LIMITATIONS ON THE EXERCISE OF THE FIRST FREEDOM TRAFFIC RIGHTS IN INTERNATIONAL AIR TRANSPORTATION IN COMMON LAW JURISDICTIONS.

By

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To my mother's brother

Uncle Hilary Peter Ojiambo.

While Moses was at Kadesh he sent messengers to the King of Edom: "We are the descendants of your brother Israel" he declared. "You know our sad history, how our ancestors went down to visit Egypt and stayed there so long, and became slaves of the Egyptians. But when we cried to the Lord he heard us and sent an Angel who brought us out of Egypt, and now we are here at Kadesh, encamped on the borders of your land. Please let us pass through your country. We will be careful not to go through your planted fields, nor through your vineyards; we won't even drink water from your wells, but will stay on the main road and not leave it until we have crossed your border on the other side!"

But the King of Edom said, "stay out! If you attempt to enter my land I will meet you with an army!"

"But Sir," protested the Israeli ambassadors, "we will stay on the main road and will not even drink your water unless we pay whatever you demand for it. We only want to pass through, and nothing else!"

But the King of Edom was adamant. "Stay out!" he warned, and, mobilizing his army, he marched to the frontier with a great force. Because Edom refused to allow Israel to pass though their country, Israel turned back and journeyed from Kadesh to Mount Hor." (1)

(1) The living Bible: Numbers Chapter 20 verses 14-22.

Abstract

Civil aircraft engaging in international air navigation usually have to fly over other countries necessitating the grant of transit of rights.

The first part of this Thesis attempts to define "transit rights" with reference to overflight of aircraft and to ascertain whether the rights exist in law for all forms of international transportation including international air transportation.

The second part deals with the limitations imposed on the right of overflight by public international air law and private rights of individuals on the surface.

Résumé

Les aéronefs civils engagés dans la navigation aérienne internationale ont ordinairement à survoler le territoire d'autres pays, ce qui implique l'octroi de droits de passage par ces pays.

La première partie de notre thèse essaie de définis ces "droits de passage" en se réferant au survol des aéronefs et de s'assurer de l'existance de ces droits juridique pour toutes les formes de transports internationaux, y inclus le transport aérien international.

La seconde partie s'occupe des limites imposées au droit de survol par le droit international public et par les droits des propriétaires de la surface.

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INTRODUCTION

International air transport is dependent on the grant and exercise of transit rights especially the right of overflight in order to achieve its main purpose which is the transportation of passengers, mail and cargo from one state to another.

International air service has been defined by Article 96 of the Chicago Convention as an air service which passes through the airspace over the territory of more than one state. Each nation has the right to fly over its own territory and territorial waters and over the high seas. It can only fly through the airspace of another nation by special authority. Therefore, unless the states between which international air transportation is to take place are neighbours, or are only separated by high seas, the ability to cross the territory of one or several states is essential in order to make a journey beginning and terminating between two distant states.

International air transportation is performed by aircraft, a vehicle which has gained popularity by its speed and the distances it covers. For example in 1945, an aircraft covered the distance between New York and Bombay in 39 hours, a passenger ship in 1920 had spent 17 days to complete the same journey.[1] Therefore, from its speed,

the aircraft cannot be effectively useful when it is confined to the borders of one state unless that state has an enormous land mass, for example, the United States of America, Canada, the Soviet Union and Australia. But such nations are few. The aircraft therefore needs the length and breadth of the whole world to realize its potential in transportation.

The aircraft disembarks passengers, cargo or mail at a point as close to their destination as possible. As stated by Dr. Matte (2) trains stop at the border and a connection with international transport can only be made by transfer. Boats too usually end their voyages in ports located at a state's land territory but the aircraft crosses frontiers without stopping, the only possible border occurring when it takes off and when it lands. To be able to cross frontiers without stopping, transit rights are necessary.

Socially, economically and politically most states are interdependent on each other. The ease and speed of movement brought about by the aircraft allows businessmen to travel to all parts of the world without loss of time and to open up businesses in different countries without worrying about the distance involved; thus the businessmen are able to enlarge their spheres of interest or to

copperate with foreign companies in order to maintain and develop very extensive commercial or industrial relations.(3) By its ability to penetrate into the most remote areas, the aircraft has led to the discovery of unexplored lands and therefore has opened up new resources to be exploited according to the needs of mankind. The aircraft has facilitated the rapid movement of consumer goods. Fresh goods can be transported from one part of the globe to another without the necessity of preservation of the said goods. Mail is carried by air from continent to continent and thereby promotes international trade operations.

In the social field, aviation has stimulated international life. People can travel to different parts of the world and thereby get to appreciate different life styles and different achievements of different states. This may result in a "tendency to diffuse cultures and techniques" and thereby "reduce the differences among civilizations".(4) Transportation by air is thus serving perfectly the idea of world community and is contributing to the unity of the nations.

In the field of international politics, air transport has "opened up unprecedented opportunities for regular and quick personal contact among statesmen of the world, whenever a situation requires their meeting".(5) This was even more of particular importance especially at the time the

Chicago Convention on International Civil Aviation 1944 was concluded because at that time statemen had to depend on speed to bring about and maintain peace and thereby put an end to World War II.

To maintain the economic, social and political cooperation through air transport, transit rights are necessary. Furthermore as stated by Morgan,(6) the former chief of Aviation Division, Office of Transport and Communications Policy, U.S. Department of State:

> Under the system of bilateral agreements you may obtain commercial rights to operate and do business in a certain country and be wholly unable to get there. You must at least have transit rights in all the intervening countries. Transit rights are no good at all if we have no commercial rights anywhere. Their value indeed depends upon their use in reaching countries with which we exchange commercial rights.

The need for transit rights in international air transport is further emphasised by the doctrine of complete and exclusive sovereignty in the airspace. Article 1 of the Convention on International Civil Aviations concluded at Chicago in 1944 provides:(7)

> Article 1: The Contracting States recognize that every state has complete and exclusive sovereignty over the airspaces above its territory.

Article 2 of the Convention defines territory to include "the land areas and territorial waters adjacent thereto under

the sovereignty, suzerainty, protection or mandate of such state".

The word sovereignty, however, is not defined. This principle is settled by established doctrine in customary international law and is understood universally to mean the international independence of a state, combined with the right or power of regulating its internal affairs without foreign dictation. It is a power to do everything in a state without accountability, to make laws, to excute and to apply them, to make war or peace and to conclude treaties with foreign nations.(8)

Article 1 of the Chicago Convention affirms an existing rule of Customary International Law. It recognizes that sovereignty over territorial airspace is an attribute to all states whether parties to the Chicago Convention or not.

After recognizing the principle of state sovereignty in the airspace, the Chicago Convention limits the lateral extent of this sovereignty by the definition applied to the word "territory" in Article 2. However, since the word "airspace" is not defined, the Convention places no restriction on what may be the upper limit to that airspace.(9)

It is commonly understood by states, that under Customary

International Law, a state does not have the right to pass over or across the territory of another state unless permitted to do so. Applying the principle of sovereignty to the problem of navigation on international rivers, Hall states that,

> it may be said without hesitation....that so far as International Law is concerned, a state may close or open its rivers at will, that it may tax or regulate transit over them as it chooses, and that it would be as wrong in the moral sense as it would be generally foolish to use these powers needlessly or in an arbitrary manner, it is morally as well as legally permissible to retain them, so as to be able when necessary to exercise pressure by their means, or so as to have something to exchange against concessions by another power.(10)

Mowat on the same subject says,

> an artificial waterway, like an artificial tunnel or road, can only be made with the leave of the territorial sovereign. The Law of Nations has never recognized any international right of way as attaching naturally to the land of an independent state. Accordingly, the sovereign can make what conditions he pleases for the construction of a canal. (11)

Internaitonal Law does not know of any natural right of states to free access to the high seas.(12) Apart from academic comments on the right of a sovereign regarding transit rights over its territory, a judicial expression was given in the Case Concerning the Right of Passage over Indian Territory, by Judge Chagla".....it is equally

undisputable that prima facie a state enjoying territorial sovereignty has the right to allow or to prohibit a right of passage or transit under such terms and conditions as she thinks proper."(13)

Therefore both commentators and judges on the International Court of Justice share the view that by virtue of the doctrine of sovereignty, other states do not possess rights to pass over another sovereign's territory. That right must be granted by a sovereign state before it can be exercised by another state, and as expressed by Lauterpacht, if sovereignty means anything, it must comprehend the right to exclude aliens or to prevent construction or use of instrumentalities dedicated to the transit of persons or goods.(14)

Support for this view is found in the practice of states in the form of treaties and conventions by which rights of transit were accorded to aliens across areas over which states had sovereignty, for example, rivers flowing through their lands; their airspace and their land territory.(15) These treaties were a mere grant of the transit rights and do not create customary international law on the existence of transit rights over a sovereign state's territory and were concluded, as stated in their preambles, without prejudice to the states, rights of sovereignty or authority

over routes available for transit.

It appears therefore that Customary International Law places no restrictions upon the sovereignty of a state over its own territory and that questions of transit are subject to the absolute discretion of the sovereign state which may grant or withdraw at will.

The same order exists in the territorial airspace and that is, that unless specifically granted either by a multilateral treaty[16] or by a bilateral agreement, no foreign aircraft have the right to transit through any other state's territorial airspace.

The Chicago Convention divides international air transport in terms of that which is, and that which is not scheduled. For that air transportation which is not scheduled, the Chicago Convention grants transit rights of overflight. For those services which are scheduled this same transit right is found in the International Air Services Transit Agreement and the bilateral air services agreements between the states involved.

The present study will endeavour to define the term "transit rights" with particular reference to overflight. This study will address itself to the issue of whether these rights exist as a rule of customary international law for

all forms of international transportation including both surface and air transportation. Any limitations imposed on the exercise of the transit rights of overflight by public international air law or by private rights of individuals in airspace are of major considerations.

FOOTNOTES TO INTRODUCTION

1. I. Vlasic, The Grant of Passage and Exercise of Commercial Rights in International Air Transport, McGill University, Montreal, 1955, p.3. Today the same distance may be covered in 14 hours.

2. N.M. Matte, Treatise on Air-Aeronautical Law, McGill, Montreal 1981, p.31.

3. Matte, op. cit. p.34

4. Vlasic op. cit. p.10.

5. Id. p. 11

6. The International Civil Aviation Conference at Chicago: What it means to the Americans. U.S. Department of State, blueprint p.14.

7. This Convention will be referred to as the Chicago Convention. The author commences with the Chicago Convention because it is the major current Convention regulating international air transport. However, the concept of sovereignty in the airspace first appeared in treaty in Article 1 of the Convention Relating to the Regulation of Aerial Navigation concluded at Paris in 1919. Both Conventions restate an existing principle of Customary International Law.

8. This power is not absolute. It is subject to provisions of Internaitonal Customary Law and to treaties binding on the sovereign state.

9. The problem of the upward limit of sovereignty in the airspace may not have been a foreseeable problem at the time the Chicago Convention was concluded - but it may raise problems with the application of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial bodies 1967 which provides as follows:

> Article 1. The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

> Outer space including the moon and other celestial bodies shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.
>
> There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and states shall facilitate and encourage international co-operation in such investigation.

Article 2 provides:

> Outer Space including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

The legal regime of Outer Space provided for in this treaty is in direct conflict with the accepted principle of sovereignty in the territorial airspace. Therefore the question must be asked: Where then does the boundary lie between airspace and outer space? There have been various propositions as to where this boundary should be.

Some of which may be found in J.C. Cooper: Explorations in Airspace Law selected Essays, edited by Vlasic, McGill Montreal, 1968 p. ; Bin Cheng: The Legal Regime of airspace and outer space, the Boundary Problem, Functionalism v. Spatialism. The Major Premises (1980) Annals of Air and Space Law p.325.

Although the lateral limit of state sovereignty in territorial airspace has been defined, its upward limit has not been defined either by the Chicago Convention or the Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the moon and other celestial bodies. Therefore Articles 1 and 2 of the Chicago Convention may be interpreted to mean that a state has complete and exclusive sovereignty in the airspace above its territory the lateral limits of which are the territorial boundaries of the state concerned including its territorial sea, the upward extent of which is limited by the Outer Space.

10. Hall: International Law 8th Edition p. 173

11. Mowat: The Concert of Europe p. 110 quoted by Lauterpacht in Freedom of Transit in International Law Vol. 44 Transactions of the Grotius Society p.316 footnote 13.

12. Schwarzenberger: International Law Vol 2 3rd Edition p. 237.

13. I.C.J. Reports 1957 p.125.

14. Vol. 44 Transactions of the Grotius Society p. 317.

15. The Bercelona Convention and statute on Freedom of Transit of 20th April, 1921, L.N.T.S. Vol. 7 p. 11.

2. The Barcelona Convention and Statute on the Regime of Navigable Waterways of International concern of 20th April, 1927 L.N.T.S. Vol. 7 p.35.

3. Barcelona Convention and Statute on the International Regime of Railways of 9th December, 1923 L.N.T.S. Vol. 47 p.55

4. The Chicago Convention 1944.

5. The Paris Convention Relating to the Regulation of Aerial Navigation 1919.

16. Chicago Convention Article 5 and the International Air Services Transit Agreement.

PART I

Transit Rights in International Law

Section I

Transit Rights in Surface International Transport

1. Definition of Transit Rights

For the purpose of this part, the author will first endeavour to define the "transit rights" in relation to overflight and to ascertain whether the principle of state sovereignty has been qualified under Customary International Law to allow the evolution of transit rights.

Neither the Chicago Convention nor the International Air Services Transit Agreement define transit rights. As stated by Lord Wilberforce "there is no reason why we should not consult a dictionary if the word is such that a dictionary can reveal its significance"(1) On that basis, a dictionary definition becomes an appropriate starting point. Black's Law Dictionary defines "transit" as in the course of passing from point to point. The Oxford English Dictionary defines it as "the action or fact of passing across or through; passage or journey from one place or point to another".

Lord Wilberforce further stated that "when dealing

with an international treaty or convention I think that there is no doubt that international courts and tribunals do in general make use of traveux préparatoires as an aid to interpretation." (2) to which I resort next. In the Canadian House of Commons on March 17, 1944 commenting on the draft Canadian Government proposal to the Chicago Conference dealing with the grant of the First and Second Freedoms, the Honourable Mr. D.C. Howe, then Canadian Minister of Munitions and Supply stated:

> I think we must be prepared to subscribe to the granting of general freedom of transit for international air services on a universal basis so that national air services will automatically possess the right to cross the territory of other nations, en route to their destinations, and to land in other countries for refuelling and reservicing, without having to request the specific permission of each government concerned. (3)

The words used by the Honourable Mr. Howe which would define "transit rights" for the purposes of this paper are "the right to cross the territory of other nations, en route to their destinations."

At the Conference on International Civil Aviation at Chicago proposals for the new Convention on International Air Navigation were submitted by the United Kingdom, the United States and Canada. All the three proposals included the grant of the First and Second Freedoms subject to various conditions. For the First Freedom, the Canadian Government's proposal provided for "the right of innocent

passage", [4] while the proposal from the United Kingdom phrases it as "the right of innocent passage through a state's airspace". [5] Both the United Kingdom and the Canadian proposals made reference to the term "innocent passage". With reference to the legal meaning of these words in territorial waters, Professor Vlasic states that,

> these are some important requirements which must be fulfilled before passage of a merchant ship can be considered as "innocent". First of all the ship ought not to endanger the security of the coastal state. This means that the ship is not allowed, for instance, to disembark persons or materials without authorization of the coastal state, or in other words carry out operations which may endanger the interests of the coastal state. Also the ship in its passage must strictly follow the navigation regulations of the coastal state and keep to the international routes. Further, such a ship must respect the economic interests of the coastal state, that is, it must refrain from exploiting the resources of territorial waters and from engaging in commercial operations at unauthorized places. Moreover, any unreasonable delay in the territorial waters, or the following of an unusual sea route, could be regarded as an abuse of the right of innocent passage. (6)

Freedom of overflight over another territory falls within the scope of this analysis for the reasons that it does not involve the right to disembark persons or materials, it refrains from exploiting the resources of the territory being overflown, it does not delay in the airspace of the territory being overflown, and must by all means follow the usual international air route since the overflying aircraft is under the control and guidance of the air traffic

controllers of the state being overflown. Professor Vlasic's analysis of the right of innocent passage through the territorial waters, if applied to the right of innocent passage through the airspace as proposed by the United Kingdom and Canada amounts to the right to fly across another sovereign state's territorial airspace without landing but strictly observing that sovereign state's navigation regulations. This explanation is in line with the United States proposal, of "the right to fly across its territory without landing".(7)

Analogies may be drawn from other international conventions in which the words "innocent passage" have been used.

The Draft Convention (8) on the Law of the Sea defines "innocent passage" in the following words,

> 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with this Convention and with other rules of international law.
>
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities:
>
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal state;

(d) any act of propaganda aimed at affecting the defence or security of the coastal state;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) the carrying out of research or survey activities;

(j) any act aimed at interfering with any systems of communication or any other facilities or installation of the coastal state;

(k) any other activity not having direct bearing on passage.

Therefore, if an aircraft in the course of its overflight engaged in any of the activities enumerated in the Draft Convention on the Law of the Sea, its overflight would not amount to "innocent passage" as envisaged by the drafters of the Chicago Convention.

Lastly, recourse will be made to a treaty, in pari materiae and equate the words "transit" to "traffic in transit" as used in the Havana Charter for an International Trade Organisation. Article 33 of the Havana Charter for

an International Trade Organisation defines traffic in transit as "goods (including baggage) and also vessels and other means of transport, shall be deemed to be in transit across the territory or a member country, when the passage across such territory is only a portion of a complete journey beginning and terminating beyond the frontiers of the member country across whose terrirory the traffic passes". Heller wrote that if the words "passengers" and "mail" are inserted in the definition, an acceptable definition of transit in international air transportation may be obtained.(9)

Therefore, in international air transportation, transit can be defined as the carriage by air of passengers, cargo (including baggage) and mail across the territory of a foreign state, where such carriage commences and terminates beyond the frontiers of the state whose territorial airspace is overflown. Having established a definition of the words "transit rights" the next object is to ascertain whether these rights are established rules of international law.

2. Transit Rights as rules of Customary International Law

(a) Transit Across High Seas

Under customary international law freedom of transit is recognised on the high seas. The law governing the high seas has its foundation in the rule that the high seas are

not open to acquisition by occupation on the part of the states individually or collectively; it is extra commercium.

The term "high seas" has been defined as meaning all parts of the sea that are not included in the territorial sea or in the internal waters of a state.(10) The Draft Convention on the Law of the Sea defines the term "high seas" as "all parts of the sea that are not included in the exclusive economic zone in the territorial sea or in the internal waters of an achipelagic state".(11)

The "freedom of the seas" means that "apart from certain special cases which are defined by international law vessels on the high seas are subject to no authority except that of the state whose flag they fly. According to the Lotus case (12) in virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them Further, Judge J.B. Moore, in his dissenting opinion states "in conformity with the principle of equality of independent states, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no state is authorised to interfere with the navigation of other states on the high seas in time of peace except in

the case of piracy by the Law of Nations or in extraordinary cases of self-defence."

In Great Britain v. United States Claims Arbitration[13] it was held that it is a fundamental principle of international maritime law that, except by special convention or in time of war interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies.

This principle of the freedom of the high seas received codification in the Convention on the High Seas 1958 under Article 2 which provides:

> The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:
> (1) Freedom of navigation
> .....
> These freedoms and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to interests of other states in their exercise of the freedom of the high seas.

The freedom of the high seas mentioned in Article 2 of the 1958 Convention on the High Seas which is relevant to this paper, is the "freedom of navigation". The freedom is recognized by general principles of international law.

It cannot be subjected to state sovereignty and is to be exercised with reasonable regard to the interests of other states. The freedom can only be regulated by treaty or by customary international law. Therefore the freedom of navigation is absolute. The same principle has been reproduced in the Draft Convention on the Law of the Sea under Article 86 which provides:

> (1) The high seas are open to all states, whether coastal or landlocked. Freedom of the high seas is exercised under the conditions laid down by this convention and by other rules of international law. It comprises inter alia, both for coastal and landlocked states:
>
> (a) freedom of navigation
>
> (b) freedom of overflight
>
> (2) These freedoms shall be exercised by all states with due consideration for the interests of other states in their exercise of the freedom of the high seas, and also with due consideration for the rights under this convention with respect to activities in the area.

Article 89 provides that no state can validly purport to subject any part of the high seas to its sovereignty and Article 90 provides that every state, whether coastal or landlocked, has the right to sail ships under its flag on the high seas.

Therefore there is absolute freedom of transit over the high seas. This freedom is a rule of customary international law which has been codified by treaties.

(b) The Right of Innocent Passage Across Territorial Waters

The right of innocent passage is firmly established in international law.

> There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters. (14)

The right of innocent passage was recognized by the Geneva Convention on the Territorial Sea and Contiguous Zone. It is stipulated that ships of all states, whether coastal or not shall enjoy the right of innocent passage through the territorial sea.(15) The coastal state has a duty to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea and not to hamper the innocent passage.(16) No charge may be levied upon foreign ships by reason only of their passage but the coastal state may levy tolls as payment for specific services rendered to a foreign ship such as pilotage or towage.(17)

Thus customary international law as well as international law as codified in treaties recognize the right of peaceful or innocent passage through the territorial sea. What then does innocent passage mean in this context.

Looking at the two terms separately, the term "passage" is defined by Article 14 (2) of the Convention on the Territorial Sea and Contiguous Zone as navigation through territorial waters. As a rule, it does not include stopping or anchoring. These are permitted only if incidental to ordinary navigation or made necessary by force majeure or distress.(18)

The term "innocent" is more complex. In the Corfu Channel Case (19) it was held that it was not the character of the ship which was the determining factor, but rather the character of the passage itself. According to that court, the question to consider is "whether the manner in which the passage was carried out was consistent with the principle of innocent passage". The Geneva Convention on the Territorial Sea and Contiguous Zone expressed the principle underlying the Corfu Channel Case that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state".(20) Under Article 14 (4) of this Convention, passage is to be presumed innocent until shown otherwise. Therefore the burden is on the coastal state to prove that the passage itself was prejudicial to its peace, good order or security.

The coastal state may regulate the passage of foreign ships to guard against the possibility of passage being dangerous to its security; and if the passage is affected

in a manner contrary to the protective regulations, the coastal state may point to the prohibited act or omission as evidence of the violation.(21) But it cannot prohibit such passage altogether.(22) The Geneva Convention on the Territorial Sea and Contiguous Zone grants the coastal state a general power to take necessary steps in its territorial sea to prevent passage which is not innocent; (23) the coastal state may also suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.(24)

Having established that there is a principle of innocent passage in international law, the question which arises is as to what waters the right applies. It applies primarily to the territorial sea. It is this right of innocent passage which distinguishes the legal status of the territorial waters from that of internal waters. However, the Geneva Convention on the Territorial Sea and Contiguous Zone extends the application of the rule of innocent passage to "internal waters which previously had been considered as part of the territorial sea or the high seas"(25) but have been acquired by states which have deeply indented coastlines or a fringe of islands by the use of a straight baseline for measuring the breadth of their territorial sea in accordance with Article 4.

(c) Innocent Passage in a strait

A strait may roughly be defined as a narrow passage connecting two sections of the high seas. The right of innocent passage is not only applicable to territorial waters and to newly enclosed waters, it also applies to straits whether or not they are formed entirely from territorial waters. And since the right of innocent passage in territorial waters finds its legal justification in the wider principle of freedom of navigation on the high seas, it follows logically that the same right should be recognized especially when the waters form the connecting link between two parts of the high seas. On this issue, Bruel comments:

> ...the right of "passage inoffensif" through territorial waters in time of peace for merchant vessels...was sufficient, in the main, to guarantee them a right of passage also in the part of the territorial waters which lies in straits. (26)

The determining consideration is the fact that a strait connects two parts of the high sea. According to the Corfu Channel Case the test of the applicability of the right of innocent passage is the geographical connection of two parts of the high seas and the fact that the strait is used in international navigation. Therefore, so long as the strait connects two parts of the open sea and is used for international navigation, the coastal state does not possess the competence to prohibit innocent passage.(27)

The 1958 Convention on the Territorial Sea and Contiguous Zone gives recognition to the existence of the right of innocent passage in straits constituting territorial waters. If such straits only connect two parts of the high seas but are not used for international navigation, they are governed by the general provisions guaranteeing the right of innocent passage through the territorial sea;[28] they have the same status as ordinary territorial waters and are subject to the same limitations. This also means that the coastal state may temporarily suspend innocent passage for security reasons.[29] If such straits connect two parts of the high seas and are also used for international navigation, they are given the same status as the high seas, and a special provision applies; not only is the coastal state precluded from prohibiting the innocent passage of foreign ships in such straits, but it may not even suspend it.[30]

The Draft Convention on the Law of the Sea[31] establishes three categories of straits. The first category includes straits used for international navigation if a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the straits.[32] To these, it is submitted, the freedom of navigation analogous to that of the high seas is applicable.

The second category includes straits used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.(33) For these straits, the "right of transit" applies.(34) Article 38 (2) of the Draft Convention on the Law of the Sea (informal text) provides:

> 2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a state bordering the strait, subject to the conditions of entry to that state.

What does this "transit passage" entail? May be drafts submitted by the United States and the Soviet Union may provide a clue. In 1971, the United States proposed the following provision:

> In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. (35)

John Stevenson in a statement to the Sub-Committee II of the Seabed Committee on July, 28 1972, said:

> The United States and others have also made it clear that their vital interests require that

> an agreement on twelve miles territorial sea be coupled with agreement on free transit of straits used for international navigation and these remain basic elements of our national policy which we will not sacrifice. (36)

Further Stuart French, U.S. Department of Defence in a letter to Senator John C. Stennis dated August 11, 1976 (37) said:

> what we seek is freedom of navigation and overflight for the purpose of transit in straits connecting high seas to high seas. We oppose restriction of innocent passage in such straits....

The Soviet draft provided that no "state shall be entitled to interrupt or suspend the transit of ships through straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind." (38)

"Transit passage" therefore lies between "freedom of navigation" on the high seas and "innocent passage". United States negotiators believe that transit passage is close to freedom of navigation avilable on the high seas. (39) In support of this interpretation it may be noted that the definition of "transit passage" does include a reference to the freedom of navigation but not to "innocent passage."

However, Article 39 (1) provides:

1. ships and aircraft, while exercising the right of transit passage shall

(a) Proceed without delay through or over the strait;

(b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations:

(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;

(d) Comply with other relevant provision of this part.

Therefore, in order for passage to be "transit passage" it must be effected without delay, not be a "threat or use of force against the sovereignty, territorial integrity or political independence of states bordering straits," and not "in any manner in violation of principles of international law embodied in the Charter of the United Nations." In comparison, high seas "freedom of navigation" has no limitations or qualifications other than the duty of reasonableness. It is therefore submitted that the right of "transit passage" is more or less similar to the right of innocent passage.

The third category of straits are those linking high seas or exclusive economic zones with waters subject to national jurisdiction [40] and those formed by an island of a state bordering the strait and its mainland. [41] To these the right of innocent passage avails. [42]

In summary of the law of innocent passage, it can be concluded that:

1) Innocent passage is a right recognised under customary international law, and not merely a privilege to be granted or refused at the discretion of the coastal state.

2) The innocence of the passage is determined by reference to the nature of the passage itself, rather than the nature of the ship.

3) The right of innocent passage applies to merchant ships and warships. The passage of merchant ships may be suspended temporarily for security reasons, and warships may be expelled for refusal to comply with regulations of the coastal state.

4) The right of innocent passage exists in the following areas:

   (a) internal waters newly enclosed by straight baselines.

   (b) territorial waters, either along the coast or in a strait.

   (c) straits connecting two parts of the high seas, or one part of the high seas and one part of territorial waters; if they are used for

international navigation and there can be no suspension of the right of innocent passage.

3. Transit Rights Granted by Treaties

Rights of Passage over land territory

Turning from rules of Customary International Law governing transit rights to the law as stated in the various relevant treaties and conventions, there are two classes of treaty that deserve consideration. Those which relate to rivers or other international waters and those which relate to transit over land. In both categories there may be found treaties dating back to the eleventh and twelfth centuries which reflect the concern for freedom of transit. As early as 1171 Ferrara undertook towards Venice, Bologna, Mantua, Milan, Modena and Ravena "to open the waters of the Po freely to all men, to keep them open, at no time to close them and to observe this in good faith and without any fraud."(43) In the same era Venice promised Milan to keep the roads within its territory open and safe.(44)

The most important point in the development of the principle of freedom of navigation on international rivers began in 1792, when the Scheldt was declared open by France on the grounds that "a nation cannot without injustice pretend to the right of exclusively occupying the channel

of a river, and hinder the neighbouring peoples who border on its higher shores from enjoying the same advantages".(45) In 1815, navigation on the Rhine was declared to be "free from the point where the river becomes navigable unto the sea, and vice versa and cannot in respect of commerce be prohibited by anyone".(46)

During the late nineteenth century, agreements dealing with rights over land became numerous. The United Kingdom; agreements with other colonial powers defining their respective spheres in Africa contained assurances of freedom of passage without hinderance of any description.(47)

After World War I, nations eager to make peace and to prevent future war signed the Covenant of the League of Nations the main aim of which was to promote international cooperation and to achieve international peace and security. (48) In the field of promotion of international cooperation, Article 23 (e) of the Covenant provided that "subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the league... will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the league. In this connection, the special necessities of the regions devastated during the war 1914-1918 shall be borne in mind."(49)

However this article was not mandatory. It did not make it an obligation that member states should accord other member states of the league freedom of communications or of transit through their territories. It was rather a suggestion that the privilege of freedom of communications and of transit should be accorded to member states to facilitate commercial development especially in view of the fact that the First World War had devastated most of the member states. As explained in an advisory opinion of the Permanent Court of International Justice (Railway Traffic Between Lithuania and Poland) this provision did not imply any specific obligations for the member states of the League of Nations "to open any particular lines of communications... specific obligations can only arise...from international conventions existing or hereafter to be agreed upon, for instance "from general conventions to which other powers may accede at a later date" as stated in the preamble to the Barcelona Convention on Freedom of Transit."(50)

Similarly, the United Nations Charter fails to impose any specific obligations on members regarding the grant of transit rights. Article 1 (2) of the Charter aims at achieving "international co-operation in solving international problems of an economic" character. By Article 13 the General Assembly is charged with a duty to initiate studies and make recommendations for the purpose of promoting international co-operation in the economic field.

According to Article 55 "the United Nations shall promote solutions of international economic ..co-operation" and by Article 62 "the Economic and Social Council may make or initiate studies and reports with respect to international economic....matters and may make recommendations with respect to any such matter to the General Assembly, to the Members of the United Nations, and to the specialised agencies concerned."

However, despite lack of obligatory provisions requiring member states to grant transit rights to each other, pursuant to Article 23 (e) of the Covenant of the League of Nations, progress was achieved through the Constitution in 1921 of the Communications and Transit Organization of the League. As stated in the League of Nations;

> the war accentuated the economic interdependence of the nations of the world, and the questions of international transport by land and water became of considerable and political importance and urgency. This was particularly the case in Europe where large area which had previously been economic units were broken up into a position to be self-sufficent but determined to retain their political independence. In order to deal with the resultant problems, the League appointed the advisory and technical organization for communications and transit.(51)

The purpose of the organization was to facilitate international co-operation in the field of communications and transit, and in particular to help the Security Council and the Assembly to accomplish the work entrusted to the

League by the Covenant.

The achievements of the Communications and Transit Organization which are of relevance to this paper are the conclusion of the following Conventions dealing with the problem of transit.

(i) Convention and Statute on Freedom of Transit of 20th April, 1921.(52)

(ii) Convention and Statute on the Regime of Navigable Waterways of International Concern of 20th April, 1921.(53)

(iii) Convention and Statute on the International Regime of Railways of 9th December, 1923.(54)

which are considered in turn hereafter.

(i) The Convention and Statute on Freedom of Transit

A general Conference on Communications and Transit was held at Barcelona in March 1921. The object of the Conference was to deal with transit and waterways throughout the world. Member states at the Conference agreed on a Convention and Statute on Freedom of Transit. The application of the Statute is to transit traffic only. Article 1 of the Statute defines "traffic in transit" as the passage of persons, baggage and goods, of vessels and of other means of transportation across the territory under the sovereignty

or authority of one of the contracting states, when the passage across such territory is only a portion of a complete journey, beginning and terminating beyond the frontiers of the state across whose territory the transit takes place.

The particular traffic to which the Statute applies was further restricted by being applicable only to traffic by rails or waterway and did not extend to traffic by air or by road. As Toulmin comments, if transit traffic is to be given freedom of passage, it must travel by routes upon which it can be easily distinguished and controlled. (55) This can be ascertained from Article 2 of the Statute which provides that the measures taken by the contracting states for regulating and forwarding traffic across their territory shall facilitate free transit by rail and waterway on routes in use convenient for international transit and that contracting states will also allow transit in accordance with the customary conditions and reservations across their territorial waters. By providing for transit rights by the routes where such traffic can be easily identified, the contracting states had their sovereign rights in mind and were not going to allow the Statute to infringe upon these rights.

Thus after granting the right of passage by rail or waterway in Article 1, the rest of the provisions of the Statute are tantamount to stating that the principle of the freedom of transit need not apply.(56)

Article 5 provides that no contracting state is bound to accord transit for passengers whose admission into its territory is forbidden or for goods whose importation is prohibited either on grounds of public health or security, or as a precaution against diseases of animals or plants or is regulated under general conventions.

The Statute only applies as between the Contracting Parties. Benefit to non-contracting Parties was specifically excluded by Article 6.

Contracting Parties were allowed to deviate from the provisions of the Statute. In case of emergency affecting the safety or the vital interests of a state, a contracting party may deviate from the provisions of the statute for "so short a time as possible". Futhermore, under Article 12 any contracting party which could establish a good case against the application of the statute in some or all of its territory, on the grounds of a grave economic situation arising out of the acts of devastation occasioned by the First World War, was to be relieved temporarily of the obligations arising thereunder.

International Treaties, Conventions and Agreements existing and inconsistent with the statute were not abrogated but the Contracting Parties were bound to bring them into harmony with the Statute so far as possible.

Finally, Article 13 provided that any dispute which may arise as to the interpretation or application of the Statute which is not settled directly between the parties themselves shall be brought before the Permanent Court of Justice, unless, under a special agreement or a general arbitration provision, steps are taken for the settlement of the dispute or some other means. In order to settle such problems in a friendly way, Article 13 further provides that Contracting States undertake, before resorting to judicial proceedings, and without prejudice to the powers and right of action of the Council and Assembly, to submit such disputes for an opinion to anybody established by the League of Nations, as the advisory and technical organisation of the members of the League in matters of communication and transit; in urgent cases, a preliminary point may recommend temporary measures intended, in particular, to restore the facilities for freedom of transit which existed before the act or occurrence which gave rise to the dispute.

Further development of freedom of transit can be observed in the Geneva Convention on the High Seas 1958[57] which contained, for the first time in a multilateral inter-

national instrument, an explicit acknowledgement in general terms of the right of states without a sea coast to free access to the sea. Article 3 provides:

> 1. In order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea coast should have the free access to the sea. To this end, states situated between the sea and a state having no sea-coast shall by common agreement with the latter and in conformity with existing conventions accord:
>
> > a) To the state having no sea-coast on a basis of reciprocity free transit through their territory.

The Convention recognizes the need of a land-locked state to have free access to the sea but does not grant the freedom of transit. It only encourages the states concerned to, by mutual agreement, grant each other this freedom of transit and if need arises, on reciprocal basis.

The Convention on Transit Trade of land-locked States 1965 (58) by Article 2 provides:

> Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport.

The question arises; Is this a general right of the land-locked state over the territory of a state separating it and the sea? The preamble to the Convention recites Articles 2 and 3 of the Convention on the High Seas (59) and

reaffirms the principles adopted by the United Nations Conference on Trade and Development which are as follows:

> Principle I — The recognition of the right of each land-locked state of free access to the sea is an essential principle of international trade and economic development.
>
> Principle III — In order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea-coast should have free access to the sea....
>
> Principle IV — In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all states, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods.

It appears therefore, that, if the freedom of transit is for the purposes of the land-locked state to enjoy the freedom of the sea then the state which separates it from the sea shall give it free access to the sea. However, if the freedom of transit is for purposes of trade, then the rights are to be granted by agreement of both states and on the basis of reciprocity.

The Convention on the Law of the Sea (Draft Convention, Informal Text)[60] provides by Article 125 paragraph 11 "that land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating

to the freedoms of the high seas and the common heritage of mankind. To this end, land-locked states shall enjoy the freedom of transit through the territory of transit states by all means of transport."

Here again the stress is on the fact that the freedom of transit is granted only for purposes of enjoying rights granted by the convention in territorial waters and on the high seas. But does not extend these rights for the purposes of trade and commerce.

(ii) The Statute on the Regime of Navigable Waterways of International Concern

Internal waters include all lakes and rivers inside a state's land territory as well as the waters on the landward side of the baseline of the territorial sea, ports harbours and historic bays.(61) An international river is a navigable river which flows through the territory of two or more states.(62) In theory and in practice, rivers are part of the territory of the riparian state consequently, if a river lies wholly, that is from its source to its mouth, within the boundaries of one and the same state, such state owns it exclusively. These are known as national rivers.(63) But many rivers do not run through the land of one and the same state only, whether they are so called "boundary rivers", that is, rivers which separate two different states from each other, or whether they run through several states, and

are therefore named "not-national rivers", such rivers are not owned by one state alone. Boundary rivers belong to the territory of the states they separate, the boundary line running either through the middle of the river or through the middle of the so called mid-channel of the river. And rivers which run through several states belong to the territories of the states concerned.(64) There is however another group of rivers which are navigable from the open sea and at the same time either separate or pass through several states between their sources and their mouths. Such rivers also belong to the territory of the different states concerned but they are named international rivers.(65) In the absence of treaty arrangements to the contrary, rivers are as much as any other land territory subject to territorial jurisdiction.(66)

The Statute on the Regime of Navigable Waterways of International Concern accorded free exercise of navigation on navigable waterways of international concern to the vessels of all contracting states.(67) Article 1 (1) specified the navigable waterways to be "all parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different states, and also any part of any other waterway, naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different states."

The provision for the settlement of disputes is generally the same as the transit statute.(68)

By Article 13 of the statute agreements in force relating to navigable waters, concluded by the contracting states before the coming into force of the statute were not abrogated. Treaties prior to the Convention and Statute on the Regime of Navigable Waterways of International Concern granted a right to the free passage of certain individual rivers, usually on a reciprocal basis as between riparian states. The treaties of the nineteenth and twentieth centuries which provide for a right of free navigation of the rivers with which they deal have their common ancestry in principle II of the Articles Concerning the Navigation of Rivers which in their Navigable Course, separate or cross different states adopted at Vienna in 1815.(69) Examples are Articles Concerning the Navigation of the Rhine 1815(70) and the Treaty of 1856 regulating the statute of the Danube.(71) In the Case Relating to the Territorial Jurisdiction of the International Commission of the River Order the Permanent Court of International Justice adverted to the fact that "most previous treaties" (prior to the treaty of Versailles) had limited the right to riparian states alone.(72)

Despite the existence of treaties which grant a right of free navigation on international rivers to the vessels of all nations, the practice of opening such waterways to gene-

al usage has not been universal.(73) Treaties which relate to navigable waters forming part of an international boundary between two states give equal rights to the nationals of both riparians.(74) To this category of arrangements belongs the Boundary Waters Treaty of 1909 between the United States and Great Britain which provides that the navigation of all navigable boundary waters is to continue "free and open for the purposes of commerce of the inhabitants and the ships, vessels, and boats of both countries equally.. ..... (75)

The question which remains to be considered is whether the right of free passage over navigable waterways is an accepted right of customary international law. Each river which is opened to international navigation, the understanding is that the management is a special one applicable to that waterway alone, constituting particular international law for that river rather than reflecting the principle of the lex generalis.(76) The continuing existence of river regimes which accord rights of passage only to riparians is an indication that a general right of free transit is not recognized by international law. Further confirmation of this view is the fact that the Barcelona Convention of 1921 on the Regime of Navigable Waterways of International Concern has been accepted by a restricted number of states.(77) In the Faber Case (78) in which the question of a right of free passage over a river flowing through two or more states and affording access to the sea arose, a conclusion was reached which supports the

contention that there is no general right of free navigation.

Transit By Railway And By Road

Transit rights by way of railways and roads have been mainly granted under bilateral agreements. The Statute on the International Regime of Railways provided for the exchange and reciprocal use of rolling stock. The movement of such rolling stock was the responsibility of the railway undertaking of the country where the movement took place. Such transport would not be considered as international transit, that is, the movement of traffic by a carrier of one state over the territory of the other state. By subsequent bilateral agreements train traffic across the territory of one state [79] have been permitted through traffic. However what is not clear is whether the traffic in transit uses the railway rolling stock of the country through which they transit or not.

In the field of road transport, except by virtue of some bilateral agreements,[80] there is no international right of way for commercial road transport, whether passengers or goods.

From the Barcelona Convention and Statute on Freedom of Transit, the Geneva Convention on the High Seas, The Convention on Transit Trade on Land-locked States 1965, The Draft Convention on the Law of the Sea and The Barcelona

Statute on the Regime of Navigable Waterways of International Concern can it be said that the right of access to the sea of land-locked states have developed into the concept of freedom of transit?

It has been argued [81] that the existence of a right of transit may be said to depend upon two basic conditions; first the state claiming the right of transit must be able to justify it by reference to considerations of necessity or convenience and secondly the exercise of the right must be such as to cause no harm or prejudice to the transit state. In distinguising the idea of "necessity" from the idea of "convenience", convenience may be described as the existence of a bona fide and legitimate interest. Article 2 of the Barcelona Statute on Transit provides that free transit shall be facilitated by the states concerned "on routes in use convenient for international transit". This meant that although the beneficiary state was not entitled to require construction of new routes, in claiming the use of an existing route, it was obliged to show its convenience and not necessity.

Necessity is a bit difficult to explain. In its judgement in the Corfu Channel Case [82] the International Court of Justice said:

> .....the decisive criterion is rather (the strait's) geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has

nevertheless been a useful route for maritime traffic.

From the passage it can be concluded that a channel can be an international highway even though it may not be a necessary or essential route and that it acquires its character as an international highway from (a) its geographical situation as a connecting link between two parts of the high seas and (b) its use as a route for maritime traffic. Applying this reasoning to passage over the territory of a state the emphasis is placed on the fact of its geographical situation as a potential communication link. Hence the geographical situation is the necessity.

Another concept to which consideration may be given when considering the existence of a right of transit is that of "the way of necessity". "Necessity" here suggests that no alternative means of transit is available and that unless some means is made available the state requiring it will be unable to survive as an independent state. This concept of "a way of necessity" is a generalization of rules to be found in Roman and English law according to which the owner of a land-locked parcel of land enjoys a right of way over his neighbour's land so long as the necessity for such a right of way exists.(83) The concept of "way of necessity" can be traced in the international conventions.(84)

The second condition upon which the existence of right of transit was said to exist was that the exercise of the right must be such as to cause no harm or prejudice to the transit state. In the Faber Case (85) Umpire Duffield was of the view that the states had a right to prohibit navigation in rivers flowing to the sea if it was necessary to the peace, safety and convenience of her own citizens. Therefore, it has been argued that in the absence of detriment to the transit state, permission to cross cannot be lawfully refused." (86) But, the discretion to determine what conditions may or may not give rise to the right of transit lies with the transit state. These interests of the transit state have also been recognised in international conventions. (87)

Hence other than for reasons of the security or legitimate interests of the transit state, a land-locked country may claim access to the sea for purposes of enjoying the freedoms on the high seas only, over the territory of a transit state as a right although it cannot be argued that the right has developed into a norm of customary international law. Therefore the principle of the freedom of transit, other than the freedom of transit over the high seas and the right of innocent passage through territorial waters and through straits, does not exist except by treaty and only between the parties to that treaty.

Section II

Grant of Aerial Transit Rights

The Chicago Convention 1944

Like the treaties on navigable waterways and on land-borne transport, the Chicago Convention starts with the recognition that every state has complete and exclusive sovereignty over its land territory and the airspace above it. It grants transit rights to aircraft of other contracting parties and specifically excludes state aircraft e.g. aircraft used in military, customs and police services; pilotless aircraft and aircraft operating scheduled international air services from enjoying the transit rights.

Non-Scheduled International Air Services

Article 5 of the Chicago Convention 1944 provides:

> Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory.... without the necessity of obtaining prior permission, and subject to the right of the state flown over to require landing. Each Contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air and navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

The right is granted by a contracting state to a

contracting state. The expression "all aircraft of the other contracting states" refers to aircraft registered in, and therefore, according to Article 17, having the nationality of other contracting states. The phrase "not engaged" means not engaged at the time the right is to exercised. This means that aircraft used at times for scheduled services can claim rights conferred by Article 5 if they are not engaged on scheduled services at the moment.

The convention grants the right to fly over a contracting state's territory to aircraft of a contracting state, not engaged in scheduled international air services but does not define the words "scheduled international air services". The International Civil Aviation Organisation presented the following definition for the guidance of the contracting states in the interpretation or application of Articles 5 and 6 of the Convention:

> A scheduled international air service is a series of flights that possess all the following characteristics:
>
> (a) it passes through the airspace over the territory of more than one state;
>
> (b) it is performed by an aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
>
> (c) It is operated so as to serve traffic between the same two or more points, either

(i) according to a published timetable; or

(ii) with flights so regular or frequent that they constitute a recognizable systematic series.(88)

The definition was maintained without any amendment by the Second Air Transport Conference held at Montreal in February, 1980.(89) The Council further defined the applicability of the definition. The definition encompasses a service which is part of an international network of services, operating according to a published timetable; a service where the on-demand passenger has a reasonable chance of securing accommodation; a service which normally operates irrespective of short term fluctuation in payload; and a service where stopover and interlining facilities are offered to the user with the appropriate ticket or air waybill, subject to relevant international agreement, if any.(90)

A service which operates frequently and regularly pursuant to a charter contract with one or more charterers with the intention of covering the entire capacity of the aircraft may be, at the discretion of states, classified as a scheduled service.(91)

It is emphasized that the main elements, of the definition are cumulative in their effect if, for a series

of flights, any one of the characteristics (a), (b) or (c) is missing, the series cannot be classified as a scheduled international air service.(92) In order to constitute a scheduled international air service according to the definition, a series of flights must be performed in such a manner that each flight is open to use by members of the public. This does not mean that all the flights of a series can be classified as non-scheduled if one of them is not open to the public, since that one could be excluded from consideration and the remainder might then form a series that could be classified as scheduled. A service may be regarded as open to the public, notwithstanding certain restrictions, which relate, for example, to the time of reservation, the minimum length of stay, or the obligation to deal with an intermediary. It is the duty of each state to assess the scope of the restriction in respect of an air service which may be regarded as open to the public and decide whether the restrictions are so substantial that the service should be considered as non-scheduled.(93)

A scheduled international air service must in the first place consist of a series of flights. A single flight by itself could thus not constitute a scheduled international air service. The definition does not state how many flights are necessary as a minimum to constitute a series in this sense. For the purpose of considering whether any

series of flights constitute a scheduled international air service, any flight or flights fulfilling the conditions specified in the definition can be included and any flight or flights not fulfilling those conditions can be excluded. Where the existence of a scheduled international air service, as defined, has been established, all extra flights associated with that particular service and open to use by members of the public are part of the same service. The non-revenue flights of commercial operators are, however, classified by the definition as non-scheduled even if operated in close association with a scheduled international air service.

The definition does not state that all the flights of a series constituting a scheduled international air service must be operated by a single operator, since it is possible for more than one operator to participate in the operation of such a service. In sub-paragraph (c), however, the definition states that a scheduled international air service is a series of flights that is operated in a certain way so that a number of unrelated flights, not operated as a series, cannot be classified as a scheduled international air service.

As for the concept of it being a "transport" service, a series of flights must be performed by aircraft for the transport of passengers, cargo or mail in order to

constitute a scheduled international air service according to the definition. Thus a series of flights performed for other purposes, such for example as training or crop spraying, could not be regarded as scheduled international air services even if it fulfilled the other elements of the definition.

The refusal on the part of the operator of air service to carry special and limited categories of traffic would not of itself prevent that service from being considered open to use by members of the public in the sense intended in this element of the definition. Restrictions placed by governments on the classes of traffic permitted to be carried by international air services would also not of themselves prevent such activities from being so considered.

The fact that the right is only enjoyed by aircraft of contracting states, and not those belonging to non-contracting states conforms with the principle that the freedom of transit, other than innocent passage through territorial seas, does not exist except by an agreement and only between parties to that agreement.

In Public Prosecutor v. Drouillet[94] a French subject, piloting a private aeroplane with United States papers on board, alighted at an aerodrome at Villacoublay.

He came from Havre. He had no special authorization from the Air Ministry to fly over French territory. The United States of America were not party to the International Air Navigation Convention of 1919. There was no special treaty between the United States and France on the subject. The French Law on Air Navigation of May 31, 1924, provided that the aeroplanes belonging to states which were not parties to the Air Navigation Convention of 1919, or which had no special treaty with France on the matter, shall not fly over French territory without special permission from the Air Ministry. The court held that the defendant was guilty of a violation of the law and said:

> The United States of America not having signed any Convention for aerial navigation with France, the registration and navigation certificates granted by the proper authorities of that country do not make lawful any flight above French territory. A special authorization granted by the Air Ministry is necessary for the flight over the territory even for a Frenchman whose aeroplane is registered in that foreign country. Having no authorization, the American aeroplane flying over French territory ought to be considered, as regards French Law, as without papers on board.

The term "aircraft of the other contracting states" means aircraft registered in, and having nationality of a contracting state in accordance with Article 17.

Aircraft enjoying transit rights conferred by the Chicago Convention cannot expect to enjoy the same when

the state overflown denounces the convention in accordance with Article 95.

According to Article 5 paragraph 1, the aircraft not engaged in the operation of scheduled international air services are entitled to fly over the airspace of a contracting state without the necessity of obtaining prior permission but the state overflown may require landing.

The fact that an aircraft which lacks one of the characteristics for aircraft operating scheduled international air services as defined by the Council of the International Civil Aviation Organization is the aircraft governed by Article 5 of the Chicago Convention is ambiguous and does not specify what type of aircraft the drafters of the Chicago Convention may have had in mind. The First Assembly of the International Civil Aviation Organization, while discussing the distinction between scheduled and non-scheduled operations, commented that "up to the Second World War the air services normally referred to as "scheduled services" formed a class that was so distinct as to need little definition. Any air transport company that wished to attract a substantial amount of business had not merely to run a schedule, but had to advertise that schedule as widely as possible. Companies running charter or taxi services found little

demand and were able to operate only relatively small aircraft at a passenger-mileage charge considerably above the scheduled services rates.(95) From that comment it appears that aircraft not engaged in the operation of scheduled international air services but transporting passengers were very few, especially in view of the fact that they had to charge more than the scheduled airlines did. Consequently, it is submitted that the drafters of the Chicago Convention may have had in mind the following aircraft operations:(96)

(1) aircraft carrying passengers on taxi basis,
(2) aircraft providing ambulance or rescue facilities,
(3) aircraft carrying emergency food and medical supplies,
(4) aircraft training or testing pilots,
(5) aircraft used in aerial photography and advertising,
(6) aircraft used in crop dusting,
(7) new aircraft being flown from the seller country to the purchaser country.

The Paris Agreement on Commercial Rights of Non-scheduled Air Services in Europe 1956 seems to support that view. Its list of the air services which do not harm the interest of the national scheduled air services includes:

(a) flights for the purpose of meeting humanitarian or emergency needs;

(b) taxi-class passenger flights of occasional character on request, provided that the aircraft does not have a seating capacity of more than six passengers and provided that the destination is chosen by the hirer or hirers and no part of the capacity of the aircraft is resold to the public;

(c) flights on which the entire space is hired by a single person (individual, firm, corporation or institution) for the carriage of his or its staff or merchandise, provided that no part of such space is resold;

(d) single flights, no operation or group of operators being entitled underthis sub-paragraph to more than one flight per month between the same two traffic centres for all aircraft available to him. (97)

The Multilateral Agreement on Commercial Rights of Non-scheduled Air Services among the Association of South East Asian Nations 1971 - seems to follow the same line. By Article 2, it specifies the non-scheduled services to be:

(a) flights for the purpose of meeting emergency or humanitarian needs;

(b) tax flights with no more than 8 passengers carried on each flight;

(c) single-entity charters;

(d) all-freight flights.

It is submitted that it was for the above category of aircraft that prior permission was not a condition precedent

to their flight over a member state's territory. In its analysis of the rights conferred by Article 5 of the Chicago Convention, the Council of the International Civil Aviation Organization states that the words "without the necessity of obtaining prior permission" meant that "generally aircraft are entitled to operate on flights specified...without applying for a permit that may be granted or refused at the election of the state to be entered. Indeed, no such instrument designated a "permit" should normally be required, even if it were automatically forthcoming upon application."

For overflights by aircraft engaged in the classes of operations described above have the states been allowing them their conventional rights of transit without requiring prior authorization? Annex 9 of the Chicago Convention which lays down standards and recommended practices relating to the admission of international flights other than scheduled international air services provides that states shall not require a greater degree of advance notice of such flights than is necessary to meet the requirements of air traffic control or of the public authorities concerned.[98] Annex 2, Rules of the Air, requires that a flight plan be submitted prior to operating any flight across international borders.[99] But under Article 38 of the Chicago Convention, states are not under a legal obligation to comply with any provisions on Annexes to the Convention if they may

file a difference in respect of the provision. Apart from Article 38 which provides for departure from the international standards and procedures set by the Council of International Civil Aviation Organization, the Chicago Convention does not provide for the ratification or adherence to the Convention with reservations as to some articles. It follows therefore that all member states to the Chicago Convention are bound by Article 5 and therefore cannot require prior permission for overflights by non-scheduled aircraft but may require notice necessary to meet the requirements of air traffic control.(100)

Scheduled International Air Services

According to the Chicago Convention, a distinction is drawn between the non-scheduled international air services which, alone, enjoy transit rights under the Convention and the scheduled international air services which are excluded from the right conferred by Article 5 of the Chicago Convention.

Article 6 of the Chicago Convention provides:

> No scheduled international air services may be operated over or into the territory of a Contracting State, except with the special permission or other authorization of the state, and in accordance with the terms of such permission or authorization.

The right of passage for scheduled international air services

remains a matter of special arrangement between the states concerned. To ascertain whether states have accorded each other these rights, one has to study the International Air Services Transit Agreement and the Bilateral Air Services Agreements.

International Air Services Transit Agreement.

Article 1 Section 1 of the International Air Services Transit Agreement inter alia provides:

> Each Contracting State grants to the other Contracting States the following freedoms of the air in respect of scheduled international air services:
>
> (i) The privilege to fly across its territory without landing.

Whereas Article 5 paragraph 1 of the Chicago Convention grants the "right" to fly across, Article 1 (1) of the International Air Services Transit Agreement grants the "privilege" to fly across. Is there any distinction between the words "right" and "privilege"? Article 5 of the Chicago Convention uses both words. In paragraph 1, the word "right" is used when granting non-scheduled international air services the freedom of flight across the territory of a contracting state and the freedom to stop for non-traffic purposes. But when granting commercial rights to aircraft, not engaged in the operation of scheduled international air services in paragraph 2, which rights

are subject to the grantor state imposing "such regulations, conditions, or limitations as it may consider desirable" the word "privilege" is used. Heller distinguishes the two words as:(101)

> A right (stricto sensu) or claim is a legal capability to requie a positive or negative act of another person; it is the benefit which a person derives from legal duties imposed upon other persons. The correlation of rights are duties.
>
> Privilege means the authority to decline a positive or negative act in favour of another; legal privileges are the benefits which a person derives from the absence of legal duties imposed upon his person.... whilst rights stricto sensu, pertain to the sphere of liberty and free will. It also covers the permission granted to walk across another person's land, provided that the permission constitutes a grant of privileges, alone, and not of accompanying rights (or claims) that the land owner or other persons shall not interfere with entering and walking across the land. The land owner may at any time physically or by withdrawing his permission, extinguish the privilege.

From Heller's distinction, legal duties imposed upon other persons exist where a right is granted and not where a privilege is granted. Is this the case with the Chicago Convention or the International Air Services Transit Agreement?

Article 5 of the Chicago Convention grants "rights" of overflights and stoppage for non-traffic purposes to aircraft not engaged in the operation of scheduled international air services, and grants "privileges" of taking or

discharging passengers, cargo or mail. Article 95 of the same Convention provides that any contracting party may give notice of denunciation of the Convention which shall take effect one year from the date of receipt; the same provisions are contained in Article III of the International Air Services Transit Agreement. Denunciation of the Convention and of the Transit Agreement puts an end to the exercise of the "rights" or "privileges" granted equally.

Article 26 of the Vienna Convention on the Law of Treaties provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Amendment, change, modification or termination of a treaty may be made with the consent of the Contracting Parties, otherwise it would amount to a breach of treaty.(102) Article 2 of the Vienna Convention on the Law of Treaties defines treaty as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. The written agreement between states whether designated "Convention" or "Agreement" is a treaty. The freedoms described as "rights" or "privileges" are granted by way of treaties. Therefore the conditions and regulations governing their application, treatment or even duration are the same.

Article 84 of the Chicago Convention provides that if

any disagreement between two or more Contracting Parties relating to the interpretation or application of the Convention, the dispute shall be decided by the Council of the International Civil Aviation Organization from whose decision an appeal may be made either to an ad hoc arbitral tribunal agreed upon by the parties to the dispute or to the International Court of Justice. Non-conformity with the Convention results in the restriction or limitation of operation of international air services over the territorial airspace of other contracting states and/or the suspension of the voting power in the Assembly and Council of any contracting state found in default.(103) These provisions relating to default and settlement of disputes have been applied to the operations of scheduled international air services by Article II (2) of the International Air Services Transit Agreement.

For both "rights" and "privileges" the same legal duties have been imposed upon other states. The state over whose territorial airspace the "right" or "privilege" of overflight is exercised is under a duty to take measures to facilitate air navigation, that is, to provide assistance to aircraft in distress in its territory;(104) to provide radio services, meteorological services and other air navigation facilities to facilitate overflight,(105) and in the event of an accident occurring in its territory, to institute an inquiry into the circumstances which led to

the accident.[106] Both "rights" and "privileges" are thus legal capabilities which "require a positive or negative act of another" state.

In international law and according to the Chicago Convention and the International Air Services Transit Agreement once the "right" or "privilege" is granted, their exercise is subject to the same conditions. A transit right of overflight is, therefore, the same right by whatever name it is described.

Leaving the question of language used aside, the right granted by Article I (1) of the International Air Services Transit Agreement fills in the blank left by the Chicago Convention. Article 6 of the Chicago Convention prohibits flight over the territory of a contracting party by an aircraft engaged in scheduled international air services of another state unless by special permission or authorization of the state to be overflown. By Article I (1) of the International Air Services Transit Agreement, the special authorization or permit is granted and to align the Transit Agreement with the Chicago Convention, it is a condition precedent to ratifying the agreement that the state seeking ratification must, in the first place, be a member of the International Civil Aviation Organization,[107] and to be a member of the International Civil Aviation Organization, a state must adhere to the Chicago Convention.

Furthermore, the exercise of the right of transit granted by the International Air Services Transit Agreement has to be in accordance with the Chicago Convention.(108)

The International Air Services Transit Agreement grants rights to Contracting States and not to airlines. Airlines may operate scheduled international air services across the territory of a Contracting State not as subjects of international law under the provisions of the International Air Services Transit Agreement but under the provisions of the municipal law of the contracting state overflown, which may make these operations subject to prior grant of an operating permission.(109)

The purpose of the International Air Services Transit Agreement is to authorize the exercise of transit rights by aircraft engaged in the operation of scheduled international air services across territories of contracting parties. The grant of this right on a multilateral basis was meant to obviate the necessity for bilateral negotiations and agreements. However, if some states so wish, they can conclude bilateral agreements inconsistent with the terms of the International Air Services Transit Agreement. This would be justifiable by Article 41 of the Vienna Convention on the Law of Treaties which provides:

> Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as

between themselves alone if:

.....

(b) the modification in question is not prohibited by the treaty and

(i) does not effect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

(2).... the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

In the case of the International Air Services Transit Agreement, the State Parties concerned would have to inform the International Civil Aviation Organization as well.

Bilateral Air Services Agreements

Because of the relatively wide acceptance of the International Air Services Transit Agreement (110) there has been little occasion for special bilateral agreements on transit rights. Where the other contracting party is not a party to the International Air Services Transit Agreement, transit rights for aircraft operating schduled international air services are granted by bilateral air services agreements. Transit rights are granted on the basis of reciprocity.(111) However, the exercise of the transit rights by one of the contracting states across the territory of another contracting state does not depend on the reciprocal exercise of the rights under the bilateral agreement

by the other state across the territory of the first mentioned state. The exercise of the transit rights by one state cannot be denied because another state does not exercise such rights.

Like the International Air Services Transit Agreement, the bilateral air services agreements confer rights and duties on the states parties thereto and not on their respective national airlines. But for aircraft to enjoy transit rights under bilateral air services agreements, they must be operated by a designated airline. The designation of an airline is required to be in writing.(112) There is no prescribed specific form in which the designation is made. Therefore, designation of airlines may be made either in the agreement itself, in a separate Exchange of Notes or in any other form of communication between states.(113)

In conclusion it is submitted that the concept of the right of innocent passage in the territorial seas has not been applied to the passage of aircraft. Aircraft, unlike ships cannot fly over a state's territorial sea without the consent of the state concerned. All the rights of overflight over a state's territory are granted by international agreements. The right of freedom of overflight exists only over the high seas which are defined as "all parts of the sea that are not included in the territorial sea or

in the internal waters of a state.[114]

The Draft Convention on the Law of the Sea[115] reduces the size of the high seas by Article 86 which provides:

> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.

Article 2 of the Chicago Convention does not include the exclusive economic zone in the definition of territory. The issue of whether or not freedom of flight exists over the exclusive economic zone is not the subject matter of this study, however, it will suffice to state that aircraft too have been granted the right of transit passage through straits.[116]

Secondly, no fees dues or other charges shall be imposed by any contracting state in respect solely of the transit rights of overflight, whether granted by the Chicago Convention, the International Air Services Transit Agreement or by bilateral air services agreements.[117] However, if air navigation facilities and services for international use, for example, telecommunications and en route navigation services, are provided, fees may be charged for the services.[118]

The issue arising at this juncture is as to why transit rights of overflight for aircraft operating scheduled international air services were not granted by the Chicago Convention. The reluctance of the contracting states to grant transit rights unequivocally is rooted in the principle of territorial sovereignty. As the Chief Justice Marshall in the Schooner Exchange Case (119) said:

> the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a dimunition of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent of that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied.

As stated by Professor Cooper (120) the extent of any international right of commerce, was in the discretion of each nation which would decide whether it would carry on commerce with another and had a right to impose such conditions as it thought fit. Because in permitting another nation to trade, it grants the other a right, and everytime is at liberty to attach such conditions as it pleases to its voluntary concessions. Therefore, the right to carry on trade can only be acquired by treaties and belong to that division of the law of nations called conventional. The treaty which gives a right to commerce is the measure of the rule of that right. Thus, while nations, like indivi-

duals, are obliged to trade with one another for the common advantage of the human race, that does not prevent each one from being free to consider, in individual cases, whether it is well for it to promote or allow commerce; and as the duties of a nation demand, in certain circumstances the state should be able to prohibit the trade.

Once again, the principle of sovereignty infiltrates to dictate the right of free privileges of states. This could explain why states which gathered at the Chicago Conference excluded commercial flights from the exercise of the transit rights granted by the Chicago Convention. The operations of scheduled air services are commercial and therefore the right to trade or to fly commercially under customary international law should be granted by treaty to individual states.

Comparing the Chicago Convention to the Paris Convention 1919 relating to the Regulation of Aerial Navigation, did the Paris Convention grant the freedom of overflight to aircraft engaged in the operation of scheduled international air services?

Article 2 of the Paris Convention 1919 provides:

> Each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other Contracting States, provided that the conditions laid down in

> the present Convention are observed. Regulations made by a Contracting State as to the admission over its territory of the aircraft of the other Contracting States shall be applied without distinction of nationality.

Read on its own, Article 2 grants freedom of overflight to all aircraft irrespective of whether or not they are engaged in scheduled international air services. However, the same Article lays down provisos to the freedom of overflight granted. The first proviso is that relating to the observation of the conditions laid down in the Convention itself. This makes the right subject to Article 1 which provides that "the high Contracting Parties recognise that every power has complete and exclusive sovereignty over the airspace above its territory," and Article 15 which supplements Article 2 and provides that "every aircraft of a Contracting State has the right to cross the airspace of another state without landing.... Every Contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."

The second proviso laid down by Article 2 relates to the observation of regulations by the overflying aircraft made by the Contracting State to be overflown.

Although it is stated that "those who drafted the Convention had the intention of allowing, within the limits

of sovereignty, the utmost possible freedom of movement to international air traffic".[121] The practice of states proved that the limits of sovereignty, coupled with the provisions of Article 15, diluted or overshadowed the freedom of overflight especially for aircraft operating scheduled international air services.

In 1929, the English Aviation Company, Imperial Airways, instituted the Cairo air connection - which was later extended to India.[122] The projected route was via Genoa and Naples in Italy. When the British Government requested the permission of the Italian authorities to fly over Italy, such permission was granted upon condition that half of the proposed flights between Genoa and Alexandria should be carried out by an Italian Airline. This was agreed to; but it soon proved that the traffic became concentrated in the English aeroplanes. A condition was then made that either half of the passengers should be carried by Italian planes or half of the proceeds accruing from the stretch Genoa-Alexandria should be handed over to the Italian company. This was not acceptable and therefore Imperial Airways had to reconstruct their route so as not to fly over Italy.

At about the same time the Compagnie Franco - Romaine was operating the Paris-Prague and Paris-Budapest line via Germany.[123] When Germany occupied the Ruhr

Province the regulation that a special licence was required for civil aircrafts if they wanted to fly over German territory was made stringent. The German Government informed the French authorities that aircraft, owned by Civil Aviation Companies were prohibited to land in Germany and that no weather forecasts would be given to them. The French Company continued flying over Germany without landing. On one of these flights, an emergency landing had to be made in the German territory, the pilot was arrested and later was led across the border while the aircraft was seized. The French Company was compelled to change its route.

In some countries, as conditions for overflights, agreements had to be entered into in which foreign concerns were compelled to build hangers, workshops, test-beaches and slipways, which after the lapse of twenty years were to be property of the country to be overflown. Some countries went further as to require the training of its pilots by the foreign company seeking the freedom of overflight and subsequently take them into their service.(124)

From the above instances, it appears that many states, members of the Paris Convention 1919, were not willing to grant the freedom of overflight to aircraft engaged in the operation of scheduled international air services, in accordance with the Paris Agreement, unless they stood to benefit from such grant.

Thus by Articles 1 and 15 of the Paris Convention the freedom of overflight as granted by Article 2 was restricted as evidenced by the practice of states. It can only be assumed that the freedom of overflight granted by Article 2 of the Paris Convention 1919 was only enjoyed by the occasional user of the airspace; the non-scheduled international aircraft. In which case there is no de facto difference in the grant of the freedom of overflight by the Paris Convention or the Chicago Convention. Although the Paris Convention provides for the freedom of overflight without distinction between scheduled and non-scheduled aircraft, it should also be appreciated that at the time the Paris Convention was concluded, little was known about the airline industry. At that time, as stated by Franklin D. Roosevelt (125) in his opening speech, air commerce was in its infancy. States accorded each other rights analogous to the rights over the seas, which rights, as proved by practice, they later were not willing to facilitate their exercise.

Security reasons also contributed to the fact of not granting transit rights of overflight to commercial aircraft. It should be noted that air transportation developed at the wrong time in history, that is, it is a product perfected by the two World Wars. The fear of the aircraft as an instrument of destruction is very old. As far back as 1759, Samuel Johnson in his work, "the history

of Rasselas, Prince of Abysinia" did not hide his fear of the destructive effects that the new transport system might have on humanity. Prince Rasselas wanted to leave the valley of happiness, the place of his states, to gain knowledge of the rest of the world and, with this in mind, he spoke with one of his scholars. The latter informed him that men can fly like birds and that only ignorance and laziness kept them bound to the earth. The scholar knew the art of making wings similar to those of a bat. He agreed to make some for Prince Rasselas, on condition that the Prince did not request that he make them for others saying; " if men were all virtuous, I should with great alacrity teach them all to fly. But what would be the security of the good, if the bad could at pleasure invade them from the sky? Against an enemy sailing through the clouds, neither walls nor mountains, nor seas could afford any security. A flight of northern savages might hover in the wind and light at once with irresistible violence upon the capital of a fruitful region that was rolling under them. Even this valley, the retreat of princes, the abode of happiness, might be violated by the sudden descent of some of the naked nations that swarm on the coast of the southern sea". (126) Through the ingenious work of mankind, the aeroplane was invented. By 1903 the Wright Brothers flew on an aeroplane at Kitty Hawk. Flight by air was born. No sooner had three or four other parties achieved the same that the world was threatened by the First World War. "The world witnessed large-scale preparations for war, and

then war itself, accompanied by barbarities unpredented in human history".[127] During the war, the aeroplane proved its worth as an instrument of war. Nations took measures to protect their own airspace. In 1913 Great Britain issued orders fixing prohibited areas, landing places and entry conditions for aircrafts coming from abroad. In the same year, France set up prohibited areas, particularly along the German border, Prussia prohibited all foreign flights across the Russo-German Frontier. In 1912 Russia ordered the Russo-German border closed. In 1914, both France and Britain prohibited flight over national land as did Netherlands, Switzerland, and Sweden. This situation existed in 1919 when the Powers met to regulate international air navigation.

At an interval of about only two decades, the world was once again threatened by the Second World War where again the aircraft showed its advantages as an instrument of war. Therefore when the nations met at the Chicago Conference in 1944, one cannot dismiss the fact that the idea that aviation was a potential instrument of destruction was still lingering in the minds of many statesmen. Their initial reaction, therefore, would be the security of their territorial airspaces. One cannot blame them for protecting their security because, by the principle of territorial sovereignty, if duties of the state demand, one of the duties being the security of the state concerned, each state should

be able to prohibit foreigners from its territory. Therefore, in the protection of their territorial integrity, the contracting states at the Chicago Conference granted the transit rights under Article 5 of the Chicago Convetnion to aircraft not engaged in the operation of scheduled international air services. Secondly, they excluded the operation of the scheduled international air services from the Convention so that they would grant airlines operating scheduled international air services commercial and transit rights on an individual basis, as and when each individual state desired and on conditions that it may wish to impose.

On the other hand, the Chicago Convention, the International Air Services Transit Agreement and the bilateral air services agreements have their merits. In the field of air transport, they have adequately regulated transit rights for international air services for nearly forty years.

There remains to be considered the question whether the right of transit of overflight has developed into a rule of customary international law.

Article 38 (1) of the statute of the International Court of Justice refers to custom as a general practice accepted as law. As stated by Schwarzenberger (128)

international custom has two constitutive elements; first, a general practice of states and secondly the acceptance of this general practice as law. Therefore, to prove the existence of a rule of customary international law, it is necessary to establish that states act in this way because they have a legal obligation to do so.

Evidence of state practice may be found in the conclusion of a uniform line of treaties in pari materiae. The large number of bilateral air services agreements filed with the International Civil Aviation Organization may be classed as the uniform pattern of treaties. These agreements have been concluded since the invention of air travel. The question arising is whether these uniform treaties can be relied upon as sources of customary international law. Reid, after referring to transit provisions in commercial treaties of the nineteenth century argues:

> They are significant in connection with servitudes only as implying a general acceptance by the nations as the right of transit itself, in practice very nearly amounting to a universal servitude comparable to the right of innocent use of the territorial sea, resting upon custom rather than upon contract. (129)

Lord McNair (130) concludes after considering the effect of the Paris Convention on Air Navigation 1919, the Madrid Convention Relating to Air Navigation (1926), the Havana Convention on Commercial Aviation 1928 and the Chicago

Convention which provide that every state has sovereignty over its superjacent airspace may be treated as evidence of the existence of a rule of customary international law to that effect. However, one can qualify Lord MacNair's argument by saying that the customary rule of state sovereignty existed long before the air navigation agreements. This is evidenced by the words used in the Paris Convention 1919 which was the first multilateral convention concluded in this respect, that the High Contracting Parties "recognise" the right of complete and exclusive sovereignty over the territorial airspace.

Westlake [131] after reviewing conventions relating to the freedom of navigation on international waterways says:

> We conclude that a sufficient consent of States exists to warrant the assertion that a right of navigation, of which the best statement is that made for the Danube by the Treaty of Paris in 1856, exists as an imperfect right on navigable rivers traversing or bounding the territories of more than one state.

This statement shows that Westlake accepted a series of uniform treaties as effective to create rights under customary international law.

Lawrence, on the other hand, states as follows:

> We venture to draw from the facts just recited the conclusion that, with regard to the navigation of rivers that traverse more countries than one, international law, is in a state of transition. Strictly speaking, a state possessed of one portion can exclude therefrom vessels of the co-riparian power, unless a right of navigation has been granted to them by treaty. Yet as a matter of comity, hardly to be distinguished from obligation, it does not withhold such right... Usage is turning against the ancient rule. It is now set aside by treaty stipulations; but in time the new usage founded on them will give rise to a new rule, and no treaty will then be required to provide for the free navigation of an international river by co-riparian states.....(132)

Lawrence's argument is acceptable. A series of uniform treaties per se, are evidence of state practice but do not evidence the existence of rules of customary international law in terms of their contents.(133)

Practice on its own is not enough to create a rule of customary international law. It must be accompanied by evidence of opinio juris. The necessity for opinio juris was expressed by the International Court in the North Sea Continental Shelf Cases (134) when the court said that acts constituting the practice in question

> .....must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.....The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of acts is not in itself enough. There are many international acts, e.g. in the field of economical and protocol, which are performed almost invariably, but which are

> motivated only by considerations of courtesy, convenience or tradition, and not by a sense of legal duty.

The same approach is adopted by Article 38 (1) (b) of the statute of the International Court of Justice by providing that practice must be "accepted as law".

Direct authority of opinio juris in the field of aerial transit is lacking. Similarly in the field of surface transport, there is very little authority from which analogies of opinio juris of transit can be drawn. The Case Concerning the Right of Passage over Indian Territory [135] is relevant but the judgement was founded upon quite narrow grounds. The main issue was whether Portugal enjoyed a right of access to two enclaved territories over which she had sovereignty in India. The Portuguese claim of access was based upon treaty and upon customary international law. In reaching its decision that Portugal enjoyed a limited right of access to the enclaves in question the court relied on a practice "clearly established between two states which was accepted by the parties as governing the relations between them." [136] Consequently, the court came to a conclusion that it was not necessary to examine whether general international custom or the general principles of law recognized by civilized nations might lead to the same result [137] a consideration which would have been of great assistance to this study.

Protests are evidence of opinio juris. The fact that rules have been laid down on how to intercept an aircraft intruding into a sovereign state's airspace (138) show that states protest whenever there is overflight through their territorial airspace without authorization or without their consent. Therefore it is submitted that in view of the fact that opinio juris is lacking, the right of overflight has not developed into a rule of customary international law. The most that can be said at this period is that it is in the process of evolution as a rule of customary international law.

FOOTNOTES TO PART I

1. Fothergill v. Monarch Airlines (1980)3. W. L.R. 209

2. Id.
Article 32 of the Vienna Convention on the Law of Treaties provides that this method of interpreting treaties is supplementary.

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of iis conclusion, in order to confirm the meaning resulting from the application of Article 37, or to determine the meaning when the interpretation according to Article 37:-
>
> a. leaves the meaning ambiguous or obscure; or
>
> b. leads to a result which is manifestly absurd or unreasonable".

3. Heller: Grant and Exercise of Transit Rights, Thesis 1954 McGill University p.58.

4. Proceedings of the International Civil Aviation Conference at Chicago November 1- December 7 1944 p. 574.

5. Id.

6. I. Vlasic: Some Aspects of the "Right of Innocent Passage" Through Airspace p.13 (A Term Paper Institute of Air and Space Law, McGill University, 1954.

The Geneva Convention on Territorial Sea and Contiguous Zone 1958 provides by Article 14 that

"-4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law."

"-5. Passage of foreign vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the terrirotial sea."

"b. Sumarines are required to navigate on the surface and to show their flag."

Article 19 of the Draft Convention on the Law of the Sea defines innocent passage and goes on to enumerate instances which are prejudicial to the peace, good order and security of the coastal state. (A/CONF.62/DC/W.P.2 (A U.N. Document)

7. Proceedings of the International Civil Aviation Conference at Chicago op.cit. p.556.

8. A/CONF.62/DC/W.P.2 (A U.N. Document)

9. Heller, op. cit. p. 2

10. Art 1. Geneva Convention on the High Seas 1958.

11. Draft Convention on the Law of the Sea (Informal Text) A/CONF.62/DC/W.P.2

12. The Lotus Case P.C.I.J. Sec. A., No. 10

13. The Jessie, the Thomas F. Baynard, and the Pescawha, in Briggs on the Law of Nations Appleton century crafts; New York cases, Documents and notes p. 327 (Second edition)

14. Campania de Navegacion Nacional (Panama) v. United States (1933) in Bishop International Law cases and materials p. 512 - 513. (Second Edition. 1962 Boston, Little Brown)

15. Article 14 (1). Reproduced in the Draft Concention on the Law of the Sea op. cit. Article 17.

16. Geneva Convention on the Territorial Sea and Contiguous Zone (1958) Article 15; Draft Convention on the Law of the Sea op. cit. Article 24.

17. Geneva Convention on the Territorial Sea and Contiguous Zone Article 18; Draft Convention on the Law of the Sea op. cit. Article 26.

18. Geneva Convention on the Territorial Sea and Contiguous Zone Article 14(3); Draft Convention on the Law of the Sea op. cit. Article 18.

19. I.C.J. Reports (1949) p. 4.

20. Article 14(4) Geneva Convention on the Territorial Sea and Contiguous Zone; Article 19 (1) Draft Convention on the Law of the Sea op. cit.

21. Corfu Channel Case at. p. 29 "(Albania) would have been justified in issuing regulations in respect of the passage of warships through the straits."

22. Id. The court said that Albania would not have been justified in prohibiting such passage or in subjecting it to the requirement of special authorization.

23. Article 16 (1); Article 25 (1) Draft Convention on the Law of the Sea op. cit.

24. Article 16 (3) Geneva Convention on Territorial Sea and Contiguous Zone.

25. Article 5; The same was reproduced in the Draft Convention on the Law of the Sea op. cit. Article 8(2).

26. I. Bruel: International Straits at p. 101 - 102.

27. McDougal & Burke: The Public Order of the Oceans (1962) p, 207.

28. Article 14 Geneva Convention on Territorial Sea and Contiguous Zone.

29. Id.
Article 16 (3)

30. Id. Article 16 (4)

31. op. cit.

32. Article 36.

33. Article 37.

34. Article 38(1)

35. 65 Department of State Bulletin 266 1971 quoted by W. Michael Reisman in the Regime of Straits and National Security: An Appraisal of International Law making (1980) Vol. 74 A. J. I. L. 48 at p. 68.

36. U.N. Doc. A/AC. 138/SC/II/SR/ 37 cited by Reisman op. cit. p. 68.

37. Quoted by Reisman at note 46 p. 68.

38. U.N. Doc. A/CONF. 62/C-2/C. 10 (1973 at 189-190. Article 2(e) - Cited by Reisman op. cit. p. 68.

39. Letter from Senator Barry Goldwater to Reisman dated July 23, 1976 - Reisman op. cit. p. 69

40. Article 45 (1) (b)

41. Article 38 (1)

42. Article 45

43. A.P. Sereni, The Italian Conception of International Law, p. 13 quoted by E. Lauterpacht in Freedom of Transit in International Law Vol.44 Transactions of the Grotius Society p. 326.

44. Id.

45. Lauterpacht, op. cit. at p. 329. For a detailed study on the Scheldt see Vol. 26 British Digest on Internaional Law, Part III Territory p. 63 - 69.

46. Article V, Definitive Treaty signed at Paris on 30th May, 1814, L. Hertslet, Commercial Treaties, Pg. 249, 15 and 19 (Vol.I).

47. Additional Articles to the Convention of October 13, 1862 between Great Britain and Prussia, Article IV. Hertslet's Commercial Treaties Vol. XII p. 763; Convention between Great Britain and France July 23, 1873 Hertslets, op. cit. Vol. XIV p. 349.

48. Preamble to the Covenant of the League of Nations.

49. Article 23 (e) Covenant of the League of Nations.

50. 22nd Session, PCIJ Series A/B, Fascicule No. 42 p. 118 - 119.

51. League of Nations: A survey (Jan. 1920 - Dec. 1926) published by the information section, League of Nations Secretariat, (1926) p. 68.

52. L.N.T.S. Vol. 7 p. 11.
As at 31st December 1979 the Convention and Statute on the Freedom of Transit had been ratified by Albania, Austria, Belgium, United Kingdom and Ireland including Newfoundland, Federated Malay States i.e. Perak, Selangor, Negri, Sembilan and Pahang, Non-Federated Malay States i.e. Brunei, Johore, Kedah, Perlis, Kelantan and Trengganu, Palestine, New Zealand, India, Bulgaria, Chile, Czechoslovakia, Denmark, Estonia, Finland, France, Syria and Lebanon, Germany, Greece, Hungary, Iran, Iraq, Italy, Japan, Latvia, Luxembourg, The Netherlands including the Netherlands Indies, Surinam and Curacao, Norway, Poland, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, Yugoslavia, Democratic Kapuchea, Fiji, Lao People's Democratic Republic, Lesotho, Malawi, Malta, Mauritius, Nepal, Nigeria, Rwanda, Swaziland.

The states which had signed but not ratified the Convention were Bolivia, China, Ethiopia, Guatemala, Lithuania, Panama, Peru, Portugal, Uruguay.

53. L.N.T.S. Vol. 7p. 35

54. L.N.T.S. Vol. 47 p.55

55. Toulmin, The Barcelona Conference on Communications and Transit and the Danube Statute 1922, - 1923 British Yearbook of International Law p. 173.

56. Id.

57. As at December 31 1979 the states which had ratified the Convention on the High Seas 1958 are Afghanistan, Albania, Argentina, Australia, Austria, Belgium, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Central African Republic, Colombia, Costa Rica, Cuba, Czechoslovakia, Democratic Kapuchea, Denmark, Dominican Republic, Fiji, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Guatemala, Haiti, Holy See , Hungary, Iceland, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Lebanon, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mauritius, Mexico, Mongolia, Nepal, Netherlands, NewZealand, Nigeria, Pakistan, Panama, Poland, Portugal, Romania, Senegal, Sierra Leone, South Africa, Spain, Sri Lanka, Swaziland, Switzerland, Thailand, Tonga, Trinidad and Tobago, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States of America, Upper Volta, Uruguay,

Venezuela and Yugoslavia.

58. U.N.T.S. Vol. 597 p.3
States which had ratified the Convention on Transit Trade as at 31st December, 1979 are Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Burundi, Byelorussian Soviet Socialist Republic, Central African Republic, Chile, Chad, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, Holy See, Hungary, Italy, Lao People's Democratic Republic, Lesotho, Luxembourg, Malawi, Mali, Mongolia, Nepal, Netherlands, Niger, Nigeria, Norway, Paraguay, Rwanda, San Marino, Sudan, Swaziland, Sweden, Switzerland, Turkey, Uganda, Ukranian Soviet Socialist Republics, United Republic of Cameroun, United States of America, Yugoslavia, Zambia.

59. Article 2 of the Geneva Convention on the High Seas 1958 provides that the high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty.

60. op. cit.

61. Schwarzenberger and Brown: A manual of International Law, Sixth Edition p. 100.

62. Westlake, International Law Part I Peace First Edition p. 142.

63. Oppenheim, International Law, Vol. I Peace First Edition p. 225.

64. Id.

65. Id.

66. Schwarzenberger and Brown op. cit. p. 89.

67. Article 3

68. Article 22

69. Hertslet's Commercial Treaties op. cit. Vol. 1 p. 15.

70. Id at p. 19.

71. Treaty of Paris of 1856 between Austria, France, Great Britain, Prussia, Russia, Sardinia, and the Ottoman Porte 46 British and Foreign State Papers 8 (1865).

72. P.C.I.J. Ser. A. No. 23 at p. 28 (1929)

73. Baxter, The Law of International Waterways p. 153.

74. An example is the Convention between Norway and Sweden Concerning Common Lakes and Watercourses signed at Stockholm October 26, 1905 Articles 3, 34 Martens N.R.G. 2nd Series 710 (1907).

75. Treaty between the United States and Great Britain relating to Boundary Waters between United States and Canada signed at Washington, January, 11 1909 Article 1.

76. Baxter op. cit. p. 156.

As at 31st December 1979 the Convention and Statute on the Regime of Navigable Waterways of International Concern had been ratified by Albania, Austria, British Empire including Newfoundland, the Federated Malay States i.e. Perak, Selangor, Negri, Sembilan and Pahang, Non-Federated Malay States i.e. Brunei, Johore, Kedah, Perlis, Kelantan and Trengganu, Palestine, New Zealand, Bulgaria, Chile, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, Italy, Luxembourg, Norway, Romania, Sweden, Thailand, Turkey, Democratic Kapuchea, Fiji, Malta, Morocco, Nigeria, Swaziland.

States which signed the Convention but did not ratify it are Belgium, Bolivia, China, Colombia, Estonia, Guatemala, Lithuania, Panama, Peru.

77. Id.

78. Germany v. Venezuela, Ralston's Report, Venezuelan Arbitration of 1903, 600 at p.620. Also reported in Briggs, The Law of Nations, Cased, documents and notes p. 263.

79. Examples are: USSR/Poland Agreement Concerning Polish Through Train Traffic on a section of the Railways of the U.S.S.R. signed at Moscow on 22nd April 1962 which permits through passengers, goods and mixed passenger and goods train traffic from the People's Polish Republic to the People's Polish Republic through the territory of the USSR U.N.T.S. Vol. 493 p. 229.

Czechoslovakia/Austria Agreement Concerning the Regulation of Railway Traffic across the frontier signed at Prague on 22nd September, 1962

by which the Contracting Parties undertake to permit Railway traffic cross the frontier. U.N.T.S. Vol. 495 p. 157.

80. 1. CZECHOSLOVAKIA/YUGOSLAVIA

Agreement Concerning Road Transport. Signed at Prague on 22nd October, 1962 (bilateral).

"All passenger transport between the two states and transit of passengers through their territory .....shall require authorization (Art:1)

(I:6974, United Nations Treaty Series 1963 Vol. 480 p. 267.)

2. Customs Convention on the International Transport of goods under cover of TIR Carnets (TIR Convention) Done at Geneva 1959.

(No. I: 4996. U.N. Treaty Series 1960 Vol. 348 p. 13).

- Provides for transit rights for transportation of goods destined for Contracting Parties.

- Signatories are Albania, Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Federal Republic of Germay, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, Ukranian, Soviet Socialist Republic, USSR, Uk, USA,- came into force on 19th November, 1963.

3. CZECHOSLOVAKIA/USSR

Agreement concerning International Road Transport. Signed at Moscow February, 3rd 1967 (bilateral)

(I:8917 U.N.T.S. Vol. 617 p. 267) by Art. 1 exchanged transit rights for road transport (passengers and goods) by bus or motor vehicle.

4. ROMANIA/USSR

Agreement concerning the International Transport of Goods by Road signed at Bucharest on 21st June, 1960 (Bilateral)

- Art. 1

(I:8746 UNTS Vol. 604 p.81)

5. ROMANIA/SWEDEN

Agreement concerning the international transport of goods by road. Signed at Bucharest on March 1, 1967.

(I: 9172 U.N.T.S. 642 p. 163)

6. ROMANIA/FRANCE

Agreement concerning the international transport of goods by road. Signed at Bucharest on March 14, 1960.

(I: 8741 U.N.T.S. V. 604 p. 33)

7. DENMARK/ROMANIA

Agreement concerning the international transport of goods by road. Signed at Bucharest on 29th August, 1967.

(I:9231 U.N.T.S. Vol. 645 p. 125).

8. BELGIUM/ROMANIA

Agreement concerning the transport of goods by road by means of commercial vehicles. Signed at Bucharest on 22nd September, 1967.

(I: 9109 U.N.T.S. Vol. 637 p.3)

9. FINLAND/HUNGARY

Agreement concerning international transport by road. Signed at Helsinki on 10th November, 1967) both passengers and goods.

(I: 9186 U.N.T.S. Vol. 643 p. 95.1)

10. BELGIUM/HUNGARY

Agreement concerning the road transport of passengers and goods by commercial vehicles. Signed at Brussels on 20th March, 1967.

(I:8686 U.N.T.S. Vol. 601 p. 37).

11. FINLAND/FRANCE

Agreement concerning international road transport.

(I:9185 U.N.T.S. Vol.643 p.75)

81. Lauterpacht op. cit. p. 332.

82. op. cit. at p. 28

83. Buckland and McNair: Roman Law and Common Law (1938) Pages 107 - 108.

84. Article 3 of the Geneva Convention on the High Seas 1958 provides " In order to enjoy the freedom of the seas. The Convention on Transit Trade of landlocked states preamble provides". Noting the General Assembly Resolution 1028 (XI) on the landlocked countries and the expansion of international trade which recognizes the need of land-locked countries for adequate transit facilites in promoting international trade"; The Draft Convention on the Law of the Sea by Article 125 (1) provides "landlocked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end land-locked states shall enjoy freedom of transit through the territory of transit states by all means of transport."

85. op. cit. p. 623.

86. Lauterpacht op. cit. p. 338.

87. Convention on Transit Trade of landlocked States (1965), Preamble Principle V. "The State of Transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind." A similar provision can be found in Article 125 (3) of the Draft Convention on the Law of the Sea.

88. I.C.A.O. Document 7278-C/842 1952.

89. I.C.A.O. Document 7297, AT Conf./2.

90. Id.

91. Id.

92. Id.

93. Id.

94. France, Tribunal correctionnel of Versailles September 3,1936, Annual Digest and Reports of Public International Law Cases (1935-1937) Vol. 8 p. 159 Case No. 51.

95. ICAO Document 4522, A1- E.C. 74 (1947)

96. The list is not exhaustive.

97. Article 2(2) Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe. Paris 1956.

98. Chicago Convention, Annex 9 2.34.

99. Chicago Convention Annex 2.

100. Special Air Transport Conference held at Montreal April, 1977, SATC Information Paper No. 2 -- Policy concerning International Non-scheduled Air Transport, Background Documentation for Agenda Item 2 prepared by the Secretariat of ICAO at p. 17.

"Transit Flights - The Policy of most states concerning foreign non-scheduled commercial flights exercising first and second freedom privileges (with no stop or with only technical stops) are generally inkeeping with Article 5 of the Convention and with the Air Transit Agreement. Subject to the condition of reciprocity the majority of states grant freedom of entry to such flights upon prior notification. Only a limited number of states require prior permission, due generally to safety or security considerations. It is generally practice for those states granting freedom of admission for non-traffic purposes to require the filing of a flight plan or some form of prior notification for air traffic control, immigration customs and public health purposes. The period of the prior notification varies from state to state, the most common being 24 hours. Standing rules also include compliance with air navigation rules and procedures. In certain cases it is also mandatory to carry adequate insurance against third party damage.

101. Heller: Grant and Exercise of Transit Rights p. 93.

102. Articles 39, 41, and 56 of the Vienna Convention on the Law of Treaties.

103. Articles 86 and 88 of the Chicago Convention.

104. Article 25 of the Chicago Convention.

105. Article 28(a) Chicago Convention.

106. Article 26 Chicago Convention

107. Preamble to the International Air Services Transit Agreement.

108. Article 1 (2) International Air Services Transit Agreement.

109. See limitations on the exercise of transit rights of overlfight ante.

110. As at December 31st 1980, there were 95 states parties to the International Air Services Transit Agreement. Members of ICAO were at that time 150 states.

111. Bilateral Air Services Agreements contain the following:

> "Each Contracting Party grants to the other Contracting Party the following rights for the conduct of international air services by its airlines".
> (excerpt from Bermuda 2 (UK - U.S.A.).

112. Excerpt from Bermuda 2 (UK - U.S.A.) Article 3 (1) (a).

> "Each contracting party shall have the right to designate an airline or airlines for the purposes of operating the agreed services on each of the routes specified in Annex 1 and to withdraw or alter such designations. Such designation shall be made in writing and shall be transmitted to the other contracting party through diplomatic channels."

113. Bin. Cheng. Law of International Air Transport p. 360.

114. Article 1 Geneva Convention on the High Seas (1958).

115. op. cit.

116. Article 38 of the Draft Convention on the Law of the Sea.

117. Article 15 paragraph 3 Chicago Convention.

118. Pan American World Airways Inc. v. The Queen and the Minister of Transport (1979)2 F.C. 34

See also statements by the Council to Contracting States adopted December 13, 1973 ICAO. Doc. 9082 - C/1015.

> "30. The providers of air navigation facilities and services for international use may require the users to pay their share of the cost of providing them regardless of where the utilization takes place. In the particular case where the aircraft does not fly over the provider's state there are however difficult and complex problems associated with the collection of route facility charges, and it is for the states to find the appropriate kind of machinery on a bilateral or regional basis for meetings between provider states and those of the user airlines, aiming to reach as much agreement as possible concerning the costs of the facilities and services provided, the charges to be levied and the methods of collection of these charges."

119. Cited by Professor Cooper in Backgrounds of International Public Air Law, 1965, Yearbook of Air and Space Law at p. 4.

120. Id. at p. 7

121. Slotemaker Freedom of Passage p. 17.

122. Id at p. 44

123. Id at p. 45.

124. Id at p. 54.

125. Proceedings of the International Civil Aviation Conference Vol. 1 p. 42.

126. Matte Treatise on Air Aeronautical Law p.20.

127. Vlasic op. cit. p. 13

128. Schwarzenberger, A manual of International Law, Fifth Edition p. 32.

129. International Servitudes in Law and Practice p. 168.

130. The Law of the Air 3rd Edition p. 6.

131. Westlake International Law Vol. 1 at p.157.

132. Principles of International Law 7th Edition 1930, p. 198.

133. This view is shared by Lauterpacht op. cit. at p. 325 - 326.

134. I.C.J. Reports 1969 p.3

135. 1960 I.C.J. Reports p.6 (Merits)

136. Id at p.44

137. Id at p. 43.

138. Chicago Convention Annex 2.

PART II

LIMITATIONS ON THE EXERCISE OF TRANSIT RIGHTS OF OVERFLIGHT

Section I

Limitations in Public International Air Law

From the foregoing it has been ascertained that the right of overflight over another State's territory for aircraft not engaged in the operation of scheduled international air services are granted by the Chicago Convention to be exercised by aircraft of the Contracting Parties to the Chicago Convention, subject to the observance of the terms of the Convention.(1) Aircraft operating scheduled international air services derive their transit rights of overflight from the International Air Services Transit Agreement or from bilateral air services agreements. By the provisions of the International Air Services Transit Agreement, once the transit rights have been granted, their exercise is governed by the provisions of the Chicago Convention.(2) As for the bilateral air services agreements, if they are concluded between States members of the International Civil Aviation Organization, the agreements are invariably made supplementary to the Chicago Convention.(3) Therefore transit rights, whether granted by the Chicago Convention, or by the International Air Services Transit

Agreement or by bilateral air services agreements between States parties to the Chicago Convention, are governed by the Chicago Convention. The Chicago Convention reserves to the Contracting Parties the right to limit in a number of ways, the exercise of the right of overflight.

1. Designation of Routes

The last sentence of the first paragraph of Article 5 of the Chicago Convention provides:

> ..... Each Contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

First of all, whether a region is one which is inaccessible or one which lacks adequate air navigation facilities is a fact which is best known by the State concerned. This forms a basis for not allowing overflight over any region except through prescribed routes. In analysing this limitation, the Council to the International Civil Aviation Organization stated:

> each government should decide which regions in its territory are inaccessible or without adequate air navigation facilities. Such regions should be publicly described, as in the case of prohibited areas under Article 9, and the nature of the restrictions to be imposed should be stated. Thus the description should be explicit as to whether the requirement is (i) merely that a

> particular route be followed, or (ii) that permission be required, or (iii) both, since the requirerements thereby seem to be cumulative, notwithstanding the use of the adjunctive "or". (4)

Further, by Article 68, the Chicago Convention provides that:

> Each Contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service.....

These two provisions read together have the effect that aircraft not engaged in the operation of scheduled international air services cannot overfly any part of the territory of a Contracting State as they wish. They must follow the routes designated to be followed by any international air service. Such routes should be delared publicly.

Aircraft operating scheduled international air services are also limited to designated routes. Article I Section 4 paragraph 7 of the International Air Services Transit Agreement provides:

> Each Contracting State may, subject to the provisions of this agreement, (1) designate the route to be followed within its territory by any international air service.....

The bilateral air services agreements are more specific.

The route to be followed is specified.(5)

The designation of transit routes is not peculiar to air transportation. As has been considered, a vessel passing through the territorial sea can be ordered to be restricted to certain routes and/The Barcelona Statute on transit applied only to transit by rail and waterways, that is, only traffic by routes which could be easily distinguished and controlled could be given freedom of passage.

2. Right to Demand a Landing

Non-scheduled transit flights are, according to Article 5 paragraph 1 of the Chicago Convention, subject to the right of the State flown over to require a landing. Aircraft operating scheduled international air services have not been subjected to similar limitation either by the International Air Services Transit Agreement or by bilateral air services agreements. However Article 1(3) of the International Air Services Transit Agreement provides that:

> A Contracting State granting to the airlines of another Contracting State the privilege to stop for non-traffic purposes may require such airlines to offer reasonable commercial services at the points at which such stops are made.

This provision, much as it may apply to the aircraft making stops for non-traffic purposes, is not applicable to

aircraft transitting for purposes of overflight only. Under Article 1(2), the exercise of the transit privileges has to be in accordance with the Convention on the International Civil Aviation. Behind this mask the words "subject to the right of the State flown over to require landing" appearing in Article 5 of the Chicago Convention, may be applied to aircraft engaged in the operation of scheduled international air service and thus give the States overflown the right to require landing.

3. Operating Permission

Article 5 of the Chicago Convention grants transit rights to aircraft of other Contracting States, not engaged in the operation of scheduled international air services across the territory of another Contracting State without the necessity of obtaining prior permission. Therefore, aircraft not engaged in the operation of scheduled international air services can exercise rights of overflight without obtaining an operating permit.

In the International Air Services Transit Agreement, the requirement of the airlines to obtain prior permission is not stated explessly. In November 1950 Pakistan submitted the issue of the requirement of operating permits under the International Air Services Agreement to the International Civil Aviation Organization Council, which formulated the question as follows:

(a) Is a State, party to the Transit Agreement entitled to require that a permit be obtained by scheduled international air services of other States, parties to the Transit Agreement before flights without landing over its territory are initiated?

(b) If so, what form of permit may be required and to what extent has the State to be overflown the discretion to grant or withhold the same?

The matter was discussed in 1950 and 1951 by the Council under Article 54 (n) of the Chicago Convention and opinions were invited from members. Four States (6) answered question (a) in the negative so that question (b) did not arise. The United Kingdom delegate to the Council submitted the following conclusions.(7)

(a) Airlines as such have no rights under the Transit Agreement; the rights are exchanged between Contracting States;

(b) Article 1, Section 5 of the Transit Agreement, clearly contemplates the issue of such a certificate or permit to the airline; the application of such a permit should be sponsored by the parent Contracting State of the airline;

(c) The airlines exercising the privileges must do so in accordance with the provisions of the Convention and must comply with the laws of the State flown over;

(d) The form of the permit is left to the discretion of the Contracting State concerned;

(e) The permission can be withheld, but only for reasons which are embodied in Article 1 Section 5 of the Transit Agreement;

(f) A permission could be limited by specifying certain routes and airports according to Article 1 Section 4, and could be granted subject to the airline providing a commercial service (Article 1 Section 3);

(g) A permit should not be withheld as a means of evading the obligations assumed under the transit Agreement.

The Representative of Egypt contributed by stating that operating permits or notifications of intent to fly were necessary in order that states might have the opportunity to apply Sections 3, 4, and 5 of Article 1 of the Transit Agreement if they so desired.(8)

The International Civil Aviation Council, however, gave what the Canadian Member described as a "rather cryptic" answer.(9)

(1) The Convention on International Civil Aviation, and in particular Article 6 thereof, does not override the provisions of Section 1, Article 1, of the International Air Services Transit Agreement.

> (2) A state by becoming party to the Air Transit Agreement, grants the privileges of transit and landing for non-traffic purposes - subject to the requirements of other provisions of this Agreement - to other states party to the same Agreement with respect to their scheduled international services.

It was obvious that Pakistan considered that the question asked had "not been effectively answered."

Article 1 (5) provides that:

> Each Contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where ownership and effective control are vested in nationals of a Contracting State, or in case of failure of such air transport enterprise to comply with the laws of the state over which it operates, or performs its obligations under this Agreement.

The words "withhold or revoke a certificate or permit" imply application for such certificate or permit. A certificate cannot be issued, or withheld or revoked without having been applied for and consequently granted.

The laws of the state over which it operates or performs its obligations also lay emphasis on the requirement of an operating permit. Section 402 of the United States Federal Aviation Act provides:

> (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage. (10)

Commenting on Section 6 of the Air Commerce Act 1926 which

provided that "foreign aircraft not part of the armed forces of the foreign nation shall be navigated in the United States only if authorized...." and which was reproduced in Section 1108 of the Federal Aviation Act 1958, Acting Attorney General Matthew F. MacGuire said that (11) with respect to aircraft regulation Section 501 which provided that it was unlawful for any person to operate or navigate an unregistered aircraft, the Section indicated that the Congress intended permits issued to foreign aircraft under Article 6 of the Air Commerce Act to serve as a substitute for registration required of all aircraft eligible for registration.

Bilateral Air Services Agreements are more explicit on the issue of operating permits. It is made a condition precedent before the designated airline can exercise the transit rights granted.

> On receipt of a designation made by one Contracting Party.... and on receipt of an application or applications from the airline so designated for operating authorizations and technical permissions in the form and manner prescribed for such applications, the other Contracting Party shall grant the appropriate operating authorizations and technical permissions provided:
>
> (a) Substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in its nationals;
>
> (b) The designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air services by the Contracting Party considering the application or applications.

Therefore, once an airline has been designated by a Contracting Party, provided that that airline fulfills the requirements laid down in the agreement, the other Contracting Party grants the appropriate operating permission without delay.

It is, therefore, submitted that for commercial aircraft to exercise rights of transit granted by the International Air Services Transit Agreement and by the Bilateral Air Services Agreements, such aircraft must obtain prior permission. It follows that the route to be followed is prescribed in the certificate or permit allowing the overflight. However, once application requiring permission to overfly has been made, "an operating permission should certainly not be withheld as a means of evading the obligations assumed under the International Air Services Transit Agreement or of delaying the exercise of the freedoms granted."(12) The main reservation here is that the airline seeking authority to exercise the rights of overflight should be substantially owned and effectively controlled by the states members of the International Air Services Transit Agreement or states subject to a Bilateral Air Services Agreement as the case may be.

4. Restrictions on Articles Carried in Aircraft

Any aircraft, whether scheduled or non-scheduled carrying munitions of war shall not be allowed to exercise rights

of overflight except with the permission of the state to be overflown. The determination of what constitutes munitions of war or implements of war is left to the state concerned.(13) It should be noted that the Chicago Convention does not apply to State aircraft of which military aircraft are part and as stated by Korovin "whatever category a plane formally belongs to, its character is determined by the function it performs, a plane used for military purposes will always be regarded as a reconnaisance plane, just like a transport plane used as a bomber, cannot expect to be treated as a commercial aircraft".(14)

The use of radio transmitting apparatus is permitted only in accordance with the regulations prescribed by the state flown over (15) and each contracting state may prohibit or regulate the use of photographic apparatus in aircraft over its territory.(16)

5. Prohibited Areas

Article 9 of the Chicago Convention is a good pretext whereby a Contracting State to the Chicago Convention may curb transit rights of overflight. The Article provides as follows:

> (a) Each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over certain areas of its territory

> provided that no distinction in this respect is made between the aircraft of the state whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other Contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a Contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other Contracting States and to the International Civil Aviation Organization.

The "reasons of military necessity or public safety" are left to be determined by the state setting-up a prohibited area in its territory. Any reasons, therefore, may necessitate the setting up of a prohibited area for as long as when the legality of the prohibited area is questioned, the state concerned can find a military reason to justify the existence of the prohibited area. The reasonableness of the "extent and location" of the prohibited area must be based upon the objective criteria,(17) that is "so as not to interfere unnecessarily with air navigation". Article 9 (a) is the legal basis for the establishment of permanent prohibited areas.

An analysis of some disputes concerning the Article may throw a light on its impact. In 1952 there arose a dispute between India and Pakistan relating to the interpretation and application of Articles 5, 6, and 9 (a) of the Chicago Convention. Pakistan had declared the entire length of West Pakistan's Western Frontier a prohibited area, and this prevented the operation of certain agreed air

services between India and Afghanistan. Pakistan would not agree to open a corridor over the area to allow India to operate air services to Kabul. India requested the Council of the International Civil Aviation Organization to solve the dispute. One of India's complaints regarding the prohibited area was that the extent and location of that prohibited area interfered unnecessarily with air navigation. Pakistan finally agreed to a route Delhi - Kabul which circuited the prohibited area prolonging the journey from 642 miles on a direct route to 2080 miles. India still claimed that the zone was unreasonable in extent and location and interfered unnecessarily with air navigation. In justifying their action in setting up the prohibited area, Pakistan said:

> ... the attitude of the inhabitants of the tribal towards an Indian airline forced down would be completely unpredictable... The tribesmen are all armed and there are reasons to believe that they take delight in having snap shots at the flying aircraft. It was therefore entirely to ensure the safety of the aircraft of the Indian airline themselves that the prohibition of flying across the prohibited areas was enforced. (18)

It would appear that the reasons given by Pakistan are more in line with Article 5 of the Chicago Convention "reasons of safety of flight" than with Article 9 (a). Neither India nor Afghanistan who later joined India in the dispute questioned the reasons behind setting up the prohibited area. All they were concerned with was the reasonableness

of the extent and location of the prohibited area. The author agrees with Professor Vlasic [19] that a combined use of Articles 9 (a) and 5 of the Chicago Convention may drastically limit the exercise of transit rights granted by the Conventions. The fact of a route being made unnecessarily long by the existence of a prohibited area may in fact repel airlines from flying over areas of certain state's territorial airspace.

In 1967 a dispute concerning Article 9 arose between Spain and the United Kingdom. Spain, on April 11, 1967 set up a zone in the vicinity of Gibraltar airport to be prohibited to all aircraft for reasons of national security. She notified the International Civil Aviation Organization and other Contracting Parties of the zone in accordance with Article 9 (a) of the Chicago Convention. The zone was so close to Gibraltar aerodrome that the aeroplanes landing and taking off in Gibraltar would have to change their normal flight paths, a fact which, because of the geography of the area would, in unfavourable weather conditions be extremely hazardous for air navigation. Having failed to reach an agreement by peaceful negotiation, the United Kingdom referred the dispute to the Council of the International Civil Aviation Organization.[20] Some of the United Kingdom's arguments were as follows:

1. That Spain had no right to determine unilaterally the interpretation and application of Article 9 (a).

2. That Article 9 (a) is a derogation in certain cases from the right of overflight granted by Article 5 of the Chicago Convention and the International Air Services Transit Agreement.

3. That the principle of sovereignty cannot be relied on as justifying the unilateral interpretation and application of provisions of a treaty to which it is a party especially when the other States' rights are affected.

4. That the zone is not reasonable either in extent or location and that it interferes unnecessarily with air navigation. "The topography of Gibraltar is such that it is at times subject to violently unstable conditions, and in such conditions civil aircraft using Gibraltar aerodrome cannot safely approach it without flying over part of the Spanish prohibited area".

Some of the reasons from the Spanish Government were as follows:(21)

1. That it is the exclusive prerogative of the State which establishes a prohibited area to decide upon the existence and basis of the reasons justifying establishment of the area and that no other state may question the use the first State has made of its sovereignty.

2. That it is inconceivable that other states may arrogate to themselves the faculty of reviewing the judgement which a state may make within its own territory as to its own military necessities and public safety.

3. That the provisions of Article 9 (a) is purely recommendatory in character and that its intent is merely to exhort states to make careful and reasonable use of the power which they have reserved to themselves in Article 9 of the Chicago Convention.

The arguments in this case tend to show that Article 9 (a) combined with Article 1 of the Chicago Convention, can also be used by Contracting States to the Chicago Convention to frustrate the exercise of the transit rights of overflight.

Article 9 (b) is much more restrictive. It provides:

> Each Contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interests of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction or nationality to aircraft of all other states.

The words, "exceptional circumstances" have not been defined. Regarding the period of emergency, Article 89 further provides:

> In case of war, the provisions of this Convention shall not affect the freedom of action of any of the Contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any Contracting State which declares a State of national emergency and notifies the fact to the Council.

According to Article 89 in the case of war and in the event of a Contracting Party declaring a State of national emergency, the State may elect not to be bound by the provisions of the Chicago Convention. Under Article 9 (b) in the case of emergency, the State can temporarily prohibit flying over the whole or any part of its territory. It is submitted that in cases of emergency, a State has an option either to choose Article 9 (b) or Article 89. Whichever is the choice, it will interfere with the exercise of the right of overflight over that State's territory enjoyed by aircrafts of other Contracting Parties.

Section II

Limitations on the Exercise of the First Freedom Traffic Rights by Property Rights in the Airspace

In the foregoing chapters, the author has endeavoured to establish the right of overflight in international air transportation. The issue remaining is not whether the aircraft has the right of overflight over the land of another because as stated by Wilson [22] while considering Article 2

of the Paris Convention for the Regulation of Aerial Navigation and after citing and considering the case of Missouri v. Holland(23)

> Article 2 of the Convention provides: "Each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters..... to the other Contracting States, provided that the conditions established in this Convention are observed". For those nations which have signed this Convention, this passage also affects the rights of private land owners, since they doubtless cannot object to a passage authorised by treaty.

The issue therefore is as to how that flying activity shall be conducted so as not to be harmful to the owner of the land or any occupier thereof.

The law of tort at common law developed to determine when the law would or would not grant redress for damage suffered by an individual in society. This damage, in the realm of aviation, may be either injury to the person, damage to property or damage to financial interests. Here the law of tort is concerned with the liability of the owner and/or operator of the aircraft to other persons on the ground while exercising his right of overflight. The author will consider the actions open to the individual against such aircraft operator and/or owner, that is, trespass quare clausum fregit, action on the case for nuisance, issues of negligence and strict liability in

respect of the use of the aircraft and the influence of the aviation statutes on those remedies.

A trespass quare clausum fregit is an entry on another's land without lawful authority and doing some damage however inconsiderable, to his real property. Thus for trespass quare clausum fregit, there must be an entry on another's land which entry results in some damage to real property. The gist of the action is the breaking and entering the close. Only the landowner or one with the immediate right of possession can maintain the action.

Both trespass quare clausum fregit and the action on the case for the nuisance are correlative actions for the protection of land. The former protects the owners from direct and the latter from indirect invasions of land in the sense that the harmful activity originates off the plaintiff's land and thus indirectly interferes with his enjoyment. Therefore nuisance is the unlawful disturbance of the owner or occupier in the enjoyment of his land. Such disturbance may consist of noise, odor, smoke, dust, vibrations or any offensive conduct. The degree of such disturbance or annoyance is measured by the objective standard. In cases of private nuisances, an injured party may resort to abatement by self help, an action at law for damages or equitable relief by injunction.

Nuisance is normally associated with repeated acts which create either a continuous or intermittent annoyance. The threat or probability of repetition is sufficient to satisfy this requirement even when an injunction is sought. Furthermore, the repetition may consist of independent acts of different persons. This would appear to take care of the situation where the flights of many individual aircraft create the disturbance.

Both trespass and nuisance involve the question of ownership or possession of airspace.

Definition of "Property Rights" in Airspace

The author reiterates that by Article 1 of the Chicago Convention every State has complete and exclusive sovereignty over the airspace above its territory. A State cannot exist without population. Thus the doctrine of complete and exclusive sovereignty of a State over the airspace above its territory is an amplification of individuals' complete and exclusive property rights in the airspace above their individual pieces of land. Therefore when a State is exercising its territorial sovereignty over its airspace, it is in effect protecting individual rights in areas owned and used by the citizens of the State. Hence in as much as the transit rights of overflight are subject to the complete and exclusive sovereignty of a State over the airspace above its territory, they will also be subject

to individual private property rights in the airspace if it can be said that such individuals have property rights in the airspace above their tracts of land. But before the limitation on the transit rights of overflight by private property rights in the airspace can be discussed the words "property rights" have to be defined. Secondly, there is need to ascertain whether such rights exist in the airspace.

The concept of property is as old as history but far from being of a size or shape incapable of entering the human mind, it was actually formed there. The concept belongs not to physics but to metaphysics.(24) Although it is a creature of the human mind, the same human mind which created it has failed to give it a clear definition. Most of the attempts to define it have been ambiguous. Sometimes the word "property" has been used to indicate the physical object to which various legal rights and privileges relate and sometimes it has been used to describe the legal interests appertaining to such physical object.(25)

Ordinarily, property describes the thing itself and nothing more, for example, an acre of land, a house, an automobile, a book and so forth.(26) Stroud's Judicial Dictionary defines property as "the generic term for all that a person has dominion over".(27) In the case of Wilson v. Ward Lumber Company (28) the term "property" is defined as denoting any external object over which the

right of property is exercised. In Magor and St. Mellions Rural District Council v. Newport Corporation [29] property is defined as including all property real and personal, and all estates, interests, easements and rights whether equitable or legal, in, to and out of property real and personal including things in action. In Commissioners of Homochito River v. Withers [30] Judge Handy says:

> it appears to us that it applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition, property of a specific, fixed and tangible nature, capable of being had in possession and transmitted to another, as houses, land, and chattels.

The definitions of the word "property" above referred to have applied the word to tangible objects. In this sense, the term is defined widely to include every claim of acquisition which a man can own except the one which concerns this paper i.e. the airspace. How can those definitions apply to airspace ownership when airspace itself by its nature is not a physical object? It has been pointed out that sometimes the word property is used to describe legal interests. Attention is therefore drawn to this usage of the word "property" to ascertain whether it encompasses rights in the airspace. Chitty J in Re Earnshaw-Wall [31] states:

> Property may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing.

Smith J. in the case of Eaton v. B. B. & M. R. R. Company[32] elaborates on the second half of Judge Chitty's statement and says:

> In a strict legal sense, land is not property, but the subject of property. The term "property" although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it"; it denotes a right of any person to possess, use, enjoy and dispose of a thing.

In St. Louis v. Hall [33] Judge Sherwood states:

> Sometimes the term is applied to the thing itself, as a house or a tract of land; these things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestation of invisible rights, the evidence of things not seen.
>
> Property, then, in a determinate object, is composed of certain constituent elements, to wit: The unrestricted right of use, enjoyment, and disposal of that object.

These latter definitions of the term "property" as the legal relations between the individual and the object seem to be suited for application to ownership of airspace because property rights in airspace are rights "accruing in connection with a geometrical void, which can be located by its distance from the surface".[34] Thus the term "property" is used in this paper not "to denote the thing with respect to which legal relations exist but rather to denote the legal relations themselves".[35] These legal

relations are otherwise known as the rights of ownership or property rights. The owner of such rights has power to possess, use, enjoy and dispose of the object, the subject matter of the rights. Property rights in the airspace would entail similar rights. These rights include the right and power to exclude others from using the airspace and therefore the flight of an aircraft through an individual's airspace without his consent would be regarded as trespass.

The common law as enunciated by Coke and Blackstone tied the ownership of airspace to ownership of land surface.

> Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cujus est solum, ejus est usque ad coelum (whoever has the land possesses all the space upwards to an indefinite extent), is the maxim of the law; upwards, therefore, no man may erect any buildings, or the like to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface.... so that the word "land" includes not only the face of the earth, but everything under it, or over it.(36)

Therefore if one owned land under common law, he owned everything above it to an indefinite elevation as well as everything beneath it to the centre of the earth. However, with the advent of air travel, how far was upward?

The principle that the owner of the land also owns the airspace above it is alleged to have originated in the

Roman Law. It has been argued and concluded by commentators that airspace over private lands under the Roman Law, either was the exclusive property of the land owner up to an indefinite height, subject to the building restrictions or other state imposed limitations or vested in the land-owner exclusive rights of occupancy or user of such air-space.(37)

Cujus est Solum ejus est usque ad coelum

The English Background of the Principle

Wherever it originated, the principle cujus est solum, ejus est usque ad coelum found its way into the English Law through the influence of the Jews who came to England with the Norman Conquest in 1066.(38) The Jews remained the servants of the king alone,(39) and the king enacted special laws as appendix to his "charter to the Jews"(40) known as the laws of the Jewry. These laws applied as among the Jews and as between the Jews and Christians. There was a Jewish Exchequer, a branch of the main Exchequer Court in which Christian judges sat with justices of the Jews and were thus exposed to Jewish Law and its application.(41) The Jews were driven out of England in 1290 but the influence of their highly developed legal system had made itself felt.(42)

In 1280,(43) before the Jews were driven out of England a conveyance made by a Jew in Norwich England under

the laws of the Jewry defined the rights of the owner as being "from the depth of the earth to the height of the sky". (44) This description on its own could not have formed part of English Common Law which is found on the rule of precedent. Its first appearance in the English Courts was in 1586 in the case of Bury v. Pope. (45)

Bury v. Pope was an action for "stopping another's lights", in which the court held that an action for nuisance did not lie where a landowner built a house which shut off the light entering the windows of an adjoining landowner whose house had been erected 30 or 40 years previously, since it was the folly of the complaining landowner to build his house close to the others land. To this case, a note was added "cujus est solum, ejus est summita, usque ad coelum. Temp. Ed I." The note does not appear to be part of the judgement. The most that can be said of it is that it may have been obiter dictum if it was part of the judgement in which case it did not form part of the ratio decidendi of the case.

Eleven years after Bury v. Pope had been decided, the principle "cujus est solum ..." was successfully invoked in Penruddock's Case (46) where it was held that a landowner could abate the nuisance caused by an overhanging roof of an adjoining landowner which protruded into the complainant's airspace and dumped rainwater on the

complainant's land. Thirteen years later in the Baten's Case [47] it was held that the plaintiff had a right to abate a nuisance consisting in the overhanging portion of a house.

Observation of the above three cases which imported the principle of "cujus est solum ..." into England reveals that all the three cases were involved with the abatement of a nuisance and not with trespass. A trespass at Common Law involves a physical invasion of the property of another whereas a nuisance does not involve the physical invasion of another's property but normally consists of the use by an owner of his property in such a way as to injure or interfere with the enjoyment of the property rights of another. What is in issue in this paper is that if the land extends upwards indefinitely, then an invasion of the coelum would amount to trespass. These early English decisions are not relevant to this question. Therefore this line of jurisprudence had not established that a landowner had such rights in the airspace above his land as to render an unauthorised flight through it to be a trespass.

Thirty two years after the invention of the art of flight [48] the principle reappeared in the case of Pickering v. Rudd. [49] In that case the defendant had nailed a board onto his wall so as to overhang the plaintiff's garden.

The plaintiff viewed the airspace above his garden as belonging to him and argued that a permanent projection into his airspace amounted to a trespass. Lord Ellenborough said:

> I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it..... But I am by no means prepared to say, that firing across a field in vacuo, is a clausum fregit. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass quare clausum fregit, at the suit of the occupier of every field over which this balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded.

Lord Ellenborough refrained from ruling on whether or not the owner of the land had property rights in the airspace above his land which affected the defendant's overhanging board. It is, therefore, submitted that his obiter dictum amounts to a statement to the effect that although a land owner may have rights in the airspace above his land, the law did not concern itself with trespasses through the airspace lasting minutes (airships and airplanes) or seconds (projectiles and missiles)[50] and as stated by Shadwell v-c in Saunders v. Smith[51]

> thus, upon the maxim of law, "Cujus est solum ejus

> est usque and coelum" an injuction might be granted for cutting timber and severing crops; but suppose a person should apply to restrain an aerial wrong, as by sailing over a persons freehold in a balloon; this surely would be too contemptible to be taken notice of.

Perhaps, at this juncture, it may be commented that all credit should be given to Lord Ellenborough "that most garrulous of chancellors..... who managed to express an opinion on almost everything at one time or another."(52) Without knowing it he lay down an important rule of law. that the landowner has rights in the airspace above his land subject to the right of overflight by aircraft especially at that time when it was doubted whether it was a trespass to pass over land without touching the soil. He, in effect, lay down the groundwork for the limitation of the maxim "Cujus est Solum ejus est usque ad Coelum".

Thirty years after Pickering v. Rudd the courts were once more faced with a case involving rainwater falling from a cornice. This was in Fay v. Prentice (53) where Judge Manle Cited Penruddock's case and Baten's Case and held that a cornice projecting over the plaintiff's garden and causing rainwater to fall on the plaintiff's garden was a nuisance. Because the cornice was overhanging the plaintiff's property, the question of the applicability of Pickering v. Rudd was raised. On this issue, the judges

were divided. Colman J. said that supposing it were to be conceded that a trespass was involved by reason of the presumption of law, cujus est solum ejus est usque and coelum, there was no evidence that the plaintiff had claimed the right. With that comment he evaded having to pronounce an opinion on the issue. Manle J. on the other hand doubted the application of the maxim and said that the maxim "cujus est solum ejus est usque ad coelum" was not a presumption of law applicable in all cases and under all circumstances.(54)

The state of doubt which existed in the English judiciary in Fay v. Prentice over the applicability of the principle of "cujus est solum ejus est usque ad coelum" was confirmed in Kenyon v. Hart.(55) The Defendant while standing on his own land, shot a cock pheasant which was then in the air over the plaintiff's land. The pheasant fell and the defendant entered the plaintiff's land to retrieve it. Blackburn J. feeling that the old query of Lord Ellenborough as to a man passing over the land of another by a balloon (56) had been raised expressed his doubts as to the correctness, legally, of Lord Ellenborough's statement in Pickering v. Rudd.

Still in this era when Lord Ellenborough's comments in Pickering v. Rudd were under continuous scrutiny was the case of Corbett v. Hill.(57) This case involved a

situation in which the plaintiff owned two adjoining houses. He sold one of them to the defendant and later discovered that a first floor room which was part of the house retained by him projected into the defendant's house. The defendants tore down their house and built a new house which partially extended over the top of the plaintiff's projecting room, but which did not touch it or interfere with it. The court held that the defendant owned the column of airspace in which the plaintiff's room projected. Sir W. M. James by way of obiter dictum stated:

> the ordinary rule of law is, that whoever has got the solum..... whoever has got the site..... is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted particularly with regard to property in town....

In this case, the rebutting fact seems to be in line with Lord Ellenborough's reasoning in Pickering v. Rudd.

In 1887, Hawkins J. followed Lord Ellenborough's decision in Pickering v. Rudd in Clifton v. Viscount Bury [58] where he was dealing with the passage of bullets fired from a musketry range, the bullets passing some seventy-five feet above the surface of the land and not striking the land. He held that that was not trespass, but, if anything, was a nuisance.

This reasoning seems to have found favour in 1895 in the case of Lemmon v. Webb,[59] a case which concerned the branches of a tree which overhung the plaintiff's boundary. Kay L. J. said:

> the encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance.

The plaintiff was allowed to cut back the branches of the tree which overhung his boundary whether or not they caused damages. He had also a right of action for actual damages caused by the nuisance.[60] Here it seems the court took the view that a landowner does not have proprietary rights in the airspace at or above the height of seventy-five feet above the ground.

However, cases concerning trespass by telegraph and telephone wires seemed to support the view that the owner of land had some rights in the airspace above his land. These cases although they differ from aviation cases in that aviation cases involve a "one minute" trespass while telegraph and telephone wires are fixed, they demonstrage the idea that a landowner has property rights in the airspace above his property.

In the case of The Board of Works for The Wandsworth

District v. The United Telephone Company Limited [61] it was held that the Metropolitan Management Act 1855 did not confer on the board of works such property rights in the street as to entitle them to maintain an action for an injunction against the erection of a telephone wire across the street, the telephone wire being erected at a great height and causing no appreciable danger to the public or to the traffic in the street. Brett M. R. said:

> I am not about to question that which has been laid down by Lord Coke..... namely that where a piece of land is granted or is conveyed in England by a grant from the king or by a conveyance from Party to party, under the word "land" everything is passed which lies below that position of land down to what is called the centre of the earth - which is, of course a mere fanciful phrase - and usque ad coelum - which to my mind is another fanciful phrase. By the Common Law of England, the whole of that is transferred by the grant or the conveyance under the term "land". But I am of opinion that it does not follow then in a grant or conveyance the word "street" would produce the same result..... It seems to me really logically to follow that those who came to the conclusion that..... the word "street" includes downwards from the surface only that which is within the area or ordinary user of the piece of ground as a street, must, if they are consistent, hold that the same rule applies to that which is above the surface, and therefore that it includes only so much of the area which is above the surface, as is the area of the ordinary user of the street as a street.

It should be noted that this case does not limit the maxim "Cujus est solum ejus est usque ad coelum" and its application to similar intrusions into privately owned

airspace as judge Fay said:

> As at present advised, I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above his freehold. (62)

Although it has been argued that the case was based on an act of parliament and that the court interpretted it as meaning that the public body's scope of ownership was more limited than that of private individuals, (63) it is submitted that Brett M. R. was stating the effect of the maxim as it is understood in regard to passage by aircraft.

The English utility cases which followed upheld the judgement in the Wandsworth District Case. In the Electric Telegraphy Company v. Overseers of Salford (64) in which the issue was whether utility wires actually occupied the space through which they passed Judge Pollock said:

> ..... there is no distinction between occupying the land, by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water. Land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of land.

In Finchley Electric Light Company v. Finchley Urban District Council (65) where the decision in the Wandsworth

District Case was once more followed it was held that the property of the defendants in the site of the street was not enlarged so as to entitle them to prevent electrical wires being carried over the street at a height above the area required for the user of the street.

Academic commentators on the subject have consistently rejected the literal application of the maxim "cujus est solum ejus est usque and coelum" Pollock (66) states that:

> At Common Law it would clearly be a trespass to fly over another man's land at a level within the height of ordinary buildings, and it might be a nuisance to hover over the land even at a greater height.

Salmond (67) states that:

> it is also commonly said that the ownership and possession of land bring with them the ownership and possession of the column of space above the surface ad infinitum. Cujus est solum, ejus est usque ad coelum et usque ad inferos.... such an extention of the rights of a land owner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in an aeroplane, or fire a bullet across it, even in cases where no actual or probable damage, danger or inconvenience could be proved by the subjacent landowners.

Winfield and Jolowicz (68) say that although it must now be taken as settled that an intrusion into the airspace

at a relatively low height constitutes trespass, it is doubtful to what height a person can possess the airspace above his land, and that it is certain that the maxim "cujus est solum ejus est usque ad coelum" is not to be taken literally.

With the improvement of Civil Aviation, the twentieth century brought more technical cases relevance to aerial trespass. In Gifford v. Dent [69] Romer J. took the view that a sign which was erected on the wall above the ground floor premises, which had been demised to the plaintiff, and projected some four feet eight inches from the wall constituted a trespass over the plaintiff's airspace. Rommer J. Said:

> ... the plaintiffs were tenants of the forecourt and were accordingly tenants of the space above the forecourt usque ad coelum, it seemed to him that the projection was clearly a trespass upon the property of the plaintiffs.

To the argument for the defendant that the defendant must have a right to put his head out of the window, the learned judge admitted that this was so, for the reason that it was "perhaps a necessary concomittant of his tenancy." This concession of a reasonable use of the airspace seems to be in line with Lord Ellenborough's statement in Pickering v. Rudd that "whether the action may be maintained cannot depend upon the length of time for which the superincumbent

air is invaded". It would seem that for aerial trespass, what matters is its reasonableness and not its duration.

The decision in Gifford v. Dent was followed by McNair J. in Kelsen v. Imperial Tobacco Co. (70) in which he granted an injunction ordering the defendants to remove a sign which projected eight inches over the plaintiff's property. McNair J. Said:

> That decision, I think, has been recognised by the texbook writers, and in particular by the late professor Winfield, as stating the true law. It is not without significance that the legislature in the Air Navigation Act 1920, Section 9 (replaced by Section 40 (1) of the Civil Aviation Act 1949), found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature at least were not taking the same view of the matter as Lord Ellenborough in Pickering v. Rudd but rather taking the view accepted in the later cases, such as the Wandsworth District Case, subsequently followed by Romer J. in Gifford v. Dent. Accordingly, I reach the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's airspace by this sign. (71)

Although the twentieth century judges were willing to find that projections overhanging a landowner's property were trespasses rather than nuisance, they did not accept the ad coelum principle. In Commissioner for Railways v. Valuer General (72) Lord Wilberforce had this to say of the maxim cujus est solum ejus est usque ad coelum.

> There are a number of examples of its use in judgements of the 19th century, by which time mineral values had drawn attention to downward extent as well as, or more than, extent upwards. But its use, whether with reference to mineral rights, or trespass in the airspace by projections, animals or wires, is imprecise and it is mainly serviceable as dispensing with analysis; cf Pickering v. Rudd .... and Ellis v. Loftus. In none of these cases is there an authoritative pronouncement that "land" means the whole of the space from the centre of the earth to the heavens; so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the common law mind. (73)

It is here submitted that Lord Wilberforce was complimenting the statement of Brett M. R. in the Wandsworth District Case when he said:

> .... under the word "land" everything is passed which lies below that position of land down to what is called the centre of the earth - which is of course a mere fanciful phrase - and usque ad coelum - which to my mind is another fanciful phrase.

In Sovmots Investment Limited v. Secretary of State for the Environment (74) Browne L. J. commenting on a submission that land in its ordinary sense meant from the centre of the earth to the sky, said:

> We therefore do not think it necessary to consider whether (counsel's) contention as to the ordinary legal meaning of "land" is right: we will only say that what Lord Wilberforce said in giving the opinion of Privy Council in Commissioner for Railways v. Valuer General seems to us to throw great doubt to it. (75)

Finally the problem of usque and coelum presented itself in Bernstein of Leigh (Baron) v. skyviews & General Limited.[76] The defendants flew over the plaintiff's piece of land for the purposes of taking an aerial photograph of the plaintiff's country house which they then offered to sell to him. The plaintiff claimed damages, alleging that by entering the airspace above his property in order to take aerial photographs the defendants were guilty of trespass, and or were guilty of an actionable invasion of the plaintiff's right to privacy by taking the photographs without his consent or authorization. Finding that the aircraft did not commit a trespass Griffiths J. said:

> I can find no support in authority for the views that a landowner's rights in the airspace above his property extend to an unlimited height..... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of airspace. This balance is in my judgement best struck in our present society by restricting the rights of an owner in the airspace above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has not greater rights in the airspace than any other member of the public.

From the foregoing the rights of the landowner in the airspace above his land are not clear. It struck the author to note that so far there is only one English decision, to the author's knowledge (as distinct from dicta)

on the position at common law as to the intrusion of aircraft into airspace and that decision is Bernstein of leigh (Baron) v. Skyview & General Limited. That decision might have been influenced by Section 40 (i) of the Civil Aviation Act 1949 which provides:

> No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight....

From the foregoing decision it can be safely concluded that the landowner's rights in the airspace above his land are restricted to such height as is necessary for his ordinary use and enjoyment of his land and the structures upon it. This limits the application of the maxim "Cujus est solum ejus est usque ad coelum" a position which the academic text book writers have maintained. It can also be further concluded that passage through the air of an aircraft at a height and in such circumstances as to involve no contact with the land or interference with the reasonable use of the subjacent land and the structures upon it does not amount to trespass. But on the other hand, considering the dictum of McNair J. in Kelson V. Imperial Tobacco Company Limited "it is not without significance that the legislature .... found it necessary to expressly negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land"

it can be also concluded that flight through the airspace is a trespass and/or a nuisance at common law and that is why Parliament specifically excluded any action arising thereunder.

The United States background of the Principle

When the colonization of North America began, the English carried with them the accepted principles of the Common Law. The local courts followed the English patterns. The English judicial procedures and trial by jury was imported into all the English colonies.(77) So was the common law pleading and the common law rule of precedent. Thus at least from the fourteenth century until the more recent statutory surge, the judicial decisions have been the most significant.(78) The fourth year of the reign of James I 1607, marked the beginning of the colonization of America and some America statutes specify this year for the adoption of the common law. For example, the Arkansas statute provides:

> The common law of England, so far as the same is applicable and of a general nature, and all the statutes of the British Parliament in aid of or to supply the defects of the common law made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that Kingdom, and not inconsistent with the Constitution and Laws of the United States or the Constitution and Laws of this State, shall be the rule of the decision in this State unless altered or repealed by the General Assembly of this State.

This adoption of the Common Law included the adoption of the judicial concept that ownership of land included rights in the airspace above it..

The English medieval text book writers on this concept were Coke and Blackstone. As far as the maxim "cujus est solum ejus est usque ad coelum" is concerned, its incorporation into the English Law has been attributed to Coke [79] who commented in 1628 that:

> And lastly, the earth hath in law a great extent upwards, not only of water as hath been said, but of ayre and all other things, even up to heaven for cujus est solum ejus est usque ad coelum. (80)

This commentary's influence on the formulation of the American Law can be observed from the following comment:

> Doctrinal writing has been a much more active and important formulating agency in Anglo-American Law than our theory leads us to admit. Coke formulated the medieval law authoritatively for the classical era, the seventeenth to the nineenth century. Nor did doctrinal writing stop. On the contrary, it gained in importance in the nineteenth century. While in form our law is chiefly the work of judges, in great part judges simply put the guinea stamp of State's authority upon propositions which they found worked out for them in advance.....The most creative judges have seldom made legal precepts out of their own heads. Text books have had much influence. (81)

As stated by Pound, the doctrinal writing continued. Blackstone, writing in 1765 - 1768 (practically on the eve

of the American Independence) reiterated Coke's view on ownership of airspace and stated the maxim and its application as follows:

> Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. "Cujus est solum, ejus est usque ad coelum" is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land..... so that the word "land" is not only the face of the earth, but everything under it or over it. (82)

This English enunciation of the maxim, was readily accepted in Independent America. The authority on the American Law, Chancellor Kent of New York in his much cited "commentaries on the American Law" (83), first published in 1826 and 1830, accepted as valid the statements of Coke and Blackstone as to the ownership of land carrying with it certain rights of the surface owner in space above.(84) He thus incorporated into the American Law the concept of proprietary rights in the airspace as existed in England in the medieval ages, that is, usque ad coelum without any limitations. Pound comments as follows:

> In addition, two other books stand very near to them in authority in the United States because they state the Common Law, in one case as it had stood just before and in the other as it stood just after it had been received definitely in this country. Sir William Blackstone's commentaries on the Laws of England (1765 - 1769) was much used in America in the contests between the colonies and the crown which culminated in the Revolution,

> and was accepted by the courts after the Revolution as a statement of the law which we received. Kent's commentaries on American Law (1826-1830), the Great American Institutional Book, while not strictly a book of authority, is so clear and accurate an exposition of our common law as received after the Revolution that it has generally stood for a decisive statement on it.(85)

The concept that ownership of land carried with it certain rights in the airspace was affirmed in numerous cases in state courts of which a few are cited.

In Connecticut in 1818, the maxim "cujus est solum, ejus est usque ad coelum was invoked in Ingraham v. Hutchinson (86) to support a proposition that a projection into a land owner's airspace would be an invasion of his rights. In Isham v. Morgan(87) it was held that land had an indefinite extent upwards, as well as downwards. In Lyman v. Hall (88) a case concerning overhanging branches, the court stated that "a land owner has not only a right to the soil, but the right, in contemplation of law, includes everything in a direct line upwards to the heavens, and everything downwards to the centre of the earth. The owner of the surface of the ground owns all that is over and under it."(89)

It seems here that the courts in Connecticut applied the legal maxim as an established rule of law which required no supporting citation of authority.(90)

In Baldwin v. Breed [91] the court stated that the maxim "is not to be discarded as frivolous, when we consider how important it is in the designation of the ownership of property."

In the State of New York, the courts, like the courts in Connecticut accepted the maxim as an established principle of law.[92] In the case of Winton v. Cornish [93] the Supreme Court of Ohio held that land included not only the face of the earth, but everything under it or over it. In Massachusetts in Smith v. Smith[94] the court held that the eaves of the defendant's barn overhanging plaintiff's property was trespass. In Atkins v. Bordman,[95] a case involving an easement of ingress and egress which had been received by the grantor, the court held that the landowner could lawfully cover the upper portion of such passage way with a building if he left a sufficient space for the grantor's use for the purpose of which it was received. The court stated:

> The owner of an estate in fee, by virtue of his interest and power as a proprietor, may make any and all beneficial uses of it at his own pleasure, and he may alter the mode of using it, by creating or removing buildings over it, or digging into or under it, without restraint, "cujus est solum, ejus est usque ad coelum". If any other person has an easement in it, the owner has still all the beneficial use, which he can have consistently with the other's enjoyment of that easement. If the easement is a right of way, this consists in a right to use the surface of the soil, for the purpose of passing or repassing..... If it be a foot way only, it shall be reasonably

> wide and high for all persons to pass on foot, with such things as are usually carried by foot passengers. If it be a way for trains, it shall be of sufficient height and breadth to admit of carriages of the largest size in common use, and high enough for loads of hay, and other similar vehicles usually moved by trains. Under such circumstances, what is a reasonable height and width, is partly a question of fact, and partly a question of law. (96)

In Gannon v. Hargadon (97) the court observed that the maxim was a general rule, applicable to the use and enjoyment of land and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained. (98)

Thus having ascertained how the maxim cujus est solum, ejus est usque ad coelum found its way into the United States and its reception there, the next question would be how it was applied. The most frequent application of the maxim, then, involved overhanging or projecting man-made structures.

The cases involving overhanging branches of trees or other natural growths were decided on nuisance and not on trespass. The land owner could abate the nuisance by cutting off the overhanging growths. (99) He had no right of ownership in the overhanging branches by virtue of the maxim. In Hoffman v. Armstrong (100) the court commented on the maxim as follows:

> This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit and no one can lawfully obstruct it to his prejudice yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging..... The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself. (101)

Therefore, the owner of the tree remained entitled, to the overhanging branches and fruits.(102) As concluded by Ball (103) these overhanging limb cases avoided the problem of possession of the airspace itself and thus they furnish no basis for determining the extent of ownership of airspace.

Cases involving overhanging man-made structures in England, for example, the Baten's Case Pickering v. Rudd and Fay v. Prentice which dealt with overhanging cornices were decided on the nuisance theory. The American courts followed suit. In Smith v. Smith where it was alleged that the defendant had built a part of his barn upon the plaintiff's close. The court, while holding that the plaintiff had to prove that the eaves of the defendant's barn projected over the close, relied on Codman v. Evans (104) a case which had been based upon nuisance and in which the court had followed Baten's Case and Fay v. Prentice.(105)

The court treated cases involving telephone and telegraphic wires as trespass and granted ejectment as a remedy. A Kentucky court held that the suspension of crossarms and wires along a line so close to plaintiff's premises that they extended over his land was a continuing trespass for which an injunctive relief was granted.(106) A similar judgement was entered in Massachusetts in the case of Curtis Manufacturing Company v. Spencer wire Company.(107) In Burtler v. Frontier Telephone Company (108) wires were stretched across the plaintiff's land at a height varying from twenty feet to thirty feet above the ground and ejectment was held to lie because the wires were a permanent occupation of the space above the land within the principle of the maxim:

> What is "real property?" What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law "cujus est solum, ejus est usque ad coelum et ad inferos." The surface of the ground is a guide, but not the full measure; for within the reasonable limitations land includes not only the surface but also the space above and the part beneath.... "usque ad coelum" is the upper boundary, and, while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man..... According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were solid, inseparable from the soil, and protects it from hostile occupation accordingly ..... Unless the principle of "usque ad coelum" is abandoned, any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a

dissein of the owner to that extent.'(109)

Shooting across land was held as a trespass even though the bullets did not fall upon it.(110) In the case of Portsmouth Company v. United States (111) the Supreme Court held that it was a trespass to discharge projectiles from heavy coast artillery over the plaintiff's land which amounted to a "taking" of his property rights by the sovereign.

The maxim has been discussed at length in order to determine the extent of the landowner's property rights in the airspace above his land at Common Law. The cases have been cited to illustrate whether interference with the land owner's airspace is an encroachment on his proprietary rights in such airspace. From the cases, it is clear that before the advent of aviation in both the United Kingdom and the United States, there was a tendency to recognise ownership in the airspace. It is also clear that no judicial decision actually held that the ownership of airspace extended indefinitely upwards. What was not clear was the upward extent of such rights. Therefore the question left open at this juncture is as to whether the landowner's proprietary rights in the airspace above his land were to such a vertical extent as to affect the right of overflight over the landowner's property.

Aviation Statutes and Rights in the Airspace

United Kingdom

The United Kingdom commenced to legislate on air navigation in 1911, but the legislation which is relevant to this study was not enacted until after the Paris Convention of 1919 on the Regulation of Aerial Navigation. By Article 2 of the Paris Concention, each Contracting State undertook in time of peace to accord freedom of innocent passage above its territory to the aircraft of other Contracting States. As stated by McNair, "Great Britain has imperium in its territory and the superincumbent airspace, but the dominium in the territory is vested in a multitude of land owners."(112) It had also incorporated in its law, the maxim "cujus est solum ejus est usque ad coelum" on the scope of which there had been some judicial debate since the medieval ages. Without legislation it was possible that British landowners would institute actions for trespass or nuisance against the operators of air transport in flight above their land, however reasonably conducted the flight might be. The Convention alone would not have been a defence to such actions if they lay at Common Law. Furthermore such suits would have hindered the development of air transportation. Therefore there was need for legislation.

A special committee on Civil Aerial Transport which

was formed in 1917 did in 1918 give a recommendation[113] to the effect that as regarding damage done by aircraft, while depriving the landowner of any existing right in property, he was to be compensated by a statutory insurance for himself and his property against such damage. The Committee considered the possibility of defining some altitude of flight but concluded that to attempt to prescribe a limit was impracticable, and that it would be sufficient to protect the landowner by giving him a specific right of action for damages caused by a nuisance and in breach of flying regulations.

The first draft of the Aerial Navigation Bill contained the following provision:

> 12 (1) The flight of an aircraft over any land in the British Islands shall not in itself be deemed to be trespass, but nothing in this provision shall affect the rights and remedies of any person in respect of any injury to property or person caused by an aircraft, or by any person carried therein, and any injury caused by the assembly of persons upon the landing of an aircraft shall be deemed to be the natural and probable consequence of such landing. (114)

It is interesting to note that this draft does not refer to nuisance or to any definite altitude. Further the draft imposes liability on the aircraft operator for damage caused by the assembly of persons upon the land of an individual in the event of the landing of an aircraft. However, the draft does not impose strict liability on the

operator of the aircraft for injury to property or person caused by an aircraft in flight or by any person carried in the aircraft.

With the recommendation of the Special Committee on Civil Aerial Transport the Bill was revised and provided by Section 9 of the Air Navigation Bill that:

> 9. No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property or the ordinary incidents of such flight, so long as the provisions of this Act and any order made thereunder are duly complied with; but where material damage or loss is caused by an aircraft in flight..... or by any person in such aircraft, or by any article falling from such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered.(115)

The suggestions of the Civil Aerial Transport Committee were before Parliament when it passed the Air Navigation Act 1920 (116) with slight drafting amendments.(117) By Section 9 of the Act, the landowner's rights, at Common Law, to sue either in trespass or nuisance were deliberately limited. The Secretary of State for Air Mr. Churchill had the following comment about the Section on the second reading of the Bill:

> The Law of trespass and damage is investigated and dealt with in this Bill. Hitherto there has been no definite principles in regard to air trespass or damage done except by aircraft. The provisions of the Bill substantially follow the recommendations of the Aerial Transport Committee of 1918 which aim at reconcilling the rights of landowners in the superincumbent air following an organization for civil aviation by abolishing actions for mere aerial trespass- that is to say, aeroplanes flying over the ground owned by the landowner and to substitute instead absolute liability by the owners of aircraft to compensate injured persons on the ground without any question of proof of negligence..... we preserve the right of the individual on the ground to some protection from objects which may descend from the superincumbent air. In its present form, the Air Ministry consider that the balance is held reasonably between the interests of civil aviation on the one hand, and the rights and remedies of the ordinary civilian on the other. (118)

Sir D. Maclean in the same debate commented as follows:

> Technically everything that flies over any piece of ground without the permission of the owner has committed a trespass. "Cujus est solum, ejus est usque ad coelum, et ad inferos". That has been swept on one side by the practical necessities of the case. There are very many important matters that arise on it. It is not a question affecting large landowners alone. Men holding very small bits of land have rights which have to be considered in connection with the nuisances that undoubtedly will arise. The public interest must prevail, while the rights and privileges of individual owners small or great are safeguarded. (119)

The limitation of the landowner's rights to sue either in trespass or in nuisance was balanced against the

public interest in aviation. In return, the landowners were assured of their property's safety by the introduction of absolute liability on the operators of aircrafts for damage to persons and property on the ground without the question of proof of negligence.

In the 1949 Civil Aviation Act, Section 40 re-enacted and improved the wording of Section 9 of the Air Navigation Act 1920 and provides as follows:

> S.40 (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight so long as the provisions of Part II and this Part of this Act and any order in Council or order made under Part II of this Part of this Act are duly complied with.
>
> (2) Where material loss or damage is caused to any person or property on land, or water by, or by a person in, or an article or person falling from an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft. (120)

According to Section 40 (1) of the Civil Aviation Act, so long as the provisions of Parts II and IV of the Civil Aviation Act 1949 and of any Order in Council or Order made thereunder, are duly complied with, no action

of trespass or nuisance will lie gainst any person by reason only of the flight of any aircraft or of the ordinary incidents of such flight, provided that the aircraft is flying "at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable."

The issue would as to what is "reasonable". Reasonableness is a relative term and must be proportioned to the circumstances of the case considered as a whole. Thus from the words of Section 40 (1) what is reasonable is a question of fact depending on all relevant circumstances. It is not possible to specify a particular altitude as marking the boundary of what is reasonable; it might depend, for example, not only on weather factors mentioned in the Act, but on the size, speed and noise of the aircraft.[121] However it will suffice to say that for an aircraft exercising its right of overflight, at an altitude of, say 37,000 feet, this height would be held reasonable in all circumstances

Before the exemption applies, the flight must comply with the statutory provisions enumerated in the Section. These provisions include the Air Navigation Order 1980, the Air Navigation (General) Regulations 1981, the rules of the Air and Air Traffic Control Regulations 1981 and the

Air Navigation (Noise Certification) Order 1979. Theoretically therefore an aircraft which flies without proper navigation light, or does not comply with its certificate of air worthiness, its operator will not be entitled to rely on the Section as a defence for trespass or nuisance. In the case of overflights it does not follow that such aircraft would be committing a trespass or nuisance.

The words "by reason only of the flight" it has been argued that, confer a right of innocent passage, analogous to the right which any member of the public has to pass over land the surface of which has been dedicated by the owner for the use as a public highway. On such public highways, trespass may be committed. For example, in Hubbard v. Pitt[122] Lord Denning M. R. said:

> The public have a right of passage over a highway but the soil may belong to someone else. The owner of the soil may sue if a person abuses the right of passage so as to use it for some other and unreasonable purpose. Such as where a racing tout walked up and down to note the trials of the race horses.

and Sir Evershed in Randall v. Tarrani[123] said:

> The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but if the driver of a vehicle on the highway passess - for some purposes, at any rate -

> from time to time of the highway, that, equally clearly, is not a user of the highway beyond what is legitimate. On the other hand, it is well established that if one is using a highway for a purpose other than passage along it, one cannot do so legitimately merely by the pretext of walking up and down along it.

Therefore if the operator of an aircraft flew over land for the purpose of viewing racehorses being galloped [124] he may not be able to claim the protection of the Section. But if the flight were at a reasonable height and complied with the statutory requirements the racehorse viewer will be protected under Section 40 (1). [125]

Trespass has not been exempted in toto. Trespass in the form of physical contact with the surface, for example in a crash or collision with a building or tower or by dropping objects on the surface is not exempted because such trespass does not arise "by reason only of the flight."

Section 40 (1) of the Civil Aviation Act 1949 specifically excludes actions for trespass and nuisance and does not mention negligence. For an action to succeed under negligence, there must be proof of actual damage. Therefore if an aircraft caused actual damage by reason only of overflight, this would be claimed more under Section 40 (2) rather than Section 40 (1).

Thus the landowner's rights in the airspace were limited by statute so as to facilitate the development of air transportation.

United States

Shortly after Great Britain had enacted the Air Navigation Act 1920, the United States approved the Uniform State Law of Aeronautics which purported to be a codification of the Common Law. The provisions of that Law relevant to this paper are as follows:

> Section 3. Ownership of Space. The ownership of the space above the lands and waters of this State is declared to be vested in several owners of the surface beneath, subject to the right of flight described in Section 4.
>
> Section 4. Lawfulness of Flight. Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

These provisions, it has been observed, embody the theory that ownership of the airspace was in the land owner but that it was subject to an easement for aerial transit.(126) These provisions were adopted by about half of the States comprising the United States of America.(127)

The Federal Government undertook to regulate

aeronautics in 1926 by the Air Commerce Act of the same year. Section 10 which is the only provision directly affecting the rights of private landowners provides as follows:

> Section 10. Navigable Airspace. As used in this Act, the term "navigable airspace" means airspace above 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.

This Section declares a right of overflight for interstate and foreign air navigation. It is contrary to the literal application of the "usque ad coelum" maxim. However, "the fact that there was no great hue and cry over invasion and deprivation of property indicates fairly conclusively that no one had even seriously taken the maxim literally....." (128)

The Civil Aeronautics Act of 1938 expressly recognised 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." These provisions were superceded by the Federal Aviation Act 1958 which defines navigable airspace as "airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft." By Section 104 the Act recognised

and declared to exist, just like the Civil Aeronautics Act 1938 had done, a public right of freedom of transit through the navigable airspace of the United States. The consequence of the Act is that except for its establishment of a right of transit through navigable airspace, Congress did not involve itself in the airspace ownership issue. This being a matter relating to local property, it could only be determined by State Law.

To sum up, Federal Legislation on the right of overflight have asserted a national sovereignty and control over navigable airspace, with a corresponding right of passage by aircraft through such airspace but without making any definite statement on ownership of airspace in general and without placing any limitations on ownership of navigable airspace other than to provide a right of use of such space for air traffic. Congress sought to legislate in this area only to the extent necessary to serve the national or public interest. It did not take interest in the rights of landowners in the airspace partly because these are handled by individual states. The problem was left for State Legislatures and the courts to solve. As for the surface owner, he was left to resort to the Common Law remedies whenever he was aggrieved.

Left with the problem, the courts had to balance the

respective interests without placing any undue limitations either on the development of air transport on the one hand or on the rights of landowners and traditional interests of property ownership on the other.

Minnesota Statute which required flights over some cities to be at a height of not less than 2,000 feet formed the basis for the decision in the Johnson v. Curtiss Northwest Airplane Company.[129] The particular aircraft involved had crashed on the plaintiff's lawn in St. Paul, and he sought not only damages but also a temporary injunction against future overflights. The court prohibited all flights under the 2,000 feet statutory limit and said;

> This rule, like many aphorisms of the law, is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development, by the courts of England, long prior to the American Revolution, as a comprehensive statement of the landowner's rights, at a time when any practical use of the upper air was not considered or thought possible, and when such aerial trespasses as did occur were relatively near to the surface of the land, and were such as to exercise some direct harmful influence upon the owner's use and enjoyment of the land. A wholly different situation is now presented.... The upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of the law such as is here invoked.

In Glatt v. Page [130] the court while prohibiting all flight under 500 feet said:

> Flying across and over.....at an altitude of less than 100 feet will ordinarily frighten teams at work there and thereby render cultivation of plaintiff's land in that vicinity difficult and hazardous, and that frequent flying there at such altitude..... constitutes a damage to the plaintiffs and an impairment of the use and enjoyment of said premises which goes with the land and belongs to plaintiffs as well as the soil thereof.

In Smith v. New England Aircraft Company[131] where the plaintiffs sought to prohibit the defendants from flying over their land and building, which was alleged to constitute a trespass and nuisance, the court was of the view that the lower flights constituted a trespass but relief was not granted since there was no evidence of damage occasioned to their property, nor interference with the use made of their land.

From the foregoing cases it can be said that the Courts were striking a reasonable balance between the landowners and the aviator. The aviator had his right of overflight through the landowner's airspace on condition that that flight did not occasion actual damage to property or actual interference with the use to which the land is made.

In Swetland v. Curtiss Airports Corporation[132] the Sixth Circuit Court of Appeals after considering the maxim "ad coelum" said that to use these decisions to define

the rights of those engaged in air commerce could not be done consistently with the traditional policy of the courts to adapt the Law to the economic and social needs of the times.

> From that point of view we cannot hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the airspace overlying the surface. This does not mean that the owner of the surface has no right at all in the airspace above his land. He has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface..... As to the upper stratum which he may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. His remedy for this latter use, we think, is an action for nuisance and not trespass. We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the airspace for himself. That height is to be determined upon the particular facts of each case.

However, the fact that the defendants' airplanes had once dropped circulars on the plaintiffs' land entitled the plaintiffs to an injunction in this regard.

The courts were gradually introducing the zone theory. In the lower stratum there was a paramount right of occupancy incidental to the landowner's use of the surface and extending upward to the point that he can reasonably be expected to make use of it. To the upper stratum there

was no paramount rights of the surface owner except for the purposes of preventing others using it from unreasonably interfering with his use of the surface. Moreover, as in the Sweetland case the court did not fix any specific height. This was left to be determined from the particular facts of each case. However, the landowner would be granted remedies where the aircraft using the upper stratum for purposes of overflight dropped some objects on the ground. Further, the court was of the view that there was a possibility of some cases of trespass against the owner of the soil, while an airplane was flying through the airspace but not in all cases.

In the case of Gay v. Taylor[133] the court said that:

> Invasions of the airspace over one's 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.

Here the court was asserting that trespass is not applicable to a mere flight without contact with the surface.

In Cory v. Physical Culture Hotel [134] a case concerning an aerial photographer who flew below one thousand feet, the court Said:

> The owner of land has the exclusive right to so much of the space above as may be actually

> occupied and used by him and necessarily incident to such occupation and use, and any one passing through such space without the owner's consent is a trespasser. As to the airspace above that actually occupied or used and necessary incident to such occupation and use, the owner of the surface may prevent its use by others in so far as that use unreasonably interferes with his complete enjoyment of the surface and the space above which he occupies, on the theory of nuisance. The height at which an airplane operator may pass above the surface without trespassing is a question depending for solution on the facts in each particular case.

In Thrasher v. City of Atlanta (135) the court commented as follows on aerial trespass:

> .... the pilot of an airplane does not seize and hold the space or stratum of air through which he navigates, and cannot do so. He is merely a transient, and the use to which he applies the ethereal realm does not partake of the nature of occupation in the sense of dominion and ownership. So long as the space through which he moves is beyond the reasonable possibility of possession by the occupant below, he is in free territory, not as every or any man's land, but rather as a sort of "no man's land". As stated above, however, the occupant of the soil is entitled to be free from danger or annoyance by any use of the superincumbent space, and for any infringement of this right he may apply to the Law for appropriate redress of relief.

From the cases of Gay v. Taylor, Cory v. Physical Culture Hotel and Thrasher v. City of Atlanta it can be observed that an aviator could fly over the defendant's property without any consent as long as he (1) acted in a reasonable manner, (2) was high enough that he did not

interfere unreasonably with the use and enjoyment of the surface, and (3) complied with the federal and State regulations.

In the case of Hinman v. Pacific Air Transport (136) a case which represents the theory that the landowner owns only such airspace as he actually occupies and may assert his rights only when use of the space results in actual damage, the court stated:

> We own so much of the space above the ground as we can occupy or make use of in connection with the enjoyment of our land..... Traversing the airspace above appellants' land is not of itself a trespass at all, but is a lawful act, unless it is done under circumstances which will cause injury to the appellants' possession. (137)

This court thus proceeded on the theory that the landowner's remedy for abuse of superjacent airspace arises only when there is actual damage committed to the land surface or crops or buildings or when there is interference with his use or possession of such surface or crops or buildings as a result of the use made of the space above them. Accordingly, the airspace was "free for all" subject only to regulations of the sovereign and subject to the rights of owners of land and buildings beneath not to be interfered with.

In Guith v. Consumers Power Company (138) where the main issue was whether the landowner owned the space above the land surface to a height necessary to erect the power transmission line and exclude airplanes from such space the court after quoting from Section 159 comment (e) and Section 194 (139) of the Restatement of Torts and the portions of the Michigan Statutes which had adapted Sections 3 and 4 of the Uniform Act concluded:

> The common law as set forth in the Restatement of the Law of Torts and the statutory law of Michigan recognize airspace ownership in the landowner subject to a public right or privilege of flight. This however does not mean indiscriminate flight at any altitude irrespective of the use of the land by the landowner, but only such flights are privileged and lawful as do not interfere with the lawful use and possession made and to be made by the landowner of the surface and the airspace above it. Any use of the airspace above land which is injurious to the land or impairs or interferes with the possession or enjoyment thereof is unlawful..... The coming of the airplane has not taken away any of the rights of the landowner to the use and enjoyment of his land and the airspace above it. The privilege or right of airplanes to fly through the airspace recognized by the common law and in statutory law of Michigan is limited to that portion of the airspace which the landowner does not need or want and the use of which does not interfere with the use, occupation or enjoyment of the land or airspace above it by the landowner. (140)

In the case of Vanderslice v. Shawn (141) the court stated:

> whether in landing, taking off or otherwise, flights over another's land, so low as to

> interfere with the then existing use to which the land is put, is expressly outside of the statutory definition of lawful flight and being an unprivileged intrusion in the space above the land, such flight is a trespass.

Thus, for the purposes of this paper the courts in the United States, in an effort to balance the interests of the landowner and the aviator, divided the airspace into two zones. The landowner had exclusive rights in the lower stratum so that anyone passing through such space without the consent of the owner committed a trespass. The aviator had the right of overflight in the upper stratum subject to the limitation that the landowner could sue for nuisance by showing unreasonable interference with his complete enjoyment of the surface.

This reasoning found support in the case of U.S. v. Causby [142] where the court said:

> The airspace is a public highway..... yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.

Canada

In Canada the question of the ownership of the airspace was first discussed in 1930 in the case of Reference re Legislative Powers as to Regulation and Control of Aeronautics in Canada [143] Newcombe J. in holding that the provinces, and not the Dominion Parliament, controlled the right of flight said:

> I would reject the argument urged on behalf of the Dominion that the subject of either of these questions is "navigation and shipping" within the 10th enumeration of S.91 of the British North America Act, 1867, I see no evidence of any Parliamentary intention that this was ever intended.
>
> > The earth has in law a great extent upwards, not only of water, as hath been said, but of and all other things even up to heaven; for "cujus est solum ejus est usque and coelum".....
>
> These are the words of Coke's venerable commentary upon Littleton (4a), and they express, as I have been taught to believe, the common law of England, which applies in the English Provinces of Canada. In the Province of Quebec, the Law is not materially different, for, by Act 414 of the Civil Code, it is declared that
>
> > "ownership of the soil carries with it ownership of what is above and what is below it."
>
> The principle is thus established, and the courts have no authority, so far as I can perceive, to explain and qualify it so as to admit of the introduction of a public right of way for the use of flying machines consequent upon the demonstrations in recent times of the practicability of artificial flight. The appropriate legislatures may, of course, provide for airways as it has habitually done for roads and highways, notwithstanding the rights of the proprietors; but the project is legislative, not judicial.

Newcombe J. went further and said that the right of way exercised within a province by a flying machine had to be derived from or against the owners of the property to be overflown and that if it were desired to confer immunity in the Provinces of Canada in respect of trespass, or nuisance by reason of flight at reasonable height as had been done in Great Britain by the Air Navigation Act 1920, resort would lie to the legislatures of the Provinces.(144)

The judgement of the Supreme Court of Canada was reversed in 1932 on Appeal to the Privy Council,(145) where it was held that the maxim "cujus est solum ejus est usque ad coelum" does not apply to prevent aerial navigation from being a public right and that flying over land was not a trespass to any proprietary rights.

In Jean Lacroix v. The Queen,(146) Lacroix sued for damages on the ground that being the owner not only of the surface of his land but also of what is below and above, flight over his land was an interference with his rights of ownership and a disturbance of his full enjoyment of his property. Judge Fournier referred to Jack Richardson's Article (147) in which he stated:

> 1. It has not been necessary for an English court to give literal effect to the maxim "cujus est solum, ejus est usque ad coelum" and no court has done so.....

2. English Courts have always accepted the general right of the landowner to the uninterrupted use and enjoyment of his property. When the right is threatened or has been infringed, the Courts will find an appropriate legal remedy to ensure his protection.....

3. As a Corollary of the owner's right of full enjoyment, no one has the right in normal circumstances to prevent him building upwards from his land. He can therefore object to anyone who purports to occupy the column of air, or a part of it, which is above his land.

4. There is an underlying assumption in the cases that use and enjoyment of land are meaningless without the ability to use the space above it, but the Courts have not pronounced upon ownership of space.

5. The decisions do not inhibit persons from making transient use of airspace above private property in circumstances having no bearing on an occupier's use and enjoyment of the sub-jacent soil.

The Learned Judge also cited the following observations on the decisions by the United States courts made by the same author:

1. The property owner has a right to the continuous useful enjoyment and occupation of his property without interference by the intrusions of aircraft in the flight space above him;

2. United States courts recognize that a landowner has an interest in the air above his property, which is of a possessory character and may be proprietary as well, to the extent he is able to occupy or make of it;

3. The courts have, without exception afforded adequate protection to the landowner in the use and enjoyment of his land, but they have at the same time, declined to enjoin air corporations unless the landowner's interest is affected or threatened;

4. a landowner in the United States may occupy or otherwise make use of the airspace above his property as incidental to his lawful use and enjoyment of the soil and no one may occupy the space or otherwise interfere with his rights;

5. the maxim, "cujus est solum, ejus est usque ad coelum", has not been applied literally and today almost certainly does not form part of the United States Law; and

6. an aircraft may fly above private property in the United States provided the flight does not interfere with the occupier's use and enjoyment of the land.

The court then held that air and space are not susceptible of ownership and fall in the category of "res omnium communis" which does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest; that the owner of land has a limited right in the airspace above his property. It is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions, the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.

The main issue in the case of Air Canada v. The Province of Manitoba (148) was the question of what rights, if any, were possessed by the Province of Manitoba in connection with the airspace above its territory. Morse J.

like Fournier J. in the Lacroix case cited Jack Richardson's Article [149]. He also cited Fleming on the Law of Torts with approval, [150] and Ellis v. Loftus Iron Company [151] where a horse on one side of a fence having bit and kicked a mare on the other side, recovery was allowed without showing a negligence on the ground that the intrusion into space over the plaintiff's land constituted trespass but distinguished it by saying that the case afforded scant guidance for cases of "momentary and harmless intrusions into airspace beyond the reach of the surface owner".

The learned judge further referred to Thom's Canadian Torrens System[152] and to the remarks made by Newcombe J. in the Reference re Aeronautics Case and dismissed the maxim saying that since the Judicial Committee did not find it necessary to deal with the ad coelum maxim, "I have concluded that I am not bound by the remarks made by the justices of the Supreme Court of Canada, and I am pursuaded that no English court has even given complete and unrestricted recognition to the ad coelum maxim as a principle of law."

While holding that the landowner had limited property rights in the airspace, Judge Morse asked a rhetorical question:

> But if the sovereign states cannot agree on the height to which sovereignty extends, how

> can the Province of Manitoba define the extent of its jurisdiction? For example, if a supersonic aircraft passes over Manitoba en route from Los Angeles to Stockholm, would the Province claim the right to levy retail sales tax on the so called consumption or use of the aircraft while it was flying over Manitoba? Or if, in the future, passengers are conveyed in the realm of Outer Space, would Manitoba claim the right of tax while the aircraft or spacecraft was in space over Manitoba?

The Province of Manitoba appealed to the Supreme Court of Canada where the case was decided on different grounds.(153)

From all the cases and statutes considered, it can be said that in keeping with the expansion and development of air navigation and commerce, but recognizing the dorminant right of the surface owner to fully use and enjoy his land, the common law courts, generally, in adjudicating the relative property rights in the airspace, have found it necessary to modify the ancient maxim of real property "Cujus est solum, ejus est usque ad coelum." The general rule now deducible from the authorities is that the right to exclusive possession of land extends upwards only to that point necessary for the use and enjoyment of the land and the incidents of its ownership, the balance being regarded as open and navigable airspace. A land owner has a dominant right of occupancy incident to his use and enjoyment of the surface, superior to any claim of rights of aerial navigators which conflict with it. According

to the United States Supreme Court, the use of land presupposes the use of some of the airspace above it; otherwise no house could be built, no tree planted, no fence constructed and no chimney erected.(154)

The height to which the owner of the surface may reasonably expect to occupy the airspace for himself is not definite but is to be determined upon the particular facts of each case. The operator of an airplane is privileged to enter the airspace above land in the possession of another, as long as he does so in a reasonable manner, at such height as is in conformity with legislative requirements, and without interfering unreasonably with the possessor's enjoyment of the surface of the earth and the airspace above it.

In considering whether the operation of aircraft interferes with a surface proprietor's rights and constitutes a nuisance or trespass, the question arises as to whether the invasion of the airspace above the land interferes with the surface proprietors enjoyment of the land. Based on the traditional theory of "cujus est solum ejus est usque ad coelum" it would be that any intrusions into the airspace above the land of another amounts to a trespass. A strict application of the rule would render one who flies an aircraft over the land technically guilty of a trespass. This common law principle cannot, consistently

with the policy of the courts to adopt the law of the economic and aerial needs of the times, be relied upon to define rights with respect to the navigation of aircraft, and the trend of the modern judges to disregard the literal application of the common law rule.(155) Therefore it cannot be said that in every case it is a trespass for one to fly an aircraft through the airspace overlying the surface of the earth and it has been expressed that even though a temporary invasion of the airspace over the land of another is a trespass, it is privileged where it does not interfere unreasonably with the possessor's enjoyment.

The law on one hand protects the rights of those in possession of land and on the other hand, serves the interests of society by permitting the reasonable development of air transportation. Therefore the flight of an aircraft over another's land may or may not amount to trespass or constitute a nuisance depending on altitude and the extent to which the rights of the occupants of the surface are interfered with or endangered. Flights have been held to constitute nuisances or trespasses when they have been as low as to interfere with the complete enjoyment of the surface ownership. This would not apply to an aircraft exercising its rights of overflight. However, a landowner may be entitled to relief if the transitting aircraft were to drop objects as they passed over his property.

Section III

Limitations by Liability to persons and property on the ground for damage caused by Aircraft in Flight

The liability for damage to property and for injuries caused by aircraft contact with the surface of the earth is a major limitation to the aviator especially in relation to the rights of individuals on the surface. Aircraft in the course of exercising the right of overflight have, for some known and unknown reasons, come falling to the surface or dropped things onto the surface causing damage to persons and property thereon. Whether or not the owner of the aircraft has any duty towards the inhabitants on the ground for the damages inflicted by an airplane that he owns, depends on the theory of liability adopted by the particular state or country.

There are two major categories into which the liability for surface damage by aircraft is separable; absolute or strict liability and negligence.

1. Absolute or Strict Liability

A form of strict liability may arise under the rule in Rylands v. Fletcher. Blackburn J. defined the rule as follows:

> We think that the rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.....He can excuse himself by showing that the escape was owing to the plaintiff's fault; or perhaps that the escape was the consequence of a vis major, or the act of God. (156)

This statement of law was approved by Lord Cairns in the House of Lords, but he restricted the principle to cases where the defendant had made "a non-natural use" of his land.(157)

Before the rule can apply, there must be an escape from the defendant's land to a place outside his occupation or control.(158) The rule has been applied among other things to the escape of water,(159) fire, (160) poison(161) motor vehicles.(162)

In Read v. J. Lyons & Co. Ltd.(163) Lord Simons stated:

> "Escape" for the purpose of applying the proposition in Rylands v. Fletcher means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control.

Thus the occupation of land is a prerequisite to liability under the rule in Rylands v. Fletcher. The issue which is relevant here is the liability of the person responsible

for an aircraft in flight. The first issue arising is whether he occupies land. But that aside, it also seems impossible to apply the conception of an "escape" to an aircraft which is under the control of a pilot while in the course of overflight. Therefore, it does not seem possible that the rule in Rylands v. Fletcher would apply to aircraft in transit flight.

Another form of strict liability may arise as liability for dangerous things. In the case of Dominion Natural Gas Co. v. Collins & Perkins (164) the defendant installed a natural gas supply at the premises of the plaintiffs' employers and allowed the safety valve to discharge into part of the building instead of leading the gas out to the open air. As a result an explosion occurred for which the defendants were held liable, and Lord Dunedin said:

> There being no relation of contract between the (defendants) and the plaintiffs, the plaintiffs cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject matter of the things involved. It has, however, again and again been held that in the case ofarticles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. (165)

The rule as enunciated applies to "articles dangerous in themselves". The question that arises is whether the aircraft is an article dangerous in itself. In Read v. J. Lyons & Co.[166] Lord McMillan said:

> In a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe. The first experimental flights of aviators were certainly dangerous, but we are now assured that travel by air is little if at all more dangerous than a railway journey.

Dr. Charlesworth argues that [167]

> an aircraft is no more at common law a dangerous thing than a motor car. An aircraft when not in flight, is quite harmless, and although, when in the air, it is dangerous, in the same sense as a suspended lamp is dangerous, still that is not enough to make it a dangerous thing.

Clearly this rule too cannot apply to the operators of aircraft.

However, Wolff[168] has suggested three bases by which the common law may apply the concept of strict liability to owners and operators of aircraft for damages to ground victims resulting from flight.

First air flights have certain elements of danger to which innocent parties on the ground are exposed.

Because of this danger, absolute liability is based on the balance of interests between the benefit from air transport and the creation of risks to others.(169) Flying is a dangerous activity but the aircraft owner benefits from or derives a profit from it. There is no gain to the land owner over whose land the airplane flies. The risk to which the land owner is subjected because of the flight over his land is completely caused by the aircraft. There is no defence that the individual on the ground has either to protect his property or himself if the aircraft were to drop from the sky. The helplessness of the ground victim in avoiding the accident is a reason for adopting absolute liability. The third reason for the common law courts to impose absolute liability on the operator of the aircraft is his ability to distribute the loss as part of the costs to those who receive its benefits,(170) i.e. the passengers and consignors and/or consignees of cargo. The ground victim has no means for spreading the risk of aircraft damage simply because he does not derive profit from the operation of the aircraft. He is in effect, a possible recipient of the damage.

For the foregoing reasons, the United Kingdom adopted the principle of strict liability but had to incorporate it into statute as did some States of the United States.

Ground Injury "Statutory Liability"

United Kingdom

Section 40 (2) of the Civil Aviation Act 1949 provides that:

> where material loss or damage is caused to any person or property in, or article or person falling from, an aircraft while in flight, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft.....

"Loss or damage" has been defined by Section 63 (3) of the Civil Aviation Act 1949 to include loss of life and personal injury. In the case of loss of life damages are recoverable under the Fatal Accidents Act 1976 or the Law Reform (Miscellaneous Provisions) Act 1934.

The word "material" has been used to mean "physical" loss or damage.(171) Therefore, the plaintiff must establish physical damage to person or to property so as to be able to recover "damages in respect of the loss or damage".

In addition to establishing physical damage or loss, the plaintiff must prove that that material loss or damage was caused by, or by a person in, or an article or person

falling from, an aircraft. Failure to establish the causal link will not entitle the plaintiff to recover damages. In Greenfield v. Law [172] the plaintiff claimed damages against the defendant for personal injuries which she sustained when a low flying aircraft startled the horse she was riding and caused her to be thrown to the ground. The plaintiff failed to establish the nexus between the aircraft and the accident and therefore her claim failed.

The section is based on absolute liability and therefore damages are recoverable "without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft."

Liability exists when the damage or loss is caused to "any person or property on land or water". In Piper v. Darling [173] the plaintiff claimed in respect of the loss of the yacht, which was broken up after she had been damaged by an aerial torpedo accidentally discharged from an aeroplane piloted by the defendant. Liability was admitted.

An article or person falling from an aircraft includes a chemical liquid.[174] It would also include a bomb, any explosives, a coffin or people or any cargo falling from the aircraft. It should not be limited to accidental falls but would include suicidal leaps and

parachute jumps.(175)

The only defence which the Section affords the aviators is that of contributory negligence of the injured party. That contributory negligence need not have been specifically committed by an injured party, but by some other person for whom the injured party is responsible.(176)

Strict Liability In the United States

The Statutes in the United States imposing liability upon aircraft owners or lessees for injury to persons of property on the ground brought about by the fall of the plane or its contents were derived from the Uniform Aeronautics Acts Section 5 which provides as follows:

> The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. (177)

The Section imposed absolute liability upon aircraft

owners or lessees for injury to persons or property on the ground brought about by the rise, flight or fall of the aircraft and its contents except for injury caused in whole or in part by the negligence of the person injured or the owner or bailee of the property injured. About half of the States adopted this porposed act, (178) Some of these States adopted in toto while others adopted it with various modifications. Although the Uniform Aeronautics Acts was withdrawn in 1943 (179) this provision was retained in whichever state it was enacted.

These statutes have been upheld against contentions, usually based on the due process requirements or the commerce clause of the United States Constitution, that they are unconstitutional.

Prentiss v. National Airlines (180) involved the Constitutionality of the provisions of New Jersey Aviation Statute which provides as follows:

> The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured....

The plane owners contended (1) that the provisions of the

statute deprived them of their property without due process of law, and (2) were a violation of the commerce clause of the Federal Constitution. As for the due process argument, the court said that it was not per se unlawful to impose absolute liability for injuries to and the death of persons and damage to property on land where planes crashed. Aviation was ultra hazardous, and fell into the category of blasting, of the storage of dynamite, of drilling for oil, of the escape of fire from trains, the peculiar dangers of each of which subjected those engaged therein to liability without fault at common law. The court added that if limited absolute liability was valid as to aviation at common law, a fortiori such liability was valid when the legislature declared it to be the public policy and law of the State. In view of the ultra hazardous character of the aviation industry, the court said that the statute had a reasonable relation to the public health, welfare and society safety, and since it was a proper exercise of the police power the statute did not deprive the owners of the property without due process of law. The court also took note of the statement of policy prepared by those drafting the statute, which pointed out the difficulties involved in proving negligence in the present situation.

As for the commerce clause argument, the court, noting the principle that if a state statute is a proper

exercise of the police power and has but an indirect effect upon interstate commerce it is not an invalid interference with interstate commerce. Further, the court pointed out that the statute challenged clearly showed that it did not affect the movement of airplanes in interstate commerce. It did not affect the average airplane, even financially, as would a tax, since it touched an airplane owner financially only, when an accident occurred, and that its provisions benefited only those who were under ordinary circumstances strangers to air travel, and who were without fault themselves.

In another New Jersey case Adler's Quality Bakery Inc. v. Gaseteria Inc. (181) an aircraft owner, whose plane struck a television tower and caused damage to real and personal property when it was precipitated to earth, argued that the statute was an unconstitutional exercise of the police power depriving airplane owners of their property without due process of law; that it contained an unconstitutional classification contrary to the equal protection clause of both the Federal and State Constitutions, and that it placed an unreasonable burden on interstate commerce.

As to the first ground, the court held that the statute in question was reasonable and bore a real and substantial relation to the end sought to be achieved and therefore was not an infringement of the State or Federal

Constitution. In holding that the statutory imposition of absolute liability upon the aircraft owner was reasonable, the court pointed to the difficulty of establishing negligence in such a situation, the expense necessary to establish fault. The effectiveness of the doctrine of res ipsa loquitur, and the fact that shifting the risk of ground damages caused by aircraft from the victim thereof to the aircraft owner was within the legislative power on behalf of the general welfare.

As for the second ground, it was held that the imposition of absolute liability upon the owner or lessee of the aircraft, but of liability for fault on the operator, was not an unreasonable classification for the reason that this statutory scheme was to place the risk of loss on the better risk bearer, which would be the aircraft owner. As for the third ground, the court adopted the reasons given in Prentiss v. National Airlines Inc. and concluded that the statute did not impose an unconstitutional burden on interstate commerce.

In South Carolina the Constitutional propriety of the statute imposing absolute liability on owner of aircraft for injury caused by its flight, irrespective of negligence was questioned in the case of United States v. Praylou[182] where the court stated:

> It should be noted that the liability asserted here against the government is not one arising out of the mere possession of property, but one created by law for the invasion of personal and property rights. It is clearly within the power of the state to enact legislation imposing such invasion of rights, whether intentional or not, can be made a wrongful act on the part of the one guilty of the invasion, and is made such by a statute imposing liability therefor.

The legislative purpose in enacting the absolute liability statutes was to place the risk of loss upon the better risk bearer. Thus where an innocent victim on the ground has shown that his personal injuries or property damage were attributable to the operation of the airplane, liability under the statute has been established.

The effect of the South Carolina Statute embodying Section 5 of the Uniform Aeronautics Acts was to make the infliction of injury or damages by the operation of an airplane itself a wrongful act giving rise to liability, the court held, in the United States v. Praylou (183) that the Federal Government was liable under the statute when, in one instance, its plane fell and exploded on the premises of one plaintiff, destroying his barn and livestock and seriously injuring three of his children; and in another instance a plane fell and exploded near a house on which the second plaintiff was working, causing him to sustain injuries. Under this statute, the court said, the owner's liability was properly viewed as arising, not out of contact

or the ownership of property, but out of the tortious or wrongful act of the person operating the plane in permitting it to cause the injury or in not preventing the occurrence which caused it. The court said that such liability was based on the theory that it was the duty of the person operating the airplane to prevent the occurrence if he undertook to operate the plant. The court added that the statute did no more than to adopt the common law rule of liability.

Thus in Metro Kadylak v. O'Brien (184) a Pennsylvania case where a boy aged thirteen was killed by a forced landing of an airplane owned by the defendant, the court cited Article IV Section 403 of the Aeronautical Code which provides as follows:

> Sec. 403 damages to persons and property on the ground. The owner and the pilot or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth shall be liable for injuries to persons or property on or over the land or water beneath, caused by ascent, descent or flight of aircraft, or the dropping or falling of any object therefrom in accordance with the rules of law applicable to torts on land in the Commonwealth.

and said

> This Section ..... makes it plain that liability without fault is not an incident of the Pennsylvania Law relating to injuries to persons upon the ground occasioned by the descent of airplanes. To establish liability in such case, negligence must be found.

In D'anna v. United States (185) a Maryland Case, the plaintiffs brought an action to recover for injuries and damages sustained when an auxiliary gasoline tank fell from a naval airplane. The case was to be determined by standards and test of the law of Maryland Article IA Section 5 of the Maryland Code which provides as follows:

> 5. Damages on land
>
> The owner of every aircraft which is operated over the lands or waters of this state is prima facie liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft or dropping or falling of any object therefrom unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured, or unless at the time of such injury the said aircraft is being used without the consent, express or implied, of the owner.....
>
> The presumption of liability on the part of the owner.... may be rebutted by proof that the injury was not caused by negligence on the part of such owner.....

The court while commenting on this section stated that one who flew an aircraft was opposing mechanical forces to the force of gravity and is engaged in an undertaking which was fraught with the gravest danger to persons and property beneath if it was not carefully operated or if the mechanism of the plane were not in first class condition.

> At common law, the hazardous nature of the enterprise subjected the operator of the plane to a rule of absolute liability to one upon the ground who was injured or whose property was

> damaged as a result of the operation.....
> The Maryland Statute has modified this rule to the extent that the owner or operator of the plane may exculpate himself by showing that the injury was caused by the negligence on his part.(186)

In this case, the falling of the gasoline tank was proof of either negligence or defective construction or equipment. The author ventures to add that this provision differs with Section 40(2) of the Civil Aviation Act 1949 of the United Kingdom in that if the owner can show that the falling object was dropped from the plane by a passenger or other person who was not under the control of the operator, he will not be held to be negligent.

Where a fishpond owner sued the operator of aircraft crop spraying service for fish killed due to chemical pollution of pond, chemical spraying constituted "dropping or falling" of object within meaning of statute imposing strict liability on aircraft owners.(187)

The absolute liability imposed by the statute does not apply in favour of an aircraft passenger. In Prentiss v. National Airlines (188) the court said:

> The benefit of the statutory provision does not go to anyone who in anywise participates in such air travel, such as passengers, but only to those who are, under ordinary circumstances, entire strangers to air travel, and who are totally without fault themselves.

It has been held that the statute does not determine the respective rights and duties between the airplane owner and the pilot or other active wrongdoer. In Adler's Quality Bakery Inc. v. Gaseteria Inc.(189) the court commenting on the plane owner's right to contribution said that the statute applied only to innocent injured persons who sought to recover for their injuries caused by falling aircraft, but that the legislature intended to prevent the owner from seeking contribution from any other person whose fault contributed to the injuries suffered by the innocent victim. And because the statute was silent as to the liability of third parties actually at fault to the owner of the aircraft, it was logical to assume that ultimate responsibility between such parties was to depend upon ordinary tort principles, since otherwise the legislature would have expressly stated the relationship to govern in such situations.

Finally, there must be a nexus between the overflight and the damages sustained by property owners. In Lorick v. United States (190) the court stated:

> .....it is essential to their causes of action that the plaintiffs prove a causal connection between the overflight of the defendant's aircraft over their property and their alleged damages.

Negligence

In an action for negligence, a plaintiff must show that the defendant was under a legal duty to him to take reasonable care, and that he has suffered damage as a result of the defendant's breach of such duty. It is therefore necessary, in aviation negligence, to ascertain whether and to whom a person in charge of an aircraft owes a legal duty to take care. If such duty exists, and a breach of it occurs resulting in damage, an action for negligence will lie against him.

The aerial navigator, just like any other driver, owes a duty of care to other persons so situated that they may sustain damage as the result of his negligence. That duty is owed both to the other users of the air and to persons on the surface of the earth and in or on structures upon it, in regard both to personal injury and to injury to property, real or personal. This duty of care is broken whether the negligent act or omission occurs in the course of the operation of the aircraft, or in some antecedent matter such as defective equipment or machinery for which the operator is responsible and which causes the damage complained of. For example, it is no defence that the cause of the damage was a negligent defect in a break which prevented the break when applied from producing the normal effect of the application of a break.

As a rule, it is for the plaintiff to prove negligence. This may not be easy especially where the true cause of the accident lies solely within the knowledge of the defendant who caused it. This hardship is avoided by the principle of "res ipsa loquitur" which applies "whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused."(191) As stated by Erle C.J. in Scott v. London Docks Company(192)

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Jurisdictions in which liability is based on Negligence

United States

The States that neither have passed statutory absolute liability legislation base their decisions regarding injury to persons and property on the ground by aircraft in flight on negligence coupled with the rule of res ipsa loquitur.

In the case of United States v. Kesinger (193)

a case under Kansas Law, Kesinger claimed damages for the destruction of his barn and milk house caused by the crash of an airforce airplane. It was held that as the aircraft which caused the injury was in exclusive custody and control of employees of the United States, acting within the scope of their employment and the airplane was of a particular safe type and at the time of the accident weather conditions were better than normal and the employees of the United States had best opportunity to ascertaining cause of the accident, doctrine of res ipsa loquitur was applicable and that evidence sustained a finding that want of due care on the part of the pilot caused the damage. Phillips C.J. said:

> The rule of res ipsa loquitur has been recognized by repeated decision of the Supreme Court of Kansas.
>
> 1. The Kansas decisions hold that it is a rule of evidence and not a substantive rule of law.
>
> 2. The rule of res ipsa loquitur is applicable when the thing which caused the injury was, at the time of the injury, in the custody and under the exclusive control of the defendant, and the occurrence was one of which in the ordinary course of things does not happen if the one having such exclusive control uses proper care.....
>
> 3. The rule is based upon the theory that the defendant, having custody and exclusive control of the instrumentality which caused the injury, has the best opportunity of ascertaining the cause of the accident, and that the plaintiff has no such knowledge and is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence.....
>
> The modern trend of authority is to hold the rule of res ipsa loquitur applicable to airplane accidents.(194)

In the case of United States v. Johnson (195) where the doctrine of res ipsa loquitur was applied in an action against the Government under the Federal Tort Claims Act for personal injuries consisting of nervousness and aggravation of heart condition from which the plaintiff was suffering caused by the defendant's negligence in the crash of its planes on the plaintiff's premises the court said:

> The district court found that the plaintiffs had produced enough evidence to show that in the ordinary course of things these accidents would not have occurred if the government and its agents and employees had been diligent, "certainly a preponderance of the evidence indicates that these planes would not have crashed in the absence of negligence either in inspection, maintenance or operation."..... We think that finding of the district court must be sustained. The failure to produce more satisfactory evidence of negligence vel non is chargeable to the government rather than to the plaintiffs. The failure of a party to produce relevant and important evidence within its peculiar control raises the presumption that if produced the evidence would be unfavourable to its cause. Under the circumstances of this case, the district court did not err in applying the doctrine of res ipsa loquitur.

Norden v. United States (196) held that where the evidence in an action for damage to property sustained when one of the defendant's aircrafts crashed, showed that the day of the crash was clear and ideal for flying, the case was one for the application of the doctrine of res ipsa loquitur.

In Parcell v. United States [197] the doctrine of res ipsa loquitur was applied where two military planes, flying in formation collided in mid-air causing damage to property on the ground.

In Sapp v. United States [198] where a combat plane developed engine trouble and crashed in attempting to land under normal weather conditions, injuring persons in a trailer camp, it was held that the doctrine of res ipsa loquitur was applicable.

For the doctrine to be applicable all its essential elements must be present. In Florida in the case of Williams v. U.S.[199] a United States Air Force jet bomber exploded in mid-air. The injuries and damages were caused by the falling of flaming fuel from the exploded airplane. There were no survivors of the jet bomber and the plaintiffs relying solely on the doctrine of res ipsa loquitur to sustain their burden of showing negligence on the part of the government, introduced no evidence other than the explosion of the jet bomber in mid-air and the damages that resulted. The court stated:

> The cases in which the doctrine has been rejected usually fall into one of three classes: those holding that the evidence fails to show that the airplane was in the exclusive control of the defendant; those holding that it is not an usual occurrence for an airplane to crash without the intervention of a human agency, and those holding that experience is not sufficiently uniform to justify a presumption that such accidents do

> not happen in the absence of negligence. In short, these cases hold that one or another of the essential elements of the res ipsa loquitur doctrine is missing, depending upon the facts of the case.
>
> In the final analysis, each case seeking to invoke this doctrine must stand or fall upon its own facts. Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience..... The concept presupposes that the defendant, who had exclusive control of the thing causing the injury, has superior knowledge or means of information to that possessed by the plaintiff as to the cause of the accident. It is not enough that the plaintiff show that the thing which injured him was in the exclusive control of the defendant, he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care.

Therefore, there must be evidence of negligence before the defendant is required by the doctrine of res ipsa loquitur to explain why he was negligent.

Canada

Substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion.(200) Any small portion of the field which is not specifically covered belongs also to the Dominion under its powers to make laws for peace, order and good government as judge Sankey L.C. stated:

> It would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion; but neither is it vested by specific words in the provinces. (201)

Therefore it lies within the legislative competence of Parliament to enact laws respecting liability in tort in connection with or arising from aeronautical operations. In Schwella . R.[202] an action dealing with the application of the Negligence Act, RSO 1950 Thurlow J. remarked that:

> It lies well within the legislative competence of Parliament in relation to aeronautics to enact laws respecting liability in tort in connection with or arising from aeronautical operations and to provide as well in such cases for both apportionment of fault and liability of one tortfeasor to another. It would also be open to Parliament, if it saw fit, to change or abolish in such cases the right of contribution or indemnity between tortfeasors which but for such legislation would attach in such situations under the general law of the province.

Canada enacted a legislation relating to liability for damage caused by foreign aircraft to third parties on the surface, the Foreign Aircraft Third Party Damage Act,[203] which was supposed to implement the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the surface, 1952 to which Canada was then a Party but this Act was repealed in 1977 when Canada denounced the Convention. As of today, Canada does not have a legislation governing the liability for damaged caused by aircraft to third parties on the surface. Claims arising for such damage are grounded on negligence.

In Salamandik v. Canadian Utilities Limited.[204] While making a forced landing on a street an aeroplane broke some electric wires suspended above the street and the force of the impact caused one of the wooden poles supporting the wires to fall down. The falling pole struct and injured the infant plaintiff who was walking on the sidewalk. The defendant had erected and maintained the poles and wires, under statutory authority, for the purpose of supplying electric power within the town. In holding that the plaintiff had failed to prove that due care was not exercised by the defendant, the court relied on Woods v. Duncan (1946) A.C. 401 where Viscount Simon had stated:

> Before the liability of a defendant to pay damages for tort of negligence can be established in an action brought by or on behalf of an injured man, three things must be proved - (1) that the defendant failed to exercise due care; (2) that the defendant owed to the injured man a duty to exercise due care; and that the defendant's failure was the "cause" of injury in the proper sense of that term.

In determining whether or not due care was exercised, the court relied on In re Polemis and Furness Withy & Co. (1921) 3KB 560 where Bankes L. J. said:

> What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances.

In Nova Mink Ltd. v. Trans-Canada Airlines[205] where

the noise of an overflying airplane caused the female mink which had just whelped to devour their young MacDonald J. stated:

> In relation to damage inadvertently caused by the operation of aircraft, there is no inherent reason why the rule of negligence, including the doctrine of duty based on foreseeable risk, should not be applied in general and with such modifications in their incidence as experience suggests..... In my view the courts should not thus early in the history of aircraft be a party to the exclusion of the law of negligence from their operation in the face of piecemeal public regulations of their operation; but should hold that law applicable except where excluded specifically by statute. In any event there is no legislation in this case which could possibly be held to exclude any common law duty which may attach to the defendant in relation to the special facts of this case.

In Daroway v. R.[206] another case concerning the destruction of young mink by their mothers caused by the noise of overflying aircraft, it was held that to support a claim against the crown the onus of proof rested on the suppliant to establish not only negligence by an officer or servant of the crown but also that the negligence occurred while such officer or servant was acting within the scope of his duties or employment.

In Canada, therefore, the remedy for injury caused to persons and property on the surface by an overflying aircraft, is based on negligence. In order to succeed, the individual on the ground has the burden to prove all

the elements of negligence, that is, that the defendant owed a duty of care to him, that he failed to exercise the duty of care and that such failure was the cause of the injury or damage. Where the actual operator of the aircraft was a servant, the plaintiff has to prove that he was acting under the scope of his employment. The rule of res ipsa loquitur has not been applied to cases of injury to property and third parties on the ground caused by an aircraft in flight.

Attention is drawn to the following cases where the rule in Rylands v. Fletcher has been applied.

In Mihalchuk v. Ratke (207) a case concerning crop spraying by aircraft, it was held that where the usual method of applying herbicide to cereal crops is boom spraying behind a tractor, spraying by aircraft is an unusual operation. It increases the danger to adjoining crops which are sensitive to the herbicide, and results in strict liability under the doctrine of Rylands v. Fletcher if the herbicide escapes and causes damage.

In Cruise v. Niessen (208) another aerial spraying case, it was held that under the principle of Rylands v. Fletcher, it does not matter whether the herbicide escaped through negligent application or by drifting. The escape alone made the defendant liable. Although aerial spraying

of herbicide by farmers can no longer be regarded as an unusual operation since farmers have accepted it as standard good farming, this does not relieve the person using the method from responsibility for damage the operation may cause to a neighbour's crop if the herbicide is permitted to escape. This judgement was upheld in the Manitoba Court of Appeal.(209)

A possible explanation as to why the cases concerning aerial crop spraying have been based on the rule in Rylands v. Fletcher is that the action was based on the occupation and user of adjoining lands. The cases succeeded not because of the use of an aircraft but because the herbicide escaped and caused damage to adjoining land. An overflying aircraft does not occupy land and therefore this rule, as stated earlier, would not apply in cases injury to persons or property on the ground caused by an overflying aircraft or by the dropping or falling of an object therefrom.

FOOTNOTES TO PART II

1. Article 5 Chicago Convention

2. Article 1 (2) International Air Services Transit Agreement

3. Preamble to the Bermuda 2 (UK - USA)

4. ICAO Document 7278 - C/841 (1952)

5. Article 2(2) of the Bermuda 2 provides:

> Each Contracting Party grants to the other Contracting Party the rights specified in this Agreement for the purposes of operating scheduled international air services on the routes specified in Annex I. Such services and routes are hereafter called "the agreed services and the specified routes" respectively.

6. Burma, Finland, Luxembourg and Netherlands See Cheng. The Law of International Air Transport, P. 361.

7. ICAO DOC C - WP.848; DOC 7107 - 8, C. 823-8; Compare also Heller, the Grant and Exercise of Transit Rights in respect of Scheduled International Air Services 1954 paragraph 184 P. 81.

8. Id

9. ICAO DOC 7101 - 12, C/823 - 12

10. In the United Kingdom, the Civil Aviation Authority Act provides by Section 21 (1)(a) that "No aircraft shall be used for the carriage for reward of passengers or cargo....unless the operator of the aircraft holds a licence granted to him by the authority in pursuance of the following Section (hereafter in this Act referred to as an "air transport licence") authorizing him to operate the aircraft on such flights as the flight in question."

    In Kenya, The Civil Aviation (Licensing of Air Services) Regulations made pursuant to the Civil Aviation Act Chapter 394 of the Law of Kenya provides:

14, An airline whose principal place of business is in a foreign state shall not operate a Scheduled Air Service to, from or across Kenya unless there is in force an operating authorization issued by the Licensing Authority.

11. 40 Opinions of Attorney General P. 136

12. Heller; op. cit. P. 83

13. Article 35 of the Chicago Convention

14. Korovin, Aerial Espionage and International Law cited by William J. Hughes in his article on Aerial Intrusion by Civil Airliners and the use of Force 1981 J.A.L.C.P. 595.

15. Article 30 Chicago Convention

16. Article 36 Chicago Convention

17. Shawcross and Beaumont, Air Law Fourth Edition P.203

18. ICAO DOC C-WP/1205, 5/6/52

19. Vlasic : Air Transport, Passage and Commercial Rights P. 163.

20. ICAO DOC CA - XLI 1967 - U-K

21. ICAO DOC CA - XLI 1967 Spanish Counter Memorandum.

22. Wilson, Handbook of International Law 2nd Edition (1927) paragraph 38 P. 77. Cited by S. S. Ball in his article, The Vertical Extent of Ownership in land University of Pennsylvania Law Review 1928, Vol. 76 P. 631 at P.640.

23 252 U.S. 416 (1920)

24. Bowen, The Concept of Private Property, (1925-26) Cornell Law Quarterly Vol. 11 P. 41

25. Hohfeld, Some Fundamental legal Conceptions as applied in Judicial Reasoning (1913 - 14) Yale Law Journal Vol. 23 P. 21.

26. Wright, the Law of Airspace P. 11

27. Stroud's Judicial Dictionary Vol. 4 P. 215.

28. (1895)67 F. 674 at 677

29. (1950)2 ALL E.R. 1226

30. (1855) 29 Miss. 21

31. (1894)3 Ch. 156

32. 51 N.H. 504 at 511 See also similar statements in Wynehamer v. People (1856) 13 N.Y. 378; Law v. Rees Printing Company (1894)41 Neb. 127 at 146 and Dixon v. People (1897 168 ILL.179 at 190

33. (1893) 116 Mo.527 at 533 - 534

34. Wright op. cit. The Law of Airspace P.12

35. Powell. Real Property Section 96 P. 360

36. 2 Blackstone: Commentaries on the Laws of England, Fourth Edition, 1770 Book II Ch.2 at P. 19

37. Wright op. cit. P. 13; Mcnair, The Law of the Air, Second Edition 1953 P. 294; Cooper, Roman Law and the Maxim "Cujus est Solum" in International Air Law, Essays Edited by I.A. Vlasic P. 58.

Klein in Cujus Est Solum Est.....Quousque Tandem? Vol. 26 Journal of Air Law and Commerce P. 237 and Matte Treatise on Air - Aeronautical Law P. 54 are doubtful as to whether the principle in fact originated in Roman Law.

For the history of the principle see Abramovitch, Property Rights in the Airspace; J.C. Cooper, Roman Law and the Maxim "Cujus est Solum" in International Law in Explorations in Aerospace Law, Selecyed Essays Edited by I.A. Vlasic P.55-102 and Klein, "Cujus est Solum Est.....Quousque Tandem?" Vol. 26 Journal of Air Law and Commerce P.237 (1959).

38. Wright op. cit. P. 15; Klein op. cit. P. 243; Abramovitvh op. cit. P. 20

39. Klein op. cit. P. 243

40. Klein op. cit. P. 243 Citing Lincoln, The Legal Background to the Stars..

41. Id

42. Id

43. Klein op. cit. names two dates i.e. 1280 and 1285; Wright op. cit. at P.15 says 1280 Abramovitch op. cit. at P.20 says 1280; and Matte op. cit. at P. 54 states 1285.

44. Klein op. cit. at P.243; Wright op. cit. at P.15; Abramovitch op. cit. at P. 20 and Matte op. cit. at P. 254 describes the rights as "to the heights of the heavens and the depths of the sea".

45. 7 - 8 English Reports 375

46 77. English Reports 210

47. 77 English Reports 810

48. Matte op. cit. at P. 21. On November 21,1783, the first flight took place in France. It was on board a balloon inflated with warm air. The following year an Englishman made the first balloon assent in England.

49. 171 English Reports 70 (1815)

50. Klein op. cit. at P. 239

51. (1838 2 Jur. 491 at P. 492

52. Bell, Air Rights Vol. 23 Illinois Law Review P. 250 (1928).

53. 135 English Reports 769 (1845)

54. Id at P. 1189

55. 122 English Reports P. 1188 (1865)

56. Id at P. 1189

57. (1870) L. R. 9 Eq. 671

58. (1887)4 T.L.R. 8

59. (1894)3 Ch. 1 at P. 24

60. Winfield and Jolowicz on Tort, 10th Edition P. 345.

61. (1884)13 Q.B.D. 904

62. Id at P. 927

63. Wright op. cit. P. 26.

64. (1855) 156 English Reports 795.

65. (1903)1 Ch. 437

66. Pollock on Torts, 14th Edition, London, 1939 at P. 278 - 279.

67. Salmond, Law of Torts, Fifteenth Edition, London 1919, P. 55-56

68. Winfield and Jolowicz on Tort, Tenth Edition, London 1975 P. 305

69. (1926) W.N. 336

70. (1957)2 Q.B. 334

71. Id at P. 345

72. (1974) A.C. 328

73. Id at P.351

74. (1977) Q.B. 411

75. Id at P. 471

76. (1978)1 Q.B. 479

77. F.X. Bush, Law and Tactics in Jury Trials. The Bobbs - Merrill Co. Inc., Indianapolis (1949) P.17

78. Pound, Vol. 3 Jurisprudence (1959) Pages 426-427.

79. Wright op. cit. P. 34

80. Cited by Cooper in Maxim "Cujus est Solum" in International Law op. cit. p. 83

81. Pound op. cit. p. 428

82. Blackstone op. cit. p. 18

83. Cooper op. cit. p. 96

84. KENT: Commentaries on American Law Vol.III (1892) p. 402

85. Pound op. cit. p. 428-429.

86. 2 Conn 584 (1818)

87. 9 Conn 374 (1832)

88. 11 Conn 177 (1836)

89. Id at p. 179

90. Wright op. cit. p. 37

91. 16 Conn 60 at p.66 (1843)

92. Mahan v. Brown 13 Wend (N.Y.) 261 (1835) and Hoffman v. Armstrong 48 N.Y. 201 (1872

93. 5. Hammond's Rep. (Ohio) 447 (1832)

94. 110 Mass. 302 (1872)

95. 43 Mass. (2 met) 457 (1841)

96. Id at p. 467

97. 92. Mass. (10 Allen) 106 (1865)

98. Id at p. 109

99. Lyman v. Hale 11 Conn. 177 (1836)

100. Note 92 Supra.

101. 48 N. Y. 201 at p.202-204

102. Ball op. cit. at p. 657

103. Id at Pp. 657 - 658

104. 89 Mass. (7 Allen) 431 (1863)

105. Other similar cases are Milton v. Puffer 207 Mass 416 (1911); Howard v. Central Amusement Company 244 Mass. 344 1916; Langfeldt v. Mcgrath 33 111 App. 158 (1889); Pierce v. Lemon 2 houst. (Del) 519 (1862); Kafka v. Bozio 191 Cal. 746 (1923); Meyer v. Metzler 51 Cal. 142 (1875); Barnes v. Berendes, 139 Cal. 32 (1903).

106. Cumberland Tel. & Tel Co. v. Bernes 30 Kyl. Rep. 1290 (1970).

107. 203 Mass. 448 (1909)

108. 186 N.Y. 486 (1906)

109. Id at p. 491.

110. Munro v. Williams 94 Conn. 377; Hall v. Browning 195 Ga. 423; Whittaker v. Stangwick 100 Min. 386 Herrin v. Sutherland 74 Mont. 587

111. 260 U.S. 327 (1922)

112. Mcnair, The Law of the Air, 3rd Edition p. 22

113. 1918 CMD 9218

114. Draft of a bill For the Regulation of Aerial Navigation 1911 I. Geo 5

115. 10 & 11 Geo 5. concept of nuisance is introduced. Possibly an after thought.

116. 10 & 11 Geo. 5 C. 80

117. Mr. Churchill at Third Reading Official Reports, Fifth Series - Parliamentary Debates - Commons (1920) Vol. 136 Dec. 20, p. 1474.

118. Parliamentary Debates on Air Navigation Bill 9th August 1920 - Official Reports, Fifth Series Parliamentary Debates - Commons p. 173.

119. Id at p. 175

120. Several jurisdictions have enacted similar provisions;

1. NewFoundland Air Navigation Act No. 22 of 1947 Section 4(1). The Act was repealed in 1949 when NewFoundland joined the Federal Government of Canada.

2. New Zealand Civil Aviation Act 1948 Section 5(2) and (3)

3. South Africa although it is not a Common Law Jurisdiction has a similar provision in the Aviation Act No. 74 of 1962 Section 11.

4. In Australia, New South Wales, Victoria, Tasmania and Western Australia have similar provisions.

5. Kenya, The Civil Aviation Act, Chapter 394 of the Laws of Kenya Section 12.

121. Shawcross and Beaumont, Air Law, Fourth Edition p. 509.

122. (1975)3 All. E.R.I.

123. (1955)1. All E.R. 600; other cases on the subject are Harrison v. Duke of Rutland (1893) 1 Q.B. 142 and Hickman v. Maisey (1900)1 Q.B. 752.

124. Hickman v. Maisey op. cit.

125. Bernstein v. Skyviews and General Limited op. cit.

126. Sweeney, Adjusting the Conflicting Interests of Landowners and Aviator in Anglo-American Law (1932) Vol. 3 Journal of Air Law and Commerce p. 531 at p. 582. Wright op. cit. at p. 111.

127. Wright op. cit. at p. 109 Note 37 lists the States as follows:

Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming, Massachussetts and Louisiana.

128. Wright op. cit. p. 115

129. (1928) U.S. Av. Rep. 44

130. District Court, 3d Jud. Dist. of Nebraska, Docket 93 - 115 (1928) cited by Sweeney op. cit. at p. 601 - 602.

131. 270 Mass. 511 (1930)

132. 41 F. 2d 929 (N.D. Ohio 1930), 55 F. 2d 201 (6th Circ. 1931)

133. (1934) US Av. R. 146

134. (1936) US Av. R. 16

135. (1934) US Av. R. 160

136. (1936) US Av. R. I; The case is often referred to as the "First Hinman" case to distinguish it from a later case involving the same Hinman i.e. United Airport Company v. Hinman (1940) US. Av. R. I

137. There was also an earlier case Commonwealth v. Nevin (1922) 2p a. Dist. Rep. 214. where the court rejected a trespass claim because there was no physical contact with the ground.

138. (1940) 36 F. 2d 21

139. Then Section S. 159 of the Restatement of the Law of Torts provided:

> A trespass, actionable under the rule stated in Section 158, may be committed on, beneath, or above the surface of the earth.

COMMENT (e) Provided:

> An unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass.

Section 194 provided:

> An entry above the surface of the earth, in the airspace in the possession of another, by a person who is travelling in an aircraft, is privileged if the flight is conducted
>
> (a) for the purpose of travel through the airspace 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 airspace above it, and
>
> (d) in conformity with such regulations of the State and Federal Aeronautical Authorities as are in force in the particular State.

In the Second Restatement of the Law of Torts, Section 194 is omitted and the matter is covered by Section 159 which provides as follows:

> (1) Except as stated in subsection (2), a trespass may be committed on, beneath, or above the surface of the earth.
>
> (2) Flight by aircraft in the airspace above the land of another is a trespass if, but only if,
>
> (a) it enters into the immediate reaches of the airspace next to the land, and
>
> (b) it interferes substantially with the other's use and enjoyment of his land.

140. op. cit. at p. 23

141. (1942) US Av. R. 11

142. (1946) US Av. R. 235

143. (1930) S.C.R. 663

144. Id at p. 701 - 702

145. In Re the Regulation and Control of Aeronautics in Canada (1932) A.C.54.

146. (1954) C.L.R. 69

147. Jack E. Richardson, Private Property Rights in the Airspace at Common Law, (1953) Vol. 31. The Canadian Bar Review p. 117.

148. (1977) 3 W.W.R. 129, Manitoba Court of Appeal Case.

149. op. cit.

150. Fleming, The Law of Torts, Fourth Edition 1971 at Pp.43 - 44

> The extent of ownership and possession of superincumbent airspace has become a topic of considerable controversy since the advent of air navigation. Much play has been made of the maxim "Cujus est Solum ejus est usque ad Coelum", but this "fanciful phrase"of dubious ancestry has never been accepted in its literal meaning of confering unlimited right into the infinity of space over land. The cases in which it has been invoked establish no wider proposition than the air above the surface is subject to dominion in so far as the use of space is necessary for the proper enjoyment of the surface. Thus, building restrictions apart, the owner has a privilege of erecting structures to any height and for any purpose. Most of the case law has been concerned with the adjustment of property rights between adjacent occupiers with respect to overhanging parts of buildings and branches of trees. Here the weight of authority clearly favours the view that direct invasion by artificial projections, like a swinging crane, advertising signs, electric cables, or the overlap of a wall, constitutes trespass actionable per se and, in suitable cases warranting a mandatory injunction to compel removal. In contrast, protruding branches, even of artificially planted trees, are treated as consequential, not direct encroachments for which the

remedy is in nuisance, requiring proof of damage or actual inconvenience except in support of the privilege to abate by cutting back the offending branch.

151. 1874 L.R. 10 C.p. 10

152. Thom's Canadian Torrens System, 2nd Edition (1962) at Pp. 115 - 116

> However it has been reiterated....that just as the strata which makes up the land may be divided among different owners so the surface and strata of air above the surface may belong to different owners. While this may be a theoretically correct generalization it does not necessarily follow that it applies to airspace simpliciter. Air and Space as such are not susceptible of ownership but fall in the category of "res omnium communis" ..... strata above the surface cannot be in fact severed in title unless actually forming part of buildings because no feoffurant could be made of such strata or spaces .....However, there can be no doubt about the general use and enjoyment of his property by, for example, building upwards from his land nor to his right to object to anyone who purports to occupy the column of air or a part of it which is above his land; the right to the enjoyment of the surface carries with it the incidental right to use the airspace above the land. So long as the element of effectiveness is present it would seem that airspace used in connection with activities on the ground is susceptible to possession. Buildings upon land forming part of of the land itself and passing with it appear to have no bearing on space rights simpliciter.

153. Her Majesty the Queen in the Right of the Province of Manitoba v. Air Canada (1980) 2 S.C.R. 303. The Chief Justice conceded that the Province of Manitoba had some legislative jurisdiction in the airspace. The Chief Justice said:

> I am prepared on this view to assume that the Province has some legislative jurisdiction in the airspace above it so that the pivoted question is whether Air Canada Aircraft, engaged in overflights are "within the Province" as

this quoted phrase is "used in S.92 (2) which empowers a province to impose" direct taxation within the province in order to the raising of a revenue for provincial purposes.

Merely going through the airspace over Manitoba does not give the aircraft a situs there to support a tax which constitutionally must be "within the Province". In the case of aircraft operations, there must be a substantial at least more than a nominal, presence in the Province to provide a basis for imposing a tax in respect of the entry of aircraft into the Province.

154. Griggs v. Allegheny County 369 U.S. 84 adopting the language used in United States v. Causby op. cit.

155. Warren School District v. Detroit 14 N.W. 2d 134

To apply the traditional restrictive legal categories of trespasser, licensee, and invitee to an airplane travelling in the space above a person's land is like trying to squeeze a square peg into a round hole. The ancient categories were designed to deal with entirely different situations and social conditions. Application of such rules to an airplane in flight is to use the letter of law to kill its spirit..... Such a use of legal categories would choke the growth of modern air transportation.

156. Rylands v.Fletcher (1866) L.R. I Exch Ch. at p. 279

157. Rylands v. Fletcher (1868) L.R. 3 H. L. 330

158. Read v. J. Lyons & Co. Ltd. (1947) A.C. 156

159. Rylands v. Fletcher op. cit.

160. Jones v. Festiniog Railway Company (1862) L.R.3 Q.B. 733.

161. West v. Bristol Tramways Company (1908) 2 K.B. 14

162. Musgrove v. Pandelis (1919) 2 K.B. 43; Perry v. Kendricks Transport Company (1956) 1 All E.R. 154.

163. op. cit.

164. (1909) A.C. 640

165. Id at p. 646

166. op. cit. at p. 172

167. Charlesworth, Liability for Dangerous things (1922) at p. 14; McNair op. cit. agrees with him at p. 84.

168. William C.Wolff; Liability of Aircraft Owners and Operators for Ground injury (1957) Vol. 24 Journal of Air Law and Commerce p. 203.

169. Id

170. Id.

171. Shawcross and Beaumont op. cit. at p. 510

172. (1955) 2 Lloyd's Rep. 696

173. (1940) 67 Lloyd's Rep. 419

174. Weedair v. Walker (1961) N.Z.L.R. 153, a New Zealand decision on a similarly worded statute.

175. Shawcross and Beaumont op. cit. p. 512

176. Lampert v. Eastern National Omnibus Co. Ltd. (1954) 2 All E.R. 719

177. 81 A.L.R. 2d p. 1059

178. See note 127 Supra

179. Boyd v. White 276 P. 2d at p. 98 "In August 1943 this proposed Act was declared to be "absolete" and was "withdrawn" by the commissioners"

180. 112 F. Supp 306

181. 81 A.L.R. 2d 1041

182. 208 F. 2d 291

183. op. cit.

184. (1941) US Av. R 8

185. 181 F. 2d 335

186. Id at p. 337

187. Green v. Zimmerman 238 S.E. 2d 323

188. op. cit.

189. op. cit.

190. 267 F. Supp. 96 at p. 102

191. Salmond, The Law of Torts, 15th Edition p. 306

192. (1865) 3 H & C 596 at 601, cited by Salmond op. cit. at p. 307

193. 190 F. 2d 529 (10th Circ. 1951)

194. Id at p. 531 - 532. Other cases applying the rule are Soliak v. State or New York (1929) US Av. R. 42; Smith v. Pennsylvania Central Airlines 76 F. Supp. 940; Bratt v. Western Airlines 169 F. 2d 214 (10th Cir)

195. 288 F. 2d 40 at p. 45

196. 187 F. Supp. 594

197. 104 F. Supp. 110

198. 153 F. Supp. 496

199. 218 F. 2d 473 (5th Circ.)

200. B.N.A. Act Sections 91(2),(5)and (7), and Section 132.

201. Re Aeronautics in Canada (1932) I D.L.R. 58 at p. 70

202. (1957) Ex. C.R. 226

203. RSC 1970 Ch. F. 28

204. (1947)1 W.W.R. 691

205. (1951)2 D.C.R. 241 at p. 253

206. (1956) Ex. C.R. 340

207. 57 2d D.L.R. 269

208. (1977)2 W.W.R. 481

209. (1978)1 W.W.R. 688; see also Bartell v. Ector 90 3d. D.L.R. 89.

CONCLUSION

Under customary international law there is freedom of navigation over the high seas and the right of innocent passage in the territorial sea and in straits for surface international transport. Until the Draft Convention on the Law of the Sea extended the right of transit rights in straits to the aircraft, the only place where the freedom of overflight existed in customary international law is over the high seas. The concept of innocent passage in the territorial sea was not extended to the aircraft. The state which has sovereignty over the territorial sea has to permit overflight over the territorial sea.

In the airspace, the right of innocent passage does not exist. Scholars have propounded differences between the airspace and the territorial sea which negated the application of the right of innocent passage into the airspace. Both are part of the territory of a sovereign state. Whereas the territorial sea adjoins the land horizontally, the airspace adjoins it vertically. Territorial sea can be severed from the land mass but airspace cannot. It is part and parcel of the land and therefore, as stated by Nijeholt, the territorial sea is not strictly necessary for the existence of the state, the airspace is.(1) For example land locked states exist and yet they have no territorial sea. The right of control and of jurisdiction over territorial waters is, to be sure, highly important

for the safety of the state, the right of fishery and cabotage interesting for its wealth, but these rights cannot be necessary for its existence. For instance, where the sea gets too narrow for two maritime belts of normal breadth, both riparian states have a belt of less extent, but without any decrease of sovereignty. And even, were all the rights of the state to cease on the line that separates the sea from the land, its sovereignty would be as intact as ever, the sea frontiers being in such a case only in the same condition as the land frontiers.' (2)

Airspace is different. Human life and activity is supported by the airspace. There is no sort of development on the land surface that does not jut into the airspace. Hence the old maxim relating to property in land "cujus est solum ejus est usque ad coelum". It would be interesting to note here that for the land owner bordering the sea, his land does not include part of the sea.

Another factor which demonstrates the importance of airspace to a sovereign vis-a-vis the territorial sea is the limit claimed. States have been content to claim 3 miles, 6 miles, 12 miles or even 200 miles of territorial sea but are not keen to fix the upper limit of the airspace.

Furthermore, occurrences in the sea adjacent to the state's land territory, may not affect the population on land.

"Above the land" is a different thing from "at the side of the land"; the states interest in what happens above the territory does not stop at any stated height, a great distance in a vertical direction by no means implies proportionally less danger for the underlying land, a fall from a high point producing even an increased rapidity in falling." (3) For example, a collision at sea may not cause damage to land but a collision in the air will by all means cause damage to the surface. A vessel can embark or disembark passengers or cargo without touching or entering the land; the same is impossible for aircraft. In the area of espionage, the aircraft is better suited for the mission than the vessel in the territorial sea.

For these reasons and for the reasons of security and commerce discussed in Part I Section II of this Study, the Sovereign State has more reason in excluding other states from having rights over its airspace than it has in excluding them from the territorial waters. Therefore, whereas the State Sovereignty over the territorial waters is qualified by the right of innocent passage, no such limitations exist as regards the state's sovereign dominion in the airspace above its territory which includes its territorial sea. Thus admitting full sovereignty each state can then grant transit rights as favours and subject them to such suitable limitations and conditions as it sees fit. Here is where the Chicago Convention plays a role.

It has minimized the limitations and conditions which individual states would have imposed but only for the aircraft operating non-scheduled services. The aircraft operating scheduled international air services has been regulated by the International Air Services Transit Agreement and the Bilateral Air Services Agreements.

The relatively liberal grant of transit rights to non-scheduled flights in Article 5 of the Chicago Convention reflects the comperative unimportance of this category of air transport operations at the time when the convention was drafted. It is here submitted that today a state is more suspicious of the non-scheduled 6 passenger flight than it is for an aircraft operating commercial air transport services and carrying 450 passengers on board.

In the field of rights of individuals in private law, the common law jurisdictions have exempted mere overflight from the application of the torts of trespass and nuisance. While refraining from limiting the altitude of landowners' rights in the airspace, airways (equivalent to the highways on the surface) have been created in the air - space so as to facilitate the growth and development of air transport. However, should an aircraft, while exercising its rights of use of the "air highway" cause damage to the underlying property and to persons on the ground, the owner and/or operator of the aircraft is liable. The rules to

which such liability is subjected differ from jurisdiction to jurisdiction, that is, from strict liability, to negligence coupled with the principle of res ipsa loquitur ad to negligence per se.

At international level both the Rome Convention for the Unification of Certain Rules Relating to Damage caused by Aircraft to Third Parties on the Surface 1933 and the Rome Convention Relating to Damage caused to Third Parties on the Surface by Foreign Aircraft 1952 adopted the principle of absolute liability of the aircraft operator for damage caused to third parties on the surface. The text of the Rome Convention 1952 Article 1 (1) provides that any person who suffers damage on the surface shall "upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation" as provided by the Convention. Apart from the fact of limitation on the compensation payable, this Article is similar to Section 40(2) of the United Kingdom Civil Aviation Act. The viction has not right to compensation if the damage is not a direct consequence of the incident giving rise to it, or if it results from the mere fact of passage through airspace.

Aside from Australia, Pakistan and Nigeria, the Rome Conventions have not found acceptance in common law jurisdictions possibly because the principle of liability

is based upon strict liability which either is already in existence in some jurisdictions or has not been recognized as applicable to surface damage by an overflying aircraft.

FOOTNOTES TO CONCLUSION

1. Nijeholt L.A., Air Sovereignty p. 25

2. Id.

3. Id at p. 24: The keen interest of states in what goes on above them has prevented the conclusion of an agreement on remote sensing by satellite.

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