TRESPASSERS IN THE SKY

By Howard H. Hackley*

I. LORD COKE'S MAXIM

The Supreme Court of the United States recently lost an excellent opportunity to express its views on a question three centuries old and yet, oddly enough, a question of considerable importance to modern aviation.

On February 1, 1937, the Court denied a writ of certiorari in the case of Hinman v. Pacific Air Transport, in which the federal circuit court of appeals for the ninth circuit had held that the flight of an airplane as low as five feet above the plaintiff's land could not be made the basis of an action for trespass in the absence of actual and substantial damage. Underlying this case was the fundamental question: Does a landowner have title to the space above his land and, if so, how much of it?

Three hundred years ago that question was almost entirely academic. There was no particular reason why a landed gentleman or a small farmer should have been concerned about ownership of the air space above his land. In those days the airplane was no less fabulous than the phoenix or the unicorn. And yet it was then that the very eminent Lord Coke was inspired to write:

"The earth hath in law a great extent upwards,. . . of ayre and all other things even up to heaven; for cujus est solum ejus est usque ad coelum."²

Had the writer been anyone else, this Latin maxim implying that the sky is the limit to a landowner's property rights might have been forgotten; but the writer was Lord Coke and consequently the maxim lived. It was not until the coming of the

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1(C.C.A. 9th Cir. 1936) 84 F. (2d) 755, cert. den. (U.S. 1937) 57 Sup. Ct. 431.

2Coke, Littleton 4a.
airplane, however, that it assumed a practical significance; for, if the sky is indeed the limit, and if a landowner has title to the space above his land “even up to heaven,” then it might well be argued that an aviator is guilty of a trespass to each and every bit of privately-owned land over which he chances to fly. Moreover, if such is the law, a landowner might with reason complain that any legislation on the part of the federal government or of a state sanctioning air navigation above his land involves an unconstitutional interference with his property rights in violation of the fifth and fourteenth amendments to the federal constitution.

These were disturbing implications to early aviation lawyers. Granted that much had happened since Lord Coke’s day, still, a maxim approved by such high authority could not lightly be disregarded. What was more, the courts had even in recent years referred to the maxim as stating “an ancient principle of law” and “one of the oldest rules of property known to the law.” In 1921, the Committee on Aeronautics of the American Bar Association felt that the ad coelum maxim would be a “bugaboo” to the development of commercial aviation. Ten years later, in spite of the fact that airplanes were darkening the heavens everywhere, one writer insisted that the ad coelum maxim was “still the law.” And as late as 1935, a federal court gave expression to the dictum that “it is a well-settled principle that the owner of property has control of the air space above his property as well as the land below the surface.”

5(1921) 46 A. B. A. Rep. 498. In the same year Major Elza C. Johnson, the legal advisor to the chief of the air service, expressed the opinion that a constitutional amendment would be a necessary prerequisite to federal regulation of the air. Air Information Circular, Vol. 2, No. 181.
6Hise, Ownership and Sovereignty of the Air Space above Landowners’ Premises with Special Reference to Aviation, (1931) 16 Iowa L. Rev. 169, 194.
7United States v. One Pitcairn Biplane, (D.C. N.Y., 1935) 11 F. Supp. 24. The court’s statement was clearly not in point, since no question of private ownership of the air space was involved in this case. An airplane which had previously been used in smuggling liquor from Canada into Ohio was seized in New York by the federal customs officials, and an action for the forfeiture of the plane was brought in the federal district court. The sole question before the court was the right of a federal court in New York to entertain this action in view of the fact that the plane had not landed within that state while transporting the smuggled goods. The court held that since the plane had flown over the state of New York in smuggling goods into Ohio, an unlawful act had been committed within the state of New York. The court’s decision was in fact based upon the ground that the state had sovereignty and jurisdiction over all wrongs committed in the air space above its territory. State sovereignty of the superincum-
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Apparently, no one now seriously advocates a literal interpretation of Lord Coke's maxim. Even before the airplane, it was characterized by an English court as "a fanciful phrase" which had never been law at all. But the exact extent of the maxim's application under modern conditions, if at all, is far from being definitely settled. As will be seen, various theories of space ownership have been advanced by writers on the subject. Some of the courts have taken the position that the flight of an airplane over private land may constitute a technical trespass, at least at low altitudes; and they have based their position upon the ground that a landowner owns the space above his land up to a "reasonable height." On the other hand, in the recent Hinman Case, the court refused to find that flight a few feet above the surface constituted a trespass. To add to the confusion, there are statutes in many states, based on the Uniform State Law for Aeronautics, which expressly recognize private ownership of space indefinitely upward, subject, however, to a right of flight in favor of airplanes.

The whole question would probably have been determined long since if it had not been for the existence of Lord Coke's ambitious maxim. Although generally discredited, it still rises, like a ghost from the past, to haunt any discussion of the respective rights of landowner and aviator. Such being the case, it seems high time that the maxim should be critically examined in order that its proper place in the law of aviation may be settled once and for all.

No doubt, maxims have served a useful purpose in our law. It was Coke himself who wrote that they should be "confessed and granted without proofe, argument or discourse." In fact, how-bent air space, however, is something entirely different from private ownership of such space; and, in referring to the ad coelum maxim, the court was obviously confusing these two different concepts. The case is discussed in (1935) 20 Minnesota Law Review 81.

It should be noted that the present study is concerned, not with state sovereignty in the air space, but with the extent of private ownership thereof.

3(C.C.A. 9th Cir. 1936) 84 F. (2d) 755, cert. den. (U.S. 1937) 57 Sup. Ct. 431.
4The Uniform State Law, further discussed hereafter, is in force in twenty states.
5Coke, Littleton 67a. Broom, Legal Maxims was prefaced by a motto stating that "maxims are the condensed Good Sense of Nations;" and in the preface to Wharton, Legal Maxims, First Am. Ed. 1878, it was asserted
ever, they have never been more than a convenient means of stating a complex legal principle. The law itself is not derived from maxims, but, in accordance with the doctrine of stare decisis, is derived from, and constituted by, the actually decided cases. Accordingly, the extent to which the ad coelum maxim states a rule of law today must of necessity be determined from a consideration of the holdings of the courts in those cases in which it has been quoted. Thus, if it was cited in a case which in fact held only that an entry in the air space ten feet above the surface of one's land constituted a trespass, that case cannot properly be regarded as authority for the proposition that an entry in the air space one thousand feet above the surface would likewise constitute a trespass. Similarly, if a decision in a particular case did not in fact depend upon a question of ownership or property rights in space, any reference to the maxim would be in the nature of dictum only and would not be binding in subsequent cases. These principles are elementary, but they are of controlling importance in determining what the ad coelum maxim means today.

Accordingly, at the risk of repeating what has already been more ably accomplished by other writers,\(^{13}\) a consideration of the question of space ownership with respect to aviation must begin with a judicial history of Lord Coke's maxim.

that maxims represent the "unerring principles of proof." For an excellent discussion of maxims generally, see Smith, The Use of Maxims, (1895) 9 Harv. L. Rev. 13.

II. THE MAXIM IN ENGLISH CASES

While the precise origin of the ad coelum maxim is still shrouded in doubt, it appears to be agreed that its long life began sometime in the thirteenth century and that its author was an eminent professor of law at the University of Bologna by the name of Accursius. Apparently, the principal occupation of lawyers in Accursius' day was the writing of glosses or comments on the Roman law; and in this occupation Accursius was preeminent. In Justinian's Digest, he ran across a passage written by the Roman Paulus, which declared with respect to the rights of the owner of a sepulchre that "coelum quod supra id solum intercedit liberum esse debet," or, in other words, that the sky above the sepulchre "ought to be free." In his annotation to this passage, Accursius coined the ad coelum maxim. Some years later, the English king Edward I, on his way home from the Holy Lands, persuaded Franciscus, the son of Accursius, to accompany him to England to lecture on Roman law at the University of Oxford. Presumably, Franciscus passed the maxim on to his pupils, and eventually it came to the attention of Lord Coke.

If this is a true account of the maxim's beginning, three things are particularly interesting. In the first place, it is to be noted that it was clearly intended, not as a statement of any property right in space as such, but merely as a statement of a landowner's right of freedom from interference in the use and enjoyment of his land. In the second place, Paulus did not assert that the sky is free, but that it ought to be free. Finally, it is not at all certain that Paulus used the term "coelum" in the same sense in which the word "sky" is used today. One writer has pointed out that the word was commonly employed by the Romans to refer to the lower air space, "the area in which the birds fly and the clouds drift and from which the rain falls and the lightning strikes;" and that according to good Latin usage, the "coelum" was a space which began only a short distance above the surface of the earth.

As to the origin of the maxim, see Bouvé, Private Ownership of Air Space, (1930) 1 Air. L. Rev. 232; Spaight, Aircraft in Peace and the Law 54; Sauze, Les Questions de Résponsibilité en Matière d'Aviation (Paris, 1916) 22.

This conclusion is supported by the reference in Bury v. Pope, (1588) 3 Cro. Eliz. 118, to the maxim as being "Tempus Edw. I."

There appears to be some evidence that the maxim was also used by another pupil of Accursius by the name of Cino da Pistoria (1270-1336), who was likewise a glossarist. Miraglia, Comparative Legal Philosophy, section 292.

(1928) 62 Am. L. Rev. 894. The uncertainty as to the exact meaning
Whatever the maxim may have meant to Accursius, it was first used judicially in *Baten's Case*,\(^{18}\) decided by Lord Coke in 1611. In that case, it was actually held only that projecting eaves from which rain water fell upon the plaintiff's land constituted a nuisance which might be "prostrated" upon a writ of quod permittat; but, after so holding, Lord Coke declared:

"Also cujus est solum, ejus est usque ad coelum and therewith agrees 13 H. 8th 1. and by the overbuilding upon part of the house of the plaintiffs, he has deprived them of the air; also he has prevented them from building their house higher."

Since the case involved a nuisance and not a question of ownership, the reference to the maxim was clearly in the nature of dictum. In any event, the language quoted indicates that Coke regarded the maxim, not as giving the plaintiffs any ownership of space as such, but as securing to them the unhindered enjoyment of their land.\(^{19}\)

The next case in which the maxim appeared was that of *Bury v. Pope*,\(^{20}\) which likewise involved a nuisance. The defendant had erected a building on his land, and the plaintiff brought an action for damages due to the obstruction of his light. It was held that the defendant had a right to erect a house on his own land even though the windows of the plaintiff's house had enjoyed unobstructed light and air for some thirty or forty years. At the end of the brief report of the case, the ad coelum maxim was noted as being of the time of Edward the First; but it could hardly have been meant to stand for more than that the defendant in this case had a right to build as high as he pleased on his own land, which

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\(^{18}\) (1610) 9 Co. Rep. 53b. This decision followed that in Penruddock's Case, (1598) 5 Co. Rep. 100b, in which it had been held that overhanging eaves might be abated as a nuisance; but there was no reference in that case to the ad coelum maxim.

\(^{19}\) In the following century, Blackstone in his Commentaries used the maxim in such a way as to imply a like interpretation. 2 Bl. Comm. 18.

\(^{20}\) (1588) 3 Cro. Eliz. 118.
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is quite another thing from holding that he owned all the air space above his land.

Not until 1845 was the maxim again cited in an English opinion. However, Pickering v. Rudd,\(^{21}\) in 1815, is extremely interesting for the language used by Lord Ellenborough in that case. The defendant, a barber, had constructed a "shew-board," or, as we would call it now, a billboard, in order to advertise his profession. The plaintiff, his neighbor, complained that the board projected over his land. It eventually appeared that the board did not in fact so project; but Lord Ellenborough could not resist commenting that if the board had extended over plaintiff's land, then it would have presented a "very nice question." He recalled a case in which he had held that firing a gun into a field was a breaking of the close or a trespass to the land, but he went on to say:\(^{22}\)

"... I never yet heard that firing in vacuo would be considered a trespass. No doubt, if you could prove any inconvenience to have been sustained an action might be maintained; but it would be questionable whether an action on the case would not be the proper form. ...

And then Lord Ellenborough prophetically queried: "Would trespass lie for passing through the air in a balloon over the land of another?" Apparently, he entertained serious doubt that the action would be proper.\(^{23}\)

In Fay v. Prentice,\(^{24}\) in 1845, a cornice of the defendant's house overhung the adjoining land of the plaintiff; and from this cornice "divers large quantities of rain water ran, flowed, and fell" upon the plaintiff's land and thereby "dirtied and spoiled" the gravel walks of the plaintiff's gardens. The court allowed the plaintiff to recover damages, but on the theory that the overhanging cornice was a nuisance, not a trespass, to plaintiff's land. Maule, J., referred to the ad coelum maxim, but only to negative its application in the case under consideration. He said:\(^{25}\)

"... I agree ... that this declaration does not allege a trespass and that it was not so intended. The maxim cujus est solum

\(^{21}\)(1815) 4 Camp. 219, 1 Stark. 56.
\(^{22}\)(1815) 4 Camp. 219, 1 Stark. 56.
\(^{23}\)Fifty years later, however, in Kenyon v. Hart, (1865) 6 B. & S. 249, 252, Lord Blackburn, obviously with the ad coelum maxim in mind, felt disposed to agree to the good sense of Lord Ellenborough's doubt, but not to the "legal reason for it." This case incidentally, held merely that a statute punishing "trespass in pursuit of game" applied only to live game and did not apply to an entry upon land in order to retrieve a bird which had been shot.

\(^{24}\)(1845) 1 C. B. 828, 14 L. J. C. P. 298.
\(^{25}\)(1845) 1 C. B. 828, 14 L. J. C. P. 298.
ejus est usque ad coelum, is not a presumption of law applicable in all cases; for example, it does not apply to chambers in the inns of courts. . . ."

Dictum likewise was the reference to the maxim in Solomon v. The Vintners' Company,26 decided in 1859. In that case, there were three houses built on the side of a hill, of which defendant's was the lowest and plaintiff's the uppermost. All three houses leaned out of the perpendicular. The intervening landowner sought to tear his house down, and as a result the plaintiff's house toppled over. For some reason, apparently because the intervening landowner had no money, the plaintiff brought action against the defendant who owned the lowest house. The court held that, since the plaintiff's house had not adjoined defendant's house, the defendant owed the plaintiff no right of support. Pollock, C. B., remarked that the leaning building "no doubt occupied a space belonging to his neighbor, the rule of law being cujus est solum ejus est uque ad coelum." This statement, however, was clearly not material to the court's decision, since the defendant's house certainly did not overhang the plaintiff's land, and the decision of the court was simply that the defendant owed the plaintiff no right of support.

There were two cases in 1874 in which the maxim, as cited by the court, bore a closer relation to the actual decisions than in the cases so far noted.

The first of these cases was Corbett v. Hill.27 The plaintiff had sold one of two adjacent buildings owned by him to the defendant with the ground site of the defendant's property carefully marked out in the deed. Later it was found that one of the rooms in plaintiff's house projected over onto the defendant's site. By some sort of architectural legerdemain, the defendant built an addition to his house which in turn overhung the plaintiff's projecting room. Naturally, the plaintiff objected and sought to enjoin the defendant from continuing the construction of such addition. The court held that it was an "ordinary rule of law" that whoever owns the "solum" is the "owner of everything up to the sky and down to the centre of the earth;" but that this rule was only a presumption of law which in this case was successfully rebutted as to the plaintiff's projecting room by the terms of the deed itself. Except for such room, however, the court held that the column of air space above the defendant's land was the

26(1859) 5 H. & N. 585, 28 L. J. Ex. 370.  
27(1870) L. R. 9 Eq. 671, 39 L. J. Ch. 547.
defendant's property and that, therefore, the addition being built by him, even though it projected above the plaintiff's room, was a proper exercise of the defendant's rights. Thus, the court accepted the ad coelum maxim as authority for the defendant's ownership of the space above his land, at least to the height to which he intended to build the addition to his house; but the case can hardly be regarded as holding that the defendant owned the superincumbent air space above his land indefinitely upward.

In the same year, in Ellis v. Loftus Iron Co., the maxim was again referred to as supporting ownership of space above one's land, at least up to a certain height. In this case, it appeared that the defendant was the owner of an "entire horse" and that the plaintiff, his neighbor, owned several mares. One day it happened that defendant's "entire horse" kicked and bit one of the plaintiff's mares through an intervening iron fence that ran along the boundary line. The plaintiff brought suit against the defendant in an action on the case for negligence. Apparently, the court felt that the defendant had not been negligent, since it appeared that his horse had never bitten or kicked any animal before, but on the contrary "was as quiet a temper as you would ever wish a horse." However, the court held that since defendant's horse must of necessity have extended his mouth and hoof over the plaintiff's land, a trespass had been committed for which recovery should be allowed. Reaching this conclusion with evident reluctance, Chief Justice Denman declared:

"It seems hard where two parties have adjoining land with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences though not in reality guilty of default or neglect any more than the other party, by reason of the application to the mere act of an animal of the technical rule cuius est solum ejus est usque ad coelum. I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so."

Ten years later, in Wandsworth Board of Works v. United Telephone Co., Lord Coke's maxim was very irreverently referred to as a mere "fanciful phrase;" but the court could not help conceding that the maxim was part of the common law of England. In this case the plaintiff had been granted title to a certain street by an act of Parliament. The defendant company sought to stretch wires over the street and the plaintiff thereupon asked for an

\[26(1874)\] L. R. 10 C. P. 10, 44 L. J. C. P. 24.
\[29L. R. 10 C. P. 10, 14, 44 L. J. C. P. 24.
\[30(1884)\] 13 Q. B. D. 904, 53 L. J. Q. B. 449.
injunction. The court held that, within the meaning of the statute vesting title in plaintiff to the street in question, the term "street" carried with it only a reasonable zone of user above and below the surface, and that, therefore, wires stretched by the defendant above the street at such a height as not to endanger traffic below could not properly be enjoined by the plaintiff. In this connection, the language of the court is particularly interesting:

"I am not about to question that which has been laid down by Lord Coke in Co. Litt. 4 a, namely, that where a piece of land is granted or is conveyed in England by a grant from the King or by a conveyance from party to party, under the word 'land' everything is passed which lies below that portion of land down to what is called the centre of the earth—which is, of course, a mere fanciful phrase—and usque ad coelum—which to my mind is another fanciful phrase. By the common law of England the whole of that is transferred by the grant or the conveyance under the term 'land.' But I am of opinion that it does not follow that in a grant or conveyance the word 'street' would produce the same result."

Obviously, this case lends little support to a literal interpretation of the ad coelum maxim, since the court was concerned, not with the meaning of "land," but with the meaning of the term "street" as used in the particular statute under consideration.

The latest English case in which the maxim appears to have been mentioned was Lemmon v. Webb,31 decided in 1894. In that case, the branches of a tree standing on the defendant's land overhung the land of the plaintiff. The court admitted that the ad coelum maxim might apply to overhanging eaves or cornices, but distinguished overhanging branches on the ground that in the case of eaves or cornices there is an actual encroachment upon and occupation of land which may give rise to an action of trespass, whereas "the owner of a tree which gradually grows over his neighbor's land is not regarded as insensibly and by slow degrees acquiring title to the space into which its branches gradually grow." The real reason, however, why overhanging branches were excepted from the ad coelum rule seems to have been that they do not effectually interfere with the landowner's use of his land, inasmuch as he may always lop off the branches as a nuisance,

31 [1894] 3 Ch. 1, 63 L. J. Ch. 570, aff'd [1895] A. C. 1, 64 L. J. Ch. 205. While there have apparently been no subsequent English cases, it is interesting to note that an English scholar, one Sir H. S. Theobold, K. C., has written a book entitled "Law of Land" in which he concludes that:

"The public . . . has the right to navigate the air at a proper height, and there is no liability for trespass by merely passing over the lands of others in flight, but there is no right to land on soil of another." See (1931) 171 Law Times 28.
a summary procedure not permissible with respect to eaves and cornices.

Such are the English cases; and it seems hardly necessary to point out that none of them may properly be regarded as authority for ownership of space in the vicinity of the stars. It will be noted that in only one case, that of \textit{Ellis v. Loftus Iron Co.}, was it specifically held that an intrusion into the space over one's lands constituted a trespass; and in that case the intrusion was within a few feet of the surface. In one other case, \textit{Corbett v. Hill}, the maxim apparently was interpreted as giving a landowner ownership of space above his land, at least to the height of an addition to his house. In all of the other cases, however, references to the maxim were unadulterated dictum, since the actual decisions in those cases depended, not upon property rights in space, but upon liability for nuisance.

\textbf{III. The American Cases}

Apparently, the earliest American decision involving title to the air space was \textit{Lyman v. Hale},\textsuperscript{22} decided in 1836. The plaintiff had on his land a tree which bore luscious pears. A branch of this tree overhung defendant's land, and the latter very naturally appropriated the fruit within his reach. Upon the trial of the case, the defendant urged that since "land comprehends everything in a direct line above it," he had a perfect right to remove fruit from branches overhanging his land. The court "readily admitted" that such was the "general doctrine," but held that it had no applicability to the case under consideration. Thus, as in the subsequently decided English case of \textit{Lemmon v. Webb}, already referred to, this case regarded the ad coelum maxim as inapplicable to overhanging branches.

In line with the English cases, the courts in this country have held that overhanging walls and eaves may be enjoined as nuisances, and in such cases, of course, the ad coelum maxim, if mentioned at all, was not the basis of the decision.\textsuperscript{33} A few cases, however, have apparently regarded the maxim as sufficient authority to support an action for trespass.

In \textit{Codman v. Evans},\textsuperscript{34} although an action for damages resulting from an overhanging wall was held to be in tort for nuisance,
the court declared that trespass might have been sustained. A few years later, on the authority of this dictum, the Massachusetts court decided that projecting eaves constituted a forcible entry of defendant's close and that trespass quare clausum fregit would lie for their removal. Similarly, a leaning building has been impliedly recognized as constituting a trespass, and nominal damages have been allowed for the "technical trespass" committed by a flashlight which extended one inch over the boundary line.

Similarly, a leaning building has been impliedly recognized as constituting a trespass; and nominal damages have been allowed for the "technical trespass" committed by a flashlight which extended one inch over the boundary line.

While the question of space ownership has generally arisen in actions for trespass to real property, in several instances it has also been presented in connection with actions of ejectment. Thus, in an early New York case, it was held that a leaning wall gave rise to an action for the recovery of possession of real property; and the court apparently based its decision on the ad coelum maxim. However, it is significant that the maxim was not interpreted literally, but was regarded merely as a rule for the protection of the use of one's land. In the words of the court in this case, "Land, it need hardly be said, extends upward as well as downward as far as the convenience of the subjacent soil may see fit to extend it." (Italics supplied.)

This decision was subsequently overruled by the case of Aiken v. Benedict, in which it was held that an action for a nuisance, and not ejectment, was the proper remedy against projecting eaves. However, this case was in turn overruled in 1906 by Butler v. Frontier Telephone Co., in which the ad coelum maxim was specifically made the basis for sustaining an action of ejectment to enforce the removal of wires which had been stretched by the defendant telephone company over the premises of the plaintiff. Treating the maxim as an "ancient principle of law," the court declared:

"... The surface of the ground is a guide but not the full measure; for within reasonable limitations land includes not only the surface, but also the space above and the part beneath. ... 'Usque ad coelum' is the upper boundary, and, while this may not be taken literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is

Sherry v. Frecking, (1855) 4 Duer. (N.Y.) 452.
(1855) 4 Duer. (N.Y.) 452, 457.
(1865) 39 Barb. (N.Y.) 400.
(1863) 39 Barb. (N.Y.) 400.
(1806) 186 N. Y. 486, 78 N. E. 716.
(1806) 186 N. Y. 486, 78 N. E. 716, 718.
concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. . . . According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. [Sic] The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. . . .”

While the court thus emphatically approved the maxim, it is to be noted that it was intimated that the maxim should not be taken as a premise for absolute ownership of all the superincumbent air space, but rather as a safeguard upon the landowner’s right to build. Thus, at a later point in its opinion, the court said:43

“. . . The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot.”

One of the most interesting cases in which the maxim has been cited was that of Hannabalson v. Sessions,44 decided by the Iowa supreme court in 1902. Plaintiff and defendant were neighbors but, it appears, not particularly friendly ones. One day, the defendant, while at work in his garden, was interrupted by a brick thrown in his direction by one of plaintiff’s children, and, “in his indignation at the unprovoked bombardment,” defendant threatened the lad with arrest. Plaintiff and her husband heard the threat and a quarrel ensued. In the course of the battle, the plaintiff rather belligerently extended her arm over the fence and the defendant, according to his own story, “laid his open hand upon plaintiff’s arm and mildly but firmly suggested the propriety of her ‘keeping on her own side of the fence.’” Some weeks later the plaintiff instituted an action for assault. The court held for the defendant on the ground that in repelling plaintiff’s arm, he was acting in justifiable defense of his property. In this connection, the court said:45

“. . . The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends not only downward to the centre of the earth, but upward usque ad coelum, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. . . .”

This case, therefore, clearly supports the proposition that an intrusion into space above one’s land at a point near the surface constitutes a technical trespass.

43(1906) 186 N. Y. 486, 78 N. E. 716, 718.
44(1902) 116 Iowa 457, 90 N. W. 93.
45(1902) 116 Iowa 457, 90 N. W. 93, 95.
The firing of bullets over a person's land has likewise been regarded as a trespass. In *Whittaker v. Stanwick*, the defendant, while duck hunting, fired over the plaintiff's land. Apparently, the shooting did no harm, and defendant relied upon the defense that the law takes no concern with trifles. The court, however, refused to recognize this defense, on the ground that such a contention involved a misapprehension of the law of trespass. It was pointed out that in trespass on the case damages directly resulting therefrom must be shown, but that in trespass to real property "it is immaterial whether the quantum of harm suffered be great, little, or unappreciable." Accordingly, the court held that the shooting constituted a technical trespass and, therefore, granted the plaintiff's request for an injunction.

The facts and the holding of the court were somewhat similar in *Herrin v. Sutherland*, where it appeared that the defendant had fired a shotgun over the plaintiff's premises. On the theory that the air space "at least near the ground is almost as inviolable as the soil itself," the court held that the plaintiff had committed a technical trespass.

In 1922, the Supreme Court of the United States, without mentioning the ad coelum maxim, gave its support to private ownership of space near the surface of the land. In *Portsmouth Harbor Land and Hotel Company v. United States*, the plaintiff, who owned a summer resort, alleged that shots had been fired over his property from a nearby government fort and that, as a result, his guests had been frightened away. In the circumstances, plaintiff charged that a servitude had been imposed upon his land for which he had a claim. In sustaining the plaintiff's contention, Mr. Justice Holmes, speaking for the court, remarked that the shots fired over plaintiff's land were "successive trespasses" which supported evidence of an intent to "take" the plaintiff's property.

Ordinarily, as has been seen, the question of property rights in the air space results from the entry or presence of objects above one's land. In at least one case, however, the question has arisen in the application of principles of constitutional law. In *Piper v. Ekern*, the Wisconsin court, in 1923, held that a statute which prohibited the erection of buildings in a certain part of a city at a

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46(1907) 100 Minn. 386, 111 N. W. 295.
47In startling contrast is the holding of the court in the recent Hinman Case, post note 73.
48(1928) 74 Mont. 387, 241 Pac. 328.
50(1923) 180 Wis. 586, 194 N. W. 159.
height exceeding ninety feet could not be regarded as a reasonable exercise of the state's police power and was, therefore, an unconstitutional taking of private property without compensation. In support of its conclusion, the court said:

"The owner's right in property when unrestricted extends not only downward under the surface to an unlimited extent, but also upwards, and the latter right, from common experience, would appear to be the more valuable..."  

Thus, the ad coelum maxim, though not expressly quoted, was here applied, not merely as protecting a landowner against trespasses by his neighbors, but as protecting him against interference by the state with his property rights; but it is to be noted that the underlying principle in this case, as in other cases already considered, was not the ownership of space for its own sake but the protection of the owner of the surface in his right to build thereon as high as he might please.

Before concluding this discussion of the cases, it may be noted that the ad coelum maxim has been applied by the courts in supporting ownership beneath, as well as above, the surface of the land. Cases of this description, while not directly affecting the question of ownership of the air space, are interesting as indicating how the courts, even in recent years, have been inclined to cite the maxim without apparently appreciating the absurdity of its literal application.

For example, in 1922, the Montana court held that a state statute prohibiting the burning of natural gas from natural gas wells under certain circumstances was an unconstitutional taking of property below the surface of the land without due process of law; and the court cited the ad coelum maxim as stating the "common law" rule in Montana. In the same year, a federal court, in a case involving the right of the state to authorize the condemnation of rights of way through a seam of coal under the surface of the land, declared that the term "land" includes "all interest in the land or that lies above or below it." And, as recently as 1929, the Indiana court of appeals declared:

"The general rule that whatever lies beneath the surface of a tract of land belongs to the owner of the surface is so familiar that it should be unnecessary to cite authority to sustain it..."

In one rather interesting case, a controversy with respect to

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41 (1923) 180 Wis. 586, 194 N. W. 159, 161.
42 Gas Products Co. v. Rankin, (1922) 63 Mont. 372, 207 Pac. 993.
43 Garnsey Coal Co. v. Mudd, (D.C. Ala. 1922) 281 Fed. 183.
the ownership of a cave was decided on the basis of that part of the maxim which purports to give a landowner title "to the depths." A man named Edwards had discovered and developed a cave in Kentucky, and had profited thereby to such an extent that his neighbor, one Lee, charged that the cave might extend under his land. He, therefore, requested the court for an order directing a survey of the cave to determine whether this was true. The trial court granted Lee's request, and Edwards sought a writ of prohibition against the judge of the court for the purpose of stopping the survey. The court of appeals, however, denied the writ on the ground that, because of the ad coelum maxim, Lee owned all beneath the surface of his land and, therefore, had a right to have the survey made in order to determine whether the cave in question in fact extended under his land. Intimating that it held the maxim in high regard, the court said:

"Cujus est solum, ejus est usque ad coelum ad infernos (to whomsoever the soil belongs, he owns also to the sky and to the depths), is an old maxim and rule. It is that the owner of realty, unless there has been a division of the estate, is entitled to the free and unfettered control of his own land above, upon, and beneath the surface. So whatever is within a direct line between the surface of the land and the centre of the earth belongs to the owner of the surface. . . ." (Italics supplied.)

One of the justices in this case, more modern-minded than the majority, wrote a blistering dissenting opinion, in which he conceded that the space above and below the surface of one's land should be subject to the dominion of the owner of the surface in so far as the use of that space is necessary for his proper enjoyment of the surface, but refused to admit that a landowner has any further right in such space different from that of the public at large.


57In the course of his dissenting opinion, Justice Logan said, (1929) 232 Ky. 791, 24 S. W. (2d) 619, 622:

"It sounds well in the majority opinion to tritely say that he who owns the surface of real estate without reservation owns from the centre of the earth to the outmost sentinel of the solar system. The age-old statement adhered to in the majority opinion as the law, in truth and fact, is not true now and never has been. . . .

"... The old sophistry that the owner of the surface of land is the owner of everything from zenith to nadir must be reformed and the reason why its reformation is necessary is because the theory was never true in the past, but no occasion arose that required the testing of it. Man had no dominion over the air until recently, and, prior to his conquering the air, no one had any occasion to question the claim of the surface owner that
Even as recently as 1936, the maxim was cited with apparent approval in a case involving ownership of the subsurface. In *Jones v. Vermont Asbestos Corp.*, the validity of a statute authorizing the state university to convey certain land to a private corporation was sustained. It appeared, however, that the original grant of the land by the state to the university had specifically excepted all gold and silver mines which might be discovered under the surface; and, accordingly, the court held that, while the statute authorizing the conveyance of the land was valid, the conveyance could not operate to convey title to any gold or silver which might subsequently be found beneath the surface. With this exception, the court described the title of the private corporation to which the land was conveyed as follows:

"The Vermont Asbestos Corporation, as the possessor of the surface of the soil, will be deemed to be in possession of whatever lies underneath the surface, since land includes not only the ground or soil, but everything attached to it above or below, in accordance with the maxim 'cujus est solum ejus est usque ad coelum.'"

Apparently, the judge was not a Latin scholar, for, while ownership of the subsurface was the question at issue, he quoted only that part of the maxim which relates to ownership above the surface. It is significant, moreover, that the court did not interpret the maxim literally as giving ownership to everything above or below the surface, but instead asserted that it gave title only to everything "attached" to the surface above or below.

The cases heretofore considered represent the principal cases, English and American, not involving the flight of airplanes, in which the ad coelum maxim has been referred to or applied. While, as has been seen, the language of the maxim appears to hold an irresistible attraction for the courts, two things stand out as im-

the air above him was subject to his dominion. Naturally, the air above him should be subject to his dominion in so far as the use of the space is necessary for his proper enjoyment of the surface, but further than that he has no right in it separate from that of the public at large. The true principle should be announced to the effect that a man who owns the surface, without reservation owns not only the land itself, but everything upon, above, or under it, which he may use for his profit or pleasure, and which he may subject to his dominion and control. But further than this his ownership cannot extend. It should not be held that he owns that which he cannot use and which is of no benefit to him, and which may be of benefit to others.

"Shall a man be allowed to stop airplanes flying above his land because he owns the surface? He cannot subject the atmosphere through which they fly to his profit or pleasure; therefore, so long as airplanes do not injure him, or interfere with the use of his property, he should be helpless to prevent their flying above his dominion. . . ."

58 (Vt. 1936) 182 Atl. 291.
59 (Vt. 1936) 182 Atl. 291, 303.
important in so far as aviation is concerned. In the first place, wherever the maxim has been construed or explained, it has generally been regarded as a rule for the full enjoyment of one's land and not as a rule for the ownership of space as such. Secondly, in no case has the actual decision been that private ownership of space exists at a high altitude above the surface such as that usually flown by airplanes, no matter how broad and sweeping may have been the court's language.

It must be admitted that some of the cases logically support the conclusion that an entry by an airplane into the space near the surface of one's land might constitute at least a technical trespass. On the other hand, it may safely be said that there is nothing in our common law, the maxim to the contrary notwithstanding, which would render all airplane flight a trespass to the underlying land. Where, then, should the line be drawn? What, exactly are the circumstances under which an aviator should be regarded as a trespasser? Or should the idea of trespass to space above land be discarded entirely?

IV. THE AIRPLANE CASES

The first case in which an aviator was brought face to face with the implications of the ad coelum maxim was that of Commonwealth v. Nevin, decided in 1922; and in that case the aviator came out victorious. He was prosecuted for low flying under a state statute which forbade "wilful entry upon land;" but he was acquitted on the ground that the statute in question applied only to such things "as were, and always had been, trespasses to land" and that flying an airplane was not in that category. Noteworthy is the fact that the plane here was flying as low as fifty feet, while in later cases, as will be seen, aviators were to be held guilty of trespass even though flying at much greater altitudes.

In the following year, the maxim was invoked in a Minnesota case as ground for an injunction against all flying over the plaintiff's property. The court refused to accept such a literal interpretation of the maxim, and granted the injunction only against flight under two thousand feet, which happened to be the minimum altitude at which airplanes could lawfully fly under Minnesota law. The court was of the opinion that the upper air space was a

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“natural heritage common to all the people,” that its use should not be hampered by an “ancient artificial maxim,” and that any idea of trespass above two thousand feet was a mere “legal fiction.”

These two comparatively early cases, although decided by lower courts, seemed to indicate that aviation would have little to fear from the application of Lord Coke's maxim. It was not until 1930, however, that the meaning of the maxim with reference to the flight of airplanes received serious consideration. In that year, the highest court of Massachusetts and a federal district court in Ohio were each petitioned by a landowner for an injunction against the flight of airplanes over the plaintiff’s land.

In the Massachusetts case, *Smith v. New England Aircraft Co.*, the plaintiff contended that the flying of airplanes from an adjacent airport over his land was both a trespass and a nuisance. The ad coelum maxim was cited as supporting a landowner’s right to the usable air space above his land, but the plaintiff stated that it was not his purpose to base his case upon this maxim. The court agreed that for the purposes of the decision, private ownership of air space extended “to all reasonable heights above the underlying land;” but it was of the opinion that the state and federal minimum altitude rules then in force operated to legalize any flights above the prescribed minimum altitude (in both cases five hundred feet), and that such altitude rules, if they interfered at all with the plaintiff's property, were, as to the state, a valid exercise of its police power, and, as to the federal government, a proper exercise of its power to regulate interstate commerce. Accordingly, without deciding whether the landowner had title to the space above the minimum altitude at which airplanes might lawfully fly, the court refused to grant an injunction against flying above that height. However, with respect to flights as low as one hundred feet above the surface of plaintiff’s land, the court held that such flights were not authorized by the minimum altitude rules, and that “under settled principles of law” they constituted a trespass to plaintiff’s land. Nevertheless, since it was not shown that any

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62 In this connection also, it may be noted that in 1923 the Comptroller General of the United States denied a claim for damages where the plaintiff’s cattle had been frightened into a stampede by low flying army airplanes; and in holding that the Government could not be held liable for the mere flying over the plaintiff’s land, the Comptroller General emphasized the fact that there had been no actual physical contact. 3 Op. Comp. Gen. 234; 1928 U. S. Av. Rep. 46.

substantial damage resulted, the court held that even flights at this altitude did not justify the granting of an injunction.

In *Swetland v. Curtiss Airports Corp.*, unlike the *Smith Case*, the plaintiffs “relied strongly” on the ad coelum maxim. Accordingly, the federal district court, in a scholarly opinion, reviewed the maxim’s history at great length. As the result of its survey of the authorities, the court concluded:

“... It is safe to say that there are no cases which involve an adjudication of property rights as appurtenant to land in the air space which would be normally used by an aviator. It is true that in many of them the maxim is quoted and, seemingly, is used by the courts as a basis for their decisions; but it is the point actually decided in the cases, not the maxim, which established the law. In other words, it can be said that the maxim is the law only to the extent that it has been applied in the adjudicated cases. Maxims are but attempted general statements of rules of law. The judicial process is the continuous effort on the part of the courts to state actively these general rules, with their proper and necessary limitations and exceptions. . . .

“It appears from these authorities that the maxim has never been applied in cases which fix rights in air space normally traversed by the aviator. There are no precedents or decisions which establish rules of property as to such air space. . . .”

As in the *Smith Case*, the court felt that the minimum altitude rules did not deny the plaintiffs “effective possession” of their property, or amount to an unlawful taking of their property without due process of law. Accordingly, the court refused to grant an injunction against flights over the plaintiffs’ land at heights above five hundred feet, the altitude fixed by the minimum altitude rules. Below that altitude, however, it was held that the minimum altitude rules did not apply, and that the rights of the plaintiffs, if unreasonably interfered with, should be protected by the application of the rule of “effective possession.” Accordingly, the court concluded that the plaintiffs were entitled to an injunction restraining the defendant from “avigating over the property of plaintiffs or any part thereof unless at altitudes of 500 feet or in excess thereof.”

Swetland, not satisfied with an injunction prohibiting only flights at less than five hundred feet, took an appeal to the circuit court of appeals. Since the trial in the lower court, the airport

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64(D.C. Ohio 1930) 41 F. (2d) 929. For comments on this case, see (1930) 40 Yale L. J. 131; (1930) 17 Va. L. Rev. 77; (1930) 30 Col. L. Rev. 1213; (1930) 1 Air L. Rev. 272; (1930) 1 Air L. Rev. 489; (1930) 6 Wis. L. Rev. 47.

65(D.C. Ohio 1930) 41 F. (2d) 929, 936.
had been more fully developed and, as a result, it had become even more obnoxious to the plaintiff. On this ground, the circuit court of appeals modified the decree of the district court, and held that the airport had become a nuisance, and that its operation should be entirely enjoined.\textsuperscript{66} With respect to the ad coelum maxim, the court refused to adopt the view which had been expressed in the district court—that is, that the early cases in which the maxim had been cited were decided upon the theory of nuisance rather than trespass. On the contrary, the circuit court of appeals seemed to feel that the maxim, so far as it affects aviation, should be entirely disregarded. In this connection, it was stated:\textsuperscript{67}

"In every case in which it is to be found, it was used in connection with occurrences, common to the era, such as overhanging branches or eaves. These decisions are relied upon to define the rights of the new and rapidly-growing business of aviation. This can not be done consistently with the traditional policy of the courts to adapt the law to the economic and social needs of the times. . . ."

Accordingly, it was the appellate court's opinion that the question should be considered in relation to the necessities of the period and that, from this point of view, it could not be held that in every case it is a trespass against the owner of the soil to fly an airplane through the air space overlying the surface. However, notwithstanding its somewhat different attitude toward the application of the maxim, the court apparently adopted the rule of "effective possession" which had been announced by the district court. In accordance with this rule, the circuit court of appeals took the position that the landowner has "a dominant right of occupancy" for purposes incident to his use and enjoyment of the surface, and that there may be such a continuous and permanent use of the lower stratum of air space as to impose "a servitude upon his use and enjoyment of the surface." On the other hand, with respect to the "upper stratum," which the landowner may not reasonably expect to occupy, the court felt that he has no rights, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface, and that in such event his remedy is an action for nuisance and not trespass.

In line with the \textit{Swetland Case}, it was decided a few years later, in a case arising in New York, that an aviator whose plane crashed into the top of a tower on the plaintiff's land was guilty

\textsuperscript{66}\textit{Swetland v. Curtiss Airports Corp.}, (C.C.A. 6th Cir. 1932) 55 F. (2d) 201.

\textsuperscript{67}(C.C.A. 6th Cir. 1932) 55 F. (2d) 201, 203.
of a trespass.\textsuperscript{68} In this case, the court based its decision on the theory that a landowner possesses exclusive rights to the space above his land, at least to such heights as he may build. With reference to the question of trespass to air space, the court said:\textsuperscript{69}

"... What is, or is to be, the law regarding the ancient maxim 'cujus est solum ejus est usque ad coelum?' Not to go beyond the necessities of this case, it may be confidently stated that, if that maxim ever meant that the owner of land owned the space above the land to an indefinite height, it is no longer the law. ...

"It is plain, however, that outside of the sovereign police power, no rule has been or will be made, which abridges the exclusive right of the owner of land to the space above it, to such height as he may build a structure upon the land; therefore, for the purpose of this case, it may be assumed that, when the airplane came in contact with the top of this tower, the rights and responsibilities of the respective parties were exactly the same as they would have been had the airplane come in contact with the earth below. .."

In \textit{Thrasher v. City of Atlanta},\textsuperscript{70} decided in 1934, the maxim was again invoked by a landowner near Atlanta, as ground for an injunction against the low flying of airplanes over his land. But the plaintiff in this case apparently realized that, in the light of the \textit{Smith} and \textit{Swetland} Cases, it would be difficult for him to obtain an injunction against flights over his land above the lawful minimum altitudes of flight. Accordingly, he sought an injunction only against "low flying" over his property under an altitude of five hundred feet. The court held, however, that the plaintiff had failed to show a trespass even as to flights below that altitude. With reference to the plaintiff's allegation that pilots had flown over his property at altitudes lower than five hundred feet, the court pointed out that, properly construed, this allegation stated an altitude of only a little less than five hundred feet, and that such an allegation, without a further statement of the exact altitude or other circumstances, could not establish a trespass.

It is interesting to note that in this case the plaintiff relied upon a state statute which provided that "the right of the owner of lands extends downward and upward indefinitely." Recognizing that this statute was based upon the \textit{ad coelum} maxim, the court without hesitation declared that since that maxim was largely \textit{obiter dictum} and could not be taken as an authentic statement of any law, the literal terms of the statute in question should be discounted and qualified. In this connection, the court stated:\textsuperscript{71}

\begin{footnotes}
\item[69] (1933) 148 Misc. Rep. 149, 266 N. Y. S. 469, 471, 472.
\item[70] (1934) 178 Ga. 514, 173 S. E. 817.
\item[71] (1934) 178 Ga. 514, 173 S. E. 817, 825.
\end{footnotes}
The maxim to which reference has been made is a generalization from old cases involving the title to space within the range of actual occupation, and any statement as to title beyond was manifestly a mere dictum. For instance, a court in dealing with the title to space at a given distance above the earth could make no authoritative decision as to the title at higher altitudes, the latter question not being involved. The common law cases from which the ad coelum doctrine emanated were limited to facts and conditions close to earth and did not require an adjudication on the title to the mansions in the sky.

In this case, as in the Swetland Case, the landowner's property rights in the space above his land were made subject to the rule of "effective possession;" and particular emphasis was placed upon the necessity for an exercise of dominion as an element of ownership. In the language of the court,72

"...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...

"But the space is up there, and the owner of the land has the first claim upon it. If another should capture and possess it, as by erecting a high building with a fixed overhanging structure, this alone will show that the space affected is capable of being possessed and consequently the owner of the soil beneath the overhanging structure may be entitled to ejectment or to an action for trespass. However, the pilot of an airplane does not seize and hold the space or stratum of air through which he navigates, and cannot do so. He is merely a transient, and the use to which he applies the ethereal realm does not partake of the nature of occupation in the sense of dominion and ownership. So long as the space through which he moves is beyond the reasonable possibility of possession by the occupants below, he is in free territory, not as every or any man's land, but rather as a sort of 'no man's land'...

Thus, it was the court's view that in order for a landowner to show a trespass by an airplane to the space above his land, he must show that the plane's flight came within that part of the air space above his land which, under the circumstances, he might reasonably occupy. On this theory, therefore, the plaintiff, by merely alleging flights under five hundred feet, was held not to have established a trespass to his property.

Finally, there was the Hinman Case,73 decided by the federal

\[72(1934) 178 Ga. 514, 173 S. E. 817.\]
\[73(C.C.A. 9th Cir. 1936) 84 F. (2d) 755, 758 cert. den. (1937) 57 Sup.\]
circuit court of appeals for the ninth circuit in July, 1936. This case is noteworthy, not only because it represents the latest judicial condemnation of the ad coelum maxim, but because the court, notwithstanding the cases just discussed, did not recognize the landowner's ownership of air space even up to the height of effective possession or possible occupation. Moreover, the case is particularly important because, as already noted, a writ of certiorari taken to the Supreme Court of the United States was denied.

The plaintiffs alleged that they were the owners and in possession of certain real property in the city of Burbank, California, "together with a stratum of air-space superjacent to and overlying said tracts . . . and extending upwards to such an altitude as plaintiffs . . . may reasonably expect now or hereafter to utilize, use, or occupy said air-space." They further alleged that they might reasonably expect to utilize, use and occupy such air space to an altitude of not less than one hundred and fifty feet above the surface of the land, and that therefore the flight of airplanes operated by the defendant corporations at altitudes less than one hundred feet above the surface were trespasses to the air space for which damages were asked.

At the outset, the circuit court of appeals refused to accept a literal construction of the ad coelum doctrine on the ground that that doctrine was not the law and had never been the law. On the contrary, the court asserted that title to the air space, unconnected with the use of the land, is inconceivable. The court then proceeded to consider the plaintiffs' contention that they might reasonably expect "now or hereafter" to use or occupy the air space above their land. After pointing out that the very essence and origin of the legal right of property is dominion over it, and that without possession it cannot be maintained, the court concluded: 74

"We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."

On this theory, it was held that, since plaintiffs had not alleged actual and substantial damage to the use of their lands, they had not established a trespass for which damages might be recovered.

Ct. 431. For comments on this case, see (1936) 7 J. Air Law 450, 462; (1936) 7 J. Air Law 624; (1936) 25 Geo. L. J. 196; (1936) 15 Tex. L. Rev. 146; (1936) 7 Air L. Rev. 445.

74 (C.C.A. 9th Cir. 1936) 84 F. (2d) 755, 758 cert. den. (1937) 57 Sup. Ct. 431.
even though it appeared that defendants' airplanes had glided through the air within a distance of less than one hundred feet of the surface of plaintiffs' land or even to a distance of within five feet of the surface at one end of the property. Then, in language which would undoubtedly have startled Lord Coke, and which will probably surprise even more modern students of the law of real property, the court announced the revolutionary doctrine that there can be no trespass to air space in the absence of actual damage. In the language of the court:75

"The case differs from the usual case of enjoining a trespass. Ordinarily, if a trespass is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the air space above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession."

In the Swetland Case, flights under five hundred feet were regarded as trespasses on the theory of "effective possession." On the similar theory of "reasonable occupation," the court in the Thrasher Case would clearly have permitted the plaintiff in that case to recover on the ground of trespass for flights at low altitudes, if the plaintiff had been more specific in alleging the circumstances and the particular altitudes at which the planes had flown over his land. In neither of these cases, apparently, did the court feel that a showing of actual and substantial damage was necessary to sustain the action of trespass. The Hinman Case, however, seems not to recognize any theories of effective or possible possession as ground for sustaining an action for trespass to the air space, but, on the contrary, appears to stand for the proposition that there can be no such trespass unless actual and substantial damage results to the actual use and enjoyment of the surface.

V. Present Theories of Space Ownership

Whatever the courts may have said in horse-and-buggy days to the effect that a landowner has title to the space above his land up to the sky, it may now safely be asserted, in the light of recent cases, that the owner of the surface of land does not have unqualified title to the air space above his property. The time has certainly arrived when the ad coelum maxim should no longer be repeated or cited in our jurisprudence, at least with respect to

75(C.C.A. 9th Cir. 1936) 84 F. (2d) 755, 758 cert. den. (1937) 57 Sup. Ct. 431.
the rights of landowners against those who utilize the ether as a means of travel.

But the rights of the landowner in the space above his land cannot be entirely forgotten. What are those rights? If he does not in fact own all the space above his land, how much, if any, does he own? At least four different views, not counting the strict "ad coelum" view, have been advanced in an effort to solve the problem.

Most popular of these views is that characterized as the "zone" or "effective possession" view, which would give the surface owner only so much of the space above him as is essential to the complete use and enjoyment of his land. While this view is essentially in accord with the spirit of the ad coelum maxim as it has been interpreted by the courts, it is subject to the practical difficulty of determining just what effective possession is and how far it extends in a particular case. Neither the Smith Case nor the Swetland Case attempted any very accurate definition of the term "effective possession," although they intimated that the meaning of the term would depend in each case upon the facts involved—that is, the purpose for which the surface of the land

76This view, as has been seen, was suggested in the Smith Case, (1930) 270 Mass. 511, 170 N. E. 385, 393. Likewise, in the Swetland Case, the federal district court said, (D.C. Ohio 1930) 41 F. (2d) 929, 942:

"... Until the progress of aerial navigation has reached a point of development where airplanes can readily reach an altitude of 500 feet before crossing the property of an adjoining owner, where such crossing involves an unreasonable interference with property rights or with effective possession, owners of airports must acquire landing fields of sufficient area to accomplish that result.

"Whether property rights or effective possession is interfered with unreasonably is a question of fact in the particular case." (Italics ours.)

The "effective possession" theory has found support among eminent writers on the law of torts. Thus, Sir Frederick Pollock, in his work on Torts, 13th ed., p. 362, says:

"It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession, which might be the most reasonable rule. . . ."

Similarly, Professor Burdick, in his Law of Torts, 4th ed., p. 406, concludes:

"So, it is submitted, throwing or firing a missile, or sending a balloon or driving an airplane through the air, over the land of another sufficiently low to invade that space which the owner of the soil may effectively possess, amounts to a legal breaking of his close. . . ."

For other treatises in which this view has been advanced, see Kingsley & Maughm, The Correlative Interests of the Landowner and the Airman, (1932) 3 J. Air Law 374; Eubank, The Doctrine of the Airspace Zone of Effective Possession, (1932) 18 A. B. A. J. 812; Bouvè, Private Ownership of Air Space, (1931) 1 Air Law Rev. 232; (1930) 16 Cornell L. Q. 119; Zollman, Law of the Air 14.
is being used or may be used. Obviously, this means that an aviator may commit a trespass while flying over A's land but may not be guilty of a trespass when flying over B's land at the same altitude. In the *Smith Case*, flights as low as one hundred feet were expressly held to be trespasses, since the land happened to be used for the cultivation of spruce and pine trees which were known to attain a growth of one hundred feet or more. In the *Swetland Case*, the district court enjoined flights at any altitudes less than five hundred feet. Yet, in the *Thrasher Case*, flights below five hundred feet were held not to constitute a trespass, in the absence of specific allegations as to the height at which planes had actually flown and as to "other circumstances."

A simple solution of the practical difficulty inherent in the "effective possession" view would be to regard the state and federal minimum altitude rules as a legislative determination of the reasonable extent of the landowner's ownership of the space above his land; and it has been seen that those rules were an important factor in the *Smith* and *Swetland Cases*. But such a solution would obviously be too simple. If effective possession really depends upon the use to which the surface is put, clearly the adoption of a single rule for all cases would be arbitrary and illogical. Moreover, it should not be forgotten that the primary purpose of the altitude rules is not to limit the landowner's property rights in space, but to regulate flying itself in the interest of the safety of both aviator and landowner.77

The second view is that indicated in the *Hinman Case*, and perhaps impliedly approved by the Supreme Court by its denial of certiorari. This view appears to make the landowner's rights in the air space depend, not upon possible use of such space, but upon actual use,78 and to eliminate any concept of technical trespass to air space justifying the recovery of nominal damages. An aviator would not be a trespasser unless his flying actually and substan-

77See Kingsley and Maugham, The Correlative Interests of Landowner and the Airman, (1932) 3 J. Air Law 374.

78In the Smith Case, (1930) 270 Mass. 511, 170 N. E. 385, 393, the Massachusetts court had said:
"The test suggested is not actual but possible effective possession. . . ."

In the Hinman Case, however, the court declared:
"It would be, and is, utterly impracticable and would lead to endless confusion, if the law should uphold attempts of landowners to stake out, or assert claims to definite, unused spaces in the air in order to protect some contemplated future use of it. Such a rule, if adopted, would constitute a departure never before attempted by mankind, and utterly at variance with the reason of the law. If such a rule were conceivable, how will courts protect the various landowners in their varying claims of portions of the sky?" (84 F. (2d) 758).
tially injured the landowner in his present use and enjoyment of the surface. The adoption of this view would certainly afford the aviator complete freedom from the annoying implications of the ad coelum maxim, and at the same time substantially protect the right of the landowner. It is true that such a view would appear to be in direct conflict with the long line of decided cases, heretofore considered, holding that any intrusions into the space above one's land, at least near the surface, are to be regarded as trespasses even though no appreciable harm results from the intrusion. This, however, is not a real objection, since, while precedents mean much in our system of jurisprudence, they are not so sacrosanct that they cannot yield to changed conditions. As one judge has said:

"It is well enough to hang to our theories and ideas, but when there is an effort to apply old principles to present-day conditions, and they will not fit, then it becomes necessary for a readjustment, and principles and facts as they exist in this age must be made conformable."

Even more disrespectful of precedent is the third view, which would give to the landowner no ownership or possessory interest whatsoever in the space above his land. As under the view just discussed, an entry into the air space would not constitute an actionable wrong unless it causes some actual damage or apprehension of damage to the landowner; but the landowner's remedy in such a case would be an action for a nuisance rather than an action for a trespass. Immediately, the question arises whether the landowner's interest would be adequately protected under this theory. Generally speaking, a nuisance involves the idea of continuity or recurrence; an isolated act is not sufficient. This being the case, it may be doubted whether a landowner would be entitled to any redress for the single flight of an airplane over his property if the view under discussion were adopted.

It is to be noted that this view is apparently based upon the premise that the surface owner cannot in reality own the space above his land as he owns the land itself—that he cannot seize,

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80 This view was indicated by Lord Ellenborough's famous dictum in Pickering v. Rudd, supra note 21, to the effect that the firing of bullets in vacuo over land and the flights of balloons would not be trespasses. Apparently, this view has likewise been advanced by Salmond, Jurisprudence, 8th ed.; Baldwin, The Law of the Airship, (1910) 4 Am. J. Int. L. 95, 97; Kuhn, The Beginnings of an Aerial Law, (1910) 4 Am. J. Int. L. 109, 123; (1931) 16 MINNESOTA LAW REVIEW 318.
81 See 46 C. J. 679.
handle, or deal with such space. It may be answered, however, that
one may not ordinarily handle land in a literal sense. Moreover,
the enjoyment of the surface of land is bound up with the right
to have it permanently and exclusively, and to prevent all others
from any use of it. In any event, both this view and the view
supported by the Hinman Case would appear to require a complete
reexamination of the whole principle of technical trespass to land,
a principle which has long been recognized in our law.

Finally, mention should be made of a theory which, while
not indorsed by the courts, appears to be the only theory as to
property rights in the air space which has gained recognition by
statute in this country. This view adopts the ad coelum maxim as
still controlling and, in accordance with the maxim, gives the
landowner title to the space above his land indefinitely upward,
except that aircraft are allowed to enjoy a legal right of free
passage through such space. In support of this view, it has been
variously urged that the right of flight is only a modern form
of the ancient "right to make a journey" or "right of necessity;" that it is a right analogous to the easement of public right of
navigation over navigable waters; or that it is a right only now
created by the "evolution of society itself." At least one recent
writer argues that it was a "latent" easement which became
"patent" with the development of aviation.

Whatever may be its rationale, this view has been incorporated
in the Uniform State Law for Aeronautics and in the American
Law Institute's Restatement of the Law of Torts. And it has
apparently been sanctioned by the Federal Air Commerce Act
of 1926.

Section 3 of the Uniform State Law for Aeronautics, approved
by the American Bar Association in 1922, provides:

"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 prescribed in Section 4."

MacCracken, Air Law, (1923) 57 Am. L. Rev. 97.
Harrison, Navigable Air Space and Property Rights, (1930) 1 J. Air Law 346.
The Air Commerce Act of 1926, section 10, approved May 20, 1926
(44 Stat. at L. 574; 49 U. S. C. A. sec. 180, 3 Mason's U. S. Code, tit. 49, sec. 180) defines the term "navigable air space" as the air space above
the minimum space altitudes of flight prescribed by the secretary of commerce and provides that such "navigable air space shall be subject to a
public right of freedom on interstate and foreign air navigation" in
conformity with the provisions of the act.
Section 4 prescribes the "right of flight" as follows:

"Flight in aircraft over 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. . . ."

At its twelfth annual meeting in 1934, the American Law Institute adopted its Restatement of Torts, and with respect to ownership of the air space, the Restatement provides:

"Section 1002. A trespass actionable under the rules stated in section 1001 may be committed on, beneath or above the surface of the earth."

Then, after thus adopting a literal construction of the ad coelum maxim, the Restatement, like the Uniform State Law, makes an exception:

"Section 1038. An entry above the earth on the air space in the possession of another by a person who is traveling in an aircraft, is privileged if the flight is conducted
(a) for the purpose of travel through the air space, 
(b) in a reasonable manner, and 
(c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it."

Both the provisions of the Uniform State Law and those of the Restatement of the Law of Torts have been adversely criticized and made the subject of much controversy. In 1931, the Committee on Aeronautical Law of the American Bar Association, in submitting a Uniform Aeronautical Code, omitted the provision contained in the Uniform State Law with the declaration that "the statement as to ownership of air space proclaims a legal untruth."

It must be admitted, however, that the "right of flight" view has the apparent advantage of reconciling the ad coelum maxim with modern aircraft interests. The aviator need have no fear of trespassing upon the space belonging to underlying landowners so

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88 Semi-A. B. A. Rep. 319. However, certain members of the association objected to the omission of the provision of the Uniform Law on the ground that the principle of property rights in the air space had become a rule of property which could not be dislodged by legislative declaration. Hayden, Objections to the New Uniform Aeronautical Code, (1932) 18 A. B. A. J. 121; Hayden, Air Space Property Rights under the New Aeronautical Code, (1933) 4 Air L. Rev. 31.
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long as he is in the proper exercise of the right of passage; it is only if he flies in the immediate proximity of the earth that he runs the risk of becoming a trespasser. On the other hand, this view not only lends support to the literal application of the ad coelum maxim in defiance of recent court decisions, but it is subject to important practical objections. The introduction of the concept of "privilege" is inaccurate, confusing, and inadequate. Thus, under the Restatement, the privilege of flight would appear to exist only for purposes of travel, and would apparently not extend to exhibition flying, test flying, racing, or scientific and military operations in the air. Moreover, the practical difficulty of determining whether the so-called right of flight has been exercised in a "reasonable manner" in a particular case is obvious.

VI. CONCLUSION

The law of aviation is still relatively young; and it would perhaps be presumptuous to attempt to predict which view of space ownership will ultimately prevail. One thing, however, seems evident. There is a fundamental conflict between the decided cases and the theory adopted by the Restatement and the Uniform State Law. The courts have definitely discarded a literal application of the ad coelum maxim; and yet both the Restatement and the Uniform Law would preserve the maxim as a principle of law (which it never has been), qualified only by the "right of flight." Until this discrepancy between judicial opinion and legislative enactment is eliminated, the rights of aviator and landowner will almost certainly continue to be a source of confusion.

Notwithstanding the great popularity of the "effective possession" view, it seems quite likely that the difficulties involved in its application will eventually lead to its rejection. If it should be adopted, then in the words of the court in the Hinman Case, "how will courts protect the various landowners in their varying claims of portions of the sky?" Any landowner may easily assert a claim to certain space above his land on the ground that he may possibly need to occupy that space in connection with his use of the surface. However, even if he succeeds in proving facts to support such a tenuous claim, there remains the difficult question

89Wherry and Condon, Air Travel and Trespass, (1934) 68 U. S. L. Rev. 78.
90See Logan, Recent Developments in Aeronautical Law, (1934) 5 J. Air Law 548. For further criticism of the "right of flight" view, see Newman, Aviation and the Constitution, (1930) 39 Yale L. J. 1113, 1129.
91(C.C.A. 9th Cir. 1936) 84 F. (2d) 755, 758, cert. den. (1937) 57 Sup. Ct. 431.
of determining just how high his title to the space should extend. And then, if the court should arbitrarily decide that his "property" extends to a certain height, the landowner may never actually occupy or use the space. Consequently, the flight of airplanes over his land might successfully be prevented within the judicially-established "zone of effective possession," even though he would suffer no actual harm if they did enter that zone.

The theory underlying the *Hinman Case*—that there may be no recovery without actual damage—appears to present a solution more satisfactory to all concerned, and certainly less fraught with practical difficulties than either the "zone" theory or the "right of flight" theory adopted by the Restatement and the Uniform State Law. The "zone" theory would apparently thrust upon the landowner the burden of proving his effective possession of the space entered by an airplane in a particular case; and the "right of flight" theory would seem to make it incumbent upon the airman to prove a proper exercise of his privilege. In either case, the burden of proof would be a burden in fact as well as in name; for it would involve the introduction of legal concepts heretofore unknown to our law. On the other hand, the adoption of the theory supported by the *Hinman Case* would mean simply that the landowner would be required to show actual and substantial injury—a matter considerably more susceptible of proof than "effective possession" or "privilege of flight."

Whether the action should be based upon the ground of trespass or upon the ground of nuisance does not appear to be vitally important. Probably trespass would be most satisfactory in the usual case, although, as previously noted, it would be a new sort of trespass based, not on technical infringement of property rights, but founded upon substantial injury.

In any event, it seems preeminently desirable that the ad coelum maxim be entirely disregarded so far as the question of trespass to air space by airplanes is concerned. Interpreted literally, the maxim was never law. At best, it was applied by the courts only for the purpose of protecting landowners against overhanging eaves, cornices, and similar permanent intrusions near the surface of the land; and intrusions of that nature cannot reasonably be compared with the flight of airplanes. According to its historians, the maxim began with a sepulchre. Surely the time has now arrived when it might appropriately end with another one—its own.

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92See (1937) 21 Minnesota Law Review 572, 585.