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The legal experience of airports

By Charles S. Rhyne*

Airports today are found necessary to the very existence of our nation from the viewpoint of national defense. Airports are also a vital and all important link in our transportation system. The days of landing in cow pastures and hayfields are past and today our great airports are business enterprises of ranking importance. The need for larger and better airports and immediate improvement of those now in use is an accepted fact. It is well, therefore, to pause now and examine the legal rights and duties arising out of acquisition and operation of airports in order that past mistakes may be avoided and favorable experience may be recalled and taken advantage of.

Most of the airports in this country are municipally owned and operated. This fact of municipal ownership as contrasted with private ownership has caused various legal problems peculiar to municipal ownership. The legal experience of both private and publicly owned airports is reviewed herein. The plan of this review is to follow this legal experience from acquisition of the airport through everyday operation and finally to consider the increasingly important problem raised by the necessity of protecting airport approaches from obstructions while at the same time giving proper consideration to the rights of those owning property adjoining airports.

Acquisition of Airports

A. Privately Owned Airports

In the case of privately owned airports the only legal problem

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1. As of August 1, 1940, there were 646 municipal, 495 commercial, 338 CAA intermediate, 632 auxiliary, 20 Navy, 58 Army, and 181 miscellaneous government, private and state airports or a total of 2,346. Civil Aeronautics Journal 394 (Aug. 1, 1940).
relating to acquisition which has reached the courts is that of the right of a private corporation to use the power of eminent domain to acquire land for airport purposes. Acting under specific Florida statutory authority, Pan American Airways brought proceedings to condemn certain private property to be used as an air terminal. The Supreme Court of Florida held that the power of eminent domain may properly be granted to private corporations for a public use, and that the use in this case was public. Hence the court affirmed the judgment of the lower tribunal in favor of Pan American. As the analogy here is to cases involving railroads, power companies and other public utilities which have long been given the power of eminent domain to acquire needed rights-of-way, obviously the case is correctly decided.

B. Publicly Owned Airports

Most of the publicly owned airports belong to cities. State and county ownership exists only in a few instances. Airports can be acquired by these public bodies by purchase, lease from private owners, condemnation under the power of eminent domain, and in rare instances by gift or dedication. Under all state constitutions, as interpreted by many court decisions, cities and other public bodies can only expend public funds for a "public purpose". This limitation on the spending of public funds is conceded by all to be a proper one to prevent use of public funds for private gain. When public bodies began to spend money for airports a question was immediately raised as to whether such an expenditure was for a "public purpose". To the credit of our courts it can be said that, with one recent solitary exception, the courts in every reported case have recognized the importance of airports to the public and have held expenditures for airports to be for a public purpose. The excep-

3. See Huzer, Air Transport Companies and The Right of Eminent Domain, 6 Air Law Rev. 302 (1935); Compare Rockford Electric Co. v. Brown, 339 Ill. 212, 271 N. E. 189 (1939), noted (1933) 4 JOURNAL OF AIR LAW 111, where an owner of land adjacent to land condemned for a power transmission line was denied recovery of damages to his property based on its prospective use as an airport.
4. See supra note 1.
5. Parker v. City of Little Rock, 189 Ark. 830, 75 S. W. (2d) 243 (1934); Krenwinkle v. Los Angeles, 4 Cal. (2d) 511, 51 Pac. (2d) 1098 (1936); Swoger v. Glynn County, 179 Ga. 768, 77 S. E. 723 (1934). In Wichita v. Clapp, 152 Kan. 190, 263 P. 12 (1928), noted (1928) 12 Minn. L. Rev. 549, noted (1928) 75 Pac. L. Rev. 1004, the court said: "The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce"; Douty v. Mayor and City Council of Baltimore, 155 Md. 126, 141 A. 499 (1928); Dusart v. St. Louis, 321 Mo. 614, 11 S. W. (2d) 1045 (1928); Ennis v. Kansas City, 321 Mo. 636, 11 S. W. (2d) 1054 (1928); Britt v. Omaha, 126 Neb. 779, 241 N. W. 681 (1932); Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273 (1928); Hesse v. Hath, 230 N. Y. S. 676 (1929) affirmed in 249 N. Y. 428, 164 N. E. 342 (1928); In re Airport of the City of Utica, 234 N. Y. 608 (N. Y. Sup. Ct. Ononda County, 1929); Hile v. Cleveland, 28 Ohio App. 385, 160 N. E. 241 (1927); State ex rel. Chandler v. Jackson, 121 Ohio St. 186, 167 N. E. 396 (1930); City of Ardmore v. Excise Board, 165 Okla. 126,
tional case arose in South Carolina last year and held that a county could not impose a tax to pay bonds issued for the purpose of improving and extending the Spartanburg municipal airport located in the county as improving a municipal airport within the county is not an "ordinary county purpose". It must be conceded that expenditure of public funds for airport acquisition and maintenance is a "public purpose" for the isolated South Carolina case is too poorly reasoned to attract more than cursory notice.

Twelve years ago the late Mr. Justice Cardozo in his classic opinion in the case of *Hesse v. Rath* made this oft quoted statement:

"We think the purpose to be served is both public and municipal. A city acts for city purposes when it builds a dock or bridge or a street or a subway. Its purpose is no different when it builds an airport. 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 ports for the new traffic, may soon be left behind in the race for competition. Chalcedon was called the City of the Blind, because its founders rejected the nobler site of Byzantium. The need for vision of the future, in the governments of cities, has not lessened with the years. The dweller within the gates even more than the stranger from afar, will pay the price of blindness."

A recent case upheld the power of the City of Denver to issue bonds to raise funds for the purchase of land to be given to the Federal government for a bombing school, thus extending the "public purpose" to a new situation. In Arkansas the action of two cities in jointly purchasing an airport has been upheld.

Use of the power of eminent domain by the Rhode Island
Airport Commission,\textsuperscript{10} the City of Spokane,\textsuperscript{11} the City of Utica,\textsuperscript{12} and Allegheny County, Pennsylvania\textsuperscript{13} to acquire land for airports has been sustained. A very interesting case recently arose before the Kansas Supreme Court involving the value which should be placed upon a private airport which the City of Topeka sought to acquire in eminent domain proceedings.\textsuperscript{14} The question was, whether the owner should receive the value of the airport as an airport—its present use—or its use as potato land—a past use. As an airport the land had little value while its value as potato land was much higher. In cases where the question has been raised, either express or implied power has been found authorizing the acquisition of airports outside the city limits.\textsuperscript{15} It has also been held that having acquired an airport dedicated to public use the City of Beaumont could not sell the airport to an oil drilling company so as to destroy the airport use.\textsuperscript{16} Two North Carolina cases have held that while cities in that State may purchase airports they cannot, without express electoral authority, spend money to erect hangars on the airport.\textsuperscript{17} Closing of public roadways in order to have the property to increase the size of airports has been sustained.\textsuperscript{18}

\textbf{C. Lease Agreements}

Cities have found it desirable to lease airports and such leases have been sustained as for a public purpose.\textsuperscript{19} In one case the court refused to hold that the City of Toledo had impliedly, though not expressly, renewed its lease of a privately owned airport.\textsuperscript{20}

Cities have also found it desirable to rid themselves of the burden of operating a city owned airport and have leased their

\begin{itemize}
\item \textsuperscript{10} State Airport Commission v. May, supra note 5.
\item \textsuperscript{11} City of Spokane v. Williams, supra note 5.
\item \textsuperscript{12} In re Airport of City of Utica, supra note 5.
\item \textsuperscript{13} Lutz v. County of Allegheny, 302 Pa. 488, 153 A. 992 (1930).
\item \textsuperscript{14} Pugh v. Topeka, 161 Kan. 862, 99 P. (2d) 862 (1940), see digest of proceedings in lower court and discussion of the valuation problems by City Attorney Mark L. Bennett, Municipalities and the Law in Action For 1939, pp. 281-287.
\item \textsuperscript{15} State ex rel. Walla Walla v. Clausen, Hile v. Cleveland, cited supra note 5 and Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271 (1938) ; compare the case of People ex rel. City of Watertown v. Gilmore, 2 N. Y. S. (2d) 338 (1938), noted (1938) 9 Air Law Rev. 296 where the city was held subject to real estate tax on its airport located outside of its corporate limits. This decision is based upon the peculiar and unusual statute involved, because municipal airports as property of the public are exempt from taxation. See for example Ky. Laws 1929, ch. 77.
\item \textsuperscript{19} Krenwinkle v. City of Los Angeles, supra note 5, City of Ardmore v. Excise Board of Carter County, supra note 5.
\end{itemize}
airports to private operators. In Kansas it was held that a city could not lease its airport to a private operator without express statutory authority, and the Kansas legislature immediately gave such sanction. Jersey City was held to have power to lease its airport to a private person without allowing the public to bid for such lease. Hangars erected on airports by lessees are trade fixtures belonging to the lessee in the absence of any special contract allowing them to become permanent fixtures. In real property law permanent fixtures to the land become a part of the property of the lessor-owner of the land.

In entering into lease agreements cities should bear in mind the provision of Section 303 of the Civil Aeronautics Act of 1938 that:

“There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.”

In other words cities and the private lessee should see to it that the lease agreement does not grant any one person exclusive use of the airport to the exclusion of the general public in order that Federal funds for the development of the airport may be obtained, if available.

OPERATION OF AIRPORTS

A. Regulations as to Use

Airports as public utilities are subject to such reasonable regulations as the particular public agency having jurisdiction to issue regulations for airports may prescribe. Jurisdiction to promulgate such regulations may be vested in a city, county or the state. Both privately owned airports and publicly owned airports are subject to reasonable regulations designed to protect the public and users of the airport.

The ordinary ordinances or laws of the city or county in which the airport is located apply as to minor breaches of the peace on
the airport and graver offenses are covered by the usual state laws of general application. The usual local regulations are those concerning landing, taking off, taxiing, parking, mooring, flight restrictions, lighting, fire regulations, starting of engines of aircraft, fees for use of the airport and its facilities, and concession agreements of various kinds for use of various airport facilities. While it is legally possible to regulate by ordinance or statute the charges made by all publicly used though privately owned airports, the charges made so far are so reasonable that such action has not become necessary. Undoubtedly, with the use of airports increasing all the time, it will soon be both necessary and desirable for the proper public agency to fix such charges for all airports. There may be some dispute as to whether cities which are served or own the airport, State Commissions or some Federal agency should fix the airport charges.

The court cases involving airport regulations have sustained the power of cities to promulgate and enforce such regulations. A case involving the City of Spokane airport states in part:

"Patrons of the field, whether they be owners of property abutting upon it or not, have no right in making use of the field to enter it with their ships except at places and in the manner provided by the rules and regulations of the city or its managers and agents in control of the field, which regulations may be changed from time to time as necessity and safety may require."

Chattanooga, Tennessee, has been held to possess implied extra-territorial power to promulgate and enforce regulations for the use of the city owned airport. A flyer was arrested, convicted and

27. Failure to use the starting blocks required by regulations constitutes negligence. Interstate Airlines, Inc. v. Arnold, 127 Neb. 665, 256 N. W. 813 (1934).
29. See Schmehl, Airport Concession Agreements, Municipalities and the Law in Action For 1939, pp. 217-220 discussing the experience of the City of Reading, Penna., and 5 Municipal Law Journal 35 for a review of the experience of the City of San Antonio, Texas. Those contracting with cities for airport facility use must do so at their peril and if statutory, charter or ordinance provisions are not complied with the private party to the agreement cannot enforce it. Standard Oil Co. of N. J. v. City of Newark, 127 N. J. Eq. 106, 11 A. (2d) 119 (1940).
30. See cases supra note 26.
31. See Rhyne, Civil Aeronautics Act Annotated (1939) at pp. 68-70 where the possible extent and constitutionality of Federal control over all phases of aeronautics is considered. See also Willebrandt, Federal Control of Air Commerce, (1940) 11 JOURNAL OF AIR LAW 204 (1940). It has been suggested that the Federal government assume control over all regulations of local airports by an unusual and extraordinary use of its treaty making power under the theory of the case of Holland v. Missouri, 233 U. S. 419, 9 Sup. Ct. 282, 69 L. ed. 614 (1920), Grover, supra note 5.
32. City of Spokane v. Williams, supra note 5 at p. 261.
fined for violating the Chattanooga regulations. The City of Long Beach, California, was held to have the same power with reference to an airport lying partly within and partly without that city's corporate limits. The City of New York's regulation of airplanes towing banners over the city itself was held a proper exercise of the police power even when exercised to the extent of prohibiting the towing of such banners. This case indicates that any local regulation which, under local conditions, is reasonable and necessary for the protection of the health, safety or general welfare of the public, will be held valid. In a damage suit, violation of a City of Atlanta ordinance regulation as to securing of airplanes, or having someone at the controls, before starting the motor, was held negligence per se.

While a state may prescribe air traffic rules for interstate traffic, a statute which fixes no criterion to be adhered to by the State Aviation Commission in establishing uniform regulations for airports is void as it violates the fundamental principle of constitutional law that an uncontrolled statutory delegation of legislative power is void.

There are some regulations peculiar to each airport which the private operator or city operator should promulgate so as to avoid the tort liability considered in the next section herein. These regulations cover hanging of red lanterns on obstructions or at defects making runways dangerous or unusable and all other regulations of a safety nature designed to prevent damage to persons or property at the airport.

B. Damage Claims for Negligent Injury

The general rule is that the operator of an airport and his employees must exercise ordinary care as to persons and property on the airport or respond in damages for all injury resulting from

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33. Silverman v. Chattanooga, 165 Tenn. 642, 57 S. W. (2d) 552 (1933), noted (1933) 4 JOURNAL OF AIR LAW 427, and 4 Air Law Rev. 204.
36. T. & T. Flying Service, Inc. v. Adamson, 47 Ga. App. 168, 189 S. E. 851 (1933), noted (1934) 5 JOURNAL OF AIR LAW 505. In the case of Ebrite v. Crawford, supra note 34, it was held that an ordinance of the City of Long Beach could lay down a standard of care required of those using the airport, but mere violation of the ordinance did not charge a defendant with civil liability for an accident in a case where the accident could have been caused in part by the contributory negligence of the plaintiff.
lack of such care. In Georgia and in Tennessee cities have been held not liable for damages caused by negligence of city employees on the theory that the city in operating the airport is engaged in a governmental rather than a proprietary function. In other cases involving cities the courts of Texas, California, Oregon, Oklahoma, and Alabama have held that in the operation of an airport cities are engaged in a proprietary function and are subject to the same liabilities as a private airport operator.

A discussion of governmental and proprietary functions of cities would serve no useful purpose here. The cases holding that an airport is just like a street railway or other public utility operated by cities so the city is liable in damages for failure of its agents to use ordinary care in operating the city airport are in the majority.

While the operator of the airport must exercise ordinary care, so also must the person using the airport. One injured at an airport as a result of his own negligence cannot recover damages from the airport operator even though the operator is also negligent. Recovery against the negligent operator is also barred where the negligence of the person injured contributed in some way to the injury.

Attempts to define ordinary care are not very useful because the definition of "ordinary care" depends upon the facts of each individual case. A review of the reported cases is useful as an

39. See cases infra notes 42-47; Logan, The Liability of Airport Proprietors (1930) 1 JOURNAL OF AIR LAW 263.
40. Mayor, etc., City of Savannah v. Lyons, 54 Ga. App. 661, 189 S. E. 63 (1936), noted (1937) 8 JOURNAL OF AIR LAW 165. Compare Morrison v. MacLaren et al, 160 Wis. 921, 152 N. W. 475 (1915) holding that one injured by an airplane exhibition at a State fair could not recover against the members of the board which sponsored the fair and the exhibition as operation of the fair was a governmental function of the State.
41. Stocker v. City of Nashville, 174 Tenn. 483, 126 S. W. (2d) 239 (1939), noted (1939) 10 JOURNAL OF AIR LAW 422.
44. Mollencop v. City of Salem, 139 Ore. 137, 8 P. (2d) 783 (1932), noted (1932) 3 JOURNAL OF AIR LAW 447.
48. See cases supra notes 42-47. For example, in Coleman v. City of Oakland, supra note 43 at p. 720 the court said: "We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally into the same classification as public utilities as electric light, gas, water, and transportation systems, which are universally classed as proprietary. Its nearest analogy is perhaps found in docks and wharves."
49. See cases infra 63-72.
50. Ibid.
indication of the kind of care expected of airport operators and their employees.

1. *Cases Holding Operator Liable*

In Michigan and Oklahoma owners of airplanes destroyed by fires caused by negligence of the airport operator's employees were held to have a right to recover the value of the airplanes so destroyed. Where the City of Santa Monica knew that automobiles frequently drove onto the city's airport runways, yet erected no fences or other devices to prevent this danger to airplanes, the city was held liable for damages caused to an airplane which struck an automobile then on the airport runway. The court declared that the city could have reasonably anticipated and avoided the accident. The City of Oakland was held liable for damages caused by the negligent operation of a city truck being used to improve the airport. In Toledo, when an airport employee, while making an unauthorized flight in an airplane stored in the airport hangar, crashed the airplane, the airport operator was held liable to the owner of the airplane for the damage so caused. An English case held an airport operator liable for damages to an airplane where the operator's employees moved the airplane out of a hangar, in order to remove another airplane, and a fierce gust of wind turned the airplane over, damaging it in various places. The Court held that in view of the prevailing weather conditions, the employees should have anticipated the danger to the airplane. The Court also held that absence of any agreement to pay hangar rental for the space used by the airplane did not relieve the operator from liability in this case. In California, a twelve year old boy entered the Santa Rosa municipal airport at night to receive newspapers delivered by airplane and was injured when struck by the revolving propeller of the airplane (the engine had been cut off but the propeller had not stopped revolving). At the time of the accident, the airport was without attendants, warning signs or barriers to prevent free access to the flying field. The court affirmed a judgment for the boy on the ground that the airport operator was negli-
gent, even though the airport operator proved that the airport was being operated in the same way as other airports of its class ("rated B-4-X" by the United States Department of Commerce). In another English case, damages were awarded the owner of an airplane which crashed through a covering over a concealed stream which ran through the middle of the airport, as the airport operator should have known of the danger and corrected it.\textsuperscript{58} In Oregon it was held to be a question for the jury as to whether the City of Salem exercised ordinary care in allowing a wire to be erected at the border of the airport over which one Mollencop tripped and was injured. If the city did not exercise such care it was liable to respond in damages for the injuries so caused.\textsuperscript{59} So too in Maryland where a boy was killed while riding a bicycle across an airport the Court of Appeals held that the case should be submitted to a jury to determine whether the airport lessee exercised ordinary care in failing to warn the boy of the danger before he was hit.\textsuperscript{60} The facts show that an air show was in progress and the boy was riding his bicycle on an old road which crossed the airport, which road had not been closed off by the airport lessee, nor had warning signs or guards been posted to warn the boy to keep off the airport. Where the city drained water from its airport onto land of an adjoining landowner it was held liable, in an Alabama case, for the damages so caused.\textsuperscript{61} Employees of airports have been held entitled to the benefits of Workmen's Compensation Laws and the operator of the airport is therefore subject to the liabilities provided under the laws of the state in which the airport is operated.\textsuperscript{62}

From these cases it can be concluded that an airport operator has been required to respond in damages to an injured party where the injury resulted from (a) negligent operation by the operator himself or his employee acting in the scope of his employment (b) failure to anticipate and avoid a foreseeable risk or danger (c) failure to discharge a non-delegable duty to keep the premises free from dangerous conditions or (4) failure to properly discharge the duty of a bailee in caring for a plane stored in the custody of the airport.

\textsuperscript{59} Mollencop v. City of Salem, supra note 44.
\textsuperscript{60} Brickhead v. Baltimore Air Terminals, Inc., et al, 171 Md. 178, 189 Atl. 265 (1936); compare Burns v. Herman, 48 Colo. 350, 112 P. 510 (1910) holding that where a safe place is furnished the public to view an exhibition one who leaves that place and is injured by supports falling from a balloon cannot recover.
\textsuperscript{61} City of Mobile v. Lartigue, supra note 47.
Some cities, in order to protect themselves against tort liability in the operation of their airports, have either taken out insurance covering possible liability or have required lessees, and others using the airport to take out insurance protecting the city from such claims.\textsuperscript{63}

(2) Cases Holding Operator Not Liable

An air school operating an airport was held not liable to a night watchman who ran out to an airplane to help put out a fire therein and ran into the airplane’s revolving propeller and was killed.\textsuperscript{64} The court found that the watchman’s own negligence contributed to his death as having been around airplanes so much the deceased knew that he must always look out for revolving propellers. In Texas a statute exempting cities from liability for damages caused by negligence of the city’s employees at city owned airports was held unconstitutional. The City of El Paso was held not liable to a spectator at an air show at the municipal airport as the city had leased the airport to a private operator who was the responsible party since no negligence on the part of the city was proved.\textsuperscript{65} In Tennessee a statute similar to the one declared unconstitutional in Texas was upheld and a plaintiff who tripped over a wire at the border of the airport was denied damages for injuries suffered.\textsuperscript{66} In Georgia a defect in the roadway to the City of Savannah airport threw one Lyons off a motorcycle and injured him. The court denied his claim for damages on the theory that the city in operating the airport and the roadway was engaged in a governmental function from which no liability could arise.\textsuperscript{67} Where the pilot of plaintiff’s plane landed with the sun in his eyes and not being able to see struck a hay rake negligently left on the runway, the plaintiff could not recover for damages to the airplane as his pilot was contributorily negligent in landing when his vision was obscured.\textsuperscript{68} In New York, the pilot of an airplane while taxiing down the runway of an airport collided with a truck negligently on the runway and no recovery for damages to the airplane was allowed because the pilot should...
have seen the truck if he had exercised ordinary care. An extreme case arose in New York where the owner of a house struck by a falling airplane joined the town of Hempstead as a defendant on the theory that the town by maintaining an airport nearby invited the airplane to invade the house. The court upon motion dismissed the case as to the town holding that no actionable negligence on the town's part was stated. There is a case now pending in California wherein the City of San Francisco is joined as a defendant with an airline company in a suit for damages for the death of an airline passenger in a plane which fell into San Francisco Bay. The plaintiff bases its claim to liability of the City on alleged failure of the City to provide adequate rescue facilities. In Tennessee, a city was held not liable for damages caused by the negligence of an airplane operating from the city airport where the pilot was not a city employee.

In general these cases indicate that an airport owner will not be liable (a) if a party injured in connection with the operation of an airport was contributorily negligent (b) if the airport is operated by an independent contractor-lessee or operator and the owner being sued was not personally negligent and (c) where the operator is a city or other public body and the operation is classified as a governmental function (a debatable proposition in some jurisdictions and in others not a possible defense).

C. Airport Nuisance Cases

Several cases have arisen in which the owners of land adjoining airports have brought suit for injunctions charging that noise, dust, congregation or crowds, and apprehension of danger caused by the operation of the airport constitutes a nuisance. In one case the City of Los Angeles brought such a suit against a private airport, and was successful in having the operation of the airport enjoined

73. See cases infra notes 74-79; see also Childs, The Law of Nuisance as Applied to Airports, 4 Air Law Rev. 122 (1933); Sweeney, The Airport as a Nuisance. (1933) 4 JOURNAL OF AIR LAW 330; Zollman, Airports, 13 Marq. L. Rev. 97 (1929). See also, Hubbard, McCintock and Williams, Airports—Their Location, Administration and Legal Basis (1936) pp. 125-130, and compare Capitol Airways, Inc., v. Indianapolis Power and Light Co., 18 N. E. (2d) 776 (Ind. 1939), noted (1940) 11 Air Law Rev. 197, holding that an airport operator could not force the power company to insulate wires upon poles adjoining the airport as airplanes flying over the wires were trespassers. An Indiana statute required insulation of wires at points where the public is liable to come in contact with them and it was this law the airport operator relied upon.
The earliest case arose in Massachusetts against a private operator of an airport. The owner of an adjoining country estate sued alleging that the noise, congregation of crowds and general apprehension of danger caused by the airport made use of the estate uncomfortable and unbearable. An injunction on a nuisance per se theory was denied but the court held that flying at low altitudes over the adjoining property was a trespass. Shortly thereafter a Federal Court sitting in Ohio followed the same reasoning in finding a trespass is committed by low flying and in addition the Court granted an injunction on the nuisance theory. The Court indicated that use of the particular site was not shown to be indispensable and no impelling "public interest" required operation of this particular airport. Again the suit had been brought by the owner of a country estate, and as an additional annoyance the owner had cited bright illumination of the field at night. The owner also proved a property depreciation of $65,000 caused by the establishment of the airport. These decisions were followed by a Pennsylvania case enjoining use of an airport as a nuisance and source of continued trespass to an adjoining landowner and holding the airport operator responsible for the objectionable acts of others using the field. The Georgia court refused to enjoin operation of the Atlanta city-owned and operated airport as a nuisance but stated that the plaintiff might recover damages actually caused by the operation of the airport. The court cited the public interest in and indispensable need for airplanes and airports and held that one seeking to enjoin operation of an airport as a nuisance must plead specifically the facts showing the nuisance as an airport is not a nuisance per se. In California, the court dismissed a suit for an injunction and $100,000 in damages against the city of Santa Monica growing out of operation of the city airport by the city's lessee. The court held that the city could not be held responsible for the alleged acts of the lessor as such acts could

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78. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934), noted (1934) 5 Air Law Rev. 299.
not reasonably have been anticipated at the time the lease was signed. 79 A suit for $90,000 against the Burbank Airport and airlines using it was dismissed on the ground that flights over the plaintiff's adjoining land at from 5 to 175 feet in height is not a trespass but is lawful unless actual damage to the land is proved. 80

It is clear from the cases that an airport is not a nuisance per se but may become a nuisance by the method of its operation. The public interest in continuance of the airport is a strong factor in all cases and the inconvenience to the individual seeking the injunction is weighed against this public interest. Each case has been decided upon its peculiar facts and the best conclusion that can be drawn is that an airport must be operated in such manner as to cause as little inconvenience as possible to adjoining property owners and if the annoyance and damage to the adjoining property owners is so great as to constitute an unbearable burden and nuisance the operation of the airport will be enjoined in cases where the public interest does not require its continued use.

PROTECTION OF AIRPORT APPROACHES

The protection of airport approaches offers one of the most pressing of current airport legal problems. 81 With the increase in size of airplanes and the advent of instrument landing the need for either larger airports or removal of obstructions surrounding airports is growing all the time as the gliding angle in landing of larger planes and planes using instrument landing facilities is naturally longer. The problem of purchasing additional land to enlarge existing airports raises almost insurmountable financial objections and the answer to the need for more space in which to land and take off from airports has been sought in the less costly use of the police power to control height of structure on property adjoining the airport. In most instances airports have been located in sparsely settled surroundings and the growing importance of air travel or factors of city expansion have caused a movement to locate various businesses and homes adjacent to the airport in recent years.

Control of the height of structures adjacent to airports which

79. Meloy v. City of Santa Monica, 124 Cal. App. 622, 12 P. (2d) 1072 (1932), noted (1933) 4 JOURNAL OF AIR LAW 111, (1933) 4 Air Law Rev. 64.
are erected out of "spite" has met with unanimous success and these cases are considered first herein. The more difficult problem of control of the height of adjacent structures by use of the police power or other methods is then considered.

A. Spite Structures

Several cases have arisen involving the right of the operator of an airport, either municipal or private, to enjoin the erection of structures on adjoining lands out of spite and malice on the part of the adjoining landowner. In most of these cases the adjoining landowner is attempting to force the operator of the airport to either lease or purchase his property and in all cases where actual malice and spite had been proved, courts have granted injunctions against the obstructions erected by the adjoining landowner insofar as they served no useful purpose other than to prevent or render dangerous the use of the airports.82

In the absence of height restrictions in zoning regulations, to be considered in the next section, there is no rule of law which prevents a landowner from building any structure upon his land to any height so long as such structures are for the reasonable use of his property.83 It has long been a rule of the common law that one cannot use his property as to injure his neighbors, and there are many cases restraining the erection of spite fences or requiring the one erecting such a fence to take it down.84 In one case, acting under statutory authority the Kentucky court granted damages for the erection of a spite fence.85 Statutes prohibiting spite structures or fences have been sustained as a proper exercise of the police power.86

A recent case decided by a Federal Court sitting in California held that poles erected on land adjoining the airport 20 feet high and connected by wire were erected out of spite and malice and were not intended to serve any useful purpose; hence the poles must be taken down by the landowner who erected them.87 In this case the landowner was trying to force the airport to lease or buy

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82. See cases infra notes 87, 89, 90.
86. Bar Due v. Cox, 47 Cal. App. 713, 190 P. 1058 (1920); Whitlock v. Uble, 75 Conn. 463, 53 A. 891 (1905); and Karasek v. Peler, 22 Wash. 419, 61 P. 33 (1906).
his unused adjoining property after losing a suit for damages based upon low flights over the property by users of the airport. In Pennsylvania the owner of property adjoining an airport erected a “spite” tower 8 feet square and 154 feet high; this tower fell and he erected a new one 90 feet high which was burned down and suit was brought by the State, the owner of the airport, to enjoin erection of any more such structures on the ground they were a nuisance. The court granted the injunction. In a similar case in Iowa a decision was entered restraining the adjoining landowner from erecting structures or growing trees over 25 feet in height as such erection or maintaining “would not constitute a proper use and enjoyment of the defendant’s premises and would not be necessary for its enjoyment”. The landowner had planted fast growing trees expected to reach the height of 35 feet and higher so as to make it dangerous to use the airport. After the injunction limit of 25 feet was made, the landowner is reported to have erected a pole 24 feet 8 inches high topped by a fluttering red flag.

A suit to enjoin New York City from planting trees along a newly opened street running parallel to plaintiff’s airport was dismissed on the ground that the airport operator had not proved the malice and spite which he had alleged motivated the city. The court further pointed out that the trees did not interfere with the operation of the airport as the plaintiff had claimed.

One must conclude from these cases that proof of actual spite and malice must be made and if such proof is made the offending landowner must take down at his own expense the obstruction he has erected.

B. Methods of Control of Height of Structures Adjoining Airports

Ten possible ways of controlling the height of structures or trees which interfere with the use of airports have been suggested. These are: (1) Voluntary action by owners of property adjoining or near the airport, (2) Purchase of all land near the airport, (3) Purchase of airspace rights over the land near the airport, (4) Acquisition of the land near the airport by use of the power of eminent domain, (5) Acquisition of airspace rights over the land near the

88. Hinman v. Pacific Air Transport, supra note 80
91. Note (1937) 7 JOURNAL OF AIR LAW 293, 294.
airport by use of the power of eminent domain, (6) Police power condemnation of hazards dangerous to those using the airport, (7) Zoning regulations, (8) Use of Commerce Power by the Federal government, (9) Use of War Power by the Federal government, and (10) Use of the Postal Power by the Federal government. Of these methods those receiving the most serious consideration at the present time are the purchase or condemnation by eminent domain proceedings of airspace rights, zoning regulations, and use of the Commerce power by the Federal government. These methods are considered separately below. Voluntary action by adjoining landowners has proved effective in Austin, Texas; Chicago, Illinois; Fresno, California; Richmond, Virginia and other cities, but such action is neither certain nor uniform. Purchase or condemnation by eminent domain proceedings of all land upon which hazards to the use of the airport may be erected is financially impossible in nearly all cases. Police power condemnation of hazards to the use of airports depends upon a finding of fact and conclusion of law that the particular hazard condemned is a public nuisance. In the spite and malice cases reviewed above, it is easy to find such a public nuisance, but in the ordinary case, with spite and malice absent, courts are, and should be, reluctant to condemn structures under the police power, as the property owner receives no compensation and must take down the structure at his own expense. The drastic nature of the use of police power condemnation does not commend it except in cases where the motives of the one erecting the hazard can be questioned. Use of the War power by the Federal government to protect airport approaches as a part of the national defense program commends itself only in time of emergency and even then practical and financial difficulties are bound to arise in any attempt of the Federal government to police the nation's airways in such a widespread fashion. While "all air routes which are now or hereafter may be in operation" are declared to be post roads, and criminal penalties are provided for wilful retarding of the carriage of mail, still it is believed that practical, legal and financial difficulties also make use of the Federal postal power to protect airport approaches an undesirable method. In cases like those involving spite structures where there is a wilful act of retarding the mails, however,

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94. Ibid, pp. 9-10.
95. Supra notes 87, 89, 90.
prosecution of those erecting such structures under the statute just referred to may be both feasible and desirable.

(1) Purchase or Condemnation of Airspace Rights Under Eminent Domain Power

The purchase of an easement of way or airspace rights over land near airports is much less expensive than the purchase of the adjoining land itself, but the difficulty is in arriving at the value of such airspace rights. How much is it worth to a property owner to erect buildings to any height he desires on land adjoining the airport? In instances where airports are located in sparsely settled or residential areas it would seem to be financially undesirable to erect tall buildings while in other instances the airport may be located in an area where tall buildings are desirable. In acquiring airspace rights the same problem of valuing the rights arises, but this problem is not insurmountable and steps should be taken to try out this method so as to determine by experience its practicability. One objection to condemnation proceedings under the power of eminent domain is that court action is necessary in each case with resultant costs for expert witnesses on value of the rights condemned and other expenses of such litigation. While some states have authorized the purchase or condemnation by eminent domain of airspace rights, others have authorized similar action to acquire individual hazards to the use of airports so that such hazards can be taken down. If a hazard is purchased and taken down it would seem that the landowner selling the hazard could be restrained from erecting a new hazard at the same place under the spite structure cases.

(2) Zoning Regulations

In order to protect airports from the danger of interfering structures erected by adjoining and adjacent landowners the idea has been evolved of promulgating zoning regulations limiting the height of all structures surrounding airports. In nearly all jurisdictions the validity of reasonable zoning regulations under the police power of cities (by virtue of properly delegated authority) for the
benefit of the community as a whole have been sustained. The reasoning of the courts has been that property rights are relative rather than absolute and the individual property owner must give up some of his rights when such giving up is for the benefit of the community as a whole including the individual property owner as a member of the community. The term "community benefit" is to be defined as embracing not only commercial and social advantages but also the health, safety and general welfare of the community—in airport approach protection, the factor looming largest, is safety. The airport zoning idea is an extension of this idea of community benefit in that such regulations assure the entire community of the full benefits of air commerce and air defense by preventing structures surrounding airports which would otherwise so limit the use of the airport as to deprive the community of the benefits of air commerce and air defense.

Under zoning plans for cities there have been established business districts, residential districts, industrial districts, etc., and these have been subdivided into various classes. The airport is necessarily a commercial or industrial activity, while at the same time the physical characteristics demanded of the area, in which it must properly be located, are those of the undeveloped or of most restricted residential sections. In connection with city planning and zoning for the protection of airports, it is suggested that the public interest in the "airport use" is so great, the area involved is so extensive, and the characteristics of the neighborhood necessary for efficient operation and development are so peculiar and nevertheless definite, that a new category should be accounted for in city planning and zoning; i.e., an "airport use district".

Some professional planners and zoners have attacked the use of the term "zoning" as applied to airport approach protection, and of course one may define the term either broadly to include all planning or limit it narrowly to include planning of a definite and accepted type. No quibbling over terminology need concern the advocates of airport approach protection as the important thing is to give the idea a fair trial in practice. It would seem that an "airport use district" fits in well with general planning of cities just as well as the accepted present classifications such as industrial, business, or

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103. McQuillin on Municipal Corporations (2nd ed.) §§1051-1053 where the cases are collected.
104. Ibid §§1025-1045.
106. See American Society of Planning Officials News Letter, Sept. 1939, p. 78, also ibid, October 1939, p. 81 and The American City, June 1940, p. 11. John M. Hunter, The Relation of Airport Zoning to Community Planning and Zoning, Address delivered at Southwestern Airport Planning Conference, Dallas, Texas, April 8, 1940.
residential and the various subdivisions of each. An airport use conditions the area surrounding the airport just as does industrial and other uses.

At least thirteen cities have adopted specific zoning regulations to control the height of buildings at or near airports and at least eleven states provide by statute for the use of such power. In other cities and in other states the power to adopt such regulations may be implied from other ordinances or statutes on zoning, but in case of doubt as to existence of the power, the better practice is to secure a specific delegation of power to enact zoning regulations for this purpose, since cities in particular have only those powers specifically delegated to them or necessarily implied from the powers delegated.

The only court decision to date arose in Baltimore and held that a state zoning law which prohibited erection of buildings within one hundred feet of the border of that city’s airport and restricted the height of buildings at greater distances was unconstitutional as a confiscation of property. The court in that case declared that the zoning regulations were promulgated for the benefit of those interested in aerial transportation rather than for the general public benefit and on this particular point, the court was, of course, in error. If the court’s opinion was based upon confiscation in that structures within one hundred feet of the airport were prohibited entirely, the result is arguable but the court’s reasoning as to the class of persons benefited by the airport zoning regulation is erroneous. The decision is by a court of original jurisdiction and no appeal was taken.

To date no court of final jurisdiction has passed upon the validity of airport zoning regulations and the validity of such regulations must be determined by reasoning from court decisions upon


108. See Report No. 59, supra note 81.

109. Mutual Chemical Company of America v. Mayor and City Council of Baltimore, et al., 1939 U. S. Av. R. 11 (Cir. Ct. Baltimore, Jan. 25, 1939), noted (1939) 10 JOURNAL OF AIR LAW 424. The Attorney General of Michigan issued an opinion on June 24, 1937, to the Governor of Michigan reading in part as follows: "The Act prohibiting erection of any structure with height greater than a ratio of one to twenty to the distance laterally to the nearest boundary of airport operated as airline terminal without permission of state board of aeronautics and any structure within 100 feet is contrary to fourteenth amendment of the federal Constitution and to Article 2, Section 16, Michigan Constitution as an invasion of property rights." In Report No. 42, supra note 25, at page 16-19 an opinion of the Oakland Port Attorney Markel Baer upholding the legality of airport zoning regulations is quoted in full.
Because of the predominant factor of public safety involved in elimination and prevention of hazards in airport approaches one can also use as authorities the decisions sustaining general police power regulations based solely upon public safety for their justification.

It is believed that airport zoning regulations offer the best solution to the problem of protecting airport approaches, after such approaches are cleared of existing obstructions by purchase or use of the power of eminent domain. Some suggestions have been made that such regulations be made retroactive so as to eliminate existing obstructions, but such retroactive effect is too drastic an application of the police power for it unreasonably affects property owners who have erected or maintain existing hazards in the approaches of airports without the motives of spite or malice already referred to. The one case on airport zoning has inserted the idea of confiscation and has given advocates of airport zoning a burden of proving in each case that the height regulations are a reasonable exercise of the police power rather than confiscation of property. There is no compelling need for making this burden larger by attempting to push the theory of zoning too far and in effect confiscate existing structures. Let the zoning regulations be to eliminate future hazards and use the methods of purchase and eminent domain to eliminate existing structures in all cases except where the existing structure was erected and is maintained for reasons of spite and malice.

(3) Use of the Federal Commerce Power

It has been suggested that the Federal government could, under its power to regulate and remove obstructions to interstate commerce, prohibit the erection and maintenance of all hazards to the use of aircraft at or near airports which are used for interstate travel. Since most travel by aircraft is interstate in character, this exercise of authority by the Federal government would have far-reaching consequences.

The Civil Aeronautics Act of 1938 is based upon the power of the Federal government to regulate commerce among the states.

Section 1101 of the Act provides as follows:

110. Report No. 42, supra note 25, McQuillin, supra note 102; compare People v. Dyce Flying Service, Inc., supra note 74. Another interesting case is that of Lehmaler v. Wadsworth, 132 Conn. 571, 191 A. 539, 1937 U. S. A. R. 42 (1936), noted (1937) 8 JOURNAL OF AIR LAW 502, where it was held that land used as an airport prior to a zoning ordinance, and not thereafter put to a "conforming use" could be used again as an airport despite the zoning ordinance after a lapse of 4 years, the ordinance providing that existing non-conforming uses of land might be continued. The airport was a non-conforming use.

111. McQuillin, supra note 103, §1016 and §981.


113. Rhyne, supra note 31, p. 66.
"The authority shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Authority, of the construction or alteration, of any structure along or near the civil airways where notice will promote safety in air commerce."

This section is intended to protect airways from hazards to air travel, and is undoubtedly intended to apply to airport approaches themselves.

Acting under this section the Authority on July 16, 1940 adopted a regulation requiring persons planning construction or alteration of structures on or near civil airways to give 15 days notice to the Authority of such construction or alteration. The following evaluates this regulation:

"Because of the difficulty of enforcement and because the regulation does not prohibit erection of hazards, the effect of the regulation is not expected to carry much weight, although it is a small step in the direction of protecting areas surrounding landing fields...

"A CAA official admitted that enforcement of this regulation will be very difficult since there is no machinery for such purposes. It also will be difficult to notify all farmers within three miles of every landing area on or within 10 miles of a civil airway.

"Added to this is the fact that the CAA does not prohibit

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114: Sec. 1. Any person who engages in the construction or alteration of any structure located within three miles of the nearest boundary of any landing area or within 10 miles of a civil airway, which structure or any part thereof is already, or may become by reason of such construction or alteration, of a height above the level of the landing area, greater than one-fiftieth of the distance of the structure from the nearest boundary of the landing area, shall, prior to the beginning of such construction or alteration, give written notice thereof to the Civil Aeronautics Authority and to the manager or person in charge of such landing area. Provided, that this regulation shall not apply to any structure which is less than five feet in height above the level of the landing area.

Sec. 2. The notice shall be given at least 15 days prior to the date on which construction or alteration is to begin. The notice shall contain: (a) The approximate date upon which, by reason of the construction or alteration, the height of any part of the structure above the level of the landing area will exceed one-fiftieth of its distance from the nearest boundary of the landing area; (b) a detailed description of the location of the structure or the site thereof with reference to the landing area, including the direction and distance therefrom; and (c) a general description of the structure when completed, including a statement of maximum height above the level of the landing area. Provided, that in the case of an emergency requiring the immediate construction or alteration of any such structure such information may be given to the nearest inspector of the Authority and to the airport manager by telephone, telegraph, or in person, and the written notice submitted thereafter.

Sec. 3. As used in these regulations the term "landing area" shall mean any landing area, as defined in Section 1 (22) of the Civil Aeronautics Act of 1938, which is equipped for the operation of aircraft at night or which has a landing surface at least 2000 feet long and at least one permanent building devoted to aeronautical purposes.

Sec. 4. This regulation shall become effective July 16, 1940.

the erection of hazards. The information is supposedly obtained for purposes of informing pilots in the notices to airmen.

"Most residents of the U. S. haven't the remotest idea whether they are, or are not, on or near a civil airway, one observer said."

Analogies to Federal safety regulations for railroads and to Federal control over navigable streams has been suggested to support the legality of Federal regulation on this subject. In these cases of railroad or navigation safety the regulations promulgated have for the most part affected only those actually operating the railroad or the ship and no nation-wide policing has been undertaken. Police regulation has been left to the states and cities as they are on the ground and best fitted to enforce such regulations. Even if one concedes the legal validity of such far-reaching regulations under the Federal power to regulate interstate commerce, the practical problems of enforcement of such regulations are too great. While the national uniformity possible by Federal regulation is desirable it would seem that local regulations by local agencies familiar with local conditions and necessities are also desirable. It is not believed that Federal regulation in this field is either desirable or practical at the present time. The local authorities are also familiar with the workings and enforcement of zoning regulations from experience in promulgating and enforcing such regulations, while the Federal government has no experience in this field.

CONCLUSION

Conclusions from the legal experience in acquiring, operating and protecting the approaches of airports have been stated in each section of this review. The legal experience of airports in the future will necessitate changes in these conclusions to fit such experience and undoubtedly new legal problems will arise in the future to match and overshadow those of the present. The law relating to airports is now only in the making and a fascinating picture indeed is revealed to one who watches this law unfold and grow into a body of legal principles which by experience have proved to be best for the governing of airports and the public.