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COURTS NOW DEEM AIRPORTS NECESSARY

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A BODY of case law has developed on the question of the airport's place in the community. Recent decisions offer ample material to one searching for authority in asserting the importance of airports and their attendant activity.

As the flood of illy considered, or lightly instituted, litigation against the construction or maintenance of airports seems to be steadily increasing, there are set forth here reactions representative of what might well be termed "airminded thinking" of several courts arising from a variety of suits brought against airport interests. The Courts of Florida, Michigan, New Jersey, Ohio, Pennsylvania, and Virginia have all recently decided litigation connected with the establishment of airports and it is interesting to notice the encouragement their decisions lend to the aviation industry. Selecting the most recent case, a decision by the Pennsylvania Supreme Court, captioned *Crew v. Gallagher,*[1] one finds the following passages:

> "There is nothing in the construction of an airfield, or in the necessary consequences of its normal operation in an agricultural district to create a nuisance . . .
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> "The testimony discloses no additional volume of objectionable noise in comparison with the existing noise level in the immediate vicinity of the proposed airport. Farm tractors, passenger cars and heavy trucks on the adjacent highway, trains on the main line of the railroad nearby, and military and transport aircraft having no connection with the airport in question, already disturb the tranquility of this neighborhood. 'No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells.' *Collins v. Wayne Iron Works,* 227 Pa. 326, 331, 76 A. 24."

The Pennsylvania court recognized that if the citizens of today are to accept the benefits of modern conveniences and scientific advancement, they also must be willing to accept as aspects of modern living the minor irritations which occasionally accompany such development. The opinion of the lower court granting an injunction restraining the use of certain property as an airport therefore was reversed.

In *Antonik v. Chamberlain,*[2] the Ohio Court of Appeals stated:

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[1] Pa. Sup. Ct., Eastern Dist. (Mar. 25, 1948). 2 Avi 14, 587.
[2] Ohio Ct. of App., 9th Jud. Dist. (Dec. 23, 1947), 2 Avi 14, 500.

"In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport of the kind contemplated is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of a valuable asset to the entire community.

"To find that the use as an airport of approximately 450 acres of land beyond the city limits and away from the closely-built-up and congested part of the city is an unreasonable use of the land, would, we think, under the circumstances of this case, obstruct the development of aviation, as a legitimate and necessary industry, to an unreasonable extent.

"Undoubtedly the plaintiffs will experience some discomfort, but that is one of the incidents or results of residing in a heavily-populated, highly industrialized state. It is an incident of living in an age of progress, in which there are erected huge rubber factories, with their accompanying smells and noises; in which the streets and highways are used by great, noisy trucks for transportation; in which commercial airliners ply the skies continuously, for the speedy transport of persons and freight; and in which thousands of various industries throughout the cities and countryside contaminate and defile the former natural beauty, peacefulness and quiet of the vicinage."

In this case, the plaintiffs sought to restrain, in anticipation thereof, the operation of an airport "because of (1) noise, (2) dust, (3) attraction of crowds, who will trespass on their premises, (4) annoyance in the peaceful enjoyment of their homes, (5) fright and fear of physical harm from low flying and the crashing of planes, (6) depreciation of property values." These allegations follow the formula of most earlier cases.[3] The trial court which had enjoined the airport project was reversed by the quoted decision.

Florida has spoken most dramatically. As recently as November 7, 1947, its Supreme Court, in *Frink v. Orleans Corp.*,[4] in overriding the attempt of the city of Miami Beach so to zone a portion of its land as to prevent the construction of an airport quoted the following passage from its earlier decision in *Stengle v. Crandon*:[5]

"In almost every town of any consequence in Florida for more than three years the sound of airplanes has been almost incessant as men trained in them for the very purpose of safeguarding the constitutional guaranties, including the one that a person may not be deprived of property without due process of law, by warding off the attacks of enemies advocating the ideologies which were the very antitheses of the American system of government. These

[3] *Swetland v. Curtiss Airports Corp.*, 41 F. 2d 929, 1930 US AvR 21 (D.C. Ohio, 1930), modified 55 F. 2d 201, 1932 US AvR 1 (C.C.A. 6th, 1931); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 1930 US AvR 1 (1930); *Hinman v. Pacific Air Transport Corp.*, 84 F. 2d 755, 1936 US AvR 1 (C.C.A. 9th, 1936) *cert. denied* 300 U.S. 654, 1937 US AvR 173 (1937).

[4] Fla. Sup. Ct., Div. B (Nov. 7, 1947), 2 Avi 14, 468, 32 So. 2 425.

[5] Fla.—, 23 S. 2d 835 (1945).

> airplanes are not mere noisy nuisances, nor are they vehicles still in the experimental stage, but they represent the latest means of transportation, and certainly if we are to progress, the establishment of airports to accommodate them should be encouraged."

The *Stengle* case,[6] decided Nov. 27, 1945, was also an appeal from the action of a Zoning Board. Here the state supreme court, however, took the affirmative action of reversing an order dismissing a Bill of Complaint wherein the airport owner prayed that the Board be ordered so to zone his tract that he could construct an airport upon it.

In New Jersey aviation's maturity has been recognized and the New Jersey Chancery Court recognizes that like the steam railroad, aviation has passed its early days. The following language is taken from *Oechsle v. Ruhl*:[7]

> "Although not so alleged in specific words, the gravamen of the bill is that the construction of an airport constitutes a nuisance *per se*. The great advances made in aviation during the past three decades have clearly demonstrated the necessity of this type of commerce. Not only have there been tremendous and, in retrospect, almost unbelievable strides made in the construction of aeroplanes during this period of time, but the modernization of airport construction has had to keep pace with the advance of aeroplane construction. The thousands of airports and airfields in their varied and diverse locations are proof that they are not nuisances *per se*. The argument advanced by complainants is comparable to that advanced while steam railroads were in their infancy. The legislative grant of authority to the State Aviation Commission to issue licenses as above stated is a recognition of the construction, operation and conduct of an airport as a legal business."

In this case, a bill of complaint was filed asking an injunction, *inter alia*, against construction of an airfield which was stricken as to that prayer by the New Jersey Chancery.

Prior to Pearl Harbor, hostilities elsewhere had prompted the Federal Government to make aviation instruction available in Universities. The University of Virginia needed an airport for this activity. Neighboring landowners attempted to enjoin its establishment and on Sept. 5, 1940, the Virginia Supreme Court took a view parallel to that of the other states mentioned. In *Batcheller v. Commonwealth*,[8] much language encouraging to aviation's advocates can be found:

> "Aviation is a lawful business and the owner of real estate has a right to establish an airport thereon if it is properly located and properly operated, notwithstanding for aesthetic and sentimental reasons it may not be agreeable to persons owning fine country homes in the community." and
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> "They have been fortunate in that they have been able to enjoy their country estate as they have for so long a time. They must now yield to change and progress of the time." and
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> "It is inconceivable that Thomas Jefferson, who left this for his

[6] Idem.
[7] N. J. Chancery, 54 A. 2d 462, 2 Avi 14, 418 (1947).
[8] 176 Va. 109, 10 S.E. 2d 599 (1940).

> epitaph, now carved upon a shrine at Monticello: 'Here was buried Thomas Jefferson, author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia', would have objected to or tolerated any objection to the establishment of the airport in question, shown to be essential to proper and full instruction in aeronautics, which is today so essential to the safety of the nation and the development of its commerce, and most probably had he been living at the time of the hearing upon the application for the permit in question, he would have been one of the strongest advocates for granting it. No reason is perceived why because the airport in question is located in an historic section in which many great men have lived and where they have died and were buried, scientific, educational, economic, and commercial development should not be sanctioned or countenanced, but instead such section should be left to the enjoyment of those having fine country homes, who object to any activity tending to interfere with their peace of mind, whatever that may be, or the quietude of the countryside, whatever that may be. If such a policy should be adopted, development of Virginia, so famed in history and having so many 'historic shrines,' would be seriously retarded."

In Michigan, an appeal was taken to the Supreme Court by divers plaintiffs who had failed in the Court below to prevent the City of Detroit from obtaining more land for its airport and to obtain relief from harm to neighboring properties by the airport's operation and management. In 1944 the Supreme Court in its decision, *Warren and Agar v. Detroit*,[9] said:

> "The city stated that the city might not use the proposed airport for the larger or heavier planes which necessarily fly much lower when landing or taking off, and could possibly cause a nuisance to plantiffs. If the airport cannot be used for very large airplanes, the city might find itself at the end of a side line, from which smaller craft would have to be flown to other cities which had the foresight to provide airports of a proper size in a locality free from obstacles so as to accommodate transcontinental and the other larger airplanes. We take judicial notice of the tremendous increase in the size of airplanes during the past few years."

The lower court was upheld and the appeal denied.

From these decisions of representative state courts one sees that today the careful advocate no longer need speak with a prophet's voice of the future treatment aviation will receive in the courts. These decisions demonstrate that the courts have and will continue to recognize the airport's place in the modern community.

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[9] 308 Mich. 460, 14 N.W. 2d 134 (1944).