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offense concluded against the statute, *State v. Jim*, *supra*, dictum. If, however, the indictment concluded both at common law and against the statute and the offense was a common law offense the conclusion "against the form of the statute" was rejected as surplusage. *State v. Lamb*, 65 N. C. 420 (1871), *State v. Bryson*, 79 N. C. 652 (1878), *State v. Harris*, 106 N. C. 682 (1890), *State v. Craft*, 168 N. C. 208 (1914).

(2) In 1854 the revised code, c. 35 §20 provided that "no judgment upon an indictment . . . shall be staid or reversed . . . for the insertion of the words *against the form of the statutes* instead of the words *against the form of the statute* or vice versa nor for omission of the words *against the form of the statute* or *against the form of the statutes*. N. C. ANN. CODE (Michie, 1927) §4625. In *State v. Kirkman*, 104 N. C. 911 (1889) these words were declared unnecessary in the indictment and in *State v. Peters*, 107 N. C. 876 (1890) they were rejected as surplusage.

III. It is apparent that the above section is a codification of our law.

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NOTES AND COMMENTS

Air Law—Liability for Injuries by Aircraft

Eight modern cases involving either actual or threatened injury to persons or property from aircraft have been noted in this country.¹ Two were cases of criminal trespass.² In both, the charge was dismissed because no statute applied. Four were cases in which damages were asked. In one of these, a dirigible flying below five hundred feet frightened a team, causing it to run away and to injure the

¹ For bibliographies on the field of Air Law, consult: Hirschberg, *Bibliography of the Law of Aviation* (1929) 2 So. CALIF. L. REV. 455; and Hotchkiss, *Select Bibliography of Air Law* (1930) 16 A. B. A. J. 264.

² Unreported case in Punxsutawney, Pennsylvania, comment in (1922) 2 WIS. L. REV. 58; *Commonwealth v. Nevin and Smith*, Court of Quarter Sessions of Jefferson County, Pennsylvania, April 1922 (unreported), comment in (1922) 71 U. OF PA. L. REV. 88.

plaintiff. Recovery was allowed.³ In two cases, fair boards had engaged aviators to exhibit at fairs and spectators were injured. The Wisconsin court refused to allow recovery because the board was exercising governmental functions. It indicated, too, that in a proper case it would require proof of negligence.⁴ In the New York case, the board was held liable under local statutes because it failed to provide a safe place for spectators.⁵ In the fourth case, defendant's plane fell on the plaintiff's lawn. The Minnesota court allowed damages and, though refusing a permanent injunction against flight at any altitude, granted a temporary injunction restraining flights at altitudes lower than prescribed by the local flight statute.⁶ In the last two of the eight cases under review, plaintiffs, owners of country estates adjoining airports, sought injunctions against flight over their land at less than the statutory standard of five hundred feet. The Massachusetts court found such flights to constitute trespass but failed to find sufficient damage to sustain an injunction.⁷ The federal court, however, granted an injunction against flights below this altitude, even though made in taking off and landing.⁸

Though decisions in this field are few, statutory provisions are numerous. In the two fair-board cases, cited above, the courts indicated that recovery must depend upon the plaintiff's ability to prove negligence.⁹ The difficulty of doing this in the case of aircraft is obvious.¹⁰ Therefore, at least seventeen states, including North Carolina, have made owners and operators of aircraft absolutely liable for any damage caused while in flight.¹¹ Although these

³ *Neiswonger v. Goodyear Tire and Rubber Co.*, 35 F. (2d) 761 (N. D. Ohio 1929); (1930) 8 N. C. L. REV. 281; (1930) 78 U. OF PA. L. REV. 633; (1930) 43 HARV. L. REV. 837; (1930) 28 MICH. L. REV. 756.

⁴ *Morrison v. Fisher*, 160 Wis. 621, 152 N. W. 475 (1915).

⁵ *Platt v. Erie Co. Agricultural Society*, 164 App. Div. 99, 149 N. Y. Supp. 520 (1914).

⁶ *Johnson v. Curtiss Northwest Airplane Co.*, district court of Ramsey County, Minnesota (1923), reported in 1928 UNITED STATES AVIATION REVIEW 42.

⁷ *Smith v. New England Aircraft Co.*, 170 N. E. 385 (Mass. 1930); (1930) 16 VA. L. REV. 714.

⁸ *Swetland v. Airport Co.*, 41 F. (2d) 929 (N. D. Ohio 1930).

⁹ *Supra*, note 2.

¹⁰ LOGAN, AIRCRAFT LAW MADE PLAIN (1928), 44.

¹¹ Seventeen states: Vermont, Delaware, Indiana, Pennsylvania, Michigan, Rhode Island, North Dakota, South Dakota, Utah, Nevada, Tennessee, Arizona, North Carolina, South Carolina, Mississippi, and Wisconsin; UNIFORM AERONAUTICS ACT, §5; N. C. PUB. LAWS (1929), c. 190, §8.5; N. C. ANN. CODE (Michie, Supp. 1929), §191 (n) (Provision makes owner and operator

statutes do not regulate noise and, in the last case stated the court refused an injunction against an airport on the grounds that there was no unnecessary noise, a constant and unnecessary disturbance will probably be dealt with by the courts as a nuisance.¹²

The most frequent cause of litigation is low flight of aircraft.¹³ Under statutory flight rules, it is unlawful to fly at less than five hundred feet, except while taking off and landing.¹⁴ The courts in the Massachusetts and Ohio cases, however, go a step farther and hold that, even while taking off and landing, actual interference with the use of land below will be regarded as trespass.¹⁵ This means that planes must reach the five hundred foot level before passing from the airport over adjoining land,¹⁶ or, in other words, that about three thousand five hundred feet be added to each dimension of the present average airport.¹⁷

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of every aircraft absolutely liable for injuries to person or property caused by the ascent, descent, or flight of aircraft or dropping of any object therefrom unless injury is caused in whole or in part by negligence of person injured or owner of property injured). See also c. 90, §§3 and 4; N. C. ANN. CODE (Michie, Supp. 1929) §191 (aa, bb) (operation of aircraft while intoxicated made a crime).

¹² LOGAN, *op. cit. supra* note 10, at 24.

¹³ It must be noticed that the courts have refused to rule that any flight above another's land is trespass, although that would seem to be required by the common-law maxim, *cujus est solum ejus est usque ad caelum*. This question has been settled in many states by statute. UNIFORM AERONAUTICS ACT, §3; N. C. PUB. LAWS (1929) c. 190, §3; N. C. ANN. CODE (Michie, Supp. 1929), §191 (e) (Places the ownership of superincumbent space in the landowner but subject to the right of flight). *Caelum* actually means a space beginning only a short distance above the earth. (1928) 62 AM. L. REV. 887. But see criticism of this view by Bogert, *Problems in Aviation Law* (1920), 6 CORN. L. Q. 271. *Wandsworth Bd. of Works v. United Telegraph Co.* (1889), L. R. 13 Q. B. Div. 904; *Erickson v. Crookston*, 100 Minn. 481, 111 N. W. 391 (1903).

¹⁴ 44 STAT. 569 (1926), 49 U. S. C. A. §173 (1929) (Secretary of Commerce given power to establish rules of aviation). Air Commerce Regulations, Chap. 5, §81 (g). (Prohibits flights under five hundred feet, except in landing or taking off.) In *Swetland v. Airport Co.*, *supra* note 8, the court based its decision on whether there was interference with effective possession where flights occurred at less than five hundred feet.

¹⁵ *Supra* notes 7 and 8. UNIFORM AERONAUTICS ACT, §4. N. C. PUB. LAWS (1929), c. 190, §4. N. C. ANN. CODE (Michie, Supp. 1929), §191 (m). (Providing that flights at such low altitude as to interfere with the then existing use of the property or so conducted as to be imminently dangerous to any person thereon is unlawful.)

¹⁶ (1930) 3 SO. CALIF. L. REV. 413, 415; 30 COL. L. REV., 579, 581.

¹⁷ TIME, Vol. 30, no. 5, at page 51; AMERICAN CITY, Vol. 43 at page 165.