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AIR LAW - LEGAL STATUS OF AIRPLANE FLIGHT

Philip A. Hart Jr.

University of Michigan Law School

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COMMENTS

AIR LAW — LEGAL STATUS OF AIRPLANE FLIGHT — The classical statement of the extent of the landowner's right to the air space above his land is the maxim, *Cujus est solum ejus est usque ad coelum*.¹ It is recognized, however, that decisions stating such a rule are not in point upon the status of air navigation today,² for when those decisions were

¹ BROWN, LEGAL MAXIMS, 8th Am. ed., 395 (1882). Attributed to the Glossator Accursius about 1250. Bouvé, "Private Ownership of Air Space," 1 AIR L. REV. 232 (1930). The maxim was used as early as *Bury v. Pope*, Cro. Eliz. 118, 78 Eng. Rep. 375 (1587). Almost immediately it is found in a case decided upon the nuisance theory. *Pennruddock's Case*, 5 Coke Rep. 100 (b), 77 Eng. Rep. 210 (1598).

² 42 A. L. R. 945 (1926) and 69 A.L.R. 316 (1930) compile the type cases which have used the maxim. But it must not be supposed that advocates for literal construction of the maxim have long since passed. It was approved in TERRY, PRINCIPLES OF ANGLO-AMERICAN LAW, § 388 (1884); 1 REEVES, REAL PROPERTY, § 97, p. 113 (1909); Eubank, "Ownership of the Airspace," 34 DICKINSON L. REV. 75

rendered flights were made in fancy only. Hence it is that all cases deciding this modern problem have disregarded the literal meaning of this maxim and tried to strike a compromise between the claims of air navigation and the claims of ownership.³ Three theories have been advanced to this end: (1) that the landowner owns the airspace above to an unlimited height, but is subject to an *easement* of travel in the public; (2) that he owns the air space within an indeterminate *zone*, but beyond that zone the ownership is vacant; (3) that his ownership extends no further upward than the earth's surface, including any growth and buildings.⁴ This last theory, using the nature of the action given as descriptive of the right, is called the *nuisance* theory. In any appraisal of these theories, our aim ought to be to determine which best secures the landowner in his legitimate interests, yet, at the same time, secures aerial freedom sufficient to meet the public interest involved.⁵

The *first*, or easement theory, has the approval of the American Law Institute in its *Torts Restatement*,⁶ as well as support from several distinguished legal commentators.⁷ Flight under this view is a privilege recognized because of the public interest in air navigation and travel. Accordingly, stunt and advertising flying are at once unlawful as being outside the scope of the public easement.⁸ This theory places

(1930); Marshall, "Legal Problems of the Aeronaut," 6 ILL. L. Q. 50 (1923). And see 19 CASE AND COMMENT 681 (1913).

³ Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. S. 469 (1933); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934); Swetland v. Curtis Airports Corp., (D. C. Ohio, 1930) 41 F. (2d) 929, modified (C. C. A. 6th, 1932) 55 F. (2d) 201; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300 (1930); noted in 78 UNIV. PA. L. REV. 902 (1930); 30 COL. L. REV. 579 (1930).

⁴ DAVIS, AERONAUTICAL LAW SUPPLEMENT 107 (1933); Ball, "The Vertical Extent of Ownership in Land," 76 UNIV. PA. L. REV. 631 (1928); 1 AIR L. REV. 272 (1930).

⁵ Bohlen, "Surface Owners and the Right of Flight," 18 A. B. A. J. 533 (1932). And the editorial comment of Dean Green, "Flight of Aircraft—Right or Privilege," 7 J. AIR LAW 201 (1936). Their conclusion as to which of these theories best meets the test will be seen to differ.

⁶ TORTS RESTATEMENT, §§ 159 (f), 194 (1934). The explanatory article by Thurston, "Trespass to Air Space," HARVARD LEGAL ESSAYS (1934), indicates clearly that the Restatement holds absolute ownership continues *usque ad coelum* subject to the easement. Also seen from notes to § 1002 in Tentative Draft No. 7 (1931) of the Restatement.

⁷ Bohlen, "Surface Owners and the Right of Flight," 18 A. B. A. J. 533 (1932); CHAPIN, TORTS, § 75 (1917). It is approved apparently in HAZELTINE, LAW OF THE AIR 74 et seq. (1911), and DAVIS, AERONAUTICAL LAW 40 et seq. (1930). The zone would be limited by the stratosphere. Ball, "The Vertical Extent of Ownership in Land," 76 UNIV. PA. L. REV. 631 at 642 (1928).

⁸ Analogous to right of passage over a highway, held not to permit loitering to

the burden of proving a justifiable use on the one claiming the privilege; and properly, because he is in better position to know the height and purpose of his flight.⁹

The *second*, or limited zone theory, likewise finds support among the commentators¹⁰ and in dicta in the federal district court's opinion in *Swetland v. Curtis Airports Corp.*¹¹ The legislative tendency makes it appear that each state soon will have a minimum height statute. This policy does not appear to be merely an exercise of the police power designed, as are pedestrian statutes, to safeguard fliers against others similarly engaged.¹² It may very reasonably be interpreted as a legislative effort to protect the landowner as well, and to define the limits of ownership. Assuming such a legislative purpose, the zone theory would correlate with legislative notions.

Yet no matter how low the ceiling of ownership might be set, there would be serious practical objections to it. A plane would in all likelihood be forced into that zone at least twice in any normal flight, at take-off and in landing.¹³ To suggest that the airport ought to be large enough to allow the plane to stay above the neighbor's ownership

watch activity in an adjoining field. *Hickman v. Maisey*, [1900] 1 Q. B. 752. Professor Bohlen argues that the wealth of analogies available, such as right of detour over private property, the privilege of travel on water over private property, makes adoption of the easement theory attractive. Bohlen, "Surface Owners and the Right of Flight," 18 A. B. A. J. 533 (1932).

Possibly if the stunt were designed as research ultimately to perfect transportation it might still be within the easement, although a court might severely restrict the scope and require experiments to be confined to space over airports.

⁹ Bohlen, "Surface Owners and the Right of Flight," 18 A. B. A. J. 533 (1932), and Green, "Flight of Aircraft—Right or Privilege," 7 J. AIR LAW 201 (1936), agree that all doctrinal machinery is to be given the landowner.

¹⁰ ZOLLMAN, LAW OF THE AIR, § 30 (1927); POLLOCK, TORTS, 13th ed., 362 (1929).

¹¹ (D. C. Ohio 1930) 41 F. (2d) 929. This was later modified in (C. C. A. 6th, 1932) 55 F. (2d) 201 (1932).

Measuring rods under the zone theory—variously, the height of possible use, possible effective use, or useful occupation, with a no-man's land beyond—have limited the maxim to air space only so far as it is appurtenant to the land. ZOLLMAN, LAW OF THE AIR, § 19 (1927), citing Kuhn, "Beginnings of an Aerial Law," 4 AM. J. INT. LAW 109 (1910).

¹² But the District Court in the *Swetland Case*, (D. C. Ohio, 1930) 41 F. (2d) 929, as interpreted by Professor Aigler, 29 MICH. L. REV. 68 at 71 (1930), looked upon minimum height statutes "as in the nature of *traffic* rules rather than as attempts to define property limits." And he would suggest that they are not to be regarded as efforts to determine ownership when he adds in a footnote: "If not merely 'traffic rules' at least they were no more than regulations of possibly conflicting claims by land occupant and aviator."

¹³ Marshall, "Some Legal Problems of the Aeronaut," 6 ILL. L. Q. 50 (1923).

zone at all times¹⁴ is to fail to recognize the economic factors involved. The airport must be close to population centers where land is too expensive for the average transportation company to have such an extensive holding at its several terminals. Moreover, if, to avoid flight in a blind area, it became necessary to drop into the necessarily arbitrarily fixed zone of ownership, the pilot might continue the risk of the blind flying area. Thus the zone theory would stand as opposed to the contemporary cry to do everything reasonably possible to secure safer air transportation. These objections apply to the first theory as well as to the second. Both acknowledge ownership at least to some extent, and it would appear that "the conflict of interest between owner and aviator cannot be solved through the concept of ownership, however else it may be."¹⁵ If for no other reason than that it will give color to nonexisting rights and aid to the litigiously inclined, necessarily injuring aviation development, the introduction of ownership concepts invites trouble.¹⁶ There is also the danger that a court, confronted with terms expressive of the landowner's property interest, may treat them as identical with property interests involved in other cases, such as overhanging eaves,¹⁷ trees,¹⁸ and telephone wires.¹⁹ These cases involve conflicts between the interest of adjoining landowners, property interests, and were decided without reference to factors present in the case of airplane flights.²⁰ The airplane cases present a conflict between a property right of the landowner on the one hand, and the public interest in air navigation and the aviator's personal right in free locomotion on the other.²¹

Such actual and possible difficulties would appear to be avoided by adoption of the *third* or nuisance theory. The landowner is guarded in

¹⁴ Such suggestion was made in *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930), discussed in 1 AIR L. REV. 272 (1930). Only if autogyros should come to be the flight method would this objection be removed.

¹⁵ Dean Green, "Flight of Aircraft—Right or Privilege," 7 J. AIR LAW 201 (1936).

¹⁶ To this effect see DAVIS, AERONAUTICAL LAW SUPPLEMENT (1933).

¹⁷ *Wachstein v. Christopher*, 128 Ga. 229, 57 S. E. 511, 11 L. R. A. (N. S.) 917 (1907).

¹⁸ *Hoffman v. Armstrong*, 48 N. Y. 201 (1872).

¹⁹ *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716 (1906).

²⁰ The danger was recognized by A. B. A. Committee on Aeronautical Law, A. B. A. ADVANCE PROGRAM 43 (1931). Dean Green, 31 ILL. L. REV. 499 (1936), points to the danger involved in any such confusion. It was recognized as early as 1910. Baldwin, "Law of the Air Ship," 4 J. INT. LAW 95 (1910).

²¹ Freedom of locomotion has always been given the fullest recognition, *Crandall v. Nevada*, 6 Wall. (73 U. S.) 35, 18 L. Ed. 745 (1868). In 31 ILL. L. REV. 499 (1936), Green distinguishes these fundamentally different interests, maintaining that the interest of the air navigator is equal to that of the landowner. And see Sweeney, "Adjusting Conflicting Rights of Landowner and Aviator in Anglo-American Law," 3 J. AIR LAW 329, 531 (1932).

the reasonable use he is presently making of his land, and can be recognized to have a dominant right to occupy further space if he desires. But unless and until there is "actual or substantial damage"²² there is and should be no liability on the air navigator. It is impossible successfully to maintain that every landowner feels similarly as regards his claims to and in the air space above his land.²³ But if landowners think about the matter at all, it would seem that the vast majority of them consider the limit of their claims to consist in being free from noise, from reasonable fear of injury²⁴ by flights, from interference with privacy, and, of course, from actual physical invasion. The nuisance theory satisfies all such claims²⁵ and, in so doing, it suggests no technical claims which might become, in case of an unreasonable owner, an invitation to litigate.

The *Hinman* case,²⁶ recently decided by the Ninth Circuit Court of Appeals, adopts the nuisance theory. In that case it was agreed that flights were being made within five feet of complainant's land, which adjoined an airport. Because no actual damage or interference with the enjoyment of this land was shown, the court refused to enjoin such activity, and declared that unless a landowner allege "a case of actual and substantial damage"²⁷ no trespass is stated. In actual fact this result has been arrived at in all such cases so far addressed to appellate tribunals, in that without damage no redress has been given, but the decisions have not acknowledged the principle that damage is the determining factor. This is believed to be unfortunate. The Massachusetts Supreme Judicial Court held²⁸ that while flights "at altitudes as low as one hundred feet . . . constitute trespass to the land of the plaintiffs,"²⁹ since there was no showing "that they have sustained any damage to their property or its use, or suffered material discom-

²² *Hinman v. United Air Lines*, (C. C. A. 9th, 1936) 84 F. (2d) 755 at 758.

²³ In his article, "Surface Owners and the Right of Flight," 18 A. B. A. J. 533 (1932), Professor Bohlen would appear to feel the landowner's claim is very much in the literal light of *usque ad coelum*.

²⁴ While the first or easement theory guards against stunt flying, this third or nuisance theory would guard against that also if there were an undue invasion of ownership.

²⁵ This would mean the nuisance theory would have the advantage of public opinion which is always an important enforcement factor.

²⁶ (C. C. A. 9th, 1936) 84 F. (2d) 755, cert. denied, (U. S. 1937) 57 S. Ct. 431.

²⁷ (C. C. A. 9th, 1936) 84 F. (2d) 755 at 759.

²⁸ *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930). This case is discussed by Hayden, "Objections to New Uniform Aeronautical Code," 18 A. B. A. J. 121 (1932).

²⁹ *Smith v. New England Aircraft Co.*, 270 Mass. 511 at 530, 170 N. E. 385 (1930).

fort . . . injunctive relief is not granted.”³⁰ That holding has been characterized as “inconsistent with the law of trespass . . . consistent with the law of nuisance.”³¹ The Georgia Supreme Court³² sustained a demurrer to a petition alleging flight below five hundred feet, despite the inclusion of the *usque ad coelum* doctrine in the Code.³³ But the court does not say that in interpreting the Code it would be guided by proof of actual damage, although that part of defendant’s operation which caused dust to disturb plaintiff was actually enjoined. The *Sweetland* case,³⁴ in the Sixth Circuit Court of Appeals, was decided solely upon nuisance, the case not presenting the specific issue of trespass and, according to at least two writers,³⁵ what was said concerning trespass was dictum.³⁶

The *Hinman* case does not become entangled in a discussion of the several theories of liability upon which to ground its conclusion. This gives the holding a force lacking when a court employs the terms ownership, possession, easement, or trespass, and yet refuses to give the relief normally flowing from such premises.³⁷ Such terms are employed because in deciding past disputes courts, sometimes of necessity, put the relationships into language broad enough to embody later developing relationships. Rather than to re-examine the circumstances in which such language was used, later courts have continued to use the old formulas, twisting them to allow recovery for actual damage, and no more, which is the only result felt justifiable in this later arising relationship between aviator and landowner. This tendency to accept phrases blindly appears twice in the *Hinman* case itself, and ought to be noted; otherwise subsequent cases may pursue a path

³⁰ *Ibid.* at 531.

³¹ Wherry and Condon, “Air Travel and Trespass,” 68 U. S. L. REV. 78 at 85 (1934). The court explained its refusal to enjoin on the ground of a Massachusetts practice.

³² Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934); noted 5 J. AIR LAW 332 (1934).

³³ Civil Code, § 3617, Ga. Code (1933), § 85-201: “the right of an owner of land extends downward and upward indefinitely.” And see § 4477. These code provisions are interpreted beginning in the case, 178 Ga. 514 at 528, *supra* note 32. In 1933 the Georgia Code was brought under the nuisance theory [Ga. Code (1933), § 11-101] although the maxim implication was not deleted from the code section defining real property in general, Ga. Code (1933), § 5-201.

³⁴ Sweetland v. Curtis Airports Corp., (C. C. A. 6th, 1932) 55 F. (2d) 201.

³⁵ Wherry and Condon, “Air Travel and Trespass,” 68 U. S. L. REV. 78 (1934).

³⁶ The court said that unoccupied air space is neutral territory in which all flights are permissible which do not constitute a nuisance to the enjoyment of the surface, according to the interpretation of Bohlen, “Surface Owners and the Right of Flight,” 18 A. B. A. J. 533 (1932).

³⁷ 31 ILL. L. REV. 499 (1936).

away from, rather than to, a recognition that unless nuisance or negligence can be shown, no action exists. The landowners alleged the regular use of two well-defined air avenues by planes and claimed that an injunction should issue to prevent an easement of flight being acquired by prescription. The court denied that prescriptive rights could be acquired, since the English doctrine of prescriptive rights to light and air has not been accepted generally in the United States. This seems quite beside the point. The reason for not accepting the doctrine of prescriptive right to light and air is that the maintenance of windows, for example, in one's building overlooking adjacent land causes no injury to that land, and hence no cause of action exists.³⁸ Without the existence of an actionable wrong acquiescence cannot be found. But if there is ownership in the air space, every flight therein would be an actionable wrong and prescription would run. All the court needed to say was, as it elsewhere indicated, that the landowner had not possession of the air space, and no right was violated, therefore no basis of prescription existed. And again, the court said a "case of trespass" is stated if substantial damage is alleged, otherwise the flight "is a lawful act."³⁹ Nowhere can be found support for the proposition that trespass necessitates a substantial injury.⁴⁰ Rather, trespass exists independent of damage, and, if damage is a prerequisite, then a nuisance or negligence claim ought to be the consequence, for damage does not create a trespass where none otherwise exists. Granted that it is less objectionable to say that there is no trespass without damage, than to say there is trespass but unless there is damage no relief will be given, there is still the objection that this is a straining of terms to avoid the "tyranny of labels."⁴¹ Security and certainty in the minds of all interested parties depends upon the frank recognition that protection against actual damage is all that a landowner rightfully can claim. The nuisance theory is best adapted to that end. It would appear to be a mistake to emasculate it by suffering old formulas, broad enough in language but unconnected in reason, to obscure the fact that it is the instrument used to measure the conflicting claims.

³⁸ It is correct that the English doctrine has not been accepted in this country. HARPER, TORTS, § 185 (1933). But the nature of the doctrine and the reason for its rejection was not treated by the court. For a discussion of it, with authority, see TIFFANY, REAL PROPERTY, § 517 (1920).

³⁹ (C. C. A. 9th, 1936) 84 F. (2d) 755 at 759.

⁴⁰ SALMON, TORTS, 8th ed., § 53 (5) (1934); HARPER, TORTS, § 180 (1933); POLLOCK, TORTS, 13th ed., 360 (1929).

⁴¹ Cardozo, J., in *Snyder v. Massachusetts*, 291 U. S. 97, at 114, 54 S. Ct. 330 (1934). Recommended as an elaboration on this analysis, Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605 (1908); Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933). And in the specific field, Shartel, "Meanings of Possession," 16 MINN. L. REV. 611 (1932).

Avoidance of such practice, and adoption of such theory will give the aviation industry a right to develop which ought not be controverted, and will not allow the industry to escape a liability for nuisance which it ought properly to bear.

Philip A. Hart, Jr.
