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Notes, Comments, Digests

NOTES, COMMENTS, DIGESTS

COMMENTS

Violation of Air Commerce Regulations as Defense to Infringement Action—Application of Federal Air Traffic Rules to Intrastate Flight.—[Federal] Novel employment of the Air Commerce Rules[1] was attempted recently in the case of *Cory* v. *Physical Culture Hotel*.[2] The defendant was a subsidiary of the Bernarr MacFadden Foundation, Inc. In answer to an action against it for infringement of a copyright aerial photograph of its health resort, it alleged that the plaintiff secured the photograph during a flight which was in violation of the Air Traffic Rules.[3] The court became involved in the usual fruitless discussion of aerial trespass[4] but did not pass on this problem as the evidence showed that the defendant had authorized the flight. Even had it been unauthorized the defense theory of illegal flight would have been inapplicable for the court recognized that "the right asserted by the plaintiff is the right to the exclusive use of his copyright, and illegal acts, if any, not affecting that particular right will not bar his remedy for infringement."[5]

Lawlessness of the plaintiff is not always a sufficient defense to his charges. As was stated in an earlier infringement case, "it is not sufficient to debar a suitor from relief that he has committed an unlawful act, unless that unlawful act affects the matter in litigation."[6] Not only must the violation affect the matter in litigation, but to be used as a defense the statute or ordinance violated "must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally, or a class to whom the ordinance necessarily applies."[7] The absence of these factors in the *Cory* case make the alleged violation of the Air Commerce Regulations a mistaken defense to the infringement charges.

Even when such conditions are present in a case involving a statute or ordinance the defendant is not always successful in setting up the plaintiff's wrongdoing in bar of the action. In personal injury suits an attempts is often made to employ such violations in establishing the defense of contributory negligence.[8] Courts have disposed of this argument by saying that the unlaw-

1. Promulgated under §3(e) of the Air Commerce Act of 1926. 44 STAT. 2120 (1926), 49 U. S. C. A. §173(e) (1935). This authorizes the Secretary of Commerce to "establish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft."

2. 14 F. Supp. 977 (W. D. N. Y. 1936), 1936 U. S. Aviation Rep. 16; see Digest, 7 JOURNAL OF AIR LAW 630 (1936).

3. Sections 69 and 71, prescribing minimum altitudes of flight. The current air traffic rules, and their accompanying air commerce regulations are issued by the Department of Commerce in Aeronautics Bulletin No. 7, "Air Commerce Regulations," and its supplements. At the present time these rules and regulations are undergoing revision and codification and will be issued shortly in a regulations manual. *Cf. J. Monroe Johnson,* "Trends in Aviation Development," 7 JOURNAL OF AIR LAW 541, 548 (1936).

4. A late case in this heated controversy is *Hinman* v. *Pacific Air Transport; same* v. *U. S. Airlines Transport Corp.*, 84 F. (2d) 755 (C. C. A. 9th, 1936); 1936 U. S. Aviation Rep. 1; 7 JOURNAL OF AIR LAW 624 (1936).

5. 14 F. Supp. 977, at 983.

6. *Benley* v. *Tibbals*, 223 Fed. 247, 252 (C. C. A. 2d, 1915).

7. *Watts* v. *Montgomery Trust Co.*, 175 Ala. 102, 57 So. 471 (1912).

8. *Watts* v. *Montgomery Trust Co., ibid.; Potter* v. *Gilmore*, 282 Mass. 49,

ful acts of the plaintiff were merely evidence of negligence, or that while the violation of the statute was negligence per se, it was not the proximate cause of the accident.[9] Similar examples of this defense theory may be found in attempts to use a violation of outmoded Sunday laws to defeat a plaintiff's action.[10] While it is just that a plaintiff who violates the law should answer to the state or to the parties injured by him, he is entitled to the protection of the law against the wrongful acts or culpable negligence of others. His own unlawfulness should not vitiate his right of action except under the rules suggested.[11]

It must be noted that the Air Commerce Regulations here involved are administrative rules, not statutes or ordinances. State administrative regulations have been held to lack the force and effect of law, and thus their violation merely evidence of negligence.[12] But the Air Commerce Regulations are more analogous to the rules of the Interstate Commerce Commission than to those of a state body, because of their concern with national problems of air transport control. The rules of the Interstate Commerce Commission have been held to have the force of law in *Wintersteen* v. *National Cooperage & Woodenware Co.*,[13] and a violation of such rules held negligence per se.[14] It is probable that a violation of the Air Commerce Rules, if raised in a proper case, would form the basis of a valid cause of action or defense, being considered in the light of the Interstate Commerce Commission cases as more than mere evidence of negligence. If violation of the altitude limitation had been proved in the instant case Cory would have been subjected to penalties,[15] and would have become liable to an injured person

184 N. E. 373, 87 A. L. R. 1462 (1933); *Tennessee Central Ry. Co.* v. *Page*, 153 Tenn. 84, 282 S. W. 376 (1926); *cf.* 27 Ill. L. Rev. 223 (1932).

9. *Stark* v. *General Baking Co.*, 283 Mo. 396, 223 S. W. 89 (1920). A preponderance of the courts usually holds such violation negligence per se, irrespective of whether contributory negligence is involved or not. *Taylor* v. *Stewart*, 172 N. C. 203, 90 S. E. 154 (1916) (statute); *Moy Quon* v. *M. Furuya Co.*, 81 Wash. 526, 143 P. 99 (1914) (ordinance); *Hopkins* v. *Droppers*, 184 Wisc. 400, 198 N. W. 738, 36 A. L. R. 1156 (1924) (statute). Contra: *Benighof-Nolan Co.* v. *Adcock*, 194 Ind. 33, 141 N. E. 782, 29 A. L. R. 1344 (1923); *Banzhof* v. *Roche*, 228 Mich. 36, 149 N. W. 607 (1924); *Manard* v. *Sheppard*, 276 N. Y. S. 494 (1935) (all involve ordinances).

10. *Armour & Co.* v. *Rose*, 183 Ark. 413, 36 S. W. (2d) 70 (1931); *Hughes* v. *Atlanta Steel Co.*, 136 Ga. 511, 71 S. E. 778, 36 L. R. A. (N. S.) 547 (1911). In *Texas Employers' Insurance Association* v. *Tabor*, 274 S. W. 309 (Tex. Civ. App. 1925), aff'd, 283 S. W. 779 (1926), a violation of the Sunday law was held no bar to a recovery for injuries sustained in the course of employment on that day, on the ground that such act was merely a "condition" which did not absolve the defendant from the result of his own negligence. *Cf. Jeneary* v. *C. & I. Traction Co.*, 306 Ill. 392, 138 N. E. 203 (1923), for use of the "condition" technique.

11. *Louisville, New Albany & Chicago Ry.* v. *Buck*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 522 (1889).

12. *Schumer* v. *Caplin*, 241 N. Y. 346, 150 N. E. 139 (1925), Note (1926) 26 Col. L. Rev. 759. Criticized in *State* v. *Whitman*, 196 Wisc. 472, 220 N. W. 929 (1928), as giving the administrative agency advisory power only.

13. 361 Ill. 95, 197 N. E. 578 (1935).

14. *Penn. Ry. Co.* v. *Moses*, 42 Ohio App. 220, 182 N. E. 40 (1931). But not all rules of the Interstate Commerce Commission have the effect of a statute, the purpose and intent of the rule and the authority granted by Congress must be examined. *Ry. Co.* v. *International Milling Co.*, 43 F. (2d) 93 (C. C. A. 8th, 1930). *cert. denied*, 51 S. Ct. 89 (1930).

15. The present case arose in New York where the law incorporates certain of the Air Commerce Regulations and provides that their violation shall constitute a misdemeanor. N. Y. CONS. LAWS (Cahill, 1930) c. 21, §246. Section 11(a) of the Air Commerce Act of 1926 (44 STAT. 2120 (1926), 49 U. S. C. A. §181 (1935) makes it unlawful, *inter alia*, to navigate any aircraft otherwise than in conformity with the air traffic rules. It is a distinct possibility that Cory in this situation might incur both the state and the federal penalties for his act. *United States* v. *Lanza*, 260 U. S. 377 (1922). The Air Commerce Regulations had been held to govern intrastate flying in New York before the state regulations were enacted. *Herrick* v. *Curtiss Flying Service, Inc.*, *infra* note 25; and these subsequently enacted state regulations have been held fully

within the purview of the Air Commerce Regulations.[16] But the defendant here cannot claim such status to save himself from the consequences of his act, as one infringing a copyright aerial photograph cannot be considered within that class for whose benefit the minimum altitude rule was promulgated.

Usually the Air Commerce Regulations have brought into litigation the problem of federal control of intrastate flight, at least as far as the traffic rules are concerned, rather than the use of the Regulations as furnishing a cause of action or defense. To protect interstate flying and to impose safety and uniformity of regulation upon all aeronautics, the "burden" theory of commerce[17] has been applied to uphold federal regulation over all air traffic, both interstate and intrastate. Uniform state laws appear unable to cope with the problem as they cannot furnish as speedy and flexible regulation as is required. With the tremendous growth of air commerce in the past few years, with larger ships flying at higher speeds, uniform traffic rules are a necessity. Recently traffic control towers were erected at Chicago, Cleveland, and Newark and additional ones are being installed in other congested airports.[18] The landing and dispatching orders issuing from these stations reach beyond the confines of their immediate states and require the use of the Air Commerce Regulations to govern intrastate and interstate flights alike, for the safety of both.

The authority of the Secretary of Commerce to establish traffic rules was not confined to the control of interstate flying. Section 67 of the Air Commerce Regulations expressly incorporates the statement of the congressional managers accompanying the conference report on the Air Commerce Act of 1926 that the air traffic rules should apply to intrastate flight to prevent an undue burden upon interstate and foreign air commerce.[19]

This view was first adopted by the federal courts in the *Neiswonger* case[20] where it was held that intrastate flight was subject to the Air Commerce Regulations if it were necessary to protect interstate commerce. This favorable ruling was supported by the decision in *Swetland* v. *Curtiss Airports Corp.*,[21] where the 500 feet altitude rule was held to apply to intrastate flight, as well as to interstate.

Incorporation of a large part of the federal rules in state regulations

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as applicable as the Air Commerce Regulations, unless they become a "burden" upon interstate commerce. *People* v. *Katz, infra* note 24. A prosecution for violation of the Air Commerce Regulation has been reported. *United States* v. *Montgomery* (W. D. Ky. 1930) 1931 U. S. Aviation Rep. 29, 3 JOURNAL OF AIR LAW 320 (1932). *Cf.* Albert Langeluttig, "Criminal Violation of Administrative Regulations," 2 JOURNAL OF AIR LAW 151 (1931); Note 4 JOURNAL OF AIR LAW 282 (1933).

16. *Neiswonger* v. *Goodyear Tire and Rubber Co.*, 35 F. (2d) 761, (N. D. Ohio 1929), 1929 U. S. Aviation Rep. 96, 1 JOURNAL OF AIR LAW 359 (1929). The court held that the plaintiff, injured through the frightening of his team by the passage of an airship below the 500 feet altitude limitation imposed by the Rules, was within the class of persons intended to be benefited by them.

17. Its relationship to aviation is amply discussed in *George B. Logan*, "Interstate Commerce 'Burden Theory' Applied to Air Transportation," 1 JOURNAL OF AIR LAW 433 (1930); *Edward A. Harriman*, "Federal and State Jurisdiction with Reference to Aircraft," 2 JOURNAL OF AIR LAW 299 (1931); Comment 3 JOURNAL OF AIR LAW 122 (1932).

18. *Johnson, supra* note 3, at 543.

19. *Supra* note 3.

20. *Supra* note 16.

21. 41 F. (2d) 929 (N. D. Ohio 1930), modified 55 F. (2d) 201 (C. C. A. 6th, 1932), 1932 U. S. Aviation Rep. 1, 83 A. L. R. 319, 3 JOURNAL OF AIR LAW 293 (1932). Here the intent of the state that the Air Commerce Regulations should apply to intrastate flying was made reasonably clear by the legislative requirement that state regulation conform to the Air Commerce Regulations as far as possible.

has been a method frequently employed to obtain uniform traffic rules.[22] In a jurisdiction where this has been done it was held that the Air Commerce Regulations were applicable to intrastate flying,[23] although independent state regulations not so adopting the Air Commerce Regulations are of course valid, and the state may control aviation within its borders until such regulation is shown to be a burden upon interstate commerce.[24] Where state regulations had not yet been established, a lower New York court held that the Air Commerce Regulations should apply to intrastate flight.[25] To the contrary is a Texas decision[26] that the Air Commerce Regulations cannot govern purely intrastate flying unless the state legislature has adopted them. The latter view was taken by the California Supreme Court in *Parker* v. *Granger* which flatly affirmed the holding of a lower court that intrastate aeronautics cannot be subjected to the Air Commerce Regulations.[27] This is the first decision from the highest court of a state so limiting the Air Commerce Regulations, but in view of the necessity of modern aviation for uniform traffic regulations it does not seem that the United States Supreme Court will hesistate to expand the burden theory to the ultimate extension of federal supervision over all air traffic, when a proper case comes before it.

RUSSELL PACKARD.*

DIGESTS

Government Contracts—Consideration.—[United States Court of Claims] The plaintiff airplane manufacturer brought suit for $35,571.25 on an express contract with the defendant whereby the plaintiff had agreed for a stipulated amount to (1) design, construct, assemble and deliver to the defendant twenty new type Martin bombing airplanes in accordance with specifications furnished by the defendant; (2) furnish and deliver a complete set of clear and legible working, paper vandykes, and a bill of material of the twentieth airplane. The contract further provided:

> "It is understood by both parties hereto that the consideration named in Article V hereof is not of itself sufficient to induce the Contractor to undertake the work herein contracted for, without the possibility of additional remuneration from the Government. It is therefore agreed that one of the considerations of this Contract is said element of possibility of additional remuneration, which is, at the same time, calculated to afford every encouragement to the Contractor to expend its best efforts to make the articles herein contracted for so superior to the contract requirements that a material contribution will thus be made to the science

22. See Department of Commerce, Aeronautics Bulletin No. 18, "State Aeronautical Legislation Digest and Uniform State Laws," for information on regulatory methods of all states. This practice involves the constitutional question of incorporation by reference of future federal regulation.

23. *Sheboygan Airways* v. *Industrial Commission*, 209 Wisc. 352, 245 N. W. 178 (1932), 1933 U. S. Aviation Rep. 248, 3 JOURNAL OF AIR LAW 464 (1932). In *De Votie* v. *Cameron*, 265 N. W. 637 (Iowa 1936), 1936 U. S. Aviation Rep. 343, 7 JOURNAL OF AIR LAW 419 (1936), the petition alleged that both the federal rules and the state regulations were violated, but the question was not passed upon as the suit was dismissed because the state was defendant in its sovereign capacity.

24. *People* v. *Katz*, 249 N. Y. S. 719 (1931), 1931 U. S. Aviation Rep. 1, 2 Air Law Rev. 386 (1931).

25. *Herrick, Olsen et al.* v. *Curtiss Flying Service, Inc.* and Byrnes (N. Y. S. C. Nassau County 1932), 1932 U. S. Aviation Rep. 110, 4 JOURNAL OF AIR LAW 103 (1933).

26. *English* v. *Miller* (Tex. Civ. App. 1931) 43 S. W. (2d) 642, 3 JOURNAL OF AIR LAW 312 (1931).

27. 90 Cal. Dec. 475, 52 P. (2d) 226 (1935), 1936 U. S. Aviation Rep. 251; 7 JOURNAL OF AIR LAW 275, 283 (1936).

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and art of Aviation and as a result of which the Government will consider it advisable to reproduce such articles in quantity.

The contract thereafter provided for the payment to the plaintiff of a percentage of the price which the Government might pay for any airplanes which it might later purchase of a similar design to those for which it was then contracting. The plaintiff proved that the defendant contracted with three airplane companies for the construction of additional planes which were manufactured according to the design, plan and drawings furnished by the plaintiff under its contract with defendant. The Government defended on the ground that the provision of the contract failed for want of consideration. *Held:* The provision for a contingent fee was supported by a valuable consideration and therefore valid. *F. Jacobson & Sons* v. *United States,* 61 C. Cls. 420; and *Cohen, Endel & Co.* v. *United States,* 60 C. Cls. 513.

In disposing of the case the court stated:

> "The facts show that the Government did consider the articles such a material contribution to the science and art of aviation and so satisfactory that it ordered and had reproduced over 100 planes from the design and vandykes which were furnished by the plaintiff. The very wording of this article shows that it was a part and parcel of the consideration of the contract, and, if it had not been agreed to, the Government would probably have had to pay a much higher price for the planes manufactured by the plaintiff. There is no question of royalty involved. There is no claim that the design or any part thereof was patented. The claim is one under contract, and the Government has received the benefits and now refuses to pay. It has been held by this court that a contingent fee is valid where there has been a valuable consideration therefor and the contractor has performed his part of the contract."

Airports—Zoning—Continuation of Air Meets, a Nonconforming Use.—[Connecticut] This was an appeal from a judgment for the defendants on an action for an injunction restraining the defendants from conducting air-meets and exhibitions. It appeared that the defendant, since 1924, had been the owner of a tract of land which had been used by him as a flying field for airplanes; a hangar was erected thereon with accommodations for five planes; and members of the public were taken for rides on the planes quartered there, or which came on occasion for such purposes. Air-meets were held on the property during 1928 and in the summer of 1929. Late in October of 1933 a zoning ordinance became effective under which the defendant's land was located in a residential zone. The ordinance contained provisions, however, that any nonconforming use existing at the time of its adoption might be continued but that no nonconforming use should, if once changed into a conforming use, be changed back again into a nonconforming use; also, that no nonconforming use should be extended so as to diminish the extent of the conforming use. No air-meets were held on the property during 1931 or 1932. However, since October, 1933, public air-meets were held at which the public was charged for the parking of cars on the field and on other land of the defendant, and concessions were let for the sale of refreshments, etc. The plaintiff's property comprised a large residence with cottages and extensive grounds, plaintiff's dwelling being located about 2,000 feet from the nearest point of defendant's land.

From the facts found the lower court reached the conclusion that the parking of cars for which a charge was collected since October, 1933, and the granting of concessions for selling refreshments, etc., were new nonconforming uses violating the zoning ordinance, but that the plaintiff had proved no damage therefrom; that before the zoning ordinance took effect there had been an abandonment of the use of the premises for air-meets, but that the right to hold them thereon still existed because the property had not been devoted to a conforming use prior to their resumption; and that the other uses, though nonconforming, were in existence when the ordinance took effect and their continuance was authorized by provisions therein con-

tained. *Held:* The findings and the conclusions of the trial court sustained. *Sophie G. Lehmaier* v. *Alvin D. Wadsworth et al,* 235 C. C. H. 1807 (Conn. Sup. Ct. of Er., April 7, 1937).

On the appeal the principal efforts of the plaintiff were directed toward establishing that the nonconforming uses prior to the taking effect of the ordinance were not continued, within the provisions of the zoning ordinance, but had been abandoned and succeeded by a conforming use—specifically a development of the land for residential purposes. In denying this contention, the court said in part:

> "The temporary interruption or suspension of the nonconforming use without substitution of a conforming one or such a definite and substantial departure from previously existing conditions and uses as to signify an abandonment of the latter does not terminate the right to presume them (citing cases). Even if the defendant had in mind the possibility of a future change in use, so long as his operations had a legitimate present purpose and utility appropriate to the existing uses there would not be such departure from the latter as to require a finding of a present change terminate his right to continue them . . . ."

After discussing other conclusions of law reached by the trial court, the Court of Errors pointed out that plaintiff predicated her claim for relief solely upon violation of the zoning ordinance and expressly disclaimed reliance upon any contention that the activities of the defendants constituted a public nuisance inflicting damage special to her or her property. It was therefore held that the appellant was not entitled to pursue, in the upper court, the latter claim.

Negligence—Res Ipsa Loquitur—Evidence—Proof of Pilot's License.—[C. C. A., Alaska] This was a suit by an administrator to recover damages for death sustained by the decedent in the crash of an airplane belonging to the appellee, the Pacific-Alaska Airways, Inc., in which the decedent was riding as a passenger. On the trial the appellant proved that the plane crashed, and rested. Appellee, to meet the prima facie case arising under the *res ipsa loquitur* doctrine, attempted to prove that the pilot of the plane and the inspecting mechanic were duly licensed under the Air Commerce Act of 1926. On the trial the appellant was permitted to ask a witness whether he knew if the pilot held a license. Objection was made to the question but was overruled and an exception noted; the ruling was assigned as error. *Held:* Judgment reversed. *M. Clifford Smith, as administrator* v. *Pacific Alaska Airways, Inc.* (235 C. C. H. 1218, Circuit Court of Appeals, Ninth Circuit, March 29, 1937).

In concluding that the license itself would be the best evidence of the fact that the pilot was so licensed, and that the admission of the witness' testimony was error, the court made the following suggestion for retrial:

> "Since this case must be retried, and the instruction given in the charge to the jury on the *res ipsa loquitur* doctrine does not adequately inform the jury of the character of proof necessary to meet a prima facie case under this doctrine in a passenger case, it is proper for us to say that a full discussion of the applicable rule appears in *Gleeson* v. *Virginia Midland R. R. Co.,* 140 U. S. 435; cited in *Sweeney* v. *Irving,* 228 U. S. 233, 240."

Liability—Workmen's Compensation—Scope of Employment.—[Ohio] The action was brought by the widow and dependent of one Smith, who was killed in an airplane accident during the period of his employment by The Embry-Riddle Company which had complied with the Ohio Workmen's Compensation Act. The Common Pleas Court had sustained the motion of the Industrial Commission for an instructed verdict, for the reason that the plaintiff had failed to show jurisdiction in the Commission, i. e., injury within the scope of employment. Smith was employed as a ground mechanic

by the defendant company, which operated an airport and owned various types of airplanes. His duties related to taking care of airplanes and repairing them while they were on the ground and in moving them from one place to another on the ground; he was not hired or permitted to fly the airplanes. The record showed that on the morning of the accident another employee, having similar duties to those of Smith, started the motor of the airplane preparatory to moving it to a starting line, at which point the foreman, one Angieri, who had no authority to operate an airplane in the air, appeared, ordered the other employee out of the airplane, entered himself and increased the speed of the motor preparatory to take-off. At this point Smith came up and entered the plane. Angieri and Smith then proceeded the long way of the field, at the usual point left the ground, turned back over the hangars in the air, and crashed to the ground at a point near but outside the flying field. *Held:* Judgment reversed and the cause remanded for further proceedings according to law. *Luvah M. Smith* v. *The Industrial Commission,* 235 C. C. H. 905 (Court of Appeals, Hamilton Co., Ohio, February 3, 1936).

In concluding that death occurred in the course of employment, the court stated:

> "Angieri was the foreman. He had authority to direct Smith as to repairing planes and moving them from place to place on the ground. It was the usual time to move planes from the hangars to the starting line. This plane had been brought out of the hangar, and its motor started for that purpose. All the circumstances up to that point indicated that the course of the employment was proceeding without deviation. When Angieri entered the plane it was, to all outward appearance, just another step in the course of the employment. And when Smith entered and took his seat beside him, he appeared to be doing that for which he was employed. There is no evidence indicating that Smith at the time knew anything of Angier's intention to do otherwise than pursue the normal tenor of the employment."

The court found that an issue was raised supported by substantial evidence, which should be submitted to the jury for its determination.