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PROPERTY IN THE AIR AS AFFECTED BY THE AIRPLANE AND THE RADIO

By HIRAM L. JOME[1]

THE popularization of the airplane and the radio has squarely raised the practical issue as to property in the air. An airplane by its noise or shadows frightens domestic animals causing great damage to the farmer. An aviator is forced down by a storm, attracting numerous visitors who ruin fences and trample upon the vegetation. Owners of the land adjacent to airdromes construct buildings so high as to interfere with the ascent or descent of aircraft. The experimenter with delicate laboratory equipment finds his operations disturbed by radio waves. The Federal Radio Commission refuses to grant a license to a station proprietor who has been operating his apparatus long prior to the passage of the Radio Regulatory Act of 1927. The Commission forces another to shift to a new wave length and a different power.

These scattered illustrations of the actual or potential legal problems incidental to the wide and growing use of the radio and the airplane show the need for the development of the law to meet such situations. Though the law of the air has been slowly evolving, these precise questions have not as yet been subjected to much litigation. However, the subject is growing in importance both in the United States and abroad, which fact suggests the need for examining historically the concept of air rights as related to their use for transportation and communication.

For centuries the problem of property in the air was concerned with the area near the ground. Such questions as arose in regard to trespass in the air[2] involved shooting,[3] or the stringing of a wire,[4] or the projecting of eaves,[5] or the spreading of a tree, or the placing of the hand[6] over another's land. These were generally held to be trespass[7] on the theory that the landowner has a property right in the air above his holding. To prove trespass it is not necessary to show that actual damage has occurred.

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[1] In this article the author considers only the problem of national or municipal law, taking no direct cognizance of the equally important question of the air in international relations. He also wishes to acknowledge the kindness of Professor Lewis M. Simes of the Ohio State University College of Law who has read and criticised the manuscript, but who is not responsible for any opinions expressed herein.

[2] See the appropriate section in any text or case book on property or on torts. A brief survey of the important cases involving trespass in the lower airspace is given in 6 *Cornell Law Quarterly* 296–7 (March, 1921); 2 *C. J.* 299; 32 *Harvard Law Review* 569 (March, 1919); 26 *R. C. L.* 939; 42 *A. L. R.* 946–9; Broom's *Legal Maxims* (London: Sweet and Maxwell, Ltd.) 9th ed., pp. 260–4. The cases cited in footnotes 3 to 6 are illustrative only.

[3] 4 *Times L. R.* 8, 9 (1887). See also Sir Frederick Pollock, *The Law of Torts* (London: Stevens and Sons, Ltd.) 12th ed., pp. 350–4.

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

[5] *Smith v. Smith*, 110 Mass. 302 (1872) (eaves); *Reimer's Appeal*, 100 Pa. Sta. 182 (1882) (bay window encroaching on public highway).

[6] *Hannabalson v. Sessions*, 116 Iowa 457; 90 N. W. 93 (1902).

[7] An unusual case is that of *Pickering v. Rudd*, 1 Starkie 56, 4 Campbell 219 (1815), in which a British judge held that a projecting board did not constitute trespass. He even hints that the shooting over another's land, "no part of the contents touching it," would not constitute trespass. This case has long since been overruled both in Great Britain and the United States, but it is of historical interest in connection with the present topic, because the judge concluded: "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that the aeronaut is liable to an action of trespass—*quaere clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage."

Then came the balloon, the radio, and the airplane. A use of the air even above the tallest structures or trees was discovered. Vehicles of the air brought to the fore the question of the extent of the rights of the landowner and the liabilities of the aviator. The trespass, if such it could be termed, came now from above, and not from the adjacent land. The proprietor of the radio station operating on a preempted or assigned wave length regarded himself as the possessor of squatter's rights. Conferences of European powers have assigned definite portions of the ether to each nation. With the advent of telephonic broadcasting, all the pathways in the broadcasting band in the United States were finally occupied. As an ever increasing stream[8] of new stations entered the field, interference became common. Though many of the owners had invested tens of thousands, or hundreds of thousands, of dollars, some of them, even while holding a license from the government, found their investment practically destroyed by interference, with an uncertain remedy either at law or in equity.

Evolution of the Legal Concepts concerning Ownership of the Airspace

As to the problem of the ownership of the airspace in relation to aviation, the difficulty seems to center about the meaning and interpretation of the Latin common law maxim, formulated in the early part of the sixteenth century, *Cuius est solum, eius est usque ad caelum* (He who owns the soil, owns it up to the sky). Some law writers translate this very freely and conclude that a landowner has exclusive proprietary rights in all the airspace over his head, and that anybody who passes, or sends his agents or agencies over another's land, at whatever height and regardless of damage, commits an actionable trespass. These authorities maintain that statutory legislation or wholesale condemnation of the air is necessary to give the aviator a right of way.[9]

Other authorities argue that the subjacent landowner has no property whatever in the airspace. They state that balloonists, smoke, sounds, carrier pigeons, and the like have for a long time passed over private property and never yet has the subjacent owner recovered damages for their mere passage without attendant or resultant damage.[10] This

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[8] There are 95 wave lengths available in the broadcasting band in the United States and Canada. By a gentlemen's agreement between the two countries, 89 were assigned to the former and 6 to the latter. In these 89 channels more than 500 stations have been operating at all times during the past five years, some sections of the country being especially congested.

[9] One writer has suggested a "statutory condemnation by act of Congress of all the airspace over privately owned property, giving the owners a right of action against the United States for any damage they might be able to prove." Plan of Judge Lamb described by William R. McCracken in 57 *American Law Review* 99 (Jan.–Feb., 1923), quoted by Edmund F. Trabue in 58 *American Law Review* 65 at 79 (1924).

A Rochester, N. Y., state court, in deciding in 1912 that an aviator flying at an altitude of 100 feet without damage to the landowner was liable for trespass, based its decision on the fact that neither the United States nor New York had passed a law legalizing flying in the air above the land held in private ownership. "Therefore, the rule of the common law applies." The judge referred to the fact that France had just enacted such a law. 19 *Case and Comment* 681 (March, 1913); 42 *A. L. R.* 951.

The legal adviser to the director of the Federal Air Service proposed a constitutional amendment or the purchase of air avenues. R. A. Greer, *International Air Regulations*, published by the Chief of the Air Service, Washington, D. C. 1926, p. 29.

Arguments that all flying constitutes trespass are also found in articles in 46 *Canada Law Journal* 730 (1910) and 7 *Ohio Law Reporter* 402 (1909).

[10] It must be recognized, however, that while smoke and sound do not constitute trespass, they may be a nuisance. One technical difference between trespass and nuisance is that in the latter damage must be proved, while in the former the presence or degree of damage is irrelevant.

group regards the air as common property.[11]

A twofold solution of the problem is possible. The first is to admit that the landowner has in theory full proprietary rights to the airspace, but to point out the fact that "exclusive" does not mean "absolute." According to this argument he holds the airspace subject to a right of passage by aviators, wireless waves, and other agencies of commerce as they take their place in our advancing culture. Aircraft have a legal right to pass through the air, even in the absence of special law, at a reasonable altitude, which depends on the nature of the buildings and obstructions, the type of business of the landowner, and weather conditions, as long as the owner's enjoyment of his life or property is not violated or threatened. If the machine should land regardless of cause, or should fly so near the ground as to damage property or business, or terrify or sicken people or animals, or inconvenience or imperil or actually injure them, the person affected would have the right to damages.[12] According to this theory, the landowner's exclusive rights extend only as far upward as he can actually use the air or over an area the occupation of which by strangers would damage or tend to damage his person or property on account of wires, smell, noise, shadows, dragging anchors. The proprietor of the land would be permitted to exclude others from the superarea only in so far as he has an interest in so doing.

According to this view, though the aviator has a privilege of passing in the airspace, he has no right of useless hovering or maneuvering. Neither does the right to fly carry with it the right to land, except perhaps in case of emergency. Neither will the right to fly carry with it the privilege of repeated passage. An air transport company operating a hundred machines per day, unless they flew at an unusually great altitude, might be regarded as a nuisance, necessitating the condemnation of an airway. On account of the difficulty of proving negligence, and the fact that the persons on land are powerless to insure their own safety against damages from aircraft the aviator or owner of the craft must

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[11] The extreme case is the old decision of Lord Ellenborough in *Pickering v. Rudd*, *supra* n. 7, which denied even that an overhanging board constituted trespass. G. D. Valentine in 22 *Juridical Review* 16 at 87 (1910) very ably argues "that the parcelling out of the air between a multitude of persons not only would not benefit them, but would deprive them all of the use of which it is capable." Therefore it should be common to all. The state, however, has an interest in the air, as well as the power to exclude from its use. Therefore, he concludes, the airspace is logically public property.

An attempt was made to insert a provision in the 1927 Radio Regulatory Law declaring the ether to be the property of the Federal Government. The Congress of the Pan American Aeronautic Federation at Santiago, Chile, in 1916 adopted the following as the first of 12 principles to be considered by the Pan American states: "The airspace is to be declared as state property." See Henry Woodhouse, *Textbook of Aerial Laws* (New York: Frederick A. Stokes Company, 1920) p. 12; also R. A. Fixel, *Law of Aviation*. (Albany, N. Y.: Matthew Bender and Company, 1927), p. 19.

Arguing that whatever cannot be occupied cannot be the property of anyone, Hugo Grotius (*Mare Liberum*, 1609) arrived at the conclusion that "the air, the running water, the outer sea or ocean are common to all." See also W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet and Maxwell, Ltd. 1925) pp. 103–4. It will be noted that Grotius held the occupation theory of property.

"*Aer communis est*" and "*Aer res publicae est*" are ancient adages, probably from the Roman Law. Justinian's *Institutes* contains the following: "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the seas." Liber II, Tit. 1, sec. 1 on "*De rerum divisione, et acquirendo earum dominio.*" Thomas Cooper's Justinian, (New York: John S. Voorhies, 1852) 3rd ed.

[12] In *Guille v. Swan*, 19 Johnson (N. Y.) 381 (1822) an aeronaut was held liable for damages done by the curious crowds when his balloon was forced to land. That even as early as this the right of flight in the air was recognized is seen from the judge's dictum, "I will not say that ascending in a balloon is an unlawful act, for it is not so . . ." Since aircraft must in flight cover a large area, this is in effect a judicial opinion of the same import as a statutory law legalizing the flight of aircraft.

be held absolutely liable for all damages incurred. When the industry becomes stabilized, this risk may be shifted by means of insurance.[13]

Moreover, the argument continues, ownership and title to an object imply the right of occupation, use, or possession. The upper airspace does not have these important attributes of property.[14] Even though the subjacent owner should possess the title to this superarea, however, his rights are too vague and indefinite to justify state intervention. Furthermore, the maxim was originated at a time when neither the airplane nor the radio was known and the balloon was not seriously regarded as a practical thing. Its purpose was to protect the landowner in the enjoyment of what he possessed rather than to extend his proprietary rights over space which at that time was not used.[15]

Since most law writers seem to agree that some limitation of the so-considered property rights of the subjacent owner in the airspace is needed in order properly to encourage aviation, it becomes necessary under our constitution to justify such modification. The grounds usually advanced are those which fall under the regulation of the police power,[16] public necessity,[17] analogies with the rights of the public on the

[13] It is conceivable that with the progress of aviation the rule of absolute liability will, as in the case of the automobile, give way to one holding the aviator liable only for negligence. For the arguments for absolute liability see the *Report of the Civil Air Transport Committee* (British), 146 *Law Times* 105–7 (Dec. 14, 1918).

[14] It is possible to have a property right in a certain channel in the ether for the purpose of radio transmission because one may be said to own not the thing, but the right to use or enjoy the thing. Compare H. T. Tiffany, *The Law of Real Property*, (Chicago: Callaghan and Company, 1920), p. 5. It may, accordingly, also be possible for an air transport company to acquire property rights in a particular portion of the airspace.

[15] In accord with some of these general principles of limitation of property in the airspace, see 42 *A. L. R.* 937 at 950 and 32 *Harvard Law Review* 569 (March, 1919). These two references contain excellent annotations of the important cases involving trespass in the air and a discussion of the relative rights of the aviator and the landowner. Also in accord: 4 *American Journal of International Law* 95 (Jan., 1910); 4 *idem.* 109 at 122–8 (Jan., 1910); 6 *Cornell Law Quarterly* 271 (March, 1921); 15 *Law Notes* 169 (1911); 8 *Cornell Law Quarterly* 26 (Dec. 1922); 16 *Case and Comment* 216, (February, 1910); 53 *American Law Review* 711 (Sept.-Oct., 1919); 46 *Canada Law Journal* 480 (August, 1910); Sir Frederick Pollock, *op. cit.*, p. 352; H. G. Tiffany, *op. cit.*, p. 865; B. Davids, *The Law of Motor Vehicles*, (Long Island: Edward Thompson Company, 1911), ch. XIX; Carl Zollman, *Law of the Air*, (Milwaukee: Bruce Publishing Company, 1927) pp. 12–5; H. D. Hazeltine, *The Law of the Air*, (London: University of London Press, 1911), second lecture; J. M. Spaight, *Aircraft in Peace and the Law*, (London: Macmillan, 1919) p. 55; R. A. Greer, *op. cit.*, ch. XI, pp. 32–33. Greer's pamphlet also contains a portion of the report of the special committee of the American Bar Association appointed to study this problem. Here also the reader will find a copy of the opinion of Judge John C. Michael of a Minnesota district court, discussed later in this article (p.252).

In 2 *Wisconsin Law Review* 58 (Oct., 1922) is a note concerning a Pennsylvania unreported case. The plaintiff living near a flying field which some gypsy fliers had rented complained of the noise and had the aviators arrested under the game laws which forbade trespassing on land that is posted. The judge held that though the aviators had flown above the plaintiff's land, they had not set foot upon his ground and had therefore not violated the law. It must be noted that this was a criminal, not a civil case, and it cannot, therefore, be used as authority for saying that an aviator is not a trespasser. See also 71 *Pennsylvania Law Review* 88 (Nov., 1922).

[16] Laws limiting property in the air have been said to be similar to statutes and ordinances forbidding the construction of buildings above a certain height. The analogy is not sound, because the limitation of the height of building may be justified on account of the public health and safety—two considerations which cannot be resorted to in justifying limitation of property rights in air in favor of the aviator.

[17] The giving or retention of full property rights in the air would hamper the progress of aviation. Travelers who cannot make their way on account of obstructions such as deep snow may with impunity enter the fields adjacent to the highway. (53 *American Law Review* 725.) This article also contains a discussion of other analogies. See also Zollman, *op. cit.* Ch. I. A ship at sea in a storm may tie up at a private pier without permission. In fact, the owner of such pier would be liable for damages if he refused such use. (*Ploof v. Putnam*, 71 Atl. 188 (1908)). The opinion in this case contains a collection of cases on this type of justifiable entry on private property.

waters of a navigable stream,[18] the right of individuals in newly settled districts to graze their cattle and sheep on unenclosed privately owned land,[19] and the fact that the common law must adapt itself to changing conditions.[20] The last three seem to be particularly in point.

The easier and more satisfactory but unorthodox method, and incidentally one which arrives at the same conclusion as to the rights of the aviator, is to inquire into the exact meaning of the common law maxim. Law writers have often misunderstood this sentence[21] and have as a result placed themselves under the necessity of proving either that it does not really mean what their translation states or of showing the necessity of and justification for its limitation.

The common law maxim states that the landowner owns *up to but not including* the *caelum*. What, then, was the *caelum?* Though the word was loosely used by Latin writers, it was commonly employed to refer to the lower airspace,[22] the area in which the birds fly[23] and the clouds drift[24] and from which the rain falls and the lightning strikes.[25] Occasionally it meant God, "heaven the home of the happy dead," and the resting place of the stars. Birds fly near the ground, storm clouds sometimes hover at an altitude of a few hundred or a thousand feet. It is only up to the beginning of this *caelum* which the landowner owns. Virgil refers to a "*machina aequata caelo*"[26]—a derrick equal in height to the *caelum*. The machine of which he sings stood on top of a wall. The entire distance probably did not exceed 100 feet.[27] Apparently, therefore, according to good Latin usage, the *caelum* was a space which began only a short distance above the surface of the earth. One Latin scholar described it as the space lying only a little above the

[18] The ownership of the bed of a navigable stream generally vests in the government and in rare instances in a private individual. Such ownership, however, is subject to an easement of navigation in favor of the public. The easement is one of *passage* only. See 6 *Cornell Law Quarterly* at 299 (March, 1921). If the bed is privately owned the owner retains exclusive fishing and hunting rights, and any activities on the surface of the water not connected with bona fide purposes of navigation constitute trespass. *Beatty v. Davis*, 20 Ontario Reports 373 (1891) (Queen's Bench, Chancery & Common Pleas Divisions).

[19] Under the common law every man's land was deemed to be enclosed, either by a visible or invisible fence, and every unwarrantable entry on such land constituted trespass. (26 *R. C. L.* 938.) American courts have enunciated the peculiar principle that during the settlement of the more remote parts of the country if anyone left his lands unenclosed, such fact was an implied license to graze stock on them. *Buford v. Houtz*, 133 U. S. 320 (1890) is the leading case. See also *Seeley v. Peters*, 10 Ill. 130 (1848); *Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172 (1854).

[20] See 2 C. J. 299 at 302. Our judges "have refused to extend this maxim to untried fields, confining it to that portion of the earth which may be used for trees and structures." Davis, *Law of Radio Communication*, (New York: McGraw-Hill, 1927) p. 18. "The rule or maxim has full effect, without extending it to anything entirely disconnected with or detached from the soil itself." (*Hoffman v. Armstrong*, 48 N. Y. 201 at 204 (1872)). For same effect see *Butler v. Frontier Telephone Co.*, *supra* n. 4. and *Herrin v. Sutherland*, 204 Pac. 328 (1925). The court in the last case (at 332) hints, however, that the question of trespass will become one of great importance when the airplane is common.

[21] Judge Stephen Davis, *op. cit.* p. 16, translates the maxim as follows: "Whoever has the land possesses *all the space upwards to an indefinite extent.*" A writer in 53 *American Law Review* 728 criticises the common law maxim on the ground that the "landowner might be holding title to *millions of acres on planets billions of miles away.*" These are extreme cases. Practically all writers forget that the Latin says "*usque ad caelum.*" (Italics mine.)

[22] Plinius and Lucretius Carus refer to the "*caelum, quid aer* (lower air) *dicitur.*" Pacuvius says the "*caelum continet terram complexu.*"

[23] "*De caelo servare,*" a term in augury, referred to a study of the birds, movements, etc.

[24] Virgil in *Aeneid* Book I, line 88: "*Eripiunt subito nubes caelumque diemque Teucrorum ex oculis.*" Cicero in *Tusculanarum Quaestionum*, Book 1: 19, 43 speaks of *caelum hoc, in quo nubes, imbres ventique coguntur.*"

[25] The terms "*de caelo tangi*" and "*e caelo ictus*" mean (to be) "struck by lightning."

[26] *Aeneid*, Book IV, line 89. Plinius writes about a mountain which extends into the *caelum.*

[27] Most of these references are taken from *Thesaurus Linguae Latinae;* Harpers Latin Dictionary (Lewis and Short ed.); Hinds and Noble Latin Dictionary.

highest tree tops and buildings. The area below this *caelum* belongs to the owner of the surface.

Blackstone and Coke, who did much to popularize the common law maxim, interpreted it according to its Latin meaning. Blackstone, after quoting the maxim approvingly says:

".....So that the word 'land' includes not only the face of the earth, but everything under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metals and other fossils, his woods, his waters, and his houses, as well as his fields and meadows."

In another connection he says:

"*Cuius est solum, eius est usque ad caelum*, is the maxim of the law upwards; therefore no man may erect any building, or the like, to overhang another's land."[28]

It is significant that as careful a writer as Blackstone does not in his specific enumeration mention the airspace or anything pertaining thereto. In the second quotation he refers to "buildings, *or the like*," overhanging another's land through the air.[29]

Coke also quoted the Latin maxim:[30] "The earth hath in law a *great extent* upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven." In the same connection Coke quoted the Latin "*Caelum coeli domini, terram autem dedit filiis hominum.*" (All the heaven is the Lord's; the earth he has given to the sons of men.)[31]

A strict and careful translation of the Latin maxim will accordingly eliminate the need of proving only a limited ownership of the airspace, for the subjacent landowner by the common law has never possessed even a theoretical right to the area normally traversed by airplanes. While in normal flight the status of the aviator will, then, be governed by the law of nuisance, not trespass.[32] To recover damages or to be entitled to equitable relief, a landowner must prove that the aviator constitutes a nuisance. An act or a situation done or maintained on one's own, on public, or on common property may be a nuisance, if the result of it is substantially to harm another's business, property, health, or comfort. A nuisance has been aptly described as the right thing in the wrong place. The test usually is: Does the act or thing harm a person of ordinary sensibilities? Thus, if an aviator's plane, for instance, casts shadows or makes loud noises which frighten a farmer's animals, he may be held to be operating a nuisance, and may be required to fly at a higher altitude. If he flies sufficiently high not to constitute a nuisance, he cannot be regarded as a trespasser, because he has not entered the property of another.[33]

[28] 2 Commentaries 19 (Oxford edition).

[29] H. L. Jome, "Economics of the Radio Industry" (Chicago: A. W. Shaw Co., 1925), p. 232.

[30] Coke upon Littleton, (Hargrave and Butler, editors), Lib. I, section I, 4a.

[31] Obviously Coke is no authority for the statement that man's proprietary rights extend indefinitely upwards. Kent, quoting Coke, says that "land includes 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 houses and other buildings; and which has an indefinite extent, upward as well as downward, so as to include everything *terrestrial*, under or over it." 3 Commentaries 401 (Charles M. Barnes, editor, 13 ed., Boston: Little Brown & Co., 1884). (Italics mine). Kent's word "indefinite" is effectively modified by the context.

[32] To commit trespass a person must generally "break the close" by illegal entry or by the projecting of some object upon the land or through the air near thereto. There are instances, also, in which interference with privacy is trespass. In *Hickman v. Maisey*, 1 Q. B. D. 752 (1900), the court held that a newspaperman who loitered on a public road watching the activities of the plaintiff, a horse trainer, was guilty of trespass.

[33] Unless he should drop an article or circle about and break the privacy of the landowner. As soon as the dropped article reached the space below the *caelum* the aviator would become a trespasser, regardless of the damage done. Shooting from a public highway or from one's own property onto or over the land of another constitutes trespass.

Obviously the altitude to be maintained and the operating standards to be enforced aboard a plane will depend upon the nature of the subjacent territory.

Modern Legislation Involving Property in Air

The laws covering this subject are of two types: (1) those which have as their purpose the limitation or in a limited sense the condemnation of the rights of the landowner on the supposition that he has theoretical property rights in all the airspace above his head; and (2) those which have been formulated on the theory that the subjacent owner has no property rights, even in theory, in the superarea.

The former type is found in the United States, Great Britain, Japan, Germany and to some extent in France. According to the British Act of 1920, "no action shall lie in respect of trespass . . . by reason *only of the flight* of aircraft at a height above the ground, which having regard to wind, weather, and all the reasonable circumstances of the cases is reasonable." The British Aerial Transport Committee which was appointed to to study the problem and whose recommendations were enacted into the above cited law said in its Report:

> "To retain this doctrine (*Cuius est*, etc.) in its entirety would be fatal to civil aeronautics. On the other hand, to allow unrestricted flying over private property at all altitudes would interfere with the reasonable rights of landowners."[34]

The Uniform State Aeronautics Act adopted by 11 American states or territories[35] contains the following sections:

Sec. 3. "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 Sec. 4."

Sec. 4. "Flight in aircraft over the lands and waters of this state is lawful, unless at such low altitudes 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. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful except in the case of forced landing. For damages caused by a forced landing, the owner or lessee of the craft or the aeronaut shall be liable, as provided in Sec. 5."

Sec. 5. Providing for absolute liability.

These laws, regardless of the real meaning of the common law maxim, have quite unnecessarily created a property right in the airspace, the justification for the limitation of which must be proved.

Other laws create in an indirect way a property right in the airspace. Section 10 of the United States Air Commerce Act of 1926 defines "navigable airspace" as meaning the "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce . . ., 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." Section 4 also, by giving the President power to make airspace reservations, appears to classify the remainder of the airspace above a reasonable altitude as free to all.

The Wyoming statute of 1927 (ch. 72, sec. 2,*j*) stipulates that the term navigable airspace "means the airspace above the minimum altitudes of flight which are hereby defined to be not less than one thousand feet over any city, town, or settlement, and not less than five hundred feet over any other portion of the State of Wyoming except in case of

[34] 146 *Law Times* 106 (Dec. 14, 1918).

[35] Delaware, Hawaii, Idaho, Maryland, Michigan, Nevada, North Dakota, South Dakota, Tennessee, Utah, Vermont.

landing, taking off or emergencies necessitating lower flight, and excepting lower flight when necessary for industrial operations."[36]

By stating that the airspace shall be subject to a public right of passage of airplanes, the federal law has admitted the existence of some property rights in the *caelum* even outside of those created by the law of nuisance or of trespass in the lower airspace. The Wyoming and other similar state laws have in a sense condemned a portion of the airspace for the purposes of aviation.

The French Code Civil provided that the airspace belongs to the subjacent landowner, but this presumption may be rebutted.[37] In 1913 France passed a law which (sec. 1) "proclaims the liberty of the circulation of airships (including airplanes) above the territory of the Republic under reservation of the observance of the law. . . . It is forbidden that airships shall descend, unless in case of *force majeure*, upon enclosed properties on which there is a dwelling, without the consent of the proprietor. . . . The airships and the aviators will be held responsible for any damage to property caused by aerial navigation, the victim of any damage so caused not being required to show that such damage was caused by any fault on the part of the aviator."

In introducing this bill M. Joseph Thierry stated that the commission in charge of drafting the legislation "had been concerned with the import of article 552 of the Code Civil." The conclusion arrived at was that the "propriété du dessus" as qualified did not extend to the atmosphere not susceptible of private appropriation. M. Thierry stated that it was the purpose of the bill, "while protecting the public, not to injure in any way a new national industry."[38] This law in effect put to rest all demands of the landowner for proprietary rights in the airspace in return for the provision that the aviator shall be held absolutely responsible regardless of proof of fault on the part of the aviator, for all damage caused either by the circulation or descent of aircraft.[39]

The German Civil Code provides that "the right of the owner of a piece of land extends to the space above the surface and to the substance of the earth beneath the surface. The owner may not, however, forbid interference which takes place at such a height or depth that he has no interest in its prevention."[40] The Japanese Civil laws stipulate that "the ownership of land, within the restriction of laws and ordinances, extends above and under the surface."[41]

The best illustration of the second type of law is found in Switzerland.

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[36] The Uniform Act prohibits flying at such a low altitude as to endanger people or property or to interfere with the existing use of the land. Some form of limitation of altitude is also found in Arkansas, California, Connecticut, Kansas, Maine, Massachusetts, New Jersey, Minnesota, Wisconsin.

An interesting constitutional question would arise if an industrial airplane under authority of the Wyoming law should persist in flying so low as to constitute a nuisance. The federal law has created a public right of passage in airspace which it indirectly admits to be private property. Is such condemnation justified by the power to regulate interstate commerce?

[37] Art. 552: "La propriété du sol emporte la propriété du dessus et du dessous. La proprietaire peut faire au-dessus toutes les plantations et constructions qu'il juge á propos, sauf les exceptions établies au titre des servitudes au services fonciers." Some of the easements and duties in the title referred to (Sections 653–685, Wright Civil Code) provide for rights of way, location of buildings, etc.

Reviere's Code Francais contains a note: "La disposition d'aprés laquelle la propriété du sol emporte celle du dessus et du dessous, n'etablit qu'une présomption, qui cede à une preuve au présomption contraire." (135 *Law Times* 70).

[38] 135 *Law Times* 70.

[39] For cases decided under this law, see note 47.

[40] Chung Hui Wang, *German Civil Code*, Sec. 905 (London: Stevens & Sons, Ltd., 1907).

[41] J. E. deBecker, *Civil Code of Japan*, Art. 207 (London: Butterworth & Co., 1911).

According to the Swiss Code, "ownership in land and soil reaches above and underneath into the air and the earth so far as the exercise of the ownership requires." This is a distinct limitation of property rights in the airspace.[42]

The Argentine Civil Code also seems to illustrate the second group of laws. "The ownership of the soil extends to its entire depth, and to the aerial space in perpendicular lines. It comprises all the objects to be found beneath the soil. . . . The proprietor is the exclusive owner of the aerial space; he may extend his constructions therein, even though they take away the light, view or other advantage from his neighbor; and he may demand the demolition of the works of a neighbor which enrcoach upon this space at any height."[43] It will be noted that while the law uses the term "at any height," it manifestly refers only to buildings and constructions. Section 2554 provides that "the ownership of a thing comprises at the same time the ownership of the things accessory thereto, whether naturally or artificially attached."

Present Status of Property in Air

The evolution of the law away from the concept or theory that ownership extends indefinitely upwards has significance in discussing the legal rights and duties involved in the situations suggested in the beginning of this article. The principles of the law as applied to the airplane and balloon may be summed up as follows: (1) A subjacent owner owns the airspace only up to a limited altitude; (2) In the superarea he has no property rights unless they have been created by statutory legislation; (3) The aeronaut, or proprietor of the aircraft, is responsible for all damages caused by him or by his descent. For instance, if while 5000 feet in the air, an altitude in which the subjacent landowner has neither practical nor theoretical proprietary rights, the aviator drops a monkey wrench and kills a farmer's calf, or makes a noise frightening animals, the aeronaut is liable regardless of fault. It will be noted that, while he himself was not at first a trespasser, he became so when the wrench reached the airspace near the land or fell on the ground. For the persistent noise he may be held liable on the ground of nuisance.

We may now briefly give the essential facts in a few situations which have actually arisen and which call forth the application of the legal principles in question.

Illustrative Cases Arising out of Travel Through the Air

Case 1. The proprietor of the "Cackle Corner Poultry Farm" at Garrettsville, Ohio, wrote to the Postmaster General:

> "I am a poultry raiser keeping about 2,500 Leghorn hens. About once in two or three weeks an airplane, sometimes it is a U. S. mail plane, flies over my place so low that the hens become so frightened that they pile up, thus injuring each other and my egg yield drops one or two hundred eggs per day, and by the time I get them back to normal along comes another low flying machine and sends the egg yield down again. I dare say a small flock would not be harmed as much as the larger flocks, but the loss to me is so great that I fear it may put me out of business and I wondered if the planes could not be requested to fly higher."[44]

The Postmaster General requested the National Air Transport, Inc., which operates the United States mail planes

[42] R. P. Shick, *Swiss Civil Code*, Sec. 667 (Boston: The Boston Book Company, 1915).

[43] F. L. Joannini, *Argentine Civil Code*, Sec. 2552 (Boston: The Boston Book Company, 1917).

[44] Postoffice Department Press Release, in *Domestic Air News*, January 31, 1928.

between New York and Chicago, to order its pilots to ascend a little higher when they reach Garrettsville. What would have been the rights of the farmer if the National Air Transport and the Postoffice Department had paid no attention to this request?

Case 2. Several years ago the dirigible "Shenandoah," while passing over Eastern Ohio was torn to pieces by a storm through no fault of the officers in charge, the parts falling on the lands of certain farmers. Curiosity seekers gathered from all parts of the country, trampling down the vegetation and destroying fences. Some of the farmers applied to the United States Government for damages. It developed that in certain instances the farmers had charged admission for the privilege of entering upon their land. What are the legal rights of the farmers and should this latter fact alter their status?

Case 3. The owner of the land alongside a French airfield built a board fence so high that the airplanes in their descent or ascent were unable to clear it. The proprietor of the airdrome sought a court order against the adjacent landowner on the grounds that the fence was serving no useful purpose. Should the injunction be granted?

In Case 1 the farmer would possess the right to force the planes to fly at a higher altitude, if they constitute a nuisance.[45] If the company had not complied with his request, he would have a right to relief both at law and in equity.

A recent decision by Judge John C. Michael of a District Court in Minnesota, involving an action brought by a landowner "to recover damages and to enjoin the defendant fliers from again flying over the plaintiff's premises regardless of the altitude of such flight" promises to become the law on the subject. Judge Michael said:

"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 (*Cuius est*, etc.) 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 landowner can do the same.

"Condemnation of airplanes is not feasible, because aircraft cannot adhere strictly to a defined course.

"Common law rules are sufficiently flexible to adapt themselves to new conditions arising out of modern progress, and it is within the legitimate province of the courts to so construe and apply them. This very rule has been modified by our Supreme Court in respect to subterranean waters. (*Erickson* v. *Crookston*, 100 Minn. 481 (1907)).

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

"Failure to sustain the plaintiff's contention, relative to upper air trespasses, does not deprive him of any substantial rights, or militate against his appropriate and adequate remedies for recovery of damages and injunctive relief, in cases of actual trespass or the commission of a nuisance."[46]

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[45] The Supreme Court in *People v. Smith*, 196 N. Y. Supp. 241 at 243 (1922) said in effect: "When seaplanes make their base at the head of a small lake and carry passengers for hire, flying at various heights above the lake's surface and shores with a noise which at times is deafening and makes property along the lakes less desirable, they may well constitute a nuisance which the legislature may abate." In a German case the plaintiff's land declined in value on account of the great noise from airplanes. He was awarded damages. See Zollman, *op. cit.*, p. 27.

[46] Quoted in Greer, *op. cit.*, in section on Municipal Law.

In Case 2 the farmers have the right to damages, and the fact that they were charging admission would perhaps only serve to give the government a chance to consider these receipts as a subtraction from the actual damages incurred.[47]

In Case 3 there seems to be a great doubt as far as American law is concerned. Some of our states permit a man to build a "spite fence" in ordinary circumstances even though it shuts off air and light from a neighbor's premises. In such case, the fence may be legal even though it be conceded that airplane operators have rights in the upper air. As the spite fence doctrine seems to be of American origin, the case would probably be decided differently in Europe or in states which do not permit the construction of spite fences or buildings. In France, for instance, the owner of the land alongside the airdrome was forced to tear down the fence. If it had served a useful purpose, the decision would perhaps have been otherwise.

Illustrative Cases Arising out of Communication Through the Air

In the field of wireless we may also describe several situations and discuss the pertinent principles involved.

Case 4. A Chicago doctor has spent many years in developing and installing delicate laboratory equipment used in connection with his practice. The popularization of radio telephonic broadcasting has resulted in ether waves interfering with his instruments. Likewise, some of his electrical apparatus tends to hamper radio reception in the community. What are the respective rights of the parties? Has the doctor, who was the first in the field, a right of priority?

Case 5. Under the Radio Regulatory Act of 1912, the proprietors of radio transmitting stations were required to obtain a license from the Secretary of Commerce (and Labor). Among other things this license stipulated the term of the license and recited the wave length on which the station was to operate. The law, however, did not give the Secretary power to limit the term of the permit, but stipulated that the license was revocable only for cause. The Secretary had no discretion in the granting of the license[48] nor could he compel adherence to the use of the power and wave length specified. A station proprietor duly licensed shifted operations from the wave length recited in his license to one so close to that of a previously authorized station as seriously to interfere with its program. Did the priority of the earlier station give it a property right in that particular portion of the ether represented by its frequency?

Case 6. Congress in 1927 enacted a law requiring all radio stations to be duly licensed whenever, in the opinion of the Radio Commission (or, after one year, the Secretary of Commerce) public convenience, interest, and necessity warranted. The licenses were to be issued

[47] In 1914, after the passage of the French act, a landowner sued three airplane companies whose machines passed continually over his property. He was awarded $300 damages. The Court stated that the air cannot by its nature be privately owned and that it is absolutely free, but it awarded damages on account of the too frequent landings of the airmen on the plaintiff's property. *New York Sun*, June 28, 1914; 2 *C. J.* 304. For the same or similar cases see Woodhouse, *op. cit.* p. 7.

In another French case the court said that "the owner of land has no such proprietary ownership of the air above that he is legally entitled to prevent an aviator from flying over it." Here the altitude was apparently sufficient. The Civil Tribunal of the Seine in a later case held "that airplanes flying from 5 to 15 meters frightening domestic animals and game, attracting spectators, and thus injuring crops and generally inconveniencing the plaintiff, render the defendant liable for damages." Cited in 53 *American Law Review* 711 at 732 (September–October 1919); 24 *Juridicial Review* 321 (1913); 18 *Law Notes* 62 (July, 1914). See also *Guille v. Swan*, *supra* n. 12.

[48] *Hoover v. Intercity Radio Co.*, 286 Fed. 1003 (1923).

for short terms only. The newly issued licenses were to contain provisions as to power and wave length, adherence to which was obligatory upon the licensee. A station proprietor who had been licensed under the law of 1912 finds himself deprived by government action of the wave length on which he had been operating for many years. The 1927 law failed to provide for compensation in a case of this kind. Has the station proprietor been deprived of his property without due process of law?

Case 7. Or the owner finds that the Commission refuses to grant him a renewal license, on the ground that the operation of his station is not justified by public convenience, interest, and necessity. The apparatus, therefore, becomes practically worthless. The proprietor, claiming that his license was granted under the provisions of the 1912 law, which conferred no authority upon the government to limit the term or to revoke the license without *cause*, complains that he has a property right in the ether; that no sufficient cause for the revocation of the license has been alleged; and that the action of the Commission deprives him of property without due process of law. Does he possess a justifiable case under the Fifth Amendment to the Constitution of the United States?

The relative rights of telephone, telegraph, power, and electric railways have occupied much space in the development of electrical law. Courts have generally held that "as between electric companies exercising similar franchises in the same streets or highways, priority of franchise and occupancy carries with it superiority of right to the extent that the subsequent licensee is under the duty so to construct its system as not unnecessarily to interfere with the prior licensee in the exercise of its franchise."[49] "This does not, however, mean that priority in grant carries with it the exclusive right in the use of the street, but merely protects the first company in its occupation of the street with its poles and wires. . . . If interference and limitation of the one or the other is unavoidable, the latter must give way, and it has been held that the fact that it is under contract with the city for work of a public nature does not alter its position or give it any claim to preference."[50]

The cases just referred to pertain particularly to interference of poles and wires. Most of the litigation involving conduction and induction concerns the question of the rights of telephone and telegraph companies against electric railways and power companies. The general rule here seems to be that both parties are bound to attempt to eliminate the interference, but that if this is impossible, the prior company has the stronger right. An electric railway as well as the company interfered with must attempt to eliminate the interference, but if this cannot be done by reasonable, tested means the railway company may have the superior right, regardless of priority, since the streets are intended primarily for travel.[51]

Though the laboratory owner in Case 4 was first in the field, to grant recourse to him would have startling and disastrous effects on our broadcasting and communication system. He would have no more claim against the radio station than against a street car company or the proprietor of a distant quarry. The duty of the broadcaster is in this respect performed where he makes use of the most practical and up-to-date devices to enable the prevention of such interference. The

[49] 20 *C. J.* 314–5.
[50] 9 *R. C. L.* 1194.
[51] J. A. and H. C. Joyce, *Electric Law*, (New York: The Banks Law Publishing Company, 1907), p. 824.

burden would seem to rest upon the proprietor of the laboratory himself to install certain insulating devices which are available at a reasonable cost.[52]

Sturges v. *Bridgman*[53] is the case of a confectioner who had operated several mortars for many years without interfering with any one, until one of his neighbors, a surgeon, equipped his laboratory with certain delicate apparatus. The operation of the mortars interfered with the instruments. The court held that the mortars constituted a nuisance and that the surgeon was entitled to relief.[54] This case differs from that under consideration in that the restriction of the confectioner's activities did not have such public significance as the enjoining of the broadcasting station.

In regard to the interference of the surgeon's electrical apparatus with the broadcast listeners, a decision may be made against the surgeon on the ground that he should use his apparatus so as not to interfere with the legitimate activities of others and that he could take easily available precautions to prevent such interference. This would be true in spite of the surgeon's priority, because the radio appears to be the logical and most advantageous use of the air.

A radio station licensed under the 1912 Act seems to have obtained a right of priority when it had firmly taken possession[55] of a certain wave length. Since the ether belonged to no one, it would seem that the proprietor of such station is in the same position as he who cuts ice on a public pond,[56] or who combines the letters of the alphabet in a slogan or a book[57] or who kills wild game[58], or who appropriates for himself the waters of a non-navigable stream.[59] By taking possession of, and using, a certain wave length, he has acquired a property right which is superior to the claims of succeeding parties. Any other party attempting to operate on the same wave length so as to interfere with the efficiency of the prior party would be liable under the 1912 Act to a suit for civil damages or a petition for relief.

A recent case illustrates the situation. The WGN station of the Chicago Tribune complained to an Illinois Circuit

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[52] Cf. 18 *Case and Comment* 138 at 142 (1911).

In denying an injunction sought by a telephone company against a street railway company on account of the conduction the court said: "The substance of all the cases we have met in our examination of this question . . . is that, where a person is making a lawful use of his own property, or of a public franchise, in such manner as to occasion injury to another, the question of his liability will depend upon the fact, whether he made use of the means which in the progress of science and improvements have been shown to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. . . . Unless we are to hold that the telephone company has a monopoly of the use of the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which in the progress of science and invention may hereafter require its use, we do not see how this bill can be maintained." *Cumberland Telephone & Telegraph Co. v. United Electric Railway Co.*, 42 Fed. 273 (1890); see also Joyce, *op. cit.*, p. 811.

[53] 1879 L. R. (Ch. D.) 852.

[54] See also Zollman, *op. cit.*, p. 123.

[55] Since it may seem impossible to hold or possess a channel in the intangible ether, it would be more accurate to state that "one owns not the thing, but the right of possession and enjoyment of the thing." Tiffany, *op. cit.*, p. 5.

[56] *Ibid*, p. 1031.

[57] See 26 *R. C. L.* 834–5; 6 *R. C. L.* 1099.

[58] See R. T. Ely, *Property and Contract* (New York: Macmillan, 1914) p. 102, 112–3.

[59] In Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming any person, whether a riparian owner or not, who first appropriated water from a stream or lake for some "beneficial and continuing use" got a first claim on the water even as against the riparian proprietors. In 10 other states this appropriation must have been made before the land bordering the stream passed out of the hands of the government. The doctrine of appropriation has in some states and by the Federal Reclamation Act been modified so that in case of a deficiency the first appropriator does not get all the water, but an apportionment among the farmers is made. Tiffany, *op. cit.* p. 1155–6; R. T. Ely and E. W. Morehouse, *Elements of Land Economics* (New York: Macmillan, 1924) p. 162–5.

Court that a nearby broadcaster, Oak Leaves Broadcasting Station, WGES, was operating on a wave length sufficiently close to that of the Tribune station to interfere seriously with its programs. Chancellor Wilson of Chicago, after discussing various analogies, held that priority in the use of a wave length, investment in property on this basis, and the education of the radio receiving public to it, established a priority of right in the particular part of the ether involved. Since WGN was prior in time it had a priority in right. "We are of the opinion, further, that under the circumstances of this case priority of time creates a superiority in right."[60] WGES was enjoined from broadcasting on its chosen wave length. This case was a new application of the old rule: "First there, first served; possession is nine-tenths of the law." This decision serves to entrench prior existing stations in their vested rights in the air. This consideration may force Congress to provide for the granting of compensation if any great change in the use of wave lengths is to be made, or if the number of our radio broadcasters is to be greatly reduced, or their locations adjusted so as to serve better all sections of the country.

In Case 5 it appears, therefore, that in the instance of a station having been established prior to the passage of the Radio Act of 1927, a property right has accrued when that station has made consistent use of a particular wave length. When Congress passed the 1927 Act, there were more than 28,000 radio stations of all kinds in the United States, including 733 of the type popularly known as "broadcasters" or program stations. This law requires all stations to be licensed not only for a definite term but for the use of prescribed wattage and wave lengths, and also requires the waiver of any possible property rights which may have been thought to vest under the license. In other words, if public convenience, interest and necessity require, the government may cancel a previously granted license which under the old law was revocable only for cause;[61] it may force a station to shift its wave length and to adapt its power according to public convenience and necessity. In this process of adjustment, no provision is made for the payment of compensation. Under these circumstances it seems that stations established prior to 1927 and operating up to that time have the right to continue operation if they so desire, unless compensation is granted. Therefore, in Case 6, the proprietor has been deprived of his property without due process of law.[62] There seems to be no question, however, that the vesting of property rights in favor of future licen-

[60] Decided Nov. 17, 1926 in Circuit Court of Cook County, Ill.; see *Chicago Tribune*, Nov. 18, 1926. This case is also discussed in 13 *Virginia Law Review* 611 at p. 613 (1927) and in Davis, *op. cit.*, p. 130. Davis (p. 120–130) discusses a number of analogous cases in which the priority rule has been applied.

[61] According to the Federal Court of Chicago in *U. S. v. Zenith Radio Corporation*, 12 Fed. (2d) 614 (1926) the federal licensing agency had under the 1912 law no power to limit the term of a license or to compel adherence to a certain power or wave length.

In response to an inquiry from Secretary of Commerce Hoover as to his powers under the 1912 Act, the Attorney General of the United States in the summer of 1926 arrived at a similar conclusion. From this time up to the appointment of the Radio Commission there was no effective regulation of radio broadcasting in the United States. The absence of public convenience, interest and necessity would not under our constitution be considered an adequate "cause" for the revocation of a license.

[62] Recognizing that the closed or shifted stations have some rights under the Constitution, the Radio Law Committee of the American Bar Association in its report gives eight reasons why compensation should be given. The most important of these is the fact that "These rights (to a certain channel) were obtained under the 1912 statute which does not fix a limitation in time and specifically provides that it (the license) may be revoked only for cause." (For report of the Committee see 12 *American Bar Association Journal* 848 (December, 1926); 13 *Virginia Law Review* 611 (1927) and Davis, *op. cit.* p. 66.

sees is checked by the provision in the law that no license shall be construed to give the licensee any rights beyond those stipulated in the license;[63] that all licensees must sign a waiver of any claim to the use of the ether or any wave length as against the regulatory power of the United States (Sec. 5-H); and that the license must state on its face that the licensee secures no rights beyond the time for which the license is granted. (Sec. 11, *a*.)[64] Therefore, in cases 6 and 7, the station proprietors seem to possess justifiable claims under the Fifth Amendment to the Constitution of the United States.

Station WGL which had been operating prior to the passage of the 1927 law on a frequency of 710 kilocycles (422.3 meters) was denied the use of this wave length. The owner decided to bring suit against the Radio Commission on the constitutional grounds that the law had without compensation circumscribed the use of facilities on which large sums had been expended. This suit was, however, subsequently withdrawn,[65] for the reason that the station owner did not care to hamper the activities of the newly created Commission.[66]

The problems involved in Case 5 will become of ever-increasing importance, since the Commission now assigns wave lengths; and an interference with a station operating on its legitimate wave length will not only be a cause for civil damages as under the law of 1912 but will also constitute an illegal act subject to criminal prosecution. The problems involved in Cases 6 and 7 will also be of increasing importance, not only because of the great number of stations in operation at the time of the passage of the 1927 Act, but also because of the necessity for a station owner to prove public convenience, interest, and necessity with due regard to the geographical location of stations. The recent order of the Federal Radio Commission directing the representatives of 174 stations, scattered throughout the entire country except the southern district or zone, to show cause why their licenses should not be cancelled on August 1, 1928, promises to bring into our federal courts this important question of constitutional law. [67]

Conclusion

The law is an evolutionary product. It must, and does, change to meet new

[63] Section 1 also states (that this Act is intended) "to provide for the use of such channels, but not the ownership thereof . . . for limited periods of time."

[64] At the time of the passage of the 1927 law there seems to have been much doubt in the minds of the Senators and Congressmen as to vested rights in the ether. Most of them agreed that no vested rights should be acquired in the future, but there was some confusion as to the rights of the stations already licensed. The sponsors of the conference report thought that the following section would abolish the rights, if any, of previously established operators: "No station license shall be granted by the (Radio) Commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." (Section 5 H). The meaning of this section even to the legislators themselves was uncertain. (See *Cong. Record*, Feb. 3, 1927, p. 2870). If the courts interpret it as depriving the previously established stations of their priority rights under an indeterminate license, there is grave doubt as to its constitutionality. Since Congress itself did not know the meaning of its own language, the courts may give it a non-confiscatory interpretation, so as to preserve its constitutionality. Many of the stations signed this waiver only under protest.

[65] *United States Daily*, Aug. 3, 1927.

[66] To the reader who may wonder why such restriction is not justified under the theory of the police power, it may be stated that it is exceedingly difficult to connect it with the public health, safety, or morals.

[67] Other important questions may also be involved. For instance, if the license of the only socialist station, WEVD, is revoked, the issue of free speech will undoubtedly be raised. This station has filed a brief demanding that it be "treated on a parity with others who are richer and more influential with the government." "We ask no special privilege," the brief con-

(*Continued on page 272*)

conditions. Several centuries ago the problem of property in the air was merely academic; today it is practical. The solution of this question will come only after a delicate balancing of the rights of the individual and of society. The individual must be protected, but his "bundle of rights" should not necessarily be so enlarged as to jeopardize the development of new industries. On the other hand, while in our advancing culture the common rights of society are likely to be enlarged, due heed must be given to the individual who may find his property and business rights irreparably damaged. In this balancing process, the particular legal rule governing use of the airspace should be varied according to the peculiarities of different uses, as in the cases of transportation and communication.

(*Footnote 67 continued from page 271*)

tinues. "Give us the power, the time and as advantageous wave length as have been bestowed on these great and mighty money making interests." Associated Press dispatch in the *Minneapolis Journal*, July 9, 1928.