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THE PROPER THEORY ON WHICH TO SEEK AN INJUNCTION AGAINST AIRFLIGHTS OVER LAND

The development and increased use of the airplane have given rise to a conflict between the landowner and the aviation interests. The courts are guided by two conflicting motives: (1) their sympathy towards aviation and (2) their desire to guard the property rights of the landowners in the use and enjoyment of their property. Accordingly, when an action is brought by a landowner to recover damages for the flight of airplanes over his lands, or to enjoin such flights, the courts attempt to reach a decision which will protect the landowner from the disturbing features associated with the flights, without causing too great a handicap to the development of aeronautics. Such an action as this is usually brought on the theory of trespass, nuisance, or both. The purpose of this article is to review the decisions¹ involving such conflicts of interest and to arrive at the theory the courts have declared to be proper. The relief sought in most of these cases is usually the same, namely, injunctive. The problem involved, however, is upon what theory the court will grant the relief—trespass, nuisance, or both.

The first case of this type arose in an inferior court of Pennsylvania in 1922.² The action was instituted by a landowner against certain aviators on the theory of trespass, under a Pennsylvania statute making it unlawful for any person willfully to enter upon any land where the owner had posted notices stating that the land was private property and warning persons against trespassing thereon. The court dismissed the suit on the theory that at the time of the passage of the act the flight of airplanes over land was not considered a trespass. The court was of the opinion that "trespass," as used in the statute, meant interference with the owner's occupation of his soil, and that flight over land was not an entry upon the land.

The next case, *Johnson v. Curtis Airplane Co.*,³ arose one year later in an inferior court of Minnesota. In this case the landowner sought to enjoin the defendant from flying planes over his land. The action was based upon the theory of trespass. The ancient maxim, *cujus est solum ejus est usque ad coelum et ad inferos* (to whomever the soil belongs he owns to the sky and

1. There have been only seven cases of this type, all arising within the last seventeen years.

2. *Commonwealth v. Nevin & Smith*, 2 Pa. D. & C. 241 (1922); *Zollman, Cases On Air Law* (1930) 58.

3. 1928 U. S. Av. Rep. 42.

also to the depths)⁴, was asserted to be the law. The court quickly disposed of this theory by saying "the upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim."⁵ The court further stated that even under the most technical application of the rule, air flights at a reasonable altitude could not amount to more than instantaneous constructive trespass, and that modern progress and great public interests should not be blocked by unnecessary legal refinements.

Thus from the beginning of this phase of air law there is a refusal by inferior courts to recognize flights over land as a trespass.⁶ The Minnesota court seems to imply by using the phrase "reasonable use" that perhaps nuisance might lie.

It was not until 1930, nine years after the first case involving this problem had arisen, that such a case was brought before a higher state court. In *Smith v. New England Aircraft Co., Inc.*,⁷ decided by the Supreme Judicial Court of Massachusetts, the plaintiffs sought to enjoin the defendants from flying over their land and from using a field adjacent to the plaintiffs' land as a flying field. The uncontested facts were that the defendants' planes on take-offs and landings flew at a low altitude over certain unused brush land of the plaintiffs and that on a few occasions the defendants' planes flew at an altitude less than five hundred feet over the plaintiffs' house. The plaintiffs brought their action on the basis of nuisance and trespass, but confined their argument to the question of trespass. They maintained that the continuance of the trespass, in itself, constituted an abatable nuisance.^{7a} The court held that the flying of the airplanes at a low altitude in take-offs and landings constituted a trespass, but refused to grant an injunction because plaintiffs failed to prove any property damage or material discomforts resulting therefrom. The court appeared to be of the opinion that although there might be a technical trespass, nevertheless, the plaintiffs should not be entitled to injunctive relief as the injury was not certain and substantial, but rather slight and theoretic-

4. The author of this maxim is unknown. For a history of the development of this maxim see, Wherry & Condon, *Air Travel & Trespass* (1934) 68 U. S. L. Rev. 73. It is not within the scope of this article to discuss this maxim.

5. *Supra*, note 3, 44.

6. These were the only two cases on this phase of air law until 1930.

7. 270 Mass. 511, 170 N. E. 385 (1930).

7a. A nuisance which is created as a result of continual trespass is distinguished in this case from the types of nuisances which are usually involved, such as noise, dust, wind, etc.

cal. The court assumed, however, that private ownership of airspace extended to all reasonable heights above the land and that flights within this distance constituted trespass.^{7b}

In regard to the nuisance theory which the plaintiffs failed to argue,⁸ the court's statement in dismissing the point is noteworthy:

"There is no sound ground for injunctive relief on the theory that the acts of the defendants constituted a nuisance. The law affords no rigid rule to be used as a test in all instances of alleged nuisance. It is elastic. It requires only that which is fair and reasonable in all the circumstances. The noise, proximity and number of aircrafts have not been such in the case at bar as to be harmful to the health or comfort of ordinary people. Fright and apprehension of personal danger or of injury to live stock or property are not present."⁹

From this statement the court seemed to imply that relief would be given on the nuisance theory under the proper set of facts, although there is no affirmative statement to that effect.¹⁰

The first case of this nature decided by a federal court was *Swetland v. Curtis Airport Corp.*¹¹ The action was instituted on two counts, nuisance and trespass. Plaintiffs sought to enjoin the defendant from building an airport next to their land. In spite of the institution of the plaintiffs' action, the defendant continued with its plans and established an airport. The District Court allowed the airport to remain, but enjoined the defendant from permitting dust from the operation of the airport to fly over the plaintiffs' property in annoying quantities, and from dropping circulars while flying over plaintiffs' land. On appeal the court granted an injunction against using the property next to the plaintiffs' land for an airport. The theory of the court was that the operation of the airport, even though properly conducted, would so materially interfere with the enjoyment of the

7b. The court failed to characterize flights between 100 feet and 500 feet as legal or illegal.

8. The court refused to go into a complete discussion of this point as the "nuisance theory" was not argued by the plaintiffs.

9. *Supra*, note 7, l. c. 518.

10. Nuisance may consist of disturbance of privacy, imminence of danger, or disturbance by noise, wind, or dust. Logan, *Aircraft Law Made Plain* (1928) 24. The case of *Smith v. New England Aircraft Co., Inc.*, *supra*, note 7, indicates that continual trespass is not considered an abatable nuisance. The mere continuance of flights over land without any other disturbance is not a nuisance.

11. 55 F (2d) 201 (C. C. A. 6, 1932).

plaintiffs' property as to constitute an abatable nuisance.^{11a} The court, however, stated that it was the traditional policy of the courts to adapt social needs to the times and that every flight over the land of another did not constitute a trespass. The court also said that the air is divided into two strata, that which the landowner may reasonably expect to use or occupy himself, and that which he may not reasonably expect to use. The former, the court termed the upper stratum and the latter it termed the lower stratum. The court went on to say that a flight through the *lower stratum* might impose such a servitude upon the landowner's use and enjoyment of the surface as to constitute a trespass,¹² but that as to flight through the *upper stratum* the landowner has no right other than to prevent its use by others to the extent of an unreasonable interference with his complete enjoyment of the surface. The court, therefore, was of the opinion that the proper remedy is an action for the abatement of nuisance and not for the enjoining of trespass, regardless of the altitude of the flights.

Immediately following this decision a similar case was decided in the Supreme Court of Georgia.¹³ In the Georgia case the landing field had already been established and the dust caused by the planes had affected the plaintiff's land and had also impaired the health of the plaintiff's wife. The Georgia court followed the decision of the *Swetland* case by stating that aerial navigation over the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It may or may not be a trespass according to all the circumstances including altitude. Even when the act does not constitute a trespass, it may amount to a nuisance, as where it occasions hurt, inconvenience, or damage to the occupant below.¹⁴ The Georgia court refused to enjoin the flying of the aircraft over the plaintiff's land, but did enjoin the defendant from flying planes so as to cause injury to the plaintiff and his land.¹⁵ The court seemed to recognize the greater flexibility of a nuisance action. It, therefore,

11a. The court took into consideration all the disturbances which are part of an airport, lights, noise, dust, etc., and arrived at the conclusion that it would be an interference with the landowner's rights.

12. This statement is in accord with *Smith v. New England Aircraft*, *supra*, note 7.

13. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817 (1934).

14. *Ibid.*, l. c. 530.

15. The court enjoined the flying of the planes in such a manner as to cause dust to settle on the plaintiffs' land. This is an example of the desire of the courts to reach a decision which protects both the landowner and the development of aviation.

was able to enjoin the objectionable features of the flights without prohibiting all flights over the land.¹⁶

The most recent cases in this field are two federal cases, *Cory v. Physical Culture Hotel, Inc.*,¹⁷ and *Hinman v. Pacific Air Transport*.¹⁸ The former case adopts without any qualifications the rule laid down in the *Swetland case*. It holds that flights above the space actually occupied and used by the landowner when they interfere with his complete enjoyment of the surface are only subject to an action of nuisance. The latter case, however, was not so easily disposed of. The plaintiff in the *Hinman* case sought an injunction to prevent low flying over his land. His action was based on the theory of trespass. The court denied the injunction as no actual damage was shown. In order to reach the conclusion that actual damage must be shown before injunctive relief will be granted, the court had to change the orthodox theory of trespass.¹⁹ The court said:

"This case differs from the usual case of enjoining a trespass. Ordinarily if a trespass is committed upon land, the plaintiff is entitled to nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possessions. Appellants do not, therefore, in their bill state a case of trespass unless they allege a case of actual and substantial damage."²⁰

The court recognized that the orthodox definition of trespass would not apply in this type of case, and redefined trespass so that it would apply. This new definition was entirely unnecessary, for the facts supported the regular nuisance action.²¹ This decision seems to cause a conflict. But if it is kept in mind that there is only a change in the meaning of the word trespass and

16. For a good discussion of the effect of *Thrasher v. City of Atlanta*, see Logan, *Recent Developments in Aeronautical Law* (1934) 5 *J. Air Law* 548.

17. 14 F. Supp. 977 (D. C. W. D. N. Y., 1936).

18. Complete title of case, *Hinman v. Pacific Air Transport, Hinman v. United Air Lines Transport*, 84 F. (2d) 755 (C. C. A. 9, 1936), certiorari denied Feb. 1, 1937, 299 U. S.—.

19. In trespass actual damage or loss to the owner has nothing to do with the giving of the right of action. It is otherwise as to nuisance for in this case detriment is the essence of the action. Logan, *Aircraft Law Made Plain* (1928) 23.

20. *Supra*, note 18, 758.

21. *Supra*, note 19.

not in the principles laid down in the previous cases, no difficulty is encountered.

From a review of these cases the following conclusions can be drawn: first, that airspace is divided into two divisions, the lower and upper strata; second, that where injury to the use and enjoyment of the land is caused by the flight of airplanes over the land, relief can be had on the theory of nuisance regardless of the stratum through which the flight was made; third, that relief on the theory of trespass is limited solely to flights through the lower stratum; fourth, that in instituting an action it would be safest to bring the action on both counts, nuisance and trespass. A trespass count should be included although the trend is towards eliminating actions upon the trespass theory. A case of this type will probably be one of first instance in the particular jurisdiction and it is possible that the court will uphold a trespass action. The trespass count, however, is merely a safety measure and the case should be based on the nuisance theory.²²

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22. For suggested theories on the handling of such situations see Flagg, *Airspace Ownership and The Right To Flight* (1932) 3 J. Air Law 400.