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AERIAL NAVIGATION IN THE LAW OF TRESPASS

The law of trespass will undoubtedly be greatly modified in the next few years by the rapid advancement of the science of aviation. One of the legal questions arising from this increase of air traffic is: Whether a landowner, having been damaged by the landing or falling of an airplane or article dropped from an airplane, need show negligence in the operator of the craft in order to recover for the damage sustained. This will, of course, depend on whether it is trespass *per se* to fly over another's land.¹ If it is trespass to so pass over, even without damage to the occupant of the soil, then, of course, negligence need not be shown where damage does actually occur. It is my purpose to review the authorities on this question, and to draw therefrom some conclusions as to how the law will adjust itself in this regard.

By the common law of England the owner of the surface of the land was also held to be the owner of all inanimate matter above and below his close: *Cujus est solum e jus est usque ad coelum et ad inferos.*² This rule of great antiquity and weight stood practically without dispute until the early part of the nineteenth century. In 1815 Lord Ellenborough expressed a doubt that this maxim should be strictly construed in regard to the upper air.³ He "thought that it was not in itself a trespass to interfere with the column of air superincumbent on the close"⁴ and that the owner or occupant could only recover for actual damage. This view, as will be shown later, has met with some favor from modern legislators. Fifty years later Lord Blackburn thought differently and returned solidly to the common law rule as being the better founded in law. He "saw the good sense" in Lord Ellenborough's doubt, but not "the legal reason for it."⁵ Courts since Lord Blackburn have been inclined to uphold his opinion and

1. Cooley on Torts, Sec. 162; Pollock Torts, p. 341.

2. "Whose is the land, his is also to be heavens and to the lowermost regions." 2 Black. Com. 18; 3 Kent Com. 401; 1 Woody & Malkin 112; Coke Litt. 4a; Broom Leg. Max. (8th Ed.) 309.

3. Pickering v. Rudd 1 Starkie 56 (1815), where Lord Ellenborough expressed the doubt, obiter, that a projecting board or a balloon drifting over the land would give rise to cause of action unless there was inconvenience to the occupier of the land.

4. Pollock on Torts 281.

5. Kenyon v. Hart 6 B. and S. 249 (1865).

have so decided in the cases of overhanging trees,⁶ projecting eaves,⁷ bullets fired over the land of the complainant,⁸ and wires strung across such land.⁹ The leading American case, wherein the right of a land holder to non-interference with the air above his soil is discussed, is *Hannabalsen v. Sessions*.¹⁰ Apart from judicial precedent this right has been recognized by the telegraph statutes in Missouri. Thus the common law theory of ownership to the heavens is substantially in force today.

But, while the *maxim usque ad coelum* is still in effect in a broad sense, yet there have been modifications and limitations of it which will be enlarged in developing the law of aerial navigation. The one limitation we are here concerned with is that of Sir Frederick Pollock: "The most reasonable rule" would be that "the scope of possible trespass is limited to that of effective possession."¹¹ While this doctrine of effective possession does not flatly deny the maxim, so as upon establishment to relieve the aerial traveler from all guilt of trespass, it does originate a theory upon which the future air voyager may reasonably expect to escape litigation except where he actually causes damage. A recent expositor of Pollock's doctrine has said: "All of truth there seems to be in the maxim of ownership to the sky is that, within lines extended thru all points of soil, ownership to the sky is

6. *Smith v. Giddy* 2 K. B. 448 (1904) where it was held the owner of land may cut the branches of trees overhanging his close to the boundary line. *Lemmon v. Webb* 3 Ch. 1 (1894), allowing trees to overhang boundary is a nuisance, 2 C. I. 303, note 31a, "the owner of land commits no tort if he cuts off the limbs of trees overhanging his land, although the trees themselves grow upon the land of another, since he is entitled to a free approach to his land from above." *Grandona v. Loydal*, 78 Cal. 611, 12 Am. S. R. 121; *Hoffman v. Armstrong*, 48 N. Y. 201; 38 Vt. 117; 1 Ld. Raym. 737; 38 Vt. 117; 1 Ld. Raym. 737.

7. *Smith v. Smith*, 110 Mass. 302 (1872), but this was so held on the rule that the owner of the land was liable to lose title by prescription.

8. *Clifton v. Bury*, 4 T. L. R. 8, on which Pollock comments: "It would be strange if we could object to shots being fired point blank across our land only in the event of actual injury being caused." See also Lord Ellenborough's dicta in *Pickering v. Rudd*, supra.

9. In this last case it has been held the owner is entitled to damages for trespass, or to an injunction or to damages in condemnation proceedings. In *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, ejectment lay though the soil was not touched. In *Wadsworth Board of Works v. United Tel. Co.*, L. R. 13 Q. B. D. 904 (1884), it was held to be trespass to string wires over the close of another, though at a considerable height.

10. *S. C. Iowa* 1902, 116 Io. 458. It was held that it was not assault to use reasonable force to remove an arm of the complainant which was hanging over the boundary fence and over the defendant's land, because the projecting arm was a trespassing of the person on realty.

11. Sec. 3327, R. S. Mo. 1909; 202 Mo. 656.

12. Pollock on Torts, 8th Ed., p. 348; and covenant thereon by A. K. Kuhn Esq. in "The Beginning of Aerial Law," 4 Am. Journal of International Law 109 (1910).

a space of preferential use to the owner of the soil; and such use is interfered with only when *enjoyment* of the soil is diminished."¹³ Mr. Kuhn remarks:

"It is hardly to be believed that courts will sanction any such liberal application of the phrase (*Usque ad coelum, etc.*) and it may be assumed that, in the absence of statutory regulation, they will hold that navigators of the air have the right to travel freely in any direction, so long as they inflict no injury on the property over which they travel or upon the residents thereof."¹⁴ But this "scope of effective possession," so strongly to be depended upon by the traveler of the air, has never been determined; and will not be unless arbitrarily by statute, since it must vary with the advance of aerial navigation.

The countries of continental Europe, before the advent of air craft in numbers, followed a rule substantially the same as that of the English common law.¹⁵ These countries have of recent years recognized the necessity of providing in some way for the expansion and development of the science. They have cast about for some theory upon which to hang their modifications of the *usque ad coelum* rule, and have settled upon a holding analogous to Pollock's doctrine. In France it is held that an aviator is not liable for trespass unless he cause a loss of enjoyment in the land holder.¹⁶ This decision may well have been arrived at by influence of the French penal code.¹⁷ Germany and Switzerland have incorporated the doctrine of effective possession into their statutes. The German act¹⁸ says, "But the owner cannot prohibit such interferences undertaken at such height or depth that he has no interest in their prevention." The Swiss statute provides that, "Property in land extends to the airspace (above) and the earth beneath as far as these may be of productive value to the owner."¹⁹ These laws well illustrate the modern tendency induced by the increase of air traffic. Law makers are realizing that fliers must be dealt with, and their science allowed to progress.

It will at once be noticed that the modern backers of Pollock's doctrine, both judicial and legislative, do not attempt to abridge the land occupant's right after damage is done. None of them go so far as to say that a man, causing from an air craft, injury or inconvenience

13. 71 Cen. L. J. 1.

14. 4 Am. J. Int. Law 126.

15. 2 Corpus Juris 304, note 41 (a).

16. 18 Va. L. Reg. 384.

17. Art. 471 French Penal Code, which holds that trespass on the ground is only forbidden when it injures the owner.

18. Secs. 667-1900, German Civil Code (in effect 1912).

19. Sec. 165, Code of the Canton of Grisons (in effect 1862).

to a holding beneath him is not liable. In the hypothetical case under discussion the damage has occurred and it is the complainant's desire to recover without having to show negligence. This he can do, because the ancient rule has not been overthrown, and has been only tentatively limited where no damage enters into the question. Even the radical continental enactments excuse trespass only where the owner has no interest in the exclusion of the trespasser. It would be absurd to say to a man hit by the debris of an airplane, "You had no interest in the space wherein that plane was flying. It was very high." A body will fall and do damage from any height which an aerial vehicle is capable of attaining. When once the damage is done it will little avail the trespasser to claim immunity because he was out of the zone of effective possession of the complainant. Yet this would substantially be his position were he to attempt to hold the landowner to proof of negligence.

It is submitted that the courts of this country will act upon the question when it arises with an eye to substantial justice between the parties. So if a man flies over my land so high as not to interfere with my enjoyment thereof, then I am entitled to no substantial compensation; but the instant he injures me then his trespass *per se* in so flying relieves me of the necessity of showing negligence on his part. This is an equitable rule, and will in all probability be adopted by the legislative bodies when they come of necessity to act upon the subject.

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