THE EXISTENCE OF THE RIGHT OF FLIGHT

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The exigencies of war determined and the International Flying Convention gave expression and international recognition to the absolute sovereignty of a state in the airspace overlying its territorial limits. Protection of their dominions and their populations compelled the nations to abandon any theory of freedom of aerial navigation comparable to the established principle of freedom of marine navigation. National existence made necessary an assumption of complete jurisdiction within the aerial limits of each state and of all persons and machines operating therein. The delegates to the Conference stated this conclusion in language succinct and direct:

> "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory." [1]

This proposition, so definitely concluded in the international field, became an unquestioned principle of the law of nations. It became then the problem of the states to administer within their several domains the law which they had accepted. They wrote into their statutes the fundamental proposition that the sovereignty of each state extended to and included, to the exclusion of any rights therein of any foreign state, the airspace overlying their territories, land and water.[2]

Having asserted this dominion, it was necessary to regulate the use of the airspace by those who traveled therein, and various enactments have followed one another from legislative halls dealing with the requirements which must be met by men and by machines which navigate above the earth.

Such an enactment is the "Air Commerce Act of 1926" [3] which passed the Congress and became effective in the United

[1] Convention Relating to International Air Navigation, Art. I (1919).

[2] See, for example, AIR NAVIGATION ACT (1920) 10 & 11 GEO. V, c. 80, of Great Britain.

[3] 44 STAT. 568 (1926), 49 U. S. C. A. § 173 (1930).

States and its territories on May 20, 1926. As did the other nations, the United States in this, its original statute controlling aerial navigation, asserted its sovereignty in its superincumbent airspace:[4]

> "The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone."

In pursuance of this sovereignty the Congress extended its control into the new domain, or rather exercised for the first time the rights of control which had hitherto existed unexercised in the realm in which activity recently begun necessitated regulation.

Similarly, the individual states of the Union declared themselves supreme in their respective aerial territories. The Uniform State Law for Aeronautics expressed the principle as follows:[5]

> "Sovereignty in the space above the lands and waters of this State is declared to rest in the State, except when granted to and assumed by the United States pursuant to a constitutional grant from the people of this State."

In the subsequent exercise of this sovereignty the legislative bodies of the states enacted regulatory measures providing for flight in the airspaces subject to their respective jurisdictions.[6]

After asserting the sovereignty of the federal government, the Congress declared that the airspace should be free for navigation above certain heights to be prescribed by the Secretary of

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[4] *Ibid.* § 6a, 49 U. S. C. A. § 176.

[5] UNIFORM AERONAUTICS ACT. See HANDBOOK OF COMMISSIONERS ON UNIFORM STATE LAWS (1922) 323.

[6] It should be stated that not all of the 48 states of the Union have exercised their right to regulate flight. At the time of writing, there are such enactments in 42 states. These statutes vary considerably in the extent of regulation. The differences in requirements have caused considerable discussion and some concern among lawmakers, executive boards and members of the several phases of the aeronautical industry. There is at present a strong sentiment in favor of uniformity of regulation and the National Council on Uniform Aeronautic Regulatory Laws called by the Aeronautics Branch of the Department of Commerce in Washington on December 16 and 17, 1930, had as its sole purpose the discussion of such uniformity from the standpoints of its desirability and advisability with the suggestion of means for its procurement. In the majority of the states the federal regulations promulgated under the authority of the Air Commerce Act are accepted.

Commerce under the authority vested in him by the statute. Freedom of navigation is stated in a provision reading: [7]

> "As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

Congress did not restrict the discretion of the Secretary in the determination of the "navigable airspace" and hence we must conclude that so far as Congressional intention went, the entire airspace is "subject to a public right of freedom of air navigation" and that it is solely the necessity as seen by the Secretary of Commerce of prohibiting flights at certain low altitudes that prevents an aeronaut from flying wheresoever he wills.[8]

The Uniform State Law for Aeronautics, however, went somewhat further and took cognizance of the possible need of the underlying land owner to certain rights in the airspace above his plot of ground. It recognized an ownership, though qualified, of such airspace in the underlying land owner, and declared: [9]

> "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."

This right of flight which is reserved from the absolute ownership of the surface owner and which impairs the completeness of his title to the airspace, is provided for as follows: [10]

> "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 over the land or water, is put by the owner, or unless

[7] AIR COMMERCE ACT, *supra* note 3, § 10, 49 U. S. C. A. § 180.

[8] The federal regulations restrict flights to altitudes over 500 feet in unthickly populated districts and to altitudes over 1000 feet in more urban localities and at all times to such heights as will permit of the making of a forced landing in case of failure of the power plant.

[9] UNIFORM AERONAUTICS ACT, *supra* note 5, § 3.

[10] *Ibid.* § 4.

so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

It will be noticed that there is no indication, either in the federal or the state enactments, of the source of this right to traverse the airspace. It is stated categorically to exist and existing property rights are declared to be subservient to it. No derivation of it is given, no justification of its creation deemed necessary.

The statement of a principle by legislation does not, of course, necessarily mean that the principle stated is a valid enunciation of the law. Legislative enactment cannot make legal what is *per se* illegal. There exist certain rights which, for the benefit of organized society, cannot be abrogated and when an attempt to invade such rights occurs it is the attempt itself which must fall and not the rights which have been its subject. Examples of the failure of legislatures to invade this realm are repeatedly occurring and every pronouncement of the unconstitutionality of a statute is a determination of the inability of legislation to alter inviolate rights.

Yet the legality of the existence of the "right of flight" or "right of freedom of air navigation" is perhaps the most fundamental question which can be asked in all aeronautical law. It is no ancient right venerated by ages of the common law for it presents a problem unique to the present century. It is a principle for the validity of which we today must vouch or which we must reject at least in the absolute form in which it has been pronounced and almost universally accepted, for upon our determination and establishment of it in the philosophy of law depend inestimable and inconceived rights of future generations.

So far as the rights of the owner of the earth's surface in the airspace overlying his land have been adjudicated, it was until very recently accepted that his title to such airspace was complete. That he has rights of ownership therein is beyond question; that the airspace is property to which his title is absolute has never been decided though numerous cases have indicated an affirmative answer. We refer to the litigation involving overhanging eaves,[11]

[11] Smith v. Smith, 110 Mass. 302 (1872); Lawrence v. Hough, 35 N. J. Eq. 371 (1882).

cornices,[12] telephone wires,[13] leaning walls,[14] and shooting over another's land.[15] These cases have decided that insofar as their subject matters invaded that space which overlies the surface boundaries of the landowner, they invaded his property rights therein. The rights which the courts determined had thus been infringed are rights which are the attributes of real property.

Relying upon the authority of these cases for the statement that the landowner is also the possessor of rights in the airspace, which if they exist at ten feet above the surface must if they be rights attribute to real property be the same at one hundred or one thousand feet, there is at once propounded the query: How can there exist a right to navigate the air without the consent of the surface owners?

This right of air navigation, if it exists, must deprive the surface owner of certain of his property rights in the superimposed airspace. Such usurpation can under our law occur in two ways: by the exercise by the legislature of the power of eminent domain and by the exercise of the police power. These two powers of sovereignty are basically different both in the nature of the powers and in their exercise, but each of them invades or destroys property rights of individuals.

Eminent domain has been defined as "the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare".[16] It is a right inherent in the state, paramount to any proprietary rights of the individual, and "has its foundation in the imperative law of necessity".[17] By virtue of it the state is empowered to take the property of a private owner for a use beneficial to the general welfare of the community. Insofar as the expropriation extends,

[12] Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278 (1897); Wilmarth v. Woodcock, 58 Mich. 482, 25 N. W. 475 (1885).

[13] Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906).

[14] Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491 (1902).

[15] Portsmouth Harbor Land & Hotel Co. v. U. S., 260 U. S. 327, 43 Sup. Ct. 135 (1922); Whittaker v. Stangvick, 100 Minn. 386, 111 N. W. 295 (1907); Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328 (1925).

[16] LEWIS, EMINENT DOMAIN (3d ed. 1909) § 1.

[17] Jacobs v. Water Supply Co., 220 Pa. 388, 393, 69 Atl. 870, 871 (1908).

it is complete and absolute and abrogates the entire rights of the individual in and his ownership of the property taken.

It can be exercised only by legislative authority and must be for a public benefit,[18] though the public benefit need not accrue to the entire community and it is sufficient if the purpose of the appropriation actually promotes the general welfare or convenience notwithstanding the fact that a lesser number of individuals may be peculiarly and directly benefited thereby.[19]

The determination of what is a public use is a question subject to unclearly defined limits, but broadly we may say that whatever enures to the benefit of the general welfare is a public use. The courts have declared this definition to apply to a wide variety of subjects and have stated that "if the proposed improvement tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable number of the community, the use is public".[20]

It would seem that this statement is somewhat excessive in its scope, but it indicates the extent to which the power of eminent domain has been applied and permits us to draw the conclusion that if it were considered necessary the courts would with no hesitation determine that the state could exercise this power over the airspace within its limits for the purpose of creating airways for aerial navigation. Exercising it in this manner would unquestionably promote the industrial welfare of the community even though it were urged the majority of the public would not realize any immediate benefit from such a taking. This would seem especially true since it has been declared that certain "intangible" rights appurtenant to real estate, such as the right of a riparian owner to access to the navigable portion of a stream, the right of light and air, may be appropriated without a condemnation of the land.[21]

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[18] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676 (1905).

[19] Jacobs v. Water Supply Co., *supra* note 17; Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744 (1899); Wisconsin River Improvement Co. v. Pier, 137 Wis. 325, 118 N. W. 857 (1908).

[20] Jacobs v. Water Supply Co., *supra* note 17, at 393, 69 Atl. at 871; Clark v. Nash, *supra* note 18.

[21] State *ex rel.* Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423 (1908).

This could be done, of course, only upon the payment of compensation for the property taken (the Federal Constitution by Article V and the Fourteenth Amendment requires compensation for property taken under the authority of the right of eminent domain, and the constitutions of the states contain similar provisions) which is an administrative problem requiring scrutiny of the facts in each particular case. It is possible that the injuries arising to the property owners might be considered so indirect that no claim for damages would be supported, since the injuries for which compensation is to be made must be real and substantial,[22] and consequential injuries have been held not included in the computation of damages for appropriation of property under this power.[23]

The police power, on the other hand, does not appropriate the property of the individual to a use beneficial to the public at large, but prevents the use of the property by the owner to the detriment of the public. The exercise of this power is not an expropriation of property but a prohibition of the use and enjoyment of property. It is an inhibitory power, essential to the sovereignty of the state, and one of regulation in the interests of organized society rather than an assertion of superior property rights by the sovereign. Every property owner is subject to this power on the principle that "all property is held under the implied obligation that the owner's use of it shall not be injurious to the community".[24] It has been described as "the power of the State . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity".[25] This definition includes many of the purposes for which the state may exercise its power of eminent domain,[26] and indeed the exercise of the two powers

[22] Backus & Sons v. Fort Street Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445 (1898).

[23] Bedford v. U. S., 192 U. S. 217, 24 Sup. Ct. 238 (1904); Stewart v. Rutland, 58 Vt. 12, 4 Atl. 420 (1886).

[24] Mugler v. Kansas, 123 U. S. 623, 665, 8 Sup. Ct. 273, 299 (1887).

[25] Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (1885).

[26] See *supra* note 20.

often operates to very similar effects. The courts are, however, alert to the confiscation of property by an exercise of the police power and such a use of it will not be countenanced.

The police power is, in contrast with the power of eminent domain, exercisable without compensation to the property owner who is presumed to be benefited by that which promotes the general welfare. The prohibition of certain uses of property are not considered a taking or an appropriation of the property and will not entitle the property owner to damages.

> "Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." [27]

The police power, then, is exercisable only in the regulation of the use to which an owner puts his property. It is a limitation upon his rights of enjoyment therein, but does not deprive him of his ownership and in no way clouds his title thereto. His rights of alienation are as unrestricted as before the exercise of the power and the completeness of his title remains unaltered. His property is not subjected to any right in any other person or entity by police regulation. The exercise of the power has operated not on or against his property but against him in his use thereof.

Can then the right to navigate the airspace come within the application of this sovereign power? The right of flight resides in others than the property owner over whose land the flight is made. It does not forbid the use or occupation of the airspace

[27] Mugler v. Kansas, *supra* note 24, at 696, 8 Sup. Ct. at 301; Chicago, etc., Ry. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 352 (1906).

by the land owner in any manner he may choose. It acts not upon his use of his property but subjects his property to a use by others. It is not an inhibitory regulation, but an affirmative assertion of a right in others. As such it must deprive him of certain rights which he hitherto possessed and can be not a regulation but must be a confiscation of his property. We must therefore conclude that no statement of the existence of a freedom of navigation in the airspace can be declared to have been an exercise of and be upheld under the police powers of a state or of the federal government.

Hence we find the right of flight is not inclusive within the scope of the police power because it operates as a direct deprivation of the property rights of the land owner, and thus resembles an appropriation by right of eminent domain. Eminent domain, however, can be exercised only by legislation. There must be an active affirmative assertion by the legislature of its intention to appropriate the property thus taken, and a mere statement of the existence of the right of flight cannot in itself act as a taking. In this matter of aerial navigation, an exercise of the power of eminent domain has not been made.

Yet the air is thronged with men and machines, traversing the nation almost as they will, without regard for the place of their passing other than in the interest of their own safety keeping as nearly as possible to developed and frequented airways. And this use of the upper regions is acquiesced in, not only by the governments which have in their legislation given their approval, but also by the public, the individuals over whose land the flights are made.

For this acceptance as of an established right of the winging of aviators wheresoever they wish, there must be a deep and underlying conviction in the public conscience of the fundamental rightness of the act. Since it is so universally accepted, it must likewise be as universally acknowledged, for it has passed the stage of acquiescence engendered in a curious and indulgent public by a novelty they cannot understand and only see to wonder. This acknowledgment can arise from no other source than a prevalent belief in the authority of those who fly to use the air-

space above the lands of every individual. The "right" has been assumed almost without question and its assumption indicates the conviction of the public that it exists.

It has been countenanced by the courts in several decisions which have not stated decisively that there exists a right to traverse another's airspace, but which have indirectly acknowledged its existence, conceding rather than deciding that the public has this right of flight. Thus we find, in *Johnson v. Curtiss Northwest Airplane Co.*,[28] a civil court temporarily enjoining the flight of defendant's aircraft above the plaintiff's property at an altitude below 2000 feet, for the reason that "to apply the rule (of absolute ownership of the upper air) as contended for would render lawful air navigation impossible."

Commonwealth v. Nevin and Smith [29] concluded that a flight over the prosecutor's land was not a trespass within the contemplation of a criminal statute which provided penalties for an entry "upon land", the court declining to extend the meaning of that phrase to a flight through the air over the land.

More recently the right was tacitly acknowledged in an action for damages for personal injury arising from an accident caused by a flight of defendant's aircraft at an altitude below the minimum established by the Department of Commerce regulations.[30] Neither the court nor the litigants questioned the defendant's right to make a flight over the plaintiff's lands, confining themselves to a consideration of the applicability of the Department's regulations to the particular case.

Smith v. New England Aircraft Company [31] more directly raised the question in an action brought to enjoin the defendant from making flights "in such manner as to constitute a trespass and nuisance" over the plaintiff's property from the defendant's airport located contiguously. Certain flights made at altitudes of less than 100 feet were held to constitute trespasses, the court citing with approval Pollock's suggestion that "the scope of pos-

[28] (1928) U. S. AVIATION REPORTS 42 (Dist. Ct., 2d Jud. Dist., Mont. 1923).
[29] 2 D. & C. 241 (Pa. 1922); (1928) U. S. AVIATION REPORTS 39.
[30] Neismonger v. Goodyear Tire & Rubber Co., 35 F. (2d) 761 (N. D. Ohio 1928), (1929) U. S. AVIATION REPORTS 96. See comment thereon (1929) 78 U. OF PA. L. REV. 663.
[31] 170 N. E. 385 (Mass. 1930), (1930) U. S. AVIATION REPORTS 1.

sible trespass is limited by that of possible effective possession".[32] No damages were directed for such trespasses, as the bill sought an injunction controlling flights which the court did not consider constituted a nuisance. As to other flights between altitudes of 100 and 500 feet, the court declined to rule, but held that the right of flight above 500 feet was legally given by statutes in an exercise of the police power. "So far as concerns property of the plaintiffs the regulation of 500 feet as the minimum altitude of flight by aircraft cannot rightly in our opinion be pronounced to be in excess of the permissible interference under the police power and under regulations of interstate commerce with the rights of the plaintiffs in the airspace above that height over their land." It is submitted that since the exercise of the police power operates against the use to which a property owner may put his property and is inhibitory on the proprietor, giving no rights in others as to such property, the ruling was incorrectly founded and cannot be supported.

The contention of the plaintiffs that the several federal and state enactments stating the right of aerial navigation and the regulations promulgated thereunder deprived them of their property contrary to their constitutional rights was dismissed on the same grounds and, it is submitted, is subject to attack for the same failure to distinguish the true functions and effect of the police power. It would seem that the court assumed rather than decided that the right to navigate the airspace existed.

Swetland v. Curtiss Airports Corporation[33] was an action similarly brought in equity to enjoin trespass by and nuisance from the flight of aircraft from defendant's adjacent airport over the plaintiff's lands. The court extensively reviewed judicial statements in seeking a basis for its conclusion that the right of flight exists, but, as have others who have given the problem consideration, found no decisive holding controlling the question. It would seem that again the exercise of the police powers of the federal and state governments was fallen back upon to substantiate a rejection of the property owner's contentions.

[32] POLLOCK, TORTS (13th ed. 1929) 362.

[33] 41 F. (2d) 929 (N. D. Ohio 1930), (1930) U. S. AVIATION REPORTS 21.

Thus we find the acceptance by the public of the right of aviators to traverse the airspace being recognized by the courts who also indicate their belief in its existence and attempt a justification of it. Because eminent domain has not been used to create rights of way for flight, that other power of sovereignty, whose comprehensiveness has not been defined, is indicated as its source. This, as has been stated, does not appear to be applicable to the problem and seems rather to confuse than to clarify.

It is, however, apparent that the right will not be declared non-existent. It must be agreed that not only is it practiced but that its exercise is justified. It is a new right just now developing, as have evolved in the dim ages of the growth of law other rights. As other rights were recognized to exist, so this one must be recognized.

A statement of Chief Justice Gibson of Pennsylvania made in 1844 is unusually pertinent in this respect: [34]

> "The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world."

Again the exigencies of social evolution require a readjustment of legal principles and legal values. This has happened before; it will unquestionably occur hereafter. The vastness of the American continent necessitated the discarding of the rule limiting the navigability of streams to those in which the ebb and flow of marine waters reflected themselves.[35] The colonization of the limitless spaces of our Western states required the right of all settlers to pasture their herds on the open prairies without regard to the ownership of the lands whereon they grazed.[36] The aridity of the Western states demanded the creation of water rights not tenable in other sections.[37]

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[34] Steinman v. Wilkins, 7 W. & S. 466, 467 (Pa. 1844).
[35] The Daniel Ball, 10 Wall. 557 (U. S. 1870).
[36] Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305 (1890).
[37] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676 (1904).

These customs arose in direct opposition to the rules of the common law as it existed; but because the common law is an expression of the legal requirements of the people living under its aegis, the old rule was abolished and the new one recognized.

Likewise in this matter of the right of flight, new conditions have demanded the abrogation of old laws. The economic advance of civilization through the increase of its inventions has reached a point where only a revaluation of the rules of social conduct will suffice. To maintain the hithereto accepted standards without alteration will paralyze the onward rush of industry, in fact will kill an industry, important to peaceful society, whose growth is essential to national security. But more important than the death of an industry is the development of a means of communication which will bind more and more securely, more and more compactly, the whole social organization into a nearer realization of that unity toward which it grows.

It is, then, not an old right which permits the navigation of the air. It is a right now created, not by legislatures, not by courts, but by the evolution of society itself. Newly nascent, its force has yet to come to maturity and to the curtailments which certainly await it. The limits to be imposed upon it must be determined as required and cannot be anticipated, though even now the pronouncements of regulatory boards have gone far in that direction.

Public acquiescence in and practice of the right have established its existence. No other justification of it need be made, for so have developed all those cherished principles which constitute the body of our law. To maintain the old rules, to refuse to adapt them to new conditions, is contrary to the very essence of the common law which gives it the superiority it commands among legal philosophies.