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THE AIRPORT AS A NUISANCE

EDWARD C. SWEENEY*

Whether the operation of an airport constitutes a private nuisance to nearby residences is a question that of necessity depends on the peculiar facts involved in each case. Judge Rugg in *Smith v. New England Aircraft Company* averred:¹

"The law affords no rigid rule to be used as a test in all instances of alleged nuisance. It is elastic. It requires only that which is fair and reasonable in all the circumstances."

Probably no legal formulae can be devised which may be so readily applied to particular airports that all future litigation will be avoided. Already there have been seven or more suits involving this question,² and it is fast becoming one of the most acute problems confronting the growing industry. The latest case is *Gay et al. v. Taylor et al.*,³ a decision of the court of Common Pleas of Chester County, Pennsylvania, enjoining the entire operation of the airport involved. The ultimate holding of the case and much of its reasoning parallels that of the Circuit Court of Appeals in *Sweetland v. Curtiss Airport Corp.*⁴

In the *Gay* case the defendants operated "Sky Haven Airport," which was situated five miles northeast of West Chester and two miles southwest of Grafton, Pennsylvania. The airport was "I" shaped, being approximately 3,000 feet north and south, and 1,800 feet east and west. The hangars backed up against the property of the plaintiff Gay and were within 400 feet of his home. The home of the plaintiff Mirkil was a little further from the boundary of the field and adjoined a less active part of the field, i. e., a portion not used to repair or warm up planes. The buildings of the third plaintiff, the Rush Hospital for Consumption and

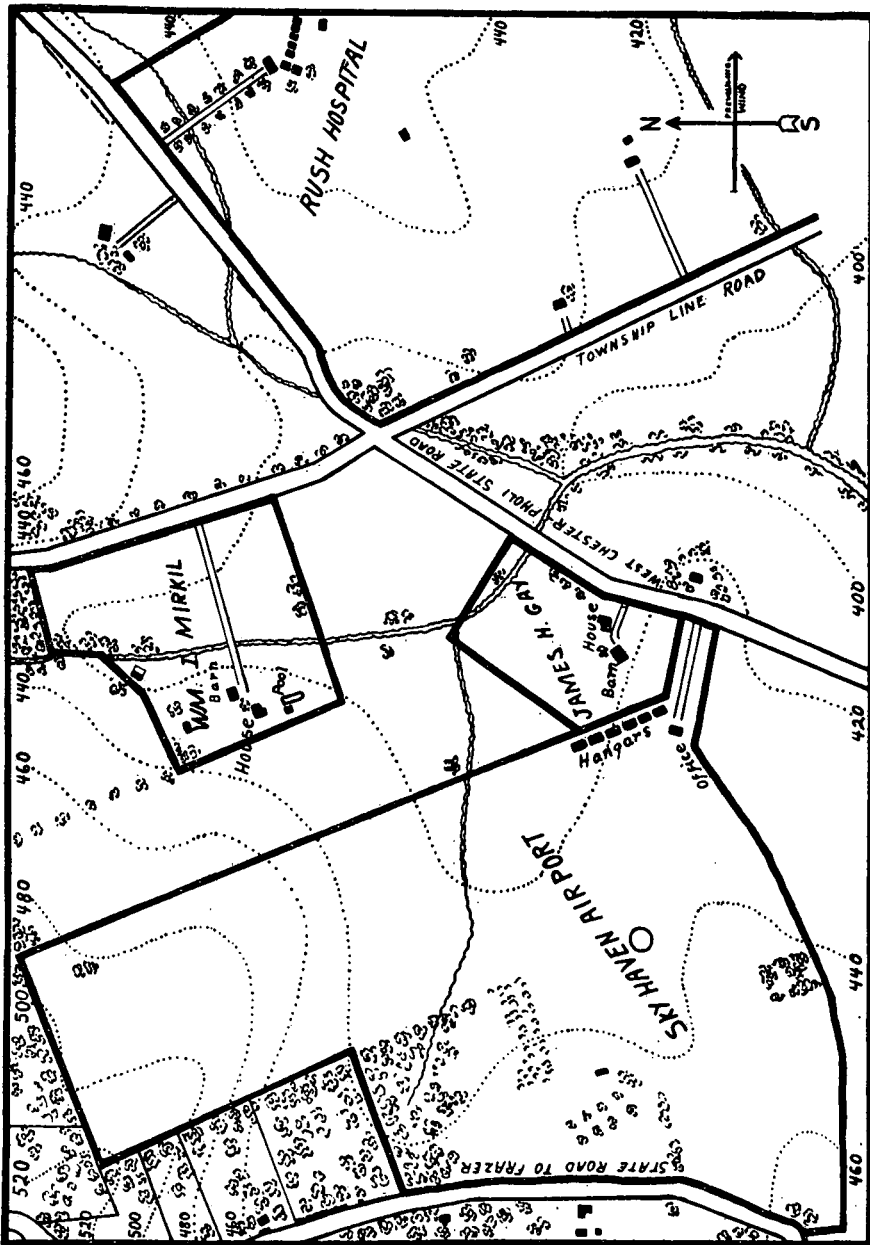
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1. 270 Mass. 511, 170 N. E. 385, at page 388, 69 A. L. R. 316, 1930 U. S. Av. R. 1 (1930).

2. *Commonwealth v. Nevin and Smith* (Pa. Quart. Sess., 1922) 2 Dist. & Co. Rep. 241, 1928 U. S. Av. R. 39, *Glatt v. Page*, District Court, 3d Jud. Dist. of Neb., Docket 93-115 (1928); *Smith v. New England Aircraft Co.*, cit. note 1; *Sweetland v. Curtiss Airports Corp.* (D. C., N. D., Ohio) 41 F. (2d) 929, 1930 U. S. Av. R. 21 (1930) (C. C. A. 6th), 55 F. (2d) 201, 1932 U. S. Av. R. 1 (1931); *Meloy v. City of Santa Monica*, 70 Cal. App. Dec. 179, 12 P. (2d) 1072, 1932 U. S. Av. R. 17 (1932); *Thrasher v. City of Atlanta, Ga.*, 166 S. E. 856 (1932); *Gay v. Taylor*, see note 3.

3. Common Pleas, Chester County, Penn., opinions handed down by Judge Windle on September 8, 1932 (reported in 232 C. C. H. 2081) and on December 27, 1932.

4. Cit. note 2.



SKY HAVEN AIRPORT AND ADJOINING PROPERTIES—GAY V. TAYLOR

Scale 1"=700'

Allied Diseases, is situated approximately one half mile from the field. The accompanying diagram shows the nature of the terrain and the relationship of the various properties and buildings which so largely determine the severity of the types of annoyances that airports tend to create.⁵ The plaintiffs alleged that the airport should be enjoined on the ground that its operation in a residential section, first, constituted a private nuisance due to the noise, dust, congregation of crowds and apprehension of danger, and secondly, resulted in continuing trespasses by flying over the plaintiffs' properties. The decision of the Nisi Prius Court rendered September 8, 1932, by Judge Windle, (1) denied that an airport was a nuisance *per se*; (2) declared that the license granted to the airport by the Pennsylvania State Aeronautics Commission did not pretend to, nor could, authorize a private nuisance in its operation; (3) recognized as "a matter of common knowledge" that "no matter how careful pilots and mechanics may be, planes do develop engine or other trouble and do get out of control and crash to the ground"; (4) concluded that the evidence established the above elements of nuisance—noise, dust, congregation of crowds, and apprehension of danger; (5) found it unnecessary to decide the question of trespass; and (6) held, considering all the above elements together, that the operation of Sky Haven Airport "constitutes a private nuisance against which plaintiffs are entitled to equitable relief by injunction." Exceptions to this adjudication were filed, and on December 27, 1932, the Nisi Prius court handed down a second opinion, dismissing the exceptions, and making clear that the court had enjoined the operation of the airport *altogether* because "an airport cannot be operated on the property in question without being a nuisance to these complainants."

An analysis of the evidence is essential to appreciate the basis for the above decision which, on first impression, appears unduly severe. An appreciable amount of apparently uncontradicted evidence was massed to substantiate each ground alleged by the plaintiffs to constitute the nuisance. The noise from low flying planes in take-offs and landings was described as "terrific," so loud as "to interfere with conversation and the use of the telephone," and as frightening children. Prevailing winds are westerly⁶ and it was asserted that, in landing, planes came in midway between the Gay and Mirkil dwellings, which are about 1,400 feet apart, and

5. The sketch was prepared from a blue print map and aerial photograph furnished the writer by Mr. Hazleton Mirkil, counsel for the plaintiffs, and from the Government Topographic map.

6. From a letter to the writer from Mr. Hazleton Mirkil, counsel for the plaintiffs.

"pass the Gay porch about on the level of the eyes of one sitting thereon." Mirkil testified that aircraft "frequently passed about fifty feet over his house" and swooped "down close over his guests using the swimming pool and shooting trap." The Rush Hospital complained of planes "in full flight" flying low over its rest rooms, disturbing and upsetting its patients, after requests not to do so. The loud speaker "installed in the office building on the landing field" was another source of complaint. Dust, the second ground of complaint, was found "a real annoyance." It came not from the landing field which was well sodded, but from the dirt driveway leading to the landing field, and was raised by automobile traffic and carried by wind and propeller blast into the Gay dwelling. In the second opinion, the court commented upon the fact that no effort was made to eliminate the dust after complaint was made. Attraction of people to the airport was considered as a separate element. "The overrunning of the Gay property by the crowds," the use of their driveway for parking and turning cars, and requests to use the telephone were declared "most annoying and disturbing." The plaintiffs' apprehension of danger arose from the low flying above described, and to show that their fears were well grounded it was shown that a "cushion and canvas cover dropped from one [of the planes] at an elevation of 3,000 feet." The court further recognized that planes "get out of control and crash to the ground" no matter how careful the pilot and mechanic may be—"a matter of common knowledge."

The defendant's refutation of the plaintiffs' testimony was obviously weak. The court stated that "the fact that the occurrences testified to by the plaintiff had actually taken place was not denied and must be considered as true." The testimony showed only that the defendant and his pilot were not guilty of the flying complained of, that he had given orders to his employees not to fly over the hospital or do certain things objected to, but that he had no control over privately owned planes who used his airport and who "flew as they pleased." Throughout the opinion runs the impression that the court thought that the airport had been run in a careless, slipshod manner. The lack of consideration for the rights of the plaintiffs is evidenced (1) by leaving the auto approach in a dusty condition; (2) by having the hangars on the portion of the field nearest to the Gay home; (3) by not providing a telephone at the airport which would have put an end to the constant requests to use the Gay phone; (4) in not controlling by field rules, or other-

wise, intentional swooping down over the Mirkil property to the annoyance of his guests.

When airports are found to be actionable nuisances, equitable relief may take either the form of closing the airport entirely, or else singling out the particular elements creating the nuisance, enjoining them in particular, but allowing the airport to continue, if possible, in compliance with specified restrictions. This last method is sometimes referred to as the "partial injunction method" and has been increasingly employed by the courts in dealing with annoyance coming from admittedly lawful businesses.⁷ The case of *Swetland v. Curtiss Airport Corp.*⁸ illustrates both the above manners of dealing with a nuisance caused by an airport to an adjacent country estate. In that case the District Court found that a nuisance resulted from (a) the blowing of dust; (b) the dropping of circulars, and (c) the noise and danger from flying at less than 500 feet in altitude over the complainants' property, and enjoined these annoyances, leaving the airport otherwise free to operate. On appeal the Circuit Court of Appeals apparently adopted a different interpretation of the evidence and found that a nuisance would result, in addition to the above (point (c) was not directly affirmed), from the normal operation of an airport and flying school of the magnitude that the defendants contemplated as then located. The Appellate Court further found that the nuisance could not be removed by the exercise of ordinary care, and modified the decree of the lower court so as to close the airport entirely.

Most annoyances coming from airports lend themselves to the

7. *Weber v. Mann*, ... Tex. Civ. App. ... 42 S. W. (2d) 492 (1931—operation of radio in root beer stand not a nuisance *per se* and held improper to absolutely prohibit its use); *Shea v. National Ice Co.*, ... Mass. ... 182 N. E. 303 (1932—company manufacturing ice cream within populous residential district, enjoined from operating machinery and truck between 9 p. m. and 7 a. m.); *City of Tuscaloosa v. Standard Oil Co.*, 121 Ala. 670, 130 So. 186 (1930—proposed filling station); *Jones v. Kelley Trust Co.*, 179 Ark. 857, 18 S. W. (2d) 356 (1929—decree permitting operation of quarry and rock crusher during certain hours and on condition that they not throw stones on plaintiff's land, upheld. Permit granted by city commission was no defense); *Mayor, etc. of Baltimore v. Sackett*, 137 Md. 56, 107 Atl. 557, 5 A. L. R. 915 (1919—proposed disposal of garbage by a city in an authorized manner. The court said: "Where the application is to restrain the carrying on of a legitimate and lawful business, the courts will go no further than is absolutely necessary to protect the rights of the parties seeking such injunction."); *Wahrer v. Aldrich*, 161 Wis. 36, 152 N. W. 456 (1915—roller skating rink with mechanical organ on premises within block of business center was a lawful business and properly enjoined only after 10 p. m. on the ground of unreasonable use); *Peck v. Newburgh Light, Heat & Power Co.*, 132 App. Div. 82, 116 N. Y. Supp. 433 (1906—when vibration of engines in a power plant, which constitute a nuisance, can be corrected, the owner should be permitted to do so); *Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. Supp. 710 (1898—held injunction restraining entire operation of planing mill should be modified to permit operation in such a manner as not to constitute a nuisance if that is possible).

8. Cit. note 2.

partial injunction method. Dust is without doubt an annoyance,⁹ which is not a necessary incident to operating an airport, although its elimination may entail considerable expense.¹⁰ The same may be said of the crowds of spectators and joy riders who congregate around an airport¹¹—their annoyance to adjoining property owners may be largely eliminated by constructing adequate facilities for the handling of the crowds and parking of automobiles upon the airport's own property. The lighting system for night flying may be an annoyance, but usually is not serious.¹²

Noise and danger present greater difficulty in their elimination. The danger element arises, of course, only when an aircraft is in the air and approximately overhead. The actual danger of an aircraft crashing into a dwelling is very remote unless the craft is flying extremely low and thus has no time to maneuver into a safe landing.¹³ The pilot's responsibility for his own life, his ship and his passengers, plus the strict enforcement of the airworthiness requirements of the Department of Commerce, may be counted on to keep the actual danger of crashing at a minimum. In the *Gay* case testimony was given that a cushion was dropped from an airplane at 3,000 feet and, although it did no damage, it was offered to show that there was a potential danger from such source. Needless to say there is a remote danger from objects falling from aircraft, but actually it is very slight and with the increase in the use of cabin planes it becomes increasingly less.

Noise is probably the most universal source of complaint

9. *Swetland v. Curtiss Airports Corp.* (D. C., N. D. Ohio), cit. note 2, at page 932. See annotations on "Dust as Nuisance" in 3 A. L. R. 310, and 11 A. L. R. 1399.

10. See report of Committee on Airport Drainage and Surfacing (Dept. of Commerce, 1931).

11. *Edmunds v. Duff*, 280 Pa. 355, 124 Atl. 489, 33 A. L. R. 719 [See annotation, page 725, on "Amusement Park as Nuisance"] (1924—an amusement park is not a nuisance *per se*, but held to be a nuisance in fact); *Spiker v. Eikenberry*, 135 Ia. 79, 110 N. W. 457, 11 L. R. A. (N. S.) 463 [See annotation on "Liability of Owner of Vacant Property for Using It, or Permitting It to Be Used, in Such a Way as to Collect Crowds, to the Injury of the Neighborhood"] (1907—In this case the court said, "Injunction will not lie to restrain the owner of vacant property from permitting it to be used as a playground merely because persons using it bat balls onto adjoining property and commit trespasses in reclaiming them"); *Hennessy v. Boston*, 265 Mass. 559, 164 N. E. 470, 62 A. L. R. 780 (1929—public playground, throwing and knocking of baseballs onto adjoining property held a nuisance and trespass); *Murphy v. Cupp*, 182 Ark. 334, 31 S. W. (2d) 396 (1930—injunction against construction of open tabernacle adjacent to church in residential district refused as noise and crowds would not necessarily be a nuisance); *Burroughs v. City of Dallas*, 276 Fed. 812 (1921—held the operation of a scenic railway on exposition grounds not a nuisance *per se* because of the crowds and noise).

12. *Swetland v. Curtiss Airports Corp.* (D. C., N. D. Ohio), cit. note 2, at page 933.

13. There have been surprisingly few, in fact almost no aviation crashes that have injured persons on the ground. The last disastrous accident of this kind occurred on March 25, 1933, when a Varney Speed Lines transport plane, due to bad weather, crashed into the side of a residence not far from Oakland, California, killing ten persons therein, in addition to two passengers and the pilot of the plane. For citation of other such accidents see article by the writer in 3 JOURNAL OF AIR LAW 329, at pages 340-342.

against airports, and is the most serious.¹⁴ Noise decreases with direct proportion to the distance of its origin, but in practice its intensity is complicated by many other factors.¹⁵ The noise from warming up of planes on the field before taking off is more constant than the momentary flying overheard while taking off and landing. Much can be done to eliminate noises on the field by proper layout of the field, i. e., by locating the hangars, where repairs and warming up takes place, as far away from nearby residences as possible. This, it was above noted, was not done in the *Gay* case.

The noise from flying above 500 feet (and at less altitude with small planes) is usually not sufficiently intense to be of material annoyance to habitants below. Unfortunately, however, almost no airport today is large enough to permit planes to keep 500 feet above all the land adjoining an airport. In the incident case, the court realized that to decree a 500 foot legal wall about the airport would be a "vain thing which a Court of Equity would not do." In this conclusion the court follows the interpretation of the Circuit Court of Appeals in the *Swetland* case and not the District Court. The insistence upon treating the annoyances coming from an airport as a whole and not piecemeal has many advantages. In most incidences the landowner wants the airport completely closed up or nothing at all. He assumes, correctly, that the airport will be operated in the least annoying manner possible. The occasional flight that is unintentionally made under 500 feet does no appreciable harm and would not in itself constitute a nuisance.

The first opinion of Judge Windle did not discuss the adequacy of the partial injunction method to the situation under consideration. Largely because of this omission, exceptions were filed to the adjudications and the court handed down a second opinion in which it admirably clarified its position:

14. *Swetland v. Curtiss Airports Corp.* (D. C., N. D. Ohio), cit. note 2, at page 932; *Krocker v. Westmoreland Planing Mill Co.*, 274 Pa. 143, 117 Atl. 669, 23 A. L. R. 1404 [See annotation on "Noise from Operation of Industrial Plant as Nuisance"] (1922—noise and dust from saw and planing mill in residential district of city held a nuisance); *Stodder v. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N. E. 251, 22 A. L. R. 1197 [See annotation on "Injunction Against Operation of Talking Machine, Mechanical Musical Devise, Etc."] (1922—merchants' use of talking machine in front of store for advertising purposes enjoined); *Weber v. Mann*, cit. note 7; *Higgins v. Decorah Produce Co.*, 214 Ia. 276, 242 N. W. 109, 81 A. L. R. 1197 [See annotation on "Poultry Yard as Nuisance"] (1932—noise and odors from poultry yard held a nuisance); *Burroughs v. City of Dallas*, cit. note 11; *Murphy v. Crupp*, cit. note 10; *Joyce*, Nuisance, p. 216.

15. The comparative volume of other noises and the number of intervening obstructions are some of the factors that influence the sense of sound. See report of Gill R. Wilson, Director of Aviation for the State of New Jersey, 7 U. S. Daily 1026, August 1, 1932.

"On the trial it was not suggested that the airport could be operated in an unobjectionable manner and it is apparent from the evidence that it cannot be. True in certain cases decided in our Supreme Court the operations of businesses that were alleged to constitute nuisances—notably garages—have been regulated by decrees of Court so as to eliminate the features that caused the nuisances, and the defendants permitted to conduct their businesses, if they could, without doing those things. Here, however, such a course is impossible. If the airport could be operated in an unobjectionable manner surely after the complaint made by plaintiffs to counsel for defendants in August, 1930, steps would have been taken to do so. It may be that they were, but if so they were not efficient to accomplish that purpose. The noise of the engines of the planes on the ground and in the air cannot be, so far as the evidence indicates, eliminated or materially reduced. Due to the size and shape of the field and the direction of the prevailing winds it does not appear practical to move the landing area to any point that would not impose the noise complained of on some of the plaintiffs or those who joined in the prayer of the Bill. The same is true of the congregation of people attracted by the operation of the port, and the apprehension of danger. It may be that the dust could be eliminated—though it was not even after complaint made, as above—but that is only one element of the nuisance complained of.

"In regard to the height of flight over complainants' lands as bearing on the question of continued trespasses, it is apparent from the evidence that to limit said height to not less than 500 feet would be an empty gesture. Planes of the type now commonly operated and using this airport could not possibly gain altitude in ascending or stay high enough in the air on descending to keep 500 feet above plaintiffs' or any other adjoining properties if the testimony is to be believed To impose any such restriction as that under discussion would be decreeing a vain thing which a Court of Equity would not do."

The latter part of this passage shows the same tendency, as have all previous courts, to shy away from basing any decision on the doctrine of trespass. However, the Court in the first opinion indulged in the following dicta:

"In view of the above it is not necessary to decide the question of trespass raised. However, an examination of the authorities, few as they are regarding flights by airplane, indicates that the maxim "*cuius est solum ejus est usque ad coelum*" no longer is strictly adhered to, and that invasions of the air space over one's real property are trespasses only when they interfere with a proper enjoyment of a reasonable use of the surface of the land by the owner thereof. If that is correct repeated trespasses of this character, would, it seems, constitute a private nuisance and be restrainable as such."

This passage indicates that the court is again following the *Swetland* case, that the Court was willing to admit that the maxim

was no longer strictly adhered to, but was unwilling to abandon the use of trespass entirely, i. e., to assert that trespass never is applicable to the mere flight of an aircraft without contact with the surface. The court once again advanced the position that the extent of aerial trespasses was somehow tied up with the extent of nuisance.¹⁶

Within certain indefinite limits the legislature may legalize private nuisances of the common law.¹⁷ Airports have received no such legislative sanction, unless the license to operate an airport which is obtained from a state aeronautics commission, is to be construed as such sanction. Judge Rugg in the *Smith* case stated:

"There are numerous analogies where the invasion of the airspace over underlying land by noise, smoke, vibration, dust and disagreeable odors, having been authorized by the legislative department of government and not being in effect a condemnation of the property although in some measure depreciating its market value, must be borne by the landowner without compensation or remedy. Legislative sanction makes that lawful which otherwise might be a nuisance."¹⁸

Judge Windle took the position that the airport license in the instant case had no effect on the question of private nuisance. Under the then existing laws,¹⁹ and regulations pursuant thereto²⁰ this position was undoubtedly correct. In granting licenses, the Pennsylvania Commission was only empowered to determine that "the field in question is adequate, safe for landing and taking off of planes and that the equipment thereof is suitable," i. e., to consider the questions of safety, but not that of nuisance irrespective of safety. In reply to complaints concerning Sky Haven Airport the commission reported ". . . nor has the aeronautics commission been given authority to consider the question of nuisance."²¹ Judge Windle stated:

"The license does not and does not pretend to confer on the proprietor

16. *Swetland v. Curtiss Airports Corp.* (C. C. A. 6), cit. note 2, at page 203.

17. This subject was discussed by the writer in an article under the sub-title "Legislative Control Over Trespass and Nuisance," 3 JOURNAL OF AIR LAW at pages 564-7 (1932).

18. *Smith v. New England Aircraft Co.*, cit. note 1, 170 N. E. at p. 390.

19. Pennsylvania Laws of 1929, Act 316, Article 2, section 201 (l), (j), (k), (m) and (n), also sections 1102 and 1104; 1929 U. S. Av. R. 753.

20. Regulations of State Aeronautics Commission under the Aeronautics Act of 1929. Chapter 8, section 6: "Upon receipt of the application for rating and license, the Commission shall register the said airport, . . . and shall issue to the owner or lessee a license in the form prescribed by the Commission: *Provided*, however, That no license shall be issued until the said airport, landing field, intermediate landing field, or air navigation facilities have been inspected and approved by the Commission as adequate, properly qualified and safe for the type of operation set forth in the application and for which the airport is to be used, . . ." 1930 U. S. Av. R. 461, 494.

21. Report of Nov. 26, 1929, as quoted in the first opinion in *Gay v. Taylor*.

of the airport the right to operate it in a manner that would constitute a private nuisance—indeed it could not do so.”

This apparently does not mean that the court believed that a state license could never have an effect upon the determination of a private nuisance, although the legislature were to grant direct sanction, for the Court had previously stated:

“The industry or art of aviation is of course in a state of development. It is desirable that every proper aid and assistance to the growth and betterment thereof be given in order that it may fulfill its promise to the commerce of the country in time of peace and to national defense in the time of war. However, until legislative bodies have conferred such powers on them, those engaged in that industry are no more privileged to infringe on the rights of others than anyone else and they must be held to the same rules of conduct in their operations as individuals engaged in different and less glamorous pursuits.”

The extent to which the legislature can legalize a private nuisance resulting from an airport remains an open question, and will remain such until some statute is brought directly in question before the courts. The analogy of the railroad cases affords no promise of being helpful.²² Certainly the location of the airport will have to be endowed with special public advantages in order to warrant much protection. It should be noticed that in the *Gay* case the airport was a private commercial field and not a municipal one,²³ and that its site was apparently not indispensable as the Department of Commerce reported that the operators had moved to a new location two miles northeast of Malvern.²⁴

22. See note 17.

23. Apparently the only case involving a municipal airport is *Thasher v. City of Atlanta*, cit. note 2; see *Childs*, “The Law of Nuisances as Applied to Airports,” 4 *Air Law Review* 132, at pp. 136-7.

24. 4 *Air Commerce Bull.* 300 (December 15, 1932).