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AIRSPACE OWNERSHIP AND THE RIGHT OF FLIGHT*

FRED D. FAGG, JR.

With the growth of aviation, it is only natural to expect some regulatory legislation. Incidentally, this is one field wherein proposed regulation almost preceded the subject matter to be regulated. It is well known that Paul Fauchille, at the Neuchâtel session of the Institute of International Law in 1900, called the attention of jurists to the need for a code of air law. In 1901, before the Wright Brothers' flight, Fauchille published his epoch-making study that served as the basis for his famous Code de l'Air. Dr. Jenny Lycklama à Nijeholt has suggested that it is undesirable to establish rules before there is any necessity for them, but the rapid development of aviation has given rise to a need for regulation. It is needed for the sake of uniformity, at least. If we are to profit by the experience of the railroads and avoid a similar mass of conflicting state legislation, there must be substantial uniformity in state laws pertaining to aeronautics. An air carrier, operating from coast to coast in a single day, can give slight heed to state boundary lines!

Recognizing this need for uniformity, the American Bar Association established a committee to make a study of the aviation problem. The committee prepared a Uniform State Law for Aeronautics, drafted largely, I understand, by Professor Bogert now of the University of Chicago. This code, sponsored by the committee, the Conference of Commissioners on Uniform State Laws, and the American Bar Association, was adopted at one time or another by some twenty-one states. Subsequently, with the inevitable changes in committee membership, there has come into existence an entirely new committee by virtue of a complete change in personnel. Certain defects in the old code have manifested themselves and a new proposed Uniform Aeronautical Code was submitted by Mr. George B. Logan, the chairman, at the last annual meeting of the American Bar Association. As one of the principal issues connected with the adoption of this proposed code is concerned with the trespass-nuisance question—which is per-

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haps the most difficult problem confronting the aviation industry—I should like to direct your attention for a few moments this morning to the committee proposals dealing with the subject of my discussion: Airspace Ownership and the Right of Flight.

We are all aware that the art of flying has given rise to a conflict of interest between the landowner and the aviator. The conflict is a most natural one and has been the subject of almost endless discussion—oral and written. While the subject has been considered as almost purely academic, it is of far more consequence. The problem calls for an adjustment, a proper and workable adjustment, of these conflicting interests. It is clear that the landowner, in the use and enjoyment of his property, wishes to be free from the disturbing features which may be associated with aviation. He wishes to be secure in his property interests, here as in any other, and to maintain—so far as is possible—the value of his property, particularly in the event of future transfer. At times, he asserts the unlawfulness of all flights above his land, and, at times, he is content to prevent such flying activities as seem to interfere with his enjoyment. When he makes the former assertion, he challenges all aeronautical activities. The conflict of interests is at once presented for solution.

Four theories, at least, have been suggested as means of handling the problem; two extreme positions and two that are intermediate. They are as follows: (1) The first is based upon the old maxim, "*Cujus est solum, ejus est usque ad coelum et ad inferos,*" and it asserts property rights in the air space *ad coelum* of the same nature as pertain to the land itself. (2) The second theory regards ownership as extending *ad coelum*, subject to a natural easement for air navigation in the upper air space. (3) The third is a "zone" theory—to the effect that ownership extends into the superjacent air space a limited, but flexible, distance as determined by "actual user," "effective possession," "lower stratum," etc. (4) The fourth theory regards ownership as extending no farther upward than the surface of the earth, the structures or natural or artificial growth thereon.

In dealing with the question, the American Bar Committee, in drafting the old Uniform State Law for Aeronautics, adopted the second of these theories. Section 3 of that code provides, in part, as follows:

"Section 3. 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."

To permit the development of aviation, the code added, in Section 4, the following provision:

"Section 4. 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 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. . . ."

The present Committee on Aeronautical Law, as a result of the private investigations of its members, and influenced no doubt by recent judicial decisions and other writings, is now of the opinion that Section 3 of the old code no longer is correct. Consequently, in the proposed Uniform Aeronautical Code, Section 3 of the old code is omitted and Section 4, slightly modified, is set up as Section 1 of the new draft in the following language:

"Section 1. Flight in aircraft over the lands and waters of this state, within the 'Navigable Air Space,' as hereinafter defined, is lawful unless at such a low altitude as to interfere with the then existing use to which the land or water or 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.

"As used in this act, the term 'Navigable Air Space' means air space above the minimum safe altitudes of flight prescribed by regulation by the State Aeronautical Commission (or State Administering Officer). Such navigable air space is subject to a public right of air navigation in conformity with the provisions of this act and with the regulations and Air Traffic Rules issued by the State Aeronautical Commission (or State Administering Officer)."

This change of front, with the resultant repudiation of Section 3 of the old code, has been challenged recently by Professor James J. Hayden in an article entitled "Objections to the New Uniform Aeronautical Code," and published in the February, 1932, issue of the American Bar Association Journal. Because the article so clearly states the viewpoint of those whose expressed position would be opposed to the new code, and because the article raises the essential problems under consideration, I should like to indicate its outlines and refer to the author's exact language so that we shall not misunderstand this position and the objections.

Professor Hayden makes the following assertions: (1) Section 1 of the new code contains language inconsistent with the announced intention to repudiate the doctrine of ownership of air space by landowners. (2) As a practical matter, it is not really in the interests of aviation to repudiate the doctrine. (3) There is no sound legal basis upon which to repudiate the doctrine. The

first assertion is concerned with the language employed. Time does not permit us to examine the merits of the objection in detail. Let us, then, assume that it is sound. The five additional words suggested can be included without difficulty, and clarity of expression is thoroughly desirable.

For the present, let us consider the author's third point—to the effect that repudiation has no sound legal basis. At once we are confronted with a seeming inconsistency of language or of position. At the beginning of the article, after mentioning the changes in the code, Professor Hayden states, "It must be apparent that the Committee has either done an amazing piece of work deserving of the unqualified admiration of the American Bar, or it has fallen into very serious error." Since, in the judgment of the author—as is later indicated by him—the committee has fallen into serious error, it results that, in taking his stand in favor of the old code, he becomes a proponent of the maxim *cujus est solum*. In asserting that the maxim cannot legally be repudiated, he affirms its soundness. To aid his contention, he invokes the support of the American Law Institute Restatement of the Law of Torts.

Having asserted the maxim to be law and evidencing ownership *ad coelum*, which usually is interpreted to mean ownership to the sky, the author then says, "Although Section 3 of the old code states *in broad terms* that the ownership of the space above the lands and waters of the state is vested in the owners of the surface, subject to a right of flight, *a reasonable construction* of this statute *does not necessarily mean ownership of that space to infinity*." (Italics ours.) To reconcile this apparent inconsistency of language, it becomes necessary to consider the two possible interpretations of that language. The first view would interpret *ad coelum* as extending *indefinitely* upwards. It would mean, in the words of Bouvé, air space ownership "beyond the stars and to the remote confines of infinite space." Construing Section 3 so as not to mean ownership of air space to infinity, would then be to effectively emasculate the maxim. The second view would interpret *ad coelum* as extending to an *undetermined*, but not *unlimited*, height.

If the author accepts the first view—ownership to infinite space—it becomes necessary to investigate the authority of the maxim, and to discover how far judicial decision has relied upon it. If the courts have not relied upon it as indicating ownership rights to indefinite space, then the committee has done nothing of an amazing nature by omitting the section as to ownership

rights. They have repudiated nothing except an erroneous statement. On the other hand, if the author accepts the second view, and the cases indicate that the maxim is law only relative to trees, houses and other structures a relatively short distance from the surface, then the committee, again, has done nothing amazing in refusing to apply to aviation a maxim that was never considered as applying to it. Whatever view be accepted, it would seem desirable to consider the maxim, and the authority given it by the courts.

While an attempt has been made to trace the maxim to Rabbi Akiba in ancient Jewish law (47 Law Quart. Rev. 14), it is generally accepted that it has its origin in a gloss on the Digest of Justinian made by one Accursius about the middle of the thirteenth century. In other words, the maxim was something added by way of a marginal note to Paulus in the Digest VIII, Tit. 2, Sec. 1, dealing with *De Servitutibus Praediorum Urbanorum*. Mr. Bouvé, in his able article on "Private Ownership of Airspace" (1 Air Law Review, 232 and 376), has sketched the history of the maxim and believes that it very probably was introduced into England by Franciscus, a son of Accursius, who spent a year at Oxford around the year 1273.

By whatever means the maxim obtained its roots in English jurisprudence, we know that it was referred to by Lord Coke's statement in *Coke on Littleton* (Book I, Sec. 1, p. 4a) where it is said: "And lastly, the earth hath in law a great extent upwards, not only of water as hath been said, but of aire, and all other things even up to heaven, for *cujus est solum ejus est usque ad coelum*, as it is holden." To support his views, Coke cited three cases. May I quote from them to show you the conception of the subject matter to be governed by this maxim. In an action of trespass brought by the Bishop of London against one N. for his close broken and for the taking of certain herons and shovelers, there was a lease of land, with a reservation of trees and woodlands. The question involved was whether or not the lessee had the right to certain birds and eggs in the trees. *Fitzherbert* stated, "By the exception of the trees things within the area of the tree and *up to the sky* are also excepted and therefore he cannot meddle with them." *Brook* added, "And the lessor will have the land in which the tree grows, for the tree has its being through the earth and air, and therefore all the earth in which it grows in depth, and the air it needs in height belong to him to whom the tree belongs, as do all the profits of the tree." (14 Henry VIII, No. 1.) For the purposes of the decision, air space rights extended to

the boughs of trees, and the language used was broader than necessary.

In the second case, arising in Trinity Term, 22 Hen. VI, no. 11, a writ of trespass was brought *quare clausam fregit*, for the taking of certain young goshawks from their nest. *Newton* said, "For in such a case, suppose I have young herons breeding in my close, and a stranger takes them I will have an action of trespass *quare clausam fregit* for taking and carrying away six herons."

In the third case, 10 Ed. IV, Fo. 14, *Bingham* stated, "In the case of the young sparrow-hawks in a nest, the plaintiff gave the price because the price was in him, for the nests were his and *thus also the things in the nest*, and they cannot fly from his possession."

Upon the authority of these three cases, Lord Coke sponsored the maxim *cujus est solum* in England. No one doubts that they extend proprietary rights to the branches of trees growing upon the soil, but it requires a considerable stretch of the imagination to consider these as precedent for an action of aerial trespass where such flight is conducted in the so-called "upper stratum." The maxim is entitled to the prestige of five hundred years if it be limited in its application to tree branches—the theft of birds or eggs—but its hoary age alone will not give it new meaning so as to embrace the normal activities of aviation.

There are many other cases since those first three. They are dealt with by Professor *Bogert* under the title, "Problems in Aviation Law" (6 *Cornell Law Quart.* 271), and by Mr. *Clement L. Bouvé* in the article aforementioned. I shall not weary you with an enumeration. Suffice it to say that they all deal with problems arising within the airspace zone not exceeding approximately one hundred feet from the surface of the soil. If we may assume as correct the statement that *the maxim is law only to the extent to which it has been applied in the adjudicated cases*, it becomes clear at once that aeronautical activities are not to be controlled by it unless the courts have relied upon it in disposing of aviation problems.

No discussion of this question will be complete, however, until we have considered the three decisions rendered in the two recent aviation cases arising in this country—*Smith v. New England Aircraft Company* (270 *Mass.* 511, 170 *N. E.* 385—1930), and *Swetland v. Curtiss Airports Corporation* (41 *F. (2d)* 929, and 55 *F. (2d)* 201—1930, 1931). In the *Smith* case, an owner of an estate near Grafton, Massachusetts, consisting of some 272

acres, discovered in 1929 that an airport was proposed on 90 acres adjoining his property. The airport was established and flights were made from it as low as one hundred feet above the wooded part of the estate. The houses were about 1320 feet from the airport. The plaintiffs sought to enjoin the defendants, (1) from flying over their property in a manner constituting trespass, and nuisance, and (2) from using the airport as a base of operations. The lower court denied the injunction and the Supreme Judicial Court upheld the decision. No damages were sought. In disposing of the case, Mr. Justice Rugg, C. J., stated that flights as low as 100 feet would constitute trespass, but, since an injunction only was sought, the point was not concluded. While assuming that "private ownership of air space extends to all reasonable heights above the underlying land," the Chief Justice also stated, "*Whatever may be the precise technical rights of the landowner to the airspace above his land, the possibility of his actual occupation and separate enjoyment of it as a feasible accomplishment has through all periods of private ownership of land been extremely limited.*" It is significant that the court did not rely upon the maxim in its absolute form. Professor Hayden suggests that the *Smith* case "assumes airspace ownership" and that the maxim is affirmed "by inference." However, it must be pointed out that while the first sentence used by Mr. Justice Rugg is frequently quoted—to the effect that "we assume that private ownership of airspace extends to all reasonable heights above the underlying land," the sentences which follow are usually omitted. They are: "It would be vain to treat property in air space upon the same footing as property which can be seized, touched, occupied, handled, cultivated, built upon and utilized in its every feature. The experience of mankind, although not necessarily a limitation upon rights, is the basis upon which airspace must be regarded." When we consider the whole quotation, are we to say that the court relied upon the maxim in any form?

In the *Swetland* case, arising, in Ohio, we have a similar situation. The Swetlands owned an estate some fourteen miles from Cleveland consisting of about 135 acres. Across a road, the defendants established, in 1929, an airport on some 272 acres. Again the plaintiffs asked for an injunction because of alleged trespasses and against the maintenance of a nuisance. There were, also, specific allegations of nuisance. In deciding the case, Judge Hahn, of the District Court, enjoined the blowing of dust upon the plain-

tiff's property, the dropping of circulars, and flying over plaintiffs' estate at less than 500 feet. But did the court place reliance upon the *cujus est solum* maxim? In his opinion, p. 936, Judge Hahn says:

"It is safe to say that there are no cases which involve an adjudication of property rights as appurtenant to land in the air space which would normally be used by an aviator. It is true that in many of them the maxim is quoted, and, seemingly, is used by the courts as a basis for their decisions; but it is the points actually decided in the cases, not the maxim, which establish the law. In other words, it can be said that the maxim is the law only to the extent that it has been applied in the adjudicated cases. Maxims are but attempted general statements of rules of law. The judicial process is the continuous effort on the part of the courts to state accurately these general rules, with their proper and necessary limitations and exceptions. A maxim, said Sir Frederick Pollock, 'is a symbol or vehicle of the law, so far as it goes; it is not the law itself, still less the whole of the law, even on its own ground.' And in Yarmouth v. France, 19 Q. B. D. 647, 653, 17 E. R. C. 217, Lord Esher said: 'I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'"

"The claims of the plaintiffs in invoking the maxim amount to an invocation of the doctrine of *stare decisis*, also called the doctrine of precedents. 19 C. J. 382, note 86. But *this doctrine contemplates only such points as are actually involved and determined in a case.*" (Italics ours.)

"So far we have considered the maxim as if there were no question as to its real meaning. Its meaning has never received critical examination and discussion by the courts, and there is a grave question as to whether or not the proponents of the maxim make any real progress by advancing it as a basis for the claim that an owner of land has exclusive proprietary rights to an indefinite extent in the superincumbent air space." (Italics ours.)

"It appears from these authorities that the maxim has never been applied in cases which fix rights in air space normally traversed by the aviator. There are no precedents or decisions which establish rules of property as to such air space." (Italics ours.)

Distinctly negating the application of the maxim in its absolute form—as indicating ownership of air space to the stellar regions—the court, adopting Pollock's phrase of "effective possession," fixed the upper limit, *in this case*, of effective possession at 500 feet. The court distinctly refused to indicate an intention to have this decision serve as precedent in a future case involving a different factual situation. The maxim in its absolute form is rejected as precedent for aviation cases. In its modified form—interpreting *ad coelum* as reaching only to a limited height (determined possibly by effective possession)—the maxim might have

been relied upon. That the court rejects it, indicates at least that it is considered by the court to mean ownership to an indefinite height and, for that reason, inapplicable to the disposition of the case.

On appeal, Judge Moorman of the Circuit Court of Appeals, after reviewing the early cases, states:

"But none of those cases nor any of the later ones undertakes to define the term '*ad coelum*', if indeed that term is one of constancy or could be defined. In every case in which it is to be found it was used in connection with occurrences common to the era, such as overhanging branches or eaves. *These decisions are relied upon to define the rights of the new and rapidly growing business of aviation. This cannot be done consistently with the traditional policy of the courts to adopt the law to the economic and social needs of the times.* The Ohio decisions are likewise inconclusive, and, *lacking any controlling precedent*, we resort to a consideration of the plaintiffs' rights in relation to the necessities of the period." (Italics ours.)

Again and conclusively, the maxim is rejected as precedent.

Thus far we have considered the value of the maxim as precedent for adjusting the interests of the landowner and the aviator. Such an extended discussion was necessary to meet the assertion that the doctrine could not be legally repudiated. Does it not appear to be obvious that, whichever view of the doctrine be adopted, courts will refuse to decide present day aviation cases upon the authority of a maxim which sprang from the imagination of some glossator who believed the world to be flat, who might have been interested in preventing encroachments above the sepulchre, or perhaps in establishing a property right in birds' eggs! One thing is certain: The public is interested both in fostering aviation and in allowing the landowner full use and enjoyment of his property. The problem, then, is to protect adequately the interests of each.

In 1920, the British Air Navigation Act found a solution in the following provision:

"No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of 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 this Act and any Order made thereunder and of the Convention are duly complied with."

The aviator was protected against litigiously minded persons and the landowner was protected against unreasonable activities of the aviator. No more specific rule was announced, as each case was to be decided upon its own merits.

The American Bar Committee on Aeronautical Law now invites your support in connection with an almost identical solution. In its proposed code, the lawfulness of flight is established with the proviso that it must not be conducted "at such a low altitude as to interfere with the then existing use to which the land or water or 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."

Under this proposal, what are the remedies available to the landowner? The new code does not refer to trespass or nuisance. In the opinion of several writers, the only remedy is through a nuisance action—on the theory that there can be no ownership of unenclosed air space, and that, consequently, a trespass action will not lie for low flying, etc. It is true that limiting the landowner to a nuisance action, or to injunctive remedy, would be of real benefit to the aviator; it would free him from countless suits wherein injury to the landowner could not be shown. And it is no doubt true that in any trespass case, where more than nominal damages are asked, the test will be that of nuisance—as to whether or not the rights of the landowner have been interfered with unduly. At one time, three remedies were available. These were, (1) an action of trespass, (2) the writ of "Quod permittat" for the abatement of a nuisance, and (3) an action of trespass on the case. In many states, at the present time, there is little or no distinction between the remedies. Limiting the remedy to a nuisance action would be most convenient and would afford effective relief in most every situation; yet there are many practical difficulties that would make it undesirable to insist upon such a limitation. Here, again, we must rely upon the efficacy of a judicial process which has already refused to be bound within the confines of rigid precedent. In dealing with the problems which arise—each with differing factual situations—the courts will doubtless also refuse to be bound within the limits of a narrow or inflexible procedure.

There are many other questions associated with this subject. They involve the operation of airports, the altitude at which one may fly in leaving or in approaching an airport, etc. Some of these questions are discussed in the principal cases already mentioned, and, for a more detailed study of the entire subject of air space rights, I should like to mention a dissertation now being prepared by Mr. Edward C. Sweeney, a research associate at the

Air Law Institute, which will probably appear in the July issue of the Journal of Air Law.

By way of summary, to dispose of Professor Hayden's second point—that it is not in the interests of aviation to repudiate a doctrine which enjoys the prestige of five hundred years, and to suggest the rationale of the problem, may I invoke the aid of two quotations. It has been said by von Ihering that: "The only practical interest which the owner has in the freedom of his airspace is that he be not deprived of the air, light, or rain from heaven, and that he be not prevented from building as high as he may wish to; . . . beyond this limit, a right to airspace loses its *raison d'être*, and would have no result other than that of putting the machinery of the law at the mercy of pure chicanery, of stimulating litigious tendencies and making enemies of good neighbors."

Lastly, is there not considerable value in the statement of Judge Scott, of Colorado, which reads as follows: "I can only hope for a day when courts of justice will decline to dig among the tombs of a dead past for ancient and obsolete precedent, particularly a precedent adopted in a day when a majority of the people believed the insane to be possessed of the devil, and when governments hung them as witches; when they will refuse to be shackled by a procedure that finds neither reason nor justice in our day and time; when the law will be treated as a philosophy to be applied to the ever changing conditions of man, and not a straight-jacket with no leeway for the exercise of common sense and common justice."