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deny the insurer the defense of non-performance at the time specified and allow recovery when proof is submitted. It is to be remembered, as noted before, that in the majority of jurisdictions recovery is allowed although proof of loss is submitted after the time specified in the policy.

Sometimes policies contain not only provisions as to the time in which proof of loss must be submitted, but also stipulate that no action can be brought on the policy after twelve months from the date of loss.[14] That is, the policy contains conditions subsequent as well as precedent. In those jurisdictions which allow recovery though proof of loss is filed late, the insurer is adequately protected by this condition. Representative of this group is *Continental Fire Ins. Co. v. Whitaker & Dillard*,[15] where the court held that, in any event, the proof would have to be rendered within ten months since no action could be brought for sixty days after the proof was submitted and no action on the policy could be brought after twelve months from the date of loss.

The important thing to note here is that there is a very definite conflict in decisions regarding these vital clauses requiring notice of proof of loss in fire insurance policies. And though the decision of the court in the *Moyer* case is in keeping with the previous rulings in that state (rulings with which New York and California courts are in agreement), it is nonetheless contended by this writer that a reconsideration of this problem is in order.

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TORTS: RESPONSIBILITY OF THE LANDOWNER TO THE AIRPLANE OVERHEAD

"Cujus est solum ejus est usque ad coelum . . . ."[1] It was an ancient doctrine at Common Law that the ownership of land extended to the periphery of the universe. But today, the rule is that the right to the exclusive possession of land extends upward only to that point necessary for the full use and enjoyment of the land and the incidents of its ownership. The balance is regarded as open and navigable airspace[2]—a public highway.[3]

Legislation and judicial decisions during the last fifty years, while still guaranteeing to every property owner the fullest enjoyment of his property, have taken away a part of the sky for which he had little or no use. Congress, by virtue of the interstate commerce clause of the United States Constitution,[4] has plenary control over airspace, as well as over navigable streams and interstate commerce on land.[5] The Civil Aeronautics Board was founded upon this power, and the Civil Aeronautics Act of 1938 declares:

> "There is recognized and declared to exist on behalf of any citizen of the United States, a public right of freedom of transit in air commerce through the navigable airspace of the United States."[6]

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[14] California fire insurance policy form contains this provision; CALIF. INS. CODE, § 2071.

[15] 112 Tenn. 151, 79 S.W. 119 (1904).

[1] BLACKSTONE, COMMENTARIES 18 (Lewis ed. 1902); KENT, COMMENTARIES 629 (Gould ed. 1896).

[2] Northwest Airlines v. Minn., 322 U.S. 292 (1943); Swetland v. Curtiss Airport Corp., 55 F.2d 201 (6th Cir. 1932); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

[3] U.S. v. Causby, 328 U.S. 256 (1946).

[4] U.S. CONST. art. I, § 8.

[5] Gardner v. County of Allegheny, 382 Pa. 88, 114 A.2d 491 (1955).

[6] Civil Aeronautics Act, 1938, § 3, 49 U.S.C.A. § 403.

The right of flight being clearly established, the upper strata of the atmosphere has been turned into a limitless freeway by the growing aviation industry.

There is a conflict of authority as to whether aviation is an ultra-hazardous activity and subject to the rule of strict liability, or whether the law of negligence is to be applied. The Restatement of Torts favors the rule of strict liability and considers aviation a dangerous enterprise.[7] On the other hand, with the further development of the aircraft industry, there has been a trend away from the use of the strict liability rule, and toward the application of the general rules of negligence.[8] However, with the rapid advancement of jet aircraft and supersonic flight, still in the experimental stage and highly dangerous as compared with the fine safety record of the more conventional aircraft, it is arguable as to whether the rule of strict liability or the rule of negligence is best as applied to aircraft.

Suits brought by the victims on the ground against the operators and owners of aircraft have been numerous. It is an established rule of law that the aircraft overhead is required to exercise a high degree of care toward the potential victims below.[9]

On the other hand, what is the landowner's responsibility to the aircraft overhead?

This question came up before the Supreme Court of Pennsylvania in *Yoffee v. Pennsylvania Power and Light Company*.[10]

On the afternoon of May 11, 1950, a clear day with visibility unlimited, Morris B. Levitz, a licensed aviator, was aloft in a single engine airplane. It struck the defendant power company's transmission line which had been strung across the Susquehanna River at a point 185 feet above the water. Levitz sustained grave injuries from which he later died. The administrator of his estate brought an action against the power company. The Court of Common Pleas entered a non-suit, asserting that the plaintiff had failed to show that the defendant had been negligent, and that the decedent had been guilty of contributory negligence. On appeal, the Supreme Court of Pennsylvania reversed the decision of the lower court and ordered a new trial.

The lower court came to the conclusion that the flight of the decedent was at such a low altitude that it violated certain federal and state regulations. However, it was shown that the General Flight Rules of the Civil Air Regulations, promulgated by the Federal Civil Aeronautics Board, permit flying below the 500-foot level under certain circumstances.[11]

There had been evidence that the transmission wires were unpainted. The practice of the industry at that locale was to paint transmission lines with aluminum or other highly visible paint. In this instance, neither the wires nor the transmission towers were visible to the eye from aloft. Furthermore, prior to the litigation, there had been two incidents in which an aircraft had collided with the wires

[7] See RESTATEMENT, TORTS § 520, comment *b* (1938).

[8] Boyd v. White, 128 Cal.App.2d 641, 276 P.2d 92 (1954). See also Williams v. U.S., 218 F.2d 473 (5th Cir. 1955); Chapman v. U.S., 194 F.2d 974 (5th Cir. 1952); Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951); U.S. v. Kesinger, 190 F.2d 529 (10th Cir. 1951); D'Anna v. U.S., 181 F.2d 335 (4th Cir. 1950).

[9] Margosian v. U.S. Airlines, 127 F. Supp. 464 (E.D.N.Y. 1955); Parcell v. U.S., 104 F. Supp 110 (S.D.W.Va. 1951); Gurard v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469 (1933).

[10] 385 Pa. 520, 123 A.2d 636 (1956).

[11] See 14 C.F.R. § 60.17(c) (Supp. 1956).

at this particular spot. The defendant had knowledge of these accidents and yet had made no effort to advise the numerous pilots within the area of this hazard.

Submitted that if the pilot aloft is negligent in the operation of his aircraft it may cause damage to those below; conversely, is it not possible that the landowner might have erected an instrumentality upon his premises which through his negligence may cause damage to the aircraft above? If this is so, then it follows that a conflict of interests exist between the right of free flight and the right of the landowners to the reasonable use of their land.

That everyone must use his property so as not to injure others is an almost universally recognized principle.[12] Generally, no one can acquire a right of the space above the land that will limit the landowner in its use. Any injurious use of such space, which constitutes an actual interference with the possession and beneficial use of the land, would be a trespass.[13] But the height to which a surface owner may reasonably expect to occupy airspace for himself, to the exclusion of others, must be determined upon the particular facts.[14]

In the principal case, the lower court was of the impression that the defendant owed the decedent no duty at all and that no liability attached. This is not unlike Judge Cardozo's opinion in the well known case of *Palsgraf v. Long Island R. Co.*[15] which held that the injury to the plaintiff was unforeseeable and as such, the defendant owed no duty to the plaintiff in that particular instance. But where the landowner has knowledge of prior incidents of contact with his instrumentality and it is foreseeable that there may be future mishaps of the same nature, then there would appear to be a duty to exercise reasonable care in regard to this foreseeable danger.[16] In the principal case, the defendant had notice of the prior accidents with its wires and consequently the injury to the plaintiff cannot be considered unforeseeable. That being the case, the defendant should have exercised due care in the maintenance of his instrumentality.

In addition, the Civil Aeronautics Board has specified that notice should be given of construction or alteration of structures over 150 feet.[17] Therefore, there is also an affirmative, quasi-statutory duty upon landowners to warn aviators of a hazard which has been created on the ground.

Where the landowner has created such a hazard, this risk affects the balance of interests. Although strict liability may be applicable to the aviator, the activity of the aircraft is no longer a one-sided affair whereby the aviator has the advantages of his actvity and the potential victims below take all the risk of ground damage.[18] The aircraft is being exposed to a hazard created by the landowner and there is now a mutuality of risks. Each party is exposing the other to a danger, and the law of negligence should be applicable to both parties.

An analogy may be drawn from an automobile being driven on a highway in relation to the owner of the adjacent property. The driver of the automobile has a duty to exercise due care so as not to injure the property of the landowner. Conversely, the landowner must so use his property as not to interfere with the rights

[12] Ladner v. Siegel, 293 Pa. 306, 142 A. 272 (1928).

[13] Strother v. Pac. Gas & Electric Co., 94 Cal.App.2d 525, 211 P.2d 624 (1949). See also Hinman v. Pac. Air Trans., 84 F.2d 755 (9th Cir. 1936).

[14] Swetland v. Curtiss Airport, 55 F.2d 201 (6th Cir. 1932).

[15] 248 N.Y. 339, 162 N.E. 99 (1928).

[16] Mix v. City of Minneapolis, 219 Minn. 389, 18 N.W.2d 130 (1945).

[17] See 14 C.F.R. § 625.3(a), 49 U.S.C.A. § 671.

[18] See Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas,* 5 HASTINGS L.J. 1 (1953).