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Law of the Air

Byron K. Elliott
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LAW OF THE AIR

BYRON K. ELLIOTT*

It is a fact of which the modern courts will certainly take judicial notice that the higher one goes above the surface of the earth, the thinner he finds the air. This scientific fact has a counterpart in law, for the higher one proceeds above the surface of the earth, the thinner becomes the legal atmosphere. The legal atmosphere thins out at a much faster pace and much closer to the surface of the earth than the air, and doubtless approximates the consistency of ether at a point long before the physical atmosphere has become sufficiently rarefied to interfere with human respiration. Suffice it to say that fortunately aircraft several thousand feet in the air do not depend upon the certainty of their legal status for their stability.

The development of that part of our law which applies to air flight has been left so deplorably behind the development of aviation because of the tremendous rapidity of the advancement of this science. Law, both legislative and decisional must, from the nature of things, be somewhat behind the progress made in our social and scientific world. Law governing unknown developments of the future has no occasion to arise in the present and no experience upon which to base the form of its enactment. Nevertheless, the law is probably farther behind aviation than it is the evolutionary stage of other scientific and social changes. I do not necessarily mean that a greater period of time elapsed between the inception of aeronautics and the enactment of the first laws. Our legislative machinery is doubtless more rapid now than in any period in history, but it remains a fact that in spite of the more or less common use of the air for the purpose of travel, very few of the private rights of aircraft owners, pilots, passengers and those affected by the use of aircraft, have been definitely established.

No other major industry has sprung up as suddenly and evolved as quickly as the aircraft industry. The speed of its development is directly attributable to military uses in the World War. The War made aviation. During the war and for a period

* See biographical note, p. 178. This address was delivered before the Indiana State Bar Association, Thursday, July 10, 1930.

thereafter there was, however, comparatively little occasion for the determination of civil rights in the air. During this period of accelerated development of wartime aircraft the law was not stirred to action and remained in its previous state without advancement.

It is not the purpose of this paper to more than touch upon international law. In recent years it has become well settled that the sovereignty of a state encompasses within its scope the air space above its territory. Through a very interesting course of arguments pro and con, there has emerged the rule that sovereignty must extend into the air, for otherwise the state would be unable to preserve the security of its people and defend its territory. The nature of flight and the effectiveness of attack from the air place this principle upon sound natural grounds. The International Flying Convention of 1919, to which the United States was a party signatory, provides in Art. 1:

"The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory and territorial waters."

A similar provision is found in the product of the Pan-American Conference of 1928 at Havana. Although the United States is not a party to these declarations, insofar as they have never been ratified by the Senate, we find the Air Commerce Act of 1926 at Sec. 6a[1] the same principle:

"Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations complete sovereignty of the air space over the lands and territories of the United States, including the Canal Zone."

The Uniform Aeronautics Law adopted by seventeen states,[2] including Indiana,[3] contains in Sec. 2 a provision:

"Sovereignty in the space above the lands and waters of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this state."

So much for who governs the air! And here let me comment that use of the term "air" should probably be understood to include the space above the earth, whether reference is limited to

1 44 U. S. Statutes at Large, 568 c. 344.

2 Several with variations.

3 Acts 1927, page 119. Approved by a committee of the American Bar Association in 1922.

the lower part containing air, or whether it extends on into the Heavens. The term "air" caused much legal confusion in the early days, some authors thinking of it as an element such as fire and water and others giving it the meaning of space. Those authorities who referred to the element by the term concluded that it could not be owned until reduced to possession. It is well not to be too sure that some day we will not be traveling above the air. Projectiles and rockets, combined with wings for support in the air, may be a common conveyance beyond the outer reaches of the atmosphere. Having observed who governs the space above the earth, we may now logically ask ourselves who owns it and what is the extent there of private rights.

Sitting, as we are, in the center of a state which has adopted the Uniform Aeronautics Law, we should have first reference to that Act.[4] Two sections, 3 and 4, are pertinent to the question of private proprietory rights in space above the earth.

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 Section 4."

Sec. 4. "Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude 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 a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in Sec. 5."

There is no doubt that the ownership of the airspace above Indiana is vested individually in the owners of the subjacent land, "subject to the right of flight" under certain circumstances. This third-dimension real estate has come into its own and acquired a usefulness making it worth claiming. The smallest city lot, in the view of the air-minded, is now a property of magnificent distances in at least one direction. The purchaser of real estate is now conscious that he has bought not a flat plane but a solid with one of its three dimensions of infinite extent.

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[4] Acts 1927, page 119. Published in leaflet form by the Secretary of State in 1930.

Section three of our Aeronautics Law seeks to subject the private ownership of airspace to the right of flight described in section four. If, prior to the passage of this law, the owner of subjacent ground owned upwards and had an exclusive right to the unoccupied space above, then, of course, that part of the act subjecting his ownership to a right of flight is unconstitutional as a taking of property without due process of law. So the validity of this provision depends on whether the common law *had* annexed to the ownership of ground as an incident thereto the exclusive ownership of the space above it.

The earliest authorities contain the maxim *cuius est solum, ejus est usque ad coelum.* Originating in the thirteenth or fourteenth century and first stated in cases involving the right to have a burial place free from overhanging structures, and the right of a landlord to certain young goshawks as against the tenant, the phrase is picked up by Coke (Coke on Littleton, Lib; Sec. 1 p. 4) and Blackstone (2 Blackstone Comm. 18) and has come down to us in more recent cases of varying facts.

The maxim referred to is now well established in our law. It may be well to mention briefly some of the cases decided thereon in order to indicate the scope of its application. The greater number of cases refer to overhanging eaves of buildings,[5] cornices projecting over property line,[6] inclining walls,[7] branches of trees and shrubbery,[8] wire strung eight to ten yards above ground,[9] boards and other projections,[10] gun fire over property,[11]

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[5] *Smith v. Smith* (1872) 110 Mass. 302; *Harrington v. McCarthy* (1897), 169 Mass. 492, 61 Am. St. Rep. 298, 48 N. E. 278; *Hahl v. Sugo* (1899), 46 App. Div. 632, 61 N. Y. Supp. 770; *Mayer v. Flynn* (1915), 46 Utah 598, 150 Pac. 962; *Huber v. Stark* (1905), 124 Wis. 359, 102 N. W. 12, 4 Ann. Cas. 340.

[6] *Young v. Thedieck* (1918), 28 Ohio C. A. 239; *Wilmarth v. Woodcock* (1885), 58 Mich. 482, 25 N. W. 475; *Lawrence v. Hough* (1882), 35 N. J. Equity 371.

[7] *Barnes v. Berendes* (1903), 139 Cal. 32, 69 Pac. 491, 72 Pac. 406.

[8] See annotation in 18 A. L. R. 655 under title of "Rights and remedies in case of encroaching trees, shrubbery and other vegetation across boundary line."

[9] *Butler v. Frontier Telephone Company* (1906), 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

[10] *Puorto v. Chieppa* (1905), 78 Conn. 401, 62 Atl. 664. See also *Norwalk, etc. Co. v. Vernam* (1903), 75 Conn. 662, 55 Atl. 168.

[11] *Whitaker v. Stanvick* (1907), 100 Minn. 386, 111 N. W. 295, 117 Am. St. Rep. 703, 10 Ann. Cas. 528, 10 L. R. A. (N. S.) 921; *Herrin v. Sutherland* (1925), 74 Mont. 587, 241 Pac. 328, 42 A. L. R. 937 (where is

and other similar encroachments. There is even a case holding that for one to extend his arm through a fence and over the property of another was a trespass,[12] and one decided that the kicking of a horse into the space above a neighbor's property was likewise a trespass.[13]

While there is an occasional authority declining to apply the maxim and a few criticizing it severely,[14] the great body of English and American law recognizes and gives it full application in certain types of cases. A rough classification of the better reasoned of these cases may be made as follows:

1. Permanent appropriation of the airspace above the land of another. (The overhanging structure and telephone wire cases.)

2. Use of such space close to the ground and so frequent as to amount to continuous occupation thereof. (Continuous gun fire cases—authorities questionable but distinction of such a type logical.)

3. Occupation imminently dangerous to those using the ground or interfering with the peaceful enjoyment thereof in comfort and security. (Gun fire cases.)

4. Strictly technical and temporary intrusion into the airspace above the land, but at a place in intimate proximity to the surface and where personal occupancy by owner is possible and *frequent.* (Extending arm over boundary, mule kicking through fence.) This type is so rare and based upon so little reason other than the maxim that it needs little consideration.

It is seen that ordinary flight at *reasonable altitudes* can hardly fall within any division of this classification.

It is extremely unwise to seek the true meaning of a principle of law by reference only to the wording of a phrase, par-

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found elaborate annotation on entire subject); *Portsmouth Harbor etc. v. U. S.* (1922), 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287; *Clifton v. Bury* (1887), 4 Times Law Rep. (Eng.) 8.

[12] *Hannabalson v. Sessions* (1902) 116 Iowa 457, 93 Am. St. Rep. 250, 90 N. W. 93.

[13] *Ellis v. Loftus Iron Co.* (1874) (Eng.), L. R. 10 C. P. 10. For valuable citation of such cases, see *Cornell Law Quarterly,* May, 1921. The Court of Quarter Sessions of Jefferson County, Pennsylvania held that flight of a ship at an altitude of 350 feet could not be a "wilfull entry" upon such land in violation of a criminal statute. *Comm. v. Nevin* (1922), 2 Pa. Dist. & Co. Repts. 241, 71 Pa. Law Rev. 88.

[14] Lord Ellenborough, *Pickering v. Rudd* (1815), 4 Camb. 219: "I do not think it is a trespass to interfere with the column of air super-incumbent upon the close . . ."

ticularly if the principle be embodied in a foreign tongue. Analysis of a latin maxim must not be solely philological, but rather based upon an examination of the instances of its application. Many a maximum worded generally is of very limited scope when actually applied.[15]

I think we are safe in saying that the maxim *cuius est solum, ejus est usque ad coelum* has been applied only to facts so different and distinguishable from the flight of a ship through the air over another's land that its extension to this modern situation would be tantamount to the creation of a new maxim and the origination of a new principle of law. The legislation subjecting the land owner's proprietary interest in airspace to a certain right of flight would prevent the annexation of a previously non-existent exclusive right as an incident to his ownership of the surface of the ground at this time. If left entirely to the courts, public policy in the interest of the development of aviation and freedom of travel would doubtless be sufficient reason to obstruct the present-day judicial birth of such a right.

It may be assumed that the existence of exclusive property in airspace is best tested in an action for trespass or maintenance of a nuisance. It is well to note here that in an action for trespass, actual damage is immaterial and the point is solely as to the invasion of the property, whereas a nuisance implies the material interference with use and enjoyment of the property. Through many of the authorities on the subject, however, runs an apparent disregard of this distinction.[16] There have been comparatively few recent cases decided on our exact question.

The most recently adjudicated[16a] case on the point we are here considering is *Smith et al. v. New England Aircraft, Inc.,*

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15 "So far as we can see, therefore, the actual decisions of the courts go no further than to hold that the landowner has a proprietary right in the lower stratum of the air-space, this proprietary right giving the landowner the action of trespass. Accordingly we are confronted with this situation: the courts have expressed a far-reaching doctrine obiter and a more restricted doctrine in their actual decisions. In this state of the authorities we may adopt one or the other of several different positions."—Hazeltine, *"The Law of the Air,"* page 69.

16 It should here be noted that a landowner even without an exclusive property in the airspace is not for that reason deprived of injunctive relief on the proper showing of a nuisance with special damage or injury. Maintenance of a nuisance does not depend on the physical occupation of other's property.

16a Subsequent to the preparation of this paper, the United States District Court for the Northern District of Ohio, decided the case of

et al.[17] The opinion is written by Chief Justice Rugg of the Supreme Judicial Court and is comprehensive and well reasoned. The case was presented solely on the ground of trespass and the nuisance resulting from its continuance, and petitions injunctive relief. The Massachusetts Law in effect at the time provided that aircraft should not be operated "over any building or person at an altitude of less than 500 feet, except when necessary for the purpose of embarking or landing." Briefly, the facts found by the master were as follows:

Plaintiffs owned an estate of a little less than 300 acres where they maintained a residence and several other houses and structures. The estate was improved, occupied and either wooded or cultivated in part. Defendant owned and operated an airport about one-half mile from plaintiff's estate, and made approximately 400 flights in two medium-sized ships during the summer of 1928, most of them, because of the prevailing wind, crossing over plaintiff's property. Except in take-offs and landings such flights have not been at low altitudes, usually in excess of 500 feet. Taking off and landing, however, the ships would fly above the wooded or uncultivated part of plaintiff's estate at an altitude of approximately 100 feet.

Defendants were enjoined from (a) Permitting dust from their operations to fly in substantial and annoying quantities over property of plaintiffs. (b) Dropping circulars on or near said property. (c) Navigating over said property unless at heights of 500 feet or more.

The opinion practically discards the maxim *cuius est solum, ejus est usque ad coelum* and very properly places the decision on the law of nuisance as it applies generally.

The court further holds, however, that the laws and regulations setting the 500-foot minimum for flight "except in taking off and landing" do not and possibly cannot authorize low flight for the excepted purposes, and says:

"Until the progress of aerial navigation has reached a point of development where airplanes can readily reach an altitude of 500 feet before crossing the property of an adjoining owner, owners of airports must

Swetland et al. v. Curtis Airports Corp. et al., July 7, 1930, Equity No. 3023, —— Fed. (2nd) ——. A country resident across the road from an airport sought to enjoin defendants from operation thereof. The court held an airport and flying school not a nuisance *per se*, and said, "An airport . . . can be regarded as a nuisance only if located in an *unsuitable location*. (*Euclid v. Ambler*, 272 U. S. 365, 388 . . .) or if operated so as to interfere *unreasonably* with the comfort of adjoining property owners." (Italics ours.)

[17] March 4, 1930; —— Mass. ——, 170 N. E. 385.

acquire landing fields of sufficient area to accomplish that result. To fly over the lands of an adjoining owner at lower altitudes, the owners of airports must secure the consent of adjoining property owners, or acquire such right by condemnation when appropriate enabling statutes are enacted."

To assure altitude of 500 feet over the airport property would necessitate ports of at least a mile in each direction. Such a requirement would be a heavy blow to aviation, and a departure from the proposition that each case should stand on its facts as to whether or not it constitutes a nuisance.

The main distinction in the facts between the instant case and *Smith et al. v. New Eng., etc., infra,* is in the highly improved and occupied character of the property here.

The master further found that—

"The plaintiffs were persons accustomed to a rather luxurious habit of living, and while the noise of airplanes in flight over their premises has caused them irritation and annoyance, yet, gauged by the standards of ordinary people, this noise is not of sufficient frequency, duration or intensity to constitute a nuisance."

"There is no evidence in this case that the defendants or any of them have conducted themselves in an unlawful or unreasonable manner unless those defendants who have flown airplanes from Whittall Field over the plaintiffs' premises in the manner described, have, by so doing, committed acts of trespass."

The opinion calls attention to the Massachusetts statute, and the Air Commerce Act of 1926, and notes that—

"These statutes and regulations recognize the existence of navigation of the air as an established condition. They do not create such navigation. They do not authorize the taking of private rights to promote such navigation. * * * they, by plain implication, if not by express terms, not only recognize the existence of air navigation, but authorize the flying of aircraft over privately owned land. * * *"

"For the purposes of this decision we assume that private ownership of airspace extends to all reasonable heights above the underlying land. It would be vain to treat property in airspace upon the same footing as property which can be seized, touched, occupied, handled, cultivated, built upon, and utilized in its every feature. The experience of mankind, although not necessarily a limitation upon rights, is the basis upon which airspace must be regarded. Legislation with respect to it may rest upon that experience."

The learned Chief Justice recites many examples where intrusion into the airspace above land has been held a trespass, and concludes, "the combination of all these factors seems to us, under settled principles of law, after making every reasonable legal concession to air navigation as commonly understood and as established under the statutes and regulations here discussed, to constitute trespass to the land of the plaintiff so far as concerns the take-offs and landings at low altitudes and flights thus made over the land of the plantiffs at altitudes as low as 100 feet.[18] Air navigation, important as it is, cannot rightly levy toll upon the legal rights of others for its successful prosecution."

The Court, after determining that the trespass exists, decides that the nature of these frequent trespasses is not such as to give rise to injunctive relief, and calls attention to the fact that they are not in the same place as to linear space or altitude and that therefore no prescriptive right to any particular way of passage could be acquired. The master found that plaintiffs had not sustained any damage to their property or its use, or to have suffered any material discomfort. The Court further says: "The kind of land upon which the trespass is committed is also an important factor. As already stated, that land of the plaintiffs, affected by flights at low altitudes, is covered with dense brush and woods. It is uncultivated. It does not appear that any valuable use is made of it, either for pleasure or profit. That might not be a factor of consequence in an action at law for the assessment of damages. * * * but it is a factor to be taken into account with all the others in determining whether injunctive relief ought to be afforded."

Whereas the decision of the Massachusetts Court is clearly right in denying injunctive relief on the grounds that no actual damages to the property or material interference with the enjoyment thereof has been shown, it leaves no doubt that intrusion into another's airspace at low altitudes in Massachusetts is a trespass, and probably continued intrusion over dwellings and

[18] The opinion also says: "These interferences create in the ordinary mind a sense of infringement of property rights which cannot be minimized or defaced." There is certainly a human tendency to ward off and guard against objects in the air immediately above them. It should be noted that craft at a higher altitude would not produce this reaction, and that the reaction itself, as well as any sense of infringement of property rights, will rapidly diminish as people become more used to safe aircraft and fly themselves.

occupied area which results in damage or serious annoyance is a nuisance which may be enjoined. It is seen from the facts, however, that the case is an authority to the effect that frequent flights at 500 feet is not to be considered an actionable nuisance under the same circumstances.

The author of the opinion is impressed by the suggestion of Pollock[19] that "It does not seem possible on the principles of common law, to assign any reason why an entry above the surface should not also be a trespass, unless indeed it is limited by that of *possible effective possession,* which might be the most reasonable rule." The opinion notes that a height of one hundred feet is within the reach of effective possession, and that trees and buildings occasionally enter this altitude zone. This is given as a ground for holding that a trespass can exist at one hundred feet.

It is submitted that the "possible effective possession" theory is unacceptable. The very subject selected for its application extends the zone of effective possession indefinitely. If others can occupy the space above his estate, certainly the owner can do so himself. Privately owned ships are not uncommon at the present time. It is just as feasible for an owner to fly around over his place as to stroll across the surface.

A further suggestion of the Chief Justice seems open to some argument on the grounds of practicability. He says—

"If, in the interest of aerial navigation, rights of flight at such low altitude over the lands of others are of sufficient public importance, doubtless the power of eminent domain for acquisition of rights of way in airspaces might be authorized."

It is difficult to see how a private owner other than a common carrier or one serving the public could make effective use of this power, even were the item of disproportionate expense ignored.

Although we cannot differ with the results of the Massachusetts case, I think the authorities upon which is based the opinion that entry into the airspace above land owned by another is a trespass, can reasonably well be distinguished upon their facts from the present day and the future use of the air for flight. A rough classification of these authorities has been made previously in this paper. In each case holding such entry to be a trespass, the entry was made in intimate proximity to

[19] *Torts,* 13th ed., page 362.

the land or there was imminent danger of damage or injury. Loose language was used in developing a maxim, the present day effect of which, if given its full force, could not possibly have been either foreseen or intended by the Courts that embodied it in English and American law. There is no reason then that present day courts should feel tightly bound by the maxim *cuius est solum, ejus est usque ad coelum.*

If we cast aside this rule in whole or in part, it is necessary that we define the land-owner's rights in his airspaces. Having had no rights well and definitely defined by common law which would meet the inroads of aeronautics, the legislature can proceed without fear of violation of the constitutional provision, The Uniform Aeronautics Law very happily phrases a practical definition of what ought to be the defined rights in airspaces.

"Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which 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."

Although the Flying Rules promulgated by the Secretary of Commerce pursuant to the authority conferred by Sec. 3 of the Air Commerce Act of 1926, seek to set a 500-foot minimum altitude for flight, we think the Indiana Statutory provisions are much more wise for several reasons. It is very difficult to determine the exact height of a ship with the bare eye. If we consider setting a definite minimum we are at once faced with the fact that the difference in ships and manner of flight varies the effect of their proximity to the ground. A glider or small motored ship is high in the air at 500 feet. However, some of the multi-motored giants being built for transport service or a dirigible would seem very low at that height, and we might ask the question—who wants the Graf Zeppelin in his back yard or an endurance flight among his chimney pots?

Our rule must not be too specific, and must result from a careful balance of the interests of the people to be affected. We cannot disregard property rights and yet we must be awake to the dictates of public policy.

The law we make in the future with regard to aviation, both by legislation and judicial decision, has a broad opportunity for scientific study, to an extent hardly paralleled in legal history. Aeronautics have come upon us and developed suddenly and present a well defined and clear-cut situation to be met by new

law. We are not tied by precedents of certain application. We have every opportunity that could be desired to design and construct this part of the corpus juris on logical, modern and scientific bases. If the law of the air, the great bulk of which is yet to be made, is based upon strained reasoning, awkward application of old maxims and unsound principles, there is no one to blame but the legislators, the judges and the lawyers.

One cannot mention the name of aviation without a quick thought to the future. Sound laws made today should not require change at each stage of development of flying. It is most unsafe to decide that there are any definite limits to the future of aviation. Were we endowed with the power of prophecy of future events we would doubtless find ourselves exceeding the limits of our wildest imagination. Alfred Lord Tennyson, in Locksley Hall, predicted a situation which is not long in the far distance, and he was writing in the year 1841.

"For I dipt into the future, far as human eye could see,
Saw the vision of the world, and all the wonder that would be;
Saw the heavens fill with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales;
Heard the heavens fill with shouting, and there rained a ghastly dew
From the Nations' airy navies grappling in the central blue."

In considering the subject we must not lose track of the public policy favoring the promotion of science, the development of Transportation and the freedom of travel. In aviation we have an infant of great promise. He will grow to be a comfort and convenience to us. He will become a stout defender of the realm. He will beneficently lengthen human life by diminishing the time required to cover distances. He will speed communication and facilitate the intercourse of nations. Let us do our part to foster his growth and favor his activities.

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