

## Ownership and Control of Airspace

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better way of clarifying the law of the commercial world than by using terminology in the law that is common to commerce and the business world. In the event of adoption of the code, however, the understanding of it would be well served by including the comments of the drafters because, as above noted, the code itself is much clarified and explained by these comments.

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## OWNERSHIP AND CONTROL OF AIRSPACE

The development of wide-spread air navigation has presented an interesting problem to the legal world. Just who owns and controls the airspace over this nation? Is it the subjacent landowner? If not, is it then the property of the public? If the property of the public, which government, federal, state or local is supreme as to regulating the use of this airspace?

Prior to the advent of aeronautics, the courts had relied on the ancient maxim, "*cujus est solum ejus est usque ad coelum et ad infernas*," in determining the landowner's rights to the airspace above his property.<sup>1</sup> Freely translated the maxim reads: "He who possesses the land possesses also all that which is above and below." Now that air travel is on a nationwide scale, four theories of airspace ownership have been advanced: (1) The ancient "*ad coelum*" maxim mentioned above which gives the landowner unrestricted ownership; (2) There is no ownership at all of unenclosed airspace. This theory is the extreme opposite of the first theory; (3) Landowner has unrestricted ownership, but the airspace is subject to a "privilege" of aerial transit at reasonable altitudes. This theory offers a compromise between the extremes of the first two theories; (4) There is unrestricted ownership up to a certain altitude, at which ownership ceases. This is the so-called "zone theory." The extent of the zone is designated by such phrases as "lower stratum," "effective possession," or "actual or prospective user."<sup>2</sup>

It is obvious that to apply the *ad coelum* maxim to the operation of airplanes would be a serious barrier to the development of aviation. Each flight would be a trespass against the rights of the land-

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<sup>1</sup> *Bury v. Pope*, 1 Cro. Elizabeth 118, 78 Eng. Rep. 375 (1586) was the first reported case in which the maxim was quoted. Case held that where a landowner erects a house so close to a window on the adjoining property that the light is cut off therefrom, the injured landowner has no complaint even though his building and his window were built forty years before the second building was erected. *Penruddock's case*, 5 Coke's Rep. 100 (1597); *Baten's case*, 9 Coke's Rep. 53, 77 Eng. Rep. 810 (1611).

<sup>2</sup> *Sweeney, Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329 (1932).

owner. Even though the landowner might only recover nominal damages in a suit, the flight itself would be unlawful. The courts have recognized that the ancient maxim is not applicable to aeronautics and have rejected its modern application.<sup>3</sup> The leading case of *United States v. Causby* expresses it thus:

"The air is a public highway, as Congress has declared. Were that not true every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claim to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."<sup>4</sup>

Since the courts have refused to recognize the landowner's absolute ownership, the problem arises as to who may control activities in the airspace. Twenty-two states, claiming to possess sovereignty over the airspace where not granted to and assumed by the Federal government, have adopted the Uniform Aeronautics Act.<sup>5</sup> Section 3 therefore provides:

"The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath subject to the right of flight described in Section 4."<sup>6</sup>

Wisconsin has enacted this into law.<sup>7</sup> Also the Restatement of Torts provides, in effect, that an entry above the surface of the earth is "privileged" if flight is conducted at such height as not to interfere unreasonably with the possessor's enjoyment of the surface and the airspace above it.<sup>8</sup> These approaches to the problem appear to resemble theory (3) outlined above.

The leading case involving the state jurisdiction over airspace is *Smith v. New England Aircraft Co.*,<sup>9</sup> which held that flights over property at altitudes of 100 feet constituted trespass; but the court refused to decide whether flights above 100 feet and under 500 feet constituted trespass or not. For purposes of the decision the court assumed that private ownership of airspace extends to all reasonable

<sup>3</sup> *United States v. Causby*, 328 U.S. 256 (1946); *Swetland v. Curtis Airports Corp.*, 55 F. 2d 201 (6th Cir. 1931); *Hinman v. Pacific Air Transport*, 84 F. 2d 755 (9th Cir. 1936); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245 (1942); *Lashbrook, The "Ad Coelum" Maxim as Applied to Aviation Law*, 21 NOTRE DAME LAW 143 (1946); Note, 23 MAR. L. REV. 131 (1939).

<sup>4</sup> 328 U.S. 256, 261 (1946), reversing 60 F.Supp. 7511 (1945).

<sup>5</sup> Arizona, Delaware, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin. 11 U.L.A. 157 (1938).

<sup>6</sup> UNIFORM AERONAUTICS ACT, Sec. 3, 11 U.L.A. (1938).

<sup>7</sup> WIS. STATS. 114.03 (1951).

<sup>8</sup> RESTATEMENT, TORTS, §194 (1934).

<sup>9</sup> 270 Mass. 511, 170 N.E. 385 (1930).

heights above the underlying land. The case does not expressly affirm the *ad coelum* doctrine, even though it recognizes the existence of an aerial trespass. The Chancery Court of Delaware found, in a situation similar to *Smith v. New England Aircraft Co.*, that low-flying planes constituted a nuisance because the flight was "so low as to interfere with the then existing use to which the land is put."<sup>10</sup>

*Smith v. New England Aircraft* also upheld the state's police power as controlling in the airspace. The court said:

"The statutes of this Commonwealth regulating the operation of aircraft manifestly were enacted under the police power . . . It (police power) includes the right to legislate in the interest of the public health, the public safety and the public morals . . . It is the proper function of the legislative department of the government in the exercise of police power to consider the problems and risks that arise from the use of new invention and endeavor to adjust private rights and harmonize conflicting interests by comprehensive statutes for the public welfare."<sup>11</sup>

The "no ownership" theory described in (2) above has been adopted in one leading case, *Hinman v. Pacific Air Transport*.<sup>12</sup> The premise of this theory is that the basis of all ownership is possession, hence the landowner "owns" only that airspace of which he actually makes use. The Court of Appeals said:

"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. This right is not fixed. It varies with our varying needs and is co-extensive with them. The owner of the land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."<sup>13</sup>

Flights as low as five feet were found not to be trespasses unless they interfered with the landowner's use of the land.<sup>14</sup> Advocates of this theory claim that it protects the landowner's rights which might need protection, yet prevents unreasonable landowners from using "technical trespass" to harass the aviation industry.<sup>15</sup>

The trend of modern authority appears to be toward the "Possible Effective Possession Zone" theory.<sup>16</sup> This is one of the types mentioned in theory (4) above. It gives the landowner exclusive right to the airspace above the surface which is necessary to the reasonable use and enjoyment of the surface. The "zone" need not be reduced

<sup>10</sup> 26 Del. Ch. 225, 27 A. 2d 87 (1942).

<sup>11</sup> *Supra*, note 9 at 390.

<sup>12</sup> 84 F. 2d 755 (9th Cir. 1936).

<sup>13</sup> *Ibid.*, p.758.

<sup>14</sup> *Supra*, note 12.

<sup>15</sup> *Comment*, 2 ARK. L. REV. 448 (1948).

<sup>16</sup> Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 BOSTON U. L. REV. 414 (1932).

to possession or put to actual use by the landowner. If it is within the zone of possible effective possession or expected use, it is sufficient.<sup>17</sup> *Swetland v. Curtiss Airports Corp.*<sup>18</sup> was the first leading case approving this doctrine. The Court of Appeals for the 6th Circuit stated:

"He (the landowner) has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface. . . . We can not fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air-space for himself. That height is to be determined upon the particular facts in each case."<sup>19</sup>

The zone theory may be criticized for uncertainty because in each case the court must define the "effective possession zone," depending upon the facts.<sup>20</sup>

The only United States Supreme Court decision on the conflict between landowner and aviator is the leading case, *United States v. Causby*,<sup>21</sup> construing the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938. The Court divides the airspace over the United States into two zones. The upper zone is called navigable airspace. Congress has defined it, "as airspace above minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority. . ."<sup>22</sup> In this upper zone the rights of the federal government are so complete that this navigable airspace, according to the Court's opinion, is "within the public domain."<sup>23</sup> Facts of the *Causby* case were:

Causby owned a small chicken farm one-third of a mile from an airfield which had been leased to the United States Government as an Army and Navy air base. The "glide pattern" was directly over the Causby property. Claiming that frequent low flights by high powered planes had destroyed the use of the property as a commercial chicken farm, the Causbys brought suit against the government in the Court of Claims on the theory that there had been a compensable "taking" of property within the Fifth Amendment. The Court found that the flights, noise, and lights had destroyed the use as alleged, deprived the family of their sleep and made them nervous and frightened. It was held that the Government had taken an easement over the land and that the value of the easement (and the chickens destroyed) was \$2,000. The Supreme Court found that there was a "taking" and that the Causbys were entitled to compensation.

<sup>17</sup> *Supra*, note 15.

<sup>18</sup> 41 F. 2d 929 (N.D. Ohio 1930), Modified by 55 F. 2d 201 (6th Cir. 1932).

<sup>19</sup> 55 F. 2d 201, 203 (6th Cir. 1931).

<sup>20</sup> *Supra*, note 15.

<sup>21</sup> 328 U.S. 256 (1946).

<sup>22</sup> 49 U.S.C.A. §180 (1951).

<sup>23</sup> *Supra*, note 21 at 266.

Before the *Causby case*, the only known remedies for the landowner whose airspace had been invaded were trespass, nuisance or negligence. Commentators point out that the *Causby case* expands the remedies available to the landowner.<sup>24</sup> However, since the enactment of the Federal Tort Claims Act, this aspect is unimportant.<sup>25</sup> The question still remains whether the landowner should be entitled to relief on trespass or nuisance. If a court adopts the trespass theory, it, in effect, holds that there can be ownership of navigable airspace by the subjacent proprietor, and the remaining questions seek to determine the extent of that ownership and whether there has been an invasion of it. If the nuisance theory is adopted, an injunction will be granted only in cases where there is proof that the low flights unreasonably and substantially interfere with the landowner's use of the surface.

The problem of which government, state, local or federal, should be recognized as supreme in the regulation of aeronautics has been the subject of considerable litigation and legal literature.<sup>26</sup> Since the development of nation-wide air transportation, the trend has been toward ever increasing control by the federal government.<sup>27</sup> Some claim that the sovereignty of the federal government is now supreme in regard to navigable airspace.<sup>28</sup> The Air Commerce Act of 1926<sup>29</sup> and the Civil Aeronautics Act of 1938<sup>30</sup> expressly claim this sovereignty for the federal government. Twenty-two states have adopted the Uniform State Law for Aeronautics, which recognizes that sovereignty may have been granted to the federal government, and does not purport to regulate air flights in respects covered by federal legislation.<sup>31</sup>

The argument for federal supremacy is based not only upon the treaty,<sup>32</sup> war making<sup>33</sup> and interstate commerce<sup>34</sup> clauses of the Con-

<sup>24</sup> Note, 41 ILL. L. REV. 502 (1946); *Comment, supra*, note 15.

<sup>25</sup> 28 U.S.C.A. §1346 (b) (1951).

<sup>26</sup> *Smith v. New England Aircraft Co.* 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300 (1931); *Erickson v. King, State Auditor et al.*, 218 Minn. 98, 15 N.W. 2d 201 (1944); Dinu, *State Sovereignty in Navigable Airspace*, 17 J. AIR L. 43 (1950); Cooper, *State Sovereignty v. Federal Sovereignty of Navigable Airspace*, 15 J. AIR L. 27 (1948); Brown, *Aircraft and the Law*, 255 (1933); Zollman, *Law of the Air*, Chapter 2 (1927); 6 AM. JUR. AVIATION §§12 and 13; C.J.S. Aerial Navigation §3; *Notes*, 69 A.L.R. 322 (1930), 83 A.L.R. 336 (1933), 99 A.L.R. 177 (1935).

<sup>27</sup> Fixel, *Law of Aviation*, §59 (3rd ed. 1948); Plaine, *State Aviation Legislation*, 14 J. AIR L. 333 (1947).

<sup>28</sup> Bouve, *The Development of International Rules of Conduct in Air Navigation*, 1 AIR L. REV. 1 (1930); Cooper, *State Sovereignty v. Federal Sovereignty of Navigable Airspace*, 15 J. AIR L. 27 (1948).

<sup>29</sup> 44 STAT. 572 (1926), 49 U.S.C.A. §176 (1951).

<sup>30</sup> 52 STAT. 980 (1938), 49 U.S.C.A. §403 (1951).

<sup>31</sup> 11 U.L.A. Motor Vehicles and Aeronautics, §157 (1938).

<sup>32</sup> U.S. Const. Art. III, §2.

<sup>33</sup> U.S. Const. Art. I, §8.

<sup>34</sup> *Ibid.*

stitution, but also upon the alleged "proprietary interest" of the federal government in navigable airspace.<sup>35</sup>

A supreme Court decision cited by the proponents of federal sovereignty is *United States v. California*.<sup>36</sup> The opinion in that case indicates that the Court felt that the paramount rights in the three-mile ocean belt along the coast of California had been acquired directly by the federal government since the adoption of the United States Constitution. One author comments on the *Causby* and *California* cases:

"Either the several States may be held under these rulings to be entirely without sovereignty or right of control in the navigable airspace over their surface territories, or the power and rights of the Federal government may be found so paramount in the navigable airspace as to produce the same legal results."<sup>37</sup>

As regards interstate commerce, postal service and matters of national defense, jurisdiction of passage through the air in large part was expressly or implicitly surrendered by the states to the United States by the adoption of the Federal Constitution. Insofar as these regulations made by the Federal government promote safety and efficiency in interstate, overseas or foreign commerce and bear some reasonable relationship to the subject, they are supreme and may not be denied.<sup>38</sup>

The power of Congress over interstate and foreign commerce is held to be exclusive by a long line of decisions and cannot be interfered with by state laws, except so far as they constitute a legitimate exercise of the police power; and even police regulations must yield when they come into conflict with the national power over commerce.<sup>39</sup>

The courts have interpreted the provisions of the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 to indicate that Congress intended, as one of the main purposes of the above Acts, the promotion of air safety. *Rosenhan v. United States* describes it:

'This chapter (Title 49, United States Code) was enacted as advanced legislation in recognition of rapidly growing air commerce and was comprehensively designed to promote civil aeronautics and to that end develop and secure maximum aeronautical safety."<sup>40</sup>

The state does have exclusive power to prescribe rules to govern

<sup>35</sup> Mr. Clement Bouvé quoted by Cooper, *State Sovereignty v. Federal Sovereignty of Navigable Airspace*, 15 J. AIR L. 27 (1948).

<sup>36</sup> 332 U.S. 19 (1947).

<sup>37</sup> Cooper, *State Sovereignty v. Federal Sovereignty of Navigable Airspace*, 15 J. AIR L. 27 (1948).

<sup>38</sup> *Rosenhan v. United States*, 131 F. 2d 932 (10th Cir. 1942), cert. den. 318 U.S. 79 (1943); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E. 2d 610 (1949).

<sup>39</sup> *People v. Katz*, 249 N.Y. Supp. 719 (1931).

<sup>40</sup> *Supra*, note 38 at 934.

the operation of aircraft flying in purely intra-state flights.<sup>41</sup> State statutes regulating such flights, so far as may be necessary to the welfare and safety of those on land, are a rightful exercise of the state's police power.<sup>42</sup> However, this jurisdiction is restricted by the federal government's control over interstate commerce.

Whenever the state or local laws regulating flying conflict with federal laws on the subject, the state or local laws must give way if they are found to be a burden on interstate commerce.<sup>43</sup> If the state or local regulation does not burden interstate commerce, it will be upheld. If Congress has not legislated on the matter, the state or local regulations are valid if they are not burdensome.<sup>44</sup> Courts upholding the validity of state regulations recognize that if the regulations had in any manner interfered with interstate commerce, the validity of the regulations would disappear.<sup>45</sup>

Wisconsin has adopted the Uniform State Law on Aeronautics.<sup>46</sup> Therefore she claims sovereignty in the airspace above this state except where granted to and assumed by the Federal government. The Wisconsin statutes also recognize the necessity of cooperation with federal aeronautical authorities.<sup>47</sup> In problems concerning flight altitudes, the Wisconsin courts appear to have adopted the regulations of the Civil Aeronautics Authority.<sup>48</sup>

A recent case, *All American Airways et al. v. Village of Cedarhurst et al.*,<sup>49</sup> focuses attention on the practical difficulties that arise when considering which government regulations are to prevail. The Village of Cedarhurst is situated very close to the busy New York International Airport (Idlewild). Alarmed by a series of accidents in which aircraft had crashed into populated areas adjacent to airports in nearby communities, the village enacted an ordinance based on its police power, prohibiting aircraft from flying over the village at altitudes of less than 1,000 feet. The approach to one of the airport's major runways is directly over the village. The regulation of the Federal Administrator of Civil Aeronautics and the Civil Aeronautics Board requires a descent to 518 feet at the edge of the village. Enforcement of the village ordinance would seriously impair the operations of the airport. Ten airlines, airplane pilots, the operators of the airport, and the administrator and the CAB as intervenors, petitioned

<sup>41</sup> *Parker v. James Granger, Inc.*, 4 Cal. 2d 668, 52 P. 2d 226 (1935), *app. dismissed*, 298 U.S. 644 (1936).

<sup>42</sup> *Supra*, note 9.

<sup>43</sup> *United States v. Perko*, 108 F.Supp. 315 (D.C. Minn. 1952); *Brown, Aircraft and the law*, 261 (1933).

<sup>44</sup> 6 AM. JUR. Aviation §13; Note 99 A.L.R. 173 (1938).

<sup>45</sup> *Supra*, notes 39 and 41.

<sup>46</sup> WIS. STATS. Ch. 114 (1951).

<sup>47</sup> WIS. STATS. §114.31 (4) 1951.

<sup>48</sup> *Kuntz v. Werner Flying Service*, 257 Wis. 405, 43 N.W. 2d 476 (1950).

<sup>49</sup> 106 F.Supp. 521 (D.C. E.D. N.Y. 1952), *aff'd* 201 F.2d 273 (2nd Cir. 1953).

for a declaratory judgment and for an injunction restraining the village and its officials from enforcing the ordinance. The District Court found the ordinance conflicted with Congressional legislation and that the enforcement of the ordinance threatened plaintiffs with irreparable injury. An injunction *pendente lite* was granted. On appeal to the Court of Appeals for the Second Circuit, the defendant village contended that there was no substantial doubt as to the validity of the ordinance and that the federal court lacked jurisdiction until the plaintiffs had exhausted their state remedies. Individual property owners of the village entered the suit after the lower court granted the injunction and sought an injunction themselves against the plaintiffs, on the ground that flying at such low altitudes constituted either trespass or a nuisance. The Court of Appeals affirmed the injunction *pendente lite*, stating that there was sufficient question of validity of the ordinance as against the supremacy of national power to continue the injunction pending trial and possible establishment by property owners of their claims of trespass and nuisance. Judge Clark, writing the opinion, recognized "The importance of the interests involved and potentially far-reaching effects" of the case. The dispute between federal regulation and the village ordinance, he asserted, "is clearly a very real one not easily to be settled."<sup>50</sup>

It appears that the landowner's rights are now very definitely limited. He must show, in any particular fact situation, that there exists either trespass, nuisance or a "taking" under the Fifth Amendment. *United States v. Willow River Paper Co.*,<sup>51</sup> involving water rights, casts some doubt as to the validity of the "taking" theory. The court stated:

"Operations of the Government in aid of navigation oft times inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. . . The uncompensated damages sustained by this riparian owner on a public highway are not different from those often suffered without indemnification by owners abutting on public highways by land."<sup>52</sup>

Apparently the subjacent landowner's control of airspace is definitely limited so as not to interfere with the right of flight. Corresponding to this limitation is the surrender of the control over the airspace by state or local authorities to the federal government. Local or state regulations of airplane flights will not be upheld if the regulations conflict in any manner with federal regulations. The ordinance involved

<sup>50</sup> 201 F.2d 273, 275 (2nd Cir. 1953).

<sup>51</sup> 324 U.S. 499 (1945).

<sup>52</sup> *Ibid.*, at 510.

in the *Cedarhurst case* certainly appears to be of doubtful constitutional validity since it conflicts directly with federal regulations over the same subject matter.

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