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Herbert David Klein

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CUJUS EST SOLUM EJUS EST . . . QUOUSQUE TANDEM?

A contribution to the legal history of a pseudo-maxim from its illegitimate conception on the shores of the Mediterranean Sea and its meteoric appearances in Common and Civil Law to its inglorious death at the hands of the Courts in the New World.

BY HERBERT DAVID KLEIN

LL.B.; J.D. (Cologne), Graduate Student at New York University
School of Law, Member of the New York Bar

CHAPTER I

THE MAXIM, ITS VARIANTS AND ITS TRANSLATIONS

Not often has a legal maxim had as doubtful a birth, as arbitrary an existence and as disgraceful a death as the phrase *CUJUS EST SOLUM EJUS EST USQUE AD COELUM ET AD INFEROS*. In the title of this contribution it has been paraphrased to reflect its exasperating reappearances no matter how often it has been laid to rest by writers and judges so that it is opportune to use Cicero's famous words addressed to Catilina and question: "*Quousque tandem?*" (How much longer?) will it act as a legal crutch to landowners eager to support their actions for trespass and nuisance against users of the superincumbent air space.

But to properly reflect to-day's jurisprudence the maxim should really be paraphrased to read: *CUJUS EST SOLUM EJUS EST USQUE AD "QUALEM LIMITEM SUMMITATIS"*? This version would more exactly delineate the legal problem which has been a bone of contention in the courts for two-thousand years and has only partially been solved by legislation in Civil and Common Law countries during the last 150 years.

The . . . *ET AD INFEROS* part of the maxim has been purposely omitted from this discussion because it has had a somewhat easier life, but still deserves a separate treatise with special reference to the development of property rights to minerals and oils in the solid strata of the earth underfoot.

Although its translation should not offer to the scholar any great difficulties, the maxim as we know it to-day, is an arbitrary form and not the original gloss attributed to Accursius of Bologna¹ which read: *CUJUS EST SOLUM EJUS DEBET ESSE USQUE AD COELUM* in a Note to Dig. VIII.2.1 and a further difficulty arises from the form in which the phrase is quoted by Lord Coke² around 1628 as taken from the first recorded English case, *Bury v. Pope*³, decided in 1586: *CUJUS EST SOLUM EJUS EST SUMMITAS USQUE AD COELUM*. The use of the word "summitas" in this first English case in conjunction with the phrasing of the gloss (*DEBET ESSE* or "ought to be" instead of the categorical *EST* or "is" in the first recorded decision of 1586) should have helped the learned profession in determining that the maxim had only pseudo-Roman history. An authority on Medieval Latin⁴ states unequivocally that "summitas" is not found in classical Latin; its meaning is "end, extremity" and appears for

¹ See p. 242, *infra*.

² COKE ON LITTLETON, Lib. 1, Ch. 1, Sec. 1 or 4a.

³ Cro. Eliz., or 1 Cro., 118 (Croke's Engl. K. B. Reports tempore Eliz.), 1586. 78 Eng. Rep. 375 (Moak's E.R.), 1587.

⁴ BAXTER & JOHNSON, MEDIEVAL LATIN WORD-LIST 411 (1934).

the first time in 720 and, again, about 860 and thus supports the now general agreement that the language of the maxim was not part of Roman written Law; while it may have partly been conceived with principles of Roman Law in mind, it is stated in a non-Roman manner.⁵ Sohm⁶ asserts that the Roman Law did not know "extravagant statements of private property. It always reconciled fixed rules with equitable discretion."⁷ Yet, since Lord Coke, and *Bury v. Pope* before him, the maxim has been reduced to the now common phrasing of CUJUS EST SOLUM EJUS EST USQUE AD COELUM which has been translated as "He who owns the soil owns everything above (and below), from heaven (to hell)"⁸ or "Whose is the soil, his it is up to the sky"⁹ or "He who possesses the land possesses also that which is above it"¹⁰ or "He who has a right to the soil has a right even to the sky"¹¹ or "Whose is the land, his is also what is above (and below) it."¹² How closely related the maxim is to the Law of Torts is pointed out by Jackson¹³ citing its connection, to some extent, with the phrase SIC UTERE TUO UT ALIENUM NON LAEDAS, a landmark in the law of trespass and nuisance on the ground.

CHAPTER II

ITS PSEUDO-ROMAN HISTORY

By its own nature, our maxim is intimately connected with air rights, and their invasion. Air rights can assume various forms:

1. They can be the right of the sovereign to control the air space above its territory which forms part of Public International Law as laid down, first, in the Paris Convention of 1919 and reaffirmed at Chicago in 1944 at the Convention of the International Civil Aviation Organization according to which "Every State has complete and exclusive sovereignty over the air-space above its territory." A typical example of a State's national sovereignty claim is found in Section 1108 (a) of the Federal Aviation Act (72 Stat. 731) of 1958 under which "The United States is declared to possess and exercise complete and exclusive national sovereignty in the air-space of the United States, including the air-space above all inland waters and . . . above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction." This is no more than a modern, legislative version of the rights which, according to Prof. John C. Cooper, an outstanding authority on Aviation Law, States have since Roman times continuously recognized, regulated and protected; they were rules of private law in favor of owners or occupants of lands on the surface below, but constitute proof that States have always claimed and exercised territorial sovereignty in space above their surface.¹⁴

⁵ COOPER, ROMAN LAW AND THE MAXIM CUJUS EST SOLUM, 1952 USAvR at 627.

⁶ THE INSTITUTES 130 (1907 Translation).

⁷ As cited by COOPER, *op. cit. supra* n. 5, at 627.

⁸ MANION, LAW OF THE AIR 1 (1950); BROWN, LEGAL MAXIMS 395 (8th ed. 1882).

⁹ BLACK'S LAW DICTIONARY 453 (4th ed. 1951).

¹⁰ BROOM'S LEGAL MAXIMS 395 (8th ed. 1911).

¹¹ HALKERSTON, A COLLECTION OF LATIN MAXIMS AND RULES 33 (1823); TAYLER, THE LAW GLOSSARY 83 (1880).

¹² PELOUBET, A COLLECTION OF LEGAL MAXIMS 44 (1880); ANDERSON, DICTIONARY OF LAW 959 (1889).

¹³ LAW LATIN 136 (1910); see also 3 BLACKSTONE COMMENTARIES 217.

¹⁴ COOPER, *op. cit. supra* n. 5, at 602, 603. John Cobb Cooper was Professor of International Air Law at McGill University, Montreal, from 1951 to 1957 and is now Professor Emeritus. 1934-1945 he was Vice-President of Pan American World Airways and from 1951 to 1955 Director of the Institute of International Air Law at McGill University.

2. Another form of air rights has long been recognized by English and American Law in the principle of lateral ownership above the surface. This division dates back to the Chambers in the Inns of Court and other buildings in London and other places¹⁵; Lord Coke states that a "man may have an inheritance in an upper chamber though the lower buildings and soil be in another." In our large cities tall buildings are erected over railroad property and tracks with the attendant grant or reservation of all that part of the premises lying above a certain plane. Sometimes such rights can only be created by the Legislature, but no matter how they come into existence they show that ownership of air space above the surface of land may be acquired.¹⁶

3. The most important forms of air rights, however, are those connected with the use of space dating back to a time when only birds and, maybe, kites were flying, but man needed space as a reservoir for air to breathe, access to the heavens for light and heat from the sun, for walking on public or private roads, for building houses and for growing crops and trees.¹⁷ While there has always been disagreement whether these were rights of complete ownership or of only as much as needed for the enjoyment of the surface property below, they were in existence for thousands of years before the invention of the art of flight in 1783, and an equitable balance had to be struck between the air rights of the landowner and those that wanted permanent or temporary user of his air space.

Roman Law could not busy itself with trespasses through the air space lasting minutes (airships and airplanes) or seconds (projectiles and missiles), but only with old-fashioned and needed elements like air, light and rainwater. Roman Law was essentially practical and never treated land merely as a flat surface entirely disassociated from space above. The classical "dominium" of the Roman Law meant full and free use of all above the land and freedom of interference with the air above.¹⁸ The result was the entire lacking of an upper limit to ownership; rules concerning the height of buildings and overhanging trees were promulgated merely as limitations in the general interest.¹⁹ Prof. Goudy, in 1913, went so far as to state that Roman Law would have granted interdicts to prevent air transit if damages were caused or threatened;²⁰ such interdict would have been "quod vi aut clam," a mandatory injunction to restore what had been done by force or stealth, subject to a one-year statute of limitations.²¹ And Prof. Lardone

¹⁵ Co. Litt. 48b; *Corbett v. Hill*, L.R. 9 Eq. 671 (1870). See also BALL, 39 Yale L.J. 616 and Art. 664 of the French Civil Code repealed on, and replaced by the Law of, 6-28-1938.

¹⁶ THURSTON, *TRESPASS TO AIR SPACE*, HARVARD LEGAL ESSAYS IN HONOR OF PROFESSORS BEALE AND WILLISTON 513 (1934). According to news reports an interesting mixture of sovereign and lateral air rights on different planes was claimed by the USSR in their reply to our protest against the "buzzing" by three Russian fighter planes of an unarmed U.S. Lockheed Hercules C-130 transport plane in the Berlin Air Corridor on March 27, 1959: the Russians asserted that "the air above 10,000 feet is Russian air" which leaves open the question whether from 0 to 10,000 feet it belongs to East Germany or the three Western Powers. According to the New York Times of April 2, 1959 this claim to ownership was based by a Spokesman at the Soviet Embassy in East Berlin upon a "prescriptive right" acquired since the German surrender 13 years ago. The Russian Military must have done quite some reading of recent U.S. decisions dealing with air easements and "taking" of air space rights! The United States maintains that its recognized right to fly along the 20-mile wide corridors leading to West Berlin has no altitude limitations.

¹⁷ COOPER, *op. cit. supra* n. 5, at 603.

¹⁸ 1 ROBY, *ROMAN PRIVATE LAW IN TIMES OF CICERO AND THE ANTONINES* 498 (1902).

¹⁹ BUCKLAND, *THE MAIN INSTITUTION OF ROMAN PRIVATE LAW* 103-4 (1931).

²⁰ TWO ANCIENT BROCARDS 231.

²¹ ROBY, *op. cit. supra* n. 18, at 521.

who at the time was an Associate Professor of Roman Law at Catholic University in Washington, D.C., while limiting the control of the air column above his property which the *Corpus Juris Civilis* gave the landowner, to low altitudes such as the height of buildings and trees, claimed in 1931 that the spirit of the sources would extend such control to any altitude.²² Other writers, however, found in the Digest and Institutes limitations which retrospectively could be defined as "interest qualifications" and were, at a later time, incorporated in most of the Continental Codes.²³ Thus Von Ihering, the great German jurist, gave ownership to the owner of the soil below only as required to satisfy his practical needs and not a right of property in space without limit.²⁴ Nowhere does the Digest state "up to the skies" or "to infinity" except in VIII.2.24; and "dominium" is not mentioned, only "as high as the landowner pleases." Reverting to Public versus Private Law, the Roman State controlled the air space as it was not essential to the enjoyment of the land below.²⁵ Two French writers, Guibé²⁶ and Sauze,²⁷ and two Italian jurists, Bonfante²⁸ and Pampaloni,²⁹ have denied the Roman landowner air space rights of ownership although the latter concedes him an exclusive power equal to ownership.

Roman Law dealt with interests in the air space over public and other non-commercial lands, such as religious property and tombs, as well as private lands.³⁰ What are the sources to which the writers have been referring over hundreds of years? The oldest were the Twelve Tables of which the text has not survived, but according to Ulpian in Dig. XLIII.27.1.8 they established in 450 B.C. the fifteen foot rule of trimming branches of trees overhanging fields in order to prevent their crops being damaged by shade: "A neighbor cannot keep the owner of land which is overhung by a tree from his land, from cutting the tree within fifteen feet."³¹ And if the tree overhung a building, its owner could cut it down entirely.³² While this was the oldest protective rule for the enjoyment of air and light by a Roman owner of land, the most important phrase was coined by Paul to protect public lands and also highways, in Dig. VIII.2.1:

"...caelum (equal to coelum), quod supra id solum intercedit, liberum esse debet."³³

This was the basis for the famous gloss which, in the form of a note attributed to Accursius, did the most to affect the problem and create the maxim as it has been known to this day.³⁴ Paul did not allow a beam or overhanging roof or other projecting structure or discharge of flowing or dripping rainwater to interfere with the ownership of underlying land. Venuleius, in

²² AIRSPACE RIGHTS IN ROMAN LAW, 2 Air L. Rev. 455 (1931).

²³ See Ch. V, *infra*.

²⁴ ZUR LEHRE VON DEN BESCHRAENKUNGEN DES GRUNDEIGENTHUEMERS IM INTERESSE DER NACHBARN (1863), as cited by COOPER, *op. cit. supra* n. 5, at 604.

²⁵ DE MONTMORENCY, THE CONTROL OF THE AIR SPACES, Vol. III, p. 67 (1917).

²⁶ ESSAI SUR LA NAVIGATION AERIENNE EN DROIT INTERNE ET EN DROIT INTERNATIONAL (1912).

²⁷ LES QUESTIONS DE RESPONSABILITE' EN MATIERE D'AVIATION (1916).

²⁸ COOPER, *op. cit. supra* n. 5, at 605, n. 15.

²⁹ *Id.*, at 605, n. 14.

³⁰ *Id.*, at 605. COOPER uses the KRUEGER-MOMMSEN edition (Berlin 1915-1928) of Institutes, Digest, Code and Novellae.

³¹ MCNAIR, THE LAW OF THE AIR 294 (2nd ed. 1953); COOPER, *op. cit. supra* n. 5, at 608. ARNOLD DUNCAN the First Baron MCNAIR, Q.C., was Vice Chancellor of Liverpool University from 1937 to 1945, President of the Institute of International Law from 1948 to 1950; from 1946 to 1955 he was Judge and from 1952 to 1955 President of the International Court of Justice at The Hague.

³² COOPER, *op. cit. supra* n. 5, at 609.

³³ *Id.*, at 606.

³⁴ *Id.*, at 618.

Dig. XLIII.24.22.4, allows the interdict "quod vi aut clam"³⁵ to protect a tomb from a projection or rainwater coming from another roof which, however, did not itself touch the monument:

"...sepulchri sit non solum is locus, qui recipiat humationem, sed omne etiam supra id caelum."

This is where Sauze³⁶ in 1916 detected the origin of our maxim. In Dig. VIII.5.8.5 we find a holding of Ulpian's again where he considered smoke coming from a cheese factory which interferes with a high adjoining house, a trespass into air space. But the same Ulpian states, in Dig. IX.2.29.1, that a landowner inconvenienced by a neighboring roof extending over his house, must not break it off, but bring an action against his neighbor.

It is easy to see how a glossator could have put together a maxim from these holdings, but it is certainly surprising to find a Roman Law holding by Ulpian which is practically "on all fours" with the case decided in *Bury v. Pope*: Ulpian and the English Judges had to deal with almost the same set of facts where in England a landowner erected a house with a window so close to a window in the adjoining property that the light was cut therefrom, and it was held that the injured landowner had no complaint even though his building and his window were built forty years before the second;³⁷ Ulpian also held in Dig. VIII.2.9:

"cum eo qui tollendo obscurat vicini aedes, quibus non serviat, nulla competit actio,"³⁸

although, under certain circumstances, the injured landowner could ask for the appointment of an arbiter.³⁹

There is finally another holding of Paul's in Dig. VIII.2.24 which led Cooper⁴⁰ to see a clear meaning that there was no legal limit to which a building could be built as long as it did not interfere with buildings underneath:

"...ius est in infinito supra suum aedificium imponere dum inferiora aedificia non graviore servitute oneret quam pati debent."

After distinguishing between "coelum" as space which is subject to private and exclusive rights, and "aer" which is common to all men, Cooper⁴¹ comes to the following conclusions as to the Roman Law:

1. The air space over lands not subject to private ownership, such as public and religious lands, had the same legal status as the surface, namely state control.
2. The air space over private lands was
 - (a) exclusive property of the landowner up to an indefinite height, subject only to building restrictions, or
 - (b) vested exclusive right of occupancy or user by the landowner.
3. Gaseous "aer" was common to all to sustain life, but there were vested rights of the landowner in "coelum."

We now have seen that there were some passages in Roman Law which may be quoted as having some relevance upon the user of air space and which, taken out of context, could have been used to weave a maxim, but the maxim is not Roman.⁴² Goudy too, only detected "a trace of a similar

³⁵ See p. 239, *supra*.

³⁶ *op. cit. supra* n. 27, at 26.

³⁷ MANION, *op. cit. supra* n. 8, at 2.

³⁸ COOPER, *op. cit. supra* n. 5, at 611.

³⁹ *Id.*, at 612.

⁴⁰ *Id.*, at 610.

⁴¹ *Id.*, at 615-6.

⁴² MCNAIR, *op. cit. supra* n. 31, at 294.

idea" in a passage in Venuleius (Dig. XLIII.24.22.4) whom he called an "obscure jurist," but nowhere in Roman Law did he find the phrase "although it is consistent with Roman Law!" Guibé⁴³ in 1912 and Eugène Sauze⁴⁴ in 1916 are generally credited with research work which verified Accursius as the author of the most important gloss leading to our maxim.⁴⁵

Who was this Accursius? He appears to have been the last and, perhaps, the greatest of the Glossators who expounded the individual texts of Justinian's great work through annotations, clarifications and cross-references; their most important period lasted from about 1100 to 1250. Cooper gives him the first name of Franciscus, but according to another source⁴⁶ only his sons adopted first names although his could have been Dominic. Cooper puts the date of his birth at 1182 and his death at 1260, but according to the other source he was born at Bagnolo, Florence in 1184 or 1185 and died in Florence in 1263. He came not from a noble, but maybe only peasant family. He studied at Bologna, probably with the great Azo, but also with Jacobus Balduini. By 1228 he had finished his *Glossa Ordinaria* on the whole *Corpus Juris Civilis*. He taught for 25 and lived for 35 more years. He died in Florence in 1263 after having been a *judex* under the *podestà* of Florence as late as early in the year of his death. This famous glossator whose large library has been traced to his law studio and to some of his sons, is the one whose gloss in a note to Dig. VIII.2.1 is the original form of our maxim:

"NOTA. Cujus est solum, ejus debet esse usque ad coelum, ut hic, & infra 'quod vi aut clam' i.f. § pen."

This is the Accursian gloss. But Goudy tried to trace it back further; he declared himself, however, unable to say whether the maxim was really due to Irnerius who gave at Bologna in the 12th century the first lectures on the newly discovered Digest, or to someone else since he failed in finding any trace of the phrase in the Digest or elsewhere.⁴⁷ Goudy, too, places emphasis on the weaker form of "debet esse,"⁴⁸ and according to him Cujacius (or Caujas), a French Romanist (1520-1590) gave it a somewhat different locution:

"Quo jure est coelum eodem jure esse debet solum et contra."

Again we find the weaker "debet esse," but Accursius, in his gloss, also refers to the interdict "quod vi aut clam" which, being a mandatory injunction, strengthens somewhat the rights of the injured landowner. Goudy complains that Barbossa did not give our maxim at all, but according to Cooper⁴⁹ the Accursian gloss reappeared in a great number of 15th and 16th century editions of the Digest.⁵⁰

We have thus noted how Accursius, a glossator, has woven from a few passages in the Digest protecting the air space above public lands, highways, tombs, fields and buildings from shading, darkening, rainwater and smoke, a clever general maxim which, with a small variation, seemingly made its

⁴³ *op. cit. supra* n. 26, at 38.

⁴⁴ MANION, *op. cit. supra* n. 8, at 2; see n. 27, *supra*.

⁴⁵ COOPER, *op. cit. supra* n. 5, at 618, n. 61.

⁴⁶ 46 L.Q.Rev. 148-9 (1930).

⁴⁷ According to "F.A.L., a learned correspondent" in 47 L.Q. Rev. 74 (1931) whom I assume to be the author cited in n. 48, *infra* since his contribution to the Law Quarterly Review deals with the same subject.

⁴⁸ As cited in LINCOLN, THE LEGAL BACKGROUND TO THE STARRS 65 (1932).

⁴⁹ *op. cit. supra* n. 5, at 618, n. 63.

⁵⁰ Venice 1477, 1482, 1484, 1488, 1489, 1490, 1491, 1494, 1498, 1584;

Nuremberg 1482;

Lyons 1531, 1537, 1542, 1552, 1566, 1572, 1580, 1589;

Paris 1548, 1559, 1566, 1576;

Antwerp 1576.

first appearance in its new form about 30 years later in an English window-obstruction litigation "on all fours" with Ulpian's holding in Dig. VIII.2.9.⁵¹

CHAPTER III ITS JEWISH HISTORY

For a while, let us forget all about *Bury v. Pope* in 1586 and go back 300 years, but not to Bologna or Florence; let us stay right there in England and visit Rabbi Oshaya ben Rabbi Isaac known as Ursell in the City of Norwich. On December 2, 1280 (others put the year at 1285) the Rabbi conveyed to Gilam the Norman certain property which he had obtained as part of the dowry of his wife Miriam. The document has fortunately been preserved in the British Museum⁵² and represents a remarkable mixture of English and Jewish Law although it is clearly made under Jewish Law throughout.⁵³ It is a "starr" (hebr.: sh'tar, a contract; french: estar; medieval Latin: starrum) and the ill-famed Star Chamber at Westminster may have been so named because it contained the starrs of pre-expulsion Jews;⁵⁴ but Fowler⁵⁵ calls this a mere conjecture. Starrs were bi-lingual in Hebrew and Latin and, in the English starrs, the names were in Hebrew and French. The first Jews in England came with the Normans in 1066. They were known as "Gyuus" in the spelling of the Patent Roll for 1269, and between Christians and Jews the laws of the Jewry (spelled "Gyuverie") applied; these were special laws enacted by the King as appendix to his "Charter to the Jews"⁵⁶ and the Jews remained the servants of the King alone. There was even a Jewish Exchequer, a branch of the main Exchequer Court and, although they were Christians, "Justices of the Jews" sat in the Jewish Exchequer and were naturally exposed to Jewish Law and its application.⁵⁷ When the Normans ceased to be strictly "Normans" and became English in sentiment as well as in domicile, the Jews were driven out in 1290, but the influence of their highly developed legal system had made itself felt.

Now let us return to our document No. 1199 drawn up just ten (or five) years before the expulsion. In line 14 it defines the rights of an owner as being "from the depth of the earth to the height of the sky." The strange coincidence between this starr and the decision in *Bury v. Pope* is that the starr was drawn up using the same maxim at the time of the reign of Edward I, "the English Justinian," which was cited, 300 years later, with the mysterious note "Temp. Ed.I" of which no one appears to have discovered the source, in the case; whether the pseudo-Roman maxim was cited as part of the judgment or simply added by Croke, the reporter, is equally unclear.⁵⁸ Mr. Lincoln comes to the conclusion that the origin of the maxim might be found in Jewish Law and Prof. Holdsworth, in his foreword to Mr. Lincoln's 1932 treatise, finds Mr. Lincoln's suggestion that Jewish influence upon legal doctrine could be traced in the acceptance by English Law of our maxim "very interesting and deserving further investigation." The phrase used in our starr, being akin to the pseudo-

⁵¹ MCNAIR, *op. cit. supra* n. 31, at 296.

⁵² STARRS AND JEWISH CHARTERS PRESERVED IN THE BRITISH MUSEUM, Vol. I by ABRAHAM AND STOKES 102 *et seq.*, Vol. II by LOEWE 107, 290 Document No. 1199 (1930).

⁵³ LINCOLN, *op. cit. supra* n. 48, at 63; the same treatise is reprinted on p. LVII *et seq.*, Vol. II, *op. cit. supra* n. 52.

⁵⁴ FUNK AND WAGNALLS, JEWISH ENCYCLOPEDIA, Vol. XI.

⁵⁵ FOWLER, ON CERTAIN STARRS, The Yorkshire Archaeological and Topographical Journal, Vol. III, p. 62, n. a (1875).

⁵⁶ LINCOLN, *op. cit. supra* n. 48, at 19, 53.

⁵⁷ *Id.*, at 52-3.

⁵⁸ LINCOLN, *op. cit. supra* n. 48, at 66; MCNAIR, *op. cit. supra* n. 31, at 297.

Roman maxim, can also be found in starrs drawn up in Cologne, Germany, a flourishing Jewish community since Roman days when Agrippina, daughter of Agrippa, founded her "Colonia Agrippinensis," and these contracts were also made during the same period as document No. 1199;⁵⁹ at an even earlier date it can be found in some starrs from Barcelona, Spain in Gulak's collection. But we may go back much further into Jewish Jurisprudence: in the Mishnah (Baba Bathra, IV, 2) Rabbi Akiba's dicta in regard to the use of the phrase are quoted, and Rabbi Akiba died in the year 132. Still earlier references can be found in Mr. Loewe's work who traces the importance of vertical air space ownership back to its role in the arid desert lands of the Mideast.

Mr. Lincoln rightly finds it remarkable that the maxim reached England at the same time as the Jews who themselves had used it for more than one-thousand years. The maxim was constantly employed by them whereas the Glossators hardly ever mentioned it.⁶⁰ Although he admits reluctantly that any dogmatic assertion cannot be arrived at, Mr. Lincoln feels justified in suggesting that the maxim entered English Law through Jewish usage and influence.⁶¹

CHAPTER IV

ITS ENGLISH HISTORY AND APPLICATIONS

Prof. Goudy traces our maxim to Croke's Reports in the time of Elizabeth (1558-1603) where, in *Bury v. Pope*, some reference is made to its use in the time of Edward I (1239-1307).⁶² The mysterious note "Temp. Ed. I" connects the adoption of the phrase not only with the time of the Jewish settlement and the use of Jewish Law, but also with the visit to England of one of the sons of Accursius, the Glossator who had coined the, let us say, Roman-Latin version in contrast with, and yet akin to, the Hebrew-Latin locution in the starrs.

Franciscus Accursius, the glossator's eldest son and equally a teacher of Law, appears to have come to England in 1274 upon the invitation of King Edward the First who seems to have met him in Bologna on his way home from the Holy Land. He was employed by Edward on public business, lectured on the law at Oxford where Vacarius had taught Roman Law as early as 1151, and appears to have left England in 1281 after having secured a pension.⁶³ His seven-year stay must have had considerable impact on English legal thinking and may have constituted the scientific link between the work of the glossators at Bologna and the English Bar and Bench. Grotius, in 1646, lists Franciscus Accursius with Bartolus (1313-1357), the greatest of the Commentators or Post-Glossators, as among those "who long ruled the Bar."⁶⁴

These two presumed mainstreams, Jewish Law and the Glossa, fed our maxim to the English Courts who, beginning in 1586, used it at first in cases dealing with ancient lights and overhanging leaves, but later, along with the American Judiciary, frequently referred to it on invasions of other interests in superincumbent air space.⁶⁵ Coke and Blackstone⁶⁶ discussed

⁵⁹ JUDENSCHREINSBUCH 64 No. 181.

⁶⁰ LINCOLN, *op. cit. supra* n. 48, at 66.

⁶¹ *Id.*, at 67-8.

⁶² *Id.*, at 66.

⁶³ MCNAIR, *op. cit. supra* n. 31, at 297, n. 13.

⁶⁴ COOPER, *op. cit. supra* n. 5, at 618, n. 60. See also MANION, *op. cit. supra* n. 8, at 2; RHYNE, AIRPORTS AND THE COURTS 95, n. 38 (1944). Charles S. Rhyme was President of the American Bar Association, 1957-58.

⁶⁵ THURSTON, *op. cit. supra* n. 16, at 503.

⁶⁶ 2 Comm. 18 and 3 Comm. 217.

the maxim in their Commentaries as, in 1826, did Chancellor Kent in the United States when he restated⁶⁷ that

"... land, according to Lord Coke, . . . has an indefinite extent, upward as well as downwards, so as to include everything terrestrial, under or over it..."

Kent, however, shows a note of caution when he uses the word "terrestrial" which could hardly refer to "coelum" in the Roman sense as being subject to private and exclusive rights; Kent would certainly have employed the term "celestial" in an upward direction whereas the word "terrestrial" would have been more proper in describing rights to the solid strata of "terra," the earth underfoot, or to things connected with the soil in an upward direction, such as crops, trees and buildings.

But maxims are not the Law. Smith⁶⁸ has stated that maxims are not meant to take the place of a digest; they are neither definitions nor treatises; some ought to be amended and some to be discarded altogether. Unfortunately there were no famous English glossators or commentators on the Corpus Juris Civilis which, for English law-men, never became the starting point for systematic reasoning and investigation that it was on the Continent.⁶⁹

In this conjunction McNair⁷⁰ delivers a scathing attack on the English Bar in attributing the "tyranny of this maxim" in England partly to the traditional respect which English lawyers while rejecting the complete Corpus Juris Civilis, habitually show to what they conceive as a rule of Roman Law "when it happens to accord with their own ideas," and partly to the "grandiloquent manner" adopted by English lawyers, notably Coke and Blackstone, in exalting the extent and importance of property in land. He continues his attack by stating no less vitriolically:

"The maxim like most maxims, and slogans, has merely been used either to darken counsel or to afford a short cut and an excuse for not thinking the matter out."

Landowners fare no better at his hands. "Coined centuries before any thought of flying machines, . . . frequently invoked in circumstances which demand a more complex analysis, . . . having the inestimable advantage of being couched in Latin, it has been glibly canvassed by landowners claiming that their property rights have been infringed."⁷¹

Lord Coke took the maxim not only from the first decided case in which it was used, but he, too, endeavored to trace it back to the Year Books, citing 14 H. VIII, fo.12; 22 Hen. VI.59; 10 E. IV.14 and, in some editions, 6 E. IV.7, pl.18. The latter is a case where a landowner in 1466 complained of thorns falling on his land and the writers do not seem to have found much support therein for Coke or the Maxim. Furthermore, Prof. Holdsworth⁷² in citing *Bury v. Pope* and Prof. Goudy, *Essays in Legal History* (ed. Vinogradoff, 1913) state that Coke's references to the Year Books there cited are incorrect, and this has been picked up by Rhyne⁷³ and McNair.⁷⁴

14 H. VIII Fol. 12 is often said to be an erroneous citation for Fol. 1 Mich. Pl. 1 which refers to a case of birds nesting on leased land. It does not cite our maxim, but is closely related to it. It was an action by the Bishop

⁶⁷ 3 COMMENTARIES ON AMERICAN LAW 402 (1892; first published 1826-30).

⁶⁸ THE USE OF MAXIMS IN JURISPRUDENCE, 9 HARVARD L.R. 13 (1885).

⁶⁹ VON MEHREN, THE CIVIL LAW SYSTEM 10 (1957).

⁷⁰ *op. cit. supra* n. 31, at 294, 297.

⁷¹ *Id.*, at 16.

⁷² 7 A HISTORY OF ENGLISH LAW 485, n. 9 (1925).

⁷³ *op. cit. supra* n. 64, at 94, n. 37.

⁷⁴ *op. cit. supra* n. 31, at 16, n. 2.

of London for trespass quare clausum fregit and for taking birds which built nests in trees on parkland leased by him to the Defendant. In it Richard Brooke, Judge of Common Pleas, ruled in quaint Norman French:

"Le lessour aura le terre sur que l'arbre cressoit, car l'a ad estre per le terre et per l'aire, et donques tout le terre sur que il cressoit in profundite, et tout l'aire que luy nurrish en altitude, perteigne a cesty a que l'arbre perteigne."

With the necessary correction as to its citation, this really is Coke's source closest to our maxim.

The remaining two are 22 Hen. VI Fol. 59, No. 11 at Trinity Term, which involves the ownership of six young goshawks as between tenant and landlord, and 10 Edw. IV Fol. 14 which involves thefts of muniments of title and quotes the goshawk case where the only connection could consist of the fact that goshawks are birds and pass over lands in flight. But none of these cases cite or quote the maxim for which Coke uses them as authority for his own statement.⁷⁵

While Coke eliminated the neo-Latin word "summitas" from the citation as used in *Bury v. Pope* and made the maxim thus appear more authentically Roman, at the same time he rendered it more categorical and non-Roman by changing Paul's original⁷⁶ and Accursius's glossatory⁷⁷ "debet esse" into a mandatory "est." Thus the damage was done for centuries thereafter.

Although the maxim has no real authority in English Law, it has been grievously misunderstood and misapplied so far as its upward limit is concerned.⁷⁸ Eleven years after *Bury v. Pope* had been decided, the maxim was successfully invoked in *Penruddock's case*⁷⁹ where rainwater fell on Plaintiff's land from the roof of Defendant's building which overhung the land of Plaintiff. And after another thirteen years we find *Baten's case*⁸⁰ where the maxim served to uphold the right of a Plaintiff to abate a nuisance consisting in the overhanging portion of a house. None of these three early English cases were decided in a manner different from the Roman Law; the first one, *Bury v. Pope*, was "on all fours" with Ulpian's holding, and the later two could also be matched with some decision in the Digest. It is interesting to note that the latter two were actions of "quod permittat prosternere," a writ given by the Statute of Westminster II which lies against any person who erects a building, though on his own ground, so near the house of another that it hangs over or becomes a nuisance to it.⁸¹ A similarity with the Roman interdict "quod vi aut clam" cannot be entirely denied.

Then—silence. For more than two hundred years the maxim does not reappear in the English decisions until it explodes, like a misfired missile, even if only as a dictum, in *Pickering v. Rudd*,⁸² just thirty-two years after the invention of the art of flight in its most rudimentary stages. The case was a simple and, by now, traditional one: a board had been nailed by Defendant to his own wall so as to overhang Plaintiff's garden, and Lord Ellenborough, looking far into the future and into the maxim's possible application to aviation cases, remarked:

"If this board overhanging the Plaintiff's garden would be a trespass, it would follow that an aeronaut is liable to an action of trespass

⁷⁵ RHYNE, *op. cit. supra* n. 64, at 95.

⁷⁶ See p. 240, *supra*.

⁷⁷ See p. 242, *supra*.

⁷⁸ McNAIR, *op. cit. supra* n. 31, at 30-1.

⁷⁹ 5 Coke's Reports 100, 77 Eng. Rep. 210 (1597).

⁸⁰ 9 Coke's Reports 53b, 77 Eng. Rep. 810 (1610).

⁸¹ 2 Lil. Abr. 413, as cited in THURSTON, *op. cit. supra* n. 16, at n. 21.

⁸² 4 Camp. 219, 1 Starkie 56, 171 Eng. Rep. 70 (1815).

quare clausum fregit at the suit of the occupier of every field over which his balloon passes in the course of his voyage."⁸³

Prophetic words indeed! Until then it had been doubted whether it was a trespass to pass over land without touching the soil, as one may in aircraft, or to cause a material object, as a shot fired from a gun, to pass over it. It was Lord Ellenborough who thought that it was not in itself a trespass "to interfere with the column of air superincumbent on the close."⁸⁴

But this was but a single rocket-like projection into the future because, thirty years later, we are back to a simple cornice projecting over another's garden and precipitating rainwater thereon⁸⁵ which led Broom⁸⁶ to elaborate upon the by now commonplace maxim by stating that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises and occasions damage thereto either by overhanging them, or by the flow of water from the roof and eaves upon them. Rabbi Akiba to whom we are indebted for earlier dicta on the same maxim in Jewish Law, could well have muttered once more that there is really nothing new under the sun!

The Roman-type decisions continue. In 1870 the English Equity Court held that a first-floor room which overhung Plaintiff's land, constituted a trespass for which he could recover damages. This led Salmond⁸⁷ to the commonly accepted statement that ownership and possession of land bring with them ownership and possession of the column of space above the surface "ad infinitum," citing our maxim. But he limits it to the extent that the landowner has in private law the right to use for his own purposes, to the exclusion of other persons, the space above it ad infinitum so that he may build the Tower of Babel if he pleases, and may remove all things situated above the surface even though they are the property of others and though their presence there does him no harm and is no wrong for which he has any right of action against their owners. This is in direct contrast with Lord Ellenborough's dictum which in 1865, fifty years after it and just five years after *Corbett v. Hill*, was attacked in *Kenyon v. Hart*⁸⁸ by Lord Blackburn who was inclined to think differently, and Sir Pollock considers his the better opinion. Clearly there can be a wrongful entry on land below the surface, as by mining, and under the Common Law Sir Pollock could not assign any reason why an entry above the surface should not also be a trespass unless the scope of possible trespass is limited by that of possible effective possession which might be the reasonable rule and is reflected by most of the Codes on the Continent. According to Pollock it would clearly be a trespass at Common Law to fly over another man's land at a level within the height of ordinary buildings, and it might be a nuisance to hover over the land even at greater height.⁸⁹

In 1895 we find ourselves transported back over almost 2350 years to the Twelve Tables when *Lemmon v. Webb*⁹⁰ allowed a landowner to cut back the branches of a tree which overhangs his boundary whether or not they cause damages; he also has a right of action for actual damages caused thereby.

With the turn of the century we come upon cases of more technical and

⁸³ At p. 221; MANION, *op. cit. supra* n. 8, at 3; BROOM, A SELECTION OF LEGAL MAXIMS 258 (10th ed. 1939).

⁸⁴ POLLOCK'S LAW OF TORTS 262 (15th ed. 1951).

⁸⁵ *Fay v. Prentice*, 1 C.B. 828 (1845).

⁸⁶ *op. cit. supra* n. 83, at 257.

⁸⁷ ON THE LAW OF TORTS 162 (12th ed. 1957).

⁸⁸ 6 B. & S. 249, 252, 34 L. J. M. C. 87 (1865).

⁸⁹ *op. cit. supra* n. 84, at 263.

⁹⁰ (1895) A.C. 1.

industrial nature gradually leading to aviation decisions. In 1884 the Queen's Bench in *Wandsworth Board of Works v. United Telephone Co.*⁹¹ denied the Plaintiff a "proprietary right in the area of ordinary user" above a street, declaring a wire at a height of thirty feet no trespass; otherwise "an ordinary proprietor of land could cut and remove a wire at any height above his freehold." But according to modern English authorities a direct intrusion into air space at a height within the area of ordinary user is a trespass.⁹² Still, in England, to this day, a non-legislative agreement has not been reached as to whether the owner of the surface has merely the exclusive right of filling the air space within that area⁹³ or whether he actually owns the air space.⁹⁴ The right to sue, on which, according also to Stephen,⁹⁵ there is little clear authority, has been prudently limited in England by the Air Navigation Act, 1920, Section 9 which, as amended by the Civil Aviation Act of 1949, Section 40, provides that

No action shall lie in respect of trespass or . . . nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which having regard to wind, weather, and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight . . ."

CHAPTER V

ITS CIVIL LAW ACCEPTANCE

At the time where the English Courts were temporarily silent about our maxim, we find, towards the end of the 17th Century, in both Germany and France a reappearance of the phrase which must have been dormant since the days of the Glossators in Italy.

In Germany it cropped up in a Doctor's dissertation whereas in France it served to explain a provision in a collection of customs which was the forerunner of the Code Napoléon.

In October 1687 Jean-Etienne Danck, a candidate for the degree of Doctor Juris at the University of Frankfort, defended before Prof. Samuel Stryk his thesis entitled "De Jure Principis Aereo" which found its way into the latter's collected works "Strykia Opera" published in Florence between 1837 and 1841.⁹⁶ It showed considerable research into the Corpus Juris Civilis, the works of Grotius and others and, citing Dig. XLIII.24.22.4 on tombs,⁹⁷ Dig. VIII.2.1 on public lands⁹⁸ and the Accursian Gloss,⁹⁹ it endeavored to apply the law of the air to the prince or ruler. It held that the ruler was not limited by building restrictions in erecting his castle, but could control private building heights; this is in contrast with an earlier Ordinance for the German Empire dating back to 1559 which allowed the destruction of castles which menaced the security of travelers below. It also defined his air rights as "regalia" or a source of income for the ruler which entitled him to levy a tax and license on windmills which used the air belonging to the ruler, and it finally declared the hunting of birds a monopoly reserved to the prince.¹⁰⁰

⁹¹ 13 Q.B.D. 904

⁹² BROOM, *op. cit. supra* n. 83 at 258; *Ellis v. Loftus Iron Co.*, (1874) L.R. 10 C.P. 19, 10 C.P.D. 10; *Finchley Electric Light Co. v. Finchley U.D.C.*, 1 Ch. 437 (1903); *Gifford v. Dent*, (1926) W.N. 336.

⁹³ MCNAIR, *op. cit. supra* n. 31, at 34-5.

⁹⁴ WINFIELD, LAW OF TORTS 340.

⁹⁵ 2 COMMENTARIES ON THE LAWS OF ENGLAND 331-2 (21st ed. 1950 with 1958 Suppl.).

⁹⁶ COOPER, *op. cit. supra* n. 5, at 624.

⁹⁷ See p. 241, *supra*.

⁹⁸ *Id.*

⁹⁹ See p. 242, *supra*.

¹⁰⁰ COOPER, *op. cit. supra* n. 5, at 625.

In France, too, building restrictions were mentioned by the commentators in conjunction with the compilation of *La Coutume de Paris*, the most important collection of customs prevailing in Northern France in contrast with "le droit écrit," a mixture of customs and written Roman Law prevailing in the Southern part of the country which was therefore known as "le pays de droit écrit."¹⁰¹ Article 187 of *La Coutume de Paris* which was effective towards the end of the 17th Century, provided that:

"Quiconque a le sol. . . il peut et doit avoir le dessus (et le dessous) de son sol, et peut édifier pardessus (et pardessous);"

This sounds like a translation of our maxim, and Ferrière in his authoritative comments on *La Coutume*¹⁰² cites our phrase which conforms to what he calls "common law," and admits a regulatory power although no general ordinance in France limited the height of buildings. Article 187, in turn, was the basis of Article 552 of the Code Napoléon which, in limpid simplicity, states in Subsection 1:

"La propriété du sol emporte la propriété du dessus (et du dessous)."

A few years after the promulgation of the Code Napoléon, Art. 297 of the Imperial Austrian Civil Code (*Allgemeines Buergerliches Gesetzbuch fuer das Kaiserthum Oesterreich*, 1811) provided:

"Unbewegliche Sachen sind Haeuser und andere Gebaeude mit dem in senkrechter Linie darueber befindlichen Luftraume."

As yet we find no limitation to the codified right of the landowner to the superincumbent air space and no consideration for aircraft which had been invented 28 years earlier. But only four years later Lord Ellenborough looked into the distant future and wondered about the rights of an aeronaut¹⁰³ while, after another seven years, word came from the New World that a balloonist who had come down in Plaintiff's garden in New York City had been held liable for the damage done by a crowd of followers whose trespass he was said to have caused¹⁰⁴ by his own.

But a mitigation of the harsh rule of our maxim which had been codified as such in France and Austria, began to be legislated towards the end of the 19th Century. The German Civil Code, enacted in 1896 and effective by the turn of the century at a time when balloons and crude dirigibles became better known, provides in Art. 905:

"Das Recht des Eigentuemers eines Grundstuecks erstreckt sich auf den Raum ueber der Oberflaeche . . . Der Eigentuemmer kann jedoch Einwirkungen nicht verbieten, die in solcher Hoehe . . . vorgenommen werden, dass er an der Ausschlussung kein Interesse hat."

Thus, for the first time, we find a limitation of the rights of a landowner predicated upon his interest in the height of the space where the latter is being affected.

While, according to Nijholt¹⁰⁵ the French version of our maxim made its way into the Codes also of Belgium, Italy, Japan, The Netherlands, Portugal, the Province of Quebec, Spain, Switzerland and Turkey, his general statement made in 1910 needs considerable softening. The new Italian Civil Code,

¹⁰¹ VON MEHREN, *op. cit. supra* n. 69, at 9.

¹⁰² CORPS ET COMPILATION DE TOUS LES COMMENTATEURS . . . SUR LA COUTUME DE PARIS, Vol. II, Col. 1543 (1714).

¹⁰³ *Pickering v. Rudd*, n. 82, *supra*.

¹⁰⁴ *Guille v. Swan*, 19 Johns. (N.Y.) 381, 10 Am. Dec. 234 (1822). According to PROSSER, *LAW OF TORTS* 62, n. 89 (2nd ed. 1955) this case was immortalized in a poem by Irving Browne, *The Balloon and the Garden-Sauce*, in 1889, 1 Green Bag 281!

¹⁰⁵ AIR SOVEREIGNTY 35 (1910).

worked out in close collaboration with French jurists before the Second World War and in force since 1942, does not at all define the space rights of the landowner above the ground; it simply states in Art. 840.2 the following limitation:

"... proprietario del suolo non puo opporsi ad attività de terzi che si svolgano . . . a tale altezza nello spazio sovrastante, che egli non abbia interesse ad escluderle."

Again we find the limitation of his exclusionary rights depending on the height in space in which he might have an interest to exclude the activities of intruders. This has its counterpart in Art. 823 of the Italian Code of Navigation of the same year which qualifies that:

"Il sorvolo dei fondi di proprietà privata da parte di aeromobili deve avvenire in modo da non ledere l'interesse del proprietario del fondo."

Aircraft must not damage the interest of owners of land being overflown.

The French-language version of the Swiss Civil Code while copying in its entirety sub-section 1 of Art. 552 of the French Civil Code ("La propriété du sol emporte celle du dessus et du dessous") adds this important limitation to its Art. 667:

"dans toute la hauteur et la profondeur utiles à son exercice."

The German-language version of Art. 667 in turn is very close to that of the German Civil Code in limiting air space rights

"auf den Luftraum . . . soweit fuer die Ausuebung des Eigentums ein Interesse besteht."

Again the same "interest qualification" of the space which the landowner himself can put to his use which we find more and more in 20th Century codifications.

While the French Civil Code, to this day, does not contain this qualification of the landowner's rights, Art. 18 of the French Air Navigation Act of 1924, as codified by the Civil and Commercial Aviation Act of 1955, limits the right of an aircraft to fly over private property by providing that such right

"shall not be exercised in any way which would interfere with the exercise of the rights of the property owner."¹⁰⁶

Thus in France it is not a mutual exclusion—it is still the property owner who wins in the struggle with modern aircraft.

And now to our Civil Law neighbors to the North where, as recently as 1930, our maxim and the Code Napoléon were cited by Judge Newcombe¹⁰⁷ according to whom Coke expresses the Common Law of England from which the Law of Quebec (Art. 414 of the Civil Code based on that of Napoléon) is not materially different. He therefore concluded that the Courts in Canada had no authority to qualify it. Fortunately, Judge Newcombe was reversed and the Attorney General of Canada stated two years later¹⁰⁸ that our maxim does not apply so as to prevent aerial navigation from being a public right, and that flying over land is not a trespass to any property right, citing *Pickering v. Rudd* where Lord Ellenborough, 117 years earlier,

¹⁰⁶ As cited in MANKIEWICZ, SOME ASPECTS OF CIVIL LAW REGARDING NUISANCE AND DAMAGE CAUSED BY AIRCRAFT, 25 JOURNAL OF AIR LAW AND COMMERCE 46 (1958).

¹⁰⁷ (1930) S.C.R. 663 as cited by COOPER, *op. cit. supra* n. 5, at 641.

¹⁰⁸ (1932) A.C. 54, at 57.

had expressed his first doubts as to aviation rights, and *Fay v. Prentice*, an old-fashioned Roman-type cornice and rainwater case.

Thus we can come to the conclusion that as far as the majority of the Civil Law areas are concerned, our maxim while still the mainstay of each code provision, has suffered invasions as serious as the landowner's air space itself.

CHAPTER VI

THE DEATH OF THE MAXIM AT THE HANDS OF THE COURTS IN THE UNITED STATES, AND THE RESTATEMENT OF TORTS

Both Cooper, the American author,¹⁰⁹ and McNair, the English jurist,¹¹⁰ agree that the maxim in itself has no authority in English Law. And, after 110 years of American decisions in Federal and State Courts, the Supreme Court of the United States in its 1946 landmark holding in *United States v. Causby*¹¹¹ sentenced the maxim to death by stating that the *ad coelum* "doctrine has no place in the modern world." This decision followed by just two years Mr. Rhyne's conclusion that "all the courts have repudiated" the "unlimited ownership" or "*ad coelum*" theory.

But it took a long, slow erosion process until our highest judicial authority, through Mr. Justice Douglas, could pronounce sentence. Comparing the number of decisions in England with those in our country, McNair was "tempted to complain of an 'embarras de richesses.'"¹¹² At one time, deep into the 20th Century, there was a tendency here to give full sway to the maxim, but more moderate counsel, in most quarters, prevailed. McNair interprets that view as gaining support according to which the landowner owns only that amount of air space which is necessary for the effective use and enjoyment of the land. It took, however, the arrival of the flying machine to dispel the artificial fog which disgruntled and litigious landowners had so effectively spread over their land by using our maxim.

In 1836, 110 years prior to the monumental holding in the *Causby* case, the Connecticut Court followed the Twelve Tables and, in a case dealing with overhanging branches, stated that "land comprehends everything in direct line above it."¹¹³ In 1872 the Judges in Massachusetts considered overhanging structures such as eaves, a trespass.¹¹⁴ In 1902 the Court in Iowa declared thrusting an arm across the boundary line a trespass in relying on our maxim as laid down by Lord Coke: "the title of the owner extends . . . upward usque ad coelum," but in a derisory vein the opinion continues that "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 . . ."¹¹⁵ This decision has often been compared with the English holding in *Ellis v. Loftus Iron Co.* in 1874 where a horse kicked through a fence, presumably at a lesser height even than Mr. Sessions' outstretched arm!

By 1906 electricity and gunpowder began to make themselves felt as trespassers into the air space. The courts continued to adhere to the Roman Law doctrine that bodily entry is not essential to a trespass. Telephone wires stretched in the air over land constitute a trespass without being in

¹⁰⁹ *op. cit. supra* n. 5, at 636.

¹¹⁰ *op. cit. supra* n. 31, at 30.

¹¹¹ 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062.

¹¹² *op. cit. supra* n. 31, at 33.

¹¹³ *Lyman v. Hall*, 11 Conn. 177.

¹¹⁴ *Smith v. Smith*, 110 Mass. 302.

¹¹⁵ *Hannabalsen v. Sessions*, 116 Ia. 457, 90 N.W. 93, 95.

contact with the landowner's premises.¹¹⁶ And shooting cases were numerous in such different jurisdictions as Connecticut,¹¹⁷ Georgia,¹¹⁸ Minnesota¹¹⁹ and Montana,¹²⁰ and shooting across the land was declared a trespass even though the bullets did not fall upon it. The most important of these is *Portsmouth etc. Co. v. United States* where, in 1922, the Supreme Court held it to be a trespass to discharge projectiles from heavy coast artillery over Plaintiff's land which amounted to a "taking" of his property rights by the Sovereign.¹²¹

But aviation cases present the most crucial problem of the application of our maxim in to-day's world. To deal with super-incumbent air space we cannot go back to the 1822 case of *Guille v. Swan* because there it was not Swan, the balloonist, in piloting his aircraft over many a parcel of land in old downtown New York, but his followers who fregerunt Mrs. Guille's clausum in trampling down her grass and flowers and vegetables, a trespass so much "down to earth" that it would always have given rise to an action, regardless whether in Rome, Judea, England or America.

The first aviation case actually dealing with intrusion into air space came up as late as 1930 in one of the few decisions basing a landowner's rights on the theory of trespass and the only one which granted any relief to the complainant; in it the Massachusetts Court held that the landowner owns the air space over his land only up to a height set by Statute and only an intrusion into this very column of air is a trespass;¹²² in this case the land was used for the cultivation of trees which attained a height of hundred feet, and the Court held flights at that height to be a trespass by applying the test suggested in *Pollock on Torts*¹²³ that the scope of possible trespass is limited by that of possible effective possession, which might be a most reasonable rule. Two years later, in 1932, the Federal District Court for Ohio held, in discarding the *ad coelum* rule, that the landowner's "right of occupancy extended only to the lower stratum which he may reasonably expect to use or occupy himself," but "as to the upper stratum which he may not reasonably expect to occupy, he has no right . . . except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface."¹²⁴ Another two years later, in 1934, the Georgia Courts picked up the problem and declared¹²⁵ that a landowner cannot own what he does not possess and that ownership of air space extends only up to the "reasonable possibility of man's occupation and dominion" (back to Roman Law!) though "perhaps the owner may be in actual possession of the space immediately covering the trees, buildings and structures." And in 1936, after another two years interval, the Western New York District Court summarized the law in stating that "the owner of land has the exclusive right to so much of the space above as may be actually occupied and used by him and necessarily incident to such occupation and use, and any one passing through such space without the owner's consent is a trespasser."¹²⁶

¹¹⁶ *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716.

¹¹⁷ *Munro v. Williams*, 94 Conn. 377, 109 A. 129.

¹¹⁸ *Hall v. Browning*, 195 Ga. 423, 24 S.E. 2nd 392.

¹¹⁹ *Whittaker v. Stangwick*, 100 Minn. 386, 111 N.W. 295.

¹²⁰ *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328.

¹²¹ 260 U.S. 327, 67 L.Ed. 287, 43 S.Ct. 135.

¹²² *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385; *McNair, op. cit. supra* n. 31, at 33; *PROSSER, op. cit. supra* n. 104, at 60.

¹²³ See p. 247, *supra*.

¹²⁴ *Sweetland v. Curtiss Airports Corp.*, 55 F. 2nd 201, at 203.

¹²⁵ In *Trasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817, at 825-6.

¹²⁶ *Cory v. Physical Culture Hotel*, 14 F. Supp. 977, at 982, *aff'd* 88 F. 2nd 411 (C.A.2, 1937).

This holding by a Federal Court in the East affirmed the excellent statement issued on the Pacific Coast by the Ninth Circuit Court which has been the gospel since 1936 and was cited approvingly, ten years later, by the Supreme Court in the *Causby* case. After restating Blackstone as follows:¹²⁷

"The air, like the sea, is by its nature incapable of private ownership except insofar as one may actually use it"

the Court in the West continues, regarding our maxim:

"We think it is not the law, and that it never was the law. This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use..."

This is the death knell for our maxim, and now the Court defines the upward limit of ownership:

"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 . . . 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 . . . Any claim of the landowner beyond this cannot find a precedent in law, nor support in reason."¹²⁸

The *Causby* case, the only United States Supreme Court case on this subject, but followed by the Court of Claims in the 1958 *Highland Park* case,¹²⁹ dealt with the effects of flights taking off from the military airport at Greensboro, N. C. during the Second World War, upon the peace and quiet of a neighboring chicken farmer and his flock; so many of his chickens flew into the walls of their coops from sheer fright that the farmer obtained \$1,060 "rental" value for the four years of military "occupancy" of his immediate air space and \$375 for the chickens which killed themselves. In the *Highland Park* case we deal with the decreased value of homes built near the military airport at Savannah, Ga. at a time when only propeller-driven planes were stationed there; when turbo-jets took over, the noise became so unbearable for the homeowners, both actual and prospective, that the developer suffered great losses and the United States was declared to have taken an "easement" in the overlying air space for which it was made to pay.

In the *Causby* case Mr. Justice Douglas declared that our maxim "has no place in the modern world." Following the *Hinman* decision which it cited approvingly, the Supreme Court states:¹³⁰

"The fact that (the landowner) does not occupy (the land) in a physical sense, by the erection of buildings and the like, is not material. . . . The flight of airplanes, which skim the surface, but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself."

Thus it can be concluded that the *Causby* case has finally rejected the theory of property rights in the air space at all altitudes, at least as far as our Judiciary is concerned.

¹²⁷ 2 BLACKSTONE COMM. 14.

¹²⁸ *Hinman v. Pacific Air Transport*, 84 F. 2d 755, at 757-8, cert. den. 300 U.S. 654.

¹²⁹ 161 F. Supp. 597.

¹³⁰ At p. 264-5.

Why then is this discussion entitled CUJUS EST SOLUM EJUS EST QUOUSQUE TANDEM? The reason can be found in the Tentative Draft No. 2 of the Restatement of the Law, 2nd, Torts. Section 194 of this Draft declares "unprivileged" and therefore a trespass a flight of aircraft which interferes "unreasonably with the possessor's use or enjoyment of the surface of the earth or the air space above it." Section 194, as drafted, must be read with Section 159 of the present Restatement which is to remain unchanged and states that "a trespass . . . may be committed on, beneath or above the surface of the earth." This should so remain concerning occurrences common to an earlier era, such as protrusions of roofs or boards which have always been considered as trespasses, but a look at Comment (c) of Section 159 shows that, according to the present Restatement under "e," "an unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass!" Quousque tandem? Thus the Restatement continues to adhere to the discarded maxim that the landowner's property right extends indefinitely into the sky! The Note to the Institute on page 36 of the Tentative Draft admits that the theory of unlimited vertical ownership

"had almost no support in case law when it was first adopted by the Restatement and . . . has had little support in the cases since" and, on page 38; it concedes it as being

"obvious that sooner or later the theory of unlimited vertical ownership of the air space above the possessor's land will have to be discarded."

But why "sooner or later?" Has it not been sufficiently discredited? Quousque tandem?

For this reason four outstanding Attorneys employed as counsel by four major Air Carriers, among them Henry J. Friendly, Vice President and General Counsel of Pan American World Airways who has just been appointed by the President to the Bench of the Court of Appeals for the Second Circuit, have come to the conclusion, as members of the American Law Institute, in a memorandum to the Institute dated May 20, 1958 that the proposed Section 194 "does not accurately reflect the state of the law to-day" and its tentative draft should be withdrawn from consideration by the Institute and be returned to the Reporter and his Advisers for further study of the correlative rights and obligations of the landowner and the operator of aircraft and the very important legal and public interest questions presented. Quousque tandem?

William Empson¹³¹ once said: "Law makes long spokes of the short stakes of men." Hasn't the time finally come to reduce the spokes reaching out into infinity to stakes that are no longer than man's interest qualifies?

¹³¹ Cambridge Poetry (1929) as quoted by Salmond, *op. cit. supra* n. 87, at 162, n. 40.