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AIRSPACE RIGHTS AND LIABILITIES AS AFFECTED BY AIRCRAFT OPERATION:† II

III.

Rights and Liabilities Respecting Aircraft Flight Other Than Landing and Taking-off

A. General Airspace Rights and Interests:

Nonaviation cases clearly reveal that the surface occupant is entitled to the undisturbed use and enjoyment of the superjacent airspace to at least a height which will preserve to him the reasonable use and enjoyment of the land.⁷⁵ The *cujus est solum* maxim has generally been applied where it was not essential and where the same solution could have been reached by using the "effective user" theory⁷⁶ or the "normal use" rule. Some publicists hold that the latter rule divides the airspace into upper and lower zones, and that entry into the lower zone alone constitutes a trespass, and then only if made without the owner's permission. Of course, due allowance is made in each case for a determination of the proper height of the lower zone.⁷⁷ The invasion of a person's right to privacy also should be given consideration, and this necessarily involves the use to which the aeronaut is placing his aircraft. For example, the minimum altitude for a commercial aircraft on a fast through flight might be considerably less than that for a sight-seeing aircraft, a

†This is the second of two installments of this article. The first appeared in the Summer Issue of Volume XXVI of the *Notre Dame Lawyer*. [Editor's note.]

⁷⁵ This was very well stated in *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 390 (1930), where the court said: "For the purposes of this decision we assume that private ownership of airspace extends to all reasonable heights above the underlying land. It would be vain to treat property in airspace upon the same footing as property which can be seized, touched, occupied, handled, cultivated, built upon and utilized in its every feature."

⁷⁶ For a case illustrating this theory, see *Hinman v. Pacific Air Transport*, 84 F. (2d) 755, 758 (9th Cir. 1936), *cert. denied*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

⁷⁷ LUPTON, CIVIL AVIATION LAW § 52 (1935).

hovering plane, balloon, or similar slow-moving equipment. It might also be that privacy against photography may impose a different rule applicable to invasions of airspace.

Some attempts have been made to classify the decisions according to established rules of the law of torts under absolute liability, negligence, trespass, or nuisance.⁷⁸ None of these provide satisfactory standards for determining liability resulting from the infringement of the surface occupant's rights. It may be that this new adventure of man which endows him with some of the abilities of air-borne creatures cannot be controlled by the old adaptations of basic natural law to surface-locked human endeavors. Consequently, new applications of the fundamental law of the rights of man to the free use and enjoyment of his life and property as long as he refrains from infringing upon the law and upon the rights of others must be reviewed to provide an equitable aviation law. The old rules should be relied upon more as guides than as absolute law. This, however, has not been the prevalent practice of the courts, which, under our system of following precedents and *stare decisis*, at times are burdened by an almost insuperable inertia and inability to adapt themselves to new conditions of life.

B. Judicial Interpretations of Rules on Airspace Rights in General:

A review of typical cases will illustrate how the courts have searched for a basis on which to determine the conflicting interests of the parties involved, and will indicate that courts may at times be conscious of the sociological effect of their decisions.

Some courts have considered aircraft dangerous *per se*, and have imposed absolute liability for all damage caused by their operation, as in the old squib case.⁷⁹ At least the courts

⁷⁸ HOTCHKISS, *THE LAW OF AVIATION* §§ 16-36 (2d ed. 1938); LUPTON, *op. cit. supra* note 77, §§101-10.

⁷⁹ Scott v. Shepherd, 3 Wils. 403, 95 Eng. Rep. 1124 (K.B. 1773).

have given this as the reason for their decisions. Thus, in *Guille v. Swan*,⁸⁰ a New York court held a balloonist liable for damages caused by his physical trespass when he accidentally landed in a garden. He was also charged with the additional damage caused by the crowd which trampled the garden as curious onlookers or souvenir seekers and which came to his aid when he cried for help while descending. He was held strictly accountable for the foreseeability of the accident and its results. While this decision seems fair, might not a better reason for the responsibility have been found to lie in the negligence of the balloonist for ascending so near to the residence in question? True, the foreseeability element was present as a determining factor, but did this, under the circumstances, not result in negligence on the part of the balloonist rather than in liability for setting in motion an inherently dangerous device?

Similarly, some commentators ascribe various motives for decisions which may not be fully justified. *Neiswonger v. Goodyear Tire & Rubber Co.*⁸¹ has been considered as supporting the absolute liability doctrine,⁸² while it was probably based on the more fundamental ground of infringement of the land occupant's right to freedom from invasion of the superjacent airspace by low-flying aircraft. In this case, a farmer recovered for damage caused by a blimp which flew low over his horses. Also, the decision in *Rochester Gas & Electric Corp. v. Dunlop*⁸³ might be misinterpreted because of the dual causes of action presented. The first cause based on negligence and specifically on *res ipsa loquitur* was dismissed on the ground that it would be unreasonable to say that the crash of the plane into the power line tower at night necessarily indicated that the pilot was negligent. The court

⁸⁰ 19 Johns. 381 (N.Y. 1882). See LUPTON, *op. cit. supra* note 77, §102.

⁸¹ 35 F. (2d) 761 (N.D. Ohio 1929).

⁸² LUPTON, *op. cit. supra* note 77, § 102.

⁸³ 148 Misc. 849, 266 N.Y. Supp. 469 (Monroe County Ct. 1933).

upheld the second cause based on absolute liability for trespass⁸⁴ and only the question of damages was presented to the jury.

A difficult case to reconcile on any theory is *Nebraska Silver Fox Corp. v. Boeing Air Transport, Inc.*⁸⁵ which was dismissed on the ground that damages could not be predicated upon the abortions of vixens which were frightened by planes flying low over a fox farm. This case might be viewed as supporting the theory that passage through the airspace over land is not a trespass of the occupant's property. But it is obvious that here, there was an infringement of the occupant's right to the undisturbed use and normal enjoyment of the land. It is possible that the plaintiff's case was based on the theory of absolute ownership of the space to all altitudes, and that insistence upon recovery under this premise was rightly denied; however, if so, the decision has been generally misunderstood.⁸⁶ It would seem that cases of this type should be governed by a "first bite" rule, as is used when dogs are involved.⁸⁷ That is, unless warned, the aircraft operator should be entitled to fly above a conventionally determined minimum altitude without liability, but once apprised of a condition requiring special care, he must act accordingly.

C. Publicists' Views on Airspace Use and Interests Generally:

It is interesting to note the views of various publicists in this field who have given much serious thought to the problems involved.

Bouvé⁸⁸ has cited with approval Sir Frederick Pollock's view that passage of an airplane over land, like that of a

⁸⁴ *Id.*, 266 N.Y. Supp. at 473. See also LUPTON, *op. cit. supra* note 77, §102.

⁸⁵ [1932] U.S. Av. R. 164. (U.S. Dist. Ct., D. Neb., Omaha Div. 1931).

⁸⁶ LUPTON, *op. cit. supra* note 77, §102.

⁸⁷ *Domm v. Hollenbeck*, 259 Ill. 382, 102 N.E. 782 (1913).

⁸⁸ Bouve, *Private Ownership of Airspace*, 1 AIR L. REV. 232, 376 (1930).

projectile may be a trespass where it is through airspace close to the ground and where it affects the normal and reasonable enjoyment of the land. This rule seems to be a basic equitable norm, but as indicated above, it requires flexibility to prevent inequities in unusual circumstances, as in the *Silver Fox* case.⁸⁹

Lupton⁹⁰ has discussed various theories and gives a good bibliography of articles supporting "the sky's the limit" theory. But he points out that were this maxim actually adopted, aviation would become entirely impractical. Aviators would need a license to pass over each parcel of land, or possibly airspace could be condemned by the state for air highway purposes, or the Federal Constitution might be amended to provide for the use of certain zones or sections of airspace. In addition, each flight might form the basis for a number of actions for trespass, causing considerable harassment to the aviator. Difficulties would also be experienced in proving the exact linear paths of the aircraft in its flight through the various airspaces.

Sweeney⁹¹ has made an excellent collection of old cases relating to the *cujus est solum* maxim and which illustrate the historical development of airspace rights.

Hayden⁹² is of the opinion that landowners actually have dominion over airspace below a minimum altitude to provide for their comfort and enjoyment of the land, and believes that the flight of aircraft generally may cause a lawful nuisance similar to the noises of church bells, automobiles, newsboys, trains, street cars, and busses. But he concludes that the physical presence of low flying planes over the land

⁸⁹ *Nebraska Silver Fox Corp. v. Boeing Air Transport, Inc.*, [1932] U.S. Av. R. 164 (U.S. Dist. Ct., D. Neb., Omaha Div. 1931).

⁹⁰ LUPTON, *op. cit. supra* note 77, §§ 37 *et seq.*

⁹¹ Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329, 355-8 (1932).

⁹² Hayden, *The New Deal in Airspace Rights*, 10 J. AIR L. 158 (1939).

or buildings causing the landowners to be fearful of injury to life or property is an actionable trespass as well as a nuisance.

Rhyne⁹³ recently was of the opinion that the common law on the question of airspace rights was not written until the present era, so that the common law applicable to other rights does not apply, and that statutes alone fix air space rights in the field of aviation. This theory, however, resolves neither the many cases which did not arise under statutes nor the conflicting applications of older common law rules to actions involving aeronautics.

D. Special Situations:

Many special abuses should be given particular consideration. Included within this abusive aerial activity is acrobatic flying.⁹⁴ It has been held that a landowner may enjoin acrobatic or stunt flying over his land at any altitude. He need not be subjected to the special risks of this dangerous activity.⁹⁵

Another generally abusive type aerial activity is low level flying. This, however, has received much conflicting treatment, but an analysis of the cases indicates that the decisions which reached seemingly inequitable results are generally not based on an unfavorable attitude of the courts toward the landowner's rights, but rather on a mistaken theory of the case, possibly so presented to the court by the attorney for the aggrieved land occupant. For example, in contrast to the failure to recover in the *Nebraska Silver Fox* case,⁹⁶ a Nebraska court in *Glatt v. Page*⁹⁷ enjoined flights

⁹³ RHYNE, AIRPORTS AND THE COURTS 82-3 (1944).

⁹⁴ HARTMAN, AVIATION LAW DIGEST 195 (1941).

⁹⁵ Johnson v. Curtiss Northwest Airplane Co., [1928] U.S. Av. R. 42 (Ramsey County, Minn.).

⁹⁶ Nebraska Silver Fox Corp. v. Boeing Air Transport Inc., [1932] U.S. Av. R. 164 (U.S. Dist. Ct., D. Neb., Omaha Div. 1931).

⁹⁷ 3rd Jud. Dist. Docket 93-115, Dist. Ct. Neb. 1928, cited in RHYNE, *op. cit. supra* note 93, at 84.

below 100 feet over a poultry farm, because the flights had allegedly caused the hens to stop laying eggs. In contrast, it was held in *Commonwealth v. Nevin*⁹⁸ that low flying was not a trespass, because under Pennsylvania law, physical contact with the land was required for a trespass. This clearly indicates that the decision resulted from the mistake of the attorney in his theory of the case. On the other hand, flights below 1,000 feet over a camp for children were enjoined, on the basis that the camp was a congested area, and because under a statute such flights were prohibited over a "congested area."⁹⁹ In addition, the court held that the noise, distraction, and the source of danger of the flights constituted a nuisance which would be abated.

Aerial sightseeing and photography require special consideration. In *Cory v. Physical Culture Hotel, Inc.*,¹⁰⁰ the aeronaut was held not liable for taking aerial photographs of the hotel since he notified the hotel sufficiently in advance to allow the sunbathers to retire from the roof. The court also held that the height at which one becomes a trespasser depends upon the particular facts and not on the Air Commerce Regulations. A flyer may pass over property without the owner's consent, if he does so in a reasonable manner and at a height which does not unreasonably interfere with the owner's complete enjoyment of the surface and space above it which he occupies. In this case, the photograph had been requested by the hotel owner and the court seems to imply¹⁰¹ that the reasonable minimum altitude for normal through passage may be lower than for sightseeing or photographic flights.

The possibility of results differing solely because of the presentation of a case by the attorney, particularly in new

⁹⁸ 2 Pa. D. & C. 241 (1922), cited in RHYNE, *op. cit. supra* note 93, at 83.

⁹⁹ *Mohican & Reena Inc. v. Tobiasz*, [1938] U.S. Av. R. 1 (Hampton County, Mass.).

¹⁰⁰ 14 F. Supp. 977 (W.D. N.Y. 1936).

¹⁰¹ *Id.* at 982.

branches of the law, such as aviation law, is further shown by two New York cases. In 1921, Judge Cardozo held that a hydroplane was a vessel while afloat upon navigable waters and subject to admiralty jurisdiction. In his opinion, he referred to the fact that the Treasury Department of the United States required seaplanes and hydroplanes to be registered as vessels.¹⁰² Yet in 1922, another New York court held that a hydroplane was not required to have a muffler on its engine when operated on lakes and waters as required by state statute applicable to floating structures.¹⁰³ This was its conclusion even though it admitted:¹⁰⁴ “. . . the evil then [1913] aimed at [by the statute] was the noise . . . of the exhaust from motor boats and similar structures upon the waters of the lake.” The amendment of the statute in 1917 did not change this terminology, so the court concluded that hydroplanes were not within the intent of the law. The court apparently did not consider the fact that it was the noise which was prohibited and since the legislature probably understood the law to cover hydroplanes, it had not amended it specifically to enumerate them, as the statute had general applicability to all floating structures. Had the attorney presented the facts as in the former case and referred to the Cardozo opinion, the decision might have been quite different.

E. Airspace Rights in Foreign Jurisdiction:

It is of special interest to note the contemporaneous growth of this new phase of law in other countries, since it is one of the few new developments in our law which need not be inherited but can be a truly American policy. The English law is of particular interest, since the principles of our common law which inevitably affect our legal thinking,

¹⁰² Reinhardt v. Newport, 252 N.Y. 115, 133 N.E. 371 (1921).

¹⁰³ People *ex rel.* Cushing v. Smith, 119 Misc. 294, 196 N.Y. Supp. 241 (Sup. Ct. 1922), *rev'd*, 206 App. Div. 642, 198 N.Y. Supp. 940 (3d Dep't 1923).

¹⁰⁴ *Id.*, 196 N.Y. Supp. at 242.

even in new fields, have descended from it. In England, the English Air Navigation Act of 1920 now supersedes the common law in aviation cases. The pertinent provision on airspace rights states:¹⁰⁵

No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with. . . .

The question of liability thus depends upon a determination of what is reasonable in each case.

The French law, which permits a separate interpretation of the law as applied to each case, provides in Article 19, May 13, 1924, that “. . . the right of aircraft to fly over privately owned land cannot be exercised under conditions such as to interfere with rights of the owner.”¹⁰⁶ This seems to indicate that the “effective user” theory is the law of France.

It is interesting to note that the English law is written in a manner primarily guaranteeing the rights of the aviator, whereas the French law is written primarily to guarantee the rights of the landowner; yet both set essentially the same measure for the rights of each party.

F. Uniform State Law for Aeronautics:

In this country, attempts have been made to obtain a uniform code covering the more important aspects of aviation law. Some states have adopted the Uniform Aeronautics Act or slight modifications of it.¹⁰⁷ Among the more important provisions, the following define the controversial question of rights in airspace:¹⁰⁸

¹⁰⁵ Air Navigation Act, 1920, 10 & 11 GEO. 5, 80, § 9.

¹⁰⁶ As cited in Bouve, *supra* note 88, at 399.

¹⁰⁷ 11 UNIFORM LAWS ANN. 157 *et seq.* (1938). This Act was withdrawn by the National Conference of Commissioners on Uniform State Laws in 1943.

¹⁰⁸ UNIFORM AERONAUTICS ACT §§ 3-5; 11 UNIFORM LAWS ANN. 160-1 (1938).

§ 3. Ownership in Space—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

§ 4. Lawfulness of Flight—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. . . .

§ 5. Damage on Land—The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. . . .

Section 5 has been varied in many states to change the responsibility of the aeronaut, some limiting liability to negligence or to a rebuttable prima facie liability, as well as to other detailed features.

These and similar statutory provisions generally are not limited to any specific type of aircraft operation. They involve taking-off, landing and, consequently, airport operation as it affects adjoining airspace over another's land. And the concentration of activity in airspace adjacent an airport magnifies the conflict of interests between the aeronaut and the landowner.

IV.

Airspace Rights as Affected by Proximity to Airports

A. Relative Rights in General of Aeronauts and Surface Occupants in Airspace Near Airports:

The general rules regarding airspace rights are applicable to airspace near airports with some limitation in certain jurisdictions favoring the aeronaut and the airport operator.

Generally the right of the surface occupant to absolute dominion of the skies has been denied with reference to airport approaches. The amount of approach airspace required has increased with the development of aircraft and this fact poses increasingly important problems. Larger planes demand longer approach zones and produce more pronounced sound and vibration penetrations into space for greater distances. Various statutes give minimum altitudes for flight over different places,¹⁰⁹ but normal airport operation necessitates passage through airspace at heights varying from ground level to normal flight level. With present day planes, the approach zones may extend for considerable distances, and were large planes limited to minimum altitudes beyond relatively short approach zones, a radical revision in plane design would be required to increase the angle of climb and descent. Or the larger planes might be forced to circle the airport to attain the desired minimum altitude.

In resolving these technical problems affecting the use of the airspace adjacent to airports, the courts have reached various conclusions. The aeronaut has been given the greatest freedom where it is considered that an actual touching of the surface is necessary for trespass.¹¹⁰ Other jurisdictions have held that unless the airspace is reduced to actual possession, it cannot be owned; and, while the surface occupant has a prior right to take possession, unless he does, there can be no trespass. This may be carried to absurd limits at times. In *Hinman v. Pacific Air Transport*,¹¹¹ the court refused to enjoin flights as low as five feet above the surface or to award damages caused by the flights on the ground that they were not trespasses and that there were no actual or substantial damages. It said:¹¹² "We own so much of

¹⁰⁹ For an illustrative statute, see N.Y. GEN. BUS. LAW § 245 (5) (1941).

¹¹⁰ *Commonwealth v. Nevin*, 2 Pa. D. & C. 241 (1922), cited in REYNE, *op. cit. supra* note 93, at 83.

¹¹¹ 84 F. (2d) 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

¹¹² *Id.*, 84 F. (2d) at 758.

the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land." The court's reasoning and statement of law may provide an equitable adjustment of the conflicting interests, but its application of the law to the facts may well be questioned as a sagacious course between the Scylla and Charybdis of the case. And while the Supreme Court of the United States denied certiorari in this case,¹¹³ it held in another case which involved the passage of artillery projectiles over the plaintiff's land, that¹¹⁴ "Every successive trespass adds to the force of the evidence."

Generally, the surface occupant's absolute rights terminate entirely at the height beyond which he cannot profitably use his land.¹¹⁵ This does not exclude all airspace not actually occupied, for *usable* airspace may vary, even from season to season as in farming, and a flexible rule which will adapt itself to the current use and needs of the land occupant is required. The land occupant, after all, still retains prior right to the beneficial use of the airspace. An equitable solution might include enjoining ascents and descents over a farm during certain periods to allow normal tillage and harvesting of crops. It might require the farmer to notify the airport of the period he would be so occupied. This would not give the aeronaut or the airport a private easement in the airspace, but some proponents favoring easements in

¹¹³ *Hinman v. Pacific Air Transport*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

¹¹⁴ *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 43 S. Ct. 135, 67 L. Ed. 287 (1922).

¹¹⁵ In *Johnson v. Curtiss Northwest Airplane Co.*, [1928] U.S. Av. R. 42 (Ramsey County, Minn.), the court said with reference to the *cujus est solum* maxim: "This rule, like many aphorisms of the law, is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development . . . as a comprehensive statement of the landowner's rights, at a time when any practical use of the upper air was not considered or thought possible, and when such aerial trespasses as did occur were relatively near to the surface of the land, and were such as to exercise some direct harmful influence upon the owner's use and enjoyment of the land. . . . The upper air is a natural heritage common to all people, and its reasonable use ought not to be hampered by an ancient artificial maxim of law. . . ."

airspace hold that surface owners have exclusive dominion subject to an easement in favor of all aircraft to use the superjacent airspace in a reasonable manner.¹¹⁶ The easement is not private but public, so that no prescriptive rights accrue and it is limited to transit, thus excluding hovering or circling. This view is supported by the *Hinman* case,¹¹⁷ which held that continuous use will not ripen into an easement through the airspace above another's land.

A general understanding of the problem of airport approaches requires a sympathetic attitude toward the annoyances and the very real depreciation in value of the landowner's property because of its proximity to an airport. But, of course, the rights of an aeronaut to ascent and descent must also be respected.

B. Airport Airspace Approaches:

The problem of airport approaches is an instance where judicial legislation has proceeded largely according to Jeremy Bentham's theory of weighing the "pleasures" and "pains" of the situations, rather than according to the basic rights of the parties involved. It appears that the theory on which a case is based has a decided influence in the cases where no statutory provision exists to determine the rights of the parties, although in some instances the courts are extremely favorable to one or the other. For instance, in *Smith v. New England Aircraft Co.*,¹¹⁸ the plaintiff's estate was adjacent the airport and airplanes flew low over the land but rose quickly in making ascents. The courts held that because no serious damage was shown, it was not a trespass to the land and that no injunction would be granted, because it was not a nuisance to the property or livestock. Mere apprehension of danger was not considered sufficient to warrant an

¹¹⁶ See the discussion of this theory in LUPRON, *op. cit. supra* note 77, § 51.

¹¹⁷ *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

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

injunction enjoining the flights. An injunction, it was thought, would be a detriment to the public without being a counterbalancing benefit to the landowner.

The *Hinman* case¹¹⁹ arrived at essentially the same result, where damages were sought for low level ascents and descents over land adjoining an airport. The court held that the airport would acquire no prescriptive right in airspace by adverse use and that actual use by the landowner must be shown to prove injury and damage. The court rejected the contention that the surface occupant should be allowed airspace to a reasonable height above the land free from penetration though not actually used by him. This seems rather inequitable when it is remembered that as a general rule, owners of elevated railways, overhead storerooms, and similar aerial structures pay the landowner for the use of the superjacent airspace.¹²⁰

The harshness of the above decisions might be said to justify the action of landowners in placing obstructions to undesired flights over their land, but "spite" structures are generally forbidden. Usually there must be proof of actual spite and malice, and if proved, the offending landowner is compelled to remove the obstruction at his own expense.¹²¹ In most cases the landowner could develop good reasons for the presence of the obstructions and successfully defend their existence. But usually, he is so vehement in asserting his claim to the airspace that he fails to justify the obstructions.

In *Commonwealth ex rel. Schnader v. von Bestecki*,¹²² the erection of towers was enjoined as a public nuisance to the state-owned airport nearby, because the towers served no good purpose.

¹¹⁹ *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (9th Cir. 1936), cert. denied, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

¹²⁰ LUFTRON, *op. cit. supra* note 77, §52.

¹²¹ Rhyne, *The Legal Experience of Airports*, 11 J. AIR L. 297, 312 (1940).

¹²² [1938] U.S. Av. R. 1 (Dauphin County, Pa. 1937).

Another example of a legally unsuccessful though physically ingenious spite obstruction is found in *Tucker v. United Air Lines, Inc.*¹²³ In this case, the landowner planted quick growing poplar trees near the airfield boundary. This effort was so successful, that soon planes using the airport were clipping the tops of 35-foot trees. The landowner insisted on his "ad coelum" land rights. The court enjoined flights under 30 feet over the land and enjoined obstructions over 25 feet high. Some good reasons undoubtedly could have been found for the existence of the trees on the land, but none were advanced and the result was an injunction against the free use of the land. Unfortunately, for the determination of the rule of law, no appeal was taken from this decision, as Tucker's farm was purchased by the airport.

Arbitrary rules and statutes limiting the height of the landowner's airspace rights ignore the basic rights of the occupant of the land and prescribe merely a course which appears expedient under the circumstances. A well reasoned opinion illustrating this problem was rendered by the Attorney General of Michigan¹²⁴ regarding the validity of a statute prohibiting the erection of any structure within 1,000 feet of the boundary of a licensed airport to a height greater than the ratio of one-to-twenty from the nearest boundary. The opinion was that it was an unconstitutional taking of property without due process and not within the police power of the state. He cited the case of *Piper v. Ekern*,¹²⁵ in which a Wisconsin zoning law prohibiting erection of buildings over 90 feet in height on a street adjacent the state capitol was declared unconstitutional on the above grounds.

Of course, the property in the airspace could be obtained by purchase, lease, or condemnation proceedings.¹²⁶ But even

¹²³ [1936] U.S. Av. R. 10 (Dist. Ct. Johnson County, Iowa 1935).

¹²⁴ Reprinted in [1939] U.S. Av. R. 18.

¹²⁵ 180 Wis. 586, 194 N.W. 159 (1923).

¹²⁶ It has been suggested that acquisition of airport approaches rights by eminent domain might be considered as obtaining a right of way over the

if zoning ordinances are valid as to future erections, they should be held invalid when retroactive.¹²⁷ And it has been ventured that obstructions to flying may be regulated by the Secretary of Commerce or by Congress under the Commerce Clause.¹²⁸

The Uniform Airports Act of 1935 effectively resolves conflicts surrounding airspace approach rights. Section 7 provides that: ¹²⁹

Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports and landing fields acquired or maintained under the provisions of this act, the counties, municipalities, and other subdivisions of this state are hereby granted authority to acquire such air rights over private property as are necessary to insure safe approaches to the landing areas of said airports and landing fields. Such air rights may be acquired by grant, purchase, lease or condemnation in the same manner as is provided in Section 3 of this act. . . .

Even without this statute, certain courts have recognized the rule expressed by it as a constitutional right of the property owner. Typical is *Mutual Chemical Co. v. Baltimore*,¹³⁰ where it was held unconstitutional to limit the height of structures to five feet within 100 feet of an airport boundary and to allow gradually increasing heights at further distances. This was deemed a taking of property without compensation since it prevented all use of the land subject to the five-foot restriction.

The following ten general methods for controlling airport approaches have been suggested.¹³¹ Some have been found mutually satisfactory; others, if not satisfactory, at least

land. Kingsley and Mangham, *The Correlative Interests of the Landowner and the Airman*, 3 J. AIR L. 374, 377-8 (1932).

¹²⁷ LUPTON, *op. cit. supra* note 77, § 97.

¹²⁸ *Id.*, §94.

¹²⁹ 11 UNIFORM LAWS ANN. 196 (1938). This Act was withdrawn by the National Conference of Commissioners on Uniform State Laws in 1943.

¹³⁰ [1939] U.S. Av. R. 11 (Baltimore City Cir. Ct., Md.).

¹³¹ Commonwealth *ex rel. Schnader v. von Bestecki*, [1938] U.S. Av. R. 1, 12-9 (Dauphin County, Pa. 1937).

lawful; others have been declared unconstitutional under certain conditions; and still others have not yet been tried:

- (1) Voluntary action by property owner near the airport.
- (2) Purchase of land near the airport.
- (3) Purchase of airspace rights over land near the airport.
- (4) Acquisition of land near the airport by eminent domain.
- (5) Acquisition of airspace rights by eminent domain.
- (6) Police power condemnation of hazards dangerous to airport use.
- (7) Zoning regulations.
- (8) Use of commerce power by Federal Government.
- (9) Use of war power by Federal Government.
- (10) Use of postal power by Federal Government.

The determination of the value of airspace is most difficult, but the purchase of airspace rights over land near an airport is at present the best solution to this problem.

C. Airport Nuisance by Effects on Nearby Airspace:

Very few injunctions have been granted on the basis of an airport being a nuisance per se¹³² and as a general rule, acts constituting special nuisance must be shown. This requirement was not met in the *Hinman* case where flying at heights of only five feet over adjoining land was held not a nuisance.¹³³ The theory on which these seemingly absurd results are often based is that the public interest in the operation of the airport offsets the inconvenience to the individual.

¹³² For a good discussion supporting this point, see *Batcheller v. Commonwealth*, 176 Va. 109, 10 S.E. (2d) 529, 531 (1940).

¹³³ *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

This is a misconception of the basic law respecting the rights of the property owner for this theory should only be used to determine whether condemnation proceedings are justified or not, and not whether an *uncompensated* infringement of the landowner's rights is justifiable. Usually, if the annoyance becomes an unbearable burden, it will be held a nuisance and enjoined.¹³⁴

The main factors relied upon to label an annoyance a nuisance are injury to livestock or danger to normal use of land, annoying quantities of dust, and excessive noise.

*Gay v. Taylor*¹³⁵ illustrates almost all of the possible types of private nuisances, and in this case the airfield operation was permanently enjoined, even though a state license had been obtained. The court held that the license did not give the operator the right to maintain a private nuisance. It was shown that great quantities of dust were blown into the plaintiff's house. In addition, the engine repair and warm-up operations were performed near the hangars, causing an annoying and excessive noise. Furthermore, planes coming in for landings flew low over the house and were a hazard. At times articles were dropped from the planes on the property. The field runways were so located and the prevailing winds were such that normal use of the airfield brought dust into houses which were farther away than the plaintiff's house. Also, low flying planes often disturbed hospital patients about a half mile away. These and sundry other nuisances together were held to constitute a continuing nuisance.

Another good illustration and definition of airspace rights adjoining an airfield is given in *Thrasher v. Atlanta*.¹³⁶ The City of Atlanta operated an airport near the plaintiff's property and in using the airfield, planes blew dust into the

¹³⁴ *Thrasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Gay v. Taylor*, [1934] U.S. Av. R. 146 (Chester County, Pa. 1932).

¹³⁵ [1934] U.S. Av. R. 146 (Chester County, Pa. 1932).

¹³⁶ 178 Ga. 514, 173 S.E. 817 (1934).

plaintiff's house. This not only caused great inconvenience but also made his wife sick with resultant medical expenses. The court held that while an airport is not a nuisance per se, it might be constructed and operated so as to become one, and the unnecessary creation of dust was held to be a nuisance for which damages might be recovered and an injunction issued. The court also pointed out that apprehension of injury from falling planes is not, in and of itself, sufficient cause for an injunction against aerial navigation.

Acts which might not make an airport a nuisance in a rural locality may cause it to be one if located in a residential district, for the hazards of low flying and noises in the latter situation almost inevitably constitute the airport a nuisance, although it is not a nuisance per se. And its further operation might be enjoined to prevent substantial injury to the property rights of the nearby residents¹³⁷ or its use might be limited to special flights at certain heights.¹³⁸

It has also been held that bright lights of an airport operated by the United States may cause the surrounding private land to be appropriated by the Government,¹³⁹ especially when accompanied by noise and dust incident to airport operation, and by leaflets dropped from planes.

Landowners also are protected in their superior right to the normal and beneficial use of their land in some jurisdictions according to basic law. In *Capitol Airways, Inc. v. Indianapolis Power & Light Co.*,¹⁴⁰ it was held that although it might constitute a hazard to air navigation and interfere with the use of the adjacent airspace, an uninsulated power line on 90-foot towers, like smoke stacks and other proper uses of land in industry, did not constitute a case for injunc-

¹³⁷ *Crew v. Gallagher*, [1947] U.S. Av. R. 342 (Chester County, Pa. 1946).

¹³⁸ *People v. Dycer Flying Service, Inc.*, [1939] U.S. Av. R. 21 (Los Angeles Sup. Ct., Cal.).

¹³⁹ *United States v. Causby et ux.*, 328 U.S. 256, 259, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

¹⁴⁰ 215 Ind. 462, 18 N.E. (2d) 776 (1939).

tive relief. It has been suggested, however, that the landowner be required to illuminate at night unusual obstructions in the airspace, especially near airports and in air traffic lanes.¹⁴¹

Judging from the different rules which have been adopted in various jurisdictions governing the rights of the landowner, aeronaut, and airport operator with respect to airspace near airports, it seems highly desirable that a uniform code be adopted. Probably the most equitable statement of these rights is in Section 7 of the Uniform Airports Act of 1935.¹⁴² However, other statutory regulation of these rights might be desirable if no uniform act is acceptable to most of the states. The present federal acts do not regulate these activities, but proposals have been made which might give a suitable basis for desired uniformity,¹⁴³ even though the states would retain primary jurisdiction over real property.

V.

Government Control and Regulation of Certain Airspace Rights

While the States and not the Federal Government control real property, there might be adequate reason for Congress to establish certain airspace regulations affecting interstate aviation and the postal service. Rules of the road¹⁴⁴ could prescribe minimum height of flight at various speeds over different areas for aircraft engaged in interstate commerce. Regulation of structures likely to interfere with flight might also be valid under both the postal and interstate commerce powers. This might serve to accelerate the adoption of uniform codes by the states, for the detailed regulation still

¹⁴¹ LUPTON, *op. cit. supra* note 77, §53.

¹⁴² 11 UNIFORM LAWS ANN. 196 (1938).

¹⁴³ For a typical proposal, see RESTATEMENT, TORTS § 194 (1934).

¹⁴⁴ For a detailed discussion of this feature, see Zollman, *Governmental Control of Aircraft*, 53 AM. L. REV. 897 (1919).

remains essentially within the jurisdiction of the states.¹⁴⁵ Several very important rights in airspace have been defined by the Air Commerce Act and the Civil Aeronautics Act. Section 3 of Title 1 of the Civil Aeronautics Act states:¹⁴⁶

There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.

Section 10 of the Air Commerce Act reads:¹⁴⁷

Navigable airspace.—As used in this Act, the term “navigable airspace” means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act.

This indicates that a fine start in providing uniformity in airspace rights has been made, although this phase of aviation law requires still more state legislation to provide a uniform and just solution, particularly with reference to airspace approaches.¹⁴⁸ The Civil Aeronautics Act has encouraged uniformity since it authorized the regulation of rates, routes, and safety features, the licensing of the pilots and crew members, and the investigation of accidents and trade practices in interstate and foreign commerce.¹⁴⁹

In considering legislation and judicial determinations affecting airspace rights, the right of society to enjoy the fruits of industrial progress should be paramount only when there is no clear infringement of established rights. These include, for example, the right to the normal use and full enjoyment of land without interference and annoyance by

¹⁴⁵ LUYTON, *op. cit. supra* note 77, §94.

¹⁴⁶ 52 STAT. 980 (1938), 49 U.S.C. § 403 (1946).

¹⁴⁷ 44 STAT. 574 (1926), as amended, 52 STAT. 1028 (1938), 49 U.S.C. §180 (1946).

¹⁴⁸ For a discussion of the constitutional restraints imposed on Congress in this sphere, see *Federal and State Jurisdiction over Civil Aviation*, 12 J. AIR L. 25, 26 (1941).

¹⁴⁹ A more complete discussion of these points is given in Hester, *The Civil Aeronautics Act of 1938*, 9 J. AIR L. 451 (1938).

aeronautical activities. Of course, this does not mean that eccentricities or supersensitivities should lead to unreasonable prohibitions or restrictions on aeronautics, but if the social or community interest clashes with rights of the land occupant, the solution should not be to deprive him of his rights, but to compensate him for the rights which he yields in the improvement of the social interest involved. It would seem proper also to require a license fee or other tax to be paid by those in aeronautics for this activity should be required to pay its way. And until a uniform code is adopted by the states, it continues to be the attorney's duty to determine the airspace rights under local law, and to advance equitable solutions, as well as to advocate uniform legislation defining airspace rights.

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