

Marquette Law Review

Volume 2
Issue 3 *Volume 2, Issue 3 (1918)*

Article 4

1918

Law of the Air

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Repository Citation

George E. Haas, *Law of the Air*, 2 Marq. L. Rev. 109 (1918).

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CONTROL OF PUBLIC UTILITIES

utility through neglect or otherwise of the governing body, gives them no right that may not be regulated. Nor does the fact that their ingenuity, genius, and foresight have created a public service where none theretofore existed, in any way alter the situation. In all cases the fact remains and the test is: are the rights of the people in the service so great as to render it necessary to their welfare? If so, it may be controlled, regulated, even at times appropriated, if the public good so demands.

FRED W. AHLGRIMM, '18.

LAW OF THE AIR

The problem of the aeroplane is probably as old as that of perpetual motion. From the time of the traditional Darius Greene with his home-made flying machine, which landed with such disastrous results upon the barnyard manure pile, until the advent of the Wright brothers, men worked and labored in vain upon such a dream. Today, the aeroplane is a vivid reality.

Thousands of aeroplanes now fly over the various battle grounds of Europe, under the most adverse circumstances, prying into the secrets of the enemy, bringing back tell-tale photographs and maps, which show the topography of the country and the position and strength of the enemy. Renowned war critics have already ventured to predict that the aeroplane will be a major factor in winning this war.

Even as this is written, the service flag of the Marquette College of Law has more than a hundred stars, a considerable portion of which represent men in the aeroplane corps. This great world war will not last forever. Eventually peace will come. Thousands of birdmen now engaged in the business of war will turn their talents and machines to the new conditions of peace, — namely, commerce, transportation, aerial mail service, and pleasure.

There will be accidents and property destruction through negligence, and the aggrieved parties will seek their remedies through the courts of law. Then a most perplexing question will arise, — "What is the law?"

The aeroplane has already made its début into the Supreme Court of this State. It is known as the famous Morrison-Fischer¹ case, which attracted nation-wide interest.

In 1910 a State Fair was being held at Milwaukee, and Mr. Hoxey, at that time one of the world's most famous aviators, agreed to make certain flights with a Wright machine. Preparations were made for starting and alighting, and several successful flights were made. On the afternoon of the eventful day Mr. Hoxey attempted to make another flight, and when less than fifty feet in the air, his machine suddenly lurched and fell to the ground, injuring several spectators, including Irene Morrison. Suit against the Board of Directors of the State Fair was instituted in the Circuit Court of Milwaukee County, but the jury refused to bring in a verdict of damages for the plaintiff. The action was decided upon the liability of a state's agents in performing certain governmental functions; but it is very interesting to note some of the questions and answers in the special verdict as reviewed by the Supreme Court:

Q. 8—Ought the said defendants, in the exercise of ordinary care to have anticipated that because of the ascent of Hoxey from the race track some such injury to the plaintiff was likely to happen? Answer—No.

Q. 9—Was Hoxey's manner of controlling the aeroplane the sole proximate cause of the injury to the plaintiff? Answer—No.

Q. 10—Was Hoxey's manner of control of the aeroplane a proximate cause of plaintiff's injury? Answer—No.

Q. 11—Did Hoxey at the time he attempted to make the ascent handle his aeroplane in a negligent manner? Answer—No.

Q. 14—Did any want of ordinary care upon the part of the plaintiff proximately contribute to her injury? Answer—No.

Mr. Hoxey was one of the few experts in 1910, and that he handled his machine in an expert manner cannot be doubted. But is every aviator an expert? And what degree of proficiency must an aviator have attained in order to fly, and just how will the answer to this question operate to enhance or mitigate damages? The courts cannot be criticized for absolving Mr. Hoxey from all liability, whether he was agent or servant of the defendants or others.

1. *Morrison vs. Fischer*, 160 Wis., 62.

In a New York case, *Platt vs. Erie County Agricultural Society*,² the members of the fair board were held liable for injuries sustained by spectators when an aeroplane dropped and injured several people, practically under circumstances similar to those of the Wisconsin case.

In a very early balloon case, *Guille vs. Swan*,³ where an aeronaut was dragged through a field after a mishap in the air, and the curious and anxious crowd broke down fences and gathered upon the premises in an attempt to aid him, the court held that he was guilty of trespass, and liable for damages committed by the people who attempted to assist him. Nothing was mentioned in this case about his responsibility for damages in flying over the lands of others, the opinion touching only upon the injury actually resulting from his unexpected landing.

In the latter part of 1913 a judgment for damages was rendered against two aviators,⁴ in a court of law in France. It was an action of trespass, for injury to real property. Likewise, in this case, nothing was mentioned about the rights of freeholders over whose estates these aviators had traveled, to an action of some other nature against the unfortunate fliers.

Probably the most recent case of record is the famous English case, "The Koenigsberg",⁵ where a British aeroplane destroyed a German armed cruiser in German East Africa. This was an action instituted by the pilot and observer of the British aeroplane, for "prize bounty". Although nothing touching trespass was mentioned or included in the proceedings, this case serves to bring out the fact that an aeroplane is used for various purposes, and many different actions will arise. Prize bounty was recovered in this action.

The old legal maxim "Cujus est solum ejus est usque ad coelum", has been more or less a paramount principle in deciding cases involving real estate and appurtenances which suspended or projected beyond the metes and bounds of certain described freeholds. The old common law theory that the owner of a freehold "owns from the center of the earth to the zenith" evolved many other maxims, which also had a deciding weight in many actions involving trespass.

2. 149 N. Y. S. 520.

3. 19 Johns 381.

4. C. L. J. V. 79, p. 184.

5. 116 L. T. Rep. 829 (1917), p. 174.

Trespass, in its strictest sense,⁶ is "an entry upon another's ground, without lawful authority, and the doing of some damage, however inconsiderable, to his real property. While in a more comprehensive sense, it is any transgression against the person or property". These maxims may have been thoroughly applicable to cases where the owner of a freehold dug a mine, and in digging, dug a tunnel or shaft, or a recess under the surface of his neighbor's freehold.

Another series of cases arose where a portion of a building, roof, board, or other appurtenance extended beyond the boundary line. This necessitated a more elastic interpretation of the old maxims, and it seemed to be the consensus of opinion of learned judges and barristers that the owner of a freehold also owned the air upwards, with no limit, over his freehold, and that to infringe upon such aerial territory also constituted "trespass."

It is quite probable that at the birth of these well established aphorisms and theories, no thought was given to any vehicle that would traverse the universe without touching this mundane sphere. Had the aeronauts in the New York case, and also in the Wisconsin case, acted under conditions where they would have been held for damages, resulting from some negligent manipulation of the aeroplane, these cases, and particularly the Wisconsin case, might have established valuable precedents touching aeroplane actions.

"Trespass" and "nuisance" are more or less correlative and reciprocal. A nuisance is an owner's "unreasonable, unwarrantable and unlawful use of his own property, either real or personal, working obstruction of or injury to the right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt, that the law will presume consequent damages."

Lord Ellenborough of England cited the following:⁸ "The strict right of property does not extend skyward without limit, so as to entitle the owner to sue in trespass", and again, further, in the case of *Pickering vs. Rudd*,⁹ "and the advent of the airships has shown that this would be impracticable". Nor would

6. 3 Bloom, p. 209.

7. 170 U. S. 213, 18 Sup. Ct. 583, 42 Ed. 1012, 1898.

8. Wood. Nuis., pp. 1.

9. Laws of Eng., Vol. 24, Sec. 305, Note.

he hold that it was trespass, but only that it was a nuisance, to fire a gun across a field "in vacuo",¹⁰ so long as no projectile touched the ground.

The traveling charge of the gun may be likened to the aeroplane, since the course of each at a certain altitude may be inevitably dangerous and damages resulting imperative.

It can be readily conceived that an aeronaut can and may be held liable to one or more actions in nuisance, and also an action of trespass. He may so conduct his machine that it will fly very close to the house tops and buildings, or near the earth, so as to endanger the lives of the subjects that be in such close proximity. Flying at a very low altitude may create disorder and confusion, resulting in injury and consequent damages. Ballast and refuse may be thrown overboard, to the detriment and injury of property and persons upon the earth.

The doctrine of "balance of convenience", though not recognized in this state, may afford some remedy or defense for the aeronauts. In an action tried in Iowa in 1883, *Daniels vs. Keokuk Waterworks*, the defendant company owned a waterworks, and the soot from their chimney damaged personal property. The court would not allow an injunction in this case, saying that such injury is not irreparable, and where damages sustained can be compensated for, equity will not interfere, where the public benefit outweighs private inconvenience. Once a nuisance, always a nuisance, and if one aeroplane so conducts itself as to constitute a nuisance, are we then compelled to say that all aeroplanes are a nuisance? Clearly not, because the public benefit immeasurably outweighs private inconvenience. We must not be partial in our prosecutions and judgments, by way of giving too much liberty to aeronauts to encourage violations and abuse of their rights; nor are we to enact laws whereby those that suffer damage or injury to themselves or property can maintain an action, even though the mass of mankind under the same and similar circumstances would not consider it damage or injury. The doctrine of balance of convenience will probably afford a key to the solution for the law of airships.

The writer will admit that an action of trespass or nuisance may afford us sufficient remedy at this time; but that the present remedies will not be adequate in the near future, no matter how

10. 4 Camp. 219.

elastic some interpretations may be, can be easily appreciated by their dubious application at this time. That well established theories and maxims governing trespass and nuisance will become worthless and obsolete, has been intimated by the courts in the decisions of the cases already cited.

The pranks and vagaries of the atmospheric agents cannot be listed categorically, as they possess very transient tendencies, and have utter disregard for exhibiting requisite danger signals; nor is the propeller the realization of perpetual motion. Many accidents will result from aeroplaning, through no proximate fault of the operator; then who is to suffer the damages to property and life, as the result of a fallen airship, or one that is in motion? There will be much conflicting evidence and testimony in such cases.

That an aeroplane must travel in a certain imaginary pathway, or at a certain altitude, and within certain speed, and that any transgression or violation of any legislative enactment will constitute negligence, or result in the proximate damage or injury, is purely conjectural at this time. Many plausible and theoretical laws can be suggested, but it will require strenuous and studious efforts to formulate practical, efficient and universal results. In the case of *Williams vs. Mississippi*,¹¹ the court said, "No relief can be granted against a law merely because it confers a discretion readily susceptible of abuse, if no actual discriminatory administration is shown".

That some legislative action will be necessary to formulate laws as to when, where and how aeroplanes shall travel is now imperative and inevitable. It is affording a very fertile field of inquiry, and many statutes may be enacted from which many diametric conclusions will be inferred and drawn. The aeroplane a few years ago was an abstract object, and its vital importance today, and its more significant purpose tomorrow, make it obviously necessary and compulsory for us to enact such legislation, carefully defining the right which each person has to his necessary portion and use of air and earth, and drawing the lines which shall mark the termination of one right at the point where another right begins.

11. 170 U. S. 213, 18 Sup. Ct. 583, 42 Ed. 1012, 1898.

LAW OF THE AIR

A uniform code of laws must be enacted to eliminate conflicting legislation of various states and other governmental units. Uniform codes have been passed in the subjects of negotiable instruments and partnership, which have been of a very decided advantage. A uniform code of laws for the airship will be an epoch in law history. We are to be congratulated at the large number of law trained men who are aviators. Many of the aviators are students from various law schools of this country, including this college, and others are attorneys who have left their active practice. These men will play an important role in enacting intelligent and impartial laws. A commission should be formed of these men to formulate the necessary laws, which can then be adopted by the various states and placed upon their statute books. Owing to the closely affiliated circumstances, such uniform laws could be readily adopted and resorted to in any part of this nation.

GEORGE E. HAAS, '18.