional infirmities, but upon the legal impracticability of a municipal corporation being a joint tenant. Joint tenancy is distinguished by the presence of the four unities (interest, title, time and possession), and the element of survivorship. A municipal corporation cannot fit the requirements of these four unities, and, due to its perpetual life, eliminates survivorship. Municipalities may validly hold property as tenants in common.[4] It is quite possible that the court abbreviated its opinion but, in effect, decided that a joint tenancy was impossible and under the prevailing rule a tenancy in common should be evolved.

The joint establishment of an airport by two cities involves (a) financial contributions and participation in a joint enterprise, and (b) municipal activities outside the corporate limits (at least for one of the municipalities).

1. *Ark.* Acts 1939, Act 80, p. 168. Similar statutory provisions are: *Mich. Stats. Ann.* (1937), Ch. 76, Sec. 10.66; *Ill. Bar Stats.* (1937), Ch. 24, Sec. 642j; *Wis. Stats.* (1935) Sec. 114.151.

2. *Ragsdale* v. *Hargraves, Mayor,* Arkansas Supreme Court, decided June 19, 1939, Commerce Clearing House, Aviation Law Service, par. 1820.

3. *DeWitt* v. *San Francisco,* 2 Cal. 290 (1852); McQuillin Municipal Corporations (2nd Ed.), Vol. III, Sec. 1225; 43 C. J. *Municipal Corporations,* Sec. 2084, page 1329.

4. *Ibid.*

Some statutory and constitutional problems may be encountered. Because of the unusual character of the municipal activity and since it involves extraterritorial functions, express statutory authorization would be required. Municipal functions generally are confined to express grants of authority. This rule gains applicability when the city ventures outside of its territorial limits. There are cases which have permitted the purchase and development of real estate outside city limits without express statutory authority but in furtherance of some necessary or legitimate municipal purpose, and, therefore, as a necessary implication thereof.[5] However, the establishment of an airport is the purpose in and of itself and furthers no other municipal duty or activity. There are several courts that have validated the establishment of airports outside corporate limits—in all instances, express statutory authority covered the activity[6] or a general statutory grant of authority was extended to cover the establishment of an airport.[7]

Constitutional attack may be made on the ground that the contribution of funds violates provisions contained in most state constitutions forbidding the loaning of municipal credit or donating of funds in aid of any corporation or individual. In Ohio, this provision prevented a municipality from participating in a joint enterprise with a private corporation. The constitution, it was said, would and did "forbid the union of public and private capital or credit."[8] But a contrary position was taken in Oregon.[9] However, these cases are distinguishable so long as the airport is being fostered by two public bodies, viz., municipalities. The constitutional provision is apparently directed against financial cooperation between a private and a municipal corporation.

Again, it might be urged that municipal funds are being expended for a non-public purpose. If the project taken alone were in furtherance of a public purpose, no reason appears to revise its designation because two rather than one municipality are engaged.[10]

The cooperation of two cities in the establishment of a joint airport encourages the creation of more and better airports. What may be too great an expenditure for one municipality may not be for two. A joint airport located in one of two cities may be accepted whereas a foreign airport regulated by a neighboring city would not.

Many municipal functions lend themselves to joint establishment and maintenance, e.g., bridges connecting two cities, ferries, water supply, sewage disposal plants, irrigation, parks and sanitaria. One common way of exer-

5. *Schneider* v. *Menasha,* 118 Wis. 298, 95 N. W. 94 (1903—power to own stone quarry implied from power to improve streets); *Somerville* v. *Waltham,* 170 Mass. 160, 48 N. E. 1092 (1898); *Maywood Co.* v. *Village of Maywood,* 140 Ill. 216, 29 N. E. 704 (1892). *Pioneer Real Estate Co.* v. *Portland,* 119 Ore. 1, 247 Pac. 319 (1926—Sewer outlet); *McQuillin, supra,* Sec. 1210 and Sec. 1969.

6. *Wichita* v. *Clapp,* 125 Kan. 100, 263 Pac. 12 (1928); *State ex rel Hile* v. *Cleveland,* 26 Ohio 265, 160 N. E. 241 (1927); *Silverman* v. *Chattanooga,* 165 Tenn. 642, 57 S. W. (2d) 552 (1933). *Ebrite* v. *Crawford,* 215 Cal. 724, 12 P. (2d) 937 (1932). See notes 4 JOURNAL OF AIR LAW 437, 3 JOURNAL OF AIR LAW 462.

7. *City of Spokane* v. *Williams,* 157 Wash. 120, 288 Pac. 258 (1930); *State* v. *Clausen,* 157 Wash. 451, 289 Pac. 61 (1930)—power to establish airport outside limits implied from power to acquire property by eminent domain outside corporate limits).

8. *Alter* v. *City of Cincinnati,* 56 Ohio St. 47, 46 N. E. 69 (1897); *Village of Brewster* v. *Hill,* 128 Ohio St. 343, 190 N. E. 766 (1934).

9. *Municipal Security Co.* v. *Baker County,* 39 Ore. 396, 65 Pac. 369 (1901).

10. *Reinhart* v. *Mac Guffie,* Pa. Ct. of Com. Pleas. of ..... decided May, 1933, Commerce Clearing House Aviation Law Service, par. 1511 (question whether county could join with city in development of airport) *Cf. Hunnicutt* v. *Atlanta,* 104 Ga. (1898—Attempt by city to acquire county courthouse by first purchasing a 1/5 interest invalidated on ground that acquisition of 1/5 interest was for profit and not for corporate purposes).

cising local functions which spread beyond the boundaries of a single municipality is to create a separate municipal district to perform that one function—irrigation districts, park districts, sanitary districts are examples. So, too, an airport district could be created.[11] The disadvantage is that additional governmental agencies are established in the same territory, with added administrators, expenses and taxes.

LEE A. FREEMAN.*

DIGESTS

Airport—Public Nuisance.—[California] Action by city attorney of Los Angeles to abate a public nuisance—an airport operated in the residential section of the city. The airport had been established fifteen years ago and prior to the development of the surrounding area. It was used for sightseeing trips and student instruction.

The evidence demonstrated that in the present operation of the airport:

(a) great quantities of dust were stirred up and blown into the surrounding residential area, due to prevailing winds;

(b) planes approached from an easterly direction over the residential area and, in landing, descended to such low altitudes as to be a menace to the residents;

(c) many shore flights were taken daily, and oil was occasionally dropped on the homes of residents and surrounding premises;

(d) motors were gunned causing loud and sudden noises;

(e) automobile traffic congestion was caused.

Held: The airport involved was not an important one and was not properly erected, operated and equipped. As operated, it was a public nuisance. Furthermore, the owners or operators would not and could not gain prescriptive rights to maintain such a nuisance from prior or long use. Injunction was granted to restrain such operations as had disturbed or annoyed the occupants of the residential area. *People of State of California* v. *Dycer Flying Service, Inc.*, California Superior Court, City of Los Angeles, decided March 31, 1939. Commerce Clearing House Aviation Law Service, par. 1818.

L. A. F.

Conflict of Laws—Workmen's Compensation—State in Which Contract Was Executed vs. State of Employment and Injury.—[Washington] An employee of Northwest Airlines, Inc., in the course of his employment in the State of Washington was killed. While he had resided and worked in Washington, his contract of employment was executed in Minnesota. The defendant air line claimed the laws of Minnesota rather than the laws of Washington controlled. The court, however, denied this contention and pointed out:

(a) that the Washington Compensation Act provides for a mandatory and exclusive form of relief and establishes a broad and comprehensive public policy;

(b) that to give effect to the Minnesota statute would be to repudiate the clear policy and provisions of the Washington Act; would deny the certain and sure relief provided;

(c) that it is no greater hardship for a foreign employer to comply with the compensation acts of the various states than for the State of Washington to enforce the obligations imposed by foreign jurisdictions. *Livermore Adm'x* v. *Northwest Airlines, Inc.*, Washington Superior Court, County of Spokane, decided March 1, 1939, Commerce Clearing House Aviation Law Service, par. 913.

L. A. F.

Insurance—Interpretation of Participation in Aviation or Aeronautics With Relation to Airplane Passengers.—[Federal] Decedent, a fare-paying passenger on a Transcontinental and Western Air Lines plane to Pitts-

11. California Airport District Act, *General Laws of California* (1937) Act 150.

* Of the Chicago Bar.

burgh, was killed in a crash. His insurance policy exempted death "as a result of participation in aviation, aeronautics or subaquatics."

Held: The exemption clause does not apply to passengers. A forceful statement of the *raison d'etre* of the decision (and recent cases in conformity therewith) is worth quoting:

> "We think that the later cases reflect a changing attitude toward aviation, due no doubt to the marvelous progress made in the art of flying. In the early days each flight was a venture. The pilot and passenger, if he had one, flew tandem, or side by side, in an open cockpit over unknown terrain, to make-shift landing fields. Today transport flying is a business. The air lines have modern landing fields and passenger stations, and their established scheduled routes are protected by radio beams, beacons, weather reports, etc. They compete with each other for patronage, and people in increasing numbers are using their services as a matter of course. Their passengers no more participate in the operation of their planes than do passengers upon a railroad train participate in operating the train or those upon an ocean liner participate in navigating the ship. They pay their fares and passively accept the services and accommodations offered. The pilot is employed because of his skill and efficiency. The passenger is not permitted to direct or control him as to how, where or when he shall fly. Any sensible passenger would not presume to do so. If it was ever true, it cannot now be said that a fare-paying passenger on a commercial air liner 'participates in aviation or aeronautics.' Words, after all, are but labels whose content and meaning are continually shifting with the times."

The Massachusetts Protective Association, Inc. v. *Bayersdorfer*, U. S. Circuit Court of Appeals, 6th Circuit, decided June 28, 1939, Commerce Clearing House, Aviation Law Service, par. 530.

L. A. F.

Transcontinental Airline—What Constitutes "Doing Business" by a Foreign Corporation for the Purpose of Service of Process.—[Federal] The plaintiff, a resident and citizen of New York, brought this suit in the Federal District Court against the defendant, a Delaware Corporation, for the alleged wrongful death of the plaintiff's intestate, a resident and citizen of New York, arising out of an airplane accident in Ohio while the plaintiff's intestate was a passenger on one of defendant's planes on a regular flight. The defendant moved to vacate and set aside the service of process and to dismiss the complaint on the grounds (1) that it was not doing business in New York, (2) that it was not properly served, and (3) that for the court to entertain the suit would constitute an unreasonable burden on interstate commerce and a denial of due process. The defendant's principal place of business was in Chicago, but it had a ticket office and passenger station and waiting room in New York City, at which it received information as to weather conditions and regularity of flights, and conveyed such information to passengers, and from which office its passengers were transported to its Newark, N. J., airport by an independent bus concern, but whose busses while in such engagements bore the defendant's name. The defendant's regular eastern airport was at Newark, N. J., but it maintained two alternative landing fields in New York. It maintained a bank account in New York City for the temporary deposit of receipts and for the payment of expenses incident to its New York office. Other than as stated, the defendant's agents in New York City had no authority to and did not make contracts for the defendant in New York or otherwise represent it there. It evidently advertised New York City as the eastern terminus of its line.

Held: Motion denied. The defendant is engaged in business in New York; service of process on its "District Traffic Manager," in charge of its New York City office, is proper service of process on it; and the maintenance of the suit and trial of the action in New York will not unduly burden interstate commerce and does not constitute a denial of due process. See Comment 10 JOURNAL OF AIR LAW AND COMMERCE 430.

Morrell v. *United Air Lines Transport Corp.*, United States District Court for the Southern District of New York—Decided June 6, 1939—C.C.H. Aviation Law Service, par. 3059.

C. G. B., JR.