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THE tremendous emergency call issued for trained airmen when the United States in 1917 entered the war brought about the establishment of a goodly number of training fields which were very much in the nature of airports though some of them were not sufficiently near to a city to serve the real purposes of commerce. When the war closed and the air mail service came into its own some of these training fields were utilized by the postoffice as airports and of these a number at least are in use today for that purpose. However this was but an adaptation and could not long fill the need which had been created.

Since airports are even more necessary to air navigation than are harbors to water navigation, the question of procuring them in proper number and at the proper places soon became pressing. The military airports in addition to privately owned flying fields were the only facilities available and were clearly insufficient to fill the needs. Turning military fields over to the postoffice department did not improve matters in the least. The imperative need was for more airports. The question therefore arose who was to establish and maintain these ports —the general government or the local communities.

This question the federal authorities decided in favor of the local communities. It was felt that these local communities were better able to do this essential work, that it was good policy to get them directly interested in the matter and that the federal government should keep its hands off except so far as regulation is concerned. It was therefore provided by the Air Commerce Act of 1926 that whenever the Postmaster General and the Secretary of Commerce should by joint order so direct, the airways under the jurisdiction and control of the Postmaster General together with all emergency landing fields and other air navigation facilities shall be transferred to the jurisdiction and control of the Secretary of Commerce and the established airports and terminal landing fields may be transferred to the jurisdiction and control of the municipalities concerned under arrangements subject to the approval of the president.[1] In consequence federal airports suitable for city airports have been generally turned over to the particular city whose purposes they are adapted to serve.

Of course this action was not sufficient to supply the fast increasing

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[1] Air Commerce Act 1926 Section 5.

need. The need for airports is felt in every city of any size. Only a few are fortunate enough to have an airport presented to them by the Federal Government. The others, unless they choose to remain alien to the new development, have to rely on private landing fields or establish airports as a municipal venture. This raises a new question of municipal law, which has been presented to numerous legislatures and to a few courts. Accordingly eighteen states have already enacted statutes authorizing cities to acquire land for the establishment and equipment of airports and four of these provide for proceeding to condemn land for this purpose.[2]

Of course statutes alone will not settle the matter, for the validity of these statutes is under our system a judicial question which must be solved by the courts. The first question which the courts will have to answer will be whether the establishment, construction, improvement, equipment, maintenance and operation of such ports is a proper "city purpose" under constitutional provisions which forbids a city from incurring any indebtedness except for city purposes. Obviously an airport involves considerable expense particularly where it must be established anew and is not presented by the Federal Government to the city on a silver platter. In view of this situation a very recent decision by the Supreme Court of New York handed down October 6, 1928 and dealing with the power of the city of Utica, New York, is of very great interest.

The court in this case says that what constitutes a city purpose cannot be stated with exactness. Something which fifty years ago would not have been such a purpose may today be clearly authorized by the constitution. The question is a changing one and adapts itself to industrial inventions and developments and to new social conditions. The law not being a fixed and rigid system develops, a living thing, as the industrial and social elements which form it make their impelling growth. The constitutional provision will therefore be construed in view of the conditions existing at the time when the question is raised. Judicial notice will be taken that aviation is no longer an experiment, that large sums are invested in airports by municipalities and that commercial and passenger lines have been established and carry passengers, mail and express. In view of such extensive development the legislature is justified in determining that the building of an airport is a city purpose as much as is the building of a bridge or a dock.[3]

In a Maryland case decided on April 11, 1928 the question was whether an act to authorize the city of Baltimore to issue city bonds

[2] Louisiana, Minnesota, Pennsylvania and Washington. See *U. S. Aviation Reports* 1928 for a reprint of all these statutes.

[3] *Hesse* v. *Rath* 230 N.Y. Supp. 676.

to an amount not exceeding $1,500,000 for the purpose of acquiring land and improvements for establishing an airport for land and sea planes was constitutional. The attack was made on six highly technical grounds none of which involved the question whether the legislature had power to recognize an airport as a municipal purpose. This point was apparently conceded by counsel and the court overruled their technical contentions and declared that the bonds were valid obligations.[4]

In Nebraska a bond issue of the city of Lincoln was objected to by the auditor of public accounts on the ground that the aviation field in connection with which the bonds were issued was not a "public service property" or a "public utility" within the meaning of the Home Rule Charter of the City, which charter did not enumerate an aviation field specifically. The court on mandamus overruled this objection saying:

> An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power.[5]

Most airports are established far away from the business center and in many cases even beyond the corporate limits of the city. The question whether an airport beyond the city limits is a proper municipal utility has been raised in Ohio. The constitution of that state provides that any municipality may acquire, construct, own, lease and operate within or without its limits any public utility the services of which are or are to be supplied to the municipality or its inhabitants. The court held that if there had been any doubt as to the right of the city of Cleveland to acquire, own or operate an air landing field it had been removed by a statute conferring express authority for establishing landing fields either within or without the limits of a municipality and declaring this to be a public purpose.[6]

The best reasoned case on the subject has arisen in Kansas. The question there raised was whether a city of the first class could acquire and maintain an airport as part of a municipal park, situated outside if its corporate limits. The court pointed out that park purposes have been construed to include a race track, a tourist camp, bridle trails, boating, bathing, refreshment and lunch stands, a waiting room for street cars, a refreshment and shelter room for the public, a grand stand, a baseball diamond, a tennis court, croquet grounds, childrens' play grounds, restaurants, museums, art galleries, zoölogical and botanical gardens, conservatories and many other recreational and

[4] *Douty* v. *Maryland* 141 Atl. 499 (Md.).
[5] *State v. Johnson* 220 N.W. 273 (Neb.).
[6] *State v. Cleveland* 160 N.E. 241 (Ohio).

educational facilities, and that in short a park may be devoted to any use which tends to promote popular enjoyment and recreation. The court then stressed the importance of airways stating that they are more than mere air lines and are material and permanent ways through the air laid out with the precision and care which an engineer adopts in choosing the course of a railway and that airports are essential parts of such airlines. As to airports the court then says after pointing out that airways are essentially federal undertakings:

The maintenance of airports, however, comes legitimately within the scope of the municipality in much the same manner as docks and harbor facilities for marine shipping. Airports are said to be as important to commerce as are terminals to railroads or harbors to navigation. Municipalities are studying local conditions and commercial organizations are pressing the importance of establishing terminal airports and of providing proper lighting for landing fields, and facilities such as hangars, garages, and repair shops. The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce. Lands susceptible of improvement as parks, playgrounds, or general recreational purposes, may be utilized and developed around the modern airport so that the municipality may bring to itself not only the advantages of air commerce but afford its citizens those other inestimable advantages of improved beautification and healthgiving opportunities. It is said that there were 3,800 landing fields in the United States in 1926 of which 400 were municipal. See 1927 Aircraft Yearbook p. 101 et seq. In a dozen cities of the Far West (California, Oregon, etc.) projects for new airports or improvements of existing facilities are under way at an estimated cost of more than $8,000,000. American City, July, 1927. In these rapidly changing times, even a wise man cannot discern the needs of the future. All signs indicate that in another 25 years airports may be needed for tourists as much as tourist camps are at this time needed for those on recreation or pleasure bent. Perhaps it may not be a "great way" into what ordinarily would be termed the "far and distant future" when the human race will be flying with wings similar to those described by Bulwer Lytton in "The Coming Race." In any event, we are of opinion that the airport or landing field is as properly included within park purposes as tourist camps and other named recreational objects, and that the board of park commissioners of Wichita is authorized and empowered, under the provisions of chapter 117 of the Laws of 1927, to proceed to purchase or condemn the lands in question for the purposes stated.[7]

The fact that in all 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

[7] *Wichita* v. *Clapp* 125 Kan. 100, 263 Pac. 12.

an avenue of escape from them. Courts in such matters however are ingenious and can be relied upon to find the avenue if there is one and perhaps in cases where there is no avenue they may discover a back alley or a subterranean channel or may boldly and in some measure appropriately escape from their predicament by some air route.

No cases on the liability of a city for accidents which may occur in connection with airports have as yet been decided. The question has however arisen particularly in connection with balloon ascensions whether the fair association or other body which sponsored the ascension was liable for any mishap which occurred in connection with it. Of course the purpose of these ascensions or flights was amusement not commerce but the cases may nevertheless be of some use by way of comparison. Fair associations have been held liable for such mishaps as an aeroplane striking a spectator with its wings,[8] a balloon carrying up a bystander by its rope and anchor,[9] and even for a collision of a person outside of the grounds with the abandoned balloon after the operator had made a parachute jump.[10] An amusement company has been held responsible for the damages caused to one of its patrons by the breaking of a cleat, its duty being to have this cleat fastened securely enough to resist the pressure which the balloon was exerting in addition to what the spectators were adding to the burden.[11] A Virginia Street Car company which in order to increase its traffic engaged an aeronaut to make a balloon ascension in a park along its line has been held responsible for the death of a little boy who was killed by the fall of one of the poles which was used to hold up the balloon though no admission to the park was charged.[12]

In all these cases the defendants were either pure amusement companies or county fair associations, and in one case a street car company, which latter two cases contained some elements of public utility. In view of these cases the decision of the Wisconsin Supreme Court absolving the Wisconsin State Board of Agriculture from liability for

[8] *Platt* v. *Erie County Agricultural Society* 149 N.Y. Supp. 520, 164 App. Div. 99.

[9] *Roper v. Ulster County Agricultural Society* 120 N.Y. Supp. 644, 136 App. Div. 97; *Smith* v. *Cumberland Agricultural Society* 163 N.C. 346, 79 S.E. 632, Ann. Cas 1915 B. 544. But see *Bernier* v. *Woodstock Agricultural Society* 88 Conn. 558, 92 Atl. 160, where the person killed had intentionally connected himself with the rope of the balloon.

[10] *Canney* v. *Rochester Agricultural and Mechanical Association*, 76 N.H. 60, 79 Atl. 517.

[11] *Peckett* v. *Bergen Beach Co.*, 60 N.Y. Supp. 966, 44 App. Div. 559.

[12] *Richmond and Manchester Ry. Co.* v. *Moore* 94 Va. 493, 27 S.E. 70, 37 L.R.A. 258, 2 Am. Neg. Rep. 473.

a mishap occasioned by a competent aeronaut to a spectator at the state fair grounds near Milwaukee for the reason that such board was a governmental agency[13] is of considerable interest. The question will soon have to be solved whether a city in establishing and maintaining an airport acts in its governmental or in its mere business capacity. It seems to the writer that it is clearly acting in its governmental capacity.

In one other aspect these amusement cases may be of value. It has been held in Maryland that the proprietor of an amusement resort who employed a competent aeronaut to make a balloon ascension as an independent contractor was not liable for the negligence of such contractor in hoisting the pole by which the balloon was held up over a carpenter's horse whence it slipped injuring the plaintiff.[14] This case is important since most if not all who will use a city's airport will be such independent contractors though they will pay for their accommodations instead of being paid for their services.

Mr. Logan in a very recent book[15] points out that the rule which makes proprietors of places to which the public is generally invited liable for injuries occurring by reason of the proprietor's negligence, active or otherwise, will probably be extended to aviation fields. This rule in the past has been applied to union stations,[16], theaters,[17] fair grounds,[18] circuses,[19] race tracks,[20] baseball parks,[21] amusement parks,[22] and stores.[23] Its extension, certainly to private aviation fields, is almost a foregone conclusion. The cases and analogies with which to solve the forthcoming problems of the damage liability of cities for injuries occuring at airports to employees, passengers, licensees and trespassers are therefore at hand. The cases as they arise will bear watching and will be very interesting but will contain no new doctrine.

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[13] *Morrison* v. *MacLaren* 160 Wis. 621, 152 N.W. 475, L.R.A. 1915, E. 469.

[14] *Smith v. Benick* 87 Md. 610, 41 Atl. 56, 42 L.R.A. 277, 4 Am. Neg. Cas. 641. See also *Burns* v. *Herman* 48 Colo. 359, 113 Pac. 310.

[15] *Aircraft Law Made Plain* pp. 66 and 67.

[16] *Union Depot and Ry. Co.* v. *Londoner* 50 Colo. 22, 114 Pac. 316, 33 L.R.A. (N.S.) 433.

[17] *Weiner* v. *Scherer* 117 N.Y. Supp. 1008, 64 Misc. Rep. 82.

[18] *Higgins v. Franklin County Agricultural Soc.*, 100 Me. 565, 62 Atl. 708.

[19] *King* v. *Ringling* 145 Mo. App. 285, 130 S.W. 482.

[20] *Hart* v. *Washington Park Club* 157 Ill. 9, 41 N.E. 620.

[21] *Crane* v. *Kansas City Baseball and Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076.

[22] *Wodnik* v. *Luna Park Amusement Co.*, 69 Wash. 638, 125 Pac. 941.

[23] *Mullen v. Sensenbrenner Merc. Co.*, 260 S.W. 982 33 A.L.R. 176 (Mo.); *Scott* v. *Kline's Inc.* 284 S.W. 831 (Mo. App.).