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The Right of Flight over Private Property

William M. Allen

THE RIGHT OF FLIGHT OVER PRIVATE PROPERTY

If a layman were asked the question whether aircraft should be allowed to fly over private property, his answer probably would be something like this.

> "I don't object to planes flying over my land unless they disturb me. They can fly over my unoccupied land as low as they want to, but when they get near my house I want them to be at a high enough altitude so there will be no danger if something should go wrong with the plane and high enough so that I will not be disturbed by the noise."

There would be no conversation regarding the ownership of air space. There would be no argument as to whether a landowner's remedy for unlawful flights over his property is in trespass or in nuisance. The landowner would very probably agree that he had no objection to flight over his property so long as the planes did not disturb him or place him in danger of injury

If we could forget the writings of Lord Coke and of Blackstone and the decisions handed down through the ages and simply consider the merits of the problem at hand, the solution to the question of the right of flight over private property would be greatly simplified.

We all recognize that flight over private property must in some way be legalized. If the courts were to hold that any entrance into the air space constituted a violation of the legal rights of the owner of the soil, it would indeed be a great blow to the aeronautical industry In order to legalize flight it would be necessary to secure the permission of all landowners over whose property a flight was made. It is conceivable that this could be accomplished along regular airways. However, it is often necessary to deviate from the regular course by reason of weather conditions—and sometimes the deviation is involuntary The time may come when travel by air will be confined to specifically defined airways. However, in the present state of the industry, if flight over private property at all heights was made unlawful, the future of air transportation would be exceedingly dark. It is therefore necessary to legalize flight over private property if travel by air is to continue its

growth and development. Clearly it is to the interest of our government and of the public that transportation by air be encouraged. To be balanced against these public and social interests are the interests of the private property owner. His right to use and enjoy his property must be protected. In defining the right of flight over private property we must recognize the public and social interest in freedom of flight, but at the same time we must give due emphasis to the interests of the property owner.

It seems obvious that the solution will not be found by fixing a hard and fast rule whereby any flight above a certain altitude is lawful, while any flight below it is unlawful. Flying over the wastes of Nevada is a very different matter from flying over the thickly populated farm country of Iowa or Illinois. In certain sections of Nevada there is very little life to be disturbed by low flight. On the other hand, an extremely low flight in Iowa or Illinois will very likely disturb or endanger the inhabitants and may frighten and stampede cattle, sheep and other animals.

Although it would be preferable to approach this problem without reference to established legal doctrines, nevertheless it must be admitted that such an approach would not be in accordance with the accepted methods of the common law lawyer. His method is one of analogy He solves his problems by comparing them with other problems that have been solved by the courts and which he believes are analogous to the one at hand. Consequently, when the question of the right of flight of aircraft over private property arose, cases involving overhanging eaves, branches and telephone wires were cited as authority for the fact that any invasion of the air space over private property by aircraft was unlawful.[1]

It is not the author's purpose to review the early English and American cases that deal with invasions of air space by overhanging eaves, branches, etc. This has been done very thoroughly in various articles and decisions.[2] However, any consideration of the problem at hand would be lacking if we did not refer to that famous maxim, "*Cujus est solum, ejus est usque ad coelum.*" It may be translated as follows "Whose the soil is, his it is up to the heavens," or "To whomsoever the soil belongs, he owns also to the sky" This maxim was given currency in our law by the great Lord Coke. In his writings on the land law of England we find the following statement.

[1] *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930) *Swetland v. Curtiss Airports*, 41 Fed (2) 929 (1930).

[2] See Clifford, The Beginnings of a Law for the Air, WASHINGTON LAW REVIEW, February, 1932; Bouve, Private Ownership of Air Space, AIR LAW REVIEW, April-July, 1930; and *Swetland v. Curtiss Airports*, note 1 *supra.*

> "And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre, and all other things even up to heaven, for *cujus est solum, ejus est usque ad coelum,* as it is holden."[3]

And later, we find Blackstone saying:

> "Land hath also in its legal signification a definite extent upwards as well as downwards." (Then quoting the maxim).[4]

This maxim became a great favorite with the courts and it has been cited many times by both English and American judges, in cases involving the right of an owner of land to object to an interference with the air space lying immediately above the land. Some of the courts have held that such an interference constituted a nuisance and others have held that it constituted a trespass.[5] It should be observed, however, that most of these interferences were connected with the ground itself and were very close to the earth's surface.[6]

The first expression which we had in this country on the right of flight over private property was contained in the Uniform State Law for Aeronautics, approved by the National Conference of Commissioners on Uniform State Laws in 1922, and thereafter approved by the American Bar Association. Since that time it has been adopted by more than twenty states.[7] The act provides

> "Section 3. 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."
>
> "Section 4. Flight of any 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 "

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[3] Liber 1, sec. 1, p. 4.
2 Cooley Blackstone, 19.

[5] For a thorough treatment of the English and American cases on the right of a landowner in the airspace immediately above the earth's surface, see *Swetland v. Curtiss Airports,* 41 Fed. (2) 929 (1930) see also authorities cited in comment on sec. 1002(c) of the Restatement of the Law of Torts by The American Law Institute.

In this article the term "landowner" is used as including any person having possession of land. The action for trespass to land is not based upon one's ownership of the land, but upon possession of the land.

[7] Arizona, Delaware, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin. Some of the foregoing states have altered certain sections of the act. See Vol. 9, UNIFORM LAWS ANNOTATED, p. 14.

Thus, the uniform law recognizes the ownership by the property owner of the air space above his land. Flight by aircraft through this space, however, is made lawful unless it interferes with the then existing use of the surface and the air space above the surface or is imminently dangerous to persons or property lawfully on the surface.

The next expression upon this subject appeared in the Federal Air Commerce Act of 1926, sec. 10 of the act providing:

> "As used in this act, the term 'navigable air space' means air space above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under Section 3, and such navigable air space shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this act."[8]

The Secretary of Commerce prescribed the minimum safe altitudes of flight as follows:

> "(G) Exclusive of taking off from or landing on an established landing field, airport, or on property designated for that purpose by the owner, aircraft shall not be flown—
>
> (1) Over the congested parts of cities, towns, or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1,000 feet.
>
> (2) Elsewhere at a height less than 500 feet, except where indispensable to an industrial flying operation."[9]

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[8] United States Code, Title 49, sec. 180.

[9] 1928 U. S. Aviation Reports, p. 405. The above regulation was amended on Sept. 19, 1930, to provide as follows:

"The minimum safe altitudes of flight in taking off or landing and while flying over the property of another in taking off or landing, are those at which such flights by aircraft may be made without being in dangerous proximity to persons or property on the land or water beneath, or unsafe to the aircraft.

"Minimum safe altitudes of flight over congested parts of cities, towns or settlements are those sufficient to permit of a reasonably safe emergency landing, but in no case less than 1,000 feet.

"Minimum safe altitudes of flight in all other cases shall not be less than 500 feet."

See 1930 U. S. Aviation Reports, 324.

The regulation in existence prior to the above amendment was the regulation considered by the court in *Smith v. New England Aircraft Co.* (Mass.) 170 N. E. 385 (1930) and *Swetland v. Curtiss Airports*, 41 Fed. (2) 929 (1930). It has been suggested that inasmuch as the amended regulation makes altitudes under 500 feet used in landing and taking off a part of the navigable air space, the basis of the above decisions has disappeared. See Report of Standing Committee on Aeronautical Law of American Bar Association in the Report of that association for 1931, at p. 320. This contention seems untenable. The courts in the above cases took the position that although the regulation permitted flights under 500 feet for the purpose of landing and taking off, such flights might nevertheless constitute a violation of the legal rights of the landowner.

It should be observed that the Federal Air Commerce Act does not attempt to define the right of the owner of land in the air space above that land. It provides that the navigable air space (that is the air space above 500 feet, or 1,000 feet if over congested areas) shall be subject to a public right of freedom of inter state and foreign air navigation.[10]

The first important decision in this country involving the right of flight over private property was that of *Smith v. New England Aircraft Co.*[11] In this case the plaintiff was the owner of a large estate in Massachusetts called "Lordvale." The defendant, New England Aircraft Co., engaged in the operation of an airport upon adjoining land. The planes of the defendants flew over the plaintiff's uninhabited land as low as 100 feet, but flights over the plaintiff's house were, with a few exceptions, no lower than 500 feet. Plaintiff did not seriously contend that the noise from the flights constituted a nuisance, but sought to enjoin the flights on the ground that he was the owner of the air space above his land, and that the invasion of this air space by the planes of defendants was unlawful. He cited, of course, the famous maxim.

In a decision by Chief Justice Rugg, the Court held that the Federal Air Commerce Act and the regulations made pursuant thereto authorize interstate flight over private property at altitudes greater than 500 feet, that the State law fixing the altitude for intrastate flights has a similar effect, that these provisions do not constitute a violation of the "due process" clause, that true, there may be a taking of property, but insofar as the federal regulations are concerned. It is a lawful exercise of the power to regulate interstate commerce, and insofar as the state regulations are concerned, it is a lawful exercise of the police power. The Court further held that flights as low as 100 feet over the plaintiff's property constituted a trespass. In arriving at this conclusion the Court applied the test of "possible effective possession."

[10] The right of flight over private property in Great Britain is fixed by the British Air Navigation Act of 1920, as follows:

"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; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered. "

Public General Acts, 10 and 11, George V ch. 80, p. 540.

[11] Note 1, *supra*.

If the flight was through air space which might, in the future, be used by the owner of the land, then the flight constituted a trespass. The Court found, however, that these flights were not of such frequency and did not do such substantial injury as to call for equitable relief.

In the *Smith* case, Chief Justice Rugg used the following language:

> "For the purpose of this decision, we assume that private ownership of air space extends to all reasonable heights above the underlying land."

We therefore find that the Massachusetts Court recognizes ownership of air space to a reasonable height above the land, that the Federal Air Commerce Act makes lawful interstate flights over private property at an altitude of greater than 500 feet, which fact may constitute a taking of private property without compensation, but that it is not such a taking as would be in violation of the Fifth Amendment to the Constitution, that flights as low as 100 feet constitute a trespass and that in determining what constitutes a trespass the test of "possible effective possession" is applied.

The next important case was that of *Swetland v. Curtiss Airports,*[12] a decision by the Federal District Court for the Northern District of Ohio. The plaintiff owned a country estate on the outskirts of Cleveland, Ohio. He had lived on the estate for a considerable period of time and it represented a large investment. The defendant purchased adjoining land for the purpose of establishing an airport. Plaintiff sought to enjoin the defendant on the ground of alleged trespass and the maintenance of a nuisance.

In regard to the maintenance of a nuisance, the Court held that an airport and flying school is not a nuisance *per se,* that there was not sufficient noise from the planes to constitute a nuisance, but that the defendant should be enjoined from stirring up dust that blew over plaintiff's property, and from distributing circulars that fell on plaintiff's property

The Court then examined the question of whether the flights by defendant over the plaintiff's property constituted a trespass. He reviewed with great thoroughness the "*Cujus est solum*" doctrine, pointing out that the maxim, when properly interpreted, may not apply upwards to an indefinite height, but only to the lower air spaces. The Court then referred to Section 10 of the Federal Air Commerce Act, which had been made the law of the State of Ohio by legislative act. The Court apparently concluded that the

[12] Note 1, *supra.*

federal and state acts authorized flight over private property at an altitude of more than 500 feet. Flights by the defendant over the plaintiff's property at an altitude of less than 500 feet were enjoined.

The plaintiff appealed from so much of the decree of the lower court as refused to enjoin the use of the property as an airport, and from so much of the decree as refused to enjoin flights over plaintiff's property at altitudes greater than 500 feet. The defendant appealed from that part of the decree which enjoined the operation of planes of the defendant over plaintiff's property at altitudes less than 500 feet. The author views the decision of the Circuit Court of Appeals for the Sixth Circuit as the most important that has been rendered upon the question of the right of flight over private property and accordingly quotes at some length from the opinion.[18]

The Court, after referring to the doctrine of *"Cujus est solum"* and the early cases involving overhanging branches, eaves, etc., disposed of the maxim and these authorities with the following statement.

> "But none of those cases nor any of the later ones undertakes to define the term *'ad coelum,'* if indeed that term is one of constancy or could be defined. In every case in which it is to be found it was used in connection with occurrences common to the era, such as overhanging branches or eaves. These decisions are relied upon to define the rights of the new and rapidly growing business of aviation. This cannot be done consistently with the traditional policy of the courts to adapt the law to the economic and social needs of the times. The Ohio decisions are likewise inconclusive, and, lacking any controlling precedent, *we resort to a consideration of the plaintiff's rights in relation to the necessities of the period.*"

For the Court's resolution "to resort to a consideration of the plaintiff's rights in relation to the necessities of the period," there should be nothing but commendation. It is encouraging to find a court refusing to be bound by precedents which have no real application to flight by aircraft.

The Court then proceeded to set forth its views as to whether flight through the air space over the plaintiff's land constituted a trespass. The Court said.

> "From that point of view we cannot hold that in every case it is a trespass against the owner of the soil to fly an airplane through the air space overlying the surface. This does not mean that the owner of the surface has no

[18] *Swetland et al. v. Curtis Airports Corporation et al.*, 55 Fed. (2) 201 (1932).

> right at all in the air space above his land. He has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface. See *Portsmouth Co. v. U S.*, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287. As to the upper stratum which he may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. His remedy for this latter use, we think, is an action for nuisance and not trespass. We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air space for himself. That height is to be determined upon the particular facts of each case. It is sufficient for this case that the flying of the defendants over the plaintiff's property was not within the zone of such expected use."

It will be observed that the Court held that the owner of land has the dominant right of occupancy of air space for purposes incident to the owner's use and enjoyment of the surface. In this all authorities agree. Further it will be observed that the Court divided the air into strata. The court indicated by inference that an invasion of the lower stratum of air space may constitute a trespass, particularly if there is a continuing invasion of that lower stratum. However, the owner of the soil can only object to flights in the upper stratum when the use of the upper stratum interferes with his enjoyment of the surface, and in such case his remedy is for nuisance and not in trespass. The height of the lower stratum is to be fixed in each case, depending upon the particular circumstances, on the basis of the height that the surface owner may reasonably expect to occupy It will be recalled that the Court in *Smith v. New England Aircraft Co.* applied the test of "possible effective possession" in determining whether flights constituted trespasses. The Appellate Court in the *Swetland* case adopted a similar test. It is submitted that this is not the proper criterion to apply in determining the lawfulness of flight. The test should be, "Does the flight interfere with the use made of the land at the time the flight is made?"—and not, "Does the flight interfere with the use to which the land may be put in the future?"

The Circuit Court of Appeals in the *Swetland* case does not specifically recognize an ownership in the landowner of air space in the lower stratum. However, the Court does imply that an action of trespass would in some instances be available to the land-

owner for invasions of the lower stratum. The Court clearly takes the position that there is no ownership of space in the upper stratum, but that the landowner may nevertheless enjoin the use of that upper stratum when it interferes with his enjoyment of the surface.

The Court further held that the question was unaffected by the federal or state regulations fixing the minimum altitudes of flight. The Court said.

> "We think the question is unaffected by the regulation promulgated by the Department of Commerce, under the Air Commerce Act of 1926 (49 U. S. C. A., sec. 171 *et seq.*), and adopted by the State of Ohio, requiring aeronauts to fly in rural sections at a height not less than 500 feet above the surface, for in our view that regulation does not determine the rights of the surface owner, either as to trespass or nuisance."

We, therefore, see that the Circuit Court rejected the position taken by the Massachusetts Court in the *Smith* case and by the lower court in the *Swetland* case, that the Federal Air Commerce Act and state legislation adopting the act makes lawful, as between the landowner and the persons flying over the land, flight over uncongested areas at an altitude of more than 500 feet.[14]

The Standing Committee on Aeronautical Law of the American Bar Association made a most interesting report during the past year.[15] Accompanying this report was a proposed Uniform Aeronautical Code.[16] This code differs in several important respects from the Uniform State Law for Aeronautics heretofore referred to. The committee rejects section 3 of the old uniform state law which declares that the ownership of the space above the lands and waters is vested in the owners of the surface beneath. In this connection the committee said.

> "The committee unanimously believes, in view of exhaustive studies made not only by this committee and its predecessors, but by other eminent students of aviation law, and particularly by able counsel in the two important litigated cases arising since the approval of the Uniform Aeronautics Act, that the statement as to ownership of air space proclaims a legal untruth.
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> "No decided case has ever held that 'air space' was

[14] The Circuit Court also held that the operation of the airport by the defendant deprived the plaintiff of the use and enjoyment of his property. The Court therefore enjoined the operation of the airport on the ground that it constituted a nuisance.

[15] Report of American Bar Association for 1931, p. 317.

[16] Report of American Bar Association for 1931, p. 328.

> 'owned' by the landowner to unlimited heights. Indications of such a legal belief appear by way of dicta only It is manifest that prior to the use of aircraft and prior to the use of upper airspace, there could have been no authoritative pronouncement on this subject."

The committee takes the position that although there is no ownership in the air space above the land, the owner of the land is entitled to prevent any use of that air space which interferes with the existing use of the surface or is imminently dangerous to persons or property lawfully on the surface. If the committee's view is adopted, an action of trespass would not lie by an owner of land for the invasion of air space above that land. The owner's remedy would be in the nature of a suit to enjoin a nuisance, or to recover damages caused by the nuisance. If the flight substantially interfered with the use or enjoyment of the land, then the owner would be entitled to relief. However, there must be a showing that there has been a real interference with the use or enjoyment of the land.

The report of the committee has been subjected to a very sharp attack in an article written by Professor James J. Hayden.[17] He contends that the law has recognized for centuries that the surface owner is also the owner of the air space above the surface; that the only decisions which we have had upon the subject, to-wit, the *Smith* and the *Swetland* cases, recognize an ownership in the air space. Professor Hayden feels that the industry would make a great mistake to sponsor any legislation which repudiates the right of ownership in the air space. He says:

> "In such circumstances, why should this industry deliberately cultivate the ill will and antagonism of every landowner in the nation by a legalistic denial of a principle of law which has been considered sound (whether rightly or wrongly does not matter) for more than five hundred years? Why should an industrial infant which has been coddled and petted and assisted in every conceivable fashion by an indulgent people turn on its benefactors and attempt to take away something which has been recognized by common consent as an invaluable incident to the ownership of land?"

The American Law Institute, in its Tentative Draft of the Restatement of the Law of Torts, recognizes that the surface owner is also the owner of the air space above the surface. Sec. 1002 provides:

[17] American Bar Association Journal, February, 1932.

"A trespass on land may be committed by entering or remaining
(a) on the surface of the earth, or
(b) beneath the surface thereof, or
(c) above the surface thereof."

The comment on clause (c) of sec. 1002 reads:

"An unprivileged entry or remaining in the space above the surface of the earth, at whatever height above the surface, is a trespass.

"A temporary invasion of the air space by aircraft, while traveling for a legitimate purpose at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air column above it, is privileged."

And so the battle wages. We have on the one hand the *Smith* and *Swetland* cases, the old Uniform Law, and the Restatement of the American Law Institute, indicating that the owner of the surface is the owner of the air space above that surface—at least to a reasonable height, but at the same time recognizing that that air space is subject to a privileged entry. On the other hand, we have the Aeronautical Committee of the American Bar Association contending that there is no ownership in air space, and that the surface owner will be amply protected if he is given the right to recover damages and to enjoin flights which interfere with the use and enjoyment of his land.

The author believes the preferable view to be that the owner of land is not the owner of the air space above that land. The owner of land should be given the right to make use of the air space above it whenever he so desires. He should be entitled to prevent the use of that air space by another if its use interferes with his enjoyment of the land and to recover damages for the interference. All of this can be accomplished, however, without recognizing an ownership of air space.

It appears that a recognition of ownership in air space may lead to difficulties. Recognizing that if ownership in air space is admitted, the rights of the owner must be limited in order to allow lawful flight, our courts are apt to establish some bad law in defining the extent of ownership. Thus in the *Smith* and *Swetland* cases we found the courts struggling to define the extent of ownership in air space and concluding that the lawfulness of a flight should be determined by the use that the landowner might reasonably be expected to make of his land in the future. Such difficulties would be avoided if we denied air space ownership, because

the owner of the land would then be entitled to a remedy only if the flight interefered with the *existing* use of the land.

However, it is the author's opinion that whichever theory is adopted, substantially the same result will be achieved. If the owner of the surface is also the owner of the air space to an unlimited height, the courts will nevertheless subject his ownership to a right of flight. If the courts recognize ownership to a limited height they will either subject his ownership to a right of flight or will limit the height of his ownership so that flight can go on when it does not interfere with the use and enjoyment of the surface. Although there is some confusion under the existing cases as to the extent of the right of flight, it is probable that ultimately the determining factor will be: "Does the flight interfere with the existing use of the surface?" If it does not interfere, then the entry will be privileged. On the other hand, if we deny ownership in air space, the criterion in determining the lawfulness of a flight through that space is whether or not it interferes with the existing use of the land. Under either theory courts will protect the owner of the land if the flight interferes with his use or enjoyment of it.

Of course, if we recognize ownership in air space, then an action of trespass will lie for an unprivileged, intentional entry into that air space, even though no damage is actually suffered by the landowner. To this extent the landowner's remedy differs from his remedy in case ownership is denied. Under the latter theory he must show an interference with his use and enjoyment in order to have a standing in court, something more than a technical invasion of the air space. This difference would appear unimportant, however, except to litigously inclined persons who enjoy litigation even when there is nothing to litigate.[18]

However, strenuous objection should be made to the position taken by the Court in the *Smith* case and by the Lower Court in the *Swetland* case that the Federal Air Commerce Act makes lawful any flight over 500 feet. It is doubtful if Congress intended by the Air Commerce Act to determine the rights, as between an owner of property and a person flying over that property If the Air Commerce Act is capable of that construction, it should be amended.

[18] In a note appearing in the JOURNAL OF AIR LAW for April, 1932, it is suggested at page 302 that in instances where there are repeated flights over private property by different operators, an action for nuisance might not lie because the flight of no one operator would cause sufficient annoyance to constitute a nuisance. However, it is unlikely that such a situation would arise unless there is an airport in the near vicinity. In such instances the landowner might secure relief by proceeding against the airport operator. In any event, it is difficult to see how the landowner, under such circumstances, would secure greater protection from an action of trespass.

It is obviously impracticable to attempt to fix a definite height above which all flight is lawful. If any flight above 500 feet is made lawful, an aviator could go above one's house, circle at an altitude of 550 feet for days on end and no legal relief could be secured. The Circuit Court of Appeals in the *Swetland* case rejected the contention that the federal act attempted to define the right of flight over private property and it is to be hoped that the courts hereafter will take a similar position. It is impossible to fix an arbitrary height which could be applied properly in all cases. Whether a flight is or is not lawful as between the landowner and aircraft operator must depend upon the particular circumstances in the case and whether we admit ownership in air space or deny it, the criterion of whether the flight is permissible will always resolve itself into a question of interference with the use or enjoyment of the underlying surface.

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In connection with the right of flight over private property, it would seem advisable to consider also the liability of operators of aircraft for injury caused to persons and property on the ground. If a plane crashes into a house should the operator of the plane be absolutely liable, regardless of whether he has been guilty of negligence? Should there be a presumption of negligence which he may overcome by proper proof, or is the burden upon the owner of the house to prove that the operator of the plane was guilty of negligence? The old Uniform State Law for Aeronautics heretofore referred to contains the following provision.

> "Sec. 5. 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. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. "[10]

By this section the *owner* of an aircraft is made absolutely liable for injuries to persons or property on the ground. On the other hand, an *operator* who is not the owner or lessee of the aircraft is liable only for the consequences of his own negligence. Apparently

[10] See Vol 9, UNIFORM LAWS ANNOTATED, p. 17.

the thought underlying Section 5 is that an airplane being a dangerous instrumentality, a duty should be placed upon its owner to see that it does no damage. The theory underlying Section 5 is similar to that embodied in the famous case of *Rylands v. Fletcher*[20]

In view of the importance of air transportation in the economic life of the nation there is little justification for the position that an aircraft is a dangerous instrumentality, and that the owner of an aircraft should be held absolutely liable for the damage which it causes. It seems clear that liability should attach by reason of the operation of the aircraft, rather than by reason of its ownership. A person should not be penalized for owning an aircraft, but the operator of an aircraft should be penalized if it is not properly operated. Under Section 5 of the old Uniform Act, if a thief stole a plane, and, while flying it, caused damage to persons or property on the ground, the owner of the aircraft would nevertheless be liable for the damage caused. Such an illustration should demonstrate conclusively that the theory underlying Section 5 is erroneous. Liability should depend upon operation and not upon ownership.

The new Uniform Aeronautical Code submitted by the Aeronautical Committee of the American Bar Association contains the following provision on damage to persons and property on the ground.

> "Section 6. Proof of injury inflicted to persons or property on the ground by the operation of any aircraft, or by objects falling or thrown therefrom, shall be *prima facie* evidence of negligence on the part of the operator of such aircraft in reference to such injury "[21]

It will be observed that under this provision liability attaches to the operator of the aircraft and not to its owner. It also will be noticed that Section 6 does not provide for absolute liability, but that proof of injury is simply made *prima facie* evidence of negligence on the part of the operator. In other words, when damage has been done to persons or property on the ground, there is a legal presumption that the operator of the aircraft causing the injury was guilty of negligence. However, if this presumption is rebutted, it will then be necessary for the injured person to make proof of actual negligence.

Section 6 of the new Uniform Aeronautical Code is a great improvement over Section 5 of the old Uniform Act insofar as it

[20] L. R. 3 H. L. 330 (1868).
[21] Report of American Bar Association for 1931, p. 329.

attaches liability to the operation of a plane rather than to its ownership. On the other hand, when persons or property on the ground are damaged by reason of aircraft, there should be more than a presumption that the operator of the aircraft has been guilty of negligence. If aircraft are to be given the privilege of flying over private property without the consent of the landowner, it would seem that in consideration of this privilege the operator of that aircraft should be made absolutely liable for all damage that he causes to persons or property beneath.

Suppose a plane, without negligence on the part of the operator, is caught in a severe storm and crashes, causing injury to persons or property on the ground. Should it be an answer that the operator had used due care? If we are to subject private property to the right of flight over it, it is only fair that the person exercising that privilege should be made liable for all damage done to persons or property on the ground, whether that damage is caused by his negligent acts or otherwise.[22]

It would seem, therefore, that Section 6 of the new Aeronautical Code should afford greater protection to the landowner for injury to his person or property than the mere creation of a presumption of negligence on the part of the aircraft operator causing the injury Liability should attach to the *operator* as contrasted with the *owner*, but the liability of the operator should be absolute in character in the absence of contributory negligence on the part of the injured party

WILLIAM M. ALLEN.*

[22] Under sec. 1011 of the Restatement of the Law of Torts by the American Law Institute (Tentative Draft No. 7) an operator of an aircraft is absolutely liable for all damage caused to persons or property on the surface, as defined by said section.

*One of a series of lectures on air law given at the Law School of the University of Washington. Mr. Allen, a member of the Seattle Bar, is counsel for the United Air Lines and the affiliated Boening Companies.