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Comment

COMMENT

COMMENT—THE INTEREST OF THE OCCUPIER OF LAND IN SUPERJACENT SPACE—THE NEW YORK VIEW.—As a part of its participation in the International Geophysical Year the Soviet Union on October 4, 1957 announced the successful launching of the first artificial earth satellite.[1] Waves of consternation bordering on hysteria swept the American people who, almost with one voice, demanded that the efforts to launch their artificial earth satellite be redoubled. The initial Soviet achievement was shortly followed by the successful launching of a larger artificial earth satellite.[2] Then following what seemed to be interminable delays coupled with abortive attempts to launch the satellite carrier, the United States successfully placed Explorer I into orbit,[3] soon to be followed by Vanguard I.[4] The magnitude of these accomplishments is incomprehensible, for with these launchings the first halting steps have been taken along a road that ultimately may lead to the conquest of space through interplanetary travel.

Popular interest and reaction to the placing of these satellites in orbit was immediate and widespread.[5] While the concept of interplanetary travel, and the law that shall be ultimately attendant thereon, is perhaps of recent origin,[6] the potential uses, military or otherwise, of these flight instrumentalities render this field of science and law of vital importance to the security and well being of the American people.

It will be of some value here to consider developments in the New

[1] In its report the Soviet Union described the satellite as a 184 pound sphere, 22.8 inches in diameter containing unspecified instrumentation, orbiting in a 96 minute period with a velocity of 18,000 miles per hour at a maximum altitude of 560 miles. This artificial earth satellite was thereafter referred to by the name of "Sputnik I."

[2] On November 3, 1957, the Soviet Union disclosed the launching of "Sputnik II," described as carrying a half-ton payload of unspecified instrumentation and a dog in a fifty foot cylinder, orbiting in a 104 minute period with a velocity of 18,000 miles per hour at a maximum altitude of 1056 miles.

[3] The U. S. Army on January 31, 1958, by means of a modified Jupiter-C intermediate range ballistic missile placed a 30.8 pound cylinder, 79 inches in overall length containing unspecified instrumentation into a 115 minute orbit with a velocity of 18,000 miles per hour at a maximum altitude of 1575 miles.

[4] The U. S. Navy had first been charged with the mission of placing a satellite into orbit as a part of the United States's contribution to the International Geophysical Year. Numerous frustrations and delays were experienced before the satellite was successfully launched on March 17, 1958. It consisted of a 3.25 pound sphere, 6.4 inches in diameter containing unspecified instrumentation placed in a 135 minute orbit with a velocity of 18,000 miles per hour at a maximum altitude of 2513 miles.

[5] As an indication of the interest generated in New York, the editorial comment of the popular press on two successive days selected at random is noted. *Outer Space,* LIFE MAGAZINE, March 17, 1958, p. 36; *The Rite of Space,* TIME MAGAZINE, March 17, 1958, p. 22; *Satellites and the Atom,* NEWSWEEK MAGAZINE, March 17, 1958, p. 25; *Vanguard I in Orbit,* New York Times, March 18, 1958, p. 28, col. 1; *Vanguard,* New York Herald Tribune, March 18, 1958, p. 18, col. 1.

[6] John Cobb Cooper, Professor, Institute of International Air Law, McGill University at the April 26, 1956 meeting of the American Society of International Law remarked that fifty years ago there was no law concerning space since the state of aviation was not sufficiently advanced to warrant governmental concern.

York law which will bear upon the control of superjacent space. In particular, what is the present nature and extent of the individual landowner's interest in the space above his land? This question is of a double aspect, since the individual landowner's interest must be viewed in proper perspective to the sovereignty of the state in the space above its territory. Thus the problem may be stated as: what are the property rights of the individual landowner in the superjacent space and how does the state's interest bear thereon?

The common law early recognized an interest or proprietary right of the occupier of land in the space superjacent to the surface. That interest was granted the protection of a remedy for the invasion of such right by way of the writ of trespass quare clausum fregit.[7] This writ lay for the recovery of damages from an injury to the real property of the plaintiff when: (1) the injury was committed with a forcible entry, (2) the resultant damage from the injury was direct and immediate, (3) the land was in the actual or constructive possession of the plaintiff at the time of the injury.[8] The right to such a remedy was recognized in New York at an early date.[9] But this writ was generally limited to those causes essentially involving an injury to the possession of land or interference with the use thereof.[10] In the model form of the writ of trespass q. c. f. Dean Reppy indicates that the plaintiff in the usual action alleges that the defendant, in addition to the unlawful entry and breaking of the close, does injury to the surface of the land.[11] When the measure of value of materials as existed in England at this time is considered, it is hardly reasonable to believe that the plaintiff's purpose in bringing this action was, in truth, to recover the value of some inconsequential vegetation casually destroyed. Of course, the substantial destruction of crops, as a result of the trespasser's widespread spoliation, was another matter; for there the plaintiff clearly sought to recover the loss of his investment in the crops. It appears then, that the

[7] In REPPY, INTRODUCTION TO CIVIL PROCEDURE, c. III, § 1, (Buffalo 1954) the origin of the writ of trespass q. c. f. is traced to the reign of Edward I when it was fully established by the Statute of Westminster II in the year 1285.

[8] SHIPMAN, COMMON LAW PLEADING, § 37 (3d ed. St. Paul 1923).

[9] Campbell v. Arnold, 1 Johns (N Y) 511 (1806). In Guille v. Swan, 19 Johns (N Y) 381 (1822), the defendant descended into the plaintiff's garden by a balloon which had been disabled. Being in peril the defendant summoned the aid of a crowd which had gathered to observe the proceedings. In response to the defendant's summons the rescuers trampled the plaintiff's vegetation. The court held the defendant liable for the destruction of the herbage and for the breaking of the close.

[10] See note 8, *supra* at 75. "Trespass against property is essentially an injury to the possession. This is the gist of the action of trespass and it will not lie unless the property, whether real or personal, was in the actual or constructive possession of the plaintiff at the time of the injury. When the property or right injured is intangible, that is, not involving possession, the injury can never be considered a trespass, but the remedy instead being an action on the case." Lambert v. Hoke, 14 Johns (N Y) 381 (1817).

[11] The allegations, in addition to a recital of the wrongful entry, include: "and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grain and herbage of the said (plaintiff) then growing (on land previously identified) . . . ." See note 7, *supra* at 120.

writ was granted by way of a punitive compensation awarded to the landowner from the trespasser who unlawfully entered the plaintiff's close, irrespective of the fact that in the usual case little if any corporeal injury was inflicted. This civil remedy was afforded in order to discourage trespassing upon private realty. Realizing that the common law courts placed such high value upon the integrity of the occupier's close and the sanctity of its borders it is little wonder that an extreme doctrine arose.

Cujus est solum, ejus est usque ad coelum et ad inferos[12] was the maxim delimiting the landowner's proprietary right in the superjacent space above his land. The plain meaning of the maxim granted to the occupier an exclusive proprietary interest in the space above his land to an infinite height. This concept of ownership to the heavens shall be referred to hereinafter as the doctrine of infinite ownership of the superjacent space. Chase, taking this maxim as he found it expressed by his great master,[13] qualified its meaning by introducing a corporeal element into the maxim by excluding from the occupier's property interest those elements which by their nature are incapable of reduction to possession.[14] This qualification limiting the landowner's right in superjacent space to corporeal things was also appreciated by an earlier American writer.[15] But while Chase and Kent may have recognized this distinction, their predecessor Blackstone did not burden the doctrine of infinite ownership of superjacent space with any niceties of distinction and held the occupier's property right to extend upwards without qualification to an infinite height.[16] This eminent jurist evidently was not troubled by the fact that included within this column of space of infinite height, to which he gave the subjacent occupier of land exclusive rights, were countless numbers of heavenly bodies whose physical existence and nature were then well known.[17] It is perhaps significant and explains a

[12] Transl. "To whomsoever the soil belongs, he owns also to the sky and to the depths." BLACK, LAW DICTIONARY, p. 453 (4th ed. St. Paul 1951).

[13] CHASE, BLACKSTONE'S COMMENTARIES (4th ed. New York 1914).

[14] *Id.* at 516. "Many other things may be the objects of qualified property. It may subsist in the very elements of fire or light, of air and of water. A man can have no absolute permanent property in these as he may in the earth and land; since these are of a vague and fugitive nature and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer."

[15] KENT, COMMENTARIES ON AMERICAN LAW, p. 402 (3d ed., New York 1836). "Corporeal hereditaments are confined to land, which include not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as house and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include anything terrestrial, under or over it."

[16] "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum,* is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: . . . . So that the word 'land' includes not only the face of the earth, but everything under it, or over it." 2 BLACKSTONE, COMMENTARIES, 18 (8th ed. Oxford 1778).

[17] The Copernican theory of planetary character, distribution and motion, as modified by Galileo and Brahe was established by the demonstrations of Kepler in the early 17th century.

great deal to note that Blackstone's pronouncement of the doctrine of infinite ownership of superjacent space markedly follows the definition of an earlier commentator.[18] Even the terminology of introduction of the two definitions, to wit: "Land in its legal signification . . ." is identical. Coke, as evidently discerned by Chase and Kent, initially limits the landowner's interest in superjacent space to the physical things that may be found therein. Then after recognizing the incorporeal nature of space and the occupier's inability to reduce space to possession[19] Coke proceeds to destroy the entire meaning of the earlier portion of his definition by disregarding the prerequisite of physical possession and thereafter enunciates the concept of infinite ownership of space.[20] What considerable mischief for future jurisprudence would have been avoided had Coke not so enlarged the initial portion of his definition of the occupier's interest beyond those corporeal elements capable of reduction into possession.

Almost immediately upon the publication of Blackstone's Commentaries doubt was expressed as to the unlimited application of the maxim *cujus est solum,* etc. Lord Ellenborough, in a case involving a wooden board attached to defendant's dwelling overhanging the plaintiff's land doubted whether an aeronaut flying over the land of another would be liable to the subjacent occupier in trespass q. c. f.[21] This doubt found sympathy in the subsequent opinion of another jurist in his comment upon the interest of the landowner in superjacent space.[22] Later in New York, while the court doubted the wisdom of the doctrine of infinite ownership of superjacent space, it gave judgment to the plaintiff occupier in an action of trespass q. c. f. where the defendant had suspended a telephone wire across the plaintiff's land, without the use of supports on the land, at a height of twenty feet above the surface.[23]

[18] COKE, INSTITUTES ON THE LAWS OF ENGLAND, § 1 (8th ed. London 1670). "Land in the legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moores, waters, marshes, furles and heath, *terra est nomen generalissimum,* and *comprehendet omnes species terra,* . . . and in that sense it included whatsoever may be plowed, and is all one with. It legally includeth also all castles, houses and other buildings, . . . , so as passing the land or ground, the structure or building thereupon passeth therewith."

[19] ". . . land buildeth is more worthy than other land, because it is for the habitation of man, ... And therefor the element of the earth is preferred before the other elements; . . . , because it is for the habitation and resting place of man, for man can not rest in any of the other elements, neither in the water, aire or fire. For as the heavens are the habitat of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; *coleum coele domino, terram mitem dedit filiis hominum.* All the whole heavens are the Lords, the earth hath he given to the children of men." See note 18, *supra* at 4.

[20] "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, . . . (citations omitted), and in other books." See note 18, *supra* at 4.

[21] Pickery v. Rudd, 4 Campb. 219, 171 Eng. Rep. 70 (1815).

[22] Blackburn, L. J. in Kanyon v. Hart, 6 Best & S. 249, 122 Eng. Rep. 1188 (1865).

[23] Butler v. The Frontier Telephone Company, 186 N. Y. 486, 79 N. E. 716 (1906).

With the development and advancement of flight instrumentalities from what were experimental playthings into a method of transportation of passengers and cargo for commercial purposes, a conflict of interests arose which required resolution if the aircraft industry was to develop. If the landowner's interest in the superjacent space extended upward to infinite height, it would be possible for the occupier to bar the aeronaut from flying over the subjacent soil by the simple expedient of bringing an action for trespass q. c. f. to recover monetary damages for the invasion of the airspace and breaking of the close. Not many trespass actions and recoveries by subjacent landowners would be required to impoverish the embryonic airline industry. Some method had to be found to limit the landowner's property interest in the superjacent space in order to facilitate the rapid development of aviation. As has been the case in other matters, when there is an overriding public need, the legislature will find a way to satisfy such need even at the risk of doing violence to existing theories of law.

By means of the Air Commerce Act the Congress proclaimed the complete and exclusive national sovereignty of the United States in the air space over the country.[24] This unilateral taking of exclusive national sovereignty was recognized by an international civil aviation convention to which the United States was a signator.[25] This compact was the successor to the earlier Paris and Havana agreements of 1919 and 1928. Recognition of national sovereignty was limited to space above the land mass and territorial waters of each national entity that was party to the convention.[26] Thus it follows by exclusion that space above the high seas is free to all. This international agreement has the effect and weight of law.[27] However, its provisions deal essentially with the regulation and qualification for entry of foreign commercial aircraft[28] and have little impact upon the interest of

[24] "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States, including the airspace above all inland waters, . . . , bays, and lakes, over which . . . the United States exercises national jurisdiction." Air Commerce Act of 1926, 44 STAT. 568, 49 U. S. C. 171 (1952).

[25] "Art. 1—The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Chicago Convention, December 7, 1944, 61 STAT. 1180, T. I. A. S. 1591 (effective April 4, 1947).

[26] "Art. 2—For the purposes of this Convention the territory of a State shall be deemed to be the land area and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." *Ibid.*

[27] U. S. CONST. art. VI., "This Constitution and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the Judges in every State shall be bound thereby, and nothing in the Constitution or laws of any state to the contrary notwithstanding." In Fellows v. Blacksmith, 60 U. S. 366, 19 How. 366, 15 L. Ed. 684 (1856), it was held that a treaty after being executed and ratified by proper authorities of the government became the supreme law of the land. In Haver v. Yakon, 76 U. S. 32, 9 Wall. 32, 19 L. Ed. 571 (1869), the court held that a treaty is more than a contract, since the constitution declares it to be the law of the land. In Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920), valid treaties were held as binding within the territorial limits of each state as throughout the dominion of the United States.

[28] "Art. 2—(a) This convention shall be applicable only to civil aircraft, and shall

the occupier of land in the superjacent space.[29] It is the domestic statutory provisions which cut down the doctrine of infinite ownership of superjacent space.

The Civil Aeronautics Act, successor to the Air Commerce Act, declares and establishes a public right of freedom of transit in air commerce on behalf of the citizens of the United States.[30] This act and its predecessor proclaimed the authority of the President of the United States and the several states to regulate the public right of user in aerial commerce, provided that the state regulations were not in conflict with federal mandate.[31]

not be applicable to state aircraft. (b) Aircraft used in military, custom and police service shall be deemed to be state aircraft. (c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof." See note 25, *supra.*

[29] "Art. 11—Subject to the provisions of this Convention the laws and regulations of a contracting State relating to . . . the operation and navigation of such aircraft while within its territory, shall be applied to aircraft of all contracting States . . . , and shall be complied with by such aircraft . . . while within the territory of that State." See note 25, *supra.*

[30] Civil Aeronautics Act of 1938, 52 STAT. 973, 49 U. S. C. 403 (1953)—"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 airspace of the United States." The Air Commerce Act, note 24, *supra,* § 180 provides that ". . . the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable air space shall be subject to a public right of freedom of . . . air navigation." § 551 of the Civil Aeronautics Act of 1938, *supra,* provides "The Authority is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and reviewing from time to time . . . (7) Air traffic rules governing the flight of aircraft, including rules as to safe altitudes of flight . . . ." § 672 of the Civil Aeronautics Act of 1938, *supra,* "In exercising and performing its powers and duties under the Act, the Authority shall do so consistently with any obligation assumed by the United States in any treaty, convention, . . . that may be in force . . . ." In United States v. Michigan Portland Cement Co., 270 U. S. 521, 46 S. Ct. 395, 70 L. Ed. 713 (1926), it was held that regulations issued by the Secretary of Commerce as authorized by Congress and so far as not violative of constitutional rights have the force of law.

[31] Air Commerce Act of 1926, note 25, *supra,* provides in § 174 ". . . The several states may set apart and provide for the protection of necessary air space reservation in addition to and not in conflict either with airspace reservation established by the President under this section or with any civil or military airway designated under the provisions of this Act." In Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment et al., 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954), which was an appeal from a judgment imposing an ad valorem tax upon certain of petitioner's aircraft making regular stops each day in Nebraska receiving and discharging freight and passengers, Reed, J. spoke for the court in these terms. "The provision pertinent to sovereignty over the navigable air space in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. . . . The Act, however, did not expressly exclude the sovereign power of the state. The Civil Aeronautics Act of 1938 gives no support to a different view. After the enactment of the Air Commerce Act more than twenty states adopted the Uniform Aeronautics Act. It had three provisions indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the state had ceded that sovereignty by constitutional grant. Where adopted, however, it (the U. A. A.) continues in effect." An analogy was then drawn between the federal and state interest in airspace and the sovereign's and individual owner's interest in the stream beds of navigable waters.

The right of public transit is in the "navigable airspace" which was defined as being above minimal safe altitudes as specified by executive order, federal legislative enactments and executive regulations.[32] Thus by exclusion the subjacent occupier of the land has exclusive rights in space up to the lower limit of minimal safe altitudes.

New York, exercising the prerogatives granted in the Civil Aeronautics Act proclaimed various regulations principally in the realm of air traffic rules.[33] Essentially, these rules conform to the federal pronouncements previously noted and generally recognize a public right of transit in the space above minimal safe altitudes. Since the New York and United States statutes coincide in their essentials a conflict of laws problem has not arisen. Had there been essential difference between the two regulatory schemes, while it might be thought that the United States statutory provisions control,[34] the United States Supreme Court has held that the federal aviation enactments have not pre-empted the field and ousted the states of jurisdiction.[35] At this point, the following problem existed. An ancient doctrine vested infinite ownership in the superjacent space in the subjacent occupier, whereas, United States and New York legislation responsive to public need, created a public right of transit in space above minimal safe altitudes. Through the device of judicial construction and interpretation the former was forced to give way to the latter.

Courts to which the landowner brought an action of trespass q. c. f. against aeronauts could not fall back upon the pronouncements of the recognized authorities and definitions of the common law theorists in view of the provisions of federal and state legislation. For Coke and his successors, while perhaps possessed of an insight as to what should be the interest of the landowner in superjacent space, had nevertheless given the

[32] 14 C. F. R. § 60.17 (1956) defines minimum safe altitudes. "Minimum safe altitudes—Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitude: (a) Anywhere. An altitude which will permit, in the event of the failure of a power plant, an emergency landing without undue hazard to the person or property on the surface; (b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 2,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft . . . . (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle or structure. . . ."

[33] N. Y. General Business Law § 245—Aircraft Traffic Rules. "The following air traffic rules shall govern the operation and use of aircraft in New York state, ..."

[34] "If any one proposition could command the universal assent of mankind, we might expect that it would be—that the government of the Union though limited in its powers, is supreme within its sphere of action. . . . This nation, on those subjects on which it can act, must necessarily bind its component parts. . . . The government of the United States, then though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land. . . ." McCullouch v. State of Maryland et al., 17 U. S. 316, 4 L. Ed. 579 (1819). Adams v. Maryland, 347 U. S. 179, 74 S. Ct. 442, 98 L Ed. 608 (1954).

[35] See *supra* note 31, Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment et al.

occupier an absolute right of property in superjacent space to an infinite height. Jurists now faced with the problem would have to cut down the effect of the *cujus est solum* doctrine and, as is often the case, did so without categorically denying the original validity of the doctrine in its earlier applications.

One of the first determinations by a prominent court limiting the extent of the ancient doctrine was *Swetland* v. *Curtis Airport Corporation*.[36] In this equity proceeding the plaintiffs were owners of several substantial tracts of land with residences thereon. Upon learning of the defendant's intention to build an airport facility in their vicinity the plaintiffs brought an action to enjoin the defendant from such construction. The lower court enjoined the defendant from permitting aircraft to fly over the unimproved portions of plaintiffs' lands at an altitude of less than 500 feet in accordance with the existing Congressional mandate. The plaintiffs appealed and therein contended that the operation of aircraft at any altitude above their lands constituted a trespass. The defendant's position in rebuttal was that the plaintiffs did not have any interest in the space above their lands. Here, at last, the doctrine of infinite ownership was laid before a court which had witnessed the development of the aviation industry and appreciated the public interest therein. Moorman, C. J., speaking for the court, held: "In every case in which it (the maxim) is to be found it was used in connection with occurrences common to the era such as overhanging branches or eaves. Those decisions are relied upon to define the rights of the new and rapidly growing business of aviation. This can not be done . . . . [W]e can not hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the airspace overlying the surface."[37] The court then went on to define the limits or extent of the landowner's interest in superjacent space in these terms: "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 incidental to the 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 and occupy himself as to impose a servitude upon his use and enjoyment of the surface. As to the upper stratum which he may not reasonably expect to occupy, he has no right, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface."[38] This case is significant for the fact that it is the first pronouncement of an important court striking a blow at the ancient doctrine. This opinion was followed by those of equally distinguished courts whose views were also hostile to the doctrine.[39] New York soon caught the spirit of the advancing times and in *Rochester Gas and Electric Corporation* v. *Dunlop*,[40] the court struck

[36] 55 F. 2d 201 (6th Cir. 1932).

[37] *Id.* at 203.

[38] *Ibid.*

[39] Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936); *cert. denied*, 300 U. S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1936). Hyde v. Somerset Air Service, 1 N. J. 2d 61, 61 A. 2d 645 (1948).

[40] 148 Misc. 849, 266 N. Y. Supp. 469 (Monroe Co. 1933).

out against the infinite ownership doctrine. In this case plaintiff was the owner of an electric transmission line which was supported on steel towers upon his land. The line was suspended in such manner that it was about fifty feet above the surface. The defendant in a sport type aeroplane was flying at night at an altitude of 2,000 feet intending to land at nearby Rochester Airport when his engine stopped for unknown cause. While attempting to effect an emergency landing the defendant failed to see the plaintiff's tower in the dark and struck it causing extensive damage. The plaintiff brought an action for the injury to his transmission system in negligence and trespass. The plaintiff advancing the doctrine of infinite ownership, contended that the defendant had committed a trespass to his land as a matter of law and moved for a directed verdict. The motion was denied, and on the plaintiff's appeal from the ruling, an issue on the merits of the doctrine of infinite ownership was placed squarely before the court.[41] The court doubted whether the occupier of land ever was considered the owner of the superjacent space to an infinite height and limited the occupier's ownership of superjacent space as extending to such height as he might occupy by structure or other corporeal thing.[42] Thus from a property right extending to the heavens the occupier's interest in superjacent space was cut down to the limits of what he might physically occupy. The view in this case was unnecessarily limited; however, for applying its dicta to an analogous situation, if the occupier did not intend to build upon his land but determined to leave it unimproved, his interest in such land, as determined by this case would not extend above the surface of the unimproved land. Since the aviation traffic rules permit flight at altitudes not less than 500 feet above the surface the dicta of *Rochester Gas and Electric Corporation* would leave a hiatus in ownership from the surface of unimproved land to the minimal safe altitude. Clearly the holding of the case would require modification in order to close the gap.

This modification was not long in coming from a Federal District Court in New York.[43] This was an action brought for the infringement of a copyrighted photograph of defendant's resort hotel taken by the plaintiff while flying in an aeroplane at an altitude of 250-600 feet above defendant's buildings with the consent of defendant's manager. In its answer the defendant, advancing the doctrine of infinite ownership, asserted that the flight by the plaintiff over defendant's land was a trespass. Rippey, J. citing *Roches-*

41 The court posed the issue with the question, "What is, or is to be, the law regarding the ancient maxim, *'Cujus est solum . . .'*?" *Id.* at 850, N. Y. Supp. at 470.

42 "Not to go beyond the necessities of this case, it may be confidently stated that, if that maxim ever meant that the owner of land owned the space above land to an indefinite height, it is no longer the law. It is plain; however, that outside the sovereign police power, no rule has been or will be made, which abridges the exclusive right of the owner of lands to the space above it to such height as he may build a structure upon the land; therefore, for the purposes of this case, it may be assumed that when the aeroplane came in contact with the top of this tower, the rights and responsibilities of the respective parties were exactly the same as they would have been had the aeroplane come in contact with the ground below."

43 Cory v. Physical Culture Hotel, Inc., 14 F. Supp. 977 (W. D. N. Y. 1936).

ter Gas and Electric Corporation stated that the maxim *cujus est solum* is outmoded and that the occupier's interest in the superjacent space extends to that height which is *necessarily* and *reasonably* incident to his occupation, use and enjoyment of the surface.[44] Thus the owner's interest, limited by *Rochester Gas and Electric Corporation* to that height he physically occupied, was extended above such possession to such height above his physical occupation as is reasonably necessary to his use and enjoyment of the land.

Approval of this modified concept of the occupier's interest in superjacent space inevitably followed at the highest judicial level.[45] In this case the respondent owned a small tract of land with his dwelling and outbuildings thereon. The land, which was used for the business of raising chickens, was about 2,000 feet distant from an airport leased to the United States from which four-engine bomber type aircraft operated. A safe glide path had been established by the Civil Aeronautics Administration which passed about sixty feet above the respondent's house.[46] Aircraft frequently passed overhead in such manner as "at times to appear barely to miss the tops of trees and so close as to blow the old leaves off." As a result of the disturbance of the engine roar the respondent lost his chicken business and the family "are frequently deprived of their sleep and . . . have become nervous." No accidents involving physical contact between the aircraft and respondent's premises had occurred, which speaks volumes for the flying skill of the pilots; however, several near misses had occurred. The Court of Claims[47] held that the operation of the aircraft in close proximity to respondent's land constituted the taking of an easement of way across the locus in quo and awarded damages for the taking. The government contended in its appeal from this judgment that the occupier of land did not own the superjacent space above his structures which he had not subjected to possession or occupancy; in effect, the *Rochester Gas and Electric Corporation* theory was asserted. In the opinion by Justice Douglas, the doctrine of infinite ownership of superjacent space was laid to rest with finality;[48] but while recognizing the public right of free transit in navigable space,[49] the

[44] ". . . the owner of land has the exclusive right to so much of the space above his land as may be actually occupied and used by him and necessarily incident to such use and occupation and anyone passing through such space without the owner's consent is a trespasser; as to the air space above that actually occupied and used and necessarily incident to such occupation and use, the owner may prevent its use by others in so far as that use unreasonably interfered with his complete enjoyment of the surface and the space above which he occupies on the theory of nuisance." *Id.* at 982.

[45] United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1945).

[46] Military aircraft are subject to C. A. A. regulations when there are no contrary Army or Navy rules. Cameron v. Civil Aeronautics Board, 140 F. 2d 482 (1944).

[47] Causby v. United States, 60 F. Supp. 751 (1945).

[48] "It is an ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*cujus est solum*, ... But that doctrine has no place in the modern world." See note 45, *supra* at 260, 66 S. Ct. at 1067, 90 L. Ed. at 1210.

[49] "The air is a public highway, as Congress has declared, 49 U. S. C. § 403. . . . To recognize such private claims to the airspace would clog the highways, seriously

court held that where the flights occur at such low altitudes as to interfere with the occupier's use and enjoyment of his land, such user constitutes a taking of the occupier's property. This was the theory determined in the *Cory* case decided by the District Court of New York.

In summary, the early common law theorists, in attempting to define the interest of the occupier of land in superjacent airspace, advanced the doctrine of infinite ownership. *Cujus est solum* was the maxim expressing this doctrine which granted to the owner of land an absolute and exclusive interest in superjacent space to an infinite height. This doctrine was subject to criticism almost immediately. A literal adherence to its provisions would render the aeronaut who passed over the plaintiff's land, at any altitude however great, liable to the landowner for damages in an action of trespass.

With the advent of the air age, a public need arose which required the modification of the ancient doctrine. This need was fulfilled by legislative fiat which created in the public a right of air commerce and free navigation in space. The statutes imposed limitations upon this public right of flight in the form of minimum altitudes of air traffic. As in all such matters, this public right of flight was limited to that which did not unreasonably interfere with the landowner's use and enjoyment of his land. However, while creating this public right of aerial navigation, the legislative enactments failed to delimit the interest of the occupier of land in superjacent space. Such limitation followed through the device of judicial construction.

Initially, the courts exceeded the necessities of the case and limited such interest in superjacent space to that height to which the landowner physically occupied. A requirement of actual possession, as recognized by the common law theorists, was reintroduced as establishing the upper limit of the occupier's interest. This unnecessarily restrictive view was then enlarged by further judicial construction. The first step taken was to expand the occupier's interest in superjacent space to that height which he might be reasonably foreseen to occupy.

Thereafter, the occupier's interest in superjacent space was defined by the United States Supreme Court as extending to such height as is reasonably and necessarily incident to his use and enjoyment of the land. This height is not of necessity coincident with the upper limit of the occupier's physical possession or occupancy. It is to be determined with reference to the height of the structures on the land yet allowing to the occupier a reasonable use and enjoyment of his land. Above this height the occupier has no interest, except to prevent the unreasonable user of others; for here in the realm of navigable space, the public has a paramount right of reasonable air transit.

interfere with their control and development, in the public interest, and transfer into private ownership that to which only the public has a just claim." See note 45, *supra* at 261, 66 S. Ct. at 1068, 90 L. Ed. at 1210.