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Notes, Comments, Digests

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NOTES, COMMENTS AND DIGESTS

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NOTES

AIRPORTS—MUNICIPAL—EMINENT DOMAIN—INTERPRETATION OF STATUTES. —The variegated pattern of state legislation dealing with the exercise of the power of eminent domain by municipal corporations in the acquisition of property for airport purposes has given rise to considerable confusion. As a result of the failure of legislatures to meet the difficulty, airport development has in many jurisdictions moved forward with halting steps, and by indirection the growth of public interest in air navigation has been retarded. Two related problems give rise to much of the uncertainty and delay: first, the nicety of specification required of a statute to support the delegation of the power of eminent domain to a municipality; second, the statutory expression necessary to support the exercise of the power outside corporate limits.

I. It is a foundation principle that the complete power of eminent domain rests in the sovereign, subject only to the conditions that the purpose for which private property be taken be public, and that just compensation be made.[1] The sovereign may delegate the power to an inferior body, but the delegation must be express or clearly implied, and all intendments are in favor of the property owner.[2] Doubtful expressions will be interpreted to negative the grant.[3] Although these rules were long applied with unyielding exactitude, modern decisions have introduced some refinements into their interpretation. The doctrine of "necessary implication" has been utilized to extend the power of eminent domain to acts necessary to the complete exercise of a right already coupled with the power.[4] But this supplementation has been sparingly used, and many courts have rigidly limited its application.[5] The boundary of interpretation, which courts rarely transgress, is well expressed in *City of Los Angeles* v. *Koyer*,[6] where it was said that the power of eminent domain would never *pass* by implication, but its *exercise* might be measured by expression or clear limitation. Another relaxation of the older rigid rule is found in such cases of *Spokane* v. *Williams*,[7] and *Helm* v. *Grayville*,[8] where the court looked to a general condemnation statute to support the exercise of the power in pursuance of a specially extended right. However, in all of these holdings it is pointed out that the result does not represent an abandonment of the hallowed principle of "jealous guardianship" which has long dictated the interpretation of statutes delegating the power of eminent domain.

1. *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 316 (1894).
2. *Devon* v. *County Board of Education*, 210 Ala. 256, 97 S. 741 (1923); *Gillespie* v. *Aurora Ry. Co.*, 228 Ill. 261, 81 N. E. 1005 (1907).
3. *Comiskey* v. *City of Lynn*, 226 Mass. 210, 115 N. E. 312 (1917).
4. *City of Los Angeles* v. *Koyer*, 48 Cal. App. 720, 192 Pac. 301 (1920).
5. *Mack* v. *Town of Craig*, 68 Colo. 337, 191 Pac. 101 (1920).
6. *Supra*, note 4.
7. 157 Wash. 120, 228 Pac. 256 (1930).
8. 224 Ill. 274, 79 N. E. 689 (1906).

The pertinency of these comments to the airport situation is illustrated by the interpretation of the Illinois statute.[9] In that statute municipalities are given the right to "acquire or lease" land for landing field purposes. While at first glance this statute would seem to evidence a legislative intent that municipalities be allowed to acquire landing field sites in such manner as becomes necessary, such is not the case. The Attorney-General has advised that these terms do not carry the power of eminent domain.[10] Indeed, "acquire" has been expressly held not to carry with it a grant of condemnation power.[11] In the absence of a grant elsewhere in the statutes to acquire land by condemnation for public purposes, Illinois municipal airport projects may be easily blocked by the exorbitant demands of landowners.

If the statutes contain a general grant of the power of eminent domain to acquire land for public purposes, and a specific authorization to engage in airport development, the statutes construed together authorize the exercise of the general power in the exercise of the special authority.[12]

II. The second problem arises as a natural consequence of the necessity of locating landing fields outside corporate limits, and the conventional limitation of municipal powers within corporate limits. About half the states have authorized the acquisition of landing field sites within or without the corporate limits, in general terms. Others limit the power to certain classes of cities, or in territorial scope, and the rest make no provision at all. Nor is the method of acquisition uniform. Eminent domain has been authorized in some states, and others, like Illinois, make no mention of it.

The stereotyped rule has long been that a municipal corporation, being a creature of statute, and of limited territorial jurisdiction, cannot acquire or hold land outside its limits in the absence of express authorization.[13] The application of this principle is well illustrated in a representative case, *Langley* v. *Georgia*,[14] where it was held that an authorization to hold *any* real estate did not countenance holding realty outside the corporate limits.

Vigorous dissent from this old rule has been expressed by outstanding authors,[15] and of late many courts have strayed from it.[16] In substance, this later line of cases holds that in the absence of express prohibition a municipality may hold property outside its corporate limits, for legitimate municipal purposes. Under such circumstances the municipality could not exercise its police power over the property. Nor could it exercise the power of eminent domain.[17] Even the dissentient courts are agreed that both these powers require statutory extension to be operative outside the territorial limits of the municipality which desires to exercise them.

There is no doubt that the state may grant municipalities the right to

9. Ill. Rev. Stat. (Cahill 1933), Ch. 24, sec. 65-99.
10. *Opinion of the Attorney General*, Nov. 17, 1933.
11. *Allegan* v. *Iosco Land Co.*, 254 Mich. 560, 236 N. W. 863 (1931).
12. *City of Spokane* v. *Williams et al.*, *supra* note 7; *State ex rel. City of Walla Walla* v. *Claussen*, 157 Wash. 457, 289 Pac. 61 (1930).
13. *Village of Houghton* v. *Huron Copper Mining Co.*, 57 Mich. 547, 24 N. W. 820 (1885).
14. 118 Ga. 590, 45 S. E. 486 (1903); *Riley* v. *Rochester*, 9 N. Y. 64 (1853).
15. *McQuillan*, Municipal Corporations (2d ed. 1928), sec. 1210; *Hubbard, McClintock and Williams*, Airports (Harvard City Planning Series I, 1930), p. 119.
16. *Schneider* v. *Menasha*, 118 Wis. 298, 95 N. W. 94 (1903); *Smith* v. *City of Kuttawa*, 228 Ky. 569, 1 S. E. (2d) 969 (1928).
17. *Thompson* v. *Park Commissioners*, 44 Mich. 602, 7 N. W. 180 (1880).

condemn land outside their limits.[18] The troublesome question is, "When does legislation accomplish this end?" In the absence of specific terms in the statute, rules of implication must be resorted to, and courts are loath to imply condemnation power to be used outside corporate limits as readily as they imply the power of purchase or lease. A general statute authorizing the exercise of eminent domain outside corporate limits, coupled with a statute authorizing the municipality to construct and maintain airports, has been held sufficient to sustain the use of the condemnation for an airport outside the corporate limits.[19] Beyond this point the courts have not gone. The useful "necessary or desirable"[20] formula often relied upon to support an implication of municipal power to *purchase* outside the corporate limits has never furnished ground for the implication of a similar power of eminent domain, and it seems highly improbable that any court will so extend it.[21]

The only remedy for these problems lies in the adoption of legislation similar to the proposed Illinois Act.[22] Until such time as legislatures realize the necessity of such an enactment, municipal airport development will be slow and expensive.

ROBERT L. GROVER.

A LETTER RELATIVE TO LIVINGSTON V. FLAHERTY

January 20, 1934.

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GENTLEMEN:

My attention was recently directed to a current review in a Los Angeles paper of an article published in your October issue of the JOURNAL OF AIR LAW, wherein the authors had extolled the reasoning and at least tacitly approved the conclusions of the trial court in *Livingston* v. *Flaherty*;[1] and, while I was disinterested in either the merits or the results of the latter action, I am particularly mindful of the potential import of all judicial decisions of first impression in the increasingly momentous evolution of aeronautical judicature; and, in an effort fairly to appraise the discernment of the reviewers of that cited case, I have examined the opinion and I am presuming upon your interest in the general subject to suggest the following divergent and perhaps more rational if inconclusive views.

Purely as an academic proposition, I should have decided the case against my sympathies, and in favor of the defendant. The purpose inspiring the fatal flight was immaterial, either as determining the question

18. *Dillon*, Municipal Corporations (5th ed. 1911), sec. 1028.
19. *Supra*, note 12.
20. *Pioneer Real Estate Co.* v. *City of Portland*, 119 Ore. 1, 247 Pac. 319 (1926); *Melville* v. *City of San Diego*, 183 Cal. 734, 192 Pac. 702 (1920); *City of Champaign* v. *Harmon*, 98 Ill. 491 (1881).
21. See Note 2 JOURNAL OF AIR LAW 94 (1931).
22. See State Regulation department, this issue, p. 301.

1. Decided Nov. 15, 1932, by Minor Moore, J., Superior Court of California, Los Angeles County. For a discussion of this case see *Kingsley, R.*, and *Gates, S. E.*, "Liability to Persons and Property on the Ground," 4 JOURNAL OF AIR LAW 515, 523.

of responsibility, or as admeasuring the recoverable damages, if any. By the same token, the humane purpose of the hapless victim, in essaying the rescue which resulted in his death, neither absolved him from liability for the results of his own negligence, if he was contributorily negligent, nor enhanced the deservedness of his widow of excessive compensation.

If the decedent had elected to remain indoors, as he might have done, and had left the "night-bird" to the fate which his own improvidence or deficient sense of direction had brought upon himself, the general and natural regret engendered by the attending and probably inevitable disaster would have been less poignant than that occasioned by the needless sacrifice of the martyr who thereby evinced the devotion to a fellow-being than which "no man hath greater love." But that consideration also in the instant case would have been inconclusive and extra-judicial.

If the night were sufficiently dark to have suggested to the plaintiff's decedent a need for the light he carried, it is improbable that the defendant, from his reported height of a thousand feet, actually "saw deceased walk from his home in a northeasterly direction and come to a stop." He probably did see a light moving from one to another unknown position on the terrain; and he thereupon "reduced his elevation to three hundred feet."

If the decedent had remained in the position marked by his lantern at rest, it may not unreasonably be assumed that the plane would have landed with its nearest wing tip at least 70 feet away from that position. The defendant, in my judgment, would have been warranted in assuming, as I doubt not he did, that his benefactor would remain *in situ quo;* and he was thereupon justified in descending to a landing height.

It seems to me that the "last clear chance" had passed when the decedent began his race to the point where he was struck by the plane; and the question of ultimate responsibility then would have become determinable upon whether or not the defendant, by the exercise of the maximum care with which he was chargeable in the circumstances, might have averted the collision. From my own meagre knowledge of aeronautics, I should have held that he could not.

Granting that the decedent's only purpose in appearing on the scene had been to invite and thereby facilitate a safe landing by the "wounded falcon," the latter, being charged with the sacred responsibility of conserving the lives of his two passengers as well as his own, was not only justified in accepting, but he might have been answerable to their survivors if he had failed to accept, the invitation bespoken by the welcoming light; and he therefore, in my opinion, was not guilty of actionable negligence in descending to a landing height, throttling down his engine to an idling speed, and straightening out to land. His subsequent action then alone determined his culpability or his blamelessness for the attendant fatality.

If he had been endowed with an extraordinary faculty of coordination, he might conceivably have veered suddenly to the right or zoomed suddenly upward; but his adoption of either alternative might have thrown the plane into a tail spin too close to the ground to have permitted him to avoid a crack-up, with probable fatal consequences to all the occupants of the plane. The decedent sacrified his life to avert just that result; and, even if the defendant had deliberately followed a course which he reasonably knew might destroy the life of the decedent, he should not

have been condemned for that result if he had reasonably foreseen it as the sole alternative to an inevitable sacrifice of three lives instead of one.

If the published statement of the case completely reviewed the material evidence, the trial attorneys may or may not have been remiss in not having shown the presence or the absence of moon-light, which might or might not have illuminated the landing field, and revealed, by the drift of smoke from the plaintiff's chimney, the direction of the wind; as the negligence or absence of negligence of the defendant in the stated circumstances might have been dependent largely upon whether he was flying with the wind, against the wind or through cross currents of wind.

In any event, the apparently undisputed fact that the plane had overturned in landing would have tended to corroborate the pilot's statement that he had dug his right wing into the ground in an effort to avoid striking the decedent, as he would thereby have induced a ground loop which would have resulted in a crack-up as described.

If it be conceded that the defendant in his observance of the first law of nature was within his legal rights in having accepted the decedent's invitation to land, and if he had not transgressed the decedent's rights in any respect precedently to the situation in which the opinion concedes that the defendant saw the decedent "at the distance of more than 300 feet away, running toward the course of the plane," it will be remembered that he was approaching the point of collision at a rate of approximately 50 feet per second, and that an interval of not more than five or six seconds intervened between the defendant's first realization that the decedent was in a position of danger and his actual collision with the decedent.

Possibly one pilot in a thousand might have had the foresight within that interval to have saved the decedent at the cost of added risks to the occupants of the plane; but I doubt that any considerable number of skilled pilots would have followed any different course than that upon which the instant suit was based.

That the decedent would "have been so destitute of judgment as to leave a position of safety to run directly into the very jaws of destruction" is readily reconcilable with his natural incertitude as to the exact position and direction of flight of the plane; and the imminence of his peril lent speed to his aimless and errant course.

His error of judgment therefore, in my humble opinion, rather than any actionable negligence on the part of the defendant, was the proximate cause of the decedent's death. There is a peculiarly hypnotic power in the hum of a whirring propeller, which on several occasions within my knowledge has impelled experienced aviators to walk with seeming deliberation into the orbit of the blades.

Upon these premises, while I agree unreservedly with the Court's major postulate that a flier is liable for damages occasioned by his voluntary landing on private property, I should have held that the particular descent was not voluntary, but on the contrary was a "forced landing," with respect to which an entirely different rule of liability should have been applied. I should thereupon have concluded with sentimental regret that the plaintiff's grievance was *damnum absque injuria;* and I should have entered a judgment for the defendant.

An inflexible application of the principles of *res ipsa loquitur* in all

cases involving the death or physical injury of any person struck by an automobile would practically preclude the classification of any such misadventure as an "unavoidable accident."

A fair and rational extension of the principles enunciated in *Livingston* v. *Flaherty,* moreover, would compensate the victims of all automobile accidents, on the theory that they might have been *avoided* if the responsible drivers had left their cars in their garages or deliberately driven them into a river before the accidents.

A general invocation of an absolute rule of liability may eventually become necessary to abate the appalling menace of reckless and irresponsible drivers; and a fitting sense of social justice should not be outraged by a visitation of the resultant losses even of "unavoidable accidents" upon those who have set in motion the forces whereby such losses were occasioned, rather than upon those whose only contribution thereto has been their unwitting presence at the points where their destinies have overtaken them.

A casual review of the decided cases, however, or of the news reports of coroners' findings in cases of traffic accidents, reflects a persuasive public sentiment of tolerance towards the drivers of automobiles, and of almost a callous disregard for the remediless victims of the speed of our industrial age.

Undeniably, it seems to me, a similar rule of reason must be applied in the determination of the actionable negligence and of the measure of pecuniary responsibility of aero-pilots; and it may not be surprising if the classic and humane pronouncements commended by your recent contributors will be found distinctly opposed to the ultimate trend of judicial decisions in such cases.

In any event, I commend the purpose and the function of your publication, in blazing the trail to a new and important field of juridical research; and with my best wishes for your continued success in that respect, I am,

Very sincerely yours,

OTIS BEALL KENT.[2]

TRESPASS—NUISANCE—MUNICIPAL AIRPORTS—EMINENT DOMAIN—RIGHTS OF ADJOINING LANDOWNERS—[Georgia] "Candler Field" of the City of Atlanta, Georgia, is the first municipal airport to be involved in a trespass-nuisance suit, commenced by a neighboring landowner and resident. In *Thrasher* v. *City of Atlanta, et al.,*[1] decided February 20, 1934, the Supreme Court of Georgia modified the ruling of the trial court which sustained a demurrer and dismissed the petition to the extent of holding that a cause of action for nuisance was stated by allegations of excessive and unnecessary spreading of dust. More important, however, is the court's holding that an action of trespass would not lie for repeated flights of airplanes over the plaintiff's adjoining land which the petition described as "low flying" and as being "at altitudes lower than 500 feet"—this being the court's holding in the absence of "a further statement of the circumstances." Notwithstanding, the court recognized that aerial trespasses by

2. Of the District of Columbia Bar.

1. For an earlier memorandum decision in this litigation, see *Thrasher* v. *City of Atlanta, Ga.*, 166 S. E. 856 (1932).

airplane were a possibility in some instances, although no contact was made with the land or objects affixed thereto. On the problem of trespass-nuisance by flight over the plaintiff's land, the court adopts a "zone theory" and states its position as follows:

Perhaps the owner of the land may be considered as being in actual possession of the space immediately covering the trees, buildings and structures affixed to the soil, so that the act of navigating a plane through this stratum could be condemned as a trespass; but that is not a question for decision in the present case, and obviously we should not here attempt to define the altitude at which aerial navigation might be considered as constituting such an offense. It is sufficient to say that the flight of aircraft across the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It might or might not amount to a trespass, according to the circumstances including the degree of altitude, and even when the act does not constitute a trespass, it could be a nuisance, as where it "worketh hurt, inconvenience, or damage" to the preferred claimant, namely, the owner of the soil, or to the rightful occupant thereof.

The City of Atlanta, it is alleged, established "Candler Field" in 1927 in conformity with a statute of 1927[2] which empowered the City "to purchase, own and operate municipal landing fields, for the reception, storage and operation of airplanes; also for the use of the government in the Air Mail Service," and placed any lands so acquired under the exclusive jurisdiction and control of the municipality. The plaintiff owned and occupied a residence in the vicinity of the field, which he purchased in 1924—a modest residence fronting on an avenue bordering a busy section of the airport. On October 17, 1931, the plaintiff instituted suit against the City of Atlanta, Eastern Air Transport, and other companies engaged in the business of aviation, and asked for an injunction and damages on the theory that the defendants were so conducting the airport that it constituted a nuisance with resulting damage to the plaintiff. The petition alleged general damage in the sum of $50,000, and special damage of $2,500 expended for medical care and attention to the plaintiff's wife as a result of defendants' conduct. The plaintiff specifically complained of (1) danger, (2) noise, (3) dust, and (4) flights of airplanes above plaintiff's land. The trial court sustained the general demurrers which were filed by the defendants severally and dismissed the petition. The plaintiff excepted thereto and appealed.

The Supreme Court held that "the petition stated a cause of action for damages for expenses incurred in connection with the wife's illness, . . . and also for injunction against the continued spreading of dust in excessive and unreasonable quantities over the plaintiff's premises," and that the trial court erred to this extent in sustaining the defendant's demurrers. Two Judges concurred specially.

The Court's own summary of its lengthy opinion is as follows:

1. The allegations of the petition were sufficient to show the liability of all defendants for the acts of each, provided a cause of action was stated.

2. By the act of August 23, 1927 (Ga. L. 1927, p. 779), the General Assembly expressly authorized and empowered the City of Atlanta to establish and operate municipal landing-fields for the reception, storage, and

2. Act of August 23, 1927, Georgia Laws 1927, pp. 779, 780.

operation of airplanes. By this franchise aviation was recognized as a lawful business and also as an enterprise affected with a public interest. Upon the establishment of any such airport by the municipality, all persons using the same in the manner contemplated by law are within the protection and immunity of the franchise granted to the municipality. An airport is not a nuisance per se, although it might become such from the manner of its construction or operation.

3. Mere apprehension of injury from the falling of planes is not sufficient to authorize an injunction against aerial navigation over the property of the complainant.

4. The unnecessary and improper creation and spreading of dust by the operation of such airport, with the result that dust in excessive and unreasonable quantities permeated the atmosphere in the vicinity of the plaintiff's home and impaired the health of the plaintiff's wire, necessitating the expense of medical treatment, and with the further result that dust was deposited in like quantities in and about the plaintiff's dwelling-house, whereby the comfort and use of his home was injuriously affected, would constitute a nuisance, affording ground for the recovery of damages and also for the grant of an injunction.

5. Aerial navigation over the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It may or may not be a trespass according to all the circumstances including altitude; and even when the act does not constitute a trespass, it may amount to a nuisance, as where it occasions hurt, inconvenience or damage to the occupant below. In the instant case the plaintiff's allegations were insufficient to show that the flying of aircraft through the space above his land constituted either a trespass or a nuisance.

In dealing with the question of whether aerial navigation is a trespass, the Court was confronted with a codification of what it assumed was "intended to express the *ad coelum* theory in its entirety," that is, the common law maxim *"cujus est solum ejus est usque ad coelum."* The Georgia Civil Code (1910), Section 3617, defines realty,[3] and then declares "the rights of an owner of lands extends downward and upward indefinitely." Section 4477 states: "The owner of realty having title downward and upward indefinitely, an unlawful interference with his rights, below and above the surface, alike gives him a right of action." "These statements as to ownership above the surface," the Court explains, "are based upon the common law maxim, *cujus est solum ejus est usque ad coelum*—who owns the soil also owns to the sky. These provisions of the code should therefore be construed in the light of the authoritative content of the maxim itself." The court properly proceeds to show the impotency of the maxim in the light of its "authoritative content" by pointing out the "indeterminate and elusive" quality of the term "sky", and the historical development of the maxim in connection with conditions "close to the earth." In this manner the court frees itself from the statutory provisions of the Georgia code.

3. Georgia Civil Code, Section 3617. *"Realty Defined.*—Realty or real estate includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein issuing out of or dependent thereon. The right of the owner of lands extends downward and upward indefinitely."

The Acts of 1933 (Georgia Laws, 1933, pp. 99 and 102), in regard to aeronautics, were passed after the petition and all amendments thereto were filed, and were not considered in the instant case. Section 1 of the Act of 1933 (p. 99) pronounces flight to be lawful and is an enactment of Section 4 of the old Uniform State Law of Aeronautics: "Flight in aircraft over the lands and waters of this state is lawful unless at such a low altitude as to interfere with the then existing reasonable use to which the land or water or space over the land or water is put by the owner of the land or water; or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

Ownership is recognized as limited to air space that is in actual possession or at least within "the reasonable possibility of man's occupation and dominion." This limits the action of trespass to invasions of the air space so possessed or owned, but does not fix the limit of the landowner's rights. The landowner beneath is recognized as the "preferred claimant" to the upper air space, with the first right to take possession of it and the right to complain by an action of nuisance againts any user of the "upper stratum"—to adopt the language of Judge Moorman in the *Swetland* case—which tends "to diminish the free enjoyment of the soil beneath." This position is clearly a "zone theory" of air space ownership, recognizing both trespass and nuisance as appropriate remedies for aerial invasions within guarded limits. While the court did not hold that either trespass or nuisance would lie against flights over plaintiff's property in the instant case, largely because of vague and indefinite pleadings, it carefully did not place any definite limit upon either action. Admonishing that its decision was only upon demurrer, the court construed the averment of flights "at altitudes lower than 500 feet" as stating "an altitude of only a little less than 500 feet."

The position of the specially concurring judges is more inflexible upon the point:

> . . . the grant of a franchise, no matter of what kind, can no more condemn a right-of-way for an aviation company over the land or dwelling of another until the owner has received adequate compensation for the condemnation of his property to a public use than would be the case where the condemnation sought to affect the surface of the ground or the use of the same by subterranean excavation. The height above the surface at which the flying is to be pursued cannot be arbitrarily fixed by those who expect to do the aerial navigation, except in proper proceedings or as a matter of contract with the owner of the soil.

The cases of *Smith* v. *New England Aircraft Company*[4] and *Swetland* v. *Curtiss Airports Corp.*[5] are similar to the instant case in that they all involve the rights of landowners adjoining an airport. However, important distinctions can readily be drawn: (a) The airports in the earlier cases were private airports, (b) they were established without express statutory authority, (c) they were said to be of small acreage as compared with "Candler Field," and (d) they were established over timely protest and objections made by the owners of expensive estates. Whereas, in the *Thrasher* case, there was (a) express statutory authority, (b) a municipally owned and operated airport, (c) an airport handling United States air mail traffic, and (d) almost five years acquiescence and delay on the part of the plaintiff in bringing suit. The statutory pronouncement considered as amounting to the *ad coelum* maxim was a difficulty only found in the Georgia case.

The Court's treatment of the question of whether the operation of the airport proper constituted a nuisance was substantially similar to that of the earlier cases. Danger, noise, and dust were each discussed in turn. The express statutory authority was invoked to show that the airport could not be a *public* nuisance because expressly authorized, that all necessary

4. 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 316, 1930 U. S. Av. R. 1 (1930).

5. (D. C., N. D., Ohio) 41 F. (2d) 929, 1930 U. S. Av. R. 21 (1930); (C. C. A. 6th) 55 F. (2d) 201, 1932 U. S. Av. R. 1 (1931).

and proper operations of the airport could not constitute a *private* nuisance no matter how annoying, but that if such necessary and proper conduct caused substantial injury to the property of the plaintiff, it might amount to a taking of private property without compensation—a question of eminent domain not raised in petition before the court. The holding of the court that a cause for nuisance was made out by the allegations of the petition in regard to the spreading of dust, was expressly placed upon the basis that such dust was alleged to have been unnecessary and that special damage had resulted therefrom, i. e., medical attention to the plaintiff's wife.

EDWARD C. SWEENEY.[6]

COMMENTS

INSURANCE—AIRPLANE AS "MOTOR DRIVEN CAR" WITHIN ACCIDENT POLICY PROVISION.—[Kentucky] Plaintiff, the beneficiary of an accident insurance policy issued by defendant to her husband, brought suit thereon, the insured having been killed in an airplane accident. The policy provided for the payment of $2,750 in the event of the death of the insured "by the wrecking or disablement of any automobile or motor driven car (motorcycle and railway cycle cars excepted) or horse drawn vehicle not plying for public hire in which the insured is riding or driving or by being accidentally thrown from such wrecked or disabled automobile or vehicle." Defendant's demurrer to the complaint was sustained, on the ground that an airplane was not within the meaning of the clause quoted. *Held,* on appeal, affirmed. *Monroe's Adm'r.* v. *Federal Union Life Ins. Co.,* 65 S. W. (2d) 680 (Ky., 1933).

Life and accident insurance litigation involving aerial navigation has thus far for the most part been concerned with questions arising from the *exclusion* of coverage while the insured is participating or engaged in aeronautics.[1] The question raised by the instant case is that of the *inclusion* of coverage in policies couched in general terms without express exceptions as to airplane accidents.[2] It is clear that under general life and accident policies death resulting from an airplane accident would be covered in the absence of pertinent exception. A special accident policy, however, providing for payments only in the event of certain types or classes of accidents, as in this case, ordinarily is not to be extended beyond the limitations specified.

Although an airplane would have to be placed in the class of "motor

6. Of the Illinois Bar.

1. Note, 2 Air Law Rev. 77 (1931); Comment, 3 JOURNAL OF AIR LAW 331 (1932); Comment, 3 JOURNAL OF AIR LAW 661 (1932); *Kremlich,* "A Survey of Aviation Insurance Law," 2 JOURNAL OF AIR LAW 524, 534-7 (1931). The cases are summarized almost to date by *Logan,* "The Recent Trend of Aeronautical Litigation," 4 JOURNAL OF AIR LAW 462, 464-9. See also *Richards,* Insurance (4th Ed., 1932), §§374, 375.

2. The case calls to mind *McBoyle* v. *United States,* 283 U. S. 25, 51 S. Ct. 340 (1931), rev'g. 43 F. (2d) 273 (C. C. A. 10th, 1930), in which it was held that an airplane was not within the meaning of the National Motor Vehicle Theft Act, 18 U. S. C., §408, "motor vehicle" being defined by the statute as an "automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." The two rules of construction upon which that case proceeded, that of *ejusdem generis* and that of construction of penal statutes most favorable to the accused, are both inapplicable to the instant case, which is governed by entirely different rules of construction. See Comments, 2 JOURNAL OF AIR LAW 437 (1931), 9 N. C. Law Rev. 447 (1931).

driven cars" in order to sustain recovery in this case, it would seem that equally plausible technical arguments could be made both for and against such a classification. The question apparently has not been previously passed on, and rules of construction sufficiently elastic to suit the plaintiff's purposes were available. The rule construing policy provisions strictly against an insurer[3] might have been applied to the more or less general term "motor driven car," and perhaps by the added force of the rule *expressio unius est exclusio alterius*[4] (made applicable by the express exceptions of motorcycles and railroad cycle cars), it might well have been said that the term is broad enough to include airplanes. On the other hand, a technical construction might well have been urged against recovery on the very simple ground, without more, that an airplane is not a "car" at all, a car being a vehicle that ordinarily runs on the ground.[5]

Cases like this, however, ought not to be governed by mere words, definitions, and rigid rules of construction.[6] The court points out that the very low premium charged for the policy—$1.25 per year—and the specific exceptions mentioned "are strongly persuasive that the policy was intended to be very limited." Further, the court says that it is generally known and recognized by all that riding in an airplane is "indeed very hazardous," and that since the insurer took the precaution to exclude motorcycles and railway cycle cars from the terms of the policy," then could it be said in the light of reason that it intended to include airplanes, which are more hazardous than the vehicles excluded?" The argument seems weak as to both points. An unexpressed intention of an insurer is not to be given effect, if contrary to the language used in the policy, even as to ambiguities;[7] as to the alleged hazard of riding in an airplane, it is generally conceded that such conclusions are not justifiable in fact, judging by the experience of recent years.[8] Nor does the court's inquiry into statutory provisions for the licensing of automobiles and motor vehicles, aid the problem, which is one not of meaning of words in the abstract, but one of insurance coverage *vel non*.[9]

3. *Life & Cas. Ins. Co. of Tenn.* v. *Metcalf*, 240 Ky. 628, 42 S. W. (2d) 909 (1931); *Smith* v. *Maryland Cas. Co.*, 246 N. W. 451 (N. D. 1933) are representative cases discussing at length the application of this time-honored rule of insurance law. See also *Vance*, Insurance (2d Ed., 1930), §§179, 257, 262.

4. See numerous cases cited in 25 C. J. 220.

5. The word "car" was originally used in statutes to indicate the unitary vehicles operated on railroads. See the numerous examples cited in 9 C. J. 1283-1284. The element of operation on rails was abandoned in time in the customary broad meaning given the word, but the necessity of wheels and the idea of operation on the ground seem to survive. It is not improbable that in time its meaning will be further expanded to designate, generically, other vehicles of conveyance. But cf. what is said in *McBoyle* v. *United States*, cit. note 2 *supra*: ". . . in everyday speech 'vehicle' calls up the picture of a thing moving on land. . . . The words 'any other self-propelled vehicle not designated for running on rails' still indicate that a vehicle in the popular sense, that is, a vehicle running on land, is the theme": 51 S. Ct. 341.

6. "Lexicographers cannot make law. Like expert witnesses, their opinion may and should aid, but cannot control, where the legal interpretation of a term is involved": *Colyer* v. *North Am. Acc. Ins. Co.*, 132 Misc. 701, 230 N. Y. S. 473, 475 (1928—"automobile" does not include "motorcycle").

7. *Vance*, op. cit. note 3, *supra*, §68.

8. Comment, 3 JOURNAL OF AIR LAW 135, 137 (1932); 3 Air Commerce Bull. 141 (1931).

9. "Rules of statutory construction applied in such cases [involving questions of the legislative classification of motor propelled vehicles for purposes of taxation] . . . are not authority upon questions involving the meaning of the contract of insurance": *Life & Cas. Ins. Co.* v. *Cantrell*, 57 S. W. (2d) 792, 793 (Tenn., 1933). Similarly, *McBoyle* v. *United States*, cit. note 2, *supra*, is no authority, being based on a penal statute subject to wholly different rules of construction.

There can be no doubt that the policy involved in the instant case was to be very limited in scope. It is impossible for an insurance company to give appreciably wide protection for an annual premium of $1.25. Nor could an insured reasonably expect any more protection that such a premium would warrant. In calculating the premium to be charged the insurer may be presumed to have studied the accident experience in different types of vehicles and to have expressd its insuring clause according to its selection of risks. Presumably airplane accidents were considered. If they were not intended to be excluded in the coverage as expressed, the insurer profits by the decision in the instant case; if they were so intended, then the absence of express exception indicates the insurer's belief that the term "motor driven car" itself excludes airplanes beyond any possibility of doubt. More probably the fact was that airplane accidents were not considered at all at the time of fixing the premium and wording the policy. Although the policy involved is not set out in full in the opinion in the instant case, it is common knowledge that such policies are so astonishingly full of express exceptions and limitations[10] that it is surprising indeed that airplane accidents were not specifically excepted in this policy. The zeal of the craftsman of the policy to embody a prolixity of exceptions is evidenced by the very mention of motorcycles, which have repeatedly been held not to be "motor driven cars" within the meaning of accident insurance policies, wholly apart from express exception, on the ground that it is impossible for a person to be riding or driving "in" a motorcycle.[11]

If the policy is to be "very limited," as the court so gravely observes, in the sense here indicated—namely, that it represents a masterful effort in using very thorough language of limitation, relegated to the inside pages of a policy which on its face, and in its advertisements, displays amounts as large as $10,000 and upward, yet for which a premium of only $1.25 is charged—then it would seem only fair that the insured should be permitted to take advantage of a situation where the insurer missed an opportunity to express another exception which, under the circumstances pointed out, it undoubtedly would have done, had it thought at all about the matter. It is submitted that in cases involving a "bargain" type of policy such as this, the rule of strict construction against an insurer should be rigidly applied. Although one may agree with the result reached in the instant case as a matter of technical construction of the word "car," the reasoning used by the court in reaching that result seems disturbing for its very confusing approach.

ANTHONY C. TOMCZAK.

DIGESTS

INSURANCE—"AVIATION RIDER" IN LIFE INSURANCE POLICY.—[North Carolina] Plaintiff was beneficiary of a life insurance policy issued to her husband, who was killed in an airplane accident. The defense was that an "aviation rider" was attached to the policy, providing that "death as a result of service, travel, or flight in any species of aircraft, except as a fare paying passenger is a risk not assumed under this policy, but if insured shall die as a result, directly or indirectly, of such service, travel,

10. See examples in *Vance*, op. cit. note 2, *supra*, pp. 868, 888.
11. *Salo* v. *North Am. Acc. Ins. Co.*, 257 Mass. 303, 153 N. E. 557, 558 (1926); *Perry* v. *North Am. Acc. Ins. Co.*, 104 N. J. L. 117, 138 A. 894 (1927); *Landwehr* v. *Continental Life Ins. Co.*, 159 Md. 207, 150 A. 732, 70 A. L. R. 1249 (1930). See also *Colyer* v. *North Am. Acc. Ins. Co.*, cit. note 6, *supra*.

or flight, the company will pay to the beneficiary the reserve on the policy." There was sufficient evidence, to be submitted to the jury, on the part of plaintiff to the effect that the "aviation rider" was not attached to the policy of insurance when delivered. This question of fact was decided by the jury in favor of plaintiff in the trial court. On appeal, affirmed, on a procedural point of law: *Messer* v. *Jefferson State Life Ins. Co.*, 171 S. E. 98 (N. C. 1933).

The clause involved in this case is identically the same "aviation rider" that was considered in *Matter of Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642 (1930), in which it was held that the clause was not in conflict with the New York statute requiring all policies to be incontestable after two years except for non-payment of premium and for a violation of the provisions regarding military or naval service in time of war. The present case seems to be the first to get to an appellate court in which the clause is used as a defense to an action brought on a policy issued after the *Conway* case had been decided, but since it was held, as a matter of fact, that the clause was not attached to the policy when delivered, the present case offers little opportunity for comment.

ANTHONY C. TOMCZAK.

WORKMEN'S COMPENSATION—EVIDENCE OF DECEASED'S EMPLOYMENT.—[Missouri] Dale Jackson, a well-known flyer, was killed at Miami, Florida, on January 6, 1932, when the wings of a Curtiss-Wright "Teal Amphibian" collapsed in an inverted dive. Claimant, the widow of Jackson, brought an action under the Workmen's Compensation Act of Missouri, asserting that Jackson had been employed by the Curtiss-Wright Airplane Company at St. Louis, as a test flyer and demonstrator of the Teal Amphibian, and was killed in the performance of the terms of his employment. Evidence of an oral agreement with the vice-president of the defendant company was introduced. Defendant denied the existence of any employment contract, claiming that deceased had taken up the plane on his own initiative, in keeping with the custom at air meets whereby any licensed transport pilot of good reputation may fly such a plane simply by obtaining the permission of some company official. Defendant had defrayed the expenses of deceased's funeral, which act was claimed by him to have been dictated by respect rather than consciousness of an obligation. The Compensation Commission made an award to the plaintiff of $12,000. The Circuit Court of St. Louis affirmed the award. *Held:* affirmed.

Upon appeal from the Compensation Commission award, the court will not re-examine the probative weight of the evidence. Mere admission of incompetent evidence will not support reversal, if competent evidence going to the same point has been introduced. The Commission members are the triers of fact; their findings will not be disturbed unless the result at which they have arrived is palpably against the weight of the evidence. *Jackson* v. *Curtiss-Wright Airplane Co.* (Mo. 1933), Supreme Court, December, 1933.

ROBERT L. GROVER.