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## AVIATOR'S RIGHTS IN AIRSPACE

### *United States v. Causby*<sup>1</sup>

The United States leased an airport approximately one-half mile from respondents' chicken farm near Greensboro, North Carolina. Continuous flights of Army and Navy planes in landing and taking off rendered respondents' land unfit for a chicken farm, and they brought suit alleging that their property had been taken by the Federal Government without compensation. The Court of Claims held that an easement had been taken and made an award of two thousand dollars to respondents.<sup>2</sup> On *certorari* (two justices dissenting) the Supreme Court agreed that a

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<sup>1</sup> 66 S. Ct. 1062 (U. S. 1946).

<sup>2</sup> 60 F. Supp. 751 (1945).

servitude had been imposed upon the land. However, since the Court of Claims failed to make certain essential findings as to the nature of the easement, the Supreme Court was unable to determine the correctness of the amount of the award, and so reversed and remanded to the Court of Claims for further determination of the exact amount of damages.

This decision brings to the fore those several theories as to airspace ownership which have so often plagued the courts in the past. Three of these, the *ad coelum*, the zone, and the easement theories, may be catalogued as being beneficial to the protection of the landowner's rights against trespasses by the aviator; the fourth and last, the nuisance theory, favors the aviator against the landowner.

The *ad coelum* theory, a product of the common law, conferred the greatest possible rights on the landowner. It gave him the sole right to all the airspace above his land, and made any invasions of this airspace an actionable trespass.<sup>3</sup> Such a rule, making trespassers of all who flew over land other than their own, had to be modified upon the advent of aviation as a factor in our civilization.

One modification of the above was an attempt to adjust the conflicting interests of the landowner and the aviator by dividing the airspace into zones or strata. This zone theory limits the owner's rights in the airspace to as much of that space as he can possibly make use of, or needs, for the fullest enjoyment of his land.<sup>4</sup> The landowner is considered as having exclusive possessory rights to the lower zone, and any intrusion is regarded as an invasion of his property, subjecting the intruder to suit for trespass. The upper zone, however, is regarded as being beyond the scope of agrarian ownership. The aviator may use it freely provided he does not unreasonably interfere with the quiet enjoyment of the surface area. Such unreasonable interferences will give the landowner the right to bring an action for nuisance,<sup>5</sup> trespass being limited to invasions of an area effectively possessed.

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<sup>3</sup> *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328 (1925), shooting at birds; *Whittaker v. Stangwick*, 100 Minn. 386, 111 N. W. 295 (1907), where ducks shot across land fell on said land; *Portsmouth Harbor L. & H. Co. v. United States*, 260 U. S. 327, 67 L. Ed. 287, 43 S. Ct. 135 (1922); *Hannabalsen v. Sessions*, 116 Iowa 457, 90 N. W. 93 (1902), thrusting an arm across a neighbors property in an angry manner.

<sup>4</sup> *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N. E. 2d 575 (1942).

<sup>5</sup> *Swetland v. Curtiss Airports Corporation*, 41 F. 2d 929, U. S. Av. R. 21 (N. D. Ohio 1930), modified on appeal, 55 F. 2d 201, 83 A. L. R. 319, U. S. Av. R. 1 (C. C. A. 6th, 1932); *Cory v. Physical Culture Hotel*, 14 Fed. Supp. 977 (W. D. N. Y. 1936); *aff'd*, 88 F. 2d 411 (C. C. A. 2d 1937).

The third of the pro-landowner theories is the theory of airspace ownership subject to a public right of avigation.<sup>6</sup> It attempts to reconcile the claims of the landowner and the aviator to the airspace by recognizing the landowner's unlimited ownership of upward space, but at the same time subjecting his upward ownership to a public right of avigation, "at a reasonable height and in a reasonable manner."<sup>7</sup> This, in effect, gives the aviator an easement in the airspace, but when he makes use of the easement granted he is required to do it at such an altitude and in such a manner as not to interfere with the landowner's use of the land. If he flies so low as to interfere, the landowner is not limited to a suit in nuisance, but may bring the possessory action of trespass against him, since the theory recognizes the landowner's unlimited possession of the upward space. The easement granted to use this space is automatically revoked when the aviator abuses his privilege by low flights, thereby allowing trespass to lie.<sup>8</sup>

Contradistinguished from the three theories advocated by the landowner groups, the air interests of this country feel that questions as to air rights should be decided by the application of the nuisance theory. It does not regard mere entries in the superincumbent airspace as trespasses, unless such entries cause actual harm or damage to the landowner. Low flights which do not touch the ground, or some structure thereon, are recognized only as nuisances, and the landowner cannot bring trespass for such low flights unless he can prove an actual touching. This theory denies any ownership at all in the airspace save where actual use thereof is being made by the landowner. It is admitted that the landowner has a prior right of occupancy wherever he is making present use of the space above his land.<sup>9</sup> This theory does not afford enough protection to the landowner, and is at odds with the law as interpreted by those courts holding that invasions of the airspace column at low altitudes are actionable trespasses.<sup>10</sup>

In the present case, the United States unsuccessfully attempted to argue the nuisance theory in its behalf. Its contention was that the Air Commerce Act of 1926<sup>11</sup> as

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<sup>6</sup> RESTATEMENT, TORTS, Sec. 159, 194.

<sup>7</sup> *Ibid.* Sec. 194, comment g.

<sup>8</sup> *Guith v. Consumers Power Co.*, 36 Fed. 2d 21 (D. Mich. 1940).

<sup>9</sup> *Hinman v. Pacific Air Transport*, 88 Fed. 2d 755 U. S. Av. R. 1 (C. C. A. 9th 1936), *cert. den.* 300 U. S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

<sup>10</sup> *Supra*, ns. 3, 4, 7.

<sup>11</sup> 49 U. S. C. (1934) Sec. 171.

amended by the Civil Aeronautics Act of 1938<sup>12</sup> should be interpreted along the lines of the nuisance theory. The Civil Aeronautics Authority had defined navigable airspace as "airspace above the minimum safe altitudes of flight",<sup>13</sup> and flights above this minimum safe altitude were exempt from suit except in nuisance. The government was contending that all the airspace needed for taking off and landing was above the minimum safe altitudes of flight and so such airspace was subject to a public right of flight therein.

The Supreme Court pointed out the hiatus in the logic of the petitioners when it distinguished between the thirty to one safe glide angle,<sup>13a</sup> which was simply approved by the C. A. A. as the safe way to land and take off, and the navigable airspace which Congress placed in the public domain.<sup>14</sup> The Court said that the flight of planes skimming the earth though not touching it, was as much an appropriation of the use of the land as a more conventional entry upon it. The intrusion here was so immediate as to subtract substantially from the owner's full enjoyment of the property, making the use of this property quite limited. ". . . the landowner, as an incident to his ownership, has a claim to it [this airspace] and . . . invasions of it are in the same category as invasions of the surface."<sup>15</sup>

In its conclusion, the Court indicated that normally the inconvenience of planes flying over land is not compensable. "The airspace, apart from the immediate reaches above the land, is part of the public domain."<sup>16</sup> The Court did not determine in this case just how far upward these "reaches" extend. However, the implication that can be drawn from the decision is that since the thirty to one safe glide angle approved by the C. A. A. passed over respondents' property at eighty-three feet, the "reaches" end somewhere between eighty-three and 500 feet in the daytime, and between eighty-three and 1000 feet at night.<sup>17</sup> Flights

<sup>12</sup> *Ibid.*, Sec. 401.

<sup>13</sup> *Ibid.*, Sec. 180.

<sup>13a</sup> A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

<sup>14</sup> *Supra*, n. 13.

<sup>15</sup> 66 S. Ct. 1062, 1068 (1946). See also Bouve, *Private Ownership of Navigable Airspace under the Commerce Clause*, 21 Amer. Bar Assoc. Journ. 416, 421-422 1935; Hise, *Ownership and Sovereignty of the Air or Air Space above Landowner's Premises with Special Reference to Aviation*, 16 Ia. L. Rev. 169 (1931); Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 Boston Univ. L. Rev. 414 (1932).

<sup>16</sup> 66 S. Ct. 1062, 1068 (U. S. 1946).

<sup>17</sup> 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, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1, Secs. 61.7400, 61.7401) and from 300

over private lands were not considered by the Court to constitute a taking unless they were so low or so frequent as to be a direct and immediate interference with the enjoyment of the land, but such flights would be considered as trespasses if below 500 feet in daytime, or 1000 feet at night.

Now let us turn to one of the more pressing legal problems at hand today—the protection of airport approaches from dangerous obstructions. With the increased size and numbers of planes, the need arises either for larger airports, or the further removal of structures and obstructions which surround these airports. Generally speaking, it would be financially prohibitive to purchase all the additional land needed, and a solution has been sought in the exercise of the police power to control the height of structures on property adjoining airports. Such control has generally been effected through zoning legislation and regulations.

Maryland has had one case<sup>18</sup> in which the validity of a state zoning statute was questioned. The statute under attack read in part:

“the height of buildings and/or other structures is hereby regulated and restricted within a distance of five thousand feet from any such public Airport or land (sic.) Field measured at a right angle from any side or in a radial line from any corner of the established boundary line thereof in any and all directions as follows:

No building or structure may be erected whose height exceeds one-fifteenth the shortest distance from the nearest side of said building or structure to the nearest established perimeter as distinguished from boundary line of such public Airport or Landing Field.”<sup>19</sup>

This statute limited the plaintiff very drastically as to the height of any buildings he could erect on his land. The Court announced that under this statute the plaintiff would be able to erect a building only six and two-thirds feet high at a distance of 100 feet from the perimeter of the

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to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, Fed. Cum. Supp., Tit. 14, ch. 1, Secs. 60.350-60.3505.

<sup>18</sup> *Mutual Chemical Co. v. Mayor and City Council of Baltimore*, Circuit Court of Baltimore City, Daily Record, Jan. 27, 1939, U. S. Av. R. 11, (1939), noted in 10 Air L. Rev. 312 (1939), 10 J. Air L. 424 (1939).

<sup>19</sup> Md. Code (1939) Art. 1A, Sec. 59.

airport, and one only thirty-three feet high at 500 feet from the perimeter. The Court felt that such prohibitions were confiscatory since they prevented a reasonable use of the plaintiff's land. It went on to say that this act purported to be a zoning regulation, and that it did not contain any provisions for the condemnation of unimproved property, or of the rights the owners may have to erect new buildings or structures above the limits of the act. The effect of the act was to confiscate the property of the plaintiff, and this, the Court said, must be done by condemnation proceedings. The Court stressed the fact that municipalities and counties of the state were given the power of exercising the right of eminent domain for the acquisition of property for airports.<sup>20</sup> The Court held that the proper method of acquiring the right to the exclusive use of the airspace at and near the boundaries of public airports would be either by purchase or condemnation of the surface of the land beneath the required airspace, or by purchase or condemnation of the right of the owner of the surface to erect buildings thereon beyond some designated height.

This particular airport zoning regulation was too strict and limiting in its scope to be valid. It was thus not a proper use of the police power. The fact, however, that this one regulation was invalid does not appear to be the basis for any claim that all airport zoning is unsound. Other state courts have held that the limiting of the height of structures which can be erected near airports, through zoning legislation, is a valid exercise of the police power.<sup>21</sup>

This brings us to a consideration of the constitutionality of the latest Maryland Zoning Statute<sup>22</sup> which was obviously enacted with an eye to revising and moderating the type of legislation struck down by the *Mutual Chemical Co.* case just noted.<sup>23</sup> Under this 1944 statute political subdivisions of the state are, in general, authorized to adopt, revise, administer and enforce *reasonable* airport zoning regulations under the police power. There is set up a Board of Appeals in each subdivision which can issue variances from the zoning regulations adopted where the case is one of practical difficulty or unnecessary hardship.

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<sup>20</sup> *Ibid.*, Secs. 35, 36.

<sup>21</sup> *Supra*, n. 4, where by dictum the Court said: ". . . it should be remembered, however, that the statute in 40A-401 now contains adequate provisions for securing and regulating the approach to public airports."; *United States v. 357.25 Acres of Land*, 235 C. C. H. sec. 1883 (W. D. La. 1944).

<sup>22</sup> Md. Laws 1944 (Sp. Sess.) Ch. 13.

<sup>23</sup> *Supra*, n. 18.

Any person desiring to erect any structure or increase the height of an existing structure in violation of any enacted zoning regulations may apply to this Board for a variance. There is further provided adequate judicial review, by a court of record, of any contested decision of the Board of Appeals. The court of record may affirm, modify, or reverse the Board, and appeal from the decision of the court of record to the Court of Appeals of Maryland is also allowed. We find in this statute an ameliorating section<sup>24</sup> which reads:

“In any case in which: . . . (d) any zoning regulation or any order, requirement, decision or determination issued or made by an authority having the power to do so interferes with the use or enjoyment of private property, or otherwise infringes upon private property rights to such an extent that it would be a taking of private property without just compensation under the provisions of the Constitution of the United States or the Constitution of Maryland, the political subdivision owning, controlling or operating the particular airport affected may acquire by purchase, grant, lease, or condemnation in the manner set forth in Article 33A . . . or in the manner provided by law under which such political subdivision may be empowered to acquire property for public purposes, other than street purposes, such as air right, easement or other right, title or interest in property as may be necessary or proper to eliminate the airport hazard or to protect the said aerial approaches . . .”

It would seem that this statute would survive an attack on its constitutionality similar to that directed at the 1939 statute in the *Mutual Chemical Co.* case.<sup>25</sup> The presence of adequate judicial review, and the recognition of the need for condemnation proceedings in certain cases are both conscious attempts to meet the objections raised to the 1939 statute. The factor, too, of the granting of variances is to be noted as official recognition of the fact that some regulations might well be too restrictive on certain landowners, and that they should be relaxed in deserving cases and within certain bounds. All of these elements were missing in the 1939 statute.

The present decision of the Supreme Court of the United States raises grave doubts as to the constitutionality

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<sup>24</sup> *Supra*, n. 22, Ch. 13, Sec. 65.

<sup>25</sup> *Supra*, n. 18.



of those zoning regulations in which the primary purpose is to acquire a public easement of avigation in the "lower reaches" of the airspace for the taking off and landing of planes, without the payment of just compensation to the private landowners adjacent to such airports. Furthermore it supports the position taken by the Baltimore City Court, that the exercise of the power of eminent domain and *not* the police power is the proper procedure for acquiring adjacent air space rights for the taking off and landing of planes.