Notre Dame Law Review

Volume 6 | Issue 1 Article 9

11-1-1930

# Notes

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# NOTES

AVIATION—TRESPASS TO REALTY.—The rapid growth of aviation has been followed with interest by people throughout the world. The attendant physical problems are matters of common knowledge. But not so generally known is the fact that aviation has been constantly confronted with a legal obstacle. The obstacle has been placed in the form of a question, doubting the right of an aviator to a free passage through the air above another's land.

For hundreds of years the question of the right to invade such air space involved merely the lower stratum of the air. The difficulties that arose very seldom concerned the rights of individuals above one hundred feet from the ground. As a consequence the early English cases quite generally held that any intrusion into the space above another's land was actionable.[1] In America the courts have followed the English decisions closely in upholding the rights of the land owner.[2]

The basis of the decisions upon invasions of the air space is the maxim *Cujus est solum ejus est usque ad coelum*.[3] Strictly construed this maxim would state that any passage over another's land, at whatever height, is a trespass. The strict interpretation was followed by many authors in past years. The modern adherents put it to use in proclaiming all aviators trespassers.[4]

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1 Baten's Case, 9 Coke's Reports 54 (1611); Penruddock's Case, 3 Coke's Reports 205 (1597); Fay v. Prentice, 1 C. B. 827 (1845) (projection over another's land as a nuisance); Clifton v. Bury, 4 T. L. R. 8 (1887); Kenyon v. Hart, 6 B. & S. 249, 118 S. C. L. 249, 122 Reprint 1188 (1865) (firing of guns over land as a trespass). The latter case criticizes the *dictum* in Pickering v. Rudd, 4 Camp. 219 (1815), wherein Lord Ellenborough expressed the belief that it was no trespass to fire a gun over the land of another. See also, Ellis v. Loftus Iron Co., L. R. 10, C. P. 10 (1874); Wandsworth Board of Works v. United Tel. Co. (1884) 13 Q. B. D. 904, 12 Eng. Rul. Cas. 630.

2 Hannabalson v. Sessions, 116 Iowa 457, 90 N. W. 93 (1902) (thrusting arm into space above another's land); Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537 (1872) (overhanging branches); Whittaker v. Stangwick, 100 Minn. 386, 111 N. W. 295 (1907) (shooting over another's land); Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920 (1906) (wires stretched over another's land). See also: Markham v. Brown, 37 Ga. 277, 92 Am. Dec. 73 (1867); Herrin v. Sutherland, 241 Pac. 328, 42 A. L. R. 937 (1925); Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278 (1897); Grandona v. Lovedal, 70 Cal. 161, 11 Pac. 623 (1886); Puroto v. Chieppa, 78 Conn. 401, 62 Atl. 664 (1905); Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365 (1888); Codman v. Evans, 89 Mass. 431 (1863).

3 ". . . . the word 'land' includes not only the face of the earth, but everything under it or over it." 2 Blackstone Comm. (4th. ed.) 18; COKE *on* LITT. 4a.

4 "The improbability of actual damage is irrelevant to the pure legal theory, neither is it necessary that there should be force nor unlawful intention; there seems every reason to support the proposition that the mere flight over a person's land is an act of trespass and that an action would lie against the offending aviator." 46 CAN. L. J. 730.

Others strongly contend that the maxim must be taken with certain limitations.[5] They point out that, at the time of its origin, the maxim was applied to a very limited area. The maxim is attributed to Accursius,[6] a glossator or commentator on the Code, who lived in Bologna about the year 1200. The phrase was used by Accursius in a discussion of rights under the Code to have burial plots or tombs free from the interference of an overhanging building.[7]

It may well be said that, in view of the circumstances under which he used the word, Accursius had no intention of applying this rule to a height beyond that which might reasonably be used by landowners. "According to good Latin usage, the *coelum* was a space which began only a short distance above the surface of the earth." [8] As the landowner owns up to but not inclusive of the *coelum*, his rights would appear to have been limited to a space only a little above the height of the tallest buildings.

Despite the controversy upon the question, the exact question of the right of an aviator to fly over another's land has never been determined. The opinions expressed in early English and American decisions were made when no such question had to be decided. Now, with aviation gaining, almost overnight, a position of importance in the commercial field, the feeling is prevalent that a doctrine must be adopted which will recognize a right of passage in the air and place our newest industry upon a law-abiding basis.[9]

The theory has been advanced that there can be no trespass by passage through the air until some actual harm results.[10]

A second theory asserts that above a reasonable height, "that of possible effective possession," it is no trespass to fly over another's land. This theory is more liberal in that it does not place as strict a liability upon the aviator in case of actual damage or inconvenience.

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5 ". . . . within reasonable limitations land includes not only the surface but also the space above and the part beneath." Butler v. Frontier Tel. Co. (cited *supra* note 2).

6 Although it is ascribed by Brissaud and Miraglia to Cinus (or Gino) of Pistoia, a student of Accursius. 23 ILL. LAW REV. 49.

7 Sweetland v. Curtis Airports Corporation, 41 Fed. (2d.) 934 (1930); 1 AIR LAW REVIEW 394.

8 62 AM. LAW REV. 894.

9 "Perhaps we may go further and say that he (subjacent proprietor) has no right at all over the air above his land, except so far as its occupation by others could be of injury to his estate. This seems to be a view quite in accordance with the spirit of our time. Modern government tends, at all points, to push the public good farther and farther into what was formerly thought the inviolable domain of private right." 4 AM. J. INT. L. 95.

10 "It is submitted, however, that there can be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil) and that a mere entry into the air space above the land is not an actionable wrong unless it causes some harm, danger or inconvenience to the occupier of the surface. When any such harm, danger or inconvenience does exist, there is a cause of action in the nature of a nuisance." SALMOND, LAW OF TORTS (7th ed.) 238.

A third theory maintains that individual landowners are not the absolute owners of the super-jacent air space. The property rests in the state, which has the duty to regulate the use of such air space. "Rights do not belong to the individual as they might be in the state of nature, or as they might be if each acted irrespectively of the others. They belong to them as members of the society in which each recognizes the other as an originator of action in the same sense in which he is conscious of being so himself, and thus regards the free exercise of his own powers as dependent upon his allowing an equally free exercise of his powers to every other member of the society * * * the members of the state derive their rights from the state * * * every right is derived from some social relation."[11]

With no binding decisions upon the subject, the law making bodies of the various nations have felt themselves free to control the air rights on principles other than that of eminent domain.

The International Air Convention of 1919, which was attended by a majority of the major nations of the world, recognized the principle of complete and exclusive state sovereignty in the air space superincumbent upon its domain. Following the rules laid down by this convention, England by the Air Navigation Act of 1920 provided "that 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 the wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight." [12]

"Article 19 of the French law of May 31, 1924, provides that aircraft may pass freely above French territory;" but that "the right of aircraft to fly over privately owned land cannot be exercised under conditions such as to interfere with the rights of the owner." [13]

The German Civil Code and the Swiss Code, while recognizing the extension of property rights into the air, declared that the subjacent owner cannot prohibit interferences which take place at such a height that he has no interest in the prevention.[14]

In the United States, the unsettled state of the authorities causes some doubt as to the right of a state or nation arbitrarily to make laws regulating air rights. Various suggestions were made as to the right of Congress to control this matter under the admiralty clause and other clauses of the Constitution. Congress did exercise its power, but under the commerce clause of the Constitution.[15] By the Air Commerce Act of 1926, Congress gave the Secretary of Commerce the power to make laws governing the minimum altitude of flight and

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11 FIXEL, LAW OF AVIATION at 32, quoting from GREEN'S PRINCIPLES OF POLITICAL OBLIGATIONS" 143, 145, 146.

12 SALMOND, *op. cit. supra* note 10.

13 1 AIR LAW REV. 399.

14 2 C. J. 304 (note 38, b and c).

15 ART. I, SEC. 8, par. 3.

declares that the navigable air space is to be subject to a public right of freedom of air navigation.[16] The Federal rule, of course, applies only to interstate and foreign aviation.

Such rules as Congress authorized have been promulgated by the Secretary of Commerce,[17] and have been held to be constitutional.[18] The Federal laws have been generally used as the basis of the State laws and the Federal right has been held supreme even where the interstate movements were only remotely affected.[19] But the State's right is equally recognized and where Federal laws do not apply, as in intrastate commerce, regulatory statutes have been passed, the most prominent being the Uniform State Law of Aeronautics.

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BILLS AND NOTES—PAYMENT ON FORGED CHECKS.—In a recent Iowa case [1] the doctrine of *Price v. Neal* [2] was again invoked and criticized. The rule established by *Price v. Neal,* that a drawee pays (or accepts) at his peril a bill, on which the drawer's signature is forged, has been repeatedly recognized both in England and in the United States.[3] There are few courts of *dernier* resort which reject

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16 44 STAT. 568 (1926); 49 U. S. C. par. 171.

17 SEC. 81 G 1-2 H. I. i, 2 (a), 3 Chap. 5, AIR COMMERCE REG. 1926.

18 Smith v. Aircraft Co., reported in U. S. AVIATION MAGAZINE (Supp. U. S. Daily, March 22, 1930) at 3. The court discussed the constitutionality of statutes permitting flight at a fixed minimum altitude. The court justified Federal legislation as proper under the Interstate Commerce clause, and the State legislation under Police Power.

19 Ry. Commission of Wisconsin v. C. B. & Q. Ry. Co., 257 U. S. 563, 42 Sup. Ct. 232 (1922); State of New York v. United States, 257 U. S. 591, 42 Sup. Ct. 239 (1922).

1 Bank of Pulaski v. Bloomfield State Bank, 226 N. W. 119. (Iowa 1929).

2 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

3 Smith v. Mercer, 6 Taunt. 76 (1815); Cocks v. Masterman 9 B. & C. 902 (1829); U. S. v. Chase National Bank, 252 U. S. 485 (1920); U. S. v. The National Exchange Bank of Baltimore, 270 U. S. 527 (1926); Hoffman v. Milwaukee Bank, 12 Wall. 181 (U. S. 1871); Young v. Lehman, 63 Ala. 519, 523 (1880); Redington v. Woods 45 Cal. 406 (1873); First National Bank v. Ricker, 71 Ill. 439 (1874); First National Bank v. Marshalltown State Bank, 107 Pa. 327 (1899); Commercial, etc., Bank v. First National Bank, 30 Md. 11 (1868); National Bank v. Bangs, 106 Mass. 441 (1871); Bernheirner v. Marshall, 2 Minn. 78 (1858); Pennington County Bank v. First State Bank, 110 Minn. 263 (1910); Stout v. Benoist, 39 Mo. 227 (1866); Weisser v. Denison, 10 N. Y. 68 (1854); Brown v. Rosenstein, 208 App. Div. 799 (N. Y. 1924); Ryan v. Bank, 12 Ont. R. 39 (1886); National Fire Insurance Company v. Mellon National Bank, 276 Pa. 212 (1923); Farmers, etc., Bank v. Bank of Rutherford, 115 Tenn. 64 (1905); State v. Brodway National Bank, 282 S. W. 194, (Tenn. 1926); Bank of St. Albans v. Farmers' Bank, 10 Vt. 141 (1838); Johnston v. Comm. Bank, 27 W. Va. 343 (1885); Fidelity & Casualty Company of N. Y. v. Planenscheck, 227 N. W. 387 (Wis. 1929).

the rule, either by express rule of statute or by judicial interpretation.[4] While the doctrine is sustained by the weight of judicial authority, unfortunately there is not a similar unanimity as to the reason of the rule.

In *Price v. Neal* there were two bills with different histories, yet both are governed by the same rules of law. W, a wrongdoer, forged the name of the drawer, D, and delivered to the payee, P, (probably a confederate); the bill was indorsed to the defendant, H, for a valuable consideration, and H subsequently submitted it to the drawee, E, and received payment. W forged the name of D to a second bill and delivered it to P; P procured the acceptance of E and delivered to H. A third case, involving an extension of the doctrine of *Price v. Neal*, is conceivable. Suppose W forges the name of D to a bill; P negotiates the bill to H, and H then gets the acceptance of E. E refuses to pay, having learned of the forgery. H sues E on the acceptance.

The rule seems to be well settled "that money paid by the drawee of a negotiable instrument to the holder, under a mistake as to the genuineness of the *body* of the instrument, or of the signature of an *indorser*, is recoverable." [5] This right is sometimes based upon an implied warranty of the genuineness of the paper.[6] Even "assuming that there is such an implied warranty by the indorser in the case of a *sale* of the paper," [7] when H presents the bill to E and receives payment the transaction can hardly be regarded as a sale; it is a *discharge* of the instrument. Professor Woodward says that it seems more accurate to say that the right to recover is *quasi contractual*.[8]

Several theories have been advanced upon which to support the exceptional rule in *Price v. Neal*. The first is that the drawee is negligent in not ascertaining the genuineness of the drawer's signature. There are, as Professor Ames has pointed out, two objections to this theory. A proper application of the doctrine would require that the drawee be allowed to show, in a given case, that he was not negligent; *e. g.*, the skillfulness of the forgery. But it seems that such evidence would be excluded.[9] In the second place, negligence on the part of the payor

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4 First National Bank v. Bank of Wyndmere, 15 N. Dak. 229 (1906) (Bill made since adoption of the N. I. L. in North Dakota, but no reference made to the statute); American Express Company v. State National Bank, 27 Okla. 824 (1911).

5 WOODWARD, THE LAW OF QUASI CONTRACTS, § 80.

6 WOODWARD, *op. cit. supra* note 5.

7 WOODWARD, *op. cit. supra* note 5.

8 WOODWARD, *op. cit. supra* note 5.

9 Ames, *The Doctrine of Price v. Neal*, 4 HAR. L. REV. 297, 298; WOODWARD, *op. cit. supra* note 5, § 83.

"If the bank pays money on a forged check, no matter what the circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free from blame and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts as its peril." Per Alvey, J., Hardy v. Chesapeake Bank, 51 Md. 562, 505.

is generally held not to be a bar to the recovery of money paid under a mistake.[10]

A second reason for denying a recovery is that in consequence of of the drawee's paying the bill, the holder loses the right of recourse against prior indorsers which the dishonor of the bill would have given him. This theory might be called a loss of secondary rights on the part of the defendant, constituting a change of position. If this were true, it would follow that if there were no prior indorsers the holder would have to restore; but such is not the law. Recovery has been allowed in cases where there were no prior indorsers, as where W negotiates the instrument to P;[11] no one is secondarily liable in such a case, for W did not so undertake, and D is not bound for his name is forged. There is no change of position and no loss of secondary rights in this instance. Suppose that we do have a prior indorser and that the law would permit E to rescind payment made to H and recover it; should H be allowed to rescind the discharge of I? The answer should be an affirmative one for otherwise H would be in a very difficult position whichever way he might act. If refused payment, he would be in danger. If the bill is valid, then I would be discharged by a proper tender. If H is entitled to rescind the discharge of I, how soon should he do so? By the better view, within the time he should have given notice if payment has not been received. Suppose H notifies I after this time; clearly he has lost the right of recourse as against I. Even so, does *loss* constitute a change of position which would be a sufficient basis for denying *quasi contractual* relief against H? A change of position will defeat the power of rescission in *quasi contractual* relief. There is essential error as between H and I; and there is a contract of *sale* as between H and I. So H is not limited to *quasi contractual* recovery against I. There may be rescission by H against I for essential error; and H has a remedy against I on the warranty of the genuineness of the instrument, giving him equally effective remedies. Therefore there is no difficulty involved if H does not secure a *quasi contractual* right against I.

"The true principle," Professor Ames contended, "upon which cases like *Price v. Neal* are to be supported, is the far-reaching principle of natural justice, that as between persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money." [12] But the equities are not in the same *res*. The equity of H is in the purchase price paid for the instrument, while the equity of E is in

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10 Ames, *op. cit. supra* note 9; WOODWARD, *op. cit. supra* note 5, § 15.

11 Bergstrom v. Ritz-Carlton Restaurant and Hotel Company, 171 App. Div. 776 (N. Y., 1916); WOODWARD, *op. cit. supra* note 5, § 85, and cases there cited.

12 *The Doctrine of Price v. Neal.* 4 HAR. L. REV. 297. 299.

the sum paid to H—the latter being an entirely separable transaction. It is contended that what Professor Ames had in mind was that as between parties equally meritorious, a legal title will not be disturbed.[13] Professor Woodward submits that this explanation does not meet the objection. He takes the view that since H's mistake precedes E's and cannot be said to result from any act or omission of E's, it is H's own calamity, for which E is in no way responsible, and affords no reason for denying to E the right to recover money irrevocably paid by him, in a subsequent transaction, to H.[14] A second objection to the equal equities theory is that if it is applied to cases of forgery of the drawer's signature, it should be applied to cases of forged indorsements. Professor Ames distinguished the latter class of cases upon the doctrine of subrogation.[15] While Professor Woodward objects that this theory involves a straining of the doctrine of subrogation, since E is permitted to sue in his own name, and without showing payment to the true owner of the bill, yet he conceded an analogy.[16]

Professor Cambell advances a theory of commercial interests. The theory that the rule is one of policy—a commercial interest that H, a *bona fide* holder for value, shall retain the money he receives in payment of the instrument—is a most plausible one. That policy must be based on the theory that H will be induced thereby to buy the instrument. H may act or refuse to act as it pleases him to do so. Commercial interests require that he be encouraged to buy the instrument. He is assured of two remedies: (1) A remedy over against P or I, the seller, on the theory of mistake or breach of warranty; (2) If he does get the money he may retain it free from any

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13 Note in 16 HAR. L. REV. 514.

14 WOODWARD, *op. cit. supra* note 5, § 84.

15 "Upon whom finally should the loss fall, when a party to a bill or note pays it to the holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged, the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use. If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defense that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner may elect to pursue, the loss must ultimately fall on the holder." 4 HAR. L. REV. 307.

16 WOODWARD, *op. cit. supra* note 14.