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THE ADJUDICATION OF RIGHTS IN AIRSPACE BY JUDICIAL PROCESS

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The subject of property rights in airspace is one in which there has existed for a number of years two divergent viewpoints as between the surface owners and the aircraft operators. As a result of this conflict there were considerable legal controversy and not a little actual litigation. Briefly speaking, the landowner contended that he owned and was entitled to the exclusive right to the airspace superincumbent to his land, upward to an indefinite extent, to zenith; whereas the aircraft operator claimed that there was no ownership or exclusive right to the airspace by the subjacent owner unless the latter actually occupied the airspace above surface ownership through the erection of a structure or some object therein.[1]

Prior to the event of aircraft, particularly the airplane, the courts had almost universally upheld the surface owners rights to all the airspace superincumbent to surface ownership. In doing so the courts followed the ancient maxim *cujus est solum ejus est usque ad coelum* which translated freely of course reads, "he who owns the surface owns upward to the sky.[2] It must be borne in mind that these early pre-aeronautical decisions were concerned with trespass and nuisance cases in which the use of the airspace by the defendants concerned objects which were fixed to and relatively near the surface, and there was no trespass in or use of the airspace at distances far removed from the surface as is the case of the use of aircraft at considerable heights above the surface. These earlier and pre-aeronautical decisions concerned trespass and nuisance actions with reference to overhanging eaves, cornices, windows and other parts of buildings, overhanging trees, telephone wires, protruding human arm, the kick of a horse, the firing of shots etc.[3]

[1] "Who Owns the Airspace?" John A. Eubank, American Law Review, February, 1929.

[2] "What About the Airspace?" John A. Eubank, Canadian Bar Review, February, 1930.

[3] "Who Owns the Airspace?" John A. Eubank, Philippne Law Journal, Manilla, Philippines, March, 1930.
Markham vs. Brown, 37 Ga. 277; Hannalbalson vs. Sessions, 116 Iowa 457; Whittaker vs. Stangvick, 100 Minn. 36; Butler vs. Frontier Tel. Co., 186 N. Y. 486; Grandona vs. Lovdal, 78 Cal. 611; Portsmouth Harbor Land and Hotel Co., vs. U. S. 260 U. S. 327.

With the advent of the airplane and the use and passage in the airspace by it, the courts very properly took a more modern viewpoint of airspace ownership and rights therein by the surface owner. Recognizing the right of flight as an inherent natural right[4] and of the fact that the use of the airspace by the surface owner was within a relatively low altitude of the surface, the courts in consequence have uniformaly held that the surface owners' rights to the airspace above was only within the realm that was necessary to the reasonable use and enjoyment of the surface.[5] While this judicial viewpoint was the crystallization of judicial pronouncements and the uniform decisions of the courts, there were occasional extreme and opposing claims to the airspace by the surface owner on the one hand and the aircraft operator on the other. In these conflicts, the landowner claimed exclusive possession and ownership of the airspace up to indefinite heights, and the aircraft operator denied that the surface owners had any rights in the airspace except as to such parts thereof which are actually physically possessed as to the erection of a structure therein or other occupancy thereof. Incredible as it may seem, a committee on aeronautical law of one of the leading bar associations, over the opposition of one lone dissenter of such committee, supported the latter viewpoint.[6] Moreover, while many state courts, including the highest, and federal district and circuit court of appeals had ruled on the question of rights in airspace, with reference to the relative rights of aircraft and the subjacent owner therein the United States Supreme Court had never spoken on the subject.

Finally, on May 27, 1946, the United States Supreme Court in U. S. vs. Causby had occasion to pass on the important questoin of property rights in airspace. Prior to this decision there had developed a legal doctrinnaire, promulgated and pronounced by Prof. John A. Eubank, a close student of aeronautical jurisprudence.[7] This doctrinnaire was and is known as the Doctrine Of The Airspace Zone Of Effective Possession. It has been accepted and reaffirmed by countless judicial decisions.[7a] By the Doctrine Of The Airspace Zone Of Effective Pos-

[4] Aeronautical Jurisprudence Vol. II, Page 140, Professor John A. Eubank.

[5] Johnson vs. Curtis Northwest Airplane Co. 1928 U.S.Av.R. 32; Smith vs. New England Aircraft Co., Inc.. et al 270 Mass. 511; Swetland vs. Curtiss Airports Corp., et al 55 Fed. (2d) 201; Gay et. al vs. Taylor et al 1934 U.S.Av.R. 126; Thrasher vs. City of Atlanta 178 Ga. 514; Hinman vs. United Air Lines et al 84 Fed. (2d) 755; Ownership of the Airspace," John A. Eubank, Dickinson Law Review, Jan. 1930; "Who Owns the Airspace?" John A. Eubank, Current History, April, 1929.

[6] New York County Lawyers Assn. pamphlet, July 1933.

[7] "The Doctrine of the Airspace Zone of Effective Possession," John A. Eubank, Boston University Law Review, June 1932; "The Doctrine of the Airspace Zone of Effective Possession," John A. Eubank, American Bar Assn. Journal, December 1932.

[7a] Smith vs. New England Aircraft Co., 270 Mass. 511. Cory vs. Physical Culture Hotel, Inc., (Pa.) 1938 U.S.Av.R. 16. Hinman vs. United Air Lines 84 F (2d) 755 Mohican et al vs. Tobiasz et al 1938 U.S.Av. R. 1.

sion is meant that surface owners have exclusive right to that part of the airspace superincumbent to their surface ownership which is necessary to the reasonable use and enjoyment of the surface. There need not be actual physical possession of the zone of effective possession, because it is the zone which can be "effective possessed" in connection with the reasonable use and enjoyment of the surface. See Eubank articles, supra. Hence constructive possession is effective possession. In Smith vs. New England Aircraft Co., supra the learned court said:

> "Even if this suggestion of extreme limit be adopted as the tests, namely that the scope of possible trespass is limited by that of possible effective possession, the plaintiff seemed entitled to assert that there have been trespassers upon their land. The test suggested is not actual but possible effective possession. It is not decisive that the plaintiffs do not at the present make that possible effective possession a realized occupation."

Moreover the zone of effective possession will vary with the use to which the surface is put. Under some circumstances the zone may be relatively near the surface, while under different situations the zone may extend to higher altitudes. See Eubank articles, supra. Although the Eubank Doctrine Of The Airspace Zone Of Effective Possession pronounced by the author in 1932 and prior thereto had met some reluctance upon the part of students of aeronautical jurisprudence and on occasions even oppositions, the courts as far back as 1930 began to recognize the soundness of the doctrine and to give it judicial sanction.[8]

Briefly the facts in the Causby case before United States Supreme Court are as follows:

Causby owned and operated a chicken farm of two and eight-tenths acres eight miles outside Greensboro, North Carolina, and near an airport which had been leased by and was jointly operated by the United States with other users. The farm consisted of a dwelling house and the usual various outbuildings which are part of a chicken farm. The end of the airport runways were about 2,200 feet from Causby's residence and chicken houses and the path of glide of the airplanes using the airport was directly over Causby's property and which property was about 100 feet wide and 1,200 feet long. At the safe gliding angle of 30 to 1 approved by the Civil Aeronautics Authority, planes in passing over the farm flew at the extremely low altitude of 87 feet which was with a clearance of only 67 feet over the dwelling and 63 feet above the barns and but 18 feet over the treetops. As the airport was used by bombers, transport and fighter planes the noise

[8] Smith vs. New England Aircraft Co., 270, Mass. 511. Corey vs. Physical Culture Hotel, Inc.. (Pa.) 1938 U.S.Av.R. 16. Hinman vs. United Air Lines 84 F (2d) 755. Mohican et al vs. Tobiasz et al 1938 U.S.Av.R. 1.

was terrifying. The passage of aircraft was frequent and the glare of the planes' lights at night brightly lighted up Causby's property. Chickens were so frightened that they would fly against the wall and were destroyed. Production also fell off to a large extent. Causby and his family had been denied of their sleep, became nervous and frightened and the use of the property both as a residence and chicken farm was greatly impaired. The Court of Claims found that the property had as the result become greatly depreciated in value, that the United States had taken in easement over the property and that the value of the property destroyed and the easement taken amounted to $2,000.

The Supreme Court noted that the case was one of first impression. The United States specifically contended that since the flights were within the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, that they were an exercise of the declared right of travel through the airspace as provided for in the Civil Aeronautics Act of 1938. Also the government advanced the flimsy argument that Causby did not own the superincumbent airspace because he had not subjected it to possession by the erection of structures and other occupancy. Finally the government declared that if it took airspace owned by Causby the damages were merely consequential for which no compensation could be obtained under the Fifth Amendment.

At the outset, the Supreme Court repudiated the ancient maxim cujus est solum est usque ad coelum by stating that the doctrine of ownership to the periphery of the universe had no place in the modern world. (See The Doctrine Of The Airspace Zone Of Effective Possession, John A. Eubank, American Bar Association Journal, December 1932). Moreover the court very specifically reaffirmed the right of flight[9] by stating that, "the air is a public highway, as Congress has declared." The Court distinguished the case from that of Richards vs. Washington Terminal Co., 233 U. S. 546 in which recovery of damage was denied to property owners who were annoyed by the noise, smoke and vibration of passing railroad trains, by stating that the damages in the instant case were not incidental because the airplanes passed directly over Causby's property, and thus the land was appropriated as directly and completely as if it were used for the runways themselves. Referring to the legal philosophy in the Portsmith Co., vs. U. S. 260 U.S. 327 decision the court said:

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminuation in its value."

[9] "Aeronautical Jurisprudence," Prof. John A. Eubank, Vol. II, page 160.

Continuing the decision pointed out that the navigable airspace to which flight is permitted under the Civil Aeronautics Act is airspace above the minimum safe altitudes of flight and such minimum safe altitudes of flight do not include the path of glide necessary to taking off and landing. On this point the court stated:

> "The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U. S. C. Sec. 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating — of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, Sec. 61.7400, 61.7401, Code Fed. Reg. Cum. Supp. Tit. 14, ch. 1) and from 300 feet to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. Id., Pt. 60, Sec. 60.350-60.3505, Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them — the minimum safe altitudes of flights."

Relative to the part of the airspace which is subject to ownership by subjacent owner, the court declared that the landowner owns at least as much of the airspace above the ground as he can occupy or use in connection with the land. Adopting the principle of THE DOCTRINE OF THE AIRSPACE ZONE OF EFFECTIVE POSSESSION, and citing Professor John A. Eubank's article, "The Doctrine Of The Airspace Zone Of Effective Possession," Boston University Law Review, June 1932, the decision stated:

> "While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the

> land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

Also reaffirming the right of ownership in airspace up to reasonable heights and likewise reaffirming the inherent right of flight and lastly restating the principle of sovereignty in airspace by the individual states, the court in citing the North Carolina statutes declared:

> "Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.' Gen. Stats. 1943, Sec. 63-11. The flight of aircraft 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.' Id., Sec. 63-13. Subject to that right of flight, '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.' Id., Sec. 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace."

It was specifically pronounced by the court that the airplane is a part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment, and that the airspace apart from the immediate reaches above the land, is part of the public domain; and further it was not necessary for the court to determine in the instant case as to what those precise limits are, because flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. In this connection the court stated it need not speculate on that phase of the present case because the findings of the Court of Claims planily established that there was a diminuation in value of the property and that the frequent, lowlevel flights were the direct and immediate cause. The decision concluded with the holding that the damages were not merely consequential, but were the product of a direct invasion of Causby's domain, and it is the character of the invasion not the amount of damages resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. The decision agreed with the Court of Claims that a servitude had been imposed on the land. The judgment was reversed and the case remanded to the Court of Claims to make the necessary findings in conformity with the opinion and to consider whether the easement taken was a permanent or temporary one and make the award accordingly. Mr.

Justice Douglas rendered the opinion and Mr. Justice Jackson took no part in the consideration or decision of the case. Both Justices Black and Burton dissented in a separate opinion. The Court of Claims had upheld that there was a taking and had rendered judgment for respondent.

The extremists in the two opposing camps, that of the surface owner and that of the aircraft operator, can both take comfort from the decision. The surface owner has been sustained in his claim of ownership of airspace and the aircraft operator has been upheld that such ownership does not extend to the periphery of the universe. Thus by citing and accepting THE EUBANK DOCTRINE OF THE AIRSPACE ZONE OF AFFECTIVE POSSESSION, the Supreme Court reconciled the differences between the landowner and the aircraft operator but most important of all reached a logical constructive solution. In this connection, perhaps the most significant part of the court's decision was that if the landowner is to have full enjoyment of his subjacent area he must have exclusive control of the immediate reaches of the enveloping atmosphere, and the fact that a surface owner does not occupy the immediate reaches of the airspace in a physical sense as by the erection of buildings and the like, is not material.

On the whole the decision was a victory for surface owners in general. Few were the landowners who claimed ownership of the airspace to the periphery of the universe. By the large, subjacent owners merely wanted to be free from the annoyance and dangers of low flying aircraft and which low flying was at times terrifying and exceedingly hazardous to all concerned. No one would deny the justice of the Causby claim. Who would question the injustice of four-engine-aircraft, notably bombing planes, flying over one's dwelling with a clearance of about 67 feet? Would the average resident owner care to be the victim of such low and hazardous flying?

The Causby's decision by the United States Supreme Court is a most important and significant one by the highest court in the land, and is of epoch making consequences in that it reaffirms and gives judicial sanction by that high court to the following legal concepts, some of which have been previously accepted and others challenged.

1. The dual sovereignty in the airspace by both the United States and the individual states.
2. Ownership in airspace by surface owners but with the unqualified repudiation of such ownership extending to the periphery of the universe.
3. The Doctrine Of The Airspace Zone Of Effective Possession.
4. The right of flight.

This decision by the highest court in the land is a clear cut judicial expression. It is a most able and constructive one. Moreover it has the emphasis of finality and reaches a sound logical conclusion.

The lessons to be learned from the development of the law and the Supreme Court's decision in the Causby case, relative to rights in the airspace, are 1. if aircraft always fly above the minimum safe altitudes as prescribed by the Civil Aeronautics Act and the regulations thereunder and 2. sufficiently large airports are provided for so that aircraft in taking off and landing will not fly over private property, for example, with a mere clearance of 18 feet, then there will be few trespass and nuisance actions against aircraft from flying over private property and the aircraft industry will be saved from the burden and expense of much preventable litigation. It is recognized that in ascending and descending from and to the ground an aircraft must of course fly at low altitudes. This is no justification for flying low over private property. The remedy is to acquire sufficiently large enough airports and landing strips so that the aircraft will be within the boundary of the airport property and not over private property when the aircraft is at necessary low altitudes in landing and taking off. (See Smith vs. New England Aircraft Co. 270 Mass. 511 and Prof. Eubank's article, supra).

The progress in the law with reference to the airspace together with the United States Supreme Court's decision in U. S. vs. Causby, taken together, are the greatest single legal development in the entire history of aeronautics. This historical development of the law climaxed by the Causby case is indeed a signal epoch in both aeronautical jurisprudence and the aeronautical industry. No longer need there be any unnecessary controversy as to the use of the airspace by aircraft and the extent of the surface owners' rights in such airspace. After many years of conflicting claims by the surface owner and the aircraft operator, the issue has been finally, completely and clearly settled to the relief of all concerned. And it can be truthfully said also to the entire satisfaction of all interested parties. The solution arrived at by the United States Supreme Court and the legal doctrinnaire of aeronautical legal experts, has been a most equitable one.