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THE RIGHT OF AIR FLIGHT

By

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Just as definitely that surface owners have the exclusive right and possess ownership in the airspace above their surface areas necessary to the reasonable use and enjoyment of the surface and the airspace above within the zone of effective possession,¹ so does aircraft have the right of flight in the airspace above private property provided such aerial navigation does not interfere with the existing use and enjoyment of the surface and the airspace above by subjacent owners or unless such flight is imminently dangerous to persons and property on the surface; and of course aerial navigation must be above minimum safe altitudes of flight as provided by federal and state laws and regulations in the proper exercise of police powers, inherent or delegated.

Article 3 of the *Uniform State Law for Aeronautics* in declaring that ownership of airspace is invested in the several owners of the surface beneath, makes the important proviso that such ownership is subject to the right of flight as described in section 4, and the latter section reads in part as follows:

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

Twenty-one of the states of the Union have adopted the *Uniform State Law for Aeronautics* in whole or in part, and all twenty-one have adopted section 4 declaring the lawfulness of flight. Other states have through legislation or court decisions sanctioned the right of flight. Every state in the Union has in one form or another given legal force to the concept of the right of flight. This has been accomplished by expressed terms or by clear implication.

Section 5 of the *Regulatory Act* of the State of Nebraska declares that the "air above the State of Nebraska is by this act declared to be here for the use and operation of aircraft subject to such rules and regulations."

While the state law of Pennsylvania also has adopted the provisions of section 4 of the *Uniform State Law for Aeronautics* declaring the lawfulness of flight, it also recognizes the right of flight in the following provisions of this state law:

"The ownership of the space over and above the lands and waters of this Commonwealth is declared to be vested in the owner of the surface beneath, but such ownership extends only so far as is necessary to

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¹ Eubank; John A., "Doctrine of the Airspace Zone of Effective Possession", B.U.L. Rev., June 1932 cited in U.S. v. Causby, 328 U.S. 256 (1945).

the enjoyment of the use of the surface without interference, and is subject to the right of passage or flight of aircraft. Flight through the space over and above land or water, at a sufficient height, and without interference to the enjoyment and use of the land or water beneath, is not an actionable wrong, unless said flight results in actual damage to the land or water, or property thereon or therein, or use of the land or water beneath."²

Section 10 of the *Air Commerce Act* of 1926 gave legal sanction to the right of flight. The section authorizes the right of flight in making a declaration of navigable airspace with relation to interstate and foreign air commerce as follows:

"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."

Like section 10 of the *Air Commerce Act* of 1926, section 3 of the *Civil Aeronautics Act* of 1938 provides for a public right of flight. The section states:

"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."

Here again there is a recognition of the right of flight and a declaration of the right of aerial navigation in so far as inter-state and foreign air commerce is concerned. Subdivision 24 of section 1 of the *Civil Aeronautics Act* also declares that navigable airspace is any airspace above the minimum altitudes of flight prescribed by regulations issued under the Act.

The *Restatement of the Law of Torts* regards aerial navigation over property as a privilege rather than a right. In other words, in the view of the *Restatement*, the operation of aircraft in the airspace over private property above minimum safe altitudes as prescribed by governmental authorities and such operation interfering in no way with the subjacent owners' rights, is a privilege of flight and not a right of flight. Section 194 of the *Restatement* declares:

"Travel Through Air Space.

An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted

- (a) for the purpose of travel through the air space or for any other legitimate purpose,
- (b) in a reasonable manner,
- (c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and
- (d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State."

² Section 401.

In Tentative Draft No. 1, "Law Of Airflight", the American Law Institute provides in Section 2 thereof as follows:

"Lawfulness of Flight. Flight of aircraft in this state is lawful:

(a) If in compliance with the laws of this state regulating aeronautics and, as far as applicable, with such laws of the United States; and

(b) If at a height permitted by the rules, regulations or orders adopted and promulgated by the state (Aeronautical Commission), and the applicable rules of the Department of Commerce of the United States; and

(c) Unless so conducted as to involve a substantial risk of harm to individuals or property on the land; or

(d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land or adversely affect the then existing value of the land and structures thereon."

A reading of this section 2 readily discloses that flight is given legal sanction when conducted with due regard to surface owners' rights, safety of persons and property on the surface and in compliance with government regulations in general and as to minimum altitudes of flight.

The constitutionality of section 4 of the *Uniform State Law For Aeronautics*, of section 10 of the *Air Commerce Act* of 1926 and of section 3 of the *Civil Aeronautics Act* of 1938 had been challenged on the ground that in authorizing flight in the airspace over private property, subjacent owners have been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution as to the states enactments of section 4 and the like, and the Fifth Amendment of the Federal Constitution as to sections 10 and 3 aforesaid. Some years ago a committee on aviation of the American Bar Association, in this connection made the following pronouncement:

"We feel that this committee can do more beneficial service to the public and the common interest of all the people than to challenge the proposition that it is an invasion of the rights of private ownership of property to utilize the air for purposes of flight."

In *Smith v. New England Aircraft Company*,⁸ it was declared that these statutes and regulations recognize the existence of navigation of the air as an established condition, that they do not create such navigation, that they do not authorize the taking of private rights to promote such navigation, and the assumption underlies their terms that navigation of the air exists. Continuing the court said that the Act of Congress and the statutes of Massachusetts by plain implication if not by expressed terms, not only recognize the existence of air navigation but authorize the flying of aircraft over privately owned land. It was also stated in the decision that it is the proper function of the legislative department of government in the exercise of the police power to consider the problems and risks that arise from the use of new inventions and endeavor to adjust private rights and harmo-

⁸ 270 Mass. 511 (1930).

nize conflicting interests by comprehensive statutes for the public welfare. The court also made the following pronouncement:

"The Court takes judicial notice of facts of common knowledge concerning navigation of the air. In the present state of the art it is impossible to confine flight to the space over existing public ways. Aircraft and navigation of the air have become of great importance to the land and naval forces of the United States, in the carrying of mails, in forest preservation and fire prevention, and in commerce as a means of transportation of persons and commodities. Statutes touching subjects of this nature have been enacted by Congress and by the Legislatures of many of the States. Aerial navigation has been regulated to a greater or less extent by foreign governments. It has been widely discussed in relation to the municipal law and the law of persons and property of our own country, and to international law."

Naturally there is much judicial support for the right of flight.⁴ "Practical air navigation is now an accomplished fact", stated the decision in *Johnson v. Curtiss Northwest Airplane Company*.⁵ In this case the court further declared:

"The upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of law such as is here invoked. To apply the rule as contended for would render lawful air navigation impossible, because if the plaintiff may prevent flights over his land, then every other land owner can do the same."

Aviation has become an important, if not an indispensable public utility.⁶ In the state of New York the right of flight above minimum prescribed height is declared by the laws of 1928, chapter 233.⁷ The privilege or right of airplanes to fly through the airspace is recognized by the common law and in the statutory law of Michigan.⁸

Navigation of the airspace is an absolute existing right. The right of flight is an inherent natural right. Aerial navigation is universally recognized and practiced.⁹ Its very existence is for the general enrichment of mankind and the development and advancement of civilization. As stated by the late Justice Rugg in *Smith v. New England Aircraft Co.*,¹⁰ the United States Congress and the statutes of Massachusetts by plain implication, if not by expressed terms, recognize the existence of aerial navigation. Moreover aerial navigation is part of our technological age.

Recent affirmation has been given to the principle of the right of flight through legislative action by a number of states in 1943. Minnesota reenacted sec-

⁴ Eubank, John A., "Adjudication of Rights In Airspace By Judicial Process", Marq. L. Rev., September 1947.

⁵ 1928 U.S. Av. R. 42.

⁶ Thrasher v. City of Atlanta, 173 S.E. 817. (1934).

⁷ See also Sysak v. DeLisser, 1931 U.S. Av. R. 7.

⁸ Guith et al. v. Consumers Power Co., 36 F. Supp. 21 (1940).

⁹ Eubank, John A., "What About The Airspace?", Can. B. Rev. February 1930. See *All-American Airways v. Cedarhurst*, U.S.C.C.A. 2nd Cir. Jan. 7, 1953.

¹⁰ 170 N.E. 385 (1930).

tion 4 of the *Uniform State Law for Aeronautics*, declaring the right of flight.¹¹ It is declared that the use of the space for the operation of aircraft in the transportation of persons and/or property is affected with the public interest and that such use should be effectively regulated in all its phases relating to the public interest.¹² In no case shall damages or compensation be awarded for the usual and customary use by aircraft of the area above land or structures.¹³ A civil airway is a route in the navigable airspace over or above the territory or waters of the Commonwealth of Pennsylvania designated by the Pennsylvania Aeronautics Commission as a route for intrastate and interstate commerce.¹⁴

Asserting the right of flight and the control and regulation thereof, it was stated by the district court in *Swetland v. Curtiss Airports Corporation*¹⁵ as follows:

"No constitutional or legislative provisions or statutes have heretofore established any exclusive proprietary rights in a landowner to the superincumbent air space normally traversed by the aviator. Constitutional provisions guaranteeing the right of property do not, in our opinion, forbid legislation which has for its purpose the regulation and adjustment of the conflicting rights and interests of the landowner and the public. Any regulatory legislation, not unreasonable or arbitrary and not abridging unreasonably a landowner's rights of effective possession, would be constitutional, it seems to us, as against the constitutional guarantees protecting property.

"Here the right of aviation necessary in times of peace, and for adequate defense in time of war, is involved, and the absolute ownership of private property may to some extent be limited and curtailed in a great public interest. It might justly be limited even for a seemingly private use, for 'it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use.' (Mr. Justice Holmes, in *Noble State Bank vs. Haskell*, 219 U. S. 104, 106."

As Mr. Justice Jackson in the case of *Northwest Air Lines v. Minnesota ana Ramsey County*¹⁶ in a statement of obiter dictum declared:

"Aviation has added a new dimension to travel and to air ideas. The ancient idea that landlordism and sovereignty extended from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical control over all the air above him than a shore owner possesses horizontal control of all the sea above him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use."

¹¹ Section 20, subdivision 3, chapter 653, Minnesota Laws of 1943.

¹² Section 2, No. 248, 1943 Laws of Alabama.

¹³ S.B. No. 138, section 9, 1943 Laws of Oklahoma.

¹⁴ Act of 1943, P.L. 201, § 102(i).

¹⁵ 41 F.2d 929 (1930).

¹⁶ 322 U.S. 292 (1943).