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THE CORRELATIVE INTERESTS OF THE LANDOWNER AND THE AIRMAN

ROBERT KINGSLEY and CARLOS R. MANGHAM*

I.

In the determination of the form in which the laws regulating and governing aerial navigation are to be developed, one paramount difficulty stands yet unsolved, although much has been written concerning it:1 Does the landowner own the airspace above his land in fee so that any interference therewith or invasion thereof is a trespass? If he does not so own the airspace in fee is there any ownership in him whereby he might declare flights over his land a trespass, or does the airman have a right of unrestricted flight over private property? These and their many kindred questions are all rooted in the involved problem of the application by our modern courts of the maxim *cujus est solum ejus est usque ad coelum.* A definite judicial determination of the extent to which this ancient maxim is to be applied today is yet to be made, although considerable judicial comment may be found.2

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†Part I is mainly by Mr. Mangham; Part II mainly by Mr. Kingsley.


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That the maxim, which may be translated freely as “He who owns the soil, owns up to the heavens and down to the depths of the earth,” had its origin in Roman Law seems generally to be agreed, but regardless of its place of origin, the fact of its spread into the judicial systems of practically all of the more important countries of the world cannot be doubted. It would seem that the first mention of the maxim in the English Common Law is to be found in Coke on Littleton, wherein it is said, apparently speaking of what the writer considered to be a well settled rule:

“And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things up to heaven: for *cujus est solum ejus est usque ad coelum*, as is holden 14 H. 8. fo. 12. 22 Hen. 6, 59. 10 E. 4. 14. *Registrum origin* and in other books.”

Through this introduction into the common law, the maxim has found a limited survival in the codes of the American States, a notable example of which is the California Civil Code, Section 892, wherein it is said:

“The owner of land in fee has the right to the surface and to everything permanent situated beneath or above it.”

It should be noticed that this statute does not say that the land-
owner also owns the airspace in fee, but only that he has "the right . . . to everything permanent situated . . . above it [the surface]." There has been no determination of how far this "right" is to be extended, but it is suggested that, under generally accepted rules of statutory construction, it would be entirely possible for a court to hold this statute to be a considerable modification of the *cujus est solum* doctrine—either by emphasizing the use of the word "permanent" and so holding that it gave no rights at all in the *air*, which is supposedly fluid and therefore *impermanent*, but only to permanent structures, or, if this was thought to be too narrow a view, by holding that it gave the landowner only a right of user in a *res* owned by the sovereign power, thus approximating the theory of "effective possession" to be discussed later.

It is clear that a strict application of the doctrine of *cujus est solum* can lead only to a holding that every flight over land, regardless of the height of the flight or of the damage done, is a trespass and remediable as such in the courts, by injunction and/or damages. In many opinions of jurists *(given mostly in the early days of the consideration of this question)* it was stated definitely that this was the case and that the only remedy was by way of constitutional amendment giving the property in the airspace to the States or to the national government. If this is indeed the

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6. Conceivably, of course, it might be argued that the air space was permanent, although the air in the space was fluid, and, therefore, that the term "permanent" in the statute would give a "right" to the space.

7. The leader among those who contended that the doctrine was in force in its strict sense and that any flight whatever over land was a trespass was Major Elza C. Johnson, Legal Advisor to the Air Service (Attached, Judge Advocate General's Department). *Pollock*, Law of Torts, page 219, says: "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..." But compare the statement in a later edition (12th ed. 1923, p. 352): "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." *(Italics added)*

8. In 2 Air Service Information Circular, No. 181, Feb. 26, 1921, pp. 1-14, Major Johnson gives an exhaustive brief of the law which he considers applicable and comes to the definite decision that the owner of the land owns the air space above it "to the heavens" and that the best way in which to provide for aviation is by an amendment to the constitutions, both of the United States and of the various States, giving that right to the government. He says in part: "If the common law rule is recognized, that the space above the earth belongs to the owner of
case, the aviation industry is faced with the problem of gaining definite rights-of-way in some manner. Three possibilities, of varying effectiveness, are offered: (1) by purchase; (2) by condemnation, should the air transport companies be declared to be such public utilities as may be given that power; and (3) by gaining a prescriptive easement of flight. It may be profitable to assume, for a space, that the *cujus est solum* doctrine is applicable in its fullest force and to consider these various remedies open to aviation under its terms.

(1) *Gaining a Right of Way by Purchase:*

The purchase of a right of way over land is the most obvious and probably the most effective, yet from a practical view the most difficult, of any of the suggested methods. The great expense involved is apparent. Men who today are barely conscious of the flight of transport planes over their land would immediately become feverishly interested in obtaining the greatest price possible for such a “wilful and wanton disregard of one of their most sacred rights”. and desert and mountainous country would find a tangible value—all at the expense of an industry already heavily laden with expenses. Another practical difficulty that stands out in the use of such a method is that it does not take care of the individual flyer, but only of the organized element of the industry.

(2) *Gaining a Right of Way by Condemnation:*

The condemnation of an airway over privately owned land clearly is a possible method of avoiding the ownership rights of an individual landowner, but the practical use of such a method is fraught with difficulties. The power of an aviation company

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to resort to condemnation proceedings depends entirely on the statutes of the particular State in which it is sought to be exercised and the extension of those statutes to the aviation industry. Hence, it is beyond the limits of this article, since the question will always be one of local statutory interpretation, not capable of a fixed set of rules.\textsuperscript{10} It might be of interest, however, to point out a few of the most apparent objections to such proceedings: (a) they would be of as great, if not even greater, cost to the air company as would be an outright purchase; (b) they would require a great length of time; and (c) they would take care only of an air company which maintained some form of regular flights and would be of no benefit to (nor even available to) the smaller companies running largely on the "joy hop" basis or to the individual owner-pilot. The only real benefit in the use of the power of eminent domain to gain a right of way through the air would be in forcing an owner to give way where he refuses voluntarily to do so.

(3) \textit{Gaining of a Right of Way by Prescription:}

Generally it has been said that the gaining of an easement\textsuperscript{11} of flight through the airspace over land is not possible. It will be of interest and benefit, therefore, to examine the elements required by the doctrines on the gaining of easements by prescription and their applicability to flights over privately owned land.

The general rule that an easement of passage may be gained when there is an open, notorious, adverse user of the claimed right for the necessary period of time is too well settled to require citation of authority. The requirements are, however, not so simple as the general principle would indicate. For one thing, the user must be without interruption by the landowner. It follows, therefore, that if the landowner does interrupt the exercise of the claimed user the period of time necessary to run in order that the easement be gained is interrupted automatically. What is

\textsuperscript{10} There would seem to be no constitutional objection to the legislative grant of such a power to regular transport lines—at least to such as are common carriers. It is unquestioned that the power of eminent domain may be granted to common carriers by land, \textit{a fortiori} it may be granted to common carriers by air. The only problem, then, is, as suggested in the text, whether existing statutes may be interpreted to cover carriers by air or whether express legislation is necessary.

\textsuperscript{11} The "easement" referred to would, normally, be an easement in gross. It has been suggested by one writer that the term "servitude" (as used in \textit{Swetland v. Curtiss Airports Corp.}, footnote No. 18) is preferable as it is a broader term, including profits. Consult: Note, 3 \textit{Journal of Air Law}, 293, 299-300 (1932). The common law term is felt, however, to be sufficiently accurate for the purposes of the present discussion.
sufficient to constitute such an interference by the landowner presents other questions. It is clear that a physical interruption will suffice and it is equally well settled that a sufficient interruption is present when the landowner resorts to the courts for protection of his property interests. In some jurisdictions, by statutory authorization, the posting of signs forbidding the exercise of the user will be held sufficient to prevent the gaining of the easement, but many States (California included) have no such statute. It is but logical then, that if an interference with the user will prevent its operation, there must be some opportunity for the landowner to make such an interference. If the landowner has opportunity neither to prevent the interference with his property rights by physical means nor to take legal action to that end the period necessary for the easement will not run until such opportunities are presented.

Another major requirement of the doctrine of easements is that the use be of the same nature and over the same place. This requirement may best be illustrated by reference to the gaining of a “path easement” over another’s land. The use must be over the same place at all times; it cannot be over one part of the land today and over another tomorrow. If the use is by walking over the land this particular type of use must be maintained; driving over the same land will not suffice.

From this it follows that, after the easement has been gained by use, it is limited to that use and to the extent (in a physical sense) thereof. To repeat the example just given, if the easement gained was for walking over the land in a particular place, driving over the same place will be actionable. The “burden” cannot be increased. It is true also that the right to the exercise of the easement is limited to the physical scope of the easement; a divergence from the physical bounds, in any direction, is a trespass.

With these general requirements of the doctrine of easements

12. *Lehigh Valley Ry. v. McFarlan*, 31 N. J. Eq. 706 (1879), holding that mere verbal protests are not sufficient to stop the running of the period, but that the interference with the owner’s property must be such that the owner is capable of either physically or legally preventing it.

13. *Sturges v. Bridgeman*, L. R., 11 Ch. Div. 852 (1879), probably the leading case, holds that when there is neither an opportunity physically to prevent the trespass nor an opportunity to take legal action based thereon the statutory period will not run so as to give an easement.

14. Probably the leading cases holding that the scope of the easement is to be determined by the user during the running of the period are: *White v. Grand Hotel*, 1 Ch. 113 (1912); *Gray v. City of Cambridge*, 189 Mass. 405, 76 N. E. 195, 2 L. R. A. N. S. 976 (1905).
in mind, their application to the gaining of an easement of flight may be considered. It is obvious that a landowner cannot prevent the flight over his land by physical means. In those States which consider posting to be sufficient interference by him it is not probable that those statutes would be held to be applicable to a flight over the land, since by no practical means could they be brought to the actual notice of the aviator. This, then, leaves the land owner to his “interference” by legal action and, since it is assumed that the doctrine of *cujus est solum* is here in force, he could so interfere. The immense practical difficulties however are clear. The expense involved in bringing a trespass action based on a flight at, say, a thousand feet or more altitude, and in which nominal damages only would be recovered, would, as a practical matter, deter the average landowner from this form of interference with the user. It is clear, however, that, under the *cujus est solum* doctrine, such action would be possible and thus is met the requirement that the landowner have some way of preventing the user.

The principal objection to the gaining of an easement of flight by prescription has been under the second requirement of the doctrine, i.e., that the user be of the same nature and in the same place. It has been said that an airplane could not meet this requirement since its path of flight would vary daily, sometimes being higher or lower than at other times and sometimes being off to one side of the “regular” path of flight. This latter part of the objection is not hard to meet however, since in any “path easement” the user has varied somewhat from time to time, it not being humanly possible for one to step in exactly the same place on each trip over the path. While it is true that one flight

15. Compare: “... it seems incredible that the Legislature would expect ‘printed notices’ posted upon the land to be seen by an aviator in rapid flight over a piece of land, or that he could or would descend, alight, ascertain property lines, and then look for notices in order to determine (if not already a trespasser and arrested as such) whether he was at liberty to proceed or could go on farther—than to jail, perhaps.” Commonwealth v. Nevin and Smith, 2 Pa. Dist. & Co. Rep. 241, 242, 1928 U. S. Av. R. 39, 41 (1922).

A question is presented however as to the possibility of giving constructive notice by “posting” such a notice through recording it. There apparently are no cases on this point and it is likely that the courts would be largely swayed by the equities involved rather than by any technical construction of the posting statutes.

16. “In the nature of things the flights of aircraft must vary with wind and land. No prescriptive right to any particular way of passage could be acquired in these conditions.” Smith v. New England Aircraft Co., supra, and consult the quotation in footnote No. 9, supra.
may be several feet from that of the prior trip, yet, in proportion
to the size of the mechanism making the user, the difference is no
greater than is incidental to the gaining of a right of way by direct
contact with the earth. Under the modern methods of flight, in
use by at least the larger air companies, the path of the flight
in fact varies but little on one day from its place on the prior
trips and it is submitted that, in so far as any horizontal variation
is concerned, such a transport company could meet the requirement
that the user be in the same place.

The case is not so clear, however, when the variation is be-
tween the paths of flight in a vertical plane. The question is
presented for the first time, since in cases heretofore the easement
always has been gained by some actual contact with the ground
(with the possible exception of the cases in which some physical
thing has been suspended over the ground—where, also, of course,
there was no vertical variation). It is again true, however, that,
at least in the case of the larger transport companies, the variation
is not so great as to be material, since the elevation of the flights
over particular property is generally fixed (particularly with refer-
ence to property adjoining airports—where the question would
have its greatest practical importance). It is again submitted that
it is possible for these air companies to meet this requirement, at
least from a practical view. In strict legal theory also it would
seem that this is possible since, in so far as the landowner
is involved, the flight on one day at a lower or a higher
elevation than is usual imposes no greater burden or deprivation
of rights when it is over the same piece of his land. The solicitude
of the law for the landowner is not to him in his capacity as a
landowner—the protection offered is to the land and to his rights
therein. Where the act, as here, would not result in any greater
injury to the land it is probable that the courts would hold it not
to be a material deviation from the usual "path." It is also likely,
however, that the courts would impose a restriction on the vertical
deviation somewhat based on its reasonableness, thus affording
the landowner protection at least from flights at greatly different
altitudes and with no intention to maintain any definite elevation.

The last major requirement—that the user be limited to the
extent and scope of the user during the period and for which
it was gained—can be met by the aviation companies, but prac-
tical difficulties would arise in its maintenance. Would a user
gained by the smaller "open" type planes be sufficient to allow a
subsequent user by the large modern transport planes? Would an easement gained by one or two flights a day allow an increase in the number of flights a day? Would an easement gained for transport flying allow the use of "freight" planes? The answer to these and the many kindred questions depends almost entirely upon the determination of whether the new use was an added burden on the landowner. It is probable that the courts would resort to the well settled rule that where there is a change only in the degree of the use and not in its nature there is no violation of the right by the user thereof and no action will lie.\textsuperscript{17} If the courts did accept this test the result would seem to be indicated that so long as the use was in the nature of "flights" the increased number thereof or the use of a different type of plane would not cause the loss of the easement.

It is submitted that the gaining of an easement of flight is both physically and legally possible,\textsuperscript{18} but the question of its advantages is yet unsettled. Here the practical side of the question becomes of importance and in effect would seem to make the gaining of an easement rather improbable to any but the well established and regularly operated air transport companies. Here again is found the objection that individual owner-pilots, or the smaller companies, cannot take advantage of the method for the use of their planes. As a further disadvantage is the fact that the company would be bound to the fixed path, as in the case of a condemnation or even of a purchase of a right of way, with the added fact that the landowner would be quite likely to harbor an ill feeling for the company which would not be present in either of the other situations. The great length of time necessary to gain an easement and the possibility of being sued (with its dual-natured consequences) are still other objections to the use of this method to gain a right of flight. It would therefore seem that although the easement method is open to the aviation industry its desirability is questionable.

\textbf{(4) Gaining a Right of Way by Constitutional Amendment:}

A fourth way of gaining a right of flight has been suggested by Major Elza C. Johnson to lie in a constitutional amendment

\textsuperscript{17} Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519 (1876).
\textsuperscript{18} "There may be such a continuous and permanent use of the lower stratum which he [the surface owner] may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface." Swetland v. Curtiss Airports Corp., 55 F. (2d) 201, 203 (C. C. A. 6th Cir. 1932), per Moorman, C. J.
whereby the individual property right is subjected to the great public necessity and given over to the government, both state and national, and by them to regulated use by airplanes.\textsuperscript{19}

The adoption of such an amendment would certainly allow the airmen a right of flight over any and all land, but the practical impossibility of its adoption is obvious.

II.

THE APPLICABILITY OF THE \textit{CUJUS EST SOLUM} DOCTRINE

So far in this article it has been assumed that the \textit{cujus est solum} doctrine was in full force, so that any flight over private property was a trespass, and the consequences of that rule have been examined briefly. It remains, however, to consider the validity of that assumption. Even at the risk of some repetition, it may prove practicable to examine, first, whether the doctrine has been definitely embodied in our law—either by court decision or by legislative action—and then, and as a separate proposition, whether it is functionally the most desirable rule.

(1) The Extent of Judicial and/or Legislative Approval:

(a) Judicial Approval:

The application of the \textit{cujus est solum} doctrine may arise in two general classes of cases: (1) where the plaintiff declares in trespass and asks damages and (2) where the plaintiff asks for an injunction against the flights (with or without a prayer for damages already suffered).

Perhaps a brief résumé of the law of trespass will prove of benefit. At common law, every man's property was deemed to be enclosed (if not by a visible, then by an invisible, fence), and every unwarranted invasion thereon necessarily carried some damage for which the trespasser was liable.\textsuperscript{20} An entry on land in the possession of another was deemed a trespass without regard to the amount of force used\textsuperscript{21} and the law presumed, conclusively, that damage resulted\textsuperscript{22}—hence a plaintiff who makes out a trespass

\begin{itemize}
  \item \textsuperscript{19} Consult, supra, footnote No. 8.
  \item \textsuperscript{20} Monroe v. Cannon, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439 and note (1900).
  \item \textsuperscript{21} Mosseller v. Deaver, 106 N. C. 494, 11 S. E. 529, 19 Am. St. Rep. 540, 8 L. R. A. 537 (1890).
  \item \textsuperscript{22} Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776 and note (1855); Whittaker v. Stanwick, 100 Minn. 386, 111 N. W. 295, 117 Am. St. Rep. 703 and note, 10 Ann. Cas. 528, 10 L. R. A. N. S. 921 (1907).
\end{itemize}
is always entitled to some damages although they may be only
nominal.

Applying these rules under the \textit{cujus est solum} doctrine the
courts have held the following acts to be trespasses: (1) to
thrust an arm into the space over a neighbor’s land,\(^{23}\) (2) for a
horse to kick over adjoining land,\(^{24}\) (3) to allow branches to over-
hang another’s land,\(^{25}\) (4) to string a wire over land of another,\(^{26}\)
and (5) to allow eaves, cornices and the like to extend over land.\(^{27}\)

It will be noticed that in all of these cases the only interests
in air space which have been protected by the courts have been
those in space immediately adjacent to and connected with the
soil. No decisions prior to the present era have been found hold-
ing that it is an actionable wrong against a landowner to enter
upon the air space at a considerable height from the
ground,\(^{28}\) although this may be explained by the fact that at the time of
most of these cases even the possibility of such an invasion was
still within the future.

In the cases dealing directly with flights as trespasses, it is
submitted that no decision will be found holding squarely that
every flight, \textit{regardless of altitude}, is a trespass. The cases are,
as yet, few—the important ones, in fact, being only four in number, namely: \textit{Commonwealth v. Nevin and Smith,\(^{29}\) Johnson v. Curtiss
Rep. 250 (1902).}
\footnote{24. \textit{Ellis v. Loftus Iron Co.}, L. R., 10 C. P. 10 (1874).}
\footnote{25. \textit{Grandona v. Lovdal}, 70 Cal. 161, 11 Pac. 623 (1886).}
866 (1902); \textit{Butler v. Frontier Tel. Co.}, 186 N. Y. 486, 79 N. E. 716, 11
Rep. 298 (1897); \textit{Wilmarth v. Woodcock}, 58 Mich. 482, 25 N. W. 475
(1885); \textit{Murphy v. Bolger}, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309 (1888).
Consult, also: \textit{Portsmouth Harbor Land \& Hotel Co. v. United States},
where the injury complained of was shooting across the plaintiff’s
land.}
\footnote{28. No argument would seem to be needed to show the inapplicability
of such cases as \textit{Guille v. Swan}, 19 Johns (N. Y.) 381, 10 Am. Dec.
234, 1928 U. S. Av. R. 53 (1822), and similar cases, where there was actual
injury to the soil and its crops, either by the aeronaut or by persons whom
he had caused to come upon the ground. The case of \textit{Neiswonger v.
Goodyear Tire \& Rubber Co.}, 35 F. (2d) 761, 1929 U. S. Av. R. 96 (D. C.
Ohio 1929) presents such a situation. Clearly these cases furnish no
analogy for the situation in which there is no contact by anyone or by
anything with the soil.}
Northwest Airplane Company,\textsuperscript{30} Smith v. New England Aircraft Company,\textsuperscript{31} and Swetland v. Curtiss Airports Corporation.\textsuperscript{32} Since the pertinent cases are so few, and since so much must turn on the exact language used with relation to the particular facts involved, it may be worth while to examine rather closely the opinions involved.

In Commonwealth v. Nevin and Smith\textsuperscript{33} the defendants were prosecuted for the violation of a criminal statute against "wilfully entering upon" posted land. The decision held that there was no violation—not, however, on the theory that no civil trespass had been committed, but rather on the idea that the statute covered only trespass on the land.\textsuperscript{34} In any event, the flight involved was at altitudes between 50 and 350 feet.

In Johnson v. Curtiss Northwest Airplane Company\textsuperscript{35} an airplane belonging to the defendants had fallen upon plaintiff's property. The latter sued asking for damages and for an injunction against any flight over his property, regardless of altitude. The decision on the issue of damages is not reported, but it is to be inferred that they were allowed.\textsuperscript{36} On the question of an injunction, the court referred to the cujus est solum doctrine and admitted that "if this is a fixed, unalterable rule of property, not subject to modification or exception, then the plaintiff's contention must be upheld."\textsuperscript{37} The court, however, then went on to say:

\textsuperscript{30} 1928 U. S. Av. R. 42 (Dist. Ct., Ramsey Co., Minn. 1923).
\textsuperscript{32} 41 F. (2d) 929, 1930 U. S. Av. R. 21 (D. C. Ohio 1930), modified, 55 F. (2d) 201 (C. C. A. 6th Cir. (1932). The district court opinion is discussed in: 27 Va. L. Rev. 77 (1930); 40 Yale L. Jour. 131 (1930); 15 Marq. L. Rev. 47 (1930); 9 Chicago-Kent L. Rev. 48 (1930); 16 Corn. L. Quart. 119 (1930); 1 Air L. Rev. 489 (1930); 29 Mich L. Rev. 68 (1930); 34 Law Notes 141 (1930); 6 Wis. L. Rev. 47 (1930); 30 Col. L. Rev. 1213 (1930); 9 Texas L. Rev. 240 (1931); 15 Minn. L. Rev. 318 (1931); 2 JOURNAL OF AIR LAW, 82 (1931). The circuit court opinion is discussed in: 3 JOURNAL OF AIR LAW, 293 (1932); 17 Cornell L. Quart. 679 (1932).
\textsuperscript{34} "The court is of opinion that the Act of April 14, 1905, P. L. 169, is inapplicable and does not warrant the present prosecution. Hence, any further discussion of the case is deemed unnecessary." Commonwealth v. Nevin and Smith, supra. In 2 Wis. L. Rev. 58 (1922), there is a note of another case (unreported) from Punxsutawney, Penn., to the same effect.
\textsuperscript{35} 1928 U. S. Av. R. 42 (Dist. Ct., Ramsey Co., Minn. 1923).
\textsuperscript{36} Consult the last paragraph of the quotation from the case, quoted infra, at footnote No. 38.
\textsuperscript{37} Johnson v. Curtiss N. W. Airplane Co., supra.
"This rule, like many aphorisms of the law is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development, by the Courts of England, long prior to the American revolution, as a comprehensive statement of the landowner's rights, at a time when any practical use of the upper air was not considered or thought possible, and when such aerial trespasses as did occur were relatively near to the surface of the land, and were such as to exercise some direct harmful influence upon the owner's use and enjoyment of the land.

"A wholly different situation is now presented. . . .

"The air, so far as it has any direct relation to the comfort and enjoyment of the land, is appurtenant to the land, and no less the subject of protection than the land itself, but when, as here, the air is to be considered at an altitude of two thousand feet or more, to contend that it is a part of the reality as affecting the right of air navigation, is only a legal fiction, devoid of substantial merit. Under the most technical application of the rule, air flights at such an altitude can amount to no more than instantaneous, constructive trespass. Modern progress and great public interests should not be blocked by unnecessary legal refinements. . . .

"Failure to sustain the plaintiff's contention, relative to upper air trespasses, does not deprive him of any substantial rights or militate against his appropriate and adequate remedies for recovery of damages and injunctive relief, in cases of actual trespass or the commission of a nuisance. . . ."38

The court then referred to a Minnesota statute prohibiting stunt flying at an altitude of less than 2000 feet and enjoined the defendant from making any flights at an altitude less than that.89

In Smith v. New England Aircraft Company, plaintiffs were the owners of a country estate adjoining which defendants had established an airport, from which considerable flying was done. The plaintiffs alleged that the maintenance of the airport was a nuisance and that the flights over their land were both nuisances and trespasses. An injunction was sought, but no damages were asked for. The case was referred to a Master who found as evidentiary facts: (1) that the plaintiff's residence was situated over 3000 feet from the boundaries of the airport and over 4000 feet from the hangars; (2) that there had been few flights over plaintiff's residence and none at less than 500 feet; (3) that, in the process of taking off and/or landing there had been a considerable number of flights over that part of plaintiff's land immediately adjoining the airports and that these flights were at altitudes as low as 100 feet; and (4) that the part of plaintiff's property over

38. Ibid.
39. As to the propriety of the use of such statutes in fixing the limits of "effective possession," consult, infra, at footnotes Nos. 69-71.
which these latter flights took place was covered with dense brush. As ultimate facts he found: (1) that the airport was not a nuisance; and (2) that the flights over plaintiff's property were not, under the circumstances, a nuisance. Deeming the question of trespass to be one of law, he declined to rule thereon. The trial court, on this report, refused an injunction.\(^{41}\)

On appeal to the Supreme Judicial Court of Massachusetts, the case was considered "solely on the ground of trespass and the nuisance resulting from its continuance." The plaintiffs expressly denied any attempt to rely on the *cujus est solum* doctrine in its broadest extent, but rested on the proposition that: "The air space which is now used or may in the future be used in the development of the underlying lands is the private property of the landowner, in which he is entitled to the exclusive use and control."\(^{42}\) The court said:

"The bald question in the case at bar is whether aircraft, in order to reach or leave an airport, may of right fly so low as one hundred feet over brush and woodland not otherwise utilized, against the protest of the owner. Suggestions as to flight of carrier pigeons and the practice of falconry over private lands seem to us too remote and distinct from the mechanical flights of high-powered aircraft to be helpful in ascertainment of rights in the case at bar. . . . In discussing this subject it is said in Pollock on Torts, 13th ed., p. 362: '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.' Even if this suggestion of extreme limit be adopted as the test, namely, that 'the scope of possible trespass is limited by that of possible effective possession,' the plaintiffs seem entitled to assert that there have been trespasses upon their land. It is general knowledge that, while not extremely common in this vicinity, trees not infrequently reach heights in growth considerably in excess of one hundred feet . . . . It is found by the master that the plaintiffs have undertaken to reforest a part of their estate by planting Norway pine and spruce. . . . The test suggested is not actual but possible effective possession. It is not decisive that the plaintiffs do not at present make that possible effective possession a realized occupation. They complain of invasion of property rights . . . . The facts show intrusion upon the land of the plaintiffs by flight of aircraft at these low altitudes by noise and by the presence of the aircraft and its occupants. These interferences create in the ordinary mind a sense of infringement of property rights which cannot be minimized or effaced. . . . The combination of all these factors seems to us, under settled principles of law, after making every reasonable concession to air navigation as commonly understood and as established

\(^{41}\) *Smith v. New England Aircraft Co.*, supra.

\(^{42}\) Italics added.
to constitute trespass to the land of the plaintiffs so far as concerns the take-offs and landings at low altitudes and flights thus made over the land of the plaintiffs 'at altitudes as low as one hundred feet.'

The court then, however, proceeded to inquire whether, admitting that there were trespasses, they should be enjoined and decided (on the basis of the doctrine of balancing of conveniences) that they should not, but that plaintiffs were entitled only to damages (which would be purely nominal).

The facts of the case of Swetland v. Curtiss Airports Corporation were in many respects similar to those of the Smith case. The plaintiffs owned a large country estate bordering upon defendants' airport. Their property was all improved and the residence was directly across the road from the center of the airport and about one-quarter of a mile from the main scenes of defendants' activity. Plaintiffs sought an injunction against the operation of the airport and against any flying over their property. The federal District Court for Ohio (Hahn, J.) found that certain acts of the defendants (causing dust to be blown onto the plaintiffs' land and dropping circulars thereon) were nuisances and granted an injunction against them. Judge Hahn then turned to the matter of flights over plaintiffs' property and said:

"That the landowner's rights are not limited to the surface of the earth, but extend into the space above it, is settled by many well-considered cases. The Plaintiffs rely strongly upon the ancient maxim: Cuius est solum ejus est usque ad coelum, which has been frequently quoted and reiterated in the opinions of the Courts and in legal literature generally for many generations. Certainly the possible rights of the landowner as to the air spaces over his land could not be more broadly asserted. The venerability of this maxim, its frequent repetition, and the high standing of many of those who have relied upon it, not only warrant, but call for, a careful consideration of its origin and application in adjudicated cases."

He then proceeded to examine the early English and American cases applying the maxim—cases of the type already mentioned—and continued:

"The cases above referred to are those usually cited in support of the proposition that a landowner has the exclusive right to occupy all of the

44. The appellate court apparently did not notice that it probably would have been beyond the power of the trial court to have granted damages, since they were not asked for.
47. Supra, at footnotes Nos. 23-27.
landowner and airman

air space above his property to an indefinite extent. There doubtless are other cases along the same line, but the cited cases fairly show the trend of the decisions in the aspect here involved. 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 normally be 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 points 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. 48

Judge Hahn then referred to the argument that the latin term "Coelum" did not mean "heavens" but only the airspace close to the earth, 49 quoted several text writers on the general subject and concluded:

"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. The Courts have never critically analyzed the meaning of the maxim, and there is much doubt whether a strict and careful translation of the maxim would leave it so broad in its signification as to include the higher altitudes of space." 50

He then proceeded to examine the national and state statutes and legislation—especially the height of flight rules—decided that they fixed a stratum of 500 feet above which flying over plaintiff's property was lawful and within which it was unlawful and enjoined all such flights at an altitude of less than 500 feet. 51

This decision was appealed to the Circuit Court of Appeals for the Sixth Circuit. That court held that any operation of the airport, as contemplated by the defendants at the time of trial, would constitute a nuisance and, accordingly, modified the limited injunction as entered by the district court so as to cover all operation of the port under the existing plan. 52 The judges, however, took occasion to express their views on the issue of trespass. Mr. Circuit Judge Moorman, speaking for the majority of the court, first referred to the cujus est solum maxim, rejected the argument that the early cases citing it were decided on a theory of nuisance, but pointed out that

49. Consult, supra, footnote No. 3.
51. As to the propriety of such use of the height of flight rules, and similar regulations, consult, infra, at footnotes Nos. 69-71.
"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 cannot be done consistently with the traditional policy of the courts to adapt the law to the economic and social needs of the times . . . Lacking any controlling precedent, we resort to a consideration of the plaintiffs' rights in relation to the necessities of the period."

Looking at the problem of right of flight, then, purely as a new situation to which old rules are to be applied, the court declared:

"From that point of view we cannot hold that in every case it is a trespass against the owner of the soil to fly an aeroplane through the air space overlying the surface. This does not mean that the owner of the surface has no right at all in the air space above his land. He has a dominant right of occupancy for purposes incident to his use and enjoyment of the surface, and there may be such a continuous and permanent use of the lower stratum which he may reasonably expect to use or occupy himself as to impose a servitude upon his use and enjoyment of the surface . . . As to the upper stratum which he may not reasonably expect to occupy, he has no right, it seems to us, except to prevent the use of it by others to the extent of an unreasonable interference with his complete enjoyment of the surface. His remedy for the latter use, we think, is an action for nuisance and not trespass. We cannot fix a definite and unvarying height below which the surface owner may reasonably expect to occupy the air space for himself. That height is to be determined upon the particular facts of each case."

The court then concluded that, under the facts of this case, the defendants had not flown over the plaintiffs' property within the zone of "expected use" and, accordingly, denied an injunction against their flights.

Mr. Circuit Judge Hickenlooper concurred (on the ground that there was a nuisance shown), but said:

"I . . . cannot concur in that portion of the majority opinion which seems to me to create a distinction between flights in the upper and lower strata, founded upon reasonable expectation of use, and to hold that, although a single flight over the plaintiffs' land may not constitute a trespass, such flights may be so continuous as in the aggregate to do so . . . It seems to me obvious that, if the aggregate of a large number of flights constitutes a trespass, it must be because each of said flights is itself a trespass, and that a trespass, in its technical sense, cannot be made up of a series of acts no one of which standing alone, amounts to such trespass."

53. Ibid.
54. Ibid.
55. Ibid, p. 204-5.
These, then, are the cases which may be considered as bearing on the question of trespass *vel non*. What may be reasonably deduced from them? Professor Edward S. Thurston, as Reporter on this subject for the Restatement of the Law of Torts for the American Law Institute has thus attempted to state the rule in his tentative draft:

"Section 1002. Trespass May Be Upon, Beneath, or Above the Surface of the Earth.

"A trespass on land may be committed by entering or remaining
"(a) on the surface of the earth, or
"(b) beneath the surface thereof, or
"(c) above the surface thereof.

"Comment to Clause (c):
"f. An unprivileged entry, or remaining in the space above the surface, is a trespass.
"A temporary invasion of the airspace by aircraft, while traveling for a legitimate purpose at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air column above it, is privileged."56

Does this correctly state the existing common law? It is respectfully submitted that it does not.67 Professor Thurston illustrates his rule by a number of examples. Four are of the type of the early *cujus est solum* cases already discussed.58 Two others are worth quoting in full:

"5. A flies in an airplane over B's pasture within a few feet of the surface thereof. B's cows are, or are likely to be, frightened and stampeded by the proximity and noise of the airplane. A is a trespasser ...

6. A flies in an airplane over B's house within two hundred feet of the roof, thereby causing annoyance and fear of injury to B and the other occupants of B's house. A is a trespasser."59

Admitting that these illustrations are supported by the authorities cited to sustain them,60 yet it is submitted that they do not sup-

57. It is only fair to point out that this section of the restatement and the discussion of it by the Institute antedate by almost a year the last opinions in *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C. C. A. 6th Cir. 1932).
port the extreme rule announced in the Section and Comment to which they are appended. Not only are the situations given such as would probably be nuisances (at least if continued), but also they are such as would constitute trespasses even under the doctrine of "effective possession."

However, the accuracy of the Restatement Section is by no means determinable by the relevancy of these illustrations. The question remains: Do the decided cases support the rule as announced? Professor Thurston has thus classified what he regards as the possible ways of dealing with the problem of trespass in the air:

1. The absolute *cujus est solum* doctrine, under which all flights are trespasses;
2. A complete rejection of that doctrine—a view that "there is no ownership and consequently there can be no occupation or possession of the air column which is superimposed upon the surface"—under which no flight would be a trespass, although it might be a nuisance;
3. The doctrine of effective possession; and
4. The view announced in the Restatement: "... that an invasion of the column of air above the surface of another's land is, unless privileged, a trespass on the land. If, however, a person invades the air column at a reasonable height above the surface for purposes of travel (or for any other legitimate purpose) he is privileged in so doing. If he flies near the surface, so near as to interfere with the reasonable enjoyment of the surface, or if his flight is for an illegitimate purpose, he is, ... a trespasser."

We have seen that all the cases join in rejecting the first of these views, and, likewise, that the decisions of two courts reject the second. As between the two remaining—the third and fourth—which, if either, is the

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[1929 U. S. Av. R. 96]. (Defendant's dirigible balloon flying close to plaintiff's land so frightened plaintiff's horses that they ran away, injuring plaintiff.)

"Illustration 6 is upheld by the language of the Smith and Swetland cases cited above." Torts Restatement (Tentative Draft No. 7, 1931), p. 51.


best expression of the present state of judicial authority? In none of the cases is there any mention of a "privileged" trespass by the aviator; all treat the question as a simple issue of trespass vel non—even the Smith case, although it denied an injunction, impliedly inferring that an action for nominal damages would have lain. As an attempt to state the substance of existing case law, then, the Restatement rule is inaccurate.

What is the true view? The cases all agree that some invasions of the airspace will be trespasses; all agree that not all are such; all unite in distinguishing the two groups by means of a horizontal division of the air space into strata—the width of these strata being dependent on the use presently or expectedly to be made of the surface. Impliedly, also, the authorities would seem to infer that a future change in this surface use would vary the extent of the strata. If this attitude is to be put into the technical terminology advocated by Professor Hohfeld, the following is suggested as an analysis:

1. The landholder owns the surface (in the usual sense of the term "ownership");
2. He has a power to reduce to possession the over-lying airspace and the aviator is under the liability of having this power exercised against him;
3. The surface owner will be deemed to have so reduced as wide a band of air space as is reasonably necessary to the use which he is now making, or in the immediate future may contemplate making, of the surface;
4. As to the air space so reduced to possession, the land-


66. Professor Thurston refers to the effective possession doctrine as follows: "... the height of the column of air owned by the possessor of the surface would necessarily vary with the use of the property. If a tall building were erected on A's land, A certainly would own the column of air to the height of the building and for some little distance above. On the other hand, if land were used to grow a crop, the column of air necessary to the possessor's enjoyment would naturally be very shallow. If land were used to pasture cattle, the column of air would have to be somewhat higher. This is because the passage of airplanes close to the surface would doubtless frighten the cattle. Again, if one were to give a play or concert in an open air theatre the column of air would have to be of considerable height to prevent such noise as would constitute an interference with the enjoyment of such use by the possessor of the land." Reporter's Explanatory Notes, Torts Restatement (Tentative Draft No. 7, 1931), pp. 52-53. Prof. Thurston refers to this possibility of variance as "a possible difficulty." The writer can see no reason why it should be.
owner has a *right* to exclusive occupancy, which the aviator is under a *duty* to observe;

(5) As to the air space not so reduced to possession the landowner is under a *disability* to prevent flights and the aviator enjoys a *correlative* immunity; and

(6) The *power* above mentioned is continuing and residual and is not exhausted by any prior exercise, but the landowner retains the *privilege* of exercising it in the future, and the aviator has *no-right* to prevent such future reductions to possession and their consequent diminutions of his *immunity*.

This, it is submitted, is the idea underlying the few existing cases; and this, it is submitted also, is what is implied in the doctrine of so-called "effective possession."

(b) **Legislative Approval:**

So far, this portion of the article has proceeded on the assumption that the problem was unaffected by legislative action. It is thought that this is, in substance, correct. The reported cases have arisen in States having no express statutes on the point, but three of the opinion have attempted to draw conclusions from statutory material.67 This mode of procedure has taken two forms: (1) Inferences based on the existence of state and federal legislation regulating aviation; and (2) more definite rules based on statutes and regulations covering height of flight. Neither, it is thought, afford proper bases for education.

If it were true that, apart from statute, the landowner owned "to the heavens" it would seem clear that legislation purporting to authorize the intrusion by others on that property would be unconstitutional.68 Statutes regulating the height of buildings, and similar legislation, are scarcely in point. Such examples of the police power are entirely negative in their application—they restrict the actions of the landowner, but they do not purport to create interests in others over the use prescribed. And it is ex-


68. It would extend this article unduly to attempt to collect here the applicable authorities. For a good expression of the view, consult Maj. Johnson's discussion in 2 Air Service Information Circular, No. 181, Feb. 26, 1921, pp. 1-14, cited, supra, in footnote No. 8.
exactly this which legislation authorizing flight through "owned" air space would do. Of course, if the analysis suggested above is correct, then these and similar statutes serve a function in determining the extent of the aviator's immunity. For reasons quite apart from aviation, they restrict the landowner in the freedom of exercise of his power to reduce air space to possession and, as a consequence of the non-exercise of this power, the aviator's pre-existing immunity remains unimpaired.

The argument that the question of trespass vel non is determinable by height of flight rules was rejected by the Circuit Court of Appeals in the Swetland Case. In fact, the arguments against the applicability of this regulation were stated and recognized by two of the courts which utilized it. The regulation read:

"Exclusive of taking off from or landing on an established landing field—aircraft shall not be flown—(1) Over the congested parts of cities, towns, or settlements, except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1,000 feet. (2) Elsewhere at height less than 500 feet; except where indispensable to an industrial flying operation."

It was urged that this rule made unactionable flights at low altitudes which were parts of take-offs or landings. The Massachusetts court rejected this argument, saying:

"The exceptions . . . do not seem to us to be intended as legislative limitations upon the rights of landowners in the airspace. . . . These legislative exceptions have ample scope for their operation in respect to conduct of pilots and general safety. It would be a strained and unnatural construction to interpret them as designed to authorize interference with recognized property rights."

But this same line of reasoning, it is submitted, is applicable to the regulation as a whole—its purpose is not to fix the relative rights of landowner and airman, but to promote safety by requiring flights (in its own words) "at a height sufficient to permit of a reasonably safe emergency landing."

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69. "We think the question is unaffected by the regulation . . . requiring aeronauts to fly in rural sections at a height not less than 500 feet above the surface, for in our view that regulation does not determine the rights of the surface owner, either as to trespass or nuisance." Swetland v. Curtiss Airports Corp., 55 F. (2d) 201, 203 (C. C. A. 6th Cir. 1932).

70. Air Commerce Regulations, 1928, c.VII, §74 (G).

As has been said, none of the cases arose in jurisdictions which (at least at the times involved) had adopted the Uniform Aeronautics Act. In the jurisdictions which have adopted that Act, there is an attempt at an express legislative declaration on the subject. The Act provides:

"Section 3. Ownership of Space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"Section 4. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such 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 to persons or property lawfully on the land or water beneath. . . ."

It is submitted that this advances the solution of the problem not at all. If, apart from the statute, the landowner "owns" the overlying airspace to infinity, then, for the reasons suggested above, any attempt to transfer rights to aviators would be unconstitutional. If, on the other hand, the surface owner does not have such an ownership of the airspace, then the statute merely expresses the rule which, as we have seen, the courts are working out without it.

In 1932 the Committee on Aeronautical Law of the American Bar Association recommended a new Uniform Aeronautical Code, somewhat modifying the older uniform act. The new Code omits the old Section 3 and, in its first section, contains a substitute for the old Section 4:

"Section 1. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this state, within the 'Navigable Air Space,' as hereinafter defined, is lawful unless at such a low altitude as to interfere with the then existing use to which the land or water or space over the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

"As used in this act, the term 'Navigable Air Space' means air space


73. Supra, at footnote No. 68.

above the minimum safe altitudes of flight prescribed by regulation by the State Aeronautical Commission (or State Administering Officer). Such navigable air space is subject to a public right of air navigation in conformity with the provisions of this act and with the regulations and air traffic rules issued by the State Aeronautical Commission (or State Administering Officer)."

Again, it is submitted, such a legislative declaration would be ineffective, for constitutional reasons, if the *cujus est solum* doctrine is actually in force in its full extent. In other words, the possibility of such a statute being valid depends on what the courts, apart from statute, will rule on that point.

Insofar as the new Code drops the old Section 3, it is probably doing a wise thing. If the absolute *cujus est solum* doctrine is otherwise in force, the section neither adds to nor detracts from the landowner's rights; if it is not, then, in the words of the Committee:

"The presence of this declaration in an Aeronautical Code would simply lend color to the assertion of non-existent and unnecessary rights by litigiously inclined persons, to the great nuisance and possible destruction of aviation."75

The attempt in the new Code, however, to fix the extent of the stratum within which flights are trespasses by reference to "minimum safe altitudes of flight" is, it is submitted, unwise. It has been pointed out already76 that these rules are determined by technical factors having nothing to do with the possibility of interference with surface use by flying. An airplane is required to fly at an altitude of 500 feet in the country, not because the regulating authorities think 500 feet to be the height of the landowner's effective use of airspace, but because they deem 500 feet to be a height above which an aviator, in case of trouble, normally could correct the difficulty or else have a sufficient gliding range to make a safe forced landing. To use rules adopted for such reasons to fix the limit of the landowner's interest is, thus, to use a measure entirely unrelated to the thing involved.

To re-capitulate, then, it is submitted: (1) that the issue of the applicability of the *cujus est solum* doctrine must be determined apart from statute; (2) that if that doctrine is applicable in its fullest extent, the statutes, however phrased, are ineffective to diminish the rights of the landowner; (3) that if the doctrine

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76. Supra, at *footnotes* Nos. 69-71.
is not applicable, then such express statutes as the Uniform Aeronautics Act and the proposed Uniform Aeronautics Code have an effect in determining the extent of the landowner's power to reduce airspace to possession and thus infringe upon the aviator's pre-existing immunity; but (4) that the attempt to use "height of flight" rules for this purpose is unwise, because the standard so set is not necessarily related to the end sought.

(2) Desirability of the rule:

There remains to be considered the problem reserved earlier in the article, viz., which is functionally the most desirable rule. It is submitted that the doctrine of "effective possession," as analyzed above77 gives the greatest measure of protection to all interests concerned.

The strict *cujus est solum* doctrine clearly would work an extreme hardship on aviators, while the possibility that easements of flight might be gained would throw on the surface owner the alternative between engaging in costly and almost continuous litigation or of being faced with the possibility that, some years in the future, a desire to reduce new strata of air space to possession would be blocked by the objection of the holder of such an easement.

The pure nuisance theory, on the other hand, does not seem to give enough protection to the landowner. As Judge Hickenlooper points out,78 "nuisance" connotes the idea of something more than an isolated act. But a single flight through air space reduced to possession may inflict damage on the surface owner for which he should be able to secure damages at law.

To the view advocated by the tentative draft of the Torts Restatement, as compared with the "effective possession" doctrine as analyzed herein, two objections seem to lie. In the first place, as has been pointed out, the terminology there used is unsupported by any of the reported cases. More important, however, is the effect on litigation of the use of the concept of *privilege*. The Restatement, by utilizing this concept, makes *every flight prima facie* a trespass which the aviator must justify by showing that it fell within the limits of the "privilege." In other words, in a suit by a landowner against an aviator, the burden would be thrown

77. Supra, at footnote No. 66.
78. *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201, 204-205 (C. C. A. 6th Cir. 1932), supra, footnote No. 55.
upon the latter of showing the propriety of his flight. This, it is submitted, is both unnecessary and undesirable. If the surface owner has suffered any injury from the flight, the evidence thereof lies in his possession—not in that of the aviator. Proof of such injury by the landowner is proof of an affirmative; proof of non-interference by the aviator is proof of a negative. These are the tests usually applied to determine the propriety of rules which fix the burdens of going forward and of proof. Why should they not be applied here?

The "effective possession" doctrine, however, would seem to have the merits of fitting with reasonable closeness the language and holdings of the cases, of insuring the surface owner against both actual present damage and interferences with future uses of the air space, of throwing the burdens of litigation on the party claiming injury—the usual situation—and of permitting to the aviator as much, but no more, freedom as is needed for the reasonable conduct of flying operations.