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Notes, Comments, Digests

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NOTES AND OPINIONS

TRESPASS—NUISANCE—LOW FLYING NEAR MUNICIPAL AIRPORT.—[Iowa] Two interesting decrees were handed down by Judge Evans of the District Court of Iowa, in and for Johnson County, on September 14, 1935, in the cases of *Tucker* v. *United Air Lines, Inc. and The City of Iowa City,* and *The City of Iowa City and United Air Lines, Inc.* v. *Tucker,*[1] which decrees are set out in full after this preliminary statement concerning the cases.

During the fall of 1934, plaintiffs, City of Iowa City and United Air Lines, Inc., filed a petition in equity in the Iowa District Court requesting a temporary injunction against Tucker, the defendant, from interfering in any manner with the rights of the plaintiffs in the use of said Iowa City airport, and, particularly, "that the defendant be restrained from erecting poles or other obstructions adjacent to said airport, and plaintiffs further pray that on final hearing said injunction be made permanent and that at said hearing the defendant be required to remove the trees planted along the north line of said airport as set forth herein, and that the plaintiffs have such other and further relief . . . ."

Shortly thereafter, plaintiff Tucker filed a petition in equity in the same Iowa District Court requesting a temporary injunction restraining the defendants, United Air Lines, Inc., and the City of Iowa City from operating, or allowing to be operated, planes lower than fifty (50) feet over any portion of Tucker's real estate. The petition also sought a hearing and a permanent injunction. Tucker further asked for damages in the sum of twenty thousand dollars ($20,000) and other relief.

The evidence presented tends to show that the city of Iowa City operates a municipal airport about a mile and a half south of Iowa City, on the west bank of the Iowa River and along U. S. Highway 161.[2] Tucker's farm, consisting of some 47 acres, adjoins the airport on the north boundary; plaintiff's house being some 700 feet north of the airport and nearly 1200 feet in a northeasterly direction from the end of the NW/SE runway.

The Iowa City municipal airport was used as a scheduled stop by the United Air Lines, Inc., and Tucker alleged low flying over his property by planes and offered in evidence certain tree branches that he claimed had been broken off by overflying aircraft.

Tucker, during the fall of 1934, for one reason or another planted certain fast-growing poplar trees on his property—along the north boundary of the airport in the vicinity of the north end of the NW/SE runway, and

1. Not yet officially reported. Copies of the two decrees furnished through the courtesy of Mayer, Meyer, Austrian & Platt, of Chicago.

2. The field, as described in the Bureau of Air Commerce Airway Bulletin, is "Rectangular, 3,100 by 2,640 feet, sod, level, artificial drainage; two hard-surfaced runways, 2,500 by 150 feet NE/SW, and NW/SE . . . ." *Descriptions of Airports and Landing Fields in the United States,* p. 65, (U. S. Department of Commerce Airway Bulletin No. 2—1934).

was threatening to plant similar trees along a large portion of the boundary when these proceedings were instituted. These trees were represented to be some 35 feet in height.

Following the hearing, in which the cases were consolidated, the two decrees hereinafter set forth were handed down:

(1) DECREE No. 26713:[3]

BE IT REMEMBERED, That on the 7th day of May, 1935, same being a day of the May, 1935, Term of this court, the above entitled cause came on for trial to the court, Dutcher, Walker & Ries and Frank Quindry appearing as attorneys for United Air Lines, Inc., and Samuel D. Whiting appearing as attorney for the City of Iowa City, Iowa, and E. P. Korab appearing as attorney for plaintiff.

Thereupon by stipulation filed of record both parties agree that this cause shall be consolidated with cause No. 28714, City of Iowa City, Iowa and United Air Lines, Inc., and shall be tried together, that the pleadings, evidence, exhibits and rulings shall constitute the record applicable to each of said causes, reference being hereby made to said stipulation and same as if set out in full herein. Thereupon said cause is tried, argued and submitted to the court.

Now, on this 14th day of September, 1935, same being still a day of the May, 1935, term of this court, the court being now fully advised in the premises finds that certain relief should be granted in each of said causes above referred to and, therefore, a separate decree is rendered and filed in each case. The court further finds that the material allegations of Paragraph One, Paragraph Two as to the ownership of real estate, Paragraph Three and Paragraph Four of plaintiff's petition are true and that the reasonable value of the premises owned by plaintiff is approximately $30,000.00.

The court further finds that the defendant United Air Lines, Inc., a corporation, have operated and permitted to be operated its aircraft at a height over plaintiff's premises that was unnecessarily low and within such short distances from the ground that the witnesses for said defendant themselves admitted is not necessary for a safe and proper landing of aircraft.

The court further finds that the defendant City of Iowa City, Iowa, have permitted said operation of aircraft landing at its airport.

The court further finds that such unnecessary low flying of aircraft has interfered with the comfortable enjoyment by plaintiff of his property; that plaintiff and those lawfully living upon or using said property have thereby suffered inconvenience and danger and that some of plaintiff's trees on the south boundary of his property have been damaged.

The court further finds that such operation of aircraft by said defendant United Air Lines, Inc., and by its pilots or agents, should be enjoined and restrained.

It is, therefore, ordered, adjudged and decreed that the defendant United Air Lines, Inc., be and it is hereby enjoined and restrained from operating or permitting its aircraft, or those used by it, to fly or travel over the south boundary of the property of plaintiff at a height lower than thirty feet from

3. *Frew A. Tucker, Plaintiff* v. *United Air Lines, Inc., a corporation and the City of Iowa City, Iowa, a municipal corporation, Defendants.*

the ground, and, except for a distance of one hundred and sixty feet north of said boundary, said defendant shall not operate, or permit to be operated, its aircraft, or those used by it, at a height lower than fifty feet from the ground over any part of the property of plaintiff described in the record in this cause.

It is further ordered, adjudged and decreed that defendant City of Iowa City, Iowa, be and it is hereby enjoined and restrained from permitting the aircraft of defendant United Air Lines, Inc., and any and all aircraft using the airport involved in this action, or which may hereafter use it, to fly over the south boundary of plaintiff's property at a height lower than thirty feet from the ground and, except for a distance of one hundred and sixty feet north of said south boundary, said defendant shall not permit any aircraft to be operated at a height lower than fifty feet from the ground over any part of the property of plaintiff.

The said defendant City of Iowa City, Iowa, is further enjoined and restrained from using or permitting its said airport to be used for the landing of aircraft which now or may hereafter fly, or are being flown over and across the premises of plaintiff, lower than the height last above set out.

It is further ordered that a writ of injunction shall issue in accordance with the provisions of this decree.

All further relief prayed for is denied.

It appearing to the court that the institution of this cause as well as the institution of cause No. 26714 was brought about primarily by the act of defendant United Air Lines, Inc., in flying its ships lower than necessary over the premises of the plaintiff, it is, therefore, ordered that the costs of this action, together with the costs of cause No. 26714 are each taxed to the defendant United Air Lines, Inc. Judgment accordingly.

All parties except.

(Signed) H. D. EVANS,
Judge.

(2) DECREE No. 26714:[4]

BE IT REMEMBERED, That on the 7th day of May, 1935, same being a day of the May, 1935, Term of this Court, the above entitled cause came on for trial to the court, Dutcher, Walker & Ries and Frank Quindry appearing as attorneys for United Air Lines, Inc., and Samuel D. Whiting appearing as attorney for the City of Iowa City, Iowa, and E. P. Korab appearing as attorney for defendant.

Thereupon by stipulation filed of record both parties agree that this cause shall be consolidated with cause No. 26713, *Frew A. Tucker* v. *United Air Lines, Inc., and City of Iowa City, Iowa,* and shall be tried together, that the pleadings, evidence, exhibits and rulings shall constitute the record applicable to each of said causes, reference being hereby made to said stipulation the same as if set out in full herein. Thereupon said cause is tried, argued and submitted to the court.

Now, on this 14th day of September, 1935, same being still a day of the May, 1935, Term of this court, the court being now fully advised in the premises finds that certain relief should be granted in each of said causes

4. *City of Iowa City, Iowa, and United Air Lines, Inc., Plaintiffs* v. *Frew A. Tucker, Defendant.*

above referred to and, therefore, a separate decree is rendered and filed in each case.

The court further finds that the material allegations of Paragraphs 1, 2, 3, 4, 5, 7, and 8 of the petition in the above entitled cause are true.

The court further finds that trees or poles along the south line or boundary of the premises of defendant that are now or hereafter by growth would attain a height of over twenty-five feet from the ground would obstruct air traffic and constitute a hazard thereto. That such trees or poles along such boundary, or such that may hereafter be planted or placed there, would not constitute a proper use and enjoyment of the defendant's premises and would not be necessary for its enjoyment.

The court further finds that the planting, erection or maintenance of trees, poles or other obstructions along or adjacent to the south line or boundary of defendant's premises should therefore be enjoined and restrained.

It is, therefore, ordered, adjudged and decreed that the defendant, Frew A. Tucker, be and he is hereby enjoined and restrained from maintaining, planting or erecting trees, poles or other obstructions on, along and adjacent to the south boundary of his said premises that are or will by growth or otherwise become in excess of twenty-five feet in height from the ground. That said defendant be and he is further hereby enjoined and restrained from erecting, planting or maintaining elsewhere upon his said premises anything that would obstruct the safe operation of aircraft at a height of fifty feet or more, except such as would be reasonably proper for the use and enjoyment of his property. A description of the premises of defendant appears in the record in this cause and reference is had thereto the same as if set out in full in this decree.

It is further ordered, adjudged and decreed that defendant, Frew A. Tucker, shall, within fifteen days from the date hereof, remove any trees or other obstructions from on, along or adjacent to the south boundary of his said premises that now exist more than twenty-five feet in height from the ground.

It is further ordered that a writ of injunction shall issue in accordance with the provisions of this decree.

All other relief prayed for is denied.

The costs of this action shall be transferred to and taxed as a part of the costs in cause No. 26713.

Exception.

(Signed) H. D. EVANS,
Judge.

DIGESTS

CONTRACTS—SUIT FOR ROYALTIES ON AIRCRAFT CONSTRUCTION CONTRACT.—[Federal] Plaintiff brings suit for the recovery of royalties allegedly due under a series of contracts for the construction of airplanes which provided, among other things, that if the defendant should subsequently build, or have built, planes of the same design, plaintiff would be entitled to royalties not to exceed $20,000.00. One contract succeeding the one containing the royalties provision granted to the defendant the right to use any improvements and inventions that might be evolved in the process of construction. Numerous such changes were made by the plaintiff and also by the subsequent manufacturer who produced airplanes of the same design under

contract with the defendant. For construction of planes by the subsequent manufacturer, plaintiff seeks to recover from the United States its maximum provided royalties. The planes according to the original plans were similar to the previously constructed French Spads and after proving unsafe and dangerous were discarded. No patents upon any feature or part of the plane in question were ever granted.

Held: Petition dismissed. The court failed to write an opinion giving its conclusions of law concerning the case, but the special findings of fact indicate that since there were no patent rights involved, and since the process of construction had involved so many changes in the specifications, the court felt justified in finding that the planes as finally completed were so unlike those originally covered by the contract involving the royalties provision as not to be covered thereby. *Thomas-Morse Aircraft Corporation* v. *United States,* — Fed. Supp. — (235 C. C. H. 3535-2, U. S. Court of Claims, decided June 3, 1935, unreported to date).

H. DON REYNOLDS.

INSURANCE—CONSTRUCTION OF "PARTICIPATION IN AVIATION" CLAUSE.—[Federal] The deceased, William N. Gregory, was insured by the defendant. The policies contain provision that the insurance company should not be liable for double indemnity for death resulting from "participation in aeronautics." The insured was killed in an airplane crash, in the state of Illinois while on a business trip, on April 18, 1933, riding as a passenger in a plane piloted by his son. The plane had been purchased by the deceased, but was registered in his son's name who had his transport pilot license. The evidence showed that the deceased could not pilot the plane and had no knowledge whatever of flying and had only been a passenger several times. The plaintiff brought this action in the District Court for the Eastern District of Arkansas and the defendants obtain judgment. *Held:* on appeal, reversed. The court concluded that the words "participation in aeronautics," as used in the policy did not when properly construed, include a passenger on a transport plane who could not fly the plane or had any general knowledge of aviation. Therefore, since the clause was ambiguous it must be construed against the insurer. *Gregory et al* v. *Mutual Life Insurance Company of New York,* 78 F. (2d) 522 (C. C. A. 8th, August 19, 1935).

This decision breaks away from a line of precedent holding that if the term "participating in aeronautics" is used, a passenger killed by an airplane accident cannot recover, since he is "participating in aviation" in the ordinary sense of the term. However, another line of cases has decided that if the term "engaged in aeronautics" or other similar terms are used a passenger can recover, since "engaged" denotes permanent affiliation and employment in the industry. These two lines of precedent were reviewed and discussed in the case of *Goldsmith* v. *New York Life Insurance Company* (69 Fed. (2d) 273 C. C. A. 8th). In that case the clause was "from engaging, as a passenger or otherwise, in submarine or aeronautic operations," and the court held that "as a passenger or otherwise" made it all inclusive including those permanently affiliated with aviation as well as passengers. All of these cases were reviewed and commented on in 6 JOURNAL OF AIR LAW 278 (1935).

In the case under consideration the court said the clause is ambiguous and that if the word "participation" had been modified by a clause such as "passengers or otherwise," it would have clearly shown the intention of the parties. The construction that the court gives the word "participation" in this case is unique and shows, as they pointed out, a construction in the light of modern conditions and developments in aviation, quite different from the construction given the term when the industry was in its infancy. On this point the court classifies the person who rides as a passenger as one "who makes no research, no investigation, no experiment, and he has no control of the machine. . . ." Thus they conclude that only those who do enter into these operations are participating in aviation. The court says the passenger "does not belong to the same craft or class as those skilled artisans who

participate in the construction, management, or operation of the airplane." It is interesting to note that the court in deciding this case referred to the Encyclopedia Britannica for a definition of aeronautics. In the opinion the court cites the names of the chapter headings that appeared in that article and since none of these referred to the passengers' contribution to flying, he concluded that a passenger does not participate in aeronautics.

Thus this case varies from the precedent, because of a different interpretation of the term "participate." As was suggested in 6 JOURNAL OF AIR LAW 278 (1935), the safest clause the insurance companies can use to avoid liability for death of passengers, is "engaged in aeronautics as a passenger or otherwise," or, as this case suggests, "participating as a passenger or otherwise"—thus making the modifying words "passenger or otherwise" all important, and obviating the defense of ambiguity.

WILLIAM G. KARNES.

NEGLIGENCE—AIRLINE PLANE CRASH—RES IPSA LOQUITUR.—[Federal] This case concerns the claim of Mrs. Arthur R. Thomas for damages for the death of her husband, who on March 19, 1932, was riding as a fare-paying passenger in an airplane operated by the defendant American Airways, Inc., on a trip from Douglas, Arizona, to the City of Los Angeles. The plane took off at Phoenix, Arizona, bound for the Burbank airport but crashed at 7:38 P. M. at the western end of the San Gorgonio Pass, near the small town of Yucaipa, California. Thomas received injuries in the crash which caused his death. The Industrial Commission of Arizona, which paid certain benefit allowances to the plaintiff as the widow of the deceased passenger, asserted an interest in the claim made by the plaintiff and for that reason was before the court as an intervener and party complainant—particularly as Thomas was on business for his Arizona employer at the time of his injury. The sole right of recovery rested upon the asserted ground that the defendant American Airways, through its pilot and agencies, was negligent in the handling of the plane in which the deceased was riding and that the death of plaintiff's husband was proximately caused by such negligence. The defendant denied its status as a common carrier, and denied that it or the pilot was guilty of negligence. *Held:* for the defendant, as a result of a verdict by the jury in his favor. The judge instructed the jury that the doctrine of *res ipsa loquitur*, relied on by plaintiff to establish a *prima facie* case, was applicable but also explained its limitations. *Thomas* v. *American Airways, Inc.*, 235 C. C. H. 1205 (unreported—U. S. Dist. Ct. for So. Dist. of Calif., Central Division, Cases Nos. 5922-C and 6396-J, decided January 23, 1935).

LORRAINE ARNOLD.

NEGLIGENCE—AIRPLANE CRASH—RECOVERY NOT PERMITTED GUEST—REASONABLE EXERCISE OF JUDGMENT.—[Pennsylvania] The plaintiff, a guest, was injured when defendant, the pilot-owner of the airplane, lost control at a height of 250 feet while in the process of "dragging a field" preparatory to making a landing. The field was forty acres in area, and was not used for landing purposes. The defendant cut his switch before the impact. The plaintiff predicated his recovery upon two alleged tortious acts of the defendant: (a) landing at an improper field, contrary to the regulations of the Department of Commerce; (b) cutting the switch as the ship commenced to fall, rather than making an attempt to regain flying speed. *Held:* judgment *n. o. v.* for defendant affirmed. The opinion of an expert, called by plaintiff, as to the impropriety of selecting the field was based on facts not in the record, and inconsistent with the actual situation. The field was freshly rolled and presented a hard, smooth surface. The surface owner signalled his assent to the landing. The action of the defendant in cutting the switch was not an unreasonable exercise of judgment. *Murphy* v. *Neely*, — Pa. —, 179 Atl. 439 (Supreme Court of Pennsylvania, June 29, 1935).

The plaintiff might have had a better chance for recovery had he based his action, not on the selection of the field, nor on the action of the defendant in cutting the switch, but on the fact that the plane apparently stalled with

no extraneous conditions responsible; that from this an inference could properly be drawn of improper management of the airplane, with a corresponding shift of the burden of proof from the plaintiff to the defendant. In short, it is suggested that a resort to the doctrine of *res ipsa loquitur* by the plaintiff's attorney might well have produced a different result. *Sed quaere* whether the courts would or should impose such a high measure of care on a private carrier not for hire?

B. W. HEINEMAN.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT.—[New York] Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (242 App. Div. 712, 272 N. Y. S. 868), entered July 31, 1934, reversing an award of the State Industrial Board made under the Workmen's Compensation Law and dismissing the claim. The husband of the claimant was employed as a bench hand in the manufacturing plant of the respondent Consolidated Aircraft Corporation. On the morning of December 15, 1931, while about to enter the premises to engage in work for the day, he slipped and fell, sustaining the injuries on the basis of which the award herein was made. He subsequently died, and the award was then ordered paid to the claimant. The Appellate Division, in dismissing the claim on the ground that the accident did not arise out of and in the course of the employment, held that it happened in the street, not within the confines of respondent's premises, and that the risk of travel was not a risk of the employment. *Held:* order affirmed. *Norah L. White* v. *Consolidated Aircraft Corporation et al.*, 266 N. Y. 554, 195 N. E. 197 (1935). (Court of Appeals of New York, decided Feb. 26, 1935).

LORRAINE ARNOLD.