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AIRPORT LEGISLATION AND COURT DECISIONS

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WITHIN a few days it will be one year since the adoption of the Federal Airport Act¹ providing \$500,000,000 in Federal funds over a seven-year period to carry out a National airport plan. Under that Act states and cities must match, chiefly on a 50-50 basis, the Federal expenditure. We will, therefore, have more than \$1,000,000,000 expended on publicly-owned airports within the next seven years.

In addition to publicly-owned airports, we have hundreds of new privately-owned airports being established throughout the Nation. The impetus given to all aviation by the great technical achievements growing out of the War has made most of these privately-owned airports a financial success, thus inducing more people to create such businesses. Perhaps one of the most noteworthy developments in recent years is the movement to establish downtown airparks where small planes can land and take off.

We now have, therefore, a tremendous growth in the number and size of airports and we can look for a vast expansion in this field in the near future. All of this intense activity in the airport field creates many legal problems to which we as lawyers must give attention.

About 20 years ago cities began their first efforts to acquire land for the development of airports in an effort to secure the airmail service which was then developing into a major need. Air transportation was then in its infancy. As indicative of the doubts of the future of civil aviation which some people then expressed I call your attention to the argument advanced by a taxpayer in St. Louis, Missouri, in attacking the expenditure of \$2,000,000 by that City for an airport. He said of the airport:²

"It will afford a starting and landing place for a few wealthy, ultra-reckless persons, who own planes and who are engaged in private pleasure flying. They may pay somewhat for the privilege. It will afford a starting and landing place for pleasure tourists from other cities, alighting in St. Louis while flitting here and yon. It will offer a passenger station for the very few persons who are able

¹ 60 Stat. 170, 49 USCA § 1101 (Supp. 1946), approved May 13, 1946.

² *Dysart v. City of St. Louis*, 321 Mo. 514, 11 S.W. (2d) 1045, 1929 USAvR 15 (1928).

to afford, and who desire to experience, the thrill of a novel and expensive mode of luxurious transportation.

"The number of persons using the airport will be about equal to the total number of persons who engage in big-game hunting, trips to the African wilderness, and voyages of North Pole Exploration.

* * *

"In the very nature of things, the vast majority of the inhabitants of the city, a 99 per cent majority, cannot now, and never can, reap any benefit from the existence of an airport.

"True it may be permitted to the ordinary common garden variety of citizen to enter the airport free of charge, so that he may press his face against some restricting barrier, and sunburn his throat gazing at his more fortunate compatriots as they sportingly navigate the empyrean blue.

"But beyond that, beyond the right to hungrily look on, the ordinary citizen gets no benefit from the taxes he is forced to pay."

In this case, the Missouri Supreme Court with unusual foresight for the time of the decision (December 6, 1928), brushed aside the plaintiff's contentions and stated in part:

"It is unquestionably true that the airplane is not in general use as a means of travel or transportation either in the City of St. Louis or elsewhere; and it never will be unless properly equipped landing fields are established."

The Court's conclusion was as follows:

"An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves, and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air. With respect to the public use which each subserves they are essentially of the same character. If the ownership and maintenance of one falls within the scope of municipal government, it would seem that the other must necessarily do so. We accordingly hold that the acquisition and control of an airport is a city purpose within the purview of general constitutional law."

In the same year the great Justice Cardozo, then a member of the New York Court of Appeals, in upholding the power of the City of Utica to issue bonds payable from tax funds for the development of an airport, said as follows:³

"We think the purpose to be served is both public and municipal. A city acts for city purposes when it builds a dock or a bridge or a street or a subway. Its purpose is not different when it builds an airport. Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

Wisconsin and all the other states now have state legislation which authorizes cities and counties to acquire and develop airports.⁴ While the courts of 27 states in 51 decisions have held that airports are a pub-

³ *Hesse v. Rath*, 249 N. Y. 435, 164 N.E. 342, 1929 USAvR 10 (1928).

⁴ See RHYNE, AIRPORTS AND THE COURTS (1944) 20.

lic purpose,⁵ this is no guarantee that some court will not depart from this long line of authorities. In 1944, for example, the Supreme Court of Illinois handed down a decision holding that airports are not a public purpose within the provisions of the Illinois Constitution relating to the expenditure of public tax funds.⁶ The decision was unanimous, and if allowed to stand it meant that some \$20,000,000 worth of airport bonds were worthless. A petition for rehearing was filed and the Court reversed its decision on this point,⁷ so airports in Illinois are now held to be a public purpose upon which cities may expend public tax funds. I merely call this problem to your attention because it may shortly arise in your state.⁸ I do not think it will be a serious problem because the public purpose of airports seems to be well established in the law.

AIRPORTS AND INTERFERENCE WITH ADJACENT PROPERTY OWNERS

Perhaps the most difficult problem arising out of the tremendous expansion in the airport field is that of the conflicting interests and rights of airports and adjacent property owners. It is claimed that airports cause injury to adjacent property owners by low flights which cause noise, dust, fear of injury from falling planes, and glare from the landing and take-off lights of planes. It is also claimed that airports attract uncontrollable crowds and traffic which are an annoyance of considerable magnitude. Airplanes warming up before take-offs are alleged to create noise and dust. The lights of the airport also create a glare disturbing to adjacent property owners. Allegations of injury to health, business and property are made in most of the cases.⁹ Depreciation in the value of property adjacent to the airport is also an element of the damage claimed. In one case great gusts of air from airplane propellers were alleged to be so strong as to upset furniture in a home adjacent to the City of Atlanta airport.¹⁰ In a similar case in Iowa, it was alleged that the wind from the airplane propellers frequently blew off an adjacent landowner's hat and that the suction pulled off his bed covers.¹¹

On the other side, it is sometimes claimed that adjacent landowners injure airports by creation or maintenance of hazards which take the form of glare in the eyes of pilots, dust or smoke which lessen visibility, and electrical interference which prevents contact between airport radio

⁵ *Ibid.*, p. 17-29.

⁶ *People ex rel. Greening v. Bartholf*, 235 C.C.H. § 1877 (Ill. March 21, 1944).

⁷ *People ex rel. Greening v. Bartholf*, 288 Ill. 445, 58 N.E. (2d) 172, 1944 USAvR 40 (Nov. 22, 1944). See also the later case of *People ex rel. Curren v. Wood*, 391 Ill. 237, 62 N.E. (2d) 809, 1946 USAvR 299 (1945).

⁸ Wisconsin is one of the states where the highest court has not yet directly passed upon the validity of the expenditure of public funds for airport purposes. This point may well arise as a result of participation in the National airport plan under the Federal Airport Act, and may require a test case, if bond houses have any doubts on the subject.

⁹ See RHYNE, *supra*, note 4 at pages 119-131.

¹⁰ *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. (2d) 245 (1942).

¹¹ See Time Magazine, Sept. 9, 1946, and Noel, *Airports and Their Neighbors*, 19 Tenn. L. Rev. 563 (1946).

control towers and aviators.¹² Physical obstructions such as buildings or other structures or objects of natural growth such as trees in airport approach zones can, if erected or maintained by adjacent landowners, render use of an airport extremely hazardous or impossible. In California, one landowner erected 20-foot poles on his property to make it dangerous to use an adjacent airport. He did this out of malice and spite to force the airport owner to purchase his property.¹³ In Pennsylvania in a similar case the property owner erected a tower 154 feet high and 8 feet square. This tower fell so he erected a new one 90 feet high, which burned down.¹⁴ In Iowa an adjacent landowner planted fast growing trees expected to reach the height of 35 feet and render use of the airport extremely hazardous. When enjoined from allowing, constructing or maintaining anything over 25 feet in height, he erected a pole 24 feet 8 inches in height topped by a fluttering red flag.¹⁵

In solving the legal problems growing out of the conflicting claims of property owners and airport owners which have been enumerated above, the courts have attempted to apply some of the oldest rules of the common law to this, our newest form of transportation. In every one of the 30-odd cases which have arisen in this field, the courts have been forced to consider the so-called *ad coelum* doctrine. That doctrine grows out of the ancient Latin phrase "*Cujus est solum ejus est usque ad coelum et ad inferos*," meaning "He who owns the soil owns everything above and below, from heaven to hell."¹⁶ This maxim originated in England and was brought into the jurisprudence of the United States by our adoption of the English Common Law.¹⁷

The best known as well as one of the most recent conflicts between a landowner and an airport owner or operator is that between the United States and the owner of a small farm adjacent to the Greensboro,

¹² Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law and Contemp. Prob. 539 (1946).

¹³ *United Airports of California v. Hinman*, 1940 USAvR 1 (U.S.D.C.S.D. Cal. 1939). The Court enjoined this property owner from erecting any structures higher than 10 feet within 200 feet of the airport, 20 feet within 200-500 feet, 50 feet within 500-1000 feet, and 100 feet within 1000 feet to the end of the landowner's property line.

¹⁴ *Commonwealth v. Von Bestecki*, 43 Dauphin Co. Rep. 446, 1937 USAvR 1 (Ct. of Comm. Pleas, Dauphin Co., Pa., 1937). The Court enjoined erection of any more such structures on the grounds that they were a nuisance.

¹⁵ *City of Iowa City v. Tucker*, 1936 USAvR 10 (Dist. Ct. Johnson Co., Iowa, 1935), and note (1937) 7 JOURNAL OF AIR LAW 293, 294.

¹⁶ See RHYNE, *supra*, note 4, at page 94 *et seq.*

¹⁷ The maxim is supposed to have been adopted by Lord Coke from an obscure glossator on Justinian's Digest of Roman Law. Blackstone restated and carried the maxim forward in his famous Commentaries and some modern authorities on real property have stated the maxim in much the same form. See, Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 JOURNAL OF AIR LAW 329, 531 (1932). Maxims are not "law" and are not given effect as legal rules in cases to which it is unreasonable to apply them. As stated by one of the leading cases in this field of aviation law: "Maxims are but attempted general statements of law. The judicial process is the continuous effort on the part of the courts to state accurately the general rules with their proper and necessary limitations and exceptions. 'A maxim,' said Sir Frederick Pollack, 'is a symbol or vehicle of the law so far as it goes, it is not the law itself still less the whole of the law even on its own ground.'" *Sweetland v. Curtiss Airports Corporation*, 41 F. (2d) 929, 1930 USAvR 21 (D.C. Ohio, 1930), modified 55 F. (2d) 201, 1932 USAvR 1 (C.C.A. 6th, 1931).

North Carolina, municipally-owned airport. This case, *Causby v. United States*¹⁸ is factually typical of the cases in this field. There the Government in 1942 secured a non-exclusive lease for the use of this airport renewable until 1967 or until six months after the war emergency, whichever occurred first. Approximately 4% of the time in taking off and 7% of the time in landing, the prevailing winds required airplanes using the airport to fly directly over Causby's home, which was located 2275 feet from the airport. The 30-to-1 safe glide angle approved by the C.A.A. passes over the Causby property at 83 feet, and is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. Up until the United States began using the airport no difficulty was experienced by the Causbys from the use of the airport by civilian aircraft. Since the United States began its operation, its four-motored heavy bombers and other planes had passed over the Causby property so close to the top of the trees as to blow the old leaves off, the noise from the planes was startling, and at night the glare from the planes lighted up the whole farm. The noise made it necessary for the Causbys to give up their chicken business because as many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total number of chickens lost was about 150. Production also fell off, and the result was the complete destruction of the use of the property as a commercial chicken farm. The Causbys also claimed that they were deprived of their sleep because they were nervous and frightened by the low flights of the planes. While no accidents had occurred on the Causby property, there had been several accidents on adjacent land.

The Causbys brought suit in the Court of Claims alleging that the United States had taken an easement over their property and that under the Fifth Amendment of the Federal Constitution this was a taking for public use without just compensation in violation of that Amendment. The Court of Claims agreed with this contention and entered a judgment of \$2,000. On appeal the Supreme Court of the United States reversed the judgment because there was no finding as to the exact nature of the easement taken, but held that a servitude had been imposed on the Causby land which entitled them to recovery on the theory stated. The Court said in part:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."

The Court then stated that "the landowner owns at least as much of the space above the ground as he can occupy or use in connection with

¹⁸ 328 U.S. 256, 1946 USAvR 245 (1946); see comment by Negel, 14 JOURNAL OF AIR LAW AND COMMERCE 112 (1947).

the land." In making such a holding the court certainly evolved a new concept of property in air space which gives landowners a new remedy for injuries suffered in this field. The property concept is the chief significance of the case. The court summarized its opinion as follows:

"The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."

The Federal Government was not subject to suit in tort at the time this case arose¹⁹ so it was necessary to work out this property taking concept to give the landowner a remedy. The other cases in this field have concerned themselves with whether the injury to an adjacent landowner is or was a nuisance or a trespass and whether the injury is of such a character as to warrant the granting of an injunction or monetary damages or both.²⁰ The importance of the trespass and nuisance doctrines is that in case of a trespass an injunction and nominal damages may be granted even though a flight through the air space over particular land did no damage, while in a nuisance case an injunction and damages may be granted only where there is proof of actual damage.²¹ With the exception of the Supreme Judicial Court of Massachusetts²² and lower courts in Delaware,²³ Pennsylvania²⁴ and Nebraska,²⁵ all the courts in passing upon cases in this field have rejected the trespass theory and adopted the nuisance theory. With the above quoted statement by the Supreme Court that "common sense revolts at the idea" of "countless trespass suits" it is to be hoped that the trespass theory will die a well deserved death. The Courts which had considered whether low flights over property adjacent to airports could create a prescriptive right or easement prior to the *Causby* case had held that such flights could not create such rights.²⁶

Five theories of air space rights had been advanced in the cases decided prior to the *Causby* case. These theories are:²⁷

¹⁹ Federal Tort Claims Act, 60 Stat. 482, 28 USCA § 921 (Supp. 1946), approved August 2, 1946 allows suits in tort against the Federal Government.

²⁰ See RHYNE, *supra*, note 4, pages 82-163.

²¹ Hunter, *supra*, note 12, at page 549.

²² *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 1930 USAvR 1 (1930), and *Burnham v. Beverly Airways Inc.*, 311 Mass. 628, 42 N.E. USAvR 39 (Ct. Q. Sess. Jeff. Ct., Pa., 1922).

²³ *Vanderslice v. Shawn*, 27 A. (2d) 87, 1942 USAvR 11 (Del. Ct. Chan., 1942).

²⁴ *Commonwealth v. Nevin and Smith*, 2 Pa. Dist. and C. Ct. Rep. 241, 1928 USAvR 39 (Ct. Q. Sess. Jeff. Ct., Pa., 1922).

²⁵ *Glatt v. Page*, unreported officially (Third Judicial Dist., Docket 93-115, 8th Dist. Ct. Neb., 1928).

²⁶ RHYNE, *supra*, note 4, page 107 *et seq.*

²⁷ RHYNE, *ibid.*, pages 154-162.

- (1) the landowner owns all the air space above his property without limit in extent;
- (2) the landowner owns the air space above his property to an unlimited extent subject to an "easement" or "privilege" of flight in the public;
- (3) the landowner owns the air space up to such height as is fixed by statute, with flights under that height "trespasses";
- (4) the landowner owns the air space up as far as it is possible for him to take effective possession but beyond the "possible effective possession zone" there is no ownership in air space; and
- (5) the landowner owns only the air space he actually occupies and can only object to such use of the air space over his property as does actual damage.

No court has held that the first theory applies in the aviation field. The Uniform State Law for Aeronautics²⁸, which is in force in 22 states, and the American Law Institute's Restatement of the Law of Torts²⁹, follow the second theory with only the Delaware Court decision³⁰ supporting it. Since it is based on the discredited *ad coelum* maxim this theory stands condemned by a vast majority of the court decisions in this field. The third theory is followed by the Supreme Judicial Court of Massachusetts³¹ and by a lower court in Minnesota,³² but such statutory flight limitations are in fact safety regulations rather than property rules, so such decisions are unsound in principle. The fourth theory, i.e. ownership of a "possible effective possession zone" has received approval by the courts of Georgia,³³ the Sixth Circuit Court of Appeals of the United States,³⁴ and indirectly by the Supreme Judicial Court of Massachusetts.³⁵ The difficulty with this theory is that it would seem to authorize recovery of nominal damages and the securing of an injunction where no actual damage is done, although the courts adopting it to date have not decreed such a result. The fifth or "actual use" theory has been adopted by the United States Circuit Court of Appeals for the Tenth Circuit in the *Hinman*³⁶ case and by the Supreme Court of the United States in the *Causby* case.³⁷ The Supreme Court cited the *Hinman* case in holding that "the landowner owns at least as much air space as he can occupy or use in connection with the land." The Supreme Court uses the word "can" in the sense of present use, thus getting away from the "possible effective possession zone" theory.³⁸

Since the *Causby* decision was handed down by the Supreme Court on May 27, 1947, two decisions enjoining the construction of proposed private airports have been reported. In both cases suits for injunctions were brought by adjacent landowners against the owner and operator

²⁸ 9 Uniform Laws Annotated 17 (1923).

²⁹ Section 194.

³⁰ *Vanderslice v. Shawn*, *supra*, note 23.

³¹ See cases cited *supra*, note 22.

³² *Johnson v. Curtiss Northwest Airplane Co.*, 1928 USAvR 42 (Dist. Ct. Ramsey Co., Minn., 1923).

³³ *Delta Air Corp. v. Kersey*, *supra*, note 10, and *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817, 1934 USAvR 166 (1934).

³⁴ *Swetland v. Curtiss Airports Corp.*, *supra*, note 17.

³⁵ See cases cited *supra* note 22.

³⁶ *Hinman v. Pacific Air Transport Corp.*, 84 F. (2d) 755, 1936 USAvR 1 (C.C.A. 9th 1936), *cert. den.* 300 U.S. 654, 1937 USAvR 173 (1937).

³⁷ *United States v. Causby et ux*, *supra*, note 18.

³⁸ See Noel, *supra*, note 11 at page 573.

of the proposed airports. In *Antonik v. Chamberlain*,³⁹ the Ohio Court of Common Pleas, Summit County, on December 7, 1946, restrained the development of a privately-owned airport near Akron, Ohio, on the ground that it would materially impair the value of adjacent property, substantially interfere with the use of that property and commit repeated and continuing acts of trespass and nuisance and constitute a continuing nuisance. In *Crew v. Gallagher*,⁴⁰ the Pennsylvania Court of Common Pleas, Chester County, on December 23, 1946, on similar facts, rendered a similar decision based on the finding that an airport near Philadelphia would constitute a private nuisance. These two recent cases amply demonstrate that this field will be a most active area of litigation for many years as the respective rights of landowners and airport operators are adjudicated by the courts.

AIRPORT ZONING

The protection of airport approaches from hazards to air navigation presents one of the most important of current airport legal problems. This problem arises out of the fact that while a city or county may purchase hundreds of acres for an airport, an obstruction in the approach to one of the airport's runways can render the entire project worthless, resulting in the loss of the millions of dollars which a modern airport costs. Under existing C.A.A. regulations, aerial approaches extending at least two miles from the ends of all airport runways are required for all of the larger airports.⁴¹ A 30-to-1 descent or approach glide angle is required, or, in the case of instrument landing, a descent glide angle at a rate of 40-to-1. This means that in the case of most airports there can be no structure, tree or other object within two miles of the ends of the runways of the airport which is higher than 1/30th or 1/40th of its distance from the end of the runway.

To meet this problem the idea of zoning the area surrounding airports so as to limit the height of obstructions has been advocated in a model state statute drafted and sponsored by the National Institute of Municipal Law Officers and the Civil Aeronautics Administration. This model statute or a statute of similar provisions has now been adopted by 35 states and by Alaska, Hawaii and Puerto Rico.⁴² Under this model act cities and counties may adopt airport zoning ordinances restricting the height of buildings, structures or objects of natural growth (like trees) in the approach zones of airports which are "utilized in the interest of the public."

It is sincerely believed that this idea of airport zoning offers a reasonable solution to this very difficult problem. For example, Wichita recently purchased land outside its corporate limits for a new airport because its existing airport was not fully usable due to obstructions to certain of its runways. Almost immediately the land surrounding the

³⁹ 235 C.C.H. § 2310.

⁴⁰ 235 C.C.H. § 2311.

⁴¹ Hunter, *supra*, note 12 at page 540.

⁴² *State Airport Zoning Legislation, January, 1947*—release of the Office of Airports, C.A.A., Department of Commerce.

new airport location was selling for high prices and plans were being made to erect many-storied hotels and other structures which would have rendered that site worthless as an airport. Under these circumstances an airport zoning statute and airport zoning ordinance are the only solution.

One thing to emphasize about airport zoning is that it is not designed to operate retroactively so as to require the taking down of existing structures. It operates only in the future, and so long as it merely reasonably restricts the height of property surrounding an airport it is believed that the basic legal principles of police power zoning will sustain its validity.⁴³ In the two reported cases on the validity of airport zoning regulations the regulations were, however, held invalid. In Newark an airport zoning ordinance was held invalid because there was no state enabling statute authorizing the city to adopt such an ordinance.⁴⁴ This defect is now being cured by adoption of proper enabling legislation. In Baltimore a state statute was held unconstitutional because it was so drafted as to limit structures immediately adjacent to the Baltimore airport to a height of not more than five feet. The court held this limitation was unreasonable.⁴⁵

In a Federal District Court in Louisiana the Federal Government sought to condemn an easement ranging at from 25 to 40 feet above certain land adjacent to a local airport. The condemnation jury returned a verdict that the easement was worth "no dollars" because of the existence of an airport zoning ordinance prohibiting the erection or maintenance of structures in excess of 25 feet in height on the particular property. The court rendered an opinion upholding this verdict and thus indirectly upheld the validity of the airport zoning ordinance.⁴⁶ In Massachusetts, by way of dictum, the Supreme Judicial Court of that state held that the airport zoning act "contains adequate provisions for securing and regulating the approaches to public airports."⁴⁷

Extensive consideration of the various legal problems involved in airport zoning is not possible in this limited paper. The zoning cases establish quite clearly the legal principle that private property rights are relative rather than absolute, and that police power regulation may go so far as to interfere with existing and established uses of private property without compensation.⁴⁸ These cases also hold that there is a point beyond which "regulation" becomes "confiscation", so valid airport zoning regulations must stay within the scope of police power regulation or they will be declared unconstitutional. Where to draw the line is the important question.

⁴³ Hunter, *supra*, note 12, page 552 *et seq.*; RHYNE, *supra*, note 4, page 177 *et seq.*; Noel, *supra*, note 11, at page 15 *et seq.*

⁴⁴ *Yara Engineering Corp. v. City of Newark*, 40 A. (2d) 559, 1945 USAvR 117 (N.J. Sup. Ct. 1945).

⁴⁵ *Mutual Chemical Co. v. Mayor and City Council of Baltimore*, 1939 USAvR 11 (Circuit Ct. Baltimore, 1939).

⁴⁶ *U.S. v. 357.25 Acres of Land*, 55 F. Supp. 461, 1944 USAvR 36 (W.D. La. 1944).

⁴⁷ *Burnham v. Beverly Airways Inc.*, *supra*, note 22.

⁴⁸ RHYNE, *supra*, note 4 at page 177 *et seq.*

In addition to the general principles enunciated by the courts in zoning cases there is present in airport zoning the safety idea, which, standing alone, without the use of the community benefit principle which supports general zoning, might be a sufficient legal basis for some courts in upholding airport zoning. The large stake of all the people in the community in aviation and the physical danger to those using the airport from obstructions are certainly factors that should weigh heavily in support of airport zoning.

DAMAGE CLAIMS AGAINST AIRPORT OWNERS AND OPERATORS

With respect to damage claims against airport owners and operators, the general rule is that the operator and his employees must exercise ordinary care as to persons and property on the airport or respond in damages for all injury resulting from lack of such care. As in most other instances, attempts to define ordinary care in the operation of an airport are not very useful because the definition of "ordinary care" depends upon the facts of each particular case. While the operator of the airport must exercise ordinary care, so also must the person using the airport. Following the usual rule of law, recovery against the negligent operator is barred where the negligence of the person injured contributes in some way to the injury.

An analysis of cases wherein the airport operator has been *held liable* to an injured party indicates that the injury occurred through one or more of the following acts of negligence on the part of the operator: *First*, the negligent operation of the airport by the operator himself, or his employee acting in the scope of his employment, as in the California case of *Coleman v. City of Oakland*,⁴⁹ decided in 1930, where the City was held liable for damages caused by the negligent operation of a city truck being used to improve the airport; *Second*, failure to anticipate and avoid a foreseeable risk or danger as in *Peavey v. City of Miami*,⁵⁰ where the city was held liable for personal injuries to an aviator, and for damages to an airplane, resulting from a collision between the airplane and road machinery left on a runway without proper warning or signals; *Third*, failure to discharge a non-delegable duty to keep the premises free from dangerous conditions, as in the English case of *Imperial Airways v. National Flying Services*,⁵¹ where the airport operator was held liable for failing to remedy a situation which allowed an airplane to crash through a covering over a concealed stream which ran through the airport; *Fourth*, failure to properly discharge the duties of a bailee in caring for a plane stored in the custody of the airport, as in the Minnesota case, of *Zanker v. Cedar Flying Service*,⁵² where a negligent bailee was held liable for failure to stake an airplane subsequently destroyed in a windstorm.

On the other hand, cases have indicated that the airport owner will *not be liable* under the following conditions: *First*, when the airport

⁴⁹ 64 Cal. App. 73, 295 P. 59, 1931 USAvR 61 (1930).

⁵⁰ 146 Fla. 629, 1 So. (2d) 614, 1941 USAvR 28 (1941).

⁵¹ 1933 USAvR 50 (K. B. Div., June 16, 1932).

⁵² 214 Minn. 242, 7 N.W. (2d) 775, 1943 USAvR 51 (1943).

is operated by an independent contractor-lessee and the owner being sued was not personally negligent as in the case of *Christopher v. City of El Paso*,⁵³ where the city was held not liable to a spectator at an air show at the municipal airport, as the city had leased the airport to a private operator and no negligence on the part of the city was proved; *Second*, when the injured party was contributorily negligent. This is well illustrated by the Wisconsin case of *Davies v. Oshkosh Airport, Inc.*,⁵⁴ where the plaintiff's airplane was returning to an airport on the evening of July 10, 1928, and approached the field from the northwest, in a northwest wind. The plane skirted the west side of the field, circled the south end, and then approached the field from the southeast. In landing, the plaintiff's pilot was blinded by the sun and the plane struck a hayrack which was negligently left on the runway. The plaintiff sued for resulting damages to his plane. In the trial court the jury found for the plaintiff. On appeal the Supreme Court reversed the judgment, holding that the pilot was negligent as a matter of law if he voluntarily attempted to land at a time when he was unable, because his vision was obscured, to see the hayrake.

A somewhat similar factual situation was presented in the New York case of *Read v. New York City Airport, Inc.*,⁵⁵ where an airplane which was taxiing down the runway collided with a truck that had been negligently left on the runway by the airport operator. There, too, the court found that the pilot had not exercised reasonable care to see that the course he was pursuing was not dangerous and recovery for damage to the plane was denied.

Finally, the airport operator has escaped liability where, the operator being a city or other public body, courts have classified such operation as a governmental, as opposed to a proprietary, function. A majority of courts which have ruled on this classification have held the operation of an airport by a city to be a proprietary function, and thus subject to the same liabilities as a private operator.⁵⁶ Wisconsin is among those jurisdictions wherein no cases have determined this question.

⁵³ 98 S.W. (2d) 394, 1937 USAvR 153, (Tex. Civ. App. 1936).

⁵⁴ 214 Wisc. 236, 252 N.W. 602, 1934 USAvR 122 (1934).

⁵⁵ 259 N. Y. S. 245, 1933 USAvR 31 (Mun. Ct. of N. Y. C., 1932).

⁵⁶ Cases holding that in the operation of an airport cities are engaged in a proprietary function: *Peavy v. City of Miami*, cited *supra*, note 52; *Christopher v. City of El Paso*, cited *supra*, note 53; *Pignet v. City of Santa Monica*, 29 Cal. App. (2d) 286, 84 P. (2d) 166, 1939 USAvR 28 (1938); *Coleman v. City of Oakland*, cited *supra*, note 49; *Mollencop v. City of Salem*, 139 Ore. 137, 8 P. (2d) 783, 1932 USAvR 22 (1932); *City of Blackwell v. Lee*, 178 Okla. 338, 62 P. (2d) 1219, 1937 USAvR 180 (1936); *Godfrey v. City of Flint*, 284 Mich. 291, 279 N.W. 516, 1938 USAvR 33 (1938); *City of Mobile v. Lartigue*, 23 Ala. App. 479, 127 So. 257, 1930 USAvR 50 (1930).

Cases holding cities operating an airport are engaged in a governmental function: *Abbott v. City of Des Moines*, 230 Iowa 494, 298 N.W. 649, 138 A.L.R. 120, 1941 USAvR 39 (1941); *Mayor, etc., City of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63, 1937 USAvR 47 (1936); *Stocker v. City of Nashville*, 174 Tenn. 483, 126 S.W. (2d) 339, 1939 USAvR 42 (1939).