AIRSPACE AND ARTICLE 414 C.C.

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One of the basic problems which has bothered lawyers and jurists in the twentieth century, in the fast developing field of aviation law, is the question of private property rights in airspace. The problem is at times purely academic, but every now and then becomes very real and urgent. The problem stems from the apparent conflict of interests between the aviator with his right to fly, combined with the impossibility of sustained flight without passing over privately owned soil, which right is opposed to the landowner's right to privacy and his rights to erect and grow upon his soil all manner of things and to be free from interference and disturbance in the enjoyment of his property.

In common law the problem is confounded all the more by the existence of a Latin maxim, which when taken on its face would appear to give to the landowner rights of ownership of the airspace above his soil to an unlimited height. This maxim, about which more will be written later, reads: *"Cujus est solum, ejus est usque ad coelum."*[1] The situation given rise to by this maxim is not unique to common law systems. A great many civil law systems contain provisions in their codes giving rise to similar literal interpretations. In the Province of Quebec, Article 414 C.C. reads as follows:

> Ownership of the soil carries with it ownership of what is above and what is below it.
> The proprietor may make upon the soil any plantations or buildings he thinks proper, saving the exceptions established in the title OF REAL SERVITUDES.
> He may make below it any buildings or excavations he thinks proper, and draw from such excavations any products they may yield, saving the modifications resulting from the laws and regulations relating to mines, and the laws and regulations of police.[2]

To the writer's knowledge, only one case has ever been reported which dealt specifically and solely with Article 414 C.C. in its application to the rights of the landowner in the airspace above his soil in reference to aircraft passing, or which might pass, thereover. This unique case is that of *Lacroix* vs. *The*

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[1]The following are a few of the authors who have written recently on various aspects of this maxim as it applies to the common law: Sir Arnold McNair, *The Law of the Air*, 2nd Ed., 1953, pp. 16-41; N. H. Moller, *The Law of Civil Aviation*, 1936, pp. 175-190; J. C. Cooper, "Roman Law and the Maxim "Cujus Est Solum" in International Air Law", (1952) 1 McGill Law Journal 23; J. E. Richardson, "Private Property Rights in the Air Space at Common Law", 1953 Can. Bar Rev. 117.

[2]In the same sense in the civil codes of other states: Article 2552 C.C., Argentina; Article 397 C.C., Austria; Article 773 C.C., China; Article 440 C.C., Italy (1865); Article 207 C.C., Japan; Article 489 C.C., Rumania; Article 723 C.C., Uruguay; Article 527 C.C., Venezuela.

Queen, heard in 1953 before the Exchequer Court.[3] It dealt with two problems — (a) the question of indemnity for the expropriation of land for the purpose of erecting and maintaining an approach lighting system to Montreal Airport at Dorval, Quebec, and (b) the question of damages resulting from the establishment of a flightway over the suppliant's property through which aircraft would fly to take off or land at the airport. The Court found the following:

1. That suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails.
2. That air and space are not susceptible to ownership and fall in the category of *res omnium communis.* This does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or any way which is not prohibited by law or against the public interest.
3. That the owner of land has a limited right to the airspace over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.
4. That the Crown could not expropriate that which is not susceptible of possession. It is contrary to fact to say that by the so-called establishment of the flightway and the flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

It would appear in this instance that the Court based its decision on the purely practical consideration of the possible effect of a literal application being given to Article 414 C.C. This writer believes that the decision of the Court was the proper one, but would go further and say that Article 414 C.C. itself, when analyzed and studied in relation to its origin and to its place in the Code, does not give to the owner of the soil rights of ownership of the column of airspace above the soil.

It is to be noted here that it is said that there are no rights of ownership *of* the airspace. The question of ownership *in* the airspace is an entirely different matter.

Space will not permit a detailed study at this time of the rights of the landowner in the airspace above his soil. Such a study would be the subject for a much longer and more precise work than this. Instead, as has been said, this writer will confine himself to demonstrating from a study of the sources of Article 414 C.C., and from an analysis of the Article in relation to the rest of the Code, that in no sense does the Article convey rights of ownership of the superincumbent airspace.

There is perhaps no field of law which has had such rapid growth as that of the law of the air, and in particular, that of International Air Law. Other forms or branches of law have had centuries in which to develop, but the rapid progression in the field of aviation has necessitated a correspondingly rapid growth in the laws governing this new phase of man's activity. In maritime law the principles of sovereignty and territorial waters have had thousands of years in which to be argned, tried and formulated. The claims went all the

[3][1954] Ex. C. R. 69.

way from *res omnium communis* held by Roman jurists concerning the Mediterranean, to the Spanish claim in the Elizabethan era of the right to the exclusive use of the waters of the Indies. And even today the principles and rules of territorial waters are not universally accepted. Small wonder then that in the field of air law, in the space of less than one hundred years, the question of sovereignty over airspace has gone through the agonies of at one moment being held to be unlimited and at the next moment being subjected to the rule of *res omnium communis,* and then stretched and reduced on Fauchille's rack of varying stages or degrees of freedom and sovereignty.[4]

In the same manner that the question of sovereignty over the airspace has gone through the whole field from absolute sovereignty to no sovereignty, so the question of private ownership of the airspace has at different times been affirmed *in toto* or in varying degrees. However, it must be pointed out that as the scope, range and number of aircraft have grown in startling arithmetical progression through the years of this century, so have the number of those who advocate private ownership of the airspace correspondingly diminished.

It is the opinion of this writer that, in the Province of Quebec at least, the terms of Article 414 C.C. do not include the airspace itself and further, that the airspace is not otherwise capable of being privately owned.[5] It is submitted on the other hand, that the airspace is in the category of *res omnium communis* so far as private ownership is concerned and that, while there is no right of ownership of the airspace above the soil, nevertheless, rights of ownership radiating from the property rights had in the soil extend into the area of the airspace, thereby giving the landowner certain proprietary, possessory or usufrnctory rights in the column of airspace over his land.

What are the basic rules of ownership as set out in the Civil Code of Quebec? Article 583 C.C. sets forth the means of acquiring ownership:

> Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise, by the effect of law and of obligations.

Articles 406, 407 and 408 C.C. set out the general principles of ownership:

> 406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by the law or by regulation.
> 407. No one can be held to give up his property, except for public utility and in consideration of a just indemnity previously paid.
> 408. Ownership in a thing, whether moveable or immoveable, is the right to all it produces, and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession.

Article 413 C.C. introduces us to Article 414 C.C., cited above:

> Whatever becomes united to or incorporated with a thing belongs to the proprietor, according to the rules hereinafter established.

[4]"Le domaine aérien et le régime juridique des Aérostats", Rev. Gen. de Dr. Int'l. Public, 1901 ,Vol. 8, pp. 414 *et seq.*

[5]For an excellent survey of the corresponding articles in other civil code systems, cf. Mateesco, "A qui appartient le milieu aérien?" 1952 R. du B. 227.

Thus we see that there are seven basic means of acquiring ownership of property set out in our Code. These means are: prehension or occupation, accession, descent, will, contract, prescription and the effect of law and obligations not otherwise included in the first six means.

Two questions arise. First, what means of acquiring ownership is contemplated by Article 414 C.C., and can it be argued that ownership of the airspace is capable of being acquired by the means set forth in this Article? If the answer to the second part of this question is in the negative, the second question arises, namely: can ownership of the airspace be acquired by any means outside of those that are set forth in Article 414 C.C.?

I. OWNERSHIP OF AIRSPACE UNDER ARTICLE 414 C.C.

We shall discuss the possibility of ownership of the airspace under Article 414 C.C. from two different points of view, both of which may be said to be academic. We shall discuss it firstly, from the point of view of the origin of this Article and what the original meaning of the Article appears to have been. Secondly, we shall discuss the inclusion of airspace in the meaning of this Article considering its relationship to the other articles of the Code and in particular, with the other articles dealing with ownership.

(a) *Origin of Article 414 C.C.*

The Codifiers tell us that Article 414 C.C. was taken word for word from the *Code Napoleon,* its corresponding article in that Code being Article 552. From the *Code Napoleon,* we learn that Article 552 is based on Article 187 of the *Coutume de Paris.*

The *Coutume de Paris* was finally consolidated in 1510 and after that was merely brought up to date from time to time until it was finally replaced by the *Code Napoleon.* It must always be remembered that the *Coutume* was but a collection of scattered rules of law existing prior to the consolidation and that these principles had been formulated at different times, in different places, and grew out of separate and absolutely distinct circumstances. In reality, it may be said that the original rules of the *Coutume* were nothing more than a collection of common law principles finally written down. Hence, the interpretation of any particular rule in the *Coutume* is rendered all the more difficult. It should be further kept in mind that in investigating the origin of Article 414 C.C., we are mainly concerned with the first paragraph, since that is the one which, if any, will convey rights of ownership of the airspace by accession.

The *Coutume* was divided into *Traités,* of which *Traité Cinquième* was entitled *"Des Servitudes".* This *Traité* was in turn divided into two *Livres,* of which the second was called *"Des Servitudes Naturelles".* Article 187, from which Article 552 C.N. was drawn appeared in this *Livre,* and read:

> Quiconque le sole appelle l'étage du rez-de-chaussée d'aucun héritage, il peut et doit avoir le dessus et le dessous de son sol, et peut édifier par-dessus et par-dessous, et y faire puits, aisemens, et autres choses licites, s'il n'y a titre au contraire.

In this Article of the *Coutume,* we find, though not in the same words, the same thought as is expressed in Article 552 C.N. and Article 414 C.C. In comparing the applicable parts of these three Articles, it is worth noting that, while Article 414 C.C. and Article 552 C.N. in their respective first sentences deal generally with the ownership of what is above and below the soil, and then in the next sentence deal particularly with plantations and buildings, Article 187 of the *Coutume* is itself in a section dealing with servitudes, combines the two thoughts into one sentence and seems to make the particular clause, concerning building and digging, a qualifying clause to the general principle.

A further difference to be noted in the drafting of these Articles is that Articles 414 C.C. and 552 C.N. refer in their respective second sentences to exceptions dealt with in another section of the Code on Servitudes, while Article 187 of the *Coutume* is itself in a section dealing with servitudes and its exception is simply expressed by the words, "s'il n'y a titre au contraire." More will be said later on the question of servitudes. Suffice it to say at this time that the rights apparently conveyed at this time by Article 187 were something different from and in addition to the right of ownership. Whether the right in question was, at such time, properly a servitude, or whether there was a need for a definable dominant and servient land in such cases is not important to us now. The important fact is that this right was merely something attached to the fact of ownership of the land. It did not convey a right of ownership distinct from the ownership of the land. At most, it conveyed a right of use.

But let us go further and ask from whence came the rule as laid down in Article 187 of the *Coutume.* In an annotated edition of the *Coutume* printed in 1665 and edited by M. C. Dumoulin, we find a footnote to the comments on Article 187 as follows:

> Reguliarment, celui qui a le sol, est estime propriètaire du dessus ,& peut y edifier tant haut que bas, par la vulgaire maxime de Droit, *Cujus est solum, ejus est usque ad coelum,* L. 1, L. 24 ff. *de servit. urban. praed.* Mais il y a ici une exception, s'il n'y a titre au contraire . . .[6]

Here for the first time officially in the history of Article 414 C.C., we find ourselves coming face to face with the famous, or perhaps in the mind of some jurists, infamous maxim, "Cujus est solum, ejus est usque ad coelum." It would appear from Dumoulin's note to Article 187 of the *Coutume* that the Article was based on this particular maxim, but even the words used by Dumoulin show that in his time there was some hesitation in applying the maxim to its fullest extent. He uses the words, "reguliarment", "est estime" and "vulgaire maxime", all of which in this writer's opinion are qualifying phrases to the broad interpretation or application of the maxim. And he concludes by stating specifically that there is an exception to the general rule of the maxim, "s'il n'y a titre au contraire."

[6]M. C. Dumoulin, *Coutume de Paris,* Paris, 1665, p. 400.

Since it appears that Article 187 of the *Coutume* was considered to have been related to or perhaps even to have been based upon the maxim, (the phrase "par la vulgaire maxime" is not too clear) we must now ask where this maxim came from and what its proper interpretation can be said to be.

The Roman law history on the source of this maxim is great. Many jurists faced with the general statement as therein contained have been bothered sufficiently by the principle to be driven to undertake an extensive research of the origin and meaning of the maxim. One of the most recent and thorough of these researches is a precise work by Professor J. C. Cooper.[7] Considering the extensive work already done in this field and the limitations of the present study, this writer will confine himself to the barest study of the question, sufficient for our purpose.

To begin with, it appears that this maxim was not an actual part of Roman law, at least not in the form quoted today. It was no doubt derived from Roman law, but we must always distinguish between Roman law proper, that is, as it existed in the time of Justinian, and the Roman law as it has come down to us today, embellished, interpreted and in some cases changed by the Glossators of the Middle Ages. This maxim, as far as can be traced, found its origin in the Glosses and not in the Codex of Justinian itself.

The Romans made a distinction between the air we breathe and the air meaning airspace. For the expression of the concept of the air we breathe, the Romans used the word "aer", a Greek word incorporated directly into the Latin. To express that area which contained the "aer", the word "coelum" was used. The able orator and attorney, Cicero, commented once upon the use of the word "aer."

> The earth is entirely surrounded by this life-giving and breathable element, of which the name is the air (aer) a Greek word, but accepted by us through use, common in Latin.[8]

From an examination of the principles of Roman law, it is clear that they held the "aer" to be free, but on the other hand, admitted of certain private rights existing in the "coelum." In studying the nature of these private rights in the "coelum", we find that they are parctically the same as certain rights specifically provided for in our Codes today, in respect of rights of view, the cutting of overhanging branches of a neighbour's tree and of overhanging buildings.[9]

But what type of rights were these that the Romans had in the "coelum" over their property? Were they *rights of ownership of the airspace,* or were they mere *rights of interest in the airspace* due to the ownership of the land beneath? The Romans were probably not much concerned with such distinc-

[7]"Roman Law and the Maxim "Cujus Est Solum" in International Air Law", (1952), 1 McGill Law Journal 23.

[8]Cic., N.D., 2, 36, 91, Harper's *Latin Dictionary,* cf. under *Aer.* Cf. also Juglart, *Traité élémentaire de droit aérien,* Paris, 1952, p. 160.

[9]For examples of these various rights, cf. Cooper, *op. cit.,* p. 28 *et seq.*

tions because the matter was not one of great importance. However, today, with aviation such as it is, the question is of vital importance when we set ourselves to determining precisely what rights the landowner has in that space superincumbent his land. Various learned studies have been made of this aspect of Roman law, which studies are all in agreement as to the existence of rights of the landowner in the "coelum", but which differ in their conclusions as to the precise nature of the rights. Professor Cooper has summed up these varying opinions concisely, and for the sake of brevity they will be quoted here.

> After independent re-examination of the Corpus Juris Civilis to determine the rights in Roman law of the landowner in airspace above his property, Lardone said: 'Has the landowner any rights in the air column above his property according to Roman law?' The general conclusion reached is as follows:
> 1. According to the wording of the Sources, the landowner is given expressly by Roman law, the control of the air column above his property at low altitudes, for instance the height of buildings, of trees, etc.
> 2. According to the spirit of the Sources, such private control can be extended to any altitude.'
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> De Montmorency held that under Roman law the state enjoyed a right of eminent domain in space above Roman soil and the control of the airspace was retained by the Roman state insofar as the airspace was not essential to the enjoyment of the land beneath. He hence disagreed with Roby as to the extent of the right of the individual in the airspace, but insisted even more strongly that the state claimed and controlled airspace.
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> Von Jhering, in Germany, upon a re-examination of the original sources, concluded that the owner of the soil was also owner of the airspace above, but only to the extent required to satisfy his practical needs, and that Roman jurists would not have accepted such an 'abuse of logic' as property in space without limit.
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> Both Guibe and Sauze, in France, denied that Roman law created rights of ownership in the airspace, but admitted that the subjacent owner had a right exercisable at any time to build up to an indefinite height or otherwise enjoy the use of his land and have the use protected by law.
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> Pampaloni and Bonfante, in Italy, each made an independent re-examination of the original sources. Pampaloni was of the opinion that in Roman law the owner of the soil had the exclusive power over contiguous airspace, which at times appeared equivalent to ownership. Bonfante, in one of the ablest presentations of the entire question thus far available, also vouched that Roman law gave limited rights of ownership in the airspace above.[10]

Professor Cooper himself does not attempt to resolve the question of precisely what type of rights were had in Roman law, being satisfied that there were rights of either ownership or use.

> So far as international air law is concerned, it is not important whether Roman law created rights of ownership or of user in the landowner. The authority of the Roman State as to airspace over Roman lands was exercised without limit whenever and to such height as was found necessary to protect public or private rights to occupy and use such space.[11]

In the opinion of this writer, however, and for the purposes of this paper, it is necessary to determine into what category these rights fall. It is submitted that if the Romans had been living in our times they would not have granted rights of ownership, but rather of use or of paramount interest. For the Romans were a precise people, and just as Von Jhering maintained that the

[10] *Ibid*, p. 27.
[11] *Ibid*, p. 40.

Roman jurist would not have accepted such an 'abuse of logic' as property in space without limit, so they would have found equally repugnant a principle of limited ownership when those limits could not be defined. To the Romans, *Dominium* was something determinate and absolute. To the mind of the writer, the opinions of Guibe and Sauze in France and Pampaloni in Italy are the most exact as to what the Romans held, and would have held today.

So much for the concept of "aer" and "coelum" in Roman law. But the question remains as to how this maxim came into the Glosses.

The origin of this maxim is commonly attributed to one Franciscus Accursius (1182-1260), the director of the *Glossa Ordinaria,* sometimes known as the *Great Gloss.* The Glosses were attempts by various learned scholars of the 12th and 13th centuries to explain and correlate the multitude of rules laid down in the Code, the Institutes and the Digest of Justinian. The original Gloss attributed to Accursius was not in the form in which we have the maxim today, but is certainly recognizable as being the origin of the maxim as we know it. The Gloss reads as follows:

> Nota. Cujus est solum ejus debet esse usque ad coelum, ut hic, & infra 'quod vi aut clam' i f. § pen.

This may be translated as:

> Whose is the soil, his it ought to be up to the heavens; as here and later in the Digest XLIII. 24. 22. 4.

This Gloss went through a whole series of changes, modifications and rewordings in the three or four centuries following its drafting until it reached us in the form in which we have it now.

This important Gloss, which all are in agreement in attributing to Accursius, appeared as a note to that well-known passage in the Digest (VIII. 2. 1.) describing limitations on servitudes when a public highway intervened between the two properties concerned. The original text of the Digest laid down the rule that the airspace over such highway was free. The Gloss of Accursius to this passage is a cross-reference to that passage stating that the airspace over a tomb is part of the tomb. It should be clearly understood that the passage to which the Gloss is a note, and the passage mentioned in the Gloss, dealt with airspace over lands *not private property.* It should also be noted that Accursius used the words "debet esse" —"ought to be". Thus, it was not a statement of law, but at the most, a statement of what the law ought to be in that writer's opinion.

In Professor Cooper's view, the Gloss of Accursius was a statement that:

> . . . the rule in the text of the Digest applicable to space over public property should also apply to space over private property. This would mean that the Glossator construed the law to be that airspace over lands privately owned ought to be (debet esse) free and unobstructed without limit — in other words, that the law was effective to protect from encroachment the airspace over private as well as public lands.[12]

[12] *Ibid,* p. 42.

This writer finds it difficult to adjust to this transition. Accursius glossed a rule applying to airspace over public lands, and at the same time made a cross-reference to another rule regarding public lands. In view of this, it does not seem to follow to say that, in his Gloss, he definitely intended to attribute the maxim to all lands, private as well as public. It is clear that in the succeeding four centuries the successive editors of the Glosses changed this Gloss by rewording until it did perhaps seem to refer to private land, and also until it did seem to imply ownership of the airspace. It is worthy of note here that Guibe is also of the opinion that Accursius did not give ownership rights to the airspace equivalent to "property in space", but rather that the original Glosses of this man were later construed by others into forms similar to the present maxim, all attributing ownership of the landowner up to infinity.[13]

As has been said, these Glosses made in the 12th and 13th centuries were subject to modification and change by the editors in the later editions. Whatever may have been the intention of Accursius, those who came after him most certainly put this Gloss in the field of private property, and moreover, have sometimes attributed ownership rights to it.

We have now traced the origin of Article 414 C.C. back to the time of Justinian. There is little possibility of finding the origins of the principles of law of Justinian's Codex, nor would any useful purpose be served. Therefore, there only remains to summarize briefly our findings concerning the origin of this Article.

In the Civil Code of Quebec and in the Code Napoleon, the rule is to be found in a section dealing specifically with ownership. In both codes the Articles contain exceptions which are merely referred to as those exceptions which might be found in the rules concerning servitudes.

In the *Coutume de Paris,* the original Article was itself an Article dealing with servitudes. Therefore, any rights which were conferred by the Article in the *Coutume* were, at the most, mere rights of servitude, not of ownership, and such rights of servitude were always subject to another's prior right. Considering this fact, it would not seem unwarranted to hold that in drawing up the Code Napoleon, the drafters erred in putting the Article in a section dealing with ownership. It perhaps did not make too much difference in those days whether you actually owned the airspace superincumbent, or merely had a servitude of use and protection, subject to another's prior right, for in those days, there was no question of flight. But today the difference is important, for the implications arising out of ownership, however, limited, are far more serious than those arising out of real servitudes or legally imposed restrictions on the rights of another.

[13]Guibe, *Essai sur la navigation aérienne en droit interne et en droit international,* Caen, E. Lanier, p. 39.

This interpretation of the *Coutume* is backed up by the fact that Article 187 definitely appears to have been based on the maxim "*Cujus est solum, ejus est usque ad coelum*", and this maxim we find, in its original form, did not intend to convey ownership, but was merely a note to a Roman law rule concerning servitudes. And in fact, the Roman law rule was one dealing with public property, not private property. This would further lead us to conclude that if the maxim has any real effect, such effect is properly confined or restricted to public or state property. Finally, it must be borne in mind that the maxim in its original phrasing, contained the words "debet esse", which surely indicate that, according to the author of the Gloss, the maxim was not considered as an actual statement of the law, but merely that person's opinion of what the law should be. In Roman law itself we do not find the maxim, but merely different rules concerning the height of buildings, views, trees and so forth. Further, Roman jurists would not be inclined to postulate such a rule.

Consequently we must conclude that the rules which give foundation to Article 414 C.C. did not convey ownership of the airspace to the owner of the land, but merely a right to use such airspace in preference to all others, but always subject to a legally imposed restriction.

Concluding this discussion of the origin and meaning of the maxim, we might cite that statement of René A. Wormser in writing of the interpretation, clarification and exceptions made to the Ten Commandments by the Jewish jurists.

> We continue to do the same things with our own laws, which, however lengthy they may seem, are yet brief in relation to the subject matter which they attempt to cover. Judges must read into the law the detail which its unavoidable brevity makes necessary. One method of interpreting a law is to determine its fundamental purpose, in order to set reasonable limits to its practical application. But many rules of law developed without any well defined purpose, and the reasons for which they originated may have disappeared. Therefore, we often ascribe a purpose to a rule which did not attach to it when it was first made.[14]

(b) *Relationship of Article 414 C.C. to the other articles of the Code.*

Article 414 C.C. is the first Article in Section One, Chapter Second, Title Second, Book Second of the Quebec Civil Code.

Book Second is entitled, "OF PROPERTY, OF OWNERSHIP AND ITS DIFFERENT MODIFICATIONS". This Book is divided into five *Titles* dealing respectively with Distinction of Things, Ownership, Usufruct Use and Habitation, Real Servitudes, and Emphyteusis.

Title Second, "Of Ownership" is divided into two *Chapters*, each dealing with acquiring ownership by accession. *Chapter First* deals with ownership by accession of the produce of a thing. *Chapter Second* deals with ownership by accession of what becomes united to and/or incorporated with a thing.

Chapter Second is in turn divided into two *Sections*, dealing respectively with ownership by accession of what becomes united to and/or incorporated

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[14] *The Law*, Simon & Schuster, N.Y., 1949, p. 15.

with immoveables, and with what becomes united to and/or incorporated with moveables.

Now, what means of acquiring ownership is contemplated by Article 414 C.C.? This article is found in a *Section* of a *Title* which deals only with ownership by accession, accession by way of something becoming united to and/or incorporated with immoveables. Therefore, if Article 414 C.C. sets forth a means of acquiring ownership of the airspace above the soil, this ownership is acquired by reason of the accession of airspace to the soil. This leads us to the question, can it be argued that ownership of the airspace is capable of being acquired by means of accession?

The dictionary defines accession from the point of view of law as follows:

> That mode of acquiring property by which the owner of a corporeal substance becomes the owner of an addition by growth, increase or labor. In general, additions or improvements made by one person or by the forces of nature to the property of another belong to the owner of the property. It occurs in the case of gradual increase, as by alluvion or accretion, regardless of the extent of the addition; in the case of addition of fixtures to the land; the increase of animals; and in the case of additions or improvements by annexation of material or by labor.[15]

To put this definition in other words, that which is accessory is something which becomes joined to or united with another thing, that which joins being the subordinate and that which is joined being the principal. Hence, we see that by definition, accession implies two things. Firstly, it implies something subordinate, something which is secondary to the thing it joins, secondary in the sense that it takes on the aspect of the thing it joins rather than remaining distinct. It may also join with the other to form an entirely new thing, but in that thing it is of secondary importance in relation to the rest which goes to make up the whole. Secondly, the definition of accession implies, by the notion of becoming united to or incorporated with something, that at one time conceivable, that thing which is accessory was not so united or incorporated. It was entirely separate and distinct from the thing it joined. Then, by some means or other, it became joined to or formed part of the principal thing, or an integral part of the whole.

Now, in the light of this definition and the rationalization of its terms, can we find a basis upon which to say that airspace is properly accessory to the land beneath it, and therefore subject to private ownership in virtue of Article 414 C.C.?

Can airspace be said to be secondary to land? Can it be said that the relationship between the soil and that area we call airspace is such that the airspace is joined to the land, and further that such airspace joined is secondary in importance to the land which it joins? One argument for the ownership of the airspace is based on the fact that for us, existence in a two-dimensional area is impossible; we are three-dimensional creatures, and our whole existence is dependent on the fact that there is a three-dimensional area in which we

[15]Webster's *New International Dictionary,* 2nd Ed., 1949; cf. also Bouvier's *Law Dictionary,* 1946, Century Edition.

can *Be*. True as this statement is, nevertheless, it does not prove the ownership of airspace in this case, for if we are dependent upon a three-dimensional area, we must of necessity say that the airspace is just as necessary for us to live as is the ground upon which our feet rest. Hence, we cannot in this sense say that the airspace is secondary to the land. It is only if we can conceive of existing without the airspace that we can say that airspace in this case is secondary to land. It might be argued that we could live underground. That is so. But properly speaking, even the ground takes up airspace, just as the building which we raise above the ground occupies airspace. It seems quite clear that from this point of view we cannot by any stretch of the imagination say that airspace is secondary to land.

Let us view the second proposition contained in the definition of accession: can airspace be said to have become united to or incorporated with the land? To say this, we must first of all show that, at one time, the airspace was not so united or incorporated. This is an obvious impossibility, for we cannot show the airspace in any other relation than that which it now has to the soil. For that matter, the same could be said of space proper in relation to any of the celestial bodies.

Hence, by definition, airspace cannot be said to be accessory to land, and consequently, Article 414 C.C. conveying ownership rights by way of accession in what is above and below the soil cannot be said to include rights of ownership of the airspace itself. It is important to understand at this point, that the above negation in no way can be said to mean that article 414 C.C. does not set down the law that we can own what is *in* the airspace. We only maintain that the Article in the question cannot be construed to give rights of ownership *of* the airspace.

Article 414 C.C., as has been said, is the first Article in a Section dealing with ownership by way of accession of what becomes united to and/or incorporated with immoveables. From a study of Article 414 C.C. itself, we have concluded that neither from the origin of the Article, nor from the interpretation of the type of ownership conveyed by the section in which the Article is found, can airspace be said to be included. Further evidence can be had by examining briefly the remaining Articles in this Section. We see that this Section is composed of rules relating to buildings, plantations and other works made on the land by the proprietor, or by another on the proprietor's lands. Rules concerning alluvion, grounds left dry by running waters and islands loosened from the bed of the river, are also contained herein, as are regulations regarding the increase of wildlife. All these rules fit into the definition which we gave to accession.[16] Nowhere in these rules do we find mention of any generality which might be construed to include ownership of the airspace itself. It is not argued that these rules are exhaustive. But it would seem

[16]Cf. Marler, *The Law of Real Property* (Quebec), 1932, paras. 72-97 for a discussion of the interpretation and application of these Articles.

that if it had been the intention of the Codifiers to include the airspace in the meaning of Article 414 C.C., they would have made specific provision for this important rule in their subsequent enumeration of the things which could be owned in virtue of Article 414 C.C.

II. OWNERSHIP OF THE AIRSPACE BY MEANS OTHER THAN ARTICLE 414 C.C.

It has been demonstrated that the airspace cannot be owned in virtue of Article 414 C.C. The question remains: can it be owned in virtue of any other Article in the Code? And if not, what right may exist in the airspace for the owner of the soil?

As has been said, Article 583 C.C. sets out the various means of acquiring ownership. This Article is exhaustive, in that these are the only ways in which ownership may be acquired.

Let us examine these various means of acquiring ownership to see if the airspace would fit into any one of these categories. Accession we have already dealt with, and will not go into further.

Can the airspace be owned by prehension or occupation? To own something by prehension or occupation, it is necessary that, prior to your acquired ownership, the thing which is now owned was not owned by another. And further, the thing acquired must be owned for itself, not in virtue of the ownership of something else to which it relates, for if this were the case, then it would be owned by accession and not by prehension or occupation. Is it possible to own the airspace in virtue of itself? Can you occupy the airspace alone? This is obviously impossible today. It should be understood that the occupation cannot be a mere transitory occupation, such as is had when one passes through the airspace. The occupying must have a sense of permanency to it. Some may say that a building occupies the airspace. This is true, and perhaps in this sense, one may say that you can own the airspace so occupied. But such ownership does not postulate the ownership of anything more than the airspace so occupied. If this argument were pushed to its logical extensions, one would have to admit that you could only own so much of the soil as you could effectively occupy at any one time. Thus, the bare ground could not be privately owned unless there was definite evidence of the works of the owner.

As for the other means of acquiring ownership provided for by Article 583 C.C. "by descent, by will, by contract, by prescription, and otherwise by the effect of law and obligations", all these means postulate that the thing in which ownership is acquired was previously owned by another. But since the only airspace which may possibly be said to be owned is such airspace as is occupied by a building, this then is the only airspace in which ownership may be acquired by the above mentioned means. And since, to acquire the ownership of this airspace, the ownership of the building is necessary also, it is

more likely that we would consider not that one had acquired ownership of the airspace, but rather that ownership of the building had been acquired.

Thus with the possible exception of airspace completely occupied by a building, we must say that ownership of the airspace cannot be acquired in virtue of the provisions of Article 583 of the Code. But since these are the only means by which one may acquire ownership, we must conclude that the aispace cannot be owned in our law.