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Editorials

Leon Green

EDITORIALS

FLIGHT OF AIRCRAFT—RIGHT OR PRIVILEGE?

In a recent review of the Torts Restatement,[1] the writer made the following comment pertinent to aeronautics:

A striking example of how confusing inadequate analysis and classification may prove is found in Section 194. There the Restatement treats "Travel through Air Space" as a trespass to land unless "privileged."[2] Incidentally, throughout the Restatement the doctrinal term "privilege" is made to bear an excessive load, of which this is but a single instance. In view of the controversy between the several groups interested in the matter, it would seem the theory of the Restatement is that by making flight a trespass subject to privilege, the landowner can always insist upon the flyer's showing a justification as a basis of his privilege. It is seemingly overlooked that this might be done even were the flight considered a nuisance, or for that matter merely negligent. But of more importance, any action by the landowner would seemingly be restricted to a trespassory basis. Neither of these positions is sustainable. There is every reason to conceive of flight as a *right,* in the sense of freedom or liberty, rather than a *privilege.* Both national policy[3] and everyday operations throughout the country clearly indicate that it is a right. The landowner, moreover, is entitled to his action of trespass, nuisance or negligence as the particular situation may best support, or in cases of doubt alternatively, as permitted in many jurisdictions. Nor should the burden of justifying always be placed upon the flyer. As in other cases the burden may be placed sometimes upon one and sometimes upon the other party. But in a new situation like this where the law is not yet even made, much less subject to restatement, the courts should be left free to deal with the cases as they arise, and in fact the decisions dealing with the problem have expressly taken this attitude. Any advance restriction such as here

1. *Leon Green,* "The Torts Restatement," 29 Illinois Law Review 582 (1935).

2. Restatement of the Law of Torts. §194. Travel Through Air Space.
"An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted
"(a) for the purpose of travel through the air space or for any other legitimate purpose,
"(b) in a reasonable manner,
"(c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and
"(d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State."
This Section is made the basis of an extended exposition by Professor Thurston in Harvard Legal Essays, p. 501 (1934).

3. Air Commerce Act of 1926. Act of May 20, 1926, c. 344; 44 Stat. 568; U. S. Code (Sup. III), Title 49, Secs. 171-184;—as amended by Act of February 28, 1929, c. 369, 45 Stat. 1404, Public Act No. 418, 73d Congress (S. 3526), approved June 19, 1934, and Public Act No. 420, 73d Congress (S. 3646), approved June 19, 1934:
"SEC. 10. *Navigable Airspace.* As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under Section 3, and such navigable airspace shall be subject to a *public right* of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

attempted is not only beyond the province of a restatement, it is also poor policy. An attempt to restrict activities of such present magnitude, to say nothing of their expanding proportions, to anything less than the fullest recognition government can give them, can only be accounted for by a failure to recognize their importance to government and citizens alike.

By way of elaboration of the foregoing comment, it must be granted that in the clash of interests between the owner of land and the aviator, there is a conflict between two fundamental rights or freedoms. (Freedom is the more accurate term, though right is generally used to express the idea.) The landowner has a maximum of freedom in the uses and enjoyment of his land, for government affords him a maximum of protection in this regard. Likewise, a person has a maximum of freedom with regard to his interests of personality—one of the most important of which is that of being active. Activity implies movement of his person and things. Here, in the exercise of this fundamental right or freedom of activity, there may be many conflicts with the rights of other persons, and particularly those of the landowner. It is government's job to adjust these conflicts in some acceptable manner. That means that there can be no such thing as an absolute right. All rights are relative; that is, subject to the rights of others. This is as true of the landowner as it is of anyone else.

In the case of flight, the landowner's interest is subjected to the peril or hazard of physical harm, not to the peril or hazard of appropriation. It is true that there might be appropiation by such long usage as to give the aviator an easement, but this is not the harm against which the landowner is seeking protection. Thus, the question is: What protection does government afford the landowner against physical harms, which includes also the threat of such harms.

Government, through its courts, has developed three doctrinal formulas for giving protection against physical harms—(1) trespass, (2) nuisance, and (3) negligence. These are basic tort law doctrines, and are available to a landowner as well as to any other person whose interest may be subjected to such harms. In ordinary cases involving intrusions upon land at or near the surface, the landowner has relied upon *trespass.* In other cases where there was no intrusion by tangible physical bodies, but interference with the landowner's enjoyment of his premises by stenches, noises, dust, smoke and other perils, either actual or threatened, arising from activities upon neighboring premises, the landowner has relied upon *nuisance.* In some instances where there has been actual

harm to the landowner by physical impairment of his premises due to the occasional and unintended conduct of a person outside his premises, the landowner has relied upon *negligence*. Upon one or the other of these doctrinal formulas or some one of their variations the landowner has always been able to secure protection to his interests where government has deemed him entitled to protection. These doctrines have such networks of variations that they permit the individualization of any case which can arise, so that its merits may be reached through the judicial process. There are numerous instances, however, where the landowner's interests have been hurt in which he has not been given any protection at all. The other person's interests were protected instead.

Thus, in the exercise of the right or freedom of flight, when the landowner is hurt or threatened with hurt, he has available all of these doctrines. The question will always be which one best serves his purposes for the particular case. And they are not exclusive. They overlap in the protection they afford. One lawyer or one court may utilize one, while in a very similar case another lawyer or court will utilize another. In some instances the landowner will be given protection and in others not, for not all risks will be placed either upon the aviator or upon the landowner. Liability will be determined in the particular case when the judicial process through the use of some one of these doctrines has functioned. Naturally, when the aviator is near the surface the landowner will be preferred; when far above the surface, the aviator. Only by trial and error based upon every-day experience will the courts be able to work out acceptable adjustments of the many hurts between these extremes which may befall the landowner from flying operations. This is the way the common law does things. Nor would it be wise to attempt to make these adjustments by rigid rules, whether by courts or legislature, unless it be recognized that such rule provide only temporary standards subject to modification as fast as experience points to better ones.

Viewing the conflicts of interests between landowner and aviator from this point of view, it is apparent how fruitless is the effort to solve them through the concept of *ownership*. In the first place, ownership is a concept for use in cases where the landowner's interest is being subjected to the hazard or risk of appropriation. That is not involved here. The aviator is not trying to secure an interest in the landowner's property. He merely subjects such interest to the perils of physical harms. In the second place,

the ownership concept is too complex and inevitably leads into those supplementary concepts of "air space," "air columns," "upper and lower levels," and other descriptive terminology which, while doubtless valuable for some purposes, get nowhere in adjusting conflicts as to physical hurts between these two basic interests of human beings. We can not possibly define ownership unless we first know the limits to which government will recognize a landowner's interests as against flights. Then there is no use for the definition. Moreover, to begin with ownership on the part of the landowner compels the reduction of the aviator's interest to a subordinate position wholly out of harmony with the dignity of the valuable interest of personality involved. The freedom of flight is entitled to recognition equal to that of freedom of the uses of land.

The very practical difficulties of proof require that the landowner should be given the benefit of all the doctrinal machinery of tort law rather than be restricted to the single formula of trespass. Many examples can be given. One will suffice. Suppose plaintiff's wife is convalescing from a severe illness, and defendant flies his plane so near and under such circumstances that the wife is thrown back into a state of high nervousness from which she never recovers. Plaintiff can not prove that defendant crossed the boundary of his sixty foot lot, therefore he is precluded from invoking the theory of trespass. The incident was a single one, hence not a nuisance, but plaintiff may have an action of negligence. In fact, it might be so extreme a case that the defendant could invoke the supplementary doctrine of presumption or that of *res ipsa loquitur*, and therefore make liability as exacting as under either of the other two doctrines. Even if defendant could prove the crossing of the boundary and thereby support the theory of trespass, he might still have a very difficult question of whether the wife's hurt could be permitted by way of aggravation of his damages. It would be easier, perhaps, both for himself and his wife to rely upon negligence, even though there were a trespass. And suppose the plaintiff, even under the best circumstances, is called upon to prove whether a flight was across the imaginary boundary of his lot; or suppose that this burden is placed upon the aviator. If any regard in most cases should be given to the truth, either party would be put at a disadvantage which he could not overcome. Even in cases of large areas, guesses as to heights and location with reference to the surface are most unreliable. If there has

been hurt it should be of no consequence that there had been no trespass. The doctrinal formula of negligence should be available for the occasional hurtful flight; the nuisance network of theory should be available for continued or threatened hurt. On the other hand, if the landowner's interests are not hurt appreciably, the aviator should not be subjected to the claim of a technical trespass. The interests of both parties and the public at large as well, require fair protection and no more. These doctrines will afford such protection without making either interest subordinate to the other. It should be a matter of give and take between equals.

LEON GREEN.*

BOUTELLE APPOINTED COORDINATOR

The various state aviation officials will be gratified to learn of the recent appointment of Richard S. Boutelle, of Nashville, Tennessee, as States Coordinator.

For a number of years, the work of the Bureau of Air Commerce and that of the several states has been brought into real harmony by the friendly attitude of both groups of officials. However, the growth of state activities during recent years has involved a considerable responsibility upon the Federal bureau to point the way toward uniformity in state legislative programs, and this new appointment should prove of immeasurable value to both state and federal governments.

Since September, 1933, Mr. Boutelle has been an aeronautic development expert. He has been connected with aeronautics since 1917 when he enlisted in the Army Air Service. He received ground instruction at the University of Texas and, after flight instruction at various fields, obtained his commission at Carlstrom Field, Florida. Transferred to McCook Field, Dayton, Ohio, in July of 1919, Mr. Boutelle was assigned to flight test duty as observer in the section headed by Major R. W. Schroeder, now Chief of the Air Line Inspection Service of the Bureau. Following his army experience, he entered commercial aviation for several years and then served as Director of the Division of Aeronautics for Tennessee from 1931-1933. For two years, Mr. Boutelle served as Regional Vice-President of the National Association of State Aviation Officials and was elected president of that organization for 1932-1933.

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No enthusiasm for the new office or officer, however, should overlook the fact that essentially every state and federal aviation official is also a coordinator! The state people have reason to be particularly indebted to Carroll Cone, Rex Martin, John Geisse, John Wynne, Paul Myers, R. W. Schroeder, Denis Mulligan, Robert Reining, George Vest, and many others. And the Bureau can well be indebted to the efforts of Frank McKee, Reed Landis, Fred Smith, George Logan, John Cooper, Smythe Gambrell, and Howard Knotts for their untiring efforts to promote a single standard of aircraft and airmen licensing throughout the country. We assume, therefore, that the possibilities for cooperative effort have now become so promising that the full-term efforts of one man are demanded. Our congratulations to Director Vidal and Col. Cone for creating this new office and appointing an excellent man to its responsibilities.

RECENT C. I. T. E. J. A. DRAFT CONVENTIONS ON AERIAL COLLISIONS AND SALVAGE

On March 23, just as this issue was coming from the press, we received translations made by the State Department of the recent C. I. T. E. J. A. draft conventions pertaining to Aerial Collisions and Assistance to, and Salvage of, Aircraft. These preliminary drafts are included in this issue, starting at page 265, and it is the hope of the members of the American Section that any comments on these drafts will be sent in to the American Section in care of Mr. Stephen Latchford, of the Department of State, in time to be incorporated in the recommendations of the American Section to the C. I. T. E. J. A. Committee at the next session in May, 1935.