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THE RECENT TREND OF AERONAUTICAL LITIGATION

GEORGE B. LOGAN*

The title of my address is listed in the program as "Report by General Counsel on Aeronautical Litigation." A report, however—just a report—would, I believe, be just about as interesting and as valueless as a report on yesterday's weather. Yesterday's weather is something we all know about and I rather feel that yesterday's court decisions are something that you all know about. What we all really want to know about the weather is what it is going to be. What we all want to know about the stock market is what it is going to do. What it has done is already too painfully impressed upon us.

At the risk of being just as reliable as those who prognosticate the weather and as correct as those who foretell the curves of rising and falling prices, I am going to do a little back and forecasting in the field of aviation litigation. But to see which way a curve is moving, you must see its beginning, its middle and its present line—and the future curve we guess at. I must, therefore, bore you a little by drawing the beginning and the middle of the curve.

The first aviation litigation in this country actually involving the right of an airplane to fly over private property was the case of *Smith* v. *New England Aircraft Company,* decided by the Supreme Court of Massachusetts on the 4th day of March, 1930.[1] You are all familiar with the brief facts in this case, involving the complaint of Mr. H. Worcester Smith against the airport operated adjoining his property, and his contention that the flights of the planes over his property constituted trespass and that the noise constituted an actionable nuisance.

Mr. Justice Shaw of the Massachusetts Supreme Court went very thoroughly into the maxim of ownership of airspace to the uttermost limits, waded painstakingly through the old cases and eventually reached the conclusion that flights above 500 feet did not constitute a trespass, did not invade any man's private property and that the noise therefrom was not such as to disturb the ordi-

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1. 170 N. E. 385; 1930 U. S. Av. R. 1.

narily susceptible person, but only those who were hypercritically sensitive. While he held that flights as low as 100 feet did in a measure more nearly approach trespass, nevertheless no damage had been done and the court refused to grant an injunction, even as against these low flights, and dismissed the suit at the costs of the plaintiff. Certainly, save for the exception of a few unfortunate expressions used, this was an exceedingly favorable decision to aviation.

The next case, a few months later, involving the same point, was the decision of Judge Hahn in the United States District Court at Cleveland in the case of *Swetland* v. *Curtiss Airports Corporation, et al.*[2] The facts, with which you are all very familiar, were quite similar to those in the *Smith* case. Two brothers owned estates adjoining each other and immediately across the road from the Curtiss Airport at Cleveland. They brought suit to enjoin flying over their property at any height, claiming a trespass, and to enjoin dust, noise and the dropping of circulars and other objects on their property. Judge Hahn, in another painstaking opinion, held that the dust and the dropping of circulars did constitute a nuisance, that the noise did not, and that flying above 500 feet was perfectly lawful, but restrained flying at a height of less than 500 feet. The operation of the airport, subject to the restriction of low flying, dust and circular dropping, was permitted to continue.

Both parties in this case appealed and we, therefore, find a third case, involving the point of air trespass, in the decision of the United States Circuit Court of Appeals for the Seventh Circuit, handed down by Judge Moorman on December 30, 1931.[3] Of course, the facts were the same, but the Court, in a much shorter opinion, while apparently not committing itself on the question of trespass, and having found that the defendants owned another site for an airport, and having found that dust and noise were apparently necessary concomitants to the operation of an airport, enjoined its operation altogether.

The last case, which comes to my attention on this point, is the case of Rush Hospital, *Gay et al.* v. *Sky Haven Airport*, decided by a court of original jurisdiction, by Justice Windle of the Chester County Court of Common Pleas in Pennsylvania.[4] This suit was brought by Mr. Gay, who lived across the street from the airport and who complained of the low flying, and the

2. 41 F. (2d) 929; 1930 U. S. Av. R. 21.
3. 55 F. (2d) 201; 1932 U. S. Av. R. 1.
4. Decided Sept. 8, 1932—not reported.

dust and the noise and even complained that the gathering of crowds at the airport, who besought the use of his telephone and of his bathroom, all constituted an unbearable nuisance. The Rush Hospital, located at some distance, complained of the noise, the disturbance of its patients, and both of them complained that the flights constituted a trespass.

The Court dodged entirely the question of trespass, holding that it was not necessary to decide that question, but held that the plaintiffs had proved the existence of a nuisance. But much more important even than this adverse holding is the language of the court. which is as follows:

> "As an airport is not a nuisance per se, the operations must constitute a nuisance before it can be classed as a private nuisance. But whether or not it is being properly operated as an airport or whether its operation constitutes only a reasonable use of the property in question is not controlling."

With all due respect to the court it may be suggested that two more inconsistent statements can hardly be found in the same sentence. If an airport is not a nuisance per se, then, if reasonably operated as an airport, it is not a nuisance. But the Court went on to find that while the operations were reasonably conducted, nevertheless a nuisance had been created and the complete operation of the airport was enjoined, without qualification.

It is hardly necessary to add that we seem to have progressed a considerable length down the curve from the first and most favorable decision by the Massachusetts Supreme Court.

Insurance Cases. There seem to be several different directions to the curve in the matter of the aviation cases involving insurance. The first real insurance case involving aviation of the type of cases needed for this study was *Ridgley* v. *Aetna Life Insurance Company,* decided by the New York Appellate Court in 1914.[5] Mr. Ridgley, whose occupation was mainly that of a financial writer for a New York paper, had applied for accident insurance and the application blank contained this question: "Do you contemplate any unusual journey or any hazardous undertaking?" His answer to this question was, "No." It seems that Mr. Ridgley and a friend of his had become interested in aviation and were building an airplane and that, a few weeks after receiving the policy, Mr. Ridgley decided to test this plane and did so, with the result that when he was about ten feet off the ground, the plane suddenly decided to come down, with serious injuries to Mr. Ridgley. The New York Court held that his answer to the question

5. 145 N. Y. S. 1075; 1928 U. S. Av. R. 139.

was false, in that he had in contemplation riding in an airplane, and that *this of itself was a hazardous undertaking.*

In January of 1921, the Supreme Court of New Jersey had before it the case of *Bew* v. *Travelers Insurance Company.*[6] Mr. Bew was a New York broker, who during the summer spent his weekends at Atlantic City and there sought the thrill of a ride over Absecon Island in an airplane. Mr. Bew was killed when the plane crashed. This accident happened in 1919. The policy carried the provision that it should not cover any injuries, fatal or otherwise, sustained by the insured while "participating in aeronautics." The question, of course, then was whether or not a passenger was participating, and the court asked these rhetorical questions:

"Is a passenger in a balloon, which is not directed or propelled by any but natural forces, a participant in sailing or navigating the air? Is an observer in a military plane, who is not piloting it, participating in aviation? Is a military bomber, who does not touch the control of the plane, a participant in aviation? Is the pilot of an airplane, which carries an observer or photographer, or the operator of a machine gun, over enemy lines, but who merely drives his machine, participating in military activities? It seems to me that the answer to all of these queries must be in the affirmative, although the individual in question is not the active agent. The purpose of his flight has no influence upon the question of whether or not he is participating in aeronautics. His presence in the plane makes him a participant in the flight which is aeronautical.

"If the question were respecting the scope of a provision that the policy did not apply to any one 'participating in tobogganing,' would it be asserted that the occupants of the sled who had no part in steering were not participating in tobogganing? If one rides in the rear seat of an automobile, is he not participating in automobiling? If one hires a motorboat and crew to take him for a ride on a river, would it be said that he was not participating in boating? It seems clear that he would be.

"These illustrations show the speciousness of plaintiff's contention."

The next case, decided in July, 1931, was that of *Peake* v. *Travelers Insurance Company*, a decision by the Supreme Court of Florida.[7] Mr. Peake had been a visitor at the State Fair at Montgomery, Alabama, and one Richard Johnson was there operating an airplane, taking passengers for short flights, precisely the same type of flying as that indulged in by Mr. Bew at Atlantic City. As a result of a crash, Mr. Peake was very seriously injured. His policy of insurance was with the same company and contained exactly the same language as the policy in the *Bew* case, and the Supreme Court of Florida followed the *Bew* case and held that

6. 95 N. J. L. 533; 1928 U. S. Av. R. 151.
7. 82 Fla. 128; 1928 U. S. Av. R. 156.

the passenger was "participating." In fact, the Supreme Court went further and held that *"a passenger in an airplane,* flying in the air, whether he takes part in the *operation of the airplane or not,* is participating in aeronautics."

Our Missouri Court of Appeals in 1923 followed the above two cases in the decision of *Meredith* v. *Business Men's Accident Insurance Company.*[8] There Mr. Meredith was attending a county fair at Breckenridge, Missouri and took a sight-seeing ride in an airplane and was killed. The policy again contained the provisions against participation in aeronautics and the court quoted both the *Bew* case and the *Peake* case in holding that the passenger was participating and even quoted with approval the *questions asked* and *answered by* the New Jersey court in the *Bew* case.

The United States Circuit Court of Appeals took a hand in cementing the above doctrine in the case of *Pittman* v. *Lamar Life Insurance Company,* decided on February 15, 1927,[9] and even went a little farther. Mr. Pittman, in this case, had completed an airplane flight, had gotten out of the plane, which had landed, and was on the ground, but walked into the propeller and was killed. It was urged that the "participating in aeronautics," which was barred by the policy, had ceased before his death. However, the United States Circuit Court of Appeals, without citing any of the previous cases, held that Mr. Pittman was participating, even after the landing was over and that he was still participating at the time he was killed.

Of course the net result of all these cases was a general warning to the public—"beware of flying, your insurance is imperiled."

The first break in this line of decisions comes with *Hayden* v. *Benefit Assn. of Railway Employees,* decided by the Supreme Court of Arkansas on November 28, 1927.[10] Paul Trotter, a railway telegraph operator, had attended the "Rice Carnival" at Stuttgart. Richard Schilberg was taking passengers for a short ride in his airplane for $2.50. Precisely the same kind of flying as in the *Bew* and *Peake* cases. Trotter took an airplane ride and was killed. Suit was brought by Mrs. Julia Hayden, his mother, the beneficiary under his policy. The policy forebade recovery in the event the injured received his injuries while "engaged" in aeronautics. Note that there is a slight difference, if there is any difference, between the words "engaged" and "participating." In

8. 213 Mo. App. 688; 1928 U. S. Av. R. 159.
9. 17 F. (2d) 370; 1928 U. S. Av. R. 188.
10. 175 Ark. 565; 1929 U. S. Av. R. 79.

any event, the Supreme Court of Arkansas held that Mr. Trotter, *as a passenger,* was *not* "engaged" in aeronautics.

The word "participation" came before the courts again in the case of *Tierney* v. *Occidental Life Insurance Company,* decided by the District Court of Appeals of California on March 8, 1928,[11] just six months after the decision in the *Hayden* case and just one year after *Pittman* v. *Lamar* had been decided by the U. S. Circuit Court of Appeals, sitting in California. This was another propeller case. Mr. Tierney had completed an airplane ride as a passenger, stepped out of the airplane, had been on the ground about two minutes, and then stepped into the propeller and was killed. The court indicated that if the accident had happened while the flight was on, they might have held that his death was the result of participation in aeronautics, but that he was not "participating" at the time of his death and his widow was permitted to recover.

More good news occurred in the case of *Jackson* v. *Masonic Insurance Company,* decided by the Supreme Court of Indiana in January, 1929.[12] This case had a tortuous trip from the date of the accident, which happened in April, 1923, to the date of its decision, in January, 1929. Jackson, while riding as a passenger with one Ralph Hunting, had been killed. In the original trial, in the Marion County Superior Court, and upon an agreed statement of facts, judgment was rendered for the plaintiff. But in 1925 this was reversed by the Indiana Appellate Court, this court following the *Meredith* case from Missouri, the *Peake* case from Florida and the *Bew* case from New Jersey, holding that Mr. Jackson had been engaged in aeronautics. But the Supreme Court of Indiana, in 1929, followed the *Hayden* case in Arkansas and held that he had not been engaged in aeronautics.

We had another interesting case in 1929, in April of that year, before the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago.[13] In this case, Mr. Valentine Gits of Chicago had been on a pleasure trip to Estes Park, Colorado, and there took an airplane ride. When about a mile high, Mr. Gits leaped out. There was no evidence as to whether it was suicide or otherwise. Be that as it may, the case came before the United States Circuit Court of Appeals in April, 1929. The language in the policy prohibited "engaging in aeronautical operations."

I call your attention to the language of the court in this case,

11. 89 Cal. App. 779; 1928 U. S. Av. R. 191.
12. 200 Ind. 472; 1929 U. S. Av. R. 84.
13. 32 F. (2d) 7; 1929 U. S. Av. R. 70.

"If the inhibition were against engaging in maritime or seafaring operations, it would hardly be contended that an occasional passenger on an ocean steamer was excepted; or if applied to 'engaging in railroading operations,' that the indemnity would be suspended while one was riding as a passenger on a train. Can the audience at a theater, or opera, or movie show be properly said to be 'engaged in dramatic or operatic, or cinematographic operations'? We think the question answers itself negatively, and can see no reason for a different conclusion where the subject is 'aeronautic operations'."

This was a latter-day and a different answer to the questions of the court in the *Bew* case—one in 1921—the other in 1929.

In October of 1929, we find another favorable decision in the case of *Peters* v. *Prudential Insurance Company,* decided in the State of New York.[14] There again the policy prohibited recovery if engaged in aviation and the court held that a *passenger* was not engaged in aviation.

Perhaps the most favorable insurance case of all was that of *Charette* v. *Prudential* decided by the Supreme Court of Wisconsin on November 11, 1930.[15] In this case one Charette had learned to fly, or thought he had, but was not in the business of aviation, or of operating airplanes. He was at an airport and watched a friend, Rollins, make a landing. He criticized the landing and offered to demonstrate how it should be done. Charette and Rollins got in the plane, with Charette at the controls, and the plane crashed into Milwaukee Bay and Charette was drowned. The court held in this case that the language of the policy prohibiting recovery if "engaged in aviation" did not bar a recovery.

There was another more favorable decision following the fateful month of October, 1929. The accident happened on Lambert field in St. Louis in August, 1928. One Delbert Flanders took a free ride in an airplane piloted by Alfred Kachenmeister and was killed. The court in this case refused to follow Missouri's previous decision in *Meredith* v. *Business Men's Assn.* and instead followed the *Hayden* case, the *Jackson* case and the *Peters* case in holding that this passenger was not engaged in aeronautics. This decision, *Flanders* v. *Benefit Assn. of Railway Employees,* was in November, 1931.[16]

One could not help, in reading these later cases, to conclude that the insurance of passengers at least was not endangered or affected.

Two months before, however, the curve of these favorable

14. 233 N. Y. S. 500; 1929 U. S. Av. R. 36.
15. 232 N. W. 848; 1931 U. S. Av. R. 48.
16. 42 S. W. (2d) 973; 1932 U. S. Av. 60.

decisions had nosed over and started downward. On August 1, 1931, the United States District Court for the Eastern District of Tennessee, in the case of *First National Bank of Chattanooga* v. *Phoenix Mutual Insurance Company,* had before it this case.[17] One Mr. Hart had a $25,000.00 policy on his life, payable to the First National Bank of Chattanooga as trustee of his estate. It provided for double indemnity in case of accidental death, but excepted from this double indemnity a death which was the result of participating in aeronautics. Mr. Hart, while at Chattanooga, suddenly received word that his wife in Florida had been seriously injured in an automobile accident. Summoning his family physician, he started in an airplane from Chattanooga to Florida and was killed in attempting to make an emergency landing at Atlanta, Georgia. It was true that Hart was interested in the company which owned the plane, but he was travelling as a passenger, and it was being piloted by a paid pilot. The court went back to the *Bew* case and the *Peake* case and distinctly disapproved of the *Gits* case, and held that the deceased was "participating in aeronautics."

In 1932 we had the case of *Blonski* v. *Bankers Life Insurance Company,* decided on June 20th of that year by the Supreme Court of Wisconsin.[18] Please note this was by the same court that decided the *Charette* case two years before. This was a propeller case, the plaintiff Blonski being killed before the trip started. The court had before it the two other propeller cases of *Tierney* v. *Occidental Life Ins. Company* and *Pittman* v. *Lamar Life Insurance Company,* and followed the *Pittman* case and not the later *Tierney* case, and held that the deceased met his death as a result of participating in aeronautics.

This ends the examination of the insurance cases.

Gasoline Taxes. I wish to call your attention to the holdings of the courts in the aviation gasoline taxation cases. The first case was that of *United Airways* v. *Shaw,* decided August, 1930, by the United States District Court in Oklahoma.[19] This case involved a tax of four cents a gallon on gasoline, which was purchased in Oklahoma and consumed partly in interstate and partly in intrastate commerce. It was contended that the imposition of this tax violated the commerce clause of the Constitution and the court held that not only was the tax unconstitutional but, in view of the fact that the amount of gasoline used in interstate commerce could

17. 57 F. (2d) 731; 1932 U. S. Av. R. 64.
18. 243 N. W. 410; 1932 U. S. Av. R. 57.
19. 43 F. (2d) 148; 1930 U. S. Av. R. 179.

not be separated from that used in intrastate commerce, the entire tax was unconstitutional as to the plaintiff, and enjoined the collection of any tax.

The next case was that of *Western Air Express* v. *Welling,* decided by a court of first instance in Utah on September 15, 1930.[20] This involved a tax on gasoline purchased outside of Utah and used inside in interstate and intrastate commerce. The tax was held void as to all that portion of gasoline used in interstate commerce.

Early the following year of 1931, we had the case of *Mid-Continent Express Company* v. *Lujan,* decided by a special court of three United States Circuit Judges,[21] which involved a pure excise tax of five cents a gallon on gasoline sold in the state. There again the court held that the tax was unconstitutional and, in view of the fact that the amount of gasoline employed in interstate and intrastate commerce could not be separated, the collection of the tax on gasoline, although bought within the state, was enjoined.

So far all of these decisions are exceedingly favorable, but we find a little wavering in the curve in the case of *Transcontinental and Western Air* v. *Asplund.*[22]This case was decided by a District Court of New Mexico and involved a five cent tax on gasoline purchased without the state and used within, or purchased within the state. The court held that even though interstate commerce was involved, the gasoline purchased within the state was taxable, although that purchased outside the state and used within was not. This was a distinct departure from the doctrine announced in *Mid-Continent Express Company* v. *Lujan,* where all the gasoline was bought within the state and all held to be non-taxable.

In the early part of 1932, the United States Supreme Court in the case of *Eastern Air Transport Company* v. *South Carolina,*[23] in an opinion by Mr. Justice Hughes, held that a tax of six cents a gallon on gasoline, although wholly used in interstate commerce, was valid as to gasoline bought within the State and so used.

It remained, however, for a special court of three federal judges, Judge Moorman (who wrote the last opinion in the Swetland Case) in the case of *American Airways* v. *Wallace,* decided just seventeen days later, to put the final touches to the changing curve.[24] In this case it was held that the American Airways had to pay to the State of Tennessee the tax provided by the Tennessee

20. 1931 U. S. Av. R. 146.
21. 47 F. (2d) 266; 1931 U. S. Av. R. 128.
22. Not reported.
23. 52 Sup. Ct. Rep. 340; 1932 U. S. Av. R. 206.
24. 57 F. (2d) 877; 1932 U. S. Av. R. 209.

law on gasoline, although used only in interstate commerce and although the gasoline was purchased without the state and brought in the state and there stored. The court had before it the *Shaw* case from Oklahoma and the *Lujan* case from New Mexico, but simply held that these cases did not apply, thus defining the abrupt downward curve.

Perhaps you have already guessed the curve of my remarks. A very momentous thing happened in aviation in May, 1927. In May, 1927, Lindbergh electrified the world with his New York to Paris flight. This occurred between the insurance case decision of *Pittman* v. *Lamar,* in April, 1927, and the next decisions of *Hayden* v. *Benefit Association,* which was in October, 1927. It was probably still fresh in the minds of all courts when the opinions up to late 1930 were written. In fact, the Attorney General of Florida, in commenting on the *Shaw* case and in rendering his own opinion on the validity of the Florida gasoline taxes, stated that the Attorney General of Oklahoma had advised him that the *Shaw* case was a friendly suit, with which the State of Oklahoma was entirely satisfied.[25]

Another momentous event occurred in the fall of 1929. This was more than a "fall." It was the crash of the overtowering house of cards in the stock market. It took perhaps a year or so for people to realize the completeness of this collapse. This collapse carried with it eventually though not immediately perhaps ninety per cent in number of all the incorporated manufacturing, passenger, flying school, flying service and other similar aviation companies. It spread aviation losses perhaps more broadly and vividly among the public than any other loss, because the aviation industry and stocks were the youngest, had been bought more recently and with more enthusiasm than any other type of security.

The collapse of the business boom rendered useless and dead perhaps one-third of the municipal airports, which had been provided in a fine burst of public enthusiasm and with public money, and which had anticipated being self-supporting out of aviation revenues. It could not help but be obvious to the U. S. Circuit Court of Appeals in the *Swetland* case that the Curtiss Airport was not being used; that its air school had been discontinued, and that the fine municipal airport at Cleveland was being operated on a scale far below its early roseate hopes and that probably the best thing for the Curtiss Company was to restore their 400 acres to the usual purpose of real estate.

25. 1931 U. S. Av. R. 151.

After all, courts are human. They shared the enthusiasm of the Lindbergh flight with other people. The view of deserted airports and closed aviation schools and collapsed aviation companies was just as equally visible to them as to the stockholders who had invested in them. In the early days aviation needed and deserved legal encouragement and got it not.

Following the Lindbergh flight aviation needed it not, but got it. I am not now arguing—the scope of this paper will not permit—the correctness or incorrectness of any of these decisions. I have briefly stated the salient facts. My hearers may or may not draw the conclusion that at one time the courts looked through rose tinted glasses, and at another through smoked glasses.

The burden of all this is that, legalistically and judicially, the aviation honeymoon is over. But I am not as pessimistic as this may sound. A second marriage is not impossible, nor a second honeymoon. But it will hardly come about by any one single epoch making exploit. So many records have been set and broken and reset and rebroken, that exploits as such no longer appeal to the public imagination.

The remaining method of winning back the public favor, and I say, with all due respect for high courts, that judicial reactions are tinged by public reaction, is a consistent, continuous, day-in and day-out rendering of a more competent, more valuable and increasingly efficient service.

It is necessary that airplanes operate safely, that they operate regularly, and that the public be courteously treated, that the public be protected, and that the airplane constantly demonstrates its right to a commercial life. This, I believe, it is doing. I believe that the business of aviation has shown more virility during these lean four years than any other, certainly than any other form of transportation, and that it will in time prove itself not a mere convenience but an indispensable means of transportation. When that comes about and when it is generally recognized by the public, we can watch for our judicial decisions to discard what might have been ancient prejudice——what now appears to be present resentment and disappointment—and start upward again on the curve of general approval.