Marquette Law Review

Volume 15
Issue 1 *December 1930*

Article 5

Air Law: Nuisance; Trespass

Lyman B. Gillet

NOTES AND COMMENT

Air Law; Nuisance: Trespass.

Plaintiff owns a farm of 135 acres located near Cleveland; such property having been acquired twenty-five years previously and had been constantly improved so that now its value is about $115,000. The surrounding countryside is devoted to farming and residence purposes, there being no stores, factories, or any other enterprises which create noise or attract crowds. The defendant owns a tract of about 275 acres immediately opposite on the other side of the road, such property having been recently acquired for use as an airport and flying school. Defendant intends to erect hangars, service station, grand stand, and a parking space for automobiles, on such land. Plaintiff now seeks an injunction restraining the alleged trespass by airplanes and the alleged maintenance of the airport as a nuisance. *Sweetland* v. *Curtis Airports Corp.*, 41 Fed., 929.

There are two question involved, (1) is a private airport and flying school a nuisance, *per se,* (2) has the application of the ancient maxim "He who owns the soil, own all to the heavens" fixed such property rights in the land owner as to make flights over his lands a trespass or nuisance.

The court held that a private airport, flying school, or landing field is not a nuisance, *per se,* for such training fields are necessary to the progress of aviation, and they can be regarded as a nuisance only if located in an unsuitable place, 272 U. S. 365, or if operated so as to interfere unreasonably with the comfort of the adjoining property owners. Petition was denied because this airport was suitably located, considering its surroundings, and the almost unanimous consent of the other adjoining owners.

In regard to the noise resulting from the warming up of the airplane motors and from the general flying over the property of the plaintiff, the court decided that it would not be of such degree as to annoy persons or ordinary sensibilities. In fact, the noises are less than the plaintiff might be compelled to endure from industrial plants which might properly locate there.

The defendants, however, are restrained from allowing dust in substantial and annoying quantities to be blown in the direction of the plaintiff's buildings when the airplanes are warming up and taking off, for it is not necessary in the proper conduct of the airport for any dust to arise therefrom; also, from distributing pamphlets over the countryside from an airplane and thereby interfering with the property rights of the plaintiff when such pamphlets fell upon his land.

It is unnecessary to determine if the value of the plaintiff's land decreased because of the adjoining airport, for even if the property

did decrease in value that alone will not justify the injunction. 46 C. J. 682.

The plaintiff has been fortunate in that he has been able to enjoy his country estate for so long a time, he must now yield to the change and progress of the times.

In regard to the property rights of a land owner in the air over his land, it is clear that in all legislation pertaining to such, that both Congress and the States proceed upon the treory that a land owner has no exclusive property in the higher air spaces. Both the Constitution of the United States and of Ohio protect in broad terms the rights of property, but neither contains any classification or definition of property, any more than they reveal the contents of the word liberty. 94 U. S. 113.

What the owners property rights are, so far as air space above is concerned, has not been declared by legislation, nor have such rights been fixed by the courts as yet. The plaintiff relies upon the old common law maxim of "Cujus est solum ejus est usque ad coelum." The court cited a long list of English and U. S. cases in which reference was made to the ancient maxim, but there were no cases which involved an adjudication of property rights in the air space which would be normally used by airplanes. It is true that the maxim has been used as the basis for some decisions, but it is the points actually decided, not the maxims, which establish the law. A maxim, said Sir Frederick Pollock, "is a symbol or vehicle of the law so far as it goes; it is not the law itself, still less the whole of the law, even on its own ground."

What was the "coelum" or originally intended by the early Latin writers? When used, it commonly referred to the lower air spaces, or that space in which the birds fly and the clouds drift. Another writer spoke of it as the space lying only a little above the highest treetop. 62 Amer. Law Rev. 894.

Thus, it appears that the maxim has never been applied in cases which fixed rights in the space traveled by airplanes, and since there are no previous decisions which establish rules as to such, any reasonable regulatory legislation would be constitutional, but so far no legislative provisions have established any exclusive proprietary rights in the land owner to the adjoining air spaces normally travelled by the airplanes.

LYMAN B. GILLET.

Constitutional Law: Due Process.

"What is due process of law must be determined by the circumstances * * * ", said Justice McKenna in *Reeves v. Ainsworth,* 219 U. S. 296. In relation to taxation it has been agreed that due process