

A DISCUSSION OF THE LAW OF THE AIR.

Through the beginning of the laws regulating rights in the air may be traced far back in the history of man, it was not until our present generation that the necessity of legislation governing a man's rights in the air above his land was realized. It has only been since the air space has become more and more traversed by aeronautic vessels that such regulations have become essential. Many noted writers who frequently in various publications deal with the freedom of the air merely regard the air as free because of the impossibility of enclosing it within a limited frontier. In so doing, these authors regard the air as an element and fail to take into account the property rights involved in the region which the air occupies. For this reason this discussion will be limited to the air space rather than deal with air as an element.

Before any results can be accomplished as to a man's rights in the air above his land, several questions must be answered. In the first place, who owns the air space? What are the public rights in the air as compared to the private rights? In the first place let us consider the rights of states as to the air space. There are two great groups of theories as to the rights of states in the air space above their territories and territorial waters.

One theory is that of freedom of the air, that is, giving states full exercise of rights in the air space regardless of height, while another theory gives to states only the exercise of rights in the air space to a limited height, the rest being completely free. Now in dealing with the rights of states as to freedom in the air space, an additional element enters, the

rights of the individual property owner. Thus the right to use the air not only interests those who are directly concerned with aerial navigation, but also those whose property rights are violated by this navigation. In the case of states it is true that sovereignty implies the possibility of occupation, and for this reason some maintain that for a state to maintain sovereignty over the air is impossible.

In order to deal primarily with property rights in the air space let us narrow our discussion further to the question of the landlord's right concerning the air space above his land. After examining the various systems of private law which is at present administered in the leading civilized countries, we find different views as to the nature and extent of the air columns above the land. One view brings us to the conclusion that the landlord has no rights in the columns of air above his land, while another view brings to light the opinion that a man has only such rights in the column of air as are to his interest. That is to say, he has full rights in the air but cannot interfere with the rights of other men in that air space in which he himself has no interest. This latter, however, is in conflict with an old doctrine based upon an ancient maxim derived from the Roman system of law. This maxim provides that the owner of land owns not only the soil on the surface, but all below the surface to the center of the earth and the air as high as the heavens. Both Coke and Blackstone thus state the doctrine in broad and general terms, that the owner of the lands owns up to the heavens.

In *Pickering vs. Rudd*¹ (1815), Lord Ellenborough said, "But I am by no means prepared to say that firing across a

1. 4 Camp. 219.

field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. 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." This doctrine was again upheld in *Kenyon vs. Hart*.² Thus an owner has the right to object to anyone passing over or putting anything over his land, regardless of the height. A case of discharging a bullet through aerial space came before the court in *Clifton vs. Bury*.³ In that case the court decided that the bullet passing over the land at a height of seventy-five feet did not constitute a trespass. As far as can be ascertained no actual decision of the courts does more than give a landlord a proprietary right in the lower stratum of the air, which furnishes his action for trespass.

The new German code adopted in 1912 does limit a man's rights to the column of air above his land if he has no interest in prohibiting others from using it. According to this code, airmen would be permitted to navigate over the lands of another as long as they commit no nuisance.

Sir Fredrick Pollock has suggested a possible solution of the problem by limiting the scope of trespass to that of effective possession. The main difficulty with such a policy, however, is the indefinite and ever varying height of the lower zone of possession and ownership. This line of ownership would vary with the structure of the land, thus bringing forth ques-

2. 6 B. & S. 249.

3. 4 Times L. R. 8.

tions as to exact legal characteristics of the upper strata of air space. It would be quite clear, however, that airmen who sailed over another's land at a very low altitude would by so doing commit a trespass. Other cases of trespass would arise if an airman would empty sand bags or deposit refuse on another's land. In such cases as these the action of trespass would certainly lie, but these cases deviate somewhat from the true problem which deals with the mere passing of an aeronaut over the land without any physical or visible injury to the property. Even though it is true that this phase of law is comparatively new, it will not be long before urgent demand for legislation in regard to such trespass will be absolutely essential. This demand will be accelerated by the increasing use of the airplane and dirigible in commercial enterprises.

Before concluding the discussion it is probably necessary to consider the principle adopted by the Institut de Droit International at its meeting at Ghent. It states that the air is free and that states have in air, both in time of peace and in time of war, only those rights which are necessary for their conservation. This principle allows states to exercise only those rights in the air which are necessary to their own security and protection. This rule of the Institut, however, has no binding force as positive international law.

It has long been suggested by many renowned jurists of the United States that the only uniform solution for the control of aerial navigation both as to interstate and intra-state navigation would be Federal control of all aerial travel. Such a governmental control of the air could be based upon any of several possible theories derived from the United States Constitu-

tion. One theory is based upon the "*commerce clause*"⁴ which declares that Congress shall have power to regulate commerce with foreign nations and among the several states. Another theory is the "*war power*"⁵ clause of the Constitution, and a third theory is derived from the Federal maritime power over all navigable waters, and by analogy such a power could possibly be used to have jurisdiction over the air. However, there is doubt whether such a law would be valid if passed by Congress, but it would undoubtedly be valid and enforceable if enacted as an amendment to the Constitution.

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4. U. S. Const., Art 1, Sec. 8.

5. U. S. Const., Art. II, Sec. 2.