

# Property - Landowner's Right to Air Space

Lee J. Wolf

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Lee J. Wolf, *Property - Landowner's Right to Air Space*, 30 Marq. L. Rev. 193 (1946).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol30/iss3/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## RECENT DECISIONS

**Property—Landowner's Right to Air Space**—The action was started in the United States Court of Claims to recover for the alleged taking by the defendant, United States, of plaintiff's home and chicken farm which was adjacent to a municipal airport leased by the defendant. The complaint stated that the defendant's large bombers and other planes, while using one particular runway to land, flew over plaintiff's land at a height of eighty-three feet. The noise and the glare of the lights disturbed plaintiff's sleep, frightened him, and made him nervous. It also frightened plaintiff's chickens so much that many of them flew against walls and were killed. Consequently, the plaintiff was forced to give up the chicken business. To review a judgment of the Court of Claims in favor of the plaintiffs, the United States brought certiorari. *Held*: That the landowner owns at least as much of the air space above the ground as he can occupy or use in connection with his use of the land, and the fact that he does not occupy it in a physical sense by erection of buildings and the like is not material. The Federal Government permitted its airplanes to fly so low as to deprive plaintiffs of the use and enjoyment of their land for the purpose of raising chickens, and this was a "taking", which entitled plaintiffs to recover just compensation. *United States v. Causby*, 66 S. Ct. 1062 (1946).

Throughout the years there have developed three distinct theories of air space ownership, each of which has had its advocates in the courts and among the many scholars and legal committees that have expressed their view on the subject. The very earliest was the old English theory, "*Cujus est solum ejus est usque ad coelum*",<sup>1</sup> which was first introduced into English Law during the time of Lord Coke, and was discussed in *Baten's Case*<sup>2</sup> and *Fay v. Prentice*.<sup>3</sup> This rule has been greatly limited, if not entirely repudiated, in both England and the United States. In the case of *Hinman v. Pacific Air Transport Corporation*<sup>4</sup> the court declared that the "cujus solum" maxim, "is not the law and never was the law", but narrowed the scope of the statement by adding the phrase, "in respect to aerial navigation". The more modern version, suggested by the advocates of this theory, is that the ownership of air space extends "ad coelum" subject to a public easement for aerial transit at heights not interfering with reasonable enjoyment of the surface. Another theory, almost the exact opposite, holds that there is no ownership of the unenclosed air space, and a third divides the air space into two layers, a lower and an upper; the landowner

1. "He who owns the surface soil owns also up to the sky above it and the center of the earth beneath it."
2. 9 Coke's Reports 546, 77 Eng. Rep. 811 (1611).

owning the lower but not the upper layer. The limit is usually determined either by height of "possible effective possession", or "effective use".

The compromise easement theory was widely accepted during the years 1920 through 1926, when the question of lawfulness of flight was first receiving serious attention. Many states at that time adopted a uniform statute, which is still the statutory law on this question in Wisconsin, as well as in North Carolina, where the *Causby* case arose.<sup>5</sup> However this theory has had few advocates and many critics since 1936, and with three possible exceptions<sup>6</sup> has been repudiated entirely.

The "zone theory" has been widely recognized during recent years, and will today be the governing rule due to clarification and definite interpretation by the Court in the *Causby* case. The case adopts the "zone doctrine" by definitely establishing two rules. The first is stated where the Court, interpreting the Air Commerce Act of 1926, as amended in 1938,<sup>7</sup> defines the navigable air space as "the air space above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Administration." The *Causby* case holds that an airplane following a C.A.A. established path of glide is not necessarily within the "minimum safe altitude" of flight meant by the statute. The second is that the C.A.A. has, of course, the power to prescribe air traffic rules, but Congress has defined navigable air space only in terms of one of them — the minimum safe altitude of flight.<sup>8</sup>

It must be noted that the *Causby* case seemingly disapproves the holdings that plane owners may not assert a right to fly over another's

---

3. 1 C. B. 828, 135 Eng. Rep. 769 (1845).

4. *Hinman v. Pacific Air Transport Corporation*, 84 F. (2nd) 755 (C.C.A. 9th 1936).

5. Wis. Statutes (1945), Sec. 114.03 "—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 114.04." Section 114.04: "Flight in aircraft over the lands and water of this state is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space above 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. . . ."

6. *Capitol Airways Inc. v. Indianapolis Power & Light Co.*, 215 Ind. 462, 18 N. E. (2nd.) 776 (1939); *Guith v. Consumer's Power Co.* 36 F. Supp. 21 (1941); *Vanderslice v. Shawn*, 27 A. (2nd.) 87. (Del. Ch., 1942).

7. Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. Sec. 171 et. seq., 49 U.S.C.A. Sec. 171 et seq., as amended by the Civil Aeronautics Act. of 1938, 52 Stat. 973, 49 U.S.C. Sec. 401 et seq., 49 U.S.C.A. 401 et seq., under which statutes the United States assumes complete and exclusive national sovereignty in the air space over this country, and grants citizens of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.

8. The minimum prescribed by the authority is 500 feet during the day, and 1,000 feet at night for air carriers, and from 300 to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain.

land upon a theory of easement or prescription.<sup>9</sup> It has been held that it is impossible to obtain an easement through the air space above another's land by continuous use or prescription.<sup>10</sup> It was pointed out in the *Smith* case<sup>11</sup> that airplanes, even if trespassing repeatedly, do not pass in the same plane or place as to linear space or altitude, and thus no prescriptive right to any particular way of passage is obtained. The Court in the *Causby* case sustains a Court of Claims decision which held that an easement had been thus obtained by the defendant, sustaining the doctrine that such a right may be obtained by prescription.

The *Causby* case has been cited by several newspaper editorials as precedent making. From a first impression, the lawyer will probably dismiss its importance — classing it as one that falls in line with the “effective use” of air space idea, which is nothing new. However, in extending the landowner's air space to include space that he does not physically, or tangibly occupy, and in seemingly allowing an easement to accrue out of continuous use of such air space, the Court has been, indeed, precedent making. It is needless to say that much litigation will arise in the future concerning this problem, and it seems to the writer that adequate zoning laws, plus reasonable interpretations of the impairment of an owner's property rights in air space, will be necessary to prevent the hampering of modern air transportation.

LEE J. WOLF

---

9. Bell, “Air Rights,” 23 Ill. L. Rev. 250, 261 (1928).

10. *Supra*, note 4.

11. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1920).