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THE "AD COELUM" MAXIM AS APPLIED TO AVIATION LAW

THE rapid development of the use of the air as a medium of commercial transportation has raised the question of the application of the ancient maxim *"Cujus est solum eius est usque ad coelum et ad inferos"* which means "He who owns the soil owns everything above and below, from heaven to hell." [1] The maxim had its origin in England and followed the body of common law from that country into the jurisprudence of the United States. In order to understand why the maxim is important we must trace it to its origin and then follow it back down through the courts as it has been applied to specific cases. Although the courts have never hesitated to deny its application to cases involving aviation, it is still being offered as a plea when property owners believe they are being damaged by the operation of aircraft over their property or by the proximity of airports to their homes.

About 1200 this maxim was being cited in discussing rights under the Justinian Code.[2] It is supposed to have been

[1] Other interpretations of this Latin phrase are: Whose is the soil his it is from the heavens to the depths of the earth." Black's Law Dictionary, p. 304;

adopted by Lord Coke from a glossator on Justinian's Digest of Roman Law. Eugene Sauze, in 1916, traced the maxim to Franciscus Accursius of Bologna (circa 1200).[3] Blackstone restated and discussed the maxim in his famous Commentaries and many of our modern courts have applied it in real property cases.

But maxims are not law. It has been said [4] that at best they are not meant to take the place of a digest; maxims are neither definitions nor treatises; some ought to be amended and some ought to be discarded altogether. Certainly where progress is being retarded by the application in a modern court of law or equity it is unreasonable to apply a maxim as a rule of law.

No court has ever said that ownership of the air extends upward to an indefinite distance, since such a question has never been presented to a court for decision. All that the courts have said is that ownership of air space may extend to a point necessary for the enjoyment of the land, and the rest is "free air." Naturally there is a difference in the use of air space by landowners. An owner of a skyscraper office building is using the air space above the land to a higher point than a farmer who tills the soil. Statutory law has in many instances provided specific measurements to be applied in determining how much air space a landowner must have above his property to enjoy safely his ownership of the land. In any event, courts in protecting the owner of land will not hamper the development of air commerce.

In 1586 in the case of *Bury v. Pope,*[5] which was the first recorded case in which the maxim was quoted, it was held

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"He who possesses the land possesseth also that which is above it." Broom, Legal Maxims 8th ed. p. 395. See also: 3 Journal of Air Law, 329 and 531; Hotchkiss, Aviation Law (1938).

2 The maxim is the basis of a portion of the Civil Code of Napoleon.

3 See also Bouve, Private Ownership of Air Space, 1 Air Law Review 242 (1930).

4 Smith, The Use of Maxims in Jurisprudence, 9 Harvard Law Review 13 (1885).

5 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (1586).

that where a landowner erects a house so close to a window on the adjoining property that the light is cut off therefrom, the injured landowner has no complaint even though his building and his window were built forty years before the second building was erected.

Later in 1597 [6] the maxim was successfully invoked in a case where rainwater fell on plaintiff's land from the roof of defendant's building which overhung the land of plaintiff. In 1611 [7] again the maxim was cited to uphold the right of a plaintiff to abate a nuisance from an overhanging roof. After 1611 it does not appear again for more than two hundred years, when as dictum in a case involving a board overhanging plaintiff's garden [8] this maxim was invoked. Here the first mention was made of the possible application of the maxim to aviation cases when Lord Ellenborough said " * * * 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.*" The court held that the board overhanging was not a trespass.

These cases were followed by several others, until in 1920 the English Air Navigation Act was passed which provided that no action should lie in trespass by reason of the flight of aircraft over property at a reasonable height above the ground. In the only reported case construing this statute, the court dismissed the action which was a suit in equity to enjoin the flying of planes over a private school.[9]

In American courts in common law states it has been held that an action in trespass shall lie where one shoots across the land of another,[10] thrusting an arm across a neighbor's

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6 Penruddocl's Case, 5 Coke's Rep. 100.

7 Baten's Case, 9 Coke's Rep. 53, 77 Eng. Rep. 810.

8 Pickering v. Rudd, 4 Campb. 219, I Starckie 56; 171 Eng. Rep. 70.

9 Roedean School v. Cornwall Aviation Co. Ltd., 99 Cent. L. J. 311. See: Moeller, Law of Civil Aviation, 1936, p. 184 and following.

10 Portsmouth Co. v. United States, 260 U. S. 327, 43 Sup Ct. 135, 67 L. Ed. 287 (1922).

property in a belligerent fashion,[11] erecting crossarms on a telephone pole to extend over the property of another,[12] and other like acts. Also the construction of subways and tunnels at considerable distances underneath the ground has been held to interfere with the surface owner's property.[13]

In 1921 the American Bar Association's Special Committee on Law of Aviation repudiated the theory as inapplicable to air rights in the aviation field. The court in the Johnson case [14] (1928) deciding this specific question, said: " * * * This rule, like many aphorisms of the law, is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development, by the courts of England, long prior to the American Revolution, as a comprehensive statement of the landowner's rights, at a time when any practical use of the upper air was not considered or thought possible, and when such aerial trespasses as did occur were relatively near to the surface of the land, and were such as to exercise some direct harmful influence upon the owner's use and enjoyment of the land. A wholly different situation is now presented. " * * * The upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of law such as is here invoked."

From these cases it is obvious that the "ad coelum" theory has never been the law with respect to air space rights in the aviation field. The law must encourage the development of science, and not hinder it. Until aviation cases began to be tried in the courts, the maxim had not been important and could be applied or not in the individual cases without serious harm. When trespass by aeronautics began to be alleged by landowners over whose land the planes flew in

11 Hannabolson v. Sessions, 116 Iowa 457, 90 N. W. 93 (1902).

12 Cumberland T. & T. Co. v. Barnes, 30 Ky. L. Rep. 1290, 101 S. W. 301 (1907).

13 Matter of New York, 215 N. Y. 109, N. E. 104 (1915).

14 Johnson v. Curtiss N. W. Airplane Co. Minn., U. S. Aviation Reports 42 (1928).

commercial flights, a definite rule had to be laid down against the plea involving this ancient maxim. The courts did not hesitate to refuse to hear such cases when the only complaint was the trespass under the "ad coelum" maxim, and to encourage aviation by holding the air to be free above certain prescribed distances, laid down by federal and state statutes.

This refusal of the courts to apply the maxim to aviation cases brings up an interesting question: if the landowner does not now own the air above to the heavens, may he obtain title to the air above his property to a height greater than his actual use of the space?

Real estate is the most corporeal of corporeal things. Its ownership can be definitely established and the limitations defined. But can such an abstract thing as air space be so owned, and so limited? Air obviously cannot, but it may be that space as such may be subject to ownership. This fact has been recognized by the courts for many years. In 1864 an Illinois court held that the owner of a *second story* of a building had the right to have his floor and walls supported by the owner of the first floor who also owned the land beneath.[15] This case apparently decided that there was a right to sell and to own a stratum of space.

In 1898 [16] the same court held that the owner of a structure projecting over an alley had the ownership of the space he was using, subject to the alley use.

In 1903 again in Illinois a court had to consider a bill for partition involving the fee simple title of the second and third stories of a brick building where the defense was that the property was not real estate and therefore, not subject to partition. The court said "A house or even the upper chambers of a house may be held separately from the soil on which it stands, and an action of ejectment will lie to

[15] McConnel v. Kibbe, 33 Ill. 175 (1864).
[16] West Side Elevated Railroad Co. v. Springer, 171 Ill. 170 (1898).

recover it. . . . We are of the opinion that the second and third stories were not personal property but were real estate." [17] Again the court recognized the right to ownership of space.

In Missouri in 1900 [18] a similar question was before the courts. There the owner of land decided to build a two-story building and granted by written conveyance to the Knights of Pythias Lodge the right to build a third story which would be the exclusive property of the lodge. The lodge made a contract with the same contractor hired by the owner of the land, and the contractor subsequently sought to get a mechanic's lien upon the lot and the entire building for his entire bill. The court held that the titles were separate and that the contractor was entitled to a lien but separately for the work done by him for each builder.

In 1915 a South Carolina court said that there was nothing invalid in a deed which granted certain property, but limited the grantee's right to build higher than fourteen feet from the ground.[19]

In 1923 a Washington bank owned property on both sides of an alley. The city undertook to vacate the alley above an imaginary horizontal plane sixteen feet above the ground. The court said that the city could vacate a part of the alley in width, or length, and that there was no reason why they could not also vacate a part in altitude.[20]

More recently an interesting deed has been recognized as valid, where a tract of land in the city of Chicago was platted to show several hundred circles of ground. The land, owned by the Northwestern Railroad, was thus platted and the circles deeded to Marshall Field. The deed describes this land as "all the land, property, and *space* (italic ours) at and below horizontal plane zero Chicago City Datum in

17 Madison v. Madison, 206 Ill. 534 (1903).

18 Badger Lumber Co. v. Stepp, 157 Mo. 366 (1900).

19 Pearson v. Matheson, 102 S. C. 377 (1915).

20 Taft v. Washington Mutual Savings Bank, 127 Wash. 503 (1923).

296 complete cylinders formed by projecting vertically downward from said plane the circles forming the boundaries of said lots as represented on the plat." The deed further calls for the transfer of title to what is called an *air lot*, being all the space within the prescribed area above a specified plane.

The interesting thought is that if it is possible to purchase a three-dimensional tract and have actual title to air space as in this case, there is certainly no reason to assume that purchases of air space where the space can be described sufficiently, for other purposes. Whether the courts may hold that such deeds are good only where the air space is to be put to a specific use, or whether one might buy air space to prevent its use by airplanes for instance, is doubtful.

The more recent cases brought by the owners of property against aviators flying over and causing damage to the landowner are brought upon the nuisance theory and all of them are for actual damages and/or injunctive relief. A leading case is the Swetland case [21] in Ohio. Here the Swetlands owned land near Richmond Heights, Ohio on which they had constructed residences at a cost of about $115,000. After the construction of the residences the Curtiss Airports Corporation purchased land immediately opposite the Swetland homes across the road, where they intended to construct and operate an airport. Despite notice by the Swetlands that such use would destroy the use of the residences the Curtiss Corporation went on with their plans. An action to enjoin the airport's construction was brought in the District Court asking that airplanes be prohibited from flying over the Swetland place at less than 500 feet, and for other injunctive relief. The relief was refused by the court, in these words: "We first consider the contention that the flying of an aeroplane through the air space over plaintiff's land is a trespass which, when recurring as a necessary incident to the operation of the air field, must be enjoined. The proposition is

[21] Swetland v. Curtiss Airports Corp. 55 F. (2d) 201 (1932).

affirmed by appellants upon the maxim, *Cujus est solum est usque ad coelum.* We are told that this maxim was imported into the English law by Lord Coke and that it has been approved in Baten's Case * * * and others. The popularity of the phrase with the courts of this country is attested by its repetition in the law reports of practically every state. Its relation to aviation has been the subject of much discussion in the legal literature of the past ten years. We do not discuss these numerous articles nor the authorities referred to in argument, many of which are cited in the opinion of the trial court. It is said that the early cases which embedded the maxim into the body of the law were decided upon the theory of nuisance and not trespass. We cannot admit that basis of decision. But none of those cases nor any of the later ones undertakes to define the term *"ad coelum,"* if indeed that term is one of constancy or could be defined. In every case in which it is to be found it was used in connection with occurrences common to the era, such as overhanging eaves or branches. These decisions are relied upon to define the rights of the new and rapidly growing business of aviation. This cannot be done consistently with the traditional policy of the courts to adapt the law to the economic and social needs of the times. * * * We cannot hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the air space overlying the surface. This does not mean that the owner of the surface has no right at all in the air space above his land. He has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he many reasonably expect to occupy himself as to impose a servitude upon his use and enjoyment of the surface. * * * As to the upper stratum which he may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface.

His remedy for this latter use, we think, is an action for nuisance and not trespass."

In 1942 in *Delta Air Corporation v. Kersey*[22] the maxim was again discussed. Here Kersey brought suit against the city of Atlanta to enjoin the city and others from operating an airport and the facts were much the same as those in the Swetland case in Ohio, except here the airport was constructed and was operating so that actual damages could be shown. The chief complaint was against the low flying of the planes in taking off and landing directly over the roof of plaintiff's house. The Georgia code in section 105-1409 states that "the owner of realty having title downwards and upwards indefinitely, an unlawful interference with his rights, below or above the surface alike gives him a right of action." The court in deciding the case said: " * * * An able discussion of the common law maxim expressed in these sections and the construction to be given to it with respect to the recently developed field of aviation is contained in the Thrasher case.[23] In refusing to give these sections a meaning that would make any and every aerial flight over the land of another a trespass, it was said, 'The space in the far distance above the earth is in actual possession of no one, and being incapable of such possession title to the land beneath does not necessarily include title to such space. The legal title can hardly extend above an altitude representing the reasonable possibility of man's occupation and dominion, although as respects the realms beyond this the owner of the land may complain of any use tending to diminish the free enjoyment of the soil beneath. Perhaps the owner of the land may be considered as being in actual possession of the space immediately covering the trees, buildings, and structures affixed to the soil, so that the act of navigating a plane through this stratum could be condemned as a trespass.' "

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22 Delta Air Corporation v. Kersey, 193 Ga. 862, 20 S. E. (2d) 245.
23 Thrasher v. City of Atlanta, 178 Ga. 514, 99 A. L. R. 158 (1934).

The Hinman case [24] in 1936 was based on the rights of a landowner above whose land planes were alleged to have trespassed. They alleged, among other things, that the Hinmans owned and were in possession of 72½ acres of real property "together with a stratum of air-space superjacent to and overlying said tract, and extending upwards to such an altitude as plaintiffs may reasonably expect now or hereafter to utilize, use or occupy said air space." The court said in deciding the case "Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace either by code enactments or by judicial decrees and that the *ad coelum* doctrine does not apply in California. We have examined the statutes of California * * * but we find nothing therein to negative the *ad coelum* formula. Furthermore, if we should adopt this formula as being the law, there might be serious doubts as to whether a state statute could change it without running counter to the Fourteenth Amendment to the Constitution of the United States. If we could accept and literally construe the *ad coelum* doctrine it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law."

Continuing, the court said: "This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able. * * *

"This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

"In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of

[24] Hinman et al v. Pacific Air Transport, 84 F. (2d) 755 (1936).

mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we approach it, it recedes. * * * There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception."

In discussing the possibility of ownership of airspace unconnected with land, the judge stated that such title is "inconceivable," and that such a right had never been asserted, and was a thing unknown to the law. At that moment, however, the deed to the Chicago property giving Marshall Field, later Mr. Kennedy by transfer of title from Field, states that title to air space was granted. The huge Merchandise Mart stands upon this spot and is occuping the space or a part of it, so that a use is being made. But supposing no building was built upon it and at some time an action in trespass was brought against an alleged trespasser by airplane, it is assumed that there could be no defense raised on the theory that the air is not *owned* by the plaintiff.

The California judge, in the Hinman case, *supra,* claimed the proposition of ownership of airspace is too new for any court to find a legal precedent upon which to lay the decision. Of course he is right in saying that such reasoning was never pursued in the history of jurisprudence until the occasion was furnished by the common use of vehicles of the air. Little aid was to be found in actual precedent but the solution could be and was found in the application of elementary legal principles. The first and foremost of these principles is that the origin or the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and must by its nature, be capable of exclusive possession. The air, like the sea, is by its nature incapable of private ownership as we usually regard the meaning of the word "ownership," except as one actually uses it. It is upon this theory that our water rights are based.

Actually, we may conclude that a man may own so much of the space above his land as he uses in connection with the enjoyment of the land. The limits are not fixed but vary with the needs of the owners. All the rest of the air belongs to the public. When we say a man owns the air to the heavens, then, it merely means that he is not to be limited in any use he may make of it in his enjoyment of the land. His title is paramount.

But any use of the space by others which interferes with the enjoyment by the owner of the land would be a trespass for which the law gives him a remedy.

Until some definite regulations are promulgated to give the courts a guide in determining cases based on trespass by aeroplanes, there will continue to be much variance in the decisions, but it seems that the courts all over the country are consistently refusing to apply the *"ad coelum"* doctrine in these cases. They proceed rather upon the theory of nuisance and insist that the plaintiff be able to show damages to the property or person before a judgment will be rendered in his favor. The tendency of the courts and of lawyers is to abandon the maxim completely and to proceed upon the nuisance theory in cases where a century ago nothing more than the maxim would have been required to form a basis for an action.

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