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A CLOSED CHAPTER IN AERITIME LAW*

BEING A PAPER READ BEFORE THE BAR ASSOCIATION
ON MARCH 16, 1975

By E. H. A.†

The subject of this paper concerns a branch of aeritime law that offers no inducement for investigation save to the student of the development of the law. The practicing lawyer of today is not confronted with any of the propositions here discussed. It is a closed chapter of our law and as far removed from the domain of the courts today as the question of wager by battle. But although this branch of aeritime law has become obsolete this class of litigation for the space of ten or twelve years consumed much of the attention of the courts and lawyers of this country.

It is proposed to discuss the liability of an operator of aerial machines, airships or aircraft of any sort to the property owners over and above whose land he navigates.

The earliest case on the subject is the case of *Burns v. New York Aerial Navigation Company*, which was decided in 1936 and is reported in 521 N. Y. 689.

The case arose upon demurrer to the petition which alleges that the plaintiff was the owner of a tract of land located in the county of Kings, New York, and the defendant was the proprietor and owner of an airship which he willfully caused to traverse over and above the land of the plaintiff to the plaintiff's damage in the sum of \$10. The trial court sustained the demurrer, but the court of appeals reversed the judgment. In the course of the opinion the court said:

"It is elementary that the owner of real property owns the space above the surface and has the same right to its free and uninterrupted use as to the land below. Blackstone (Book 2 p. 18) says 'Land has also in its legal

* Reprinted from *The Green Bag*, December, 1907, which carried the following editorial note on the contribution: "The author of our humorous study of aerial law is a former graduate of the Harvard Law School now in practice in St. Louis, who was inspired to prophetic frenzy by the recent international contests in aerial navigation conducted in that city. He prefers that the oracle be veiled."

† St. Louis, Mo., November, 1907. ED. NOTE: It has been established that the author of the interesting article was Eugene Henry Angert, who was graduated from Harvard Law School in 1896, practiced in St. Louis and died in May, 1929. He displayed a keen interest in aviation and a remarkable foresight into its development. Twenty years after the original publication of this article, Mr. Angert served as toast-master at a dinner given to Colonel Lindbergh by his backers after his return to St. Louis from his trans-Atlantic flight.

signification an indefinite extent upwards as well as downwards. The word *land* includes not only the face of the earth but everything under it or over it.' Consequently, as any physical contact, no matter how slight, with the surface of the earth owned by another would be a trespass; it follows that physical contact with the air above the surface is likewise a trespass.

"The defendant has submitted no authorities but has strongly urged that the old notion that the ownership of the soil carried with it ownership of the air above the soil is a fiction which must give way before considerations of common sense. It has also insisted that this is a case in which by its very nature actual damage is an impossibility and the courts should not open their doors to a line of litigation that would accomplish nothing. This question while never finally passed upon, has agitated the minds of learned judges for almost two centuries. The authorities are discussed in an old text book entitled Pollock on Torts (Am. Ed.) page 423, where it is said:

"It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass to interfere with the column of air superincumbent on the close and that the remedy would be by an action on the case for any actual damage; though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot fall on his neighbor's land. *Pickering v. Rudd*, 4 Camp. 219. Fifty years later Lord Blackburn inclined to think differently (*Kenyon v. Hart*, 6 B. S. 252), and his opinion seems the better. Clearly, there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon; but this appears irrelevant to the pure legal theory. Trespasses clearly devoid of legal excuses are committed every day on the surface itself and yet are of so harmless a kind that no reasonable occupier would or does take any notice of them. Then one can hardly doubt that it might be a nuisance apart from any definite damage to keep a balloon hovering over another man's land, but if it is not a trespass in law to have the balloon there at all, one does not see how a continuing trespass is to be committed by keeping it there. Again it would be strange if we could object to shots fired across our land only in the event of actual injury being caused and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property.' We have examined the early cases cited by the learned author and find that in the case of *Pickering v. Rudd*, *supra*, Lord Ellenborough said: 'Would trespass lie for passing through the air in a balloon over the land of another?' This question was not answered and so the case is no authority. But in *Kenyon v. Hart* we find the question answered affirmatively by Lord Blackburn in this language: 'That case raised the old query of Lord Ellenborough as to a mere passing over the land of another in a balloon; he doubted whether an action of trespass could lie for it. I understand the good sense of the doubt though not the legal reason of it.' The last sentence has given rise to much dis-

cussion and has been, we believe, justly criticized, for if legal reason does not support the learned Lord's opinion how can good sense figure in it? Consequently, the dictum of Lord Blackburn is a distinct authority for the maintenance of an action such as the present one. From this examination of authorities it is apparent that an action of trespass should lie under the circumstances of this case. We believe we are concluded by the legal maxim *cujus est solum ejus est usque ad coelum*. The ownership of the column of air is vested in the proprietor of the subsoil. And if this action be not allowed, what is to prevent the owner of an airship from permanently anchoring his machine on my land? If one machine, why not hundreds? And then eventually he may acquire ownership by adverse possession and I will no longer own *usque ad coelum*. It is necessary to sustain the plaintiff's right of action in order to retain that principle upon which all title to real property is founded. The trifling nature of the damage is of no importance, for courts protect property rights no matter how insignificant and the maxim *de minimis non curat lex* has no application; see *Butler v. Telephone Co.*, 109 N. Y. App. Div. 217, where the owner of land was allowed to recover six cents in damages in an action of ejectment for injury to his land by a wire stretched over it. Also *Murphy v. Bodger*, 60 Vt. 723. The court erred in sustaining the demurrer and the judgment is reversed."

In the case of *Dyer v. St. Louis & New York Rapid Transit Co.*, 528 N. Y. 30, the same court decided that it is a defense to the action to show that the airship was driven out of its route and across the plaintiff's land by a gale, since trespass necessarily meant a wilful act. The court found abundant authority for the decision in the early case of *Smith v. Stone*, decided by the King's Bench Michaelmas Term. reported in Style 67, as follows: "Smith brought an action of trespass against Stone, *pedibus ambulando*. The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of others and was not there voluntarily, which is the same trespass for which plaintiff brings action. The plaintiff demurs to this plea. In this case Roll J. said that it is the trespass of the party that carried the defendants (sic) upon the land and not the trespass of the defendant; as he that drives my cattle into another man's land is the trespasser against him, and not I, who own the cattle."

The effect of the decision in the Burns case, allowing the owner of the land an action for trespass, was widespread. With remarkable unanimity it was followed and approved in every jurisdiction. There was a perfect flood of airships litigation. Suits became so numerous that in 1939 a special division of the Circuit Court in St. Louis, known as the "Air Division" was created for the purpose of trying nothing but this class of cases. Since necessarily only nominal damages could be obtained, one might well

wonder why so many suits should be brought on account of an infringement of a right that was purely technical and which could not result in material gain to the plaintiff. The answer must be sought in the history of aircraft.

Although extensively used for passenger traffic for 15 years previous, it was only in 1934 that freight transportation by aircraft became general, and then it was that the bitterest and most destructive conflict in the history of the economic world began. On the one side were ranged, the railroads of the country with their tremendous investments, their control of the channels of commerce and of the financial institutions of the country together with all the political and legislative influence they had built up through decades. Against this aggregation of wealth, power and prestige the airship companies had nothing to pit save their superior practicability and the reduced cost of transportation. But the importance of this latter consideration will appear when it is noted that when the fight was at its height, the air craft companies were able, without loss, to transport freight and passengers at rates that were about half the actual cost to the railroads. Every device known to the courts of law was invoked by the railroads, every aid that could be wrung from the cupidity of legislators was brought into play. So effective and so costly was their fight that it is doubtful whether the aircraft companies would have won in the struggle in spite of their ability to transport at much lower rates than the railroads, had not the people been active in their favor. Public sentiment and public sympathy expressed in many different ways were all allied against the railroads. The smaller railroads yielded first and went into bankruptcy and receiver's hands, receiverships from which unlike those of former years they did not emerge. One after another the railroads became abandoned hulks of commerce and rotting ties and deserted stations dotted the country from one end to the other.

In 1942 the great Atlantic and Pacific Railroad alone remained. It formed a continuous route from New York to Seattle and was organized in 1909. The final crash came in 1942 when the Atlantic and Pacific Railroad went into the hands of a receiver. Its subsequent sale did not realize enough to pay its floating indebtedness. The collapse of the Atlantic and Pacific Railway marked the passing of the railroads as instruments of commerce; although in some localities electrical roads were still used for many years as a means of transportation for short distances and also for switching purposes, it being at first impracticable for the aircraft companies to load and unload freely in closely built cities. Today when railroads

belong to the antiquated and superseded inventions of mankind and airships literally darken the heavens, when the journey from New York to San Francisco is made between the rising and setting of the sun, when commodities are transported from one locality to another at such slight cost and with such rapidity as to make distances from the points of production practically no item in the ultimate cost; when travel by steamship across the ocean is as far superseded as the ox cart was seventy-five years ago for travel across the prairies; when the war airships have so completely supplanted the old battleship as the gatling gun has superseded the bow and arrow, we can hardly realize that this tremendous transformation, penetrating every department of civilized life, has taken place within the last fifty years. In the bitter struggle which raged between the railroads and the aircraft companies from 1934 to 1940 and even down to 1942 when the great A. & P. Rwy. went out of existence every attack that ingenuity could devise was resorted to by both sides. The decision in the Burnes case came in 1936 when the fight between the railroads and the airship companies was at its height and suggested a weapon that was eagerly seized and viciously used. The railroads were the inspiration of practically every suit of trespass that was brought, and whenever a property owner friendly to the railroad interests was found over whose land a line of aircraft operated he was made a plaintiff in an action of trespass. There was no limit to the number of actions that land owners could bring, since each passage of the airship constituted a separate trespass. At first the only result to be gained by the railroad was the purely negative one of impairing the finances of the airship companies by making them pay the costs of the almost inexhaustible supply of litigation. The effect of this can be estimated when in the city of St. Louis alone something over 7,000 judgments were given against airship companies in the year 1939 and the costs in each case averaged about \$50.

But this litigation although successful was found to be slow in effecting the ultimate result aimed at and accordingly we find the railroad attorneys looking around for some other line of legal procedure that would more effectually and speedily hamper the operations of the air companies. They hit upon the design of resorting to equity and securing an injunction in behalf of property owners against the operations of air craft over their land.

The leading case on this subject is *Penn. Railroad Co. v. U. S. & Mexico Airobile Company*, 635 U. S. 42, a case arising in the eastern district of Illinois. In the course of an elaborate opinion

the Supreme Court said: "In this case a perpetual injunction was granted restraining the defendant company from operating its air machines over and across the land of the plaintiff company. The evidence conclusively showed that the defendant company operated an air craft for the transportation of persons and freight between the city of St. Louis and the city of Mexico and that its machines to the number of 20 per day passed continuously over the land of the plaintiff. Under the long line of authorities beginning with *Burns v. St. Louis and Chicago Airship Co.* it is clear that defendant is a trespasser. It further appears that the trespass has been and is likely to be continuous. A court of equity will prevent the invasion of the legal rights of another, when it is shown that such right has been repeatedly invaded and is continuously threatened. In No. 4 Pomeroy Eq. Jurisprudence 1357, it is said that injunction is granted to prevent the commission of a tort in such cases because being continuous and repeated the full compensation for the entire wrong cannot be obtained in one action at law for damages and many decisions are cited by the learned author in support of this statement of the law. In the *Debs* case, *In re Debs*, 158 U. S. 564, this court went so far as to prevent by injunction the commission not of a civil tort but of a crime. We are therefore of the opinion that both upon reason and authority the action of the lower court in awarding the injunction was proper and should be affirmed."

The decision did not meet with universal approval, and in some of the state courts a different result was reached. Among such decisions are *O'Brien v. San Francisco and Boston Airoplane Co.*, 924 Mo. 265, *Addicks v. Transatlantic & Pacific Airship Co.*, 24 South Texas 63, *Kanmore v. U. S. & Philippine Aerial Assn.* 76 Honolulu 25.

However, as in most instances, the U. S. courts had jurisdiction because the air companies were foreign corporations, these decisions of the state courts offered no difficulty, and we find that in the spring of 1939 practically every aircraft line of importance was tied up by injunction and in many instances its officers and employees were confined in federal jails for contempt. It looked for a time as if the air companies would have to go out of business or make terms with the railroad. But the air companies saw relief in sight if the power of eminent domain was conferred upon them. The battle was transferred to the legislatures, public sentiment being with the aircraft companies forced the governors of each state to call the legislature in extra session, and in less than two months after the decision was announced the legislatures of 66 states had

promptly passed acts granting to air lines the right of eminent domain.

This relief was at once utilized and whenever an injunction was in force to prevent the operation of airships condemnation proceedings were resorted to and of course the injunction became inoperative.

The value of the property right taken was in most cases found to be nominal. The procedure was not so costly to the aerial companies as their defense to the action of trespass since one suit forever disposed of a landowner and effectually put a *quietus* upon litigation either by trespass or injunction, while there was practically no limit to the number of actions of trespass a land owner might bring. Nevertheless costs in condemnation suits under the common form of assessment of damages by commissioners with an appeal to a jury in every case the costs of which had to be borne by the condemning company, proved burdensome. To avoid this expensive procedure, the air companies induced Congress to pass in 1940, what was known as the Corbin Composite Condemnation Act. Briefly this law provided that any company operating aerial craft and engaged in interstate commerce could file in any United States Circuit Court a proposed route not more than ten miles in width, giving the name of all the underlying property owners and upon paying into court the sum of one cent on account of the damage to each of said property owners the right to use said route would at once vest in the company and all actions legal or equitable by the property owner should be forever barred. The effect of this law would have been to put an end to all legal and equitable proceedings against the aerial companies and relieve them from the necessity of exercising the right of eminent domain against each property owner. Its constitutionality, however, was vigorously attacked in the courts. The test case was *Thompson v. National Fast Air Line*, 832 U. S. 512, in which it was finally held by a divided court of twelve to eleven that the Corbin Act was unconstitutional, since it deprived a property owner of his property without due process of law. This decision, however, was not handed down until 1944, and as at that time the railroads had gone out of existence its practical effect was *nil*. With the collapse of the railroads, suits by property owners ceased. There no longer was any inducement to engage in expensive litigation to protect theoretical rights and to recover nominal damages. We find a few cases reported as late as 1949, but none after that year, and I have not been able to find a single

decision of any of the questions here discussed during the last 25 years. It is truly a closed chapter on aeritime law, a chapter of the greatest importance to the lawyer of the thirty-five years ago, and interesting today to the student of the common law because it presents a situation in which the protection of a merely theoretical legal right was resorted to as the means of destroying the practical value of the greatest invention in the history of the world.