RECENT CASES

Air Law—Flight of Aircraft—Rights of Landowner and Aviator—[Federal].—The plaintiff's land was adjacent to an airport used by defendant's aircraft. The plaintiff, alleging that despite his protests flights were made at heights ranging from 5 to 175 feet above the surface of his land, sued in trespass for $90,000 in damages and sought injunctive relief to prevent the defendant from acquiring an easement. No specific damages were alleged. From a decree sustaining the defendant's demurrer, the plaintiff appealed. *Held*, affirmed. Flights by aircraft are not an enjoinable trespass unless they result in interference with the landowner's beneficial use of his land. The plaintiff was entitled at most to nominal damages. *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (C.C.A. 9th 1936); *cert.* denied, Feb. 1, 1937.

The flights in question are the lowest that an aviation company has been permitted to make repeatedly over private land. *Cf. Johnson v. Curtiss Airplane Co.*, 1928 U.S. Av. Rep. 42 (Minn. Dist. Ct. 1923); *Swetland v. Curtiss Airports Corp.*, 41 F. (2d) 929 (D.C. Ohio 1930), modified, 55 F. (2d) 201 (C.C.A. 6th 1932); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Tucker v. United Air Lines*, Supp. 1935 U.S. Av. Rep (D.C. Iowa 1935), unreported, facts digested and decree set out in full in 6 J. of Av. Law 622 (1935). *Cf. Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). In making this extension of the protection granted to the aviation interests, the court followed the judicial tendency to grant or deny injunctive relief by use of the nuisance formula. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Gay v. Taylor*, 1934 U.S. Av. Rep. 146 (Ct. of C.P. Pa. 1932). See Green, Trespass by Airplane, 7 J. of Air Law 624 (1936). This formula, which has been advocated by the aviation interests, denies the landowner's ownership of airspace and allows an action only where there has been an "unreasonable interference" with the enjoyment of the surface. Report of Am. Bar Ass'n Committee on Aeronautics, 1933 U.S. Av. R. 259; the Uniform Aeronautical Code sponsored by the Committee has been enacted in Georgia, Ga. L. 1933, act no. 206, p. 99; 36 Col. L. Rev. 483. See especially Sweeney, Adjusting the Conflicting Interests of Landowner and Aviator, 3 J. of Air Law 329, 531 (1932); *cf.* Thurston, Trespass to Air Space, Harvard Legal Essays 501 (1934). On the other hand, the Restatement of Torts has formulated a rule of trespass which affirms the landowner's ownership of a column of airspace subject, however, to a privilege of reasonable flight. Rest., Torts §§ 158, 159, 194 (1934). See Thurston, Trespass to Air Space, Harvard Legal Essays 501 (1934); *cf.* Wherry and Condon, Air Travel and Trespass, 68 U.S.L.Rev. 78 (1934). A rule of trespass imposing liability for invasion of the landowner's zone of effective possession has also been suggested by courts and commentators who, however, have often failed to make clear whether they mean zone of actual or possible possession. Moorman, J., in *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201, 203 (C.C.A. 6th 1932); Eubank, Doctrine of Airspace Zone of Effective Possession, 12 B.U.L.Rev. 414, 426 (1931); Pollock, Torts 362 (13th ed. 1929); see also Ball, Division into Horizontal Strata of Land above the Surface, 39 Yale L. J. 616 (1930). Probably a court's decision will not be significantly

affected by the use of one rule rather than the other since each is sufficiently vague to enable a court to carry out its own notions of policy. However, the burden of proof will probably vary with the rule applied: the Restatement rule imposing upon the defendant aviator the burden of justifying his flight as reasonable, the rule of effective possession imposing upon the plaintiff the burden of showing an invasion of the zone of effective possession, the nuisance rule imposing upon the plaintiff the burden of showing the flight "unreasonable." Thurston, Trespass to Air Space, Harvard Legal Essays 501, 503 (1934); Green, Trespass by Airplane, 31 Ill. L. Rev. 499, 504 (1936); 36 Col. L. Rev. 483 (1936).

The application of any one of these standards will afford legal justification for ordinary flights between air terminals and will prevent captious landowners from hamstringing the development of the aviation industry. But the difficult problem is that brought into relief by the instant case—the determination of liability for repeated low flights over private land in taking off or landing at an airport. On the one hand there is the interest of the owner of land adjacent to an airport whose land, especially if located in an actual or potential residential district, may depreciate in value both because of the proximity of the airport and because of flights made over his land by ascending and descending aircraft. Rau, Airports versus Subdivisions, 6 J. of Land and Pub. Ut. Econ. 205 (1930); Hine, Home Versus Aeroplane, 16 A.B.A.J. 217 (1930). On the other hand, there is the dilemma of the aviation industry which, if compelled to purchase or lease outright enough land to furnish an aerial stairway over its own land for ascending and descending aircraft, might be forced to locate at inconvenient distances from urban centers. Newman, Airports and a Way by Necessity, 1 Air L. Rev. 458 (1930); 36 Col. L. Rev. 483. Moreover, it is to be noted that in some situations the location of an airport will have no effect on or even enhance the value of land. Hubbard, McClintock and Williams, Airports 164 (Harvard City Planning Series I. 1930). It is questionable whether a court by the use of the standards discussed above will be able to adjust these conflicting interests effectively. Courts often achieve a permanent solution only by enjoining the flights in question since, in the absence of an eminent domain statute, the plaintiff has not been required to agree to future continuance of the complained-of-activity as a price of recovery for permanent depreciation. Walsh, Equity 288, 296 (1930). Even where the plaintiff is denied the right to damages or an injunction, the solution is not permanent and the aviation company is insecure since the liability of the aviation company may change with changes in the use of the land. Walsh, Equity 192 (1930); *cf. Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). Moreover, courts do not effectively prevent disputes since they neither supervise the location of airports nor act until there is a clash of interests. See Borchard, Justiciability, 4 Univ. Chi. L. Rev. 1 (1936).

Possibly a more effective solution would be promoted by the creation of state or federal administrative boards having both the power to condemn airspace rights and the power to supervise the location of airports. It is noteworthy that in some states airport sites must be licensed or approved by state boards as a prerequisite to operation. Grover, Legal Basis of Municipal Airports, 5 J. of Air Law 410, 425 (1934). Experience in other conflicts between landowners and transportation interests causing depreciation of land values suggests that long continued litigation may be the alternative of compensation for the landowner. See *Galivay v. Metrop. El R. Co.*, 128 N.Y. 1322, 28 N.E. 479 (1891); *Paffenbeim v. Metrop. El. R. Co.*, 128 N.Y. 426, 28 N.E. 518

(1891); Walsh, Equity 187 (1930). A board could require that new airports be located at a point consistent with the public interest and aviation needs, where there was least interference with the actual or prospective use of the land. If, nevertheless, there was depreciation the board could decree, at the petition of either the landowner or the aviation company, compensation for "airspace rights" in return for which the landowner would recognize the right of the airport to operate. See Bell, Air Rights, 23 Ill. L. Rev. 250 (1928). Although any attempt to determine the permanent depreciation of undeveloped land would encounter serious practical difficulties, adjustment of the conflicting interests would probably be more equitable than that achieved at present by the nuisance approach. In insuring the aviation interests against future complaints by the landowner, and against future use obstructing the airways, the scheme suggested would enable aviation interests to invest with security and thus would achieve one of the purposes of the zoning acts passed in some states. See Report of the Commission on Airport Zoning and Eminent Domain, 2 Air Commerce Bull. 325 (1931); Grover, Legal Basis of Municipal Airports, 5 J. of Air Law 410 (1934); Elliott, Unobstructed Airports Approaches, 3 J. of Air Law 207 (1932). In addition, the scheme would permit of compensation whenever aviation needs caused a serious invasion of the landowner's interests. Thus, the damage caused by an expanding industry could be shifted from a single landowner to the community in the form of higher airplane rates. With respect to airports already located this board could be set in motion at the request of either the landowner or aviation interests for condemnation of airspace rights. See 2 Lewis, Eminent Domain §§ 511–14 (3d ed. 1909); 1 *ibid.* § 408; Blair, Federal Condemnation Proceedings, 41 Harv. L. Rev. 29 (1927). To attain uniformity of regulation and a co-ordinated airport system, it would probably be desirable to have this board set up by the federal government, under the commerce clause, perhaps under the jurisdiction of the Department of Air Commerce. For a discussion of the constitutionality of federal control, see Bogert, Problems in Aviation Law, 6 Corn. L. Q. 271 (1921); Grover, Legal Bases of Municipal Airports, 5 J. of Air Law 410, 432 (1934).

Although the scheme suggested will face many practical difficulties, if intelligently administered it might produce the following benefits: prevention of litigation, more equitable distribution of damage to realty interests inevitably caused by the development of the aviation industry and promotion of the development of a co-ordinated aviation system.

Bankruptcy—Provability of Bank Stockholder's Liability before Assessment—[Federal].—The plaintiff, a receiver for a national bank, sued the defendant stockholder on an assessment made in 1934. Three years before, the bank had been declared insolvent and closed to business. The defense was that this debt had been discharged by the defendant's discharge in bankruptcy in 1933. Even though no assessment had at that time been made, these shares of stock had been listed as a liability (as well as included in the defendant's schedule of assets). *Held*, for the plaintiff. Liability on a stock assessment is statutory, not contractual. Since the liability of a stockholder is contingent until an actual assessment is made, the bank did not have a provable claim in bankruptcy. As there is discharge only from provable debts, this obligation was not discharged. *Slaughter v. Brown*, 16 F. Supp. 494 (N.J. 1935); aff'd,