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MODERN AIR LAW PROBLEMS AND THE "CUJUS SOLUM" MAXIM

Courts have lately been forced to re-examine the maxim, "*Cujus est solum ejus est usque ad coelum*,"¹ with a view of determining its effect upon modern air-law problems. This maxim was first introduced into English law during the reign of Lord Coke² and was supported by decisions in *Baten's case*³ and *Fay v. Prentice*.⁴ Both of these cases involved nuisances in which there was an objection to overhanging structures which permitted rain to fall from the defendant's cornice or some other part of his structure on the plaintiff's land.

In *Pickering v. Rudd*,⁵ a case involving the question of a board projecting or overhanging a neighbor's enclosure, Lord Ellenborough first overruled the maxim. It is as though he had looked into the future and foreseen the coming of the airplane and the problems it would bring, for, in writing his opinion, he considered the rights of an aeronaut in a hypothetical case used in his reasoning.⁶ In Lord Ellenborough's reasoning of almost 125 years ago it is interesting to note that his concept of the "*cujus solum*" maxim is strictly in conformity with that of the majority of courts which already have passed upon the maxim in connection with air travel today. For example, in *Gay v. Taylor*⁷ where aircraft from a field five hundred feet away flew at such low altitudes over the plaintiff's land as to make it dangerous to use the property in a reasonable way, it was held that although the maxim formerly did and in fact may still be given force as a maxim, it cannot be applied in cases of an alleged air trespass except where such trespasses are of such a nature as to interfere with the reasonable and proper enjoyment of the plaintiff's property. If the latter conditions were present, and the courts granted relief such would be based upon the theory of nuisance and not solely upon trespass.

¹ He who owns the surface soil owns also up to the sky above it, and the center of the earth beneath it.

² Coke's death occurred in 1634.

³ 9 Coke's Reports 54b, 77 Eng. Rep. 811 (1611).

⁴ 1 C. B. 828, 135 Eng. Rep. 769 (1845).

⁵ 4 Campbell 219, 171 Eng. Rep. 70 (1815).

⁶ "I do not think it is a trespass to interfere with the column of air superincumbent on the close . . . I am by no means prepared to say that firing across a field in vacuo, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action *quare clausum fregit* at at the suit of the occupier of every field over which his balloon passes in the course of his voyage."

⁷ *Gay v. Taylor*, 1934 U.S. Av. Rep. 146 (1932), (Penn.—Not officially reported). An injunction was granted in this case upon the nuisance theory which in this particular instance embodied elements of noise, dust, congregating crowds and apprehension of danger from low flying and stunting planes which when considered together did interfere with the reasonable enjoyment of plaintiff's property but the case was not decided on any arguments of trespass.

The latest decision upon this matter was *Hinman v. Pacific Air Transport Corporation*,⁸ in which the court declared that the "*cujus solum*" maxim, "is not the law and never was the law," but narrowed the scope of the statement by adding the phrase, "in respect to aerial navigation." In the *Hinman* case the defendant operated planes at less than one-hundred feet and as low as five feet over the plaintiff's land in disregard of notices to discontinue. The court held that no injunction could be granted on the ground of trespass under such facts. It was stated that the ownership of space above land could not be measured by any device quite as effectively as by the use to which the landowner put such space. The decision in effect holds that a landowner owns only as much of the airspace above his property as he uses and he has an absolute right to this space only as long as he so continues to use it. In discussing the maxim the court further stated: "When it is said that man owns or may own to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him."⁹ It is obvious from this statement, therefore, that no necessary use to which a landowner could put his overhead space would interfere with or hinder aerial navigation.

In adjudicating the rights of a landowner below the soil it was held that the "*cujus solum*" maxim would have no force in the decision because the court decided that it was overshadowed by another maxim which contends that "one must use his own so as not to injure another."¹⁰ The effect of this holding was to declare that a landowner is not entitled to an unrestricted use of the water flowing under his lands, if such a usage will injure his neighbor. This is the majority rule and has been followed by all states except Wisconsin which continues to follow the common law and permits a landowner to exercise an unfettered use of underground water.¹¹

Air space rights have by virtue of their importance, found their way into the leasing of railroad properties. In *Phoenix Insurance Co. v. New York & Harlem R. R. Co.*¹² the question of leasing the air space

⁸ *Hinman v. Pacific Air Transport Corp.*, 84 F. (2d) 755 (C.C.A. 9th 1936), 1936 U. S. Av. Rep. 1.

⁹ *Ibid.*

¹⁰ *Erickson v. Crookston Water Works, Power & Light Co.*, 100 Minn. 481, 111 N.W. 391 (1907).

¹¹ *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354, 62 L.R.A. 589 (1903). The Wisconsin supreme court held to the English and common law rules fashioned after the "*Cujus Solum*" Maxim which effect is to give the landowner the right to use such waters as he sees fit, even to the extent of malicious waste.

¹² *Phoenix Ins. Co. of Hartford v. N. Y. & Harlem R. R. Co.*, 59 F. (2d) 962, (C.C.A. 2d, 1932). ". . . to the extent that super surface spaces were not

over the railroad's property was raised by some of the stockholders. The instant case shows that this mode of conveyance has advanced beyond the experimental stage and is being used in several instances to realize upon the valuable building space above tracks and yards in downtown areas.¹³ Such properties are unique in having a description containing three dimensions.¹⁴

Plane-owners seeking the right to fly over another's land attempted to assert such right upon the theory of easement or prescription. These attempts were unsuccessful and it has been held that it is impossible to obtain an easement through the airspace above another's land by continuous use or by prescription.¹⁵ Airplanes, even if trespassing repeatedly do not pass in the same place as to linear space or altitudes, and thus no prescriptive right to any particular way of passage is obtained¹⁶

Objections to flight by property owners over their property have been based upon the theories of trespass and nuisance. Thus, flights at one-hundred feet over the plaintiff's property have been declared to constitute a trespass.¹⁷ However, in the *Hinman* case¹⁸ an unreasonable flight was held to be a nuisance but not a trespass. And in *Gay v. Taylor*¹⁹ the airport itself was declared to be a nuisance by reason of the noise, dust and low flying planes.

In an attempt to satisfy both landowners and aviators the courts have attempted to establish a minimum altitude to be maintained by aviators. Only flights at lower altitudes were held to be a trespass. However, it has been stated that no definite line of demarcation of flight could be set, and it always remains a question of fact whether a flight at five feet above another's land constitutes a trespass.²⁰ Thus it has been held that the reasonableness of the altitude depends upon the

at the time required for railroad purposes, leases thereof were made by the Central for commercial purposes. Under these leases for twenty-one years the super-surface spaces were safeguarded for future railroad uses should such uses become necessary."

¹³ Bell, *Air Rights* (1928) 23 ILL. L. REV. 250, 261; Schmidt, *Public Utility Air Rights* (1929) 54 A.B.A. REP. 839.

¹⁴ (1928) 23 ILL. L. REV. 250.

¹⁵ *Supra* note 8.

¹⁶ *Smith v. New England Aircraft Co.*, 269 Mass. 639, 170 N.E. 385, 1930 U.S. Av. Rep. 1 (1930).

¹⁷ *Ibid* note 16. In this case the court stated that flight at one hundred feet would constitute trespass but seemed to infer that various higher flights would not necessarily be trespasses. It might be well to mention that no injunction was granted in this case because whether there was such trespass or not there was no evidence of danger or injury to livestock or property of the plaintiff. Also *Rochester Gas & Elec. Corp. v. Dunlop*, 266 N.Y. Supp. 469, 148 Misc. 849, 5 Jour. Air Law 655 (1934). Trespass was present as a matter of law where defendant crashed into plaintiff's transmission line towers, reversing lower court which held otherwise.

¹⁸ *Supra* note 8.

¹⁹ *Supra* note 7.

²⁰ *Supra* note 8.

character of the lands flown over.²¹ No injunction will be granted to any landowner who complains of trespass unless real injury can be shown. Thus where there was neither evidence of fright or apprehension of personal danger, nor injury to plaintiff's livestock or property, an injunction was denied.²²

In 1926 the Air Commerce Act²³ was passed. This act coupled with the Uniform Aeronautics Act²⁴ has tended to settle the question as to who shall have the authority to fly or restrict flight over privately owned lands. By the Air Commerce Act the United States assumed sovereignty of all air space over all of its lands and waters for the purpose of preventing any serious impeding of aviation by the rights of those who may have varied and conflicting interests and also to guard against a free flight by planes of foreign jurisdictions.

The Uniform Aeronautics Act was approved by the National Conference of the Commission on Uniform State Laws in 1922. Legislatures in adopting this act often have made some changes. Under the act the states assume sovereignty in all the airspace over their respective jurisdictions which the Federal Government has not taken²⁵ In

²¹ *Supra* note 16.

²² *Ibid.*

²³ 49 U.S.C.A. § 176. "The 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 waters of the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State." The Air Commerce Act of 1926 was framed under Article I, Sec. 8, of the Federal Constitution, which provides that Congress shall have the power to "regulate commerce with foreign nations and among the several states and with the Indian tribes."

²⁴ Arizona Code, 1928, 1934 Supp., §§ 175Z22 to 175Z44 1929 U.S. Av. Rep. 403; Delaware Original Act 1928 U.S. Av. Rep. 472; Hawaii Rev. Laws 1935 Secs. 6975-6986 1928 U.S. Av. Rep. 472, 482; Idaho Code 1932, Secs 21-101 to 21-110 1931 U.S. Av. Rep. 335; Indiana Burns' Stat. 1933, §§ 14-101 to 14-112 1928 U.S. Av. Rep. 472, 484; Md. Bagby's Code, 1929 Supp., Art 1-A 1928 U.S. Av. Rep. 472, 519; Mich. Comp. Laws 1929 §§ 4811-4821 1928 U.S. Av. Rep. 472, 532; Minn. Mason's Stat., '31 Supp. §§ 5494-7 to 5494-21 1929 U.S. Av. Rep. 625; Mo. St. Ann., §§ 13905-13915 1929 U.S. Av. Rep. 648; Mont. Original Act 1929 U.S. Av. Rep. 655; Nev. Comp. Laws 1929 §§ 275-288 1928 U.S. Av. Rep. 472, 545; N. J. Comp. Stat., 1930 Supp., §§ 15-21 to 15-34 1929 U.S. Av. Rep. 683; N. Car. Code 1935, §§ 191(j)-191(w) 1929 U.S. Av. Rep. 701; N. Dak. Supp '25, §§ 2971 cl 2971 cl 2 1928 U.S. Av. Rep. 472, 557; R.I. Original Act 1929 U.S. Av. Rep. 799; So. Car. Code 1932, §§ 7100-7111 1929 U.S. Av. Rep. 810; S. D. Comp. Laws 1929, §§ 8666-L to 8666-W 1928 U.S. Av. Rep. 472, 569; Tenn. Code 1932, §§ 2716 to 2726 1928 U.S. Av. Rep. 472, 569; Utah Rev. Stat. 1933, §§ 4-0-1 to 4-0-9 1928 U.S. Av. Rep. 472, 571; Vermont Pub. Laws 1933, §§ 5219 to 5249 1928 U.S. Av. Rep. 472, 571; Wis. Stat. 1933, §§ 114.01 to 114.10 1929 U.S. Av. Rep. 872.

²⁵ "Section 2. Sovereignty in Space.—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. Section 3. Ownership of Space.—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. Section 4. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this state is lawful, unless at such low altitudes as to

adopting the act the Wisconsin Legislature made but minor changes.²⁶

In conclusion, it may safely be predicted that the matter of air space rights and aerial navigation will be the subject of much future legislation. A statute recently enacted in New Jersey illustrates this fact.²⁷ This statute would appear to enable airports to buy airspace in their immediate vicinity and thereby reduce their liability,²⁸ and would tend to diminish situations similar to that of *Tucker v. United Air Lines*,²⁹ where the landowner was granted an injunction against the Air Transport Company from operating aircraft at a height of less than thirty feet over the plaintiff's land and also enjoined the plaintiff from erecting any poles or trees which might prove dangerous to craft operating out of the airport.

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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, etc."

²⁶ 114.02 Sky Sovereignty. 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. 114.03 Landowner's Rights Skyward. The ownership of 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 114.04. 114.04 Flying Lawful, Landing Unlawful, Limitations; Emergency. 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 or damaging 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 section 114.05.

²⁷ New Jersey Laws of 1938, Chapter 370. "Estates, rights and interest in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas and shall be deemed to be estates, rights and interests in land."

²⁸ (1938) 52 HARV. L. REV. 355.

²⁹ *Tucker v. United Air Lines & City of Iowa City*, 1936 U.S. Av. Rep. 10 (1935).