

THE MAXIM "CUJUS EST SOLUM EJUS USQUE AD COELUM" AS APPLIED IN AVIATION

*The Maxim 'Cujus Est Solum Ejus Usque Ad Coelum'
is a presumption rebuttable by circumstances.*¹

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I. Introduction

Centuries ago, before mankind thought of the flying machine the Latin maxim was coined, "*cujus est solum ejus usque ad coelum*".

This rule means: "Whose is the soil, his it is up to the sky"², or in a more simple explanation "He who possesses the land possesses also that which is above it".³ Other elucidations are: "He who owns the soil owns everything above (and below) from heaven (to hell)",⁴ and "He who owns the land owns up to the sky".⁵

This maxim has been grievously misunderstood and misapplied so far as the upward limit is concerned, for it confuses air, which is capable of reduction to ownership, (e.g. by liquefaction) with space, which is not. It cannot definitely be affirmed that the law is committed to the view that mere abstract space can be the subject of ownership, apart from its contents. "Moreover, does the maxim really mean that space is in itself 'ownable'?" It is suggested that it does not, and that it should be taken to mean: "Whosoever owns a portion of the surface of the earth, also owns anything below and anything above that portion, that may be capable of being reduced into private ownership".⁶

The maxim is connected, by its nature, with air rights and their invasion.

States have always claimed and exercised territorial sovereignty in space above their surface, to the extent needed to make valid the public and private rights in space. This was laid down in the Paris Convention, 1919, and reaffirmed at Chicago, 1944.⁷ But the most important forms of air rights were in existence for thousands of years before the invention of flight.

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¹Sauagan and Drynan, *The Encyclopedia of Words and Phrases: Legal Maxims* (1940), Vol. II, p. 122.

²Black, *Law Dictionary*, 4th Ed. (1951), p. 453.

³Broom, *Legal Maxims*, 8th Ed. (1911), p. 395.

⁴Manion, *Law of the Air* (1950), p. 1; Brown, *Legal Maxims*, 8th Ed. (1882), p. 395.

⁵Zollmann, *Law of the Air* (1927), p. 6.

⁶McNair, *The Law of the Air*, 2nd Ed. (1953), p. 31.

⁷Cooper, *Roman Law and the Maxim 'Cujus est solum' in International Air Law* (1952), p. 2.

Various views were held with reference to the nature and extent of private rights in the column of air above the land.

There is the first view that the landowner has no rights at all in the air column above his land. This view is based upon the idea that the air is free to all, and that it is incapable of being possessed and owned.

The theories of the second group are those which give the landowner rights in the column of air above his land, but there is a wide divergence as to the nature and extent of the rights. Some grant the landowner full proprietary rights in air space, while others give him merely rights of user as needed for the enjoyment of his property.

In considering the following historical development of the maxim, it is well to have in mind that "maxims are not law", and are not given effect as legal rules in cases to which it is unreasonable to apply them.⁸ "A maxim is a signpost which directs the traveller, but does not choose the destination".⁹ A maxim is often a convenient way of stating a legal rule; sometimes lawyers seize upon it, if it expresses their own idea of what the law should be.¹⁰ Lord McNair expresses his view that "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."¹¹ Lord Esher pointed out: "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading".¹² In *Sweetland v. Curtiss Airports Corp.*,¹³ one of the leading cases in the field of aviation, it was stated: "Maxims are but attempted general statements of law. 'A maxim', said Sir Fredrick Pollock, 'is a symbol or vehicle of the law'".

Literally translated, the maxim leads to the obvious absurdity of claiming private exclusive ownership (*dominium*) in space above the land, up to infinity, but this maxim has limitations, and these limitations have been indicated from time to time by the decisions of the courts.

In order to explore adequately the conflict of rights between landowners and airmen, and to understand the importance of this maxim, it is necessary to trace it to its origin, and then to examine its historical development through the decisions of the courts. The discussion will be confined to the private law aspects of the subject.

II. *The Jewish History of the Maxim*

There are some passages in Roman Law which may be quoted as having some relevance to the user of air space, and which could have been used to

⁸Smith, "The Use of Maxims in Jurisprudence" (1895) 9 Harv L. Rev. 13.

⁹Moller, *The Law of Civil Aviation* (1936), p. 176.

¹⁰Richardson, "Private Property Rights in Airspace in Common Law" (1953) 31 Can. B. Rev. 117.

¹¹McNair, *op. cit.*, Note 6, p. 297.

¹²*Yarmouth v. France* [1887] Q.B.D. 647; 17 E.R.C. 217.

¹³[1930] 41 Fed. (2d) 929; [1930] U.S. Av. R. 33.

weave the maxim, but the origin of the maxim is not found in Roman Law.¹⁴ Henry Goudy could not find the maxim in Roman Law, "although it is consistent with Roman Law".¹⁵ Edward Sweeney said on the same matter that "all attempts to trace the exact language of the maxim to the *Corpus Juris* have failed".¹⁶

But Lincoln in his book, *The Legal Background to the Starrs*,¹⁷ comes to the conclusion that the origin of the maxim might be found in Jewish Law.

In the Jewish ancient law, the *Babylonian Talmud*, which is the product of the Babylonian schools during the period which extended from the third to the fifth century B.C., there is a *Mishna*¹⁸ (*Baba Bathra* IV 2) which reads as follows:

(The vendor of a house does not sell therewith) A well or a cistern, even though he inserts (in the deed the words) including the depth and the height.¹⁹

The *Mishna* is not explicit and the Commentators in the *Gemara* explain and analyse the law.

Rabbi Dimi of Nahardea said in the *Gemara*:

If one sells a house with the intention of giving title to all its contents, although the bill of sale states the word (I sell you) the depth and the height, title is not acquired in wells etc., unless he writes: 'You shall acquire title from the depth of the earth to the height of the sky.' And it is not sufficient to state 'from depth to the height of this house is sold to you'.²⁰

Rabbi Akiva (died in the year 132 A.D.) in his dicta, apparently contended that all rights in a well passed by a conveyance from the depth to the height:

Title is not given to a well or to the stone wall thereof, although there is mentioned that he sold him the depth and the height, however, the seller must buy a way to the well from the new owner of the house.²¹

If the cistern is included, the purchaser has the exclusive right of way to it, and when the cistern alone is sold the right of way to it passed to the purchaser by implication.²²

Hebrew conveyancers used two phrases to indicate the vertical extent of the land's ownership—"depth and height" and "from the abyss below to the sky above". As Palestine was a very dry land, these phrases were of particular importance in determining whether wells and cisterns passed by a conveyance.²³

¹⁴McNair, *op. cit.*, Note 6, p. 294; Cooper, *op. cit.*, Note 7, p. 28.

¹⁵Henry Goudy, "Two Ancient Brocards". *Essays in Legal History* (1913), p. 231, Ed. by Vinogradoff.

¹⁶E. Sweeney, "Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law" (1932) 3 J. Air L. & Com. 363; Cooper, *op. cit.*, Note 7, p. 28.

¹⁷Lincoln, *The Legal Background to the Starrs* (1932), p. 63.

¹⁸The *Mishna* is a report of the legal decisions of a line of analysts and judges.

¹⁹Epstein D. Ed. *The Babylonian Talmud*, Seder Nezikin, Baba Bathra (*Mishna* IV 2) (1936), p. 257.

²⁰New Talmud Pub. Ed. *The Babylonian Talmud*, Seder Nezikin, Baba Bathra (*Mishna* IV 2) (1902), p. 153.

²¹*Ibid.*, p. 154.

²²*The Jewish Encyclopedia* (1901), p. 643.

²³Sweeney, *op. cit.*, Note 16, p. 371.

Lord McNair²⁴ tried to trace the maxim to *Deuteronomy* XXX, 11-14 and *Isaiah* VII, 11, but this does not appear to be in point.²⁵

The use of this phrase can be found in some starrs (contracts) from Barcelona, Spain, and also in Cologne, Germany, a flourishing Jewish community.²⁶ These contracts were made during the same period as the well-known contract in Norwich.²⁷

III. *The Roman History of the Maxim*

The Roman system seems to have known only a full and absolute right of ownership.²⁸ Roman Law was essentially practical, and never treated land merely as a flat surface entirely dissociated from space above. Roman Law protected the needed rights of the land owner to the use and enjoyment of space above his lands, whether occupied by buildings, or used as cultivated fields, implying, though not stating, that these space rights constituted '*dominium*' (ownership), but without fixing definitely the height in space to which these rights extended. 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.²⁹

The Roman Law dealt with interests in the airspace over (a) public lands, (b) non-commercial lands (religious property and tombs) and over (c) private lands.

(a) The most important phrase was coined by Paul in Dig. VIII, 2.1, in order to protect public lands and highways.

If public ground or a public road comes in the way, this does not hinder the servitude or a *via*, (a general right of way) or an *actus* (a right of way for vehicles) or a right to raise the height of a building, but it hinders a right to insert a beam, or to have an overhanging roof or other projecting structure, also one to the discharge of a flow or drip of rainwater, because the sky over the ground referred to ought to be unobscured.³⁰

(b) Venulcius in Dig., XLIII, 24.22.4, in discussing airspace above religious property, stipulates:

If a person shall have built a projection, or allowed rainwater to fall from a roof, into a sepulcher, even though he may not have touched the grave monument itself, he can rightly be summoned for action against a sepulcher by violence or stealth, since not only is the actual place of interment part of the sepulcher, but also all the sky above it, and therefore he can be summoned on the charge of a violation of sepulcher.³¹

(c) There are few sources describing airspace rights over private lands. The oldest were the *Twelve Tables*, of which the text has not survived, but according to Ulpian it was established in Dig., XLIII, 27.1.8. and 9,

²⁴McNair, *op. cit.*, Note 6, p. 297.

²⁵Notes by F.A.L., "Cujus est solum" (1931) 47 L.Q. Rev. 14; Sweeney, *op. cit.*, Note 16.

²⁶Gulak, *The Principles of Jewish Law* (1935).

²⁷British Museum; Document No. 1199.

²⁸Hazeltine, *The Law of the Air* (1911), p. 74.

²⁹Roby, *Roman Private Law in Times of Cicero and the Antonines*, (1902), Vol. I, p. 498.

³⁰Monro, *The Digest of Justinian*, (1904-1909), Vol. II, p. 68.

³¹Cooper, *op. cit.*, Note 7, p. 8.

. . . that tree branches up to fifteen feet should be trimmed; this was done to prevent harm to the neighboring estate by the shade of a tree. This is the difference between the two heads of the interdict; if a tree hangs over buildings it should be cut down; but if it hangs over a field, it should be only trimmed up to fifteen feet of the ground.³²

In Dig., VIII, 5.8.5., there is a holding by Ulpian, in which he considered smoke coming from a cheese factory which interfered with a high adjoining house, a trespass into airspace.³³ 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 neighbour.³⁴

Ulpian also held in Dig., VIII, 2.9:

Where a man, by raising the height of his own house, cuts off the flow of light to that of his neighbor, but is not subject to a servitude in respect of the latter, there is no right of action against him,³⁵

although under certain circumstances the injured landowner could ask for the appointment of an arbiter.³⁶

There is another opinion of Paul, in Dig., VIII, 2.24, which led Cooper 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.³⁷

Dig., VIII, 2.1, was the basis for the famous gloss, which was in the form of a note attributed to Accursius (1184-1263). Accursius, a glossator or commentator on the Code, who flourished in Bologna, did the most to affect the problem and create the maxim, which has been known till these days.

Henry Guibe³⁸ and Eugene Sauze³⁹ are generally credited with research work which verified Accursius as the author of the most important gloss leading to the maxim.

Although Accursius had produced about a hundred thousand glosses, and this maxim may very well have been among them, Lord McNair pointed out that this is not equivalent to saying that Accursius was the "true and first inventor" of the maxim, because the gloss was a composite document.⁴⁰

The original text of Dig., VIII, 2.1 stated that the airspace over the highway ought to be free. The gloss to this passage, as attributed to Accursius, reads as follows: "*Nota — Cujus est solum ejus debet esse usque ad coelum*".

Henry Goudy⁴¹ inclined to the opinion that in Roman Law "the right of property in the *calum*, would have sufficed to prevent air transit over a man's

³²*Ibid.*, p. 10.

³³*Ibid.*, p. 10.

³⁴*Ibid.*, p. 11.

³⁵*Ibid.*, p. 12.

³⁶*Ibid.*, p. 13.

³⁷*Ibid.*, p. 11.

³⁸Guibe, *Essai sur la Navigation Africaine en droit interne et en droit international* (1912), p. 38.

³⁹Sauze, *Les Questions de responsabilité en matière d'aviation* (1916), p.24.

⁴⁰McNair, *op. cit.*, Note 6, p. 295.

⁴¹*Op. cit.*, Note 15.

ground, and interdicts to prevent it would have been granted, had damage been caused or threatened".

Von Jhering,⁴² the great German jurist, came to the conclusion that the owner of the soil was also owner of the airspace above, but only to the extent required to satisfy his practical needs, and that Roman jurists would not have accepted such an "abuse of logic" as ownership in space without limit.

After an independent re-examination of the sources in the *Corpus Juris*, to determine, according to Roman Law, the landowner's rights in airspace above, Francisco Lardone⁴³ concludes that the landowner has rights at low altitudes, because Roman lawyers did not deal at that time directly with the question of occupying high altitudes in airspace. But he suggests that in the spirit of the sources, the landowner has the right of controlling airspace at any altitude over his land, because it is property in its use (*jus utendi*).

Henry John Roby⁴⁴ said about ownership that it was the full right of doing whatever one liked to do with a thing, and that in substance, the owner of land had the full and free use of all above his land.

James de Montmorency⁴⁵ disagreed with Roby as to the extent of the individual's rights in airspace, but insisted that the state claimed and controlled such airspace.

William Buckland⁴⁶ was of the opinion that had the Romans been forced to face modern problems, they would probably have held that there was no upper limit of ownership, and that rules for height of buildings and for overhanging trees were merely limitations of ownership in the general interest.

Twenty years later, in a joint effort, Buckland and McNair⁴⁷ considered that "there is little mention of the higher reaches of the air for the reason that for the Romans no question could arise as to these".

Henri Guibe⁴⁸ and Eugene Sauze⁴⁹ denied that Roman Law created rights of ownership in airspace, but admitted that the subjacent owner had a right exercisable, at any time, to build up to an indefinite height, or otherwise enjoy the use of his land and have such use protected by law.

⁴²Von Jhering, *Zur Lehre von den Beschränkungen des Grundeigentümers in Interesse der Nachbarn* (1863), Vol. 6.

⁴³Lardone, "Airspace Rights in Roman Law" (1931) 2 *Air L. Rev.* 455.

⁴⁴Roby, *op. cit.*, Note 29, p. 414.

⁴⁵de Montmorency, "The Control of the Airspaces" in: *Grotius Society, Problems of the War* (1917), Vol. 3, p. 67.

⁴⁶Buckland, *The Main Institutions of Roman Private Law* (1931), p. 103.

⁴⁷Buckland and McNair, *Roman Law and Common Law* (1952), p. 101.

⁴⁸*Op. cit.*, Note 38.

⁴⁹*Op. cit.*, Note 39.

After distinguishing between 'coelum' as space, which is subject to private and exclusive rights, and 'aer' which is common to all, John Cooper comes to the following conclusions:

- (1) The airspace over lands not subject to private ownership, such as public and religious lands, had the same legal status as the surface, and that the state exercised control in such airspace to prevent any encroachment;
- (2) The airspace over private lands was either
 - (a) the exclusive property of the landowner up to an indefinite height, subject to building restrictions or other state-imposed limitations, 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'.⁵⁰

We have noted how from a few passages in the *Digest*, protecting the airspace, a general maxim has been woven, which with a small variation made its first appearance in England.

IV. The Entrance of the Maxim into England

The maxim has been recognized in England from very early times.

Bouve,⁵¹ in a very interesting article, finds evidence that the oldest son of Accursius was taken to England (in 1274) by Edward I (1239-1307), on his return from the Holy Land. Accursius's son lectured on Roman Law, at the University of Oxford and by his influence this maxim was brought into English jurisprudence.

The first recorded case in England on the maxim was *Bury v. Pope* (1586)⁵², to which this phrase was added: "*Nota — Cujus est solum ejus est summitas usque ad coelum — Temp. Ed. I'*".

But the word 'summitas' (end, extremity) is not found in classical Latin,⁵³ and this supports the idea that the language of the maxim was not part of Roman written law. While it may have partly been conceived as one of the principles of Roman Law, it is stated in a non-Roman manner.⁵⁴ This all should help us to determine that the maxim had only a pseudo-Roman history.⁵⁵

The phrase came into English jurisprudence through the influence and usage of Jewish people, who used it for more than a thousand years.⁵⁶ When it appeared in English Law it was used to define ownership, and the Jews alone used it in that sense. Moreover, at that time, the Jews were more likely to influence English Law, since they were constantly in touch with it through the Exchequer, and were accustomed in their fines to employ their own customs

⁵⁰Cooper, *op. cit.*, Note 7, p. 17.

⁵¹Bouve, "Private Ownership of Airspace" (1930) *Air L. Rev.* 242.

⁵²(1586) 1 *Cro. Eliz.* 118.

⁵³Baxter and Johnson, *Medieval Latin Word List* (1934), p. 411.

⁵⁴Cooper, *op. cit.*, Note 7, p. 28.

⁵⁵Herbert D. Klein, "Cujus est solum . . . Quousque tandem?" (1959) 26 *J. Air L. & Com.* 237.

⁵⁶Lincoln, *op. cit.*, Note 17, p. 64; F.A.L., *op. cit.*, Note 25, p. 16.

and phraseology.⁵⁷ The Jews who came to England in 1066, with the Normans, even had a Jewish Exchequer — a branch of the main Exchequer Court — and thus Christian judges sat in the Jewish Exchequer as “Justices of the Jews”, and were naturally exposed to Jewish Law and its application.⁵⁸

It appears that on December 2, 1280 a '*starr*' — a Jewish contract⁵⁹ — was written between Rabbi Ashaya ben Rabbi Isaac, from the City of Norwich, and Gilam the Norman. This contract related to certain property, which he had obtained as part of the dowry of his wife Miriam, and which was conveyed to Gilam. In line 14 it defines the rights of the owner as being “from the depth of the earth to the height of the sky”. The document, which has been preserved in the British Museum,⁶⁰ represents a remarkable mixture of English and Jewish Law, although it is definitely made under Jewish Law.

The strange coincidence between this contract and the decision in *Bury v. Pope*⁶¹, is that the contract was drawn at the time of the reign of Edward I, using the same maxim which was cited three hundred years later in this case with the mysterious note '*Temp Ed I*'. The source of this note is unknown.

Having regard to the fact that this maxim was rarely used by the Glossators, but was constantly employed by the Jews for the definition of ownership — exactly as it was used by English Law — this should point out the influence of Jewish Law on the applicability of the maxim in England.⁶²

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 made itself felt during the coming centuries.⁶³

V. *The Application of the Maxim in England*

The maxim in itself has no authority in English Law.⁶⁴ It concerns us only in so far as it has been adopted by judges whose opinions are considered authoritative and by text writers of great eminence.

It is proposed, in the first place, to examine some of the principal cases and texts in which the maxim has been cited, for there is no doubt that it has

⁵⁷Sweeney, *op. cit.*, Note 16.

⁵⁸Lincoln, *op. cit.*, Note 17; McNair, *op. cit.*, Note 6, p. 297.

⁵⁹The famous Star Chamber at Westminster may have been so named because it contained the 'starrs' of pre-expulsion Jews (*Jewish Encyclopedia, op. cit.*, Note 22, Vol. XI, p. 287).

⁶⁰Document No. 1199.

⁶¹*Op. cit.*, Note 52.

⁶²Rabbi I. Herzog, *The Main Institutions of Jewish Law* (1936), Vol. I; McNair, *op. cit.*, Note 6, p. 297.

⁶³*Op. cit.*, Note 55.

⁶⁴Winfield, *On Tort*, 6th ed. (1954), p. 378; McNair, *op. cit.*, Note 6, p. 31. Cooper, *op. cit.*, Note 7, p. 37.

exercited a very considerable influence upon the development of the Common Law.

In 1586, in *Bury v. Pope*⁶⁵, which was the first recorded case in which the maxim was quoted, it was agreed by all justices that when a landowner erects a house, with a window so close to a window in the adjoining property that the light is cut off therefrom, the injured landowner has no complaint, even though his building and his window were built forty years before the second building was erected.

To this case there is added a note: "*Nota — cujus est solum ejus est summitas usque ad coelum. Temp. Ed I*". The maxim as stated here might be translated as "Who owns the land his is the highest place even to the skies".⁶⁶

Whether the maxim was cited as part of the judgment, or was added by the reporter, is not clear. Likewise, no one appears to have been able to discover the source '*Temp Ed I*', to which the reporter is referring, or to shed any light upon it. Harold Hazeltine's⁶⁶ interpretation of this note is that the reporter was asserting that "from Edward 1st's time onward, it had always been a maxim of the English Courts". De Montmorency⁶⁷ calls this supplement of '*Temp Ed I*', — "the reporter's daring addition".

The usual source referred to is Coke's comment, *On Littleton*,⁶⁸ but the dogma does not start with Lord Coke (1552-1634), who in fact based his statements on earlier authorities.

The dogma received its first modern literary formulation in Lord Coke's writing, where under the heading '*Terra*' we find the following language:

And lastly the earth hath in law a great extent upwards, not only of water as hath been said, but of aire and all other things even up to the heavens, for *cujus est solum ejus est usque ad coelum*, as it is holden.

These principles of ownership in airspace made their first appearance in English Law, not however in the actual language of the *Corpus Juris*, or even in the original glosses to the *Digest*, but rather in one of the more arbitrary forms of the maxim.

Lord Coke took the maxim not only from the first decided case in which it was used, but he also tried to trace it back to the Year Books as upholding his expressed view, citing 22 Henry VI 59; 10 Edward IV 14; and 14 Henry VIII 12.

The first case involved a dispute between landlord and a tenant under a lease as to the ownership of six young goshawks roosting in the trees on the leased land. The case of the goshawks is quoted in the second, which relates to the theft of muniments of title. The third discusses the right of the Bishop of London to certain herons and shovelers, which built nests in trees on land which the Bishop had leased.

⁶⁵*Op. cit.*, Note 52.

⁶⁶Hazeltine, *The Law of the Air* (1911), p. 62.

⁶⁷*Op. cit.*, Note 45.

⁶⁸Coke, *On Littleton* (1628), Lib. 1, Sec. 1, p. 4.

The Courts apparently assumed that if a person owned the land which enfolded the roots of the trees, he owned the branches that were in the airspace above and in which the birds had their nests.

None of these cases which Coke cites as authority for his own statement quotes the maxim.⁶⁹

Holdsworth⁷⁰ and Goudy⁷¹ stated that Coke's references to the Year Books are incorrect. Bolland⁷² amplified this and said: "I think there has been a growing suspicion of recent years that Coke's knowledge of the Year Books was practically confined to what he found in the Abridgements".

Coke limits the application of the maxim to its fullest extent when he says: "A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another and seeing it is an inheritance corporeall it shall pass by livery".⁷³

While Coke eliminated the neo-Latin word '*summitas*' from the citation as used in *Bury v. Pope*⁶², and made the maxim appear more authentically Roman, at the same time he rendered it more categorical and non-Roman, by changing the words '*debet esse*' (ought to be) to '*est*' (is). By this change the statement in the glosses that the landowner ought to have the use or enjoyment of the airspace over his property to an indefinite height had become, in the maxim as cited by Coke, a statement of the existence of present ownership of space to infinity.⁷⁴

Blackstone,⁷⁵ relying upon Coke, also states the doctrine in these words:

Land hath also in its legal signification a definite extent upwards as well as downwards. *Cujus est solum ejus est usque ad coelum* is the maxim of the law upwards . . . So that the word 'land' includes not only the surface of the earth, but everything under it or over it.

Some other modern authorities on real property have stated the maxim in the same form. Among them is Tiffany,⁷⁶ who stated "According to the theory of the Common Law, the ownership of the surface of the land involves, if not the ownership, at least the control of the space above it to an indefinite distance".

Both Coke and Blackstone stated the doctrine in broad and general terms, and this doctrine has found expression in the opinions of English judges and in writings of English jurists.

One of the earliest cases which dealt with this maxim was *Penruddock's Case*.⁷⁷ In this case action was brought for nuisance against the defendant who

⁶⁹Sweeney, *op. cit.*, Note 16; Rhyne, *Airports and the Courts* (1944), p. 94.

⁷⁰Holdsworth, *History of English Law* (1925), Vol. VII, p. 485.

⁷¹*Op. cit.*, Note 15.

⁷²Bolland, *A Manual of Year Books Studies* (1925), p. 85.

⁷³Coke, *On Littleton* (1628), Lib. 1, p. 48.

⁷⁴Cooper, *op. cit.*, Note 7, p. 28.

⁷⁵Blackstone, *Commentaries* 4th Ed. (1770) Vol. II, p. 18.

⁷⁶Tiffany, *The Law of Real Property*, 2nd Ed., p. 866.

⁷⁷(1597) 5 Coke's Rep. 100, (1c).

built an overhang over the plaintiff's land and caused rainwater to fall upon his land. The court upheld the plaintiff's right to abate the nuisance.

The importance of this case is that the court held that the invasion of the right was a nuisance, rather than a trespass.

In the case of trespass the invasion of the property gives the plaintiff a right of action irrespective of any damage, whereas nuisance is an interference such as "materially to interfere with the ordinary comfort of human existence".⁷⁸

The maxim was quoted again in *Baten's Case*⁷⁹, in support of the decision that an overhanging upon the freehold of the plaintiff's house created an actionable nuisance.

There is a critique by Thurston⁸⁰ which involves the early English cases and the assertion is that although these were nuisance cases, there is nothing to indicate that an action for trespass would not also lie.

Two hundred years after *Baten's Case* there is the first mention of the possible application of the maxim to aviation cases.

The most striking and pertinent observation was made in 1815 by Lord Ellenborough in the case of *Pickering v. Rudd*.⁸¹ Although his remarks are really obiter, because no cases were cited, it is important to discuss this judgment.

In this case it was alleged that the defendant, a barber, had committed trespass by fixing a signboard to his house, which projected several inches from the wall and overhung the plaintiff's garden, cutting down the plaintiff's virginia creeper. Lord Ellenborough says:

I do not think it is a trespass to interfere with the column of air superincumbent on the close . . . But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it amounts to a *clausum fregit*. Nay if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage.

According to Starkie's report Lord Ellenborough did not express himself quite so affirmatively, but the report attributes to him some prescience about aviation, since the suggestion is implicit that trespass may not lie for passing through the air in a balloon over the land of another.⁸²

It is evident from an examination of both reports of this case that Lord Ellenborough was holding nothing more than that the technical action of trespass would not hold — not that the owner of the land had no rights in airspace affected by defendant's overhanging board. In fact, both (Campbell's and Starkie's) reports made it clear, that the learned judge would have given

⁷⁸*Crump v. Lambert* (1867) L.R. 3 Eq. 409.

⁷⁹(1610) 9 Coke's Rep. 53 (1c); 77 Eng. Rep. 810.

⁸⁰Thurston, "Trespass to Airspace" (1934) *Harv. Legal Essays*, p. 20.

⁸¹(1815) 4 Camp. 219; 1 Starkie 56; 171 E.R. 400.

⁸²Richardson, "Private Property Rights in Airspace in Common Law" (1953) 31 Can. B. Rev. 117.

damages to the plaintiff in an "action on the case" if, as Starkie's report says, "you could prove any inconvenience to have been sustained".

In support of Lord Ellenborough's *dictum* is the following *dictum* by Norman J, in an Indian case.⁸³ "No man has any absolute property in the open space above his land. To interfere with the column of air superincumbent upon such land is not a trespass".

There is a long gap between *Baten's Case*⁸⁴ and the case of *Fay v. Prentice*⁸⁵. Judge Maule cited *Penruddock's Case*⁸⁶ and *Baten's Case* and held that a cornice projecting over the plaintiff's garden and shooting rainwater therefrom was a nuisance. The Court of Common Pleas held that "the bare existence of the projection" was a nuisance, "whether or not rain had fallen", and that the law would infer damages.

In this case two judges comment, in *dicta*, on the maxim, and indicate that this maxim has limitations.

Coltman J. regards it as "a mere presumption" and Maule J. remarks that "the *maxim cuius est solum* . . . is not a presumption of law applicable in all cases and under all circumstances, for example it does not apply to chambers in the inns of courts".

Referring to Lord Ellenborough's words, fifty years later, Lord Blackburn in the case of *Kenyon v. Hart*⁸⁷ said: "I understand the good sense of Lord Ellenborough's view, but not the legal reason for it". Blackburn thus adheres to the maxim that the owner of land owns up to the heavens.

Although Blackburn said so, it seems nevertheless clear that Ellenborough's legal reason for hesitation was that in the case of the bullet speeding through space, and in the case of the flight of the balloon, he could see no interference with the possession of the land itself. He inclined to the opinion that trespass could only be committed by some actual physical contact with something visible — the land itself, or something attached naturally or artificially to the land. Therefore he expressly says that if a bullet falls upon the field of another man this would quite clearly be a trespass.⁸⁸

Pollock in the first edition of his book, *The Law of Torts*,⁸⁹ considered Lord Blackburn's opinion to be the better one, and he continued:

At Common Law it would clearly be a trespass 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 a greater height.

⁸³*John George Bagram v. Khettranath Karformah* (1869) 3 Bengal L. R. (Original Civil Jurisdiction) 18; 43 2 Indian Decisions (N.S.) 433.

⁸⁴*Op. cit.*, Note 79.

⁸⁵(1845) 1 C.B. 828.

⁸⁶*Op. cit.*, Note 77.

⁸⁷(1865) 6 B & S 249.

⁸⁸Kuhn, "The Beginning of an Aerial Law" (1910) 4 Am. J. Int. L. 124.

⁸⁹Pollock, *The Law of Torts* 1st Ed. (1886), p. 280.

In later editions Pollock somewhat qualified this position by adding: "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".⁹⁰

Salmond⁹¹, in discussing the same problem said:

This is true to this extent that the owner of land has the right to use for his own purposes, to the exclusion of all other persons, the space above it *ad infinitum*. But "a mere entry into the airspace above the land is not an actionable wrong, unless it causes some harm, danger or inconvenience to the occupier of the surface . . ."

Both Pollock and Salmond concurred in the existence of exclusive private rights held by the landowner in the airspace. They differed only as to the kind of action to be brought, and as to whether or not harm, danger or inconvenience must be proved.

The principles governing the maxim were stated also in *Corbett v. Hill*.⁹² The plaintiff owned two contiguous houses in London, of which one was sold to the defendant. One of the first floor rooms in the house which the plaintiff retained projected over the site and was supported by the house which the plaintiff had conveyed to the defendant. In the course of demolishing the house in order to rebuild it, it was discovered that a room of the plaintiff's house protruded into the defendant's house. The defendant proposed to rebuild over the roof of this protruding room, and the plaintiff sought to restrain him by an injunction claiming the column of air *usque ad caelum* over his projecting room. He failed in his claim, on the ground that the vertical column of air over so much of the room as overhung the defendant's site belonged not to the plaintiff but to the defendant.

Sir W. M. James held that the plaintiff's house could not overhang the defendant's site, and by way of *dictum* he stated that the defendant had a property right in the column of air over his entire property site, and that the intrusion or overhanging of the plaintiff's house was trespass thereto.

Speaking about the maxim Sir James said:

The ordinary rule of law is that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns.

In this case the rebutting fact seems to have been that the plaintiff had conveyed to the defendant the column of air superincumbent upon his protruding room.

An English court followed these decisions by holding that the act of a horse in reaching his head into an adjoining field and biting another horse is a trespass.⁹³

⁹⁰Pollock, *The Law of Torts* 15th Ed. (1951), p. 262.

⁹¹Salmond, *On the Law of Torts* 11th Ed. (1953), p. 233.

⁹²(1870) L.R. 9 Eq. 671.

⁹³*Ellis v. Loftus Iron Co.* (1874) L.R. 10 C.P. 10.

Lord Coleridge C. J. held that "It seems to me sufficiently clear that some portion of the defendant's horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law". Denman J. referred to the maxim as a "technical rule", but held that according to the circumstances there was no escape from holding that a trespass existed.

The case of discharging a bullet through aerial space came before the court in *Clifton v. Viscount Bury*⁹⁴. The plaintiff, who was a tenant of a farm, sought an injunction to restrain the Civil Service Volunteers from shooting over their range so as to affect the ordinary use and enjoyment of his property.

Hawkins J. referred to *Pickering v. Rudd*⁹⁵ and held that the bullets which passed entirely over the plaintiff's land did not constitute a trespass "in the strict technical sense of the term", but he did look upon such firing of bullets as "a grievance which under the circumstances afforded a legal cause of action". On the other hand the use of the range "in such a manner as to cause splashes and fragments of flattened bullets to fall on plaintiff's land constituted a series of trespasses of an actionable character".

The court therefore took the view that the owner of the land has not a proprietary right in the column of air at a height of seventy five feet above the ground.

The development of the telegraph and the telephone brought claims of landowners against companies owning the wires.

Although so far as aviation is concerned there is no likelihood of questions arising, since interference by flying is that of a moving object — not a fixed wire — it is interesting to note the law with regard to telegraph and telephone wires.

Both the legislation and the relevant decisions are based on the principle that the owner of the *solum* owns the column of air above it, at any rate, up to a height which includes that at which wires are fixed.

In the case of *Wandsworth Board of Works v. United Telephone Co.*⁹⁶ Fry J. said: "As at present advised I entertain no doubt that an ordinary proprietor of land can cut and remove a wire, placed at any height above his freehold".

Similarly Lord Esher, in the same case, accepted Coke's doctrine, and Bowen L. J. inclined to rehabilitate the maxim and said: "The man who has land has everything above it, or at all events is entitled to object to anything else being put over it". This judge shifts his position, however, by maintaining that the landowner's actual ownership of the airspace might well be held to extend as high as is necessary for the use of the structures erected on the land, "whilst the owner would be entitled to restrain (as a nuisance) anything amounting to an interference with his enjoyment of the upper part of the air".

⁹⁴(1887) 4 T.L.R. 8.

⁹⁵*Op. cit.*, Note 81.

⁹⁶[1884] L.R. 13; Q.B.D. 904.

In *Finchley Electric Lighting Co. v. The Urban District Council*,⁹⁷ where wires crossed the defendant's street at a height of thirty-four feet, the court recognized, by way of *dictum*, that an owner of land, as expressed in Lord Collins' words, "owns the soil below *usque ad inferos* and the column of air above *usque ad coelum*".

Salmond⁹⁸ states that in *Wandsworth's Case* Lord Fry went so far as to hold that the owner of the land has the right to cut and remove a telegraph, or other electric wire stretched through the airspace above his land, at whatever height it may have been placed, and whether or not he can show that he suffers harm or inconvenience from its being there.

These cases were followed by several others until in 1920, the English Air Navigation Act was passed and in section 9 the right to sue has been prudently limited.

This act was amended by the Civil Aviation Act, 1949, and the corresponding section is section 40, which provides that:

No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of an 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, so long as the provisions of Part II and this Part of this Act and any order in Council or order made under Part II or this Part of this Act are duly complied with.

VI. *The Acceptance of the Maxim by the Civil Law*

The maxim's principles were carried through different legal systems of nearly all nations. A great majority of the modern Codes of Civil Law countries are founded on this ancient maxim.

In France these principles of the maxim were similarly translated into rules of property, In the Coutume de Paris, effective by the end of the seventeenth century, Article 187 provided that whoever has the land is able and ought to have all above and below his land, and can build above and below.⁹⁹

Article 187, which sounds like a translation of the maxim was the basis of article 552 of the French Civil Code (Code Napoleon) of 1804. This article declares that ownership of the land includes ownership of what is over and under it.¹⁰⁰

"The construction assigned to Article 552 has ranged from an analysis based on the restatement of the maxim *Cujus est solum*, with its arbitrary construction of ownership of space to infinity, to the theory that the article creates no ownership rights except in buildings or other physical additions to the land, but does give the landowner the right to occupy such space over his land as

⁹⁷(1903) 1 Ch. 437.

⁹⁸*Op. cit.*, Note 91.

⁹⁹Article 187: "Quiconque a le sol . . . , il peut et doit avoir le dessus (et le dessous) de son sol, et peut édifier pardessus (et pardessous)".

¹⁰⁰Article 552: "La propriété du sol emporte la propriété du dessus (et du dessous)".

may be used by buildings, trees, crops and other physical improvements, together with the right to be protected from interference by third parties in the use and enjoyment of his lands and any improvements thereto".¹⁰¹

In a decision rendered by the Tribunal Correctional de Vervins on December 18, 1895, it was held that to shoot from a spot where one has hunting privileges at game, situated above a place where one has not that right, undoubtedly constitutes the misdemeanor of hunting on the property of another "since the right of property extends as well above the soil as along its surface". This decision was affirmed by the Cour d'Amiens on appeal February 19, 1896.

While the Tribunal Civil de Compiègne (Judgment of Dec. 19, 1888) announced that Article 552 seems but to affirm the principle of the maxim, it was decided that the axiom must not be applied too strictly and that the reasonable and practicable way to apply it was "to decide that ownership of the soil necessarily includes ownership of so much of that part (of the airspace) situated above the soil as can be made use of".

The French Civil Code does not contain this qualification of the landowner's rights, but Article 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".

Thus, in France, it is not a mutual exclusion — it is still the property owner who wins in the struggle with modern aircraft.¹⁰²

The German Law, prior to the enactment of the present Civil Code, was based upon the maxim. The new German Civil Code has somewhat modified this doctrine.

The German Civil Code which was enacted in 1896, and was effective only in January 1900, stated in Article 905:

The right of the owner of a piece of land extends to the space above the surface of the earth and under the surface. However, the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion.¹⁰³

This section is a mitigation of the harsh rule of the maxim. We find here a limitation of the rights of a landowner predicated upon his interest in the height of the space, where the latter is being affected.

¹⁰¹Cooper, *op. cit.*, Note 7, p. 31.

¹⁰²Klein, *op. cit.*, Note 55.

¹⁰³The German text of Section 905 reads: "Das Recht des Eigentümers eines Grundstücks erstreckt sich auf den Raum über der Oberfläche und auf den Erdkörper unter der Oberfläche. Der Eigentümer kann jedoch Einwirkungen nicht verbieten, die in solcher Höhe oder Tiefe vorgenommen werden, dass er an der Ausschliessung kein Interesse hat".

The Swiss Civil Code is based on the same principle as Section 905 of the German Code. Section 667, adopted in 1907, stated:

The ownership of real estate extends into the airspace above and into the soil beneath the surface of the land, so far as the owner has an interest in exercising a right of ownership in such airspace or in such soil.¹⁰⁴

The German Code and Swiss Code both raise in practice the difficulty of determining the height at which the owner of lands below has that character of interest in the space above which authorizes him to prevent or interfere with the use of such space by others.

The French version of the maxim made its way into the Codes of Belgium, Austria, Italy, Japan, the Netherlands, Portugal, Spain, Switzerland, Turkey and the Province of Quebec.¹⁰⁵

The Italian Civil Code of 1865, in Article 440, provided that:

He who has ownership of the land has also ownership of the space above the land and of everything which is found above and below the surface.¹⁰⁶

This article does not state the height to which such ownership extends.

The new Italian Code, which has been in force since 1942, does not define the space rights of the landowner above the ground. There is a limitation of his exclusionary rights, depending on the height in space in which he might have an interest to exclude the activities of intruders.

Article 823 of the Italian Code of Navigation continues along this line, stating that an aircraft must not damage the interest of owners of land being overflown.¹⁰⁷

In 1930, the Supreme Court of Canada was asked certain questions by the Governor General in Council, as to the respective legislative powers of the Parliament and of the legislatures of the provinces in relation to the regulation and control of aeronautics.¹⁰⁸ The opinion of Newcombe J. was that:

The Common Law of England applies in the English provinces of Canada. In the province of Quebec the law is not materially different, for by Article 414 of the Civil Code it is declared that ownership of the soil carries with it ownership of what is above and what is below it.

The judgment of the Supreme Court of Canada was reversed in 1932 on appeal to the Privy Council.¹⁰⁹ In the arguments for the Attorney-General it

¹⁰⁴Hazeltine, *op. cit.*, Note 66, p. 61. Section 667 reads: "*Das Eigentum an Grund und Boden erstreckt sich nach oben und unten auf den Luftraum und das Erdreich, soweit für die Ausübung des Eigentums ein Interesse besteht*".

¹⁰⁵Nijnolt, *Air Sovereignty* (1910) p. 35; Klein, *op. cit.*, Note 55: "This general statement made in 1910 needs considerable softening".

¹⁰⁶Cooper, *op. cit.*, Note 7, p. 32. Article 440 reads: "*Chi ha la proprietà del suolo ha pur quella dello spazio sovrastante a di tutto ciò che si trova sopra e sotto la superficie*".

¹⁰⁷Klein, *op. cit.*, Note 55. Article 823 reads: "*Il sorvolo dei fondi di proprietà privata da parte di aeromobili deve avvenire in modo da non ledere l'interesse del proprietario del fondo*".

¹⁰⁸Reference re Legislative Powers as to Regulation and Control of Aeronautics in Canada [1930] S.C.R. 663.

¹⁰⁹In re the Regulation and Control of Aeronautics in Canada [1932] A.C. 54.

was argued that the "maxim does not apply so as to prevent aerial navigation from being a public right; flying over land is not a trespass to any proprietary right".

In 1954, in a discussion about the maxim, a Canadian court¹¹⁰ held that the owner of land is not an owner of unlimited airspace over his land, for airspace is *res omnius communis*; the owner of land has only a limited right in airspace over it, his right being limited by what he can possess or occupy for the use and enjoyment of his land.

VII. *The First Interpretation of the Maxim in the U.S.A.*

The English immigrants to the American continent (U.S.A. and Canada) brought with them the principles of the Common Law. These included the juridical concept that ownership of land includes the right to superjacent space.

At the beginning there was a tendency to give full sway to the maxim.

Chancellor Kent, in his *Commentaries on American Law*,¹¹¹ accepted the statements of Coke and Blackstone about the ownership of the landowner in the space above.

In most of the early cases containing discussions of this maxim, the decisions of the English courts were accepted. Therefore, I intend now to consider only a few of the most important subsequent decisions, with a view to discovering their effect upon the doctrine of ownership in the airspace.

In a case dealing with overhanging branches the court followed the Twelve Tables and stated that "land comprehends everything in a direct line above it".¹¹²

It has been held in the United States courts that rights were invaded in cases of projecting eaves,¹¹³ a telephone wire across property,¹¹⁴ a projecting cornice¹¹⁵ and other protruding things.

In *Hannabalsen v. Sessions*¹¹⁶ the court relied on the maxim and said: "The title of the owner of the soil extends . . . upwards *usque ad coelum*".

Many of these cases do not consider the question as to whether the action is one for trespass or nuisance, but in *Butler v. Frontier Telephone Co.*¹¹⁷ the court held that an action of ejectment was a proper remedy in a case where a telephone

¹¹⁰*Lacroix v. The Queen* [1954] U.S. Av. R. 259.

¹¹¹Kent, *Commentaries on American Law* (1892), Vol. III, p. 402.

¹¹²*Lyman v. Hall* (1836) 11 Conn. 177.

¹¹³*Smith v. Smith* (1872) 110 Mass 302; *Laurence v. Houge* (1832) 35 N.J. Eq. 371.

¹¹⁴*Butler v. Frontier Telephone Co.* (1906) 186 N.Y. 486.

¹¹⁵*Harrington v. McCarthy* (1897) 169 Mass. 492.

¹¹⁶(1902) 116 Iowa 457; 90 N.W. 93. This decision has been often compared with the English case of *Ellis v. Loftus Iron Co.*, *op. cit.*, Note 93.

¹¹⁷*Op. cit.*, Note 114.

wire was unlawfully strung across the plaintiff's premises. Chief Justice Cullen said about the maxim "that it may not be taken too literally", but "so far as the case before us is concerned, the plaintiff, as the owner of the soil, owned upwards to an indefinite extent".

On the other hand, the court in *Grandona v. Lovdal*¹¹⁸ held that overhanging trees did not entitle the plaintiff to relief in the absence of proof of damage, although it did entitle him to cut off the branches himself.

The most important of these cases is *Portsmouth v. U.S.*¹¹⁹, where the Supreme Court held in 1922 that the United States was guilty of 'taking' the plaintiff's property, by repeated firing across the plaintiff's land.

VIII. *The Disregard of the Maxim in Aviation Cases*

The advent of aerial navigation gives a new significance to the maxim and awakens interest in its origin and scope.

The re-examination and clarification of the principles of the maxim began only after aviation became a fact as a new instrument of transport.

When landowners, over whose land the planes flew in commercial flights, began to allege trespass against the aeroplane companies, some definite construction of this ancient maxim became necessary.

Nearly all the writers who have considered the question of aviation have recoiled from the literal application of the Latin phrase.

Henry G. Hotchkiss¹²⁰ is of the opinion that a maxim which was established long ago, "should not and must not control aviation which was unknown and unthought of when the rule received form".

Davids, in his treatise, *The Law of Motor Vehicles* (1911), sec. 289, argues that the absence of injury is a practical refutation of the extreme view of ownership of airspace.

McNair¹²¹ suggested that we must reject the theory of the ownership of the column of airspace above a parcel of land to an indefinite height. He continues by stating that there can be only two theories:

That *prima facie* a surface owner has ownership of the fixed contents of the airspace and the exclusive right of filling the airspace with contents, and alternatively (ii) the same as (i) with the addition of ownership of the airspace within the limits of an area of ordinary user surrounding and attendant upon the surface and any erections upon it.

McNair admits that for practical purposes there is not much difference between the theories, but he prefers the first one because the second involves the ownership of space, the possibility of which he strongly doubts.

¹¹⁸(1889) 78 Cal. 611.

¹¹⁹*Portsmouth Harbour Land and Hotel Co. v. U.S.* (1922) 260 U.S. 327; 43 Sup. Ct. 135; *Herrin v. Sutherland* (1925) 74 Mont. 587; 241 Pac. 328.

¹²⁰Hotchkiss, *A Treatise on Aviation Law* 2nd Ed. (1938), p. 33.

¹²¹McNair, *op. cit.*, Note 6, p. 31.

Sir P. Winfield¹²² preferred the second theory because he found "it hard to share the learned author's doubts".

Conversely, the most extreme view was expressed in 1921 by Major Johnson, legal adviser to the Chief of Air Service, U.S.A.¹²³. He said that property rights of the landowner in the airspace above land are so absolute that before aviation could become possible, a constitutional amendment would be necessary to establish a right to fly over property at reasonable altitudes. Until this were done every flight would involve a series of repeated trespasses amounting to a 'taking' of property without due process of law.

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.

But the courts did not hesitate to refuse to hear such cases, when the only complaint was trespass under the '*ad coelum*' maxim, and to encourage aviation by stating the freedom of airspace above certain prescribed distances laid down by Federal and State statutes.

In 1921, the American Bar Association's Special Committee on the Law of Aviation repudiated the theory stated by the maxim as inapplicable to air rights in the field of aviation.¹²⁴

The first aviation case dealing with intrusion into airspace was *Johnson v. Curtiss Northwest Airplane Co.*¹²⁵ In this case the plaintiff sought to enforce the maxim and claimed that airplane flights over his land, no matter how high the altitude, constituted actionable trespass. The court, in repudiating the literal application of the maxim, said:

This rule like many aphorisms of the law is a generality and does not have its origin in legislation, but was adopted . . . at a time when any practical use of the upper air was not considered or thought possible . . . A wholly different situation is now presented . . . The upper air is a natural heritage common to all of the people and its reasonable use ought not to be hampered by an ancient artificial maxim of law, such as is here invoked.

In *Gay v. Taylor*¹²⁶ the court indicated:

The maxim . . . is no longer strictly adhered to and that invasions of the airspace over one's property are trespasses only when they interfere with a proper enjoyment of a reasonable use of the surface of the land by the owner thereof.

The court discussed the applicability of the maxim in *Swetland's Case*,¹²⁷ saying:

The courts have never critically analysed 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.

¹²²Winfield, *op. cit.*, Note 64, p. 379.

¹²³Johnson, *Air Service Information Bulletin* (1921), Vol. 2, Note 181, pp. 1-14.

¹²⁴"Report of the Special Committee on Law of Aviation", (1921) A.B.A. Rep. 498.

¹²⁵[1928] U.S. Av. R. 44.

¹²⁶(1932) 19 Pa. Dist & Co. Rep. 31 (Ct. of Com. Pl. Chester Co. Pa.).

¹²⁷*Swetland v. Curtiss Airport Corp.* (1930) 41 Fed. (2d) 929 (U.S.D.C. OHIO). Modified (1932) 55 Fed. (2d) 201; [1932] U.S. Av. R.1.

It was added 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.

In *Rochester's Case*¹²⁸ the court held that striking a tower by an aircraft constituted trespass as a matter of law. So far as the rights in airspace are concerned the court said with respect to the maxim:

Not to go beyond the necessities of this case, it may be confidently stated that if that maxim ever meant that the owner of land owns the space above the land to a definite height it is no longer the law.

In 1936, the court stated in *Cory v. Physical Culture Hotel*¹²⁹:

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.

In the first *Hinman Case*,¹³⁰ where the plaintiff claimed damages against a commercial air line which flew across the plaintiff's property at low altitudes of less than a hundred feet, the court dismissed the claim, saying:

If we should accept and literally construe the *ad coelum* doctrine, it would simplify the solution of this case, however, we reject that doctrine.

We think it is not the law and that it never was the law.

The leading case is *U.S. v. Causby*,¹³¹ which was decided by the Supreme Court.

The claim was that frequent flights of service aircraft from a nearby airfield amounted to a 'taking' of a right in property. The plaintiffs showed, *inter alia*, that the use of their property as a commercial chicken farm had become impossible. The court held that there was a real interference with the use and enjoyment of the land below and that the low flights were equivalent to a 'taking' of the property. Douglas J. said:

The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land . . .

It is ancient doctrine that at common law, ownership of the land extended to the periphery of the universe '*Cujus est solum ejus est usque ad coelum*'.

But that doctrine has no place in the modern world. The air is a public highway . . . (and) to recognize such private claims to the airspace would clog these highways; seriously interfere with their control and development in the public interest.

The *Causby Case* has finally rejected the theory of property rights in the airspace at all altitudes.

¹²⁸*Rochester Gas and Electric Corporation v. Dunlop* (1933) 148 Misc. 849; 266 N.Y. Supp. 469; [1933] U.S. Av. R. 511.

¹²⁹(1936) 14 Fed. Supp. 977 (D.C.W.D.N.Y.); [1936] U.S.Av.R.16.

¹³⁰*Hinman v. Pacific Air Transport Corp.* (1936) 84 Fed. (2d) 755; [1936] U.S.Av. R. 1.

¹³¹(1946) 328 U.S. 56; 66 Supp. C. 1062; 90 L. Ed. 1206; [1946] U.S. Av. R. 235.

In *All-American Airways v. Village of Cedarhurst*¹³² the court cited *Causby's Case* and held that owners of land "have a right to be free of the menace of air travel at levels near the ground . . ."

In a later case, *Gardner v. County of Allegheny*,¹³³ the court said:

It is clear as crystal under the authority of the *U.S. v. Causby* that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking'.

Causby's Case was also cited lately in the Court of Claims in *Highland Park's Case*.¹³⁴ The plaintiff's suit for compensation for the alleged 'taking' of his property resulted from flights of heavy airplanes over his land. The court granted him compensation for the decreased value of houses which were built at the time when only propeller-driven planes were in use and not turbo-jets as afterwards.

The airspace over the land . . . may be used by airplanes with impunity, so long as the flights do not substantially interfere with the use and enjoyment of the surface of the ground.

In this connection it is interesting to examine the *American Restatement of the Law*.¹³⁵

Section 194 declares¹³⁶ "unprivileged" and therefore a trespass, the flight of aircraft which interfere "unreasonably with the possessor's use or enjoyment of the surface of the earth or the airspace above it". This article must be read with Section 159(c) of the present *Restatement* which provides that "an unprivileged intrusion in the space above the surface of the earth at whatever height above the surface is a trespass"!

The Note to the American Law Institute on page 36 of the *Tentative Draft* admits that the theory of unlimited 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 it is "obvious that sooner or later the theory of unlimited vertical ownership of the airspace above the possessor's land will have to be discarded".

As a result four attorneys from different Air Carriers came to a conclusion, in a memorandum to the Institute of American Law — May 20, 1958, that section 194 "does not accurately reflect the state of the law today", and that its *Tentative Draft* should be withdrawn.

¹³²(1953) 201 Fed. (2d) 273; [1953] U.S. Av. R. 36.

¹³³(1955) 114 (A) (2d) Pa. 491; [1955] U.S. Av. R. 409.

¹³⁴*Highland Park Inc. v. United States* (1958) 161 F Supp. 597; [1958] U.S. Av. R. 483.

¹³⁵Tentative Draft No. 2 of the *Restatement of the Law 2nd—Torts*.

¹³⁶Section 194 reads: "An entry above the surface of the earth in the airspace in the possession of another, by a person who is travelling in an aircraft, is privileged if the flight is conducted:

- a) for the purpose of travel through the airspace or for any other legitimate purpose;
- b) in a reasonable manner;
- c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the airspace above it, and
- d) in conformity with such regulations of the state and federal aeronautical authorities as are in force in the particular State".

Herbert David Klein,¹³⁷ in a very interesting treatise, cannot agree with this delay and argues: "But why sooner or later? Has it not been sufficiently discredited? *Quousque tandem?* (how much longer)". How much longer will it act as a legal crutch to landowners eager to support their actions for trespass and nuisance against users of airspace?

IX. Conclusion

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹³⁸

Literally translated this ancient maxim, which was coined when human flight was regarded as a pure dream, would lead to the absurdity that the landowner owns all the airspace above his land.

From the above cases it certainly must be concluded that the '*ad coelum*' theory has never been the law in the field of aviation.

The maxim has in practice given the landowner the right of the effective use of his property, without interference by flights which hamper his real enjoyment of the land, but it has never given him an absolute right in airspace above his land.

This maxim "has become nothing but a clog around the neck of the development of the law"¹³⁹ because although the courts have never hesitated to deny its application in cases involving aviation, it is still being offered as a plea when property owners believe that they are being damaged by the operation of an aircraft over their property or by the proximity of airports to their homes.

The law grows with the development of science and the progress of mankind, and it has to encourage and develop, not hinder, this progress. Now that the airplane is in existence and is in world-wide use, a new branch of law must be created with all attendant legal rules to govern the landowner's rights in airspace.

No court has ever held in an aviation case that the landowner owns the airspace above his property to an indefinite extent, therefore this theory or maxim must be entirely discredited in aviation.

I will conclude my survey with the statement by Mr. Justice Scott of Colorado:¹⁴⁰

I can only hope for a day when courts of justice will decline to dig among the tombs of a dead past for ancient and obsolete precedent . . . and the law will be treated as a philosophy to be applied to the ever changing condition of man, and not as a straight jacket with no leeway for the exercise of common sense and common justice.

¹³⁷Klein, *op. cit.*, Note 55, p. 254.

¹³⁸Holmes, *The Common Law* (1881), p. 1.

¹³⁹Winfield, *op. cit.*, Note 64.

¹⁴⁰As quoted by Fred D. Fagg, "Airspace Ownership and the Right of Flight (1932) 3 J. Air L. & Com. 410.