THE LEGAL BASIS OF MUNICIPAL AIRPORTS*

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A municipal airport is not a thing entirely apart from all other municipal enterprises. Its justification as a municipal enterprise is analogous to that of other similar projects, and the public benefit realized from it is not substantially different from that arising from traction systems and other utilities often publicly owned. But there are many problems peculiar to the airport alone. Its location, its regulation, its part in the general transportation scheme and its general utility have all raised questions requiring the re-examination of doctrines of municipal corporation law in the light of new difficulties.¹ The philosophy of regulation itself is in an unsettled state, due to the rapid growth of the airport movement, and the paucity of reliable information bearing upon the wisdom of certain courses of action. The situation calls for a survey of what has actually been done by courts and legislatures.

The municipal airport is an indispensable link in the air navigation chain.² Day and night schedules could not be carried on without the presence of the well-constructed, well-lighted municipal ports which dot the airways. Municipal contribution in the form of these facilities has made possible the construction and maintenance of necessary ports where commercial private ports could never have survived, and thus contributed largely to the rapid growth of commercial air navigation.³ The municipal ports have been in the nature of an indirect subsidy to aviation, without

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²The airport statistics of the Department of Commerce, 5 Air Comm. Bull. 206 (Feb. 1, 1934), reveal in part the indispensability of the municipal facilities. On that date, there were 564 municipal airports and 647 commercial airports. Of these 211 municipal ports had night lighting equipment, while only 113 commercial ports were so equipped. An inspection of the other equipment reveals further municipal superiority. The effect of the Aeronautics Branch—Civil Works Administration airport development program should not be overlooked, although it does not properly fall within the scope of this study. On March 30, 1934, 688 airport projects, all public, were being carried on under the Administration supervision.
³The United States seems to stand alone as regards the number and quality of its municipal airports. Local public airports have been urged in England without success. See Wingfield, Lawrence A., "Memorandum on Improved Facilities for Airports and Airport Proprietors in England," 4 Air L. Rev. 278 (1933).
which the development of the industry would have been long retarded.4

Unless hampered by adverse legislation or judicial rulings, the municipal airport promises to play even a larger part in air navigation in the future than in the past. Municipalities are on the whole in a better position to construct conveniently located airports, adequately financed and serviced at the outset, than are private companies. The power of eminent domain makes property available to government which private capital might never reach, and the resources of public credit, coupled with taxation, surpass by far those of private operators.

I. AUTHORITY TO ACQUIRE AND MAINTAIN MUNICIPAL AIRPORTS.

The Doctrine of "Public Purpose":

The primary obstacle to municipal participation in a new enterprise, particularly one of a semi-commercial nature, is found in the doctrine of "public purpose." The question arises principally in two ways: (1) in an action to enjoin construction, upon the ground of lack of public or municipal purposes, and (2) in an action to enjoin expenditure of funds, upon the grounds of appropriation of public credit for private use, a practice forbidden by practically all state constitutions.

In many states there is statutory declaration that municipal airports are for a public purpose.5 Such a declaration is neither essential nor conclusive, but it does fortify the argument of public need, an essential element in public purpose. The distinction between "public purpose" and "municipal purpose," once frequently utilized to defeat municipal participation in new proprietary activities, has seemingly lost its validity. At least in the airport field it presents no objection that cannot be met by a finding of public purpose.6

Judicial decisions are unanimous in their holding that a municipal airport project is endowed with a public purpose, although the means by which courts have arrived at this conclusion vary widely. In cases where city charter provisions seem to require, the airport is thrown into the category of a public utility,7 which carries

4. Supra, note 1. For statistics showing the poor financial return from such airports, see 28 Aviation 584 (1930).
5. Arizona Laws of 1929, Ch. 38; Minnesota Laws of 1929, Ch. 127; Iowa Laws of 1929, Ch. 128.
6. See Dysart v. City of St. Louis, infra, note 9; City of Ardmore v. Excise Board of Carter County, infra, note 9, held the airport to be a "purely municipal" function.
7. State ex rel. City of Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273
public purpose with it. Where the court deems it necessary to satisfy the requirements of a park statute under which an airport is projected, public purpose is found in amusement and recreation incident to a landing field. Where general municipal enabling statutes or general grants of municipal power are concerned, courts say that an obvious express or implied legislative intent to keep abreast of the times will support the extension of the “public purpose” classification to a municipal airport. Nor will the combination of an airport with other municipal projects defeat the application of the label “public purpose” to the airport.

Regardless of the form in which the question has been presented, the motivating factor in the result has been uniform. Mr. Justice Cardozo phrased it succinctly in Hesse v. Rath:

Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dwellers within the gates, even more than the stranger from afar, will pay the price of blindness.

Argument on the other side of the question has been based upon the narrow limitation upon benefit derived by the general public from an airport. Such objection is exemplified by the
brief of counsel\(^2\) in *Dysart v. St. Louis*,\(^3\) quoted by the court. The answer to that argument is bottomed on the principle that "public purpose" does not require a personal direct benefit to each citizen of the community. The standard in determining the presence or absence of "public purpose" is very flexible; the determination of the degree of public benefit necessary to endow a municipal project with "public purpose" lies to a great extent with the municipality itself.\(^4\) Such a result is proper, since the factors which determine public benefit are often peculiarly local, and decision upon them should be left to those best acquainted with them, the local municipal authorities and the people. In *McClintock v. City of Roseburg*,\(^5\) the court went further, and judicially recognized the present limited scope of the benefit, holding that the community and the legislature might anticipate a broadened future benefit. That municipal airports are endowed with a public purpose, even in the absence of statutory declaration, seems now impregnbly established.

*From Whence the Power Flows:*

There is but little uniformity in the means by which the power to acquire and maintain municipal airports has been established and extended by statute. The mechanics and completeness of treatment have in large part depended upon the degree of interest manifested in the development of air travel by the state, and the thoroughness with which the legislation has been prepared.

Enabling legislation may be cast into three general categories:\(^6\) (1) That of the type which merely adds another brief power to an extended list of powers granted to municipalities. Typical of this

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12. "It (the airport) will afford a starting and landing place for a few wealthy ultra-reckless persons, who own planes and are engaged in private pleasure flying... It will afford a starting and landing place for pleasure tourists from other cities, alighting in St. Louis, while flitting here and there. It will offer a passenger station for the very few persons who are able to afford, and who desire to experience, the thrill of a novel and expensive mode of luxurious transportation...


16. Tabulation of the various state statutes is fruitless because of the rapid changes taking place. Consequently, only examples will be given in each class.
class was the Illinois statute before the passage of the recent Municipal Airport Act. (2) Amendments to city charters already granted, specifically altering the instrument. In states which have inaugurated city home rule, or granted specific city charters, many legislatures deemed it sufficient to add the power to the enumerated list of those which may be exercised by these cities, in order to avoid the ever present objection that it was not a true city project. (3) A well-considered independent airport statute, prepared by experts, and designed to meet all exigencies. Typical of this legislation is the proposed Uniform Airports Act, a measure calculated to obviate piece-meal legislative remedies, and avoid the delays and litigation which always attend procedure under an ambiguous and crudely framed statute.

There seems to be a definite tendency toward a standardized treatment of the airport problem. Illinois has but recently swept away the relics of early endeavor and placed upon its statute books an act fully as comprehensive as the proposed Uniform Airports Act. Other states, progressing with equal delay, have remedied early shortcomings and arrived at nearly the same goal by different routes.

In Whom the Power Is Vested:

A consideration of the various governmental units through which airport construction and management is empowered to be carried on reveals a startling contrariety of opinion as to the proper media of airport development.

(1) In practically all states at present, cities and villages in general are empowered to construct and maintain airports. Commencing soon after the war, when limited classes of large cities ventured into the airport field, and secured enabling legislation, in some cases over considerable objection, there has been a steady movement toward the extension of the privilege to all cities and

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20. See 2 Journal of Air Law 555 (1931) for text. This uniform act has been sponsored by the American Bar Association Committee on Aeronautical Law. At a joint meeting of the Bar Association Committee and the Aviation Committee of the National Conference of Commissioners on Uniform State Laws, held at Washington, D. C., on May 10, 1934, it was decided to submit the draft in its present or amended form at the Milwaukee meeting of the American Bar Association, in August, 1934. See also Indiana Acts of 1929, section 3238 and ff.
21. Supra, note 17.
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villages, in general terms. The change in sentiment went hand in hand with the rapid development of commercial air navigation, which emphasized the possibilities of benefit, present and future, that might be derived by a municipality on a main lane of air travel.

(2) Counties are now generally extended the same power. The wisdom of this seemingly unnecessary and duplicatory delegation is illustrated in those states which have large areas of sparse population, and few cities large enough to venture into airport development unaided. However, the benefit which a county might derive from an airport would seem considerably more remote than that flowing to a city.

(3) While not properly within the scope of this survey, it is essential to mention that in a few instances states have reserved and delegated to their administrative departments some power of airport development.\(^2\)\(^3\) Apparently the basis of the policy is the desire to reserve sufficient power to locate necessary airports in areas where local enthusiasm has been insufficient to stimulate development.

(4) In a few jurisdictions the organization of special airport districts, as separate municipal corporations, with independent administration and powers of tax levy and bond sale, has been provided in detail.\(^2\)\(^4\) The necessity of such additional governmental complexities is questionable. Municipalities already organized and functioning can singly or collectively administer an airport project without undue strain. Nor is it necessary to the establishment and financing of an airport to embrace in the taxing area far-flung expanses of territory, or tracts of land not already annexed to a municipality, as do special levee and sanitary canal districts. If the attempted exercise of this statutory device would have any effect, it would be the discouragement of airport development, by the creation of a psychological obstacle in the path of public participation in the enterprise—the creation of additional governmental machinery.

(5) Peculiar circumstances have in a few situations led to the delegation of power to port and harbor districts.\(^2\)\(^5\) While such a situation would rarely arise, it must be said that the colorful analogy frequently referred to by courts, that between harbors of the sea and harbors of the air, falls with the utterance. There

\(^{23}\) Laws of Kentucky, 1926, Ch. 107; Rhode Island Laws of 1929, Ch. 1363.
\(^{24}\) California Statutes of 1929, Ch. 487.
\(^{25}\) Wisconsin Laws of 1931, Ch. 74.
is an equally striking practical dissimilarity in operation, and the
two functions should not be combined in the hands of the same
authority.

(6) The last substantial group of municipal organisms fre-
quently endowed with the power of acquisition and operation of
airport facilities is park districts. The choice of park districts
as repositories of supervisory power over airport development
seems to be based upon a misconception of airport purposes. The
lodgment of the power as above described has been supported by
the courts, largely upon the reasoning that the maintenance of an
airplane landing field is a park purpose because it furnishes
amusement and recreation to the park visitors. Amusement and
recreation should not be the functions of a municipal airport.
While convenience to private flyers is a factor never to be over-
looked, the airport is a quasi-commercial enterprise, and should
be so regarded and conducted.

(7) Legislation frequently extends the power to joint opera-
tion of airports by cities, cities and county, and in some instances
by counties. Joint operation is a useful device to spread the
expense of maintenance. It might be said that the public benefit
also is spread wide and woefully thin. But as has previously been
pointed out, once general public benefit has been found, individual
participation or lack of it furnishes no argument to defeat public
participation in the project.

How the Power Is Exercised:

The initiation of an airport development in a community is
the point at which much delay has occurred. Unguided local enthu-
siasm, failing of direction in the enabling statutes which all too
too frequently have omitted the mention of directing authority in
specifying the skeleton of procedure, has come to naught through
sheer lack of channels of procedure.

Practically all state statutes now contemplate action by the
municipal legislative body as the initiatory step. County super-
visors, port and park commissioners, stand in the same position.
While this is the ordinary provision, it commonly results in making
an airport proposal a political football, as municipal utilities have

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26. This is a very common provision. See, for example, Illinois Laws of
1929, p. 557.
27. Sentiment on this point is divided. Mr. MacDonald makes a strong
argument in favor of park control and maintenance: MacDonald, supra, note 1.
See Sheriff, Fred B., "Airport Management," Proceedings of the First Regional
Meeting, North Central Section, National Association of State Aviation Officials,
p. 49 (1933).
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been, or throwing it into the great mass of suggestions which fail of completion through lack of surface appeal to the ordinary layman, or political glamour.

In California, provision has been made for the creation of special airport districts by petition and ballot, and the election of airport commissioners whose sole function is the development and management of the airport, the levy of taxes throughout the district, and the general promotion of local aviation. This method of procedure has the advantage of providing a body specialized in function and undisturbed by extraneous political problems. But the obstacle presented, which has prevented a wide use of the device, is the apathy or active opposition of the general mass of citizens toward a proposal which involves the levy of additional tax burdens, and the creation of additional governmental machinery.

Indiana, with characteristic faith in the judgment of the electorate and its representatives, has adopted the customary method of initiation, that of endowing the local governing body of the municipality the power of initiation, but in addition it allows a referendum on the whole proposal, upon a petition requesting ballot, signed by five per cent of the voters of the district. It also requires in specific terms the filing of the plans and estimates for public perusal before final action is taken by the municipality.

Kentucky has adopted a semi-separate set-up which is very appealing; a separate impartial county air board is created in each county, the board to be created of men selected by the local officials, and to be composed of members qualified for their offices. With them rests the discretion of initiating local development measures, and following them through to completion. This board may levy taxes through the county machinery, bond or borrow in anticipation of its revenue, and do all other acts which the ordinary statute authorizes the municipality to do. These powers may be exercised alone or in cooperation with any municipality in the county. The Kentucky scheme has much to recommend it. It offers unified control, advantageous placement and distribution of airport developments, and widespread tax levies. It also makes possible a stability of personnel and continuity of policy which are impossible in independent local bodies. Kentucky also allows the

specially created State Air Board to provide airports where necessary, presumably where county boards will not cooperate with the state-wide plan. Considering these two approaches together with the further delegation of power to park commissioners of first class cities to establish airports, it must be conceded that Kentucky probably has one of the most comprehensive governmental plans for airport development found in the United States.

In Rhode Island, the State Airport Commission is vested with complete power to acquire and maintain airports, and finance them out of special state airport bond issues. The justification for the vesting of exclusive power in a state commission is found in the geographical characteristics of the state. In a larger state such a plan would be of far less utility, because of the magnitude of the financial obligation, and the diversity of problems presented by varying local conditions.

South Carolina has found it necessary to alter by statute the charters of several of the large cities to allow their governing bodies, or special airport commissioner created within them, to exercise the power. Other states have followed this same method of procedure where the city charters called for it; some states have in general terms given the grant of power, with the expectation that courts would hold city charters, especially those of the home rule group, to be construed liberally by legislative expression.

While these illustrations present a general survey of the means ordinarily used to initiate local airport development, it must not be forgotten that state constitutions and general revenue statutes frequently call for a referendum upon an increase in the tax levy for a new project, and for a bond issue. Thus even where the power of acquisition and maintenance seems to rest in the local governing body without referendum, the electorate retains indirect control by its power to throttle necessary financial measures.

II. Acquisition.

Means of Acquisition:

The desirability of an all-inclusive grant of acquisitory power is obvious. The model pronouncement is found in the Uniform Airports Act, section 1.:

Municipalities, counties, and other political subdivisions of this state are hereby authorized, separately or jointly, to acquire, establish, construct, own,

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31. Rhode Island Laws of 1929, Ch. 1353.
32. Supra, note 19.
33. See 3 JOURNAL OF AIR LAW 645 (1932), for the text of the Act.
lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft.

Statutory draftsmanship differs widely throughout the states, but in general all the power which might be inferred from the above selection are granted. Of course, municipalities being strictly limited in their activities by legislative mandate, are dependent upon specifically granted or necessarily implied powers.

(1) Without the power of purchase, there could be no development whatsoever. It is a power unanimously granted, but sometimes hedged about with express and implied restrictions. For example, it has been required that before final action be taken, an option must be secured on the land proposed to be used, notice and details posted, and an opportunity afforded for public hearing and discussion of the details of the proposal. Then, of course, the necessity of referendum of bond issues and tax levies, previously referred to, places another restriction upon the untrammelled exercise of the power.

(2) The lease of private lands for airport purposes is frequently attended by considerable restriction. Power to acquire by lease is not implied in a general grant of power to "acquire", and must be specifically mentioned in the statute. General statutes frequently limit the power of a municipality to acquire by lease, requiring public notice, opportunity for a hearing, limiting the period which the lease may run, and the covenants which may be contained in it. Airport legislation must be read in the light of the general restrictions placed upon the exercise of municipal powers otherwise granted.

(3) Acquisition through gift and dedication is universally acknowledged to be implicit in the power to acquire, although not expressed. However, the purposes of the dedication must be conformed with reasonably, or it fails altogether, and the donor may reenter.

(4) Land acquired by any means for purposes other than an airport can ordinarily be used for an airport, unless voluntary conveyances forbid. When the public authority owns the entire title to land it may be given by law the power to use the land devoted to one public purpose for another. Under some condemnation laws the local government takes a fee, bringing it under the above-stated rule, but under others only an easement passes for

34. Indiana Acts of 1920, Sec. 3838 and ff.
36. Hubbard, McClintock and Williams, op. cit. infra, note 54, at p. 120.
37. Ibid.
the purposes specified. While courts are stricter in analyzing the use in the latter case, even there statutes may indirectly or impliedly authorize an alteration of purpose, in the interest of the development of a valid public project. Statutory authorization for a park district to maintain an airport impliedly authorizes land taken and held for park purposes to be used for an airport.

(5) The exercise of the power of eminent domain has been the basis of most of the litigation in this branch of the law. The variegated pattern of state legislation on the point has given rise to much confusion. As a result of the failure of legislatures to meet the difficulty, airport development in some jurisdictions has moved forward with halting step, and by indirection the interest of the public in air navigation has been retarded. The question resolves itself into one inquiry: what nicety of specification is required of a statute to support the delegation of the power of eminent domain to a municipality?

It is a foundation principle that the power of eminent domain rests in the sovereign, subject only to the conditions that the purpose for which private property be taken is public, and that just compensation be made. The sovereign may delegate the power, but the delegation must be express or clearly implied, and all intentions are in favor of the property owner. Doubtful expressions will be interpreted to negative the grant. 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 acts whose partial execution was already coupled with the power. But this supplementation has been sparingly used, and courts have rigidly limited its application. The boundary of interpretation which courts rarely transgress was well expressed in City of Los Angeles v. Koyer, 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 as Helm v. Grayville, where the court looked to a general condemnation statute to support the exercise of the power in pursu-
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ance 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.

The pertinency of these principles to the airport situation is illustrated by their application to statutes similar to the recently supplanted Illinois statute, which gave power to "acquire and maintain" for landing fields. While at first glance such a provision would seem to give power to acquire in any manner that seemed convenient, such is not the case. The Attorney-General has advised that these terms do not carry with them the right to acquire by eminent domain. Indeed, "acquire" standing alone has been expressly held not to carry with it the power of eminent domain. Thus, in the absence of a general grant, elsewhere in the statutes, to acquire land for public purpose by eminent domain, municipal airport projects may be blocked by the exorbitant demands of landowners.

If the statutes contain a general grant of power to acquire land by eminent domain for public purposes, and a specific authorization to engage in municipal airport development, courts will construe the statutes together to authorize the exercise of the general power for the specific project, under the doctrine of "necessary implication."

Where Land May Be Acquired:

In a majority of the states, legislatures have now extended general power of acquisition with its attendant means to municipalities to be used within or without the corporate limits. It is in the states which have not so provided that the attempted exercise of the power of extraterritorial acquisition has been attended with grave difficulty. In many cases the power of extraterritorial acquisition has been granted to limited classes of cities, or limited in distance. In view of the frequent necessity of establishing an airport beyond corporate limits, both from financial and geographical causes, it is seen that the problem presents serious ob-

44. Ill. Rev. Stat. (Cahill, 1933), Ch. 24, Soc. 65.99.
obstacles in those states where legislative expression has not been clear and unequivocal.48

A rule long adhered to in the intraterritorial limitation of corporate powers is expressed in Langley v. Georgia,49 in the following terms:

A municipal corporation being a governmental institution, designed to create a local government over a limited territory, the general rule is that such a corporation cannot purchase and hold real estate beyond its territorial limits, unless the power to do so is expressly given by the legislature.

This doctrine finds expression in an older case50 in much the same phraseology: the power to acquire real estate extraterritorially is not conferred by a power "to purchase, hold, and convey any estate, real or personal, for the public use of said corporation," and a conveyance of such land to a city having the beforementioned power only is void.

The rule enunciated for extraterritorial acquisition by eminent domain without specific legislative authority is even more strictly construed,51 and the older cases went to great lengths in their requirements of extreme clarity and unequivocalness of expression in granting the power.52

There seems to be no dispute that the legislature may authorize extra-corporate exercise of eminent domain, with the customary constitutional limits, and within the limits of the state.53 The difficulty presented in all the cases is: When has the power been granted?

As to the unexpressed power to purchase extraterritorial realty, vigorous dissent from the old rule has of late been expressed by outstanding authors,54 whose opinions have been borne out by courts which have strayed from the stereotyped expressions. Thus it has been said that in the absence of an express prohibition, a municipal corporation may purchase and hold real estate outside its corporate limits for legitimate municipal purposes.55 McQuillan considers that the rule so enunciated is "supported by the weight of authority as well as by the better reasoning, especially where the city

49. 118 Ga. 690, 46 S. E. 486 (1903).
50. Bible v. Rochester, 9 N. Y. 64 (1853).
51. Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711 (1885).
52. See 42 L. R. A. (N. S.) 137.
53. Dillon, Municipal Corporations (5th Ed., 1911), Sec. 1028.
55. Smith v. City of Kuttawa, 22 Ky. 569, 1 S. W. (2d) 979 (1828); Schneider v Menasha, 118 Wis. 293, 95 N. W. 94 (1903). This rule applies only to instances where purchase is the mode of acquisition: Leeds, Eminent Domain, Sec. 372.
has a broad charter provision, such as one conferring power to pur-
clease and hold real estate sufficient for the public use, convenience,
or necessities. Municipalities have power to do those things which
are necessary to or fairly implied in or incident to powers ex-
pressly granted. Thus if it becomes necessary to acquire land
outside the city limits in order effectively to exercise a power ex-
pressly granted, the power to acquire such lands will be implied.
Nor has this flexible implication doctrine been limited alone to
those extra-corporate lands which are deemed necessary; some
courts have held that it will be utilized where the land would be
desirable from the viewpoint of health and sanitation. This is
not, however, a substantial departure from the necessity doctrine.

Can the application of these doctrines to municipal power to
acquire and maintain an airport support an extra-corporate acqui-
sition by purchase or gift? The line of cases supporting the doctrine
of necessity are those dealing with sewers, pest-houses, and ceme-
teries, and proceed largely upon the basis of protecting the health
and safety of local inhabitants. While it may be urged that danger
would result if an airport were located in close proximity to thickly
populated areas, a stronger argument might be based upon the
noise, dust, and crowds incident to airport operation. These factors
arise more directly in the cases in which airports have been at-
tacked as nuisances.

A few cases, of which Hafner v. City of St. Louis is an
example, have extended the power of extraterritorial purchase
without express statutory authorization to a point at which the
ruling is extremely apposite to an airport situation. In that case
the city of St. Louis was given power to purchase and hold such
real estate as might be required by the purposes of the corporation,
and also the power to purchase and hold property outside the city
limits for certain enumerated purposes. It was held that the city
had power to purchase extra-corporate realty for a purpose not
enumerated in the charter, since the purpose sought to be achieved
was a proper public one, and one which often required land outside
the corporate limits for its exercise. Unfortunately, the liberality
shown by the court in the construction of the charter provisions
is not frequently found, the majority of courts drawing the line of

56. McQuillan, op. cit. supra, note 54, Sec. 1210.
57. Melville v. City of San Diego, 183 Cal. 724, 192 P. 762 (1920); Leeds v. City of Richmond, 102 Ind. 372 (1885); Dillon, op. cit. supra note 53, Sec. 1028; McQuillan, op. cit. supra, note 54, Sec. 1860.
58. City of Champaign v. Harmon, 58 Ill. 491 (1881); Coldwater v. Tucker, 36 Mich. 474 (1877); Cochran v. Park Ridge, 138 Ill. 295 (1891); see also Dillon, op. cit. supra, note 53, Sec. 980.
59. 161 Mo. 34, 61 S. W. 632 (1900).
implication at such cases as the sewer, cemetery and pest-house cases.

Courts have been far less ready to imply the power of eminent domain outside the corporate limits. The general rule seems to be that even if power to condemn within the corporate limits for a special purpose is granted specifically, power to condemn outside the corporate limits for the same purpose is lacking. Nor if power is granted to purchase, or own land for a specific purpose outside the city limits, will the courts imply a power of condemnation for the more complete exercise of the specific purpose. But, as Professor Zollmann, a recognized writer on the subject, has pointed out, the courts have not been completely fettered by these well-defined historical limitations. He says, after reviewing some recent airport decisions:

The fact that in all of these cases the power of the city to do what it proposed to do was sustained is significant. The necessity of an airport, if a city is not hopelessly to fall in the rear of the progress of the world, is so patent that courts apparently will deny it such powers only if the legal limitations are such that the courts are unable to find an avenue of escape from them.

Two Washington cases illustrate well the line of approach which courts are adopting to supplement incompletely phrased municipal powers in the airport field. In both these cases the municipality was given complete power to acquire, by condemnation or otherwise, maintain, and operate airports, within its city limits, and such airports were declared to be for a public purpose. By general statute they were given the power to condemn within and without corporate limits for corporate purposes. An attempt was made to defeat condemnation outside the city limits for airport purposes, and the court ruled that the power so to do had been granted. It was held that the two statutes, read together, clearly authorized the exercise of the airport power outside the city, in conjunction with the power of eminent domain.

In City of Wichita v. Clapp the airport statute authorized the acquisition of land for an airport, and another statute gave the city the power to condemn land within five miles of the city limits for park purposes. The City attempted to condemn land

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60. Nichols, Eminent Domain (1917), Sec. 359.
63. City of Spokane v. Williams, et al., supra, note 47; State ex rel. City of Walla Walla v. Clausen, supra, note 47.
64. Supra, note 9.
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for a park, most of which was to be used for an aviation field. The court held that although the airport statute did not confer the desired power, the park statute might be utilized, since the creation of an airport came within proper park purposes.

In summation, it may be said: (1) that a municipality simply empowered to acquire and maintain an airport may acquire land for that purpose by gift or purchase outside the corporate limits. Whether it may condemn within the city is doubtful; it is certain that eminent domain may not be exercised without the limits; (2) that a city authorized to condemn within its limits for an airport, and vested with power to pursue corporate purposes outside the limits may by implication be allowed to exercise the power outside the city, although such a combination is far less persuasive than an authorization to acquire an airport within the city, coupled with a statute extending the power of condemnation within and without the city for corporate purposes; and (3) that there seems no doubt that a city empowered to acquire and maintain an airport within or without the city, and also vested with a general power of condemnation within or without the city for corporate purposes, may utilize the power outside the city to acquire an airport.

III. CONTROL AND REGULATION

Local Control.

From the outset it has been assumed that certain aspects of air navigation control lend themselves logically to concentration in the hands of local authorities. The line of division between the categories of municipal, state, and federal concern has not been satisfactorily located. Of course, the supervision of persons and property at the airport is primarily a local matter, and ground and approach rules ordinarily are considered as local matters, subject to standardization by the state. State bodies in turn bow by courtesy or necessity to federal regulations, and international rules adopted as part of the federal code.

The advantages of local control in many phases of airport
operation is obvious. Local police and administrative officials are present or easily accessible, local circumstances may necessitate adaptations unknown to officials farther removed from the scene, and local legal sanctions can easily be applied. The desirability of a large measure of local control was recognized by the Air Commerce Act of 1926, which authorized the transfer of federal fields to municipalities wherever deemed advisable.\(^6\)

The degree of control granted to the municipalities empowered to construct and maintain airports has varied greatly from state to state. With the increasing tendency to vest a larger measure of control in the state aeronautics commission, or the department vested with the powers ordinarily granted to such a body, has come a corresponding diminution in the measure of local control which can be exercised freely.

The scope of power ordinarily granted is well-defined in the proposed Uniform Airports Act.\(^7\) Power is granted to local bodies "to adopt regulations and establish charges, fees and tolls for the use of such airports or landing fields, fix penalties for the violation of said regulations, and establish liens to enforce payment of said charges, fees and tolls." In the absence of such specific enabling legislation, power to enact such reasonable regulations as may be necessary and incidental to the operation of the airport is inferred from the grant of legislative authority to establish, maintain, or operate an airport.\(^7\)

What is the scope of this power? It is limited by two factors: (1) the inroads upon it in the form of delegation of specific powers of regulation to state bodies and the Federal government, which will be discussed later, and (2) the restrictions which have been placed upon the delegation of legislative power to administrative bodies. Necessarily, consideration of the latter point is based upon recognizing the clear distinction between the powers which are to be exercised by a municipality \textit{per se} through its local legislative channels, and the powers which are attempted to be exercised by an administrative body, independent of some local or state legislative regulatory pattern.

The exercise of the police power by the state or municipality properly vested with it for the performance of legitimate municipal functions, comprehends the imposition of all necessary regulations for the protection of the lives, health, and property, of its citizens

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\(^6\) Sec. 5, Code Title 49. See Fixel, Rowland W., "The Regulation of Airports," JOURNAL OF AIR LAW 484 (1930).

\(^7\) Supra, note 33.

\(^7\) Brown v. Clark, 102 Tex. 323, 116 S. W. 360 (1909). See Mr Fixel's article, supra, note 65, at p. 487.
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and the public morals. Once the public purpose of the airport was established, the question of direct municipal regulation never arose as a serious difficulty.

The tendency to vest administrative bodies with broad powers of regulation gives rise to more weighty considerations, as regards both state and local administrative agencies. The delegation of legislative powers to administrative bodies is prohibited; administrative rulings must be based upon a definitive statement of legislative policy, and an enunciation of the general standards of conduct. Indefinite standards vesting arbitrary powers in an administrative body are incapable of delegating power to supply their deficiencies. 72

Frequently states have provided that the rules and regulations made by municipalities shall not be contrary to rules made either by the state regulatory body, or the Department of Commerce. 78 Some legislatures have incorporated into their statutes by reference the enactments of Congress, and attempted to provide that all future federal laws shall have the effect of local law. As to the first procedure, it has been said that most state courts would support a statute directing a commission to adopt rules in conformity with federal regulations, if no new penalties were prescribed by subsequent federal legislation. 74 Two objections have been raised. The first is the delegation of legislative power of the state to the federal government, based upon the insufficiency of a local declaration of sufficiently definite standards. 75 If the local standard be reasonably complete, that objection is overcome; if it is not, regulations, conformatory or not, would be invalid. The second objection is based upon incorporation by reference. In the absence of constitutional provisions prohibiting the practice, there seems to be no objection to incorporation of present federal statutes, but an attempted present incorporation of future changes in the federal statute may be held to be bad. 76 It was upon this latter

72. See two exhaustive articles by Albert Langeluttig on the broader aspects of this field: "Criminal Violations of Administrative Regulations," 2 JOURNAL OF AIR LAW 151 (1931), and "Standards in Aviation Legislation," 4 JOURNAL OF AIR LAW 29 (1933).

73. This is in keeping with the general rule that administrative bodies cannot change existing law by regulation. To achieve adaptability of regulation, statutes should be as broad and general as possible in their regulatory provisions.


75. State constitutions are usually more explicit in their prohibition of delegated legislative powers than the Federal constitution, but state courts have been quite liberal in interpreting these provisions. See Langeluttig, Albert, "Criminal Violations of Administrative Regulations," supra note 72, at p. 153.

76. See Fagg, Fred D., Jr., "Incorporating Federal Law Into State Legislation," 1 JOURNAL OF AIR LAW 199 (1930). Although this statement of the rule is found in Black, Constitutional Law (4th Ed. 1927), p. 354, words may
point that the New Jersey Aviation act was held invalid by the
*nisi prius* court in *State v. Larson*.77

The power of protective zoning attempted to be vested in local
authorities by such statutes as that of Indiana,78 and the proposed
Uniform Airports Act,79 in general gives power to provide unob-
structed air space for landing and taking-off by the creation of
restricted zones. Combined with the power of eminent domain
over circumjacent territory,80 this would seem to give protection to
the airport and those who use it, as well as protection to the land-
owner whose structures may interfere with the proper and safe
maintenance of the airport.81 Excess or partial condemnation has
been approved in several legislative measures.82 Coördinate with
these powers is that sometimes granted, to order the removal of
high tension lines and similar dangerous hazards maintained by
public utilities.83 That these powers are largely supplementary is
easily seen; failure to grant one without the other may result in
thwarting the purpose of the whole program. Excess condemna-
tion and zoning arrive at practically the same result by contrary
means. Zoning is protective and preventive; condemnation is
destructive. Zoning may result in less expense, however. Since the
landowner's rights in superjacent air space are said to extend only
to his "effectively possessed" air space, the exercise of the police
power through the medium of zoning will limit his effective pos-
session, and make possible the use of space above it without
remuneration for trespass.84 Condemnation contemplates taking
air rights for public use, and the award of damages. A serious
objection to the use of zoning has been pointed out by Sheldon

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77. 10 N. J. Misc. 284, 160 A. 556 (1932). Henry Heineman treats the
problem in an excellent comment in 3 JOURNAL OF AIR LAW 456 (1932).
78. Supra, note 34.
79. Supra, note 20.
80. As found in Connecticut Acts of 1929, Ch. 236.
81. Some of the difficulties are pointed out in a comment, 4 Air Law Rev.
165 (1933).
82. Ohio Laws of 1931, No. 601, Sec. 5939; Maine Laws of 1931, Ch. 213,
Sec. 4.
83. Hubbard, McClintock and Williams, op. cit. supra, note 54, at p. 128.
See also an article by Williams, Frank H., "Legal Considerations in Planning
Airports," 165 Annals 43 (Pt. II, 1931). This measure was vigorously urged
in the Report of the Commission on Airport Zoning and Eminent Domain,
2 Air Commerce Bull. 325 (1931).
84. The apparent utility of zoning may be destroyed by the application
of a principle like that enunciated by Metzenbaum: "When a case or situation
involves an actual 'taking' of property, or a genuine 'deprivation' of a full or
partial interest in property, and when such 'depriving' is for some specific im-
provement or project, the courts have promptly removed the false label of
'Police Power' and have in place thereof affixed the true and appropriate name
of 'Eminent Domain,' thus insuring to the owner, that compensation to which
he may be legally and constitutionally entitled": Law of Zoning, Sec. 48.
See also Brown, op. cit. supra, note 67, p. 286.
Elliott: zoning regulations are necessarily impermanent, since they are based upon the compromise of conflicting rights, which may change radically in a short time and necessitate a readjustment less satisfactory to the airport.86

One writer on airport law has attacked the validity of any zoning ordinance based upon the "gliding angle" formula, which furnishes the foundation for most of such regulation. He says:

Manifestly any zoning limitation of the height of all structures in the district a given distance from its (airport's) outer boundaries at an angle of seven to one or ten to one is impossible; for it is a serious burden on neighboring land in the interest of the port and does not in any proper sense treat all similar land in the same district in the same way.87

Another pertinent objection has been pointed out to the use of zoning ordinances: the interest and safety of the public in using the airport must be shown to be paramount to the right of the individual landowner to use his land as he sees fit. While there are pronouncements in zoning statutes and ordinances to the effect that such enactments are based upon considerations of public safety, these are not conclusive upon a court.88

There is no doubt that a municipality may be empowered to exercise its police power outside its corporate limits, in the presence of enabling legislation.89 A more difficult question, and happily a rare one, arises when the power of regulation is not specifically so extended. No case has as yet arisen on this point,90 and in view of the tendency to codify and clarify state airport legislation, including among other additions the power to regulate the extra-territorial airport empowered to be acquired, the possibility of such controversy is becoming increasingly slight. Where municipalities are allowed by the courts to exercise the power of purchase without their limits, in the absence of statute, police power over the land so acquired would seem to be lacking.91 On the other hand, in the light of the general doctrine that powers neces-

86. Arthur L. Newman advances the interesting proposition that the doctrine of "way by necessity" might be utilized to protect airport approaches: "Airports as a Way by Necessity," 1 Air L. Rev. 468 (1930). The impracticability of the suggestion is pointed out by Rohlfing, Charles C., "The Airport Approach," infra note 88.
87. Frank B. Williams, In Hubbard, McClintock and Williams, op. cit. supra, note 54, at p. 127.
narily incident to an expressed power will pass by implication, the power of extra-corporate regulation would pass by a statute authorizing extra-corporate acquisition and maintenance of an airport.

State Control:

State control of municipal airports, while it is based upon statutes, which vary widely in their provisions, may be divided roughly into four categories: (1) control through the initial choice of site, design and construction; (2) control through the power to supersede local police regulations with uniform regulations emanating from the state regulatory body; (3) control through licensing, both initial, and renewal, the license being contingent upon continuing compliance with state requirements, based upon inspection periodically; and (4) control through the infrequently granted power to order protective zoning locally, or the removal of obstructions. Recent legislation viewed broadly indicates an ever-increasing tendency to vest in the state regulatory body sufficient authority to require compliance with uniform standards of rules and maintenance. The propriety and advisability of such a tendency is unassailable. The ever-increasing volume of travel makes it essential that travelers be certain that they will not run afoul of peculiar local regulations, or meet disaster through reliance upon map markings which do not indicate unusual local conditions.

Some few states set as a prerequisite to the establishment of a municipal airport, approval of the site and construction plans by the state regulatory body. Typical of this class are Illinois and Connecticut.

A power far more frequently reserved in the state is that of making supervening regulations for the practical conduct of the municipal airport. Seemingly the regulatory power of the municipality is confined to making those regulations which are purely supplementary to, and not conflicting with the state regulations. The advantages of this division are well illustrated by the situation in Michigan, where a competent Board of Aeronautics, acting under legislatively granted power of the nature here discussed, has

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92. Ogden v. Madison, 111 Wis. 413, 87 N. W. 568 (1901); Ex parte Blois, 179 Cal. 234, 176 P. 449 (1919).
94. Ill. Rev. Stat. (Smith-Hurd 1933) Ch. 15Y.
95. Connecticut Laws of 1929, Ch. 238.
96. Connecticut requires that local regulations be filed with the Commissioner and approved by him, before the airport can be operated.
adopted a complete, well-considered code of rules for the conduct of air traffic and airports throughout the state.\textsuperscript{97}

Licensing provisions are rapidly finding their way into the law. They assume the presence of competent, full-time assistants to the state aeronautics commission, who make periodic inspections of all airports, make recommendations, and require compliance with minimum standards. These licensing provisions are of two kinds: (1) those similar to the Federal licensing program, which merely grants certificates in the nature of recognitions of merit to those airports which have voluntarily complied with certain requirements, but which carry no sanctions for non-compliance, and (2) those represented by the Michigan provision, which requires a license from the Michigan Board of Aeronautics as a prerequisite to operation. Coupled with the power to make all reasonable rules and regulations for the conduct of airports, this latter type of provision practically nullifies any remaining regulatory power in the municipality. It represents the culmination of considerable agitation on the part of aeronautical engineers, who foresaw chaos in an uncoordinated municipal airport development program.\textsuperscript{98}

A fourth type of control, which might possibly be better termed encouragement,\textsuperscript{99} is found in statutes similar to that of Connecticut.\textsuperscript{100} It is there provided that the Director of Aeronautics shall have the right to exercise the power of eminent domain, and order the removal of power lines and similar obstructive hazards, when he deemed it necessary for a municipal airport development. Why those powers should not be vested in the municipality itself is difficult to see. Happily, opposition to more complete grants of power has almost vanished, but vestiges of it are still apparent in a few instances.

Corollary to state control of municipal airports is active state participation in financing and management. Not infrequently state bodies are authorized to follow this course of conduct. The apparent purpose is two-fold: first, to insure a high degree of state

\textsuperscript{97} 1930 Air Traffic Regulations, 1930 U. S. Av. R. 408.
\textsuperscript{98} For an exceedingly thorough plan of state regulation, see Michigan Laws of 1929, No. 177, and Pennsylvania Laws of 1929, Sec. 316.
\textsuperscript{100} Connecticut Public Acts of 1929, Ch. 236.
control over key airports, and second, to bring about the establishment of advantageously located ports where the communities themselves are unwilling or unable to bear the entire burden. While aside from the purpose of this study, it seems necessary to point out here that state bodies are in some instances granted the power to establish airports entirely independent of municipal action, a power which rounds out the plan of a complete coördinated state development program.101

Federal Control:

The degree of control which the Federal government can exert over municipal airports is still very largely a matter of conjecture. The desirability of enforced uniformity of airport rules and marking through the country has been strongly urged in many quarters,102 but as yet no vigorous direct action has been taken in that direction.103

Federal legislation and Department of Commerce rules made in pursuance to it have not attempted to cover the field of local airports.104 Indeed, by implication, non-federal control of some type has been impliedly approved by the prohibition upon maintenance of commercial airports throughout the country by the Department of Commerce,105 and the statutory admonition in the Air Commerce Act of 1926 to turn over to municipalities commercial airports maintained by the government or any of its branches, wherever located.106

In view of the increasing scope of interstate airlines, and their use of municipal airports, the interstate commerce power furnishes the basis for complete regulation of airports where required in the interest of the protection of that commerce.107 There is *dictum*

101. A general discussion of practical application of principles is found in Cuthell, Chester W., "The Scope of State Aeronautical Legislation," 1 JOURNAL OF AIR LAW 525 (1930).


104. In People v. Katz, 140 Misc. 46, 249 N. Y. S. 719 (1931) the ingenious defense to a prosecution for violation of a state air traffic regulation was that the Federal Air Traffic rules had supplanted state regulation. The court denied the validity of the defense.


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in the *Neiswonger* case supporting the conclusion that a regulation of intrastate air travel is valid if in the interest of protecting interstate commerce. This reasoning is supported by cases in other fields of commerce. But how far does the same line of approach apply to control of an airport? It seems indisputable that an airport is as indispensable to interstate commerce as railroad lines or terminals are to the conduct of interstate railroad commerce. Legal rules of long standing would then support the extension of Federal power to these instrumentalities, insofar as the exercise of such power is essential to the protection of interstate commerce. If the mere act of flight within a state may be considered as sufficient interference with interstate commerce to merit regulation by the Federal government, then certainly the maintenance of an airport frequently used as a station in interstate travel would be so considered.

In order to determine the fields of primarily local police regulation to which Federal control might extend, regard must be had for the well-settled rules enunciated in two leading cases concerning the scope of the so-called Federal police power. Within the territory of a state the Federal government has no general police power, nor can the power to regulate interstate commerce be exercised as a general police power, supervening the general police power of the states in the control of their local trade and manufacturing. Thus any exercise of police power by the Federal government as an incident to control of interstate commerce, or under similarly granted powers, as that over navigable waters, must be construed as are all delegated powers, i.e., strictly. But the rule applied by the United States Supreme Court in resolving conflicts between residuary state powers and the delegated Federal power of control over interstate commerce, as applied in many cases, indicates a liberal view of the grant, and has resulted in extending Federal control to great lengths. By direct analogy, rates, tolls, fees, field regulations covering both landing and taking

109. Federal Jurisdiction is treated in a comment, 1 *JOURNAL OF AIR LAW* 359 (1930).
off, the use of airport facilities, and airport marking, would fall directly within the scope of Federal power. As to zoning and removal of obstructions, Mr. Edward A. Harriman in an interesting discussion of the whole problem of Federal control of aeronautics, has pointed out that, although the commerce power is probably broad enough to support Federal enactments forbidding the erection of structures which would interfere with commerce by air, the courts would be reluctant to extend that power without compensation to the owners, and the exercise of the power must have a direct relation to the protection of interstate commerce.\footnote{Ibid.}

By indirection, Federal control through regulations is rapidly extending throughout the states through the adoption of state legislation which incorporates Federal statutes and rules and the delegation of the regulatory power to bodies to be exercised only in accordance with Federal rules.\footnote{Supra, note 1.} Statutes like that of Nebraska\footnote{Nebraska Laws of 1929, Ch. 35.} reach the same end through a variant procedure. It is there provided that all airports must conform with Department of Commerce standards for approved and rated airports.\footnote{Supra, note 2.} By this means, standards which were in their inception purely suggestive, and designed to encourage rather than require, have become regulative without further action by the Federal government. The difficulties which inhere in the use of this procedure have been previously pointed out.\footnote{Ibid.}

Another instrumentality of indirect Federal control, frequently used in other fields, is found in grants and subsidies to local projects conditional upon conformity with Federal standards. Although this device has not yet come into extensive use in the aviation field, it was embodied to some extent in the Aeronautics Branch-CWA airport program.\footnote{Nebraska Laws of 1929, Ch. 35.}

\textit{International Control:}

The rapid increase of international air navigation agreements, in both scope and number, necessitates some consideration of their effect upon the control and regulation of local airports. Both the

\footnote{Ibid.} \footnote{Minnesota Laws of 1933, Ch. 430; Pennsylvania Laws of 1933, Act. 224.} \footnote{Nebraska Laws of 1929, Ch. 35.} \footnote{Supra, note 1. These optional standards have evidently not been very successful in raising the standards of airports throughout the country.} \footnote{It seems established that the Federal Air Traffic Rules do not amount to legislation and are therefore not violative of the prohibition against the delegation of legislative power. See \textit{Neiswonger v. Goodyear Tire and Rubber Co.}, 26 F. (2d) 761 (D. C. Ohio, 1928), dicta in \textit{Smith v. New England Aircraft Co.}, 270 Mass. 511, 170 N. E. 385 (1930), and the \textit{Swetland} case in the District Court, 41 F. (2d) 929 (D. C. Ohio, 1931).} \footnote{Supra, note 2.}
International Convention for Air Navigation, known as the Paris Convention, and the Pan-American Convention for Commercial Aviation contain provisions concerning airports. The latter, of which the United States is a signatory power, provides in Article XXIII, "The establishment and operation of airdromes shall be regulated by the legislation of each country, equality of treatment being observed." Article XXIV provides for uniformity of airport charges between local and international aircraft.

The extent to which the Federal government can control local airports in pursuance of treaty obligations has not yet been satisfactorily defined, nor has any step been taken in the exercise of the power. But reasoning from the doctrine of Missouri v. Holland and subsequent cases which have followed it, it appears that the Federal government can constitutionally control all aviation in the United States to the extent necessary to assure the uniform rules and regulations provided in the Convention.

IV. Operation.

Once the municipal airport is thrown into the category of proper municipal enterprises, its operation is governed by the same principles which govern similar municipal projects, as water plants, and municipal utilities. There are, however, certain points of difference which have found places in judicial decisions, and deserve mention.

In the case of State ex rel. Chandler v. Jackson, a landing field was declared to be a public utility, and as such its construction by the municipality was approved. It was there also held that inasmuch as the airport was a public utility, all ordinances concerning it must be passed upon by the people, as provided by state statute for ordinances concerning other public utilities. While other restrictions upon operation have not yet found their way into the cases, it is highly possible that other local statutory peculiarities of local park and public utility operation may be found to hamper free operation of the airport.

Indirect operation through lease to a private person, through an operations contract with an independent operator, or by joint operation with an aircraft company or an airline, involving joint contributions, has presented another obstacle to the free exercise

120. 282 U. S. 415 (1920).
122. Supra, note 7.
of discretion in the choice of means to accomplish the most useful and inexpensive management of the local airport.\textsuperscript{123} \textit{State ex rel. Mitchell v. City of Coffeyville}\textsuperscript{124} denied the power of the municipality to lease an airport to a private person for operation, even though the management thus obtained would be responsible and desirable, upon the ground that the power to acquire and manage did not carry with it the power to lease to a private person.\textsuperscript{125} In the absence of express statutory enactment, the power is denied. This holding is in conformity with the conventional view of the power to lease municipal facilities to private persons.\textsuperscript{126} The legislature of Kansas immediately enacted the necessary permissive statute, which was supported and interpreted to support a similar desirable lease in the case of \textit{Concordia Arrow Flying Service Corp. v. City of Concordia}.\textsuperscript{127} The operations contract is open to the same attack.

Joint operations with private operators, coupled with joint contributions, is a practice laden with dangerous possibilities, if the suggestions of the court in the case of \textit{Reinhart v. McGuffie}\textsuperscript{128} are to be taken seriously. In that case there was joint management by a county and a private company, and the court sounded the warning that such agreements would be very carefully scrutinized for any evidence of unfair distribution of expense, or subsidy. The length to which such scrutiny might be carried is exemplified in the court's own language:

\begin{quote}
We did find that the mechanic employed by the [public] board of management was also privately employed, and payments made for his services were made to the Aircraft Corporation, and while the amount was nominal, we condemned the practice and directed its discontinuance.
\end{quote}

The \textit{McGuffie} case illustrates the application which might be made of the doctrine of extension of public credit for private use, to a lease or operations agreement. If the terms of the lease provide for a purely nominal rental, as they well might under present economic conditions, the public credit argument would undoubtedly be raised to defeat the indirect subsidy. In reference to this latter


\textsuperscript{124} 127 Kans. 663, 274 P. 268 (1929).

\textsuperscript{125} A statute granting this power was upheld and applied in \textit{Stern v. Mayor and Aldermen of Jersey City}, supra, note 123.

\textsuperscript{126} \textit{Palmer v. Albuquerque}, 19 N. M. 285, 142 P. 285 (1914). But see \textit{Dillon, Municipal Corporations}, op. cit. supra, note 64, at Sec. 907, as to real estate in general. This rule might as well apply to improved airport tracts. "In the case of lands held for public purposes, a city may lease the same for purposes which are not inconsistent with, but germane to and in furtherance of the public uses for which the lands are held."

\textsuperscript{127} 131 Kans. 247, 259 P. 965 (1930).

\textsuperscript{128} \textit{Supra}, note 9.
point there is an intimation in the *Dysart* case\(^{129}\) that the same considerations which motivated courts to approve municipal subsidies of railroads three-quarters of a century ago might prevail today to support subsidies to a municipal airport.

V. Taxation Exemption.

A factor which lends appreciably to the advantage enjoyed by municipal airports over those privately owned is the exemption from taxation, frequently found in statutes.\(^{130}\) Such exemption is in the nature of another subsidy in the cause of aviation development. Unfortunately it is sometimes provided that in the event of a lease to a private person the exemption is suspended and the property returned to the tax rolls. In view of the popular practice of leasing, it is seen that this provision robs the taxation exemption of much of its efficacy. Further, it loses sight of the original exemption, which as an indirect subsidy could be granted to the donee as well through the medium of the lessee as through the channel of direct municipal operation.

VI. Tort Liability.

The liability of municipalities for tortious acts occurring in the course of their management and operation of an airport depends primarily upon whether the airport be considered a governmental or proprietary function.\(^{131}\) In a few cases which have already arisen upon the point it has been held that the airport falls within the category of "proprietary functions" by analogy to electric utilities, waterworks, or docks and wharves.\(^{132}\) In treating the defense of "government function" raised in the *Lartigue* case\(^{133}\) the court rules that the airport was essentially a part of the city's transportation system, bearing strong analogy to a railway station or bus terminal, and the work of building and maintaining streets, which was done in a corporate as distinguished from a governmental capacity. The profitableness of the function was held to have no bearing upon its character. It is well settled that in the pursuance of a proprietary or ministerial function, the lia-

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130. *Kentucky Laws* of 1929, Ch. 77.
133. *City of Mobile v. Lartigue*, *supra*, note 132, noted in 1 *JOURNAL OF AIR LAW* 366 (1930), 34 Law Notes 112 (1930), and 17 *Va. L. Rev.* 80 (1930).
bility of the municipality is similar to that of a private person engaging in the same activity.

Difficulty is encountered in those jurisdictions which term an airport a proper park function. Parks have been thrown into the "governmental function" class, with limited liability, in some jurisdictions, although the decisions are in considerable conflict, and it would seem to follow that an airport maintained in a park would be insulated from ordinary liability. But in the Coleman case it was not so held, in spite of the fact that in California airports are specifically declared to be proper park functions, and parks have been repeatedly held there to be a "governmental" not a "proprietary" function. The airport in that case was termed a proprietary function, and full liability was attached.

The significance of the distinction between governmental and proprietary functions is breaking down in its application to liability for tort. The historical basis for the extension of immunity has been nullified, by reason of the "ever-increasing state-wide significance of activities formerly conceived of as purely local in character." As a purely practical matter, the advisability of extending immunity into fields of governmental activity formerly occupied exclusively by private enterprise is doubtful. In view of the diminishing scope of governmental immunity from tort, the possibility of airports receiving the benefit is very slight.

The recognition of the impossibility of limiting municipal liability under existing judicial rules has suggested two different types of protection. The first is the enactment of specific immunity statutes, relieving the municipality of tort liability in the conduct of their airports. This has been done in several states, but the doubtful social expediency of such legislation will probably check its wide-spread adoption. The other, and more advisable solution is that adopted in the rules of the Virginia Corporation Commission, which is given extensive control over municipal airports. Airport liability insurance is there required as a prerequisite to operation. Another solution suggested in a bill introduced into the New York state legislature, but never passed, would limit

135. See comment, 1 Journal of Air Law 421 (1930).
136. For a complete analysis of this whole problem, see Borchard, E. M., "Governmental Liabilities in Tort," 34 Yale L. Jour. 1 (1921).
137. Iowa Laws of 1929, Ch. 118; Texas Laws of 1929, Ch. 83; Wisconsin Laws of 1929, Ch. 464.
138. See note in 1 L. R. A. (N. S.) 49 on the effect of such legislation.
139. Administrative Orders of the State Corporation Commission, Sept. 26, 1929.
the liability of airport proprietors to torts arising from "palpable negligence."

Liability for nuisance and trespass is governed by the same rules of tort liability which govern accidents. Nor is a license to operate, issuing from the state board of aeronautical control, a defense to an action of nuisance. Such defense was made in the case of Gay and the Rush Hospital v. Taylor, et al., and it was there treated properly with but scant ceremony.

A municipality which leases its airport to a private person for management is liable upon the ordinary rules of lessor's liability for the acts of the lessee. In the Meloy case the question was raised whether liability of the lessor for nuisances in the maintenance of the airport might not be assessed upon the basis that the airport purpose contemplated at the time of the leasing was a nuisance per se. The argument lacks force, and it seems that liability can not be impressed upon such a foundation. The same result applies to trespasses by the lessee.

VII. CONCLUSION.

Out of the chaos which of necessity accompanied the rapid development of this wide-spread but uncoordinated movement to establish municipal airports, there is evolving some semblance of order. The efforts of the proponents of the Proposed Uniform Airports Act may be seen reflected in recent state legislation roughcast in the mould of the Uniform Act, replacing older legislation of the haphazard era; the persuasive effects of the non-coercive uniformity program of the Department of Commerce are mirrored in the administrative codes of the state regulatory bodies. It seems likely that the near future will see more direct Federal control impressed upon airports; such a step will only hasten the inevitable nation-wide coordination of avigational facilities.

140. See report, 1 JOURNAL OF AIR LAW 348 (1930).
142. C. P. of Chester County, Pa., Sept. 8, 1932, 224 C. C. H. 826.
143. Meloy v. City of Santa Monica, 70 Cal. App. 179, 12 P. (2d) 1072 (1932), noted in 4 JOURNAL OF AIR LAW 111 (1933).