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# The New Deal in Airspace Rights

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# THE NEW DEAL IN AIRSPACE RIGHTS

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My admiration for George B. Logan's enthusiasm for aviation in all its aspects makes it difficult to criticize him but his Annual Report at the Omaha meeting of the N. A. S. A. O., and his report as Chairman of the committee of that organization on the Proposed Uniform Aeronautical Code, contain such glaring errors and sweeping declarations with reference to the rights of landowners in the airspace above their lands that I cannot resist the urge to present the other side of the picture. For the sake of convenience each of these reports will be considered separately.

1. *Mr. Logan's Annual Report.*[1]

At page 634, we find the following statement:

"Note also that the air space involved is that air space which is 'navigable air space,' and 'navigable air space' is that air space below the minimum safe altitude of flight. It is everywhere. It is not only along the civil airways. It is the air space above everybody's land. It is the universal air space."

The obvious import of this language is, of course, that one may navigate at any altitude, below as well as above, the minimum safe altitude, and the authority for that privilege is no less than the Civil Aeronautics Act of 1938. A glance at that Act shows how erroneous the claim really is. Title I, Section 3, states that:

"There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

Title I, Section 1 (3) of the Act, says that:

"'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas, or foreign air commerce."

Section 1 (16) of the Act defines "Civil Airway"; Section 1 (20) defines "Interstate air commerce," "overseas air commerce," and "foreign air commerce"; neither of those definitions justify

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1. 9 JOURNAL OF AIR LAW 622, 630, *et seq.*

the claim of Mr. Logan, but rather deny it. Title XI, Section 1107 (i), paragraph 1, amends the Air Commerce Act of 1926, as amended, by striking out (among other portions) the words "Secretary of Commerce" in Section 10 of that Act and inserting in lieu thereof the words "Civil Aeronautics Authority." It appears, therefore, that at the time the report was made and at the present time, Section 10 of the Act of 1926 is still in force in the following language:

"Section 10. Navigable airspace.—As used in this Act, the term "navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigabble airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

In the light of the foregoing it seems fair to say that the navigable airspace of the United States, according to the Act of 1938, does not include airspace *below* the minimum safe altitude. It is not the purpose of this article to discuss the question whether or not the Act of 1938 is constitutional, or subject to challenge at any point, but merely to point out that the statute itself makes no attempt to authorize avigation below the minimum safe altitudes of flight.

At page 634 of his report, Mr. Logan says:

"Note that the 'Right of flight' exists in behalf of *any* citizen, whereas before, the 'right of flight' was recognized only in behalf of those operating in *interstate* and *foreign* air commerce."

The Act of 1938 contains nothing to warrant such a distinction. Section 3 of Title I, quoted above, limits freedom of transit to citizens engaged in air commerce, and the definition of air commerce in Section 1 (3) of Title I, differs from the 1926 Act only in verbiage. It is important to note that Section 3 of Title I does not say that the right of flight exists in behalf of any citizen, but merely that such right of flight exists in behalf of any citizen engaged in air commerce. Flights not included under the statutory definition of "air commerce" certainly are not protected under the Act of 1938. Without pausing to inquire whether the definition of "air commerce" in Section I (3) of Title I of the Act of 1938 is subject to challenge, it seems apparent enough that the Act does not purport to wipe out the authority of each State to regulate flying within its proper sphere. The Civil Air Regulations adopted under the authority of the Act of 1938 make no pretence of claiming exclusive regulation of flight in the United States.

At page 631 of the report, the following language is used:

"Please note that the word 'business' and the words 'transportation for hire' have been left out of the new definition of 'air commerce.' Please note that there has been added to the definition of 'air commerce' the words 'within the limits of any civil airway' and 'which directly affects,' or 'may endanger' interstate air commerce.

Thus, we have a new definition of air commerce, almost as broad as the definition of interstate commerce used in the Wagner Labor Relations Act and in the Wage and Hour Bill. Of what significance is this?"

In answer to this claim, we need only refer to Section 1 (20) of Title I of the Act of 1938, which provides in part as follows:

"'Interstate air commerce,' 'overseas air commerce,' and 'foreign air commerce,' respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation."

It will be observed that the section incorporates the word "business" and the words "carriage . . . for compensation or hire." In reality, then we have not a new definition of air commerce but a restatement of the old definition in almost identical language with Section 1 of the Act of 1926; the three additional phrases cannot be said to constitute a new definition.

2. *Mr. Logan's report as Chairman of the Committee of the N. A. S. A. O. on the Proposed Uniform Aeronautical Code.*[2]

The advocate has the right to present his client's case in the strongest light possible, consistent with facts, but this report contains some sheer nonsense in the fundamental contentions of the Committee in that portion of their report dealing with the Uniform Law of Airflight, pages 687 to 691. Attention is directed to the following examples:

At page 688, paragraph (d) of the proposed Act is objected to on the grounds that:

"A church bell may interfere with sleep; so may automobiles, newsboys, fire engines, ambulances, trains and street cars. To this extent they may 'substantially interfere with the use' of private property used as dwellings, apartments, or hotels, but none of these things are unlawful."

The analogies cited are noises of church bells, street cars, etc., as interferences with sleep and thus the use of private property without being unlawful; the analogies are poor since it is not the noise of air planes at reasonable heights that usually constitute substantial interference, but the physical presence of planes over

2. 9 JOURNAL OF AIR LAW 687.

the land or buildings and the resulting fear of injury to life or property by low flying that arouses the landowner. While the noise incident to low flights is annoying and warrants relief, the cases do not show that mere noise of planes at lawful heights has actually caused substantial interference. The analogies further assume that noises on neighboring land have the same legal effect as noises over the land in airspace. The error is plain. While both may be nuisances, the latter may be a trespass as well, according to recent cases.

The Report contends also that flying over a nudist camp would interfere with its use but that no relief would be granted if the plane used an established airway, but otherwise if the camp were not under such airway. In reply it may be said, first, that history does not record personal modesty as characteristic of nudists, but quite the reverse; second, the height of flight would clearly constitute an important if not decisive factor in weighing the alleged interference; and third, the fact of an established airway would hardly be a vital matter since navigable airspace is determined by altitude rather than by airways.

At page 689 of the report it is argued that trees or buildings are not "using" space, but merely *displacing* space or filling it with contents. This is merely juggling words, and is actually incorrect. As a matter of physics, space cannot be displaced; it can be and is occupied or used by trees or buildings. If the landowner occupies or fills space by erecting a building, he is clearly "using" the space filled by that building. Only dire desperation could inspire the "use" of such an argument. Incidentally it might be recalled that in 1931, Mr. Logan was Chairman of the American Bar Association Committee on Aeronautical Law which sponsored a proposed uniform aeronautical code, Section 1 of which affirmatively declared that space could be used. Section 1[3] read in part as follows:

"Flight in aircraft above the lands and waters of this state, within the 'Navigible 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."

In passing it may be noted that the quoted matter carries the definite implication that as recently as 1931, Mr. Logan believed that the landowner had priority in the "use" of airspace.

At page 689 of the report, the committee contends:

"When it comes to the phrase 'adversely affect the then existing value,' we find that this is even a greater departure from established law. It would be no news to a real estate dealer that the erection of an apartment house

3. 56 Reports of American Bar Association 318.

or a store of any kind or a filling station or movie theater adjacent to or even within the same block as a dwelling house 'adversely affects its value.' An unsightly vacant lot does the same thing. But it would be, indeed news if any of these things, absent local ordinances, would be deemed unlawful. Besides, these things which we have mentioned are permanent in their nature, but flight is a momentary thing. Yet, under this act there is nothing to prevent a landowner from claiming, by interference at least, that a single flight adversely affected the value of his land and hence it was unlawful."

The analogy employed in support of this argument is that the erection of a movie theater within the same block as a dwelling "adversely affects its value" but is not unlawful. The analogy is defective in that it assumes too much. The answer is, that first, the presence of a theater does not necessarily depreciate the value of a dwelling house, since the character of the entire neighborhood and the size and population of the particular community are important factors; second, zoning regulations, just as flight regulations, protect the owner of the dwelling house to a reasonable degree; and third, it is not a single momentary flight that depreciates land values, but rather regular and continual flights over land at low altitudes which do the harm.

At page 690, the committee contends that there is no such thing as ownership of airspace. In commenting on the 2d section as a proposed compromise by which the aviator is to get a limited right of flight in exchange for absolute liability, limited, if insured, the committee says:

"The land owners have nothing to offer. Court decisions and the Federal Act have taught us this. We now know that they do not own the airspace. The right of flight is just as clear and just as untrammeled as the right to drive an automobile, and much broader. The right to drive an automobile is limited to public ways. All of the airspace is public. Absent the sovereign right of the government or of the State to set aside restricted airspaces, there is no privately owned airspace."

The answer to this contention is that court decisions and the Federal Act have taught us that the landowner can and does own airspace. Neither the 1926 Act nor the 1938 Act contains any reference to the rights of landowners in the airspace above their lands; it should require no argument to prove that Congress has no jurisdiction as to real property and the rights incident thereto among the various States, aside from Federal territory. Assuming the complete legality of Section 3, Title I, of the Act of 1938, it contains no denial of complete dominion by the land owner of airspace below the minimum altitudes of flight, and at most purports to give to the public merely an easement in the airspace above such minimum altitudes. In short, the Federal Acts leave to the courts

in the various States, including the Federal Courts within the well known sphere of their jurisdiction, the question of rights of landowners to the airspace above their lands.

The Courts in this country have not decided that landowners do not own airspace. The cases demonstrate that airspace above a man's land can be and is the subject of ownership. The following excerpts are in point:

In *Johnson* v. *Curtiss,* 1928 U. S. Av. R. 42, it is said:

"The air, so far as it has any direct relation to the comfort and enjoyment of the land, is appurtenant to the land and no less the subject of protection than the land itself; but when as here the air is to be considered at an altitude of 2,000 feet or more to contend that it is a part of the realty, as affecting the right of air navigation, is only a legal fiction devoid of substantial merit. Under most technical application of the rule, air flights at such an altitude can amount to no more than instantaneous, constructive trespass. Modern progress and great public interests should not be blocked by unnecessary legal refinements."

In *Smith* v. *New England Aircraft Company,* 270 Mass. 511, Chief Justice Rugg cited with approval the famous case of *Butler* v. *Frontier Telephone Co.,* 186 N. Y. 486, although that case involved the stretching of a wire across the land of the plaintiff and not an interference by airplane, and then went on to say that:

"For the purposes of this decision, we assume that private ownership of airspace extends to all reasonable heights above the underlying land."

While the assumption of airspace ownership does not of itself establish that such ownership exists as a matter of law, we may safely contend that the Supreme Judicial Court of Massachusetts would not assume a principle of law if such principle were out of harmony with the jurisprudence of that state, or if such a principle had no reasonable legal basis.

In *Swetland* v. *Curtiss Airport Corporation,* 41 F. 2d 929, modified in 55 F. 2d 201, the Circuit Court of Appeals denied the contention of defendants that the early cases dealing with the maxim *cujus est solum* were decided on the theory of nuisance and not trespass, and after pointing out the lack of controlling precedents in Ohio, and further that the case before the Court must be decided in relation to the necessities of the times, declared:

"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 airplane 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. See *Portsmouth Co.* v. *United States,* 260 U. S. 327. 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. It is sufficient for this case that the flying of the defendants over the plaintiffs' property was not within the zone of such expected use."

The extract just cited clearly recognizes that the owner of land has first of all the dominant right to occupy the airspace above his land as an incident to his enjoyment of the surface, and second, his rights in the lower stratum are such that a servitude could be imposed by adverse user. If such language does not mean ownership of airspace in the lower altitudes, at least, it is difficult to understand what it does mean.

In *Thrasher* v. *City of Atlanta,* 178 Ga. 514, it was provided in Section 4477 of the Georgia Civil Code of 1910 that:

"The owner of realty having title downwards and upwards indefinitely, an unlawful interference with his rights, below and above the surface, alike gives him a right of action."

In spite of that section of the Code, the Court insisted upon construing the section in the light of what it understood the old maxim to mean at common law, and in that light, held that the pleadings did state a cause of action for nuisance but were insufficient to state such cause of action for trespass. In discussing the principle of trespass, the Court said:

"It is sufficient to say that the flight of aircraft across the land of another cannot be said to be a trespass without taking into consideration the question of altitude. It might or might not amount to a trespass, according to the circumstances, including the degree of altitude; and even when the act does not constitute a trespass, it could be a nuisance, as where it 'worketh hurt, inconvenience, or damage' to the preferred claimant, namely, the owner of the soil, or to a rightful occupant thereof."

This citation implies that an action of trespass would lie if plaintiff pleaded facts constituting trespass. It is evident that if an action of trespass is maintainable, the landowner must be the owner of airspace since trespass lies only where a property right is attacked.

In *Hinman* v. *Pacific Air Transport Co.,* 84 F. 2d 755, cert. den. 300 U. S. 654, relief was denied in a case in which the factual

allegations were so bare that the final result was inevitable from the start. During the course of its opinion the Circuit 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 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."

It would appear that the Circuit Court is of the opinion that ownership of airspace is an ordinary feature of occupancy of airspace, and also that airspace really is "used," the Committee to the contrary notwithstanding.

In the same opinion the Court points out that an action of trespass for damage to airspace owned by plaintiffs is quite possible where facts are alleged to show such damage. Said the Court:

"The case differs from the usual case of enjoining a trespass. Ordinarily if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellants' land is not, of itself a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession.

Appellants do not, therefore, in their bill state a case of trespass, unless they allege a case of actual and substantial damage. The bill fails to do this. It merely draws a naked conclusion as to damages without facts or circumstances to support it. It follows that the complaint does not state a case for injunctive relief."

It is interesting to note that the Court in this case differs from the Circuit Court in the 6th Circuit (*Swetland* v. *Curtiss Airports Corp., supra*) as to the application of the principle of easement by continued adverse user of the lower stratum, but there is no conflict between the two cases on the subject of ownership of airspace.

A careful reading of the pleadings and the briefs in the Hinman case leaves no room for doubt that the plaintiff failed to state facts showing actual damage to the land to which the airspace was incident. This case expressly affirms the principle that airspace is susceptible of ownership, even though use is made the condition of such ownership. The Court does not undertake to define the boundaries of the word "use" nor to limit its application. Whether physical occupancy of airspace is essential to constitute a "use" of such space is still open to determination.

The Hinman case is of particular significance because it does deny that the old maxim *cujus est solum* is now or was in the past sound law in California. No better illustration could be given to

show that mere denial of the efficacy of the maxim is a far cry from saying that there is no such thing as ownership of airspace. The Circuit Court must have appreciated the distinction else it could not have written the language quoted above.

Other recent cases[4] in which the right of flight has been involved, directly or indirectly, contain no reasoning or decision inconsistent with the views above expressed, and detailed analysis of them is omitted for the sake of brevity.

It is not surprising that such a furious attack has been aimed at an established principle of property law since the interests of the aviation industry are somewhat hampered by that principle. The right of flight should be recognized and has been recognized both by statute and by common law decisions; the landowner has the advantage of tradition and priority by many centuries. There is no fundamental reason why the aviation industry should not grow and prosper in spite of such advantage, and it will do so. The industry must realize, however, that the right of the landowner in the airspace above his land is a property right which cannot be blown down by huffing and puffing and the reiteration of mere catch phrases.

4. *Tucker* v. *United Air Lines*, 1936 U. S. Av. R. 10; *Rochester Gas & Electric Corp.* v. *Dunlop*, 266 N. Y. S. 469; *Gay* v. *Taylor*, 1934 U. S. Av. R. 146; *Pennsylvania* v. *Von Bestecki*, 1937 U. S. Av. R. 1; *Cory* v. *Physical Culture Hotel*, 14 Fed. Supp. 977, 986, 88 F. 2d 411; *Mohican & Renna* v. *Tobiasz*, 1938 U. S. Av. R. 1. See also Secs. 158, 159, 194, Restatement on Torts (American Law Institute) Sec 3, Uniform Aeronautical Code.