AVIATION AND THE MAXIM CUJUS EST SOLUM*

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In these days of competition between lawyers and trust companies, between lawyers and real estate men, between lawyers and insurance companies, and in these times when group insurance, sick benefits and workmen's compensation laws are settling for themselves many questions formerly litigated, it is comforting to know that there is a new industry, which offers hope of some additional employment not only to lawyers of today but to the lawyers of the next several generations.

Perhaps this is only by way of saying that the law is a permanent profession. Each new invention, each new development of civilization, each new mode of living brings its law and its litigation. The casebooks are full of reports of railroad suits, automobile cases, electric power and telephone cases, all arising by virtue of new inventions and representing litigation nonexistent but for these new inventions.

We now have on our legal as well as on our social horizon a new invention as important as any of the others because it involves a change of transportation as well as of our mode of living, and because it offers a possibility of more litigation and legislation than probably any other. The reason I make this statement is that this new invention, the airplane, makes use of a hitherto unused element. The air is now usable for transportation—it is navigable. The significance of this statement, in view of the facts that only land and water have heretofore been usable for this purpose in all the thousands of years of our history, can hardly be overestimated.

What the effect will be on law as well as on life can at best be but conjectured in a brief talk, such as I mean this to be. In fact, only one topic of the limitless possibilities may be mentioned.

The first violent impact of this new invention on the old order of things in law is the clash when the right to air navigation runs

* Credit for the major portion of this material is gladly given to the brief of Messrs. Cuthell, Hotchkiss & Mills, attorneys in the Swetland-Curtis case cited above. G. B. L.

directly afoul of one of the most firmly and permanently established rules of our common law.

All law students are familiar with the maxim, *Cujus est solum, ejus est usque ad coelum et ad infernos.* For more than ten years lawyers have speculated in addresses such as this one and in articles in pamphlets and legal magazines, as to what would happen when some landowner should say "No" to an aviator flying over his land and should invoke the maxim as the reason for his "No," and ask the aid of the courts to make his "No" effective. It is still permissible to speculate, although the point has been raised in two cases in the United States; for, unfortunately, it has not been definitely determined. The cases to which I refer are *Smith v. New England Aircraft Company,*[1] and *Swetland v. Curtiss Airports Corporation.*[2]

The facts in these cases were fairly similar. In each case a landowner, whose property adjoined an airport, had brought suit to enjoin the flying of the planes using the airport over his property and, in each case, had alleged that these flights constituted both trespass and nuisance. In both of these cases the courts held that flights above 500 feet were lawful, basing their decision as to this point on the regulations issued by the Department of Commerce,[3] which define the minimum safe altitudes of flight at 500 feet and above. The Air Commerce Act itself specifies that the navigable air space (above the minimum safe altitudes of flight) shall be subject to a public right of flight. In both cases, however, the courts held that flights below 500 feet constituted trespasses. Both courts discussed at length the ancient maxim and threw considerable doubt on the birth, origin, and respectability of the old greybeard, but both were apparently loath to let loose of so well established a legal doctrine.

Bear in mind that we lawyers likewise have a well established doctrine in our own minds and that is that trespass implies and calls to mind either title or possession. Hence, to sustain the action of trespass, the plaintiffs in these cases must have had either ownership of the air space or possession of it. Not having possession, at least not physical possession, the theory of tres-

[1] (Mass. 1930) 170 N. E. 385.
[2] (D. C. N. D. Ohio, 1930) 41 F. (2d) 929.
[3] Air Commerce Act, 44 Stat. 568 (1926), 49 U. S. C. A. sec. 171.

pass in the minds of the court must have been based upon ownership. Since the shadow of these decisions has hung as a pall over the future of air navigation, it is exceedingly important that we as lawyers investigate for ourselves the birthplace and the family history of this maxim of law.

Dean Pound has said that sometimes a Latin maxim is a substitute for thought and it remains for us to see whether this maxim appears as thought or merely a substitute.

The earliest English text in which we find a statement of the maxim is COKE on LITTLETON.[4]

> And lastly, the earth hath in law a great extent upwards, not only of water as hath been said, but of aire, and all other things even up to heaven, for *cujus est solum ejus est usque ad coelum,* as it is holden.

It is necessary to note that Lord Coke was considering the feudal concept of land and that land then was of the highest importance and the corner stone of the feudal system itself. So respected was land that in an action trespass *quare clausum fregit,* if entry on one's land was shown, there was no defense.

But, under this system, there were rights in land or rather arising out of the ownership of land, which did not attain to the dignity of ownership or possession. There were such rights as piscary and turbary; there were rights in common fields; there were the necessary rights of ingress and egress; the ancient rights of firebote and fencebote; above all there was the right of escheat which belonged to the crown. All of such rights went with and appertained to the ownership of some parcel of land (or with tenancy) but eventually were not expressed by the land ownership itself.

Now it is evident that there are more ways of interfering with rights in land than by actual trespass. One of the greatest rights in land, a right which existed then and does now, is the right of complete and peaceful enjoyment. This right could be just as effectively interfered with by a boiler factory on one side of the hedge as on the other. The early common law made a distinction; for in the one case there was the action of trespass and in the other the ancient writ of *Quod permittat,* the fore-

[4] Bk. 1, sec. 1, "Terra," p. 4.

runner of the action of nuisance. This gives us, then, the background at the time Coke wrote and gives us the sharp distinction which existed at that time between the right of property and the right of peaceful enjoyment of property. It is evident that what Coke was saying was not only that a man's castle was his own but also that he could build his castle as high as he saw fit and that none might interfere. It is also evident, for that construction would have been as unnecessary as it was impossible, that he was not saying that the man who owned the land owned the cubic contents of the air space enclosed by vertical planes, projected upward from his boundary lines. This early distinction between the action of trespass and the action of nuisance has apparently been lost sight of, but it is important today in interpreting the meaning of an old common-law writer.

With this survey of the background, let us return to Coke's statement. He cited three cases from the Yearbooks. These were 22 Henry VI 59, 10 Edward IV 14, 14 Henry VIII 12. The first case is a dispute as to the ownership of six young goshawks as between landlord and tenant under a lease. The second case relates to the theft of muniments of title in which the case of the goshawks is referred to. The latest one discusses the right of the Bishop of London as landlord to certain herrons and shovelers nesting in trees on land which the Bishop has leased. The significance of some of the cases is somewhat obscure to the reader of today but the result seems entirely sound. The crux of the matter seems to be that the owner of land has an interest in birds that nest in trees growing thereon because if he owns the land which enfolds the roots of the trees he owns the branches that are in the air space above and in which the birds in dispute have their nests. The litigation between landlord and tenant turns on the rights under leases and does not affect the question in which we are particularly interested. All of these cases emphasize the right of the landowner to the fullest use and enjoyment of his property.

There remains the Latin maxim itself. Examination shows that the words are attributable to Accursius, a glossator or commentator on the Code, who flourished in Bologna about the year 1200. Mr. Bouve, in a very interesting discussion on this same subject, finds evidence that the son of Accursius was taken to

England by Edward I on his return from the Holy Land and there lectured on subjects of Roman Law at the University of Oxford. It is suggested that this was the reason that the maxim gained currency, as stated in Burry v. Pope,[5] as early as Edward I, who reigned from 1239 to 1307.

Accursius, however, used the phrase in a discussion of a right to maintain a burial plot or tomb free from interference of an overhanging building. There can be no quarrel with this doctrine, for an overhanging building would clearly have been a permanent invasion of the right of complete enjoyment of the land. But, when all is said and done, the rights now asserted in air space inevitably come back to this Latin maxim.

After Coke's text, there came a discussion contemporary with Coke in Penruddock's Case, reported by Coke himself.[6] This involved an overhanging building, dropping rain on the land, but the action was by way of the writ of *Quod permittat.* The holding was that it constituted a nuisance and that it should be abated.

Another case, also contemporary with Coke, was Baten's Case.[7] Here again was a projecting house, depositing rainfall on the plaintiff's land, and again the use of the ancient writ of *Quod permittat.*

There is a lapse then of over 200 years until we find the famous dicta of Lord Ellenborough in Pickering v. Rudd.[8] This was a case of a projecting barber sign. Lord Ellenborough gave a hint of the future when he said:

> I do not think it is a trespass to interfere with the column of air superincumbent on the close. . . . If this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passes in the course of his voyage.

In view of the fact that balloon flights carrying passengers had been inaugurated by the Montgolfier brothers in 1783, Lord Ellenborough must be recognized as having at least the prophetic sense of what is happening today.

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[5] (1588) 1 Cro. Eliz. 118.
[6] (1597) 3 Coke 205.
[7] (1611) 9 Coke 54.
[8] (1815) 4 Camp. 219.

Following that came the case of Fay v. Prentice,[9] which was a case involving a projecting cornice, precipitating rainfall on plaintiff's garden. The judge cited Penruddock's Case and Baten's Case and referred to the Latin maxim as "a presumption of law not applicable in all cases."

Just twenty years later, in Kenyon v. Hart,[10] Lord Blackburn quoted the dicta of Lord Ellenborough and said that he "agreed with the sound sense of his comment, but doubted the legal reasoning." With all due respect to the memory of Lord Blackburn, it would seem that sound sense and legal reasoning should not be strangers, but handmaidens and go together. Indeed, Justice Holmes has said that the law is but the expression of accumulated wisdom.

It will be noted that in the foregoing cases there was simply a citation of the maxim, wholly unnecessary to the decisions made. In the case of Corbett v. Hill,[11] we again have dicta, by Vice-Chancellor James, expressing a belief in the old maxim. This was a case where the defendant, owning two adjoining houses, had sold one to the plaintiff. The remaining house owned by the defendant had a room which projected over the line of the property sold to the plaintiff. It was unnecessary for the Vice-Chancellor to make the statement that a conveyance of the house conveyed the air space. The projecting room of the defendant was an obstruction to the right of complete enjoyment and could be abated as a nuisance.

A case decided in the same year which has been much quoted and cited and for the most part incorrectly is the case of Ellis v. Loftus.[12] This is a case in which damages were sought for injuries by one horse kicking another horse through the fence. It is cited as authority for the proposition that a horse kicking through a fence commits trespass, but the case itself is based upon negligence.

These are the leading English cases down to date. Our American cases have followed them almost blindly, and, as we did not continue to retain in our practice the distinction between the ancient action of *Quod permittat* (later succeeded by trespass on the case) and the action of trespass, a great many of our cases

[9] (1845) 1 C. B. 827.
[10] (1865) 32 L. J. Rep. 87.
[11] (1874) 9 L. R. Eq. 671.
[12] (1874) L. R. 10, C. P. 10.

indiscriminately use the word trespass in referring to overhanging boughs, cornices, roofs, etc., while the cases themselves are decided on the grounds of nuisance.

It is now necessary to stop and detour. In spite of the cases holding that "he who owns the soil owns likewise to the heavens," it is nevertheless true that from the most ancient of days, everything which could fly has been permitted to fly. There are no cases involving a trespass by bees, carrier pigeons, domestic ducks, geese, chickens, and particularly by balloons. The nonexistence of the holding that flight by balloons constitutes a trespass is a strong argument that the question of trespass was never raised, because a balloon passage is noiseless and, while noise may create a nuisance, it could not add to nor detract from the existence of trespass.

It is now proposed to make a double-barrelled argument—first, that the landowner does not own the air space, and second, that if he does own the air space according to common law, the common law should be changed. In the first place, it is evident that none of the decided cases involved anything beyond a height close to the ground, and hence, even though the maxim was frequently quoted, the statement of the maxim can at best be dicta in the decided cases. It is well known that questions that merely lurk in the record are not raised. It is only those questions necessary to a decision of the case as presented that are in fact decided.

On the other half of the scales and weighing against the maxim is the old and well-known statement by common-law writers that there are certain properties which no man may own, among them the air and the high seas. It is only fair to say that these early writers, no more than Coke himself, had in mind air space. They were probably referring to the element of air. But air space, now that it has become navigable, at least is clearly analogous to the navigable seas. Just as the navigable seas belong to all nations and all men, so does the navigable air space (aside from any question of national sovereignty, distinct from ownership, which is not here discussed).

Finally, if the maxim has been the common law, it should be changed because an individual owner of property should not be permitted to assert rights unnecessary to his complete enjoyment of his land and property, and at the same time destructive of a right so necessary to the progress of civilization.

In view of the fact that the greatest right arising out of land ownership is the right to complete, undisturbed enjoyment, it is sufficient if this right be preserved in its completest sense to the landowner. The right of air navigation, therefore, should be circumscribed and limited only by the right of the landowner to the complete enjoyment of the land. This means that the right of flight should be limited by the question of nuisance and hence that flights which interfere by reason of noise, creating fear, invasion of the right of privacy, etc., should be enjoined, not because they are trespasses, but because they are nuisances.

The new fact of flight, the new fact of air navigation should be recognized, just as Chief Justice Taney in the opinion of the Propellor Genesee Chief v. Fitzhugh,[13] recognized the new fact of river navigation brought about by the invention of steam-propelled boats.

England, by act of Parliament, has already brought at rest, in the very cradle of the doctrine of the ancient maxim, any contention of rights in the upper air space by the enactment of the British Air Navigation Act of 1920,[14] which provides as follows:

> Sec. 9 (1). No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property, at a height above the ground, which having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any order made thereunder and of the convention are duly complied with.

It is to be hoped that either by statute or by enlightened judicial opinion the same question will likewise be brought to a quiet and permanent rest in this country.

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[13] (1851) 53 U. S. 443.

[14] 10 & 11 Geo. V c. 80 sec. 9 (1920).