Journal of Air Law and Commerce

Volume 5 | Issue 1 Article 7

1934

Notes, Comments, Digests

Robert Kingsley

Robert L. Grover

Raymond I. Suekoff

Lorraine Arnold

NOTES, COMMENTS, DIGESTS

Department Editors..... {ROBERT KINGSLEY / ROBERT L. GROVER}

COMMENTS

ADMIRALTY—LIBEL FOR VIOLATION OF CUSTOMS REGULATIONS—INTERVENING LIBEL FOR REPAIRS.—[Federal] The Secretary of the Treasury, pursuant to Sections 454 and 459 of the Tariff Act of 1930 and articles 244, 245, 246 and 254 of the Customs Regulations of 1931, assessed penalties in the amount of $2100 against the pilot and master in charge of one Fairchild Seaplane on account of failure to give advanced notice of arrival in the United States from British Columbia; for failure to make a first landing at an airport of entry as designated by the Secretary of the Treasury; for failure to make an immediate report to the Collector of Customs; and for unloading a passenger without permit. The libel asked that upon default in the payment of the imposed penalties the same be impressed as a lien against the seaplane and its engine and appurtenances and that they be sold to satisfy the same. In addition to this libel by the United States, an intervening libel was filed by the Northwest Air Service which alleged that said company had expended for labor and material the sum of $1,268.72 upon said seaplane after its arrival in the United States at the express request of the owner thereof. This libel asked that a first and prior lien be impressed on said seaplane, its engine and appurtenances and that the same be sold to satisfy said lien.

The government excepted to the intervening libel on the ground that it did not state facts sufficient to constitute a cause of action, or to give the federal court jurisdiction of the libel, inasmuch as the cause of action was not grounded upon a maritime contract or lien, and that the court was without admiralty jurisdiction to entertain the suit for the reason that the services rendered did not constitute a maritime contract in that said seaplane was not a vessel within the admiralty jurisdiction of any court in the United States. *Held:* "The jurisdiction of the Court over the res under the libel of the United States being unquestioned, other courts are without jurisdiction to entertain the complaint of the intervening libellant and, therefore, whatever the nature of its claim against the res, it must be asserted in this cause." *United States* v. *One Fairchild Seaplane, etc.,* 4 F. Supp. 249, 233 C. C. H. 3109 (D. C. Wash. 1933).

Whether or not a seaplane is to be treated as a "vessel," so that actions concerning it are to be treated as within admiralty jurisdiction is a question as yet unsettled. In *Reinhardt* v. *Newport Flying Service Corp.*,[1] the Court of Appeals of New York held that a seaplane, moored and floating on navigable waters, was a "vessel" insofar as jurisdiction over an attempt to recover for injuries to its watchman was concerned. In what is apparently the only reported case involving a repairman's lien, the same judge who

1. 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324, 1928 U. S. Av. R. 4 (1921).

decided the instant case refused to allow an admiralty proceeding to enforce the lien,[2] basing his decision principally on the absence of any express legislation on the subject.[3] Neither of these decisions is determinative of the instant case. By express statute, the penalties imposed by the customs laws for failure of an aircraft to comply with the applicable regulations is enforceable by proceedings in rem, which "shall conform as nearly as may be to civil suits in admiralty."[4] Such was the nature of the original proceeding here. To allow a person holding a claim against the aircraft to intervene in such an action is by no means to hold that he might file an original libel.

ROBERT KINGSLEY.

AIRPORTS—ESTABLISHMENT AND MAINTENANCE OF A MUNICIPAL AIRPORT AS A PUBLIC PURPOSE.—[Pennsylvania] The uncertainty of legal rights which once attended the municipal acquisition, ownership and operation of airports and landing fields is at present fairly well dispelled, but two recent cases would seem to indicate that the legal profession is not yet entirely reconciled to municipal participation in aviation. In the case of *Reinhart* v. *MacGuffie et al.*[1] the County Commissioners of Luzerne County, Pennsylvania, agreed to contribute two-thirds of the expenses of an airport to be maintained in co-operation with the city of Wilkesbarre, operation and management to be joint. An action was brought to restrain the payment of any county funds for airport purposes on the grounds (1) that such payment would be an appropriation of public funds or credit for private purposes, contrary to the constitution, and (2) that the county had no authority to sponsor or finance an airport. In *Armstrong* v. *Wayne County Board of Auditors,*[2] complainant sought to prevent the levy of further taxation for the maintenance of an airport constructed in 1928 upon (1) the ingenious contention that the legislation enabling the initial bond issue and tax levy therefor was an unconstitutional interference with internal improvements and (2) that the county had no power to construct an airport. The bills of complaint in both cases were dismissed.

Municipal (including county) airport activities have been declared in various ways to be endowed with a public purpose, the term being adapted to the obstacles presented in the various cases. But in every case thus far reported the result has been to uphold the legality of the maintenance and operation of the airport. Thus in cases where city charter provisions required, the airport has been declared a public utility,[3] or within a limited

2. *Crawford Bros., No. 2,* 215 Fed. 269, 1928 U. S. Av. R. 1 (D. C. Wash. 1914), discussed in: 28 Harv. L. Rev. 200 (1914); 3 Cal. L. Rev. 143 (1915).

3. "In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the Court that, in the absence of legislation conferring jurisdiction, none would obtain in this Court, and that questions such as those raised by the libellant must be relegated to the common-law courts of general jurisdiction."

4. Air Commerce Act of May 20, 1926, c. 344, §11(b), 49 U. S. C. §181(b).

1. Penn. Ct. of Common Pleas of Luzerne County, decided May, 1933, 233 C. C. H. 3129.

2. Circuit Court of Wayne County, Mich., No. 205,086, decided Aug. 29, 1933.

3. *State ex rel. Chandler* v. *Jackson,* 121 O. 126, 167 N. E. 396 (1929); *State ex rel. City of Lincoln* v. *Johnson,* 117 Neb. 301, 220 N. W. 273 (1929), noted in 14 Ia. L. Rev. 233 (1929).

public purpose requirement;[4] where the purpose of a park statute was required to be met, the landing field has been termed conducive to amusement and recreation;[5] where general municipal enabling statutes or general grants of municipal power were concerned,[6] courts have said that obvious legislative intent to keep abreast of the times would support the extension of the "public purpose" classification to airport operation.[7] The cases reveal that in spite of varying presentations of the questions, the principal motivating factor in the result has been uniform. It is succinctly stated in *Hesse* v. *Rath:*[8] "Aviation today is 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 laying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dwellers within the gates, even more than the stranger from afar, will pay the price of blindness."

The argument of extension of public credit for a private purpose has been relied upon in several cases for the defeat of municipal participation in construction of landing fields.[9] Supporting this argument is the contention that such a field is for the benefit of a very limited section of the public.[10] In the *MacGuffie* case[11] the court solved the difficulty by pointing out that

4. *Dysart* v. *City of St. Louis*, 321 Mo. 514, 11 S. W. (2d) 1045 (1928), noted in 14 St. Louis L. Rev. 441 (1929); *Ennis* v. *Kansas City*, 321 Mo. 536, 11 S. W. (2d) 1054 (1928).

5. *Schmoldt* v. *City of Oklahoma City*, 144 Okla. 208, 291 P. 119 (1930), noted in 1 Air L. Rev. 481 (1930), 17 Va. L. Rev. 165 (1930); *City of Wichita* v. *Clapp*, 125 Kans. 500, 263 P. 12 (1928), noted in 12 Minn. L. Rev. 549 (1928), 76 U. Pa. L. Rev. 1004 (1928). In the *Schmoldt* case the court supported its conclusion that the airport was a proper park purpose in the following rhapsodical language: "The public would enjoy an airplane exhibition, to see an airplane glide gently to the earth and take to the air again as gracefully as an eagle in its flight, and ponder over the wonderful accomplishments of the airplane."

6. *McClintock* v. *City of Roseburg*, 127 Or. 698, 273 P. 331 (1931), noted in 8 Tenn. L. Rev. 64 (1929); *State ex rel. City of Walla Walla* v. *Clausen*, 157 Wash. 457, 289 P. 61 (1930); *City of Spokane* v. *Williams*, 157 Wash. 120, 288 P. 258 (1930), noted in 2 JOURNAL OF AIR LAW 94 (1931); *Doughty* v. *Mayor and City Council of Baltimore*, 141 A. 499 (Md. App. 1928); *Wentz* v. *City of Philadelphia*, 301 Pa. 261, 151 A. 883 (1930), noted in 20 Natl. Mun. Rev. 44 (1931); *Hesse* v. *Rath*, 294 N. Y. 436, 164 N. E. 342 (1928), aff'g 224 App. Div. 344, 230 N. Y. S. 676 (1928), noted in 15 Va. L. Rev. 491 (1929), 33 Law Notes 33 (1929); *In re Airport of City of Utica*, 234 N. Y. S. 668 (1929).

7. *State ex rel. City of Walla Walla* v. *Clausen, supra* note 6.

8. *Supra* note 6.

9. *State ex rel. Hile* v. *City of Cleveland et al.*, 26 O. App. 265, 160 N. E. 241 (1927); *Dysart* v. *City of St. Louis, supra* note 4; *Wentz* v. *City of Philadelphia, supra* note 6.

10. In *Dysart* v. *City of St. Louis, supra* note 4, the court rejected the following language of the lower court:

"It (the airport) will afford a starting and landing place for a few wealthy, ultra-reckless persons, who own planes and are engaged in private pleasure flying. . . . 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 to afford, and who desire to experience, the thrill of a novel and expensive mode of luxurious transportation."

"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."

Cf. *City of Wichita* v. *Clapp, supra* note 5, for the opposite view.

11. *Supra* note 1.

all the public did not benefit from any public improvement, and that the determination of the degree of public benefit necessary to make the project a public one lay to a great extent within the discretion of the municipality itself. Such a result is proper, since the factors which determine the public benefit are often peculiarly local, and should be left to the judgment of those best acquainted with them, i. e., the local authorities. The Oregon court,[12] confronted with the same contention, held that the municipality might anticipate broadened future public benefits, in spite of the present limited scope of the benefit.[13]

The *MacGuffie* case points out that the public credit doctrine is danger-laden in its application to a present practice in municipal airport management. In many instances, municipalities lease their airports to private corporations, or enter into management or financing contracts with them. In the *MacGuffie* case there was joint management, and the court sounded a warning that such agreements would be very carefully scrutinized for any evidence of unfair distribution of expenses or subsidy: "We did find that the mechanic employed by the [public] board of management was also privately employed, and payments made for his services were made to the Airport Corporation, and while the amount was nominal, we condemned the practice and directed its discontinuance." The ordinary public operation of an airport, apart from the practice above outlined, does not support the charge of extension of public credit for private use, regardless of who uses the port. As yet no cases have arisen under statutory provisions which allow the leasing of airports to private corporations. If the terms of the lease provide for a purely nominal rental, as might be necessary under present economic conditions, the extension of public credit argument will undoubtedly be raised in attempt to defeat such an indirect subsidy. There is an intimation in the *Dysart*[14] case that the same considerations which motivated courts to approve municipal subsidies of railroads three-quarters of a century ago might prevail today.

The two instant cases do no more than strengthen a well-buttressed doctrine. In all probability further attacks on municipal participation in air transportation will be shifted to less well-settled grounds, such as management agreements, or the extension of municipal police power beyond corporate limits.

ROBERT L. GROVER.

CRIMES—LIENS—PRIORITY OF CHATTEL MORTGAGE OVER LIEN FOR VIOLATION OF AIR COMMERCE REGULATIONS.—[Federal] The owner of the airplane in question flew the plane from Mexico to an airport in the United States without giving prior notice to the appropriate Collector of Customs and did not make his first landing at an official airport of entry—all in violation of the Air Commerce Act and the Regulations promulgated thereunder.[1] At the time of this flight the plane was subject to a valid chattel mortgage

12. *McClintock* v. *City of Roseburg*, *supra* note 6.
13. Cf. comment, 1 Air L. Rev. 139 (1930).
14. *Supra* note 4.

1. Act of May 20, 1926, c. 344, §§7(b) & 11(b), 44 Stat. at L. 568, 572 & 574, 49 U. S. C. §§177(b) & 181(b); Foreign Air Commerce Reg. of Nov. 5, 1930, [1930] U. S. Av. Rep. 378; Aircraft Customs Reg. of Jan. 3, 1929 [1929] U. S. Av. R. 267; Airports of Entry Reg. of Nov. 1, 1931, [1932] U. S. Av. R. 295.

in favor of the intervenor, who had no notice or knowledge of this breach of law. A libel was filed against the plane to enforce the lien for the penalty provided by the Act for such violations. It was stipulated that the sole issue was whether the intervenor's mortgage-lien was prior or subject to that of the government. *Held,* that the intervenor's lien was prior. *United States* v. *One Waco Bi-plane,* 1933 U. S. Av. R. 159 (D. C. Ariz. Dec. 1932).

This is apparently a case of first impression, no cases directly in point being cited by the parties and none having been found by the present writer. The Air Commerce Act provides that the violation of the regulations here in question shall subject the violator "to a civil penalty of $500. . . . In case the violation is by the owner or person in command of the aircraft, the penalty shall be a lien against the aircraft. Any civil penalty imposed under this section may be collected . . . in case the penalty is a lien, by proceedings in rem against the aircraft. Such proceedings shall conform as nearly as may be to civil suits in admiralty . . ."[2] The parties agreed that the reference to admiralty referred solely to matters of procedure and did not make either the government's or the intervenor's liens subject to the substantive rules of maritime law. The argument for the intervenor, which was adopted by the court, was that, since the statute provided merely for a lien to enforce a penalty and not for confiscation of the property, there had been no intention to cut off the rights of innocent third parties but that, the penalty being primarily an obligation of the violator, the lien attached to his equity only. While the point is not entirely free from difficulty, since (as pointed out by counsel for the government) there is a general policy in favor of proceedings to enforce the customs laws, the decision is probably correct. It is submitted that the problem is of sufficient importance to justify a clarification of the statute by Congressional action.

ROBERT KINGSLEY.

GASOLINE TAX—COMMERCE—STATE TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Federal] Plaintiff is engaged in Interstate air transportation and all of its lines pass through the state of Louisiana. It imports gasoline from Texas and stores it at its Louisiana airports where it is pumped into its airplanes. A Louisiana statute levies a cumulative tax of five cents per gallon upon all motor fuel sold, used or consumed in the state for domestic consumption. A suit to enjoin collection of the tax was brought by plaintiff on the ground that the tax is a charge for the privilege of using an instrumentality of interstate commerce. *Held:* Bill dismissed. This tax is levied upon the "use" of gasoline within the state of Louisiana. The "use" here is the withdrawal of the gasoline from storage and it is immaterial that the gasoline is destined for fueling an instrumentality of interstate commerce: *American Airways, Inc.* v. *Grosjean,* 3 F. Supp. 995 (E. D. La. 1933). The United States Supreme Court affirmed the District Court decree in a per curiam decision and denied a petition for a rehearing. 233 C. C. H. 3139.

The court merely followed earlier decisions of the Supreme Court of the United States.[1] It is at the time of withdrawal of the gasoline from storage alone that "use" is measured for the purposes of the tax.

2. Act of May 20, 1926, c. 344, §11(b), 44 Stat. at L. 568, 574, 49 U. S. C. §181(b).

1. *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249, 53 S. Ct. 591 (1933); *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 53 S. Ct. 345 (1933); *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 52 S. Ct. 631 (1932).

It is now impossible for an interstate air transportation company to avoid paying a gasoline tax in every state in which it refuels its planes. If gasoline is purchased within the state the gasoline is subject to a sales tax.[2] If it is imported from another state it is subject to a tax upon its withdrawal from storage.[3]

RAYMOND I. SUEKOFF.[4]

NEGLIGENCE—CARRIERS—EXISTENCE OF PASSENGER-CARRIER RELATIONSHIP —LIMITATION OF LIABILITY—PROOF OF NEGLIGENCE.—[Federal] Plaintiff's intestate purchased transportation by airplane from defendant's predecessor in interest. Due to fog conditions, the pilot attempted to make an emergency landing on private property, crashed and he and plaintiff's intestate were both killed. Plaintiff having recovered judgment in the trial court,[1] defendant appealed, contending: (1) that the relationship between its predecessor and the decedent was that of charterer-charteree rather than that of carrier-passenger; (2) that there was not sufficient evidence of negligence to make a case for a jury; and (3) that, by virtue of a clause to the effect in the "ticket," defendant's liability was limited to the sum of $10,000. *Held:* (1) that decedent was a passenger; (2) that the evidence sufficiently showed negligence on the part of the pilot to support the verdict; and (3) that defendant's predecessor was a "common carrier" and that, therefore, an attempt to limit its liability for negligence was void. *Curtiss-Wright Flying Service* v. *Glose,* 66 Fed. (2d) 711, 1933 U. S. Av. Rep. 26, 233 C. C. H. 3123 (C. C. A. 3d 1933).

(1) *The existence of a carrier-passenger relationship.* The contention here made by the defendant, that the purchaser of air transportation should be considered merely as a charterer of the craft and crew is novel in air litigation, though the idea has been somewhat mooted among the members of the aviation industry. If the contention were well founded in fact, the result would be that the air operator's obligation was only to furnish an airworthy plane and a competent crew, and that it was not liable for negligence of the pilot.[2] The instant case, in rejecting the contention, does so solely on the ground that, under the facts presented, no such relationship was shown to exist. Stress is laid on two elements: (1) that the contract itself was denominated a "ticket," the parties were referred to therein as "the passenger" and "the carrier" and the word "charter" was nowhere present in the agreement; (2) that provisions of the agreement, especially clauses reserving all control to the operator and a clause giving the operator the power to cancel the "revocable license" created, were "compatible with a passenger-carrying service, but not with a charter." The case, therefore, does not stand for the proposition that there can never be a "charter" of a passenger airplane. There would seem to be no reason why an individual or a party could not hire a plane for a definite trip, giving to the respective parties the powers usual in such cases—the instant case being authority

2. *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,* 285 U. S. 147, 52 S. Ct. 340 (1932).
3. *American Airways, Inc.* v. *Grosjean, supra; Edelman* v. *Boeing Air Transport, Inc., supra; Nashville C. & St. L. Ry.* v. *Wallace, supra; Gregg Dyeing Co.* v. *Query, supra.*
4. Of the Chicago Bar.

1. *Glose* v. *Curtiss-Wright Flying Service, Inc.,* 1933 U. S. Av. R. 228 (D. C. N. J. 1932).
2. See *The Nicaragua,* 72 F. 207, 18 C. C. A. 511 (1896); *Kerry* v. *Pacific Marine Co.,* 121 Cal. 564, 54 P. 89 (1898); and *McNair,* The Law of the Air, pp. 152-4.

merely for the proposition that the powers granted and reserved in the present contract did not create such a relatively novel relationship.

(2) *The evidence of negligence.* The parties expressly had conceded at the trial that the plane was in satisfactory condition and fit for the journey proposed, and that the pilot was duly qualified. Plaintiff's claims of negligence were two: (1) That it was unnecessary and negligent for the pilot to attempt to land on the particular place selected by him—the evidence showing (a) that another plane flying near to that of the defendant had proceeded successfully with its journey and landed safely at the terminal airport for which the fatal ship was bound, and (b) that there were other and properly equipped emergency fields in the immediate neighborhood, whereas the spot selected for this landing was small, surrounded by many obstacles and transversed by ditches; (2) that the pilot was negligent in the manner of landing on the field—there being evidence showing violation of various Department of Commerce regulations.[3] The court held that the evidence on these two points was sufficient to go to the jury.

(3) *The effect of the limitation of liability provision.* The court's method of attack on this problem is of importance. It points out that there has existed a well settled rule of decision in the federal courts to the effect that such a limitation by a common carrier by land is void,[4] and holds that, under the evidence which showed a general holding out by the defendant, it was a common carrier by air. The court then addresses itself to the problem of the extent to which the rules applicable to carriage by land may be applied to carriage by air and concludes that the treatment should be the same, saying:

"Such being the settled law, why should it not be applied to airplane passenger service? What reason is there why the same principles applicable to land and water should not also be applied to air transportation? . . . All alike perform the same service, viz., transportation. They are competitors for the same class of business. Every passenger carried by airplane means a passenger less for the railroad or the steamship. Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result.[5]

Such an attitude is significant. The idea has been expressed from time to time by zealous aviation enthusiasts that air transportation, because of its physical novelty, demanded the creation of an entirely novel set of legal rules, to be fashioned from a new bolt of legal cloth without regard to those in existence for other forms of transportation. That air transportation does create its own problems is obvious; but the writer submits that, so far as possible, old rules should be applied and that the burden lies squarely upon those who would seek to avoid the application of such rules and substitute new ones to show some compelling reason therefor; and that, since nothing of the sort here appears, the court was correct in the instant case in applying the land rule.

ROBERT KINGSLEY.

3. Particularly Air Traffic Rules Nos. 74, 75 and 79. Consult: *Glose* v. *Curtiss-Wright Flying Service, Inc.*, 1933 U. S. Av. R. 228, 233 and 241-242 (D. C. N. J. 1932).

4. Citing: *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872 (1876); *Kansas City So. Ry.* v. *United States*, 282 U. S. 760, 51 Sup. Ct. 304, 75 L. Ed. 684 (1931); *Delaware, L. & W. Ry.* v. *Ashley*, 67 Fed. 209 (C. C. A. Third Circuit, 1895).

5. *Curtiss-Wright Flying Service, Inc.* v. *Glose*, 66 Fed. (2d) 710, 712 (C. C. A. 3d 1933).

DIGESTS

CONTRACTS—SALES—"REQUIREMENT ORDERS"—COUNTER-OFFERS.—[Kansas] Defendant submitted to plaintiff a written order for certain specified quantities of wire to be used in the construction of airplanes, the order calling for shipment over a period of one year at a certain rate per month and containing the clause "covering approximate yearly requirement, more or less." The order called, also, for an acknowledgement. Plaintiff sent an acknowledgement reading in part as follows: ". . . your order . . . is accepted subject to the following terms and conditions whether or not they are at variance with terms appearing on your purchase order. . . . 6. On orders for special materials, the right is reserved to ship and bill 10% more or less than the exact quantity specified. 7. Order not subject to cancellation." Thereafter plaintiff shipped and defendant accepted some thirteen shipments. Defendant then requested plaintiff to suspend shipments temporarily, and later requested that the order be cancelled or that plaintiff dispose of the merchandise to other parties. Plaintiff, having been successful in disposing of only a small quantity to other purchasers, brought the present action for damages for breach of contract. The trial court sustained a demurrer to plaintiff's petition, in which the above facts were set forth, on the theory that the defendant's communication was only a so-called "requirement order," *i. e.*, an order for so much only of the specified quantity as defendant might need in its business. *Held:* (1) Whether this was a proper construction of defendant's original order is now immaterial, since (2) plaintiff's "acknowledgement," because it contained the two important additional conditions above quoted, was not an acceptance of defendant's original offer, but a counter-offer (citing: *Hayes* v. *Possehl*, 92 Kan. 609, 141 Pac. 559 (1914); Restatement, Contracts (1932) §60), which defendant had accepted by its conduct (citing: Restatement, Contracts (1932) §§29, 63 and 72). *Belden Mfg. Co.* v. *Curtiss-Wright Airplane Co.*, 22 P. (2d) 494, 1933 U. S. Av. R. 256 (Kan. June 10, 1933).

ROBERT KINGSLEY.

CRIMES—TRANSPORTATION OF LIQUOR BY AIRCRAFT—CERTIORARI.—[N. Y. Sup. Ct.] The United States Supreme Court on October 16, 1933, denied a petition for a writ of certiorari to the Fifth Circuit Court of Appeals in the case of *Vinkemulder* v. *U. S.*, 64 F. (2d) 535, 1933 U. S. Av. R. 65, 233 C. C. H. 3131.

For digest of facts in case, see 4 JOURNAL OF AIR LAW 438.

LORRAINE ARNOLD.

INSURANCE—FIRE INSURANCE—HANGAR A TRADE FIXTURE—DELIVERY OF POLICY—PROOF OF LOSS.—[Kansas] Plaintiffs, in three consolidated actions to recover on two insurance policies covering a hangar which was destroyed by fire, were the owner and the mortgagee of the hangar. Plaintiff owner had erected the hangar on leased premises. The insurance contracts concerned in these actions were issued to the owner for cash and a promissory note payable in 70 days, it being agreed that the insurance agent was to hold the policies until the note was paid. The hangar was destroyed by fire before payment of the note and delivery of the policies, and the defendant insurance company resisted payment of the insurance. This action was brought and the verdict of the jury in the lower court was for the plaintiff in the amount of the policies; and judgment was entered accordingly. Defendants had demurred to plaintiff's evidence on the ground (1) that plaintiff, Lee Lawson, was not the owner of the hangar and had no insurable interest in it; (2) that at the time the insurance contracts were effected defendants were not aware that the hangar was on leased premises; (3) that defendants did not know that plaintiff, Nathaniel Lawson, had a mortgage on the hangar; (4) that plaintiff, Lee Lawson, had misrepresented the facts and overstated the value of the hangar and that therefore by the terms of the policies they were void; (5) that formal proof of loss

had never been made by plaintiffs. Appeal was taken on the errors assigned and the over-ruling of the demurrers and the judgments affirmed. *Nathaniel Lawson et al.* v. *Southern Fire Insurance Company, et al.*, 137 Kan. 473, 21 P. (2d) 387, 1933 U. S. Av. R. 38 (State of Kansas, Supreme Court, May 6, 1933).

Held: (1) Although the policies never came into the manual possession of the plaintiff, under the circumstances they became effective according to their tenor on the dates of their execution. (2) Plaintiff, Lee Lawson, was the sole and unconditional owner of the hangar within the terms of the policies although he had acquired the hangar for various considerations which included a sum of money to be paid in annual installments, only 2/5 of which had been paid. (3) Defendant's agent had been apprised of the fact that the hangar was on leased ground, and defendants cannot defeat the policies by relying on a paragraph in the policies requiring a fee-simple title in realty, since the hangar was in the nature of a trade fixture or personal property and insured as such. (4) Plaintiff's omission to submit formal proof of loss as required by the terms of the policies cannot defeat the obligation of the insurer, since under the circumstances the policies were not accessible to plaintiff to remind him of such requirements, and the conduct of defendant's agents after oral notice of the fire was bound to throw plaintiff off his guard as to such requirement.

LORRAINE ARNOLD.

NEGLIGENCE—DEGREE OF CARE.—[Federal] Plaintiff's intestate was a passenger on an airplane owned and operated by defendant on an airline between Los Angeles, California, and El Paso, Texas. The plane ran into fog while going through San Gorgonio Pass, near Banning, California, and crashed into a mountain, killing the pilot and passengers. The jury returned a verdict in favor of the defendant, plaintiff's motion for a new trial was denied, and plaintiff appealed, assigning as error: (1) that the evidence did not support the verdict and that the trial court erred in denying the motion for a new trial; and (2) that there was error in the instructions on the subject of degree of care. *Held:* (1) there was evidence sufficient to sustain the verdict and the action of a trial court in passing on a motion for a new trial is not reviewable on appeal; (2) the alleged errors in the instructions cannot be passed on, since plaintiff did not take his exceptions thereto in the manner required by court rule. *Allison, Admr.* v. *Standard Air Lines, Inc.*, 65 F. (2d) 668, 1933 U. S. Av. R. 92, 233 C. C. H. 3093 (C. C. A. 9th June 5, 1933).

The action of the trial court in the instant case (1930 U. S. Av. R. 292) was the subject of a discussion in an earlier number of the JOURNAL (2 JOURNAL OF AIR LAW 71 (1931)). In view of the interesting and important problems raised, it is regrettable that the appeal had to be decided on technical rules of procedure.

ROBERT KINGSLEY.

PATENTS—USE BY THE UNITED STATES—IMPLIED CONTRACT—STATUTE OF LIMITATIONS.—[Federal] Prior to January, 1917, the development of the aircraft industry in the United States was seriously retarded by the existence of a chaotic situation concerning the validity and ownership of basic aeronautical patents. Certain companies were threatening infringement suits, with the result that the industry was generally demoralized, making it impossible for the government to obtain fulfillment of its orders. In addition the license fee paid on planes manufactured was so high as to be excessive, and since the Army and Navy were the principal purchasers the burden was in effect falling upon the Federal Government. Rather than expend the time and money necessary to condemn these patent rights, the United States, through its Secretaries of War and Navy and its specially created National Advisory Committee for Aeronautics, worked out a scheme whereby a group of aircraft manufacturers were induced to incorporate an organization under the laws of New York known as "The Aircraft Manu-

facturers Association." The patentees, on their part, agreed to pool their rights in this association, to which only responsible manufacturers could become "subscribers" or stockholders. It was provided, however, that no stockholder could acquire more than one share, and that only members were eligible to become subscribers to the cross-license agreement, which, together with the by-laws, provided for the issuance of licenses to use the patented devices owned or controlled by the association. The agreement also called for the payment of royalties to the association at the rate of $200 on airplanes and division between participating patentees. The agreement was endorsed by all parties concerned, including the United States. Thus as to airplanes manufactured by subscribers either the United States or the manufacturer paid the royalty to the plaintiff association. But as to planes purchased from non-subscribers the United States agreed impliedly, if not in fact, at the time of the consummation of the plan, to pay the royalty.

This suit involves $363,500 in royalties which the plaintiff claims is due upon 2,216 airplanes owned by the United States, but manufactured by non-subscribers and not reported to the plaintiff. The claim was approved by the Secretaries of War and Navy, but disallowed bp the Comptroller General. Although no formal agreement was entered into by the parties as to these particular planes, the plaintiff bases its claim upon an implied contract to report and pay for them.

The Court of Claims, speaking through Judge Littleton, held that under Section 145 of the Judicial Code a claim based upon a contract implied in fact (not in law) constituted a good cause of action. That in this case, "the acts and conduct of the parties, and their relations, established an implied contract on the part of the Government to pay the plaintiff the royalties which it now claims," especially in view of the fact that the Government sponsored this Association and practically dictated its own terms in order that the patents might be made available to it without the necessity of entering impending infringement litigation or condemnation proceedings. The Court further held that none of the elements of a patent infringement were present here; that the suit was not so grounded, but was properly based upon an implied contract to pay the royalty stipulated. In passing over a plea in bar under the Statute of Limitations the Court held that the cause of action did not accrue, in this particular case, upon the delivery date of the airplanes, but rather, under usages established between the parties, after the reports upon the planes in question had been made by the Government and invoices rendered thereon by the plaintiff. As to the contention that the plaintiff was not the absolute owner of the patents, the Court held that not only did the plaintiff control the patents and have an interest therein, but the actual patentees were parties to the agreement. The plaintiff had judgment in the amount claimed. *Manufacturers Aircraft Association, Inc.* v. *United States of America*, — C. Cls. —, 1933 U. S. Av. R. 133 (Court of Claims, May 8, 1933).

ROBERT T. WRIGHT.

TAXATION—AIRPLANE AS PERSONAL PROPERTY—SITUS OF AIRPLANE.—[Mississippi] The Attorney General of Mississippi in an opinion rendered on June 7, 1933, to the Tax Assessor of Walthal County, Mississippi, advised that an airplane should be assessed for taxes for the year as any other personal property in the County where it is located on January 1st.

Opinion of the Attorney General of Mississippi, June 7, 1933, 1933 U. S. Av. R. 227, 233 C. C. H. 3117.

LORRAINE ARNOLD.