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Raymond W. Clifford

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THE BEGINNINGS OF A LAW FOR THE AIR

This article aspires to give such boundaries as the subject will permit to a branch of the law so recent in its origin that its terminology is still in dispute. For the present we shall designate as "air law" that developing group of legal principles which apply to the occupancy, use and navigation of the air. But the difficulties which this definition encounters will be apparent as we proceed, and our excuse for its present employment is that it describes the matter in familiar terms.

The discovery of new arts and instrumentalities has always exerted powerful influence upon the trend of the development of law. So it is that in our time the invention and perfection of aircraft and of the radio transmitter and receiver have compelled the formulation of a law for the air.¹ This air law found ready made and properly adaptable to the new use, many familiar concepts, and these will be given little more than passing notice. But on the other hand, air law presents some problems of sovereignty, jurisdiction and the limitations of private property which are unique and largely incapable of solution by direct application or analogy of the common law.

There are, as yet, few celebrated cases in this field. To be sure, man has for many years penetrated the upper air in captive or free balloons, has made some sort of use of the air above the land of another by firing projectiles through it,² and under the "ancient lights" doctrine of the English common law has been protected in the enjoyment of a prescriptive right to light transmitted through this medium across the land of adjacent owners.³ These relationships or uses have given rise to actions in which the incidents of the ownership of the soil as extended upward have been asserted. The adjudications in such actions have been frequently employed as a supposed basis for the genesis of air law. But a reading of those decisions we believe will bring conviction that their writers would be quite unwilling to extend the doctrines announced to new devices and to the then unknown potentialities of the air medium.

The Wright brothers of Dayton, Ohio, inventors of the airplane, demonstrated their machine in actual flight for the first time on December 17, 1903. The use of the air medium for communication dates from Marconi's establishment of wireless communication over a distance of four miles in 1897.

² As an example only of many cases up this subject see *Clifton v. Viscount Bury* (1887), IV Times Law Reports 8.

³ See a full discussion of this doctrine in a decision of the House of Lords, *Collis v. Home and Colonial Stores, Ltd.*, 1904 Law Reports, Appeal Cases, p. 179. 90 L. T. 687.

FREEDOM OF THE AIR

As we endeavor in a general way to mark off the limits of the jurisdictions pertaining to the air, we commence with that which having the most extensive physical boundaries yet offers the least complexity with respect to the subject in hand—we refer to the air above the high seas.

The freedom of the sea—the principle that beyond territorial waters and such marine zones as exist by reason of a coast state exercising authority to prevent violation or evasion of its laws, the open sea is the common highway of nations and is not subject to any sovereignty,—is now a universally recognized rule of international law⁴ Although the first expressions of the rule are found in the Roman law, it was Hugo Grotius who first announced it in its modern form. In 1580 Spain was protesting the voyage of discovery made by the English navigator Drake, who had picked a quarrel with the Spaniards in the Pacific Ocean. To these protests Queen Elizabeth made answer to the Spanish ambassador Mandoza, as follows:⁵

“Neither nature nor public interest permit the exclusive possession of the sea by a single nation or private individual, the ocean is free to everybody, no legal titles exist whatever that would grant its possession to anyone in particular, neither nature nor usage permit its seizure, the domains of the sea and of the air are common property of all men.”

So far as her statement refers to the domain of the air, we cannot accord to the good Queen the prescience which her pronouncement imported. But at this day “all are agreed that over the free seas the air is free.”⁶

In the evolution of air law, however, this principle of the freedom of the air over the high seas came to have in theory a wholly unwarranted extension and one which eventually had to be abandoned. Partly by reason of the fact that the air at no great distance above the earth had the physical aspect of the vast open sea, and partly by reason of a supposed analogy in contemplation of law, there arose a school of thought which proposed a universal freedom of the air above both land and sea.⁷ But this doctrine of the universal freedom of the air fell soon under the weight of practical considerations, for aircraft, like ships, must come to port. The World War

⁴ Meurer, *The Program of the Freedom of the Sea*, p. 13.

⁵ Meurer, *supra*, p. 11.

⁶ *American Journal of International Law*, Vol. IV p. 113 (article by Kuhn)

⁷ For a bibliography on this subject see Hyde, *International Law*, Vol. I, p. 324, note 2.

also brought forcefully to attention the fact that aircraft in flight were always potential invaders of the domain of the sovereign beneath.

THE CINA

In these days when both oceans have been crossed in non-stop flights, it is easier to understand the compulsion which brought about a further development in air law. The geographically compact group of nations which we refer to as the Continent, have been for some time capable of being crossed in a single flight. As a direct result of the World War the air frontiers of these nations were closed to all foreign aircraft. This condition was intolerable. It was apparent to all that the development of practical navigation of the air required the opening of the air frontiers. The Cina was the outgrowth of this situation.

The Cina is an international agreement respecting flight, dated October 13, 1919. It takes its name from the French title of the agreement, *Convention Internationale de Navigation Aerienne*. Ratification of or adherence to its provisions has been made by the following states: Belgium, Great Britain and the British Dominions and India, France, Greece, Japan, Portugal, Jugo-Slavia, Siam, Persia, Italy, Bulgaria, Czechoslovakia, Roumania, Uruguay, Poland, Chile, The Saar Territory, Sweden, Denmark, The Netherlands and Panama.⁸ However, the Cina (convention) enunciated some principles of first magnitude in the domain of international air navigation which are worthy of consideration.

THE AIR SOVEREIGNTY OF NATIONS

The very first article of the Cina provides as follows: "The high contracting parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory." It is to be noted that the subject of the sovereignty asserted is "air space" and not "air." A little reflection will suggest the aptness of this choice of terms. The air or atmosphere above the land of any particular proprietor is a continually changing thing, but the air space above given land is capable of at least approximate boundary laterally. The sovereignty of every power over its air space is declared to be "complete and exclusive." Here is the explicit renunciation of the doctrine of universal freedom of the air. The second article is

⁸It is a rather long and complicated document (9 chapters and 8 appendices) and no digest of its provisions will be attempted here. The reader who is interested in the text is referred to the reprint in *Official Bulletin* No. 11, December, 1926, of the International Commission for Air Navigation.

equally noteworthy. It provides in part as follows. "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States." There should be read in connection with the foregoing article, a portion of the thirty-second article as follows "No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization." The term "innocent passage" is borrowed from international law. That law conceives a maritime state as having a zone of territorial waters along its seacoast separating such coast from the high seas. The littoral state is upheld in asserting a measure of jurisdiction over these territorial waters for purposes of self-protection. On the other hand, the territorial waters are said to be subject to a servitude or easement of innocent passage in favor of the merchant-ships of foreign nations. A famous international lawyer has put the matter tersely as follows:⁹ "Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten." The significance, then, of the quoted portions of articles two and thirty-two of the Cina is that the high contracting parties have created thereby a mutual right of passage for non-military aircraft.

Reverting now to the declaration of sovereignty over air space as asserted in the first article of the Cina, we wish to call attention to similar expressions in later enactments. The British Air Navigation Act of 1920 commences with this declaration:¹⁰

"Whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto—be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lord's Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows. "

Our nation has likewise proclaimed its sovereignty over air space in Article 6 of the Air Commerce Act of 1926 which reads in part as follows:¹¹

"The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the air space over the lands and waters of the United States, including the Canal Zone."

⁹ Argument of Mr. Elihu Root in XI Proceedings, North Atlantic Fisheries Arbitration, p. 2006.

¹⁰ The British Air Navigation Act of 1920—Public General Acts, 10 and 11 George V Chap. 80, p. 540.

¹¹ Air Commerce Act of 1926—44 Stat, at L. 568, U. S. C. A. Supp. 1927, Tit. 49, sec. 171-184.

The Uniform State Law of Aeronautics, now adopted in its entirety or with but slight changes by twenty-one states and Hawaii,¹² declares in Section 2 as follows.¹³

“Sovereignty in the space above the lands and waters of this state is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this state.”

In fact declarations of complete national sovereignty in the air space are now so numerous as to give foundation to the belief that this principle will soon become universal.

So far our discussion of the *Cina* bears upon its regulation of international aviation. Its effect upon the national law of the nations parties thereto is quite as important. That the private law regulating the operation of aircraft should be uniform as nearly as may be, is highly desirable. If the attitude toward the development of flight is a friendly one, the ever increasing range of such flights demands the elimination of conflicting provisions which would render passage over territory foreign to that of the nationality of the aircraft not feasible. Accordingly the *Cina* contains uniform regulations upon the following subjects: nationality of aircraft (Chap. II) and their marking (Annex A), certificates of the airworthiness of the craft and competency of the operating crew (Chap. III and Annexes B and E), log books required to be carried (Annex C), lights, signals and rules for air traffic (Annex D), aeronautical maps and the legends thereon and ground markings (Annex F), rules, codes and color scheme for meteorological information (Annex G), and customs rules (Annex H). Because of the completeness of these regulations it will be seen that they immensely facilitate a flight which goes beyond the boundaries of the state of departure, as well as affording a great measure of protection to the states flown over.

The *Cina* is a by-product of the Treaty of Versailles. The signers of that treaty are, with few exceptions, the signers of the *Cina*. As the World War had closed the air frontiers, so the establishment of peace argued loudly for their re-opening. The greater speed, ceiling and lifting capacity of the aircraft developed during the war helped to strengthen the demand that the domain of this new vehicle of transport be international. The *Cina* was the outgrowth of this situation. The administrative machinery which it creates

¹² Cf. "A Survey of State Aeronautical Legislation," by Fred D. Fagg, Jr., Professor of Law Northwestern University School of Law *Journal of Air Law* Vol. 1, p. 452.

¹³ The text of the Uniform State Law of Aeronautics will be found in Zollman, "Law of the Air," p. 260 et seq., and Logan, "Aircraft Law—Made Plain," p. 109 et seq.

is operated by a permanent International Commission for Air Navigation under the direction of the League of Nations (Chap. VIII). Doubtless therein lies the reason why the United States, while a signatory of the Cina, has never ratified it. The arguments advanced in opposition to ratification are substantially the same as those in opposition to ratification of the Treaty of Versailles.

To give a complete picture of international air law agreements, it is necessary to mention two other conventions. The Ibero-American Convention was prepared in a conference called by the Spanish Government at Madrid in 1926. The conferees included Spain, Portugal and South American countries, as well as some of the signatories of the Cina. The Ibero-American and the Cina conventions are practically identical. The Pan-American Convention, signed in Havana, February 20, 1928, has been ratified by only four nations, Guatemala, Mexico, Nicaragua and Panama, and is not yet effective. It is quite different from the other two conventions. The United States and Canada have entered into a reciprocal arrangement, effected by a note dated August 29, 1929, from our Secretary of State and the reply of the Minister of the Dominion of Canada of October 22, 1929, which arrangement provides for (1) the admission in to the one country of civil aircraft of the other country, (2) the issuance by each country of pilot licenses to nationals of the other, and (3) the acceptance by each country of certificates of airworthiness in connection with aircraft imported from the other country as merchandise.¹⁴

AN ANCIENT MAXIM—GROUND PROPRIETORSHIP

The early discussions of air law were much involved with attempts to define the rights of the ground proprietor in the superincumbent air space, and a considerable vestige of the controversy still remains. Literally volumes have been written upon this subject and a bibliography would fill many pages. The core of this controversy is the meaning of the maxim *cujus est solum ejus est usque ad coelum* (Whoever owns the soil owns also to the sky) It is heartening to those who endeavor to discover the meaning of this maxim to know that an eminent English authority¹⁵ has said that "no English judge or writer has ever satisfactorily expounded the matter." The maxim is of considerable age. Sir George Croke reporting the case of Bury against Pope¹⁶ adds a note referring to the maxim as of

¹⁴ For a complete account of negotiations with Canada see article by Stephen Latchford, "Technical Assistant, Treaty Division, Department of State, Washington, D. C., appearing in Journal of Air Law, Vol. II, No. 3 p. 335 (July, 1931).

¹⁵ Dr. Arnold D. McNair, Fellow and Senior Tutor of Gonville and Caius College, and Lecturer in Law in the University of Cambridge, England.

¹⁶ Crokes K. B. Reports, Vol. I, part 1, p. 118, Cro. Eliz. 118 (1587).

the time of Edward I, the English Justinian (1272-1307) But its origin, as many writers believe, may have occurred much earlier. Certain it is that at the time the first edition of Lord Coke's "Commentary Upon Littleton" appeared in 1628, the maxim had attained some degree of currency, for that writer says¹⁷ "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 even up to heaven, for *cujus est solum ejus est usque ad coelum.*" In 1765 Sir William Blackstone commenced the publication of his "Commentaries" in which he said¹⁸

"Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum ejus est usque ad coelum*, is the maxim of the law, upwards, therefore no man may erect any building, or the like, to overhang another's land by the name of land, which is *nomen generalissimum*, everything terrestrial will pass."

Therefore, the maxim began to be quoted and applied by the English judges.

An examination of a few of these cases as representative of the trend of the English judicial thought is in point. These cases generally are concerned with the question whether invasion of the air space above land is (a) nuisance or (b) trespass. And it is well in this connection, without going into refinements of pleading, to recall the essential difference between the two sorts of injury as they affect real property and the actions for their redress. For our present purpose it is sufficient to remember that a nuisance, with reference to real property, is¹⁹ "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another" and that it is necessary in such action to show actual damage resulting from the acts complained of, while in trespass on realty a showing that the possession of the complainant has been disturbed is sufficient to support the action. Accordingly, if air space be capable of possession in the sense that land can be possessed, we should find the English judges holding that the invasion of air space is trespass. And by the same token air space, in legal contemplation, is part of the subjacent land. In *Fay v. Prentice*²⁰, plaintiff recovered damages by reason of the adjoining owner having erected a cornice projecting into the air space above plaintiff's land, from which cornice, it was alleged, rain fell upon and damaged plaintiff's land. The court treated the injury as a nuisance. Being urged by one of

¹⁷ Day's Ed. Book 1, Cap. 1, sec. 1, 4a.

¹⁸ Blackstone—Commentaries on the Laws of England, 2nd Ed., Vol. II, p. 18.

¹⁹ Blackstone's Commentaries, Vol. III, p. 216.

²⁰ 14 L. S. (C. P.) 298, 1 C. B. 828 (1845)

the serjeants to treat the matter as trespass, Coltman, J said. "But conceding that under certain circumstances such an act would amount to a trespass, there is nothing on this record which shows it to have been so. It may be the presumption of law that the space from the earth to the sky belongs to the owner of the soil, but this is a mere presumption, and not a matter of fact, and there is no allegation in this declaration that the plaintiff had this extensive right." *Penruddock's Case* (1598),²¹ and *Baten's Case* (1610),²² are very like the facts of *Fay v. Prentice* and are cited therein as authority supporting the decision. These cases indicate a judicial reluctance to concede an ownership or possession of air space. In *Pickering v. Rudd* (1815),²³ the plaintiff sued in trespass because the defendant had nailed upon his house a board, which projected over the plaintiff's garden. Lord Ellenborough said. "I do not think it is a trespass to interfere with the column of air superincumbent on the close," and the jury found for the defendant. But the remarks of the court obiter are most interesting. Continuing, he said

"I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned judge, who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. 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."

Lord Ellenborough's reference to an aeronaut may well have been suggested by historical events which were then of very recent occurrence. In the Napoleonic campaigns which culminated in the Battle of Waterloo fought on June 18, 1815, balloons had been employed to obtain information concerning the position of the enemy²⁴

In 1865 occurred the case of *Kenyon v. Hart*.²⁵ The facts of the case involving an alleged trespass by one going upon the land of another to retrieve a pheasant which he had killed, do not make it in

²¹ 5 Coke's Reports 100, 77 Eng. Repts (Reprint) 210.

²² 9 Coke's Report 53, 77 Eng. Repts. (Reprint) 810.

²³ 4 Campbell's Reports, 219, 1 Stark, 56.

²⁴ Hazeltine, *The Law of the Air*, p. 66.

²⁵ 6 Best & Smith 249, 11 L. T. 733.

point in our present inquiry. But Blackburn, J. alluding, as the reporter conceives, to the reference made by Lord Ellenborough to an aeronaut in *Pickering v. Rudd*, *supra*, and the doubt which His Lordship entertained that the passage of a balloon over the land was a trespass, says "I understand the good sense of that doubt, though not the legal reason of it." In other words Blackburn was still of opinion that the *ad coelum* maxim should be taken literally.

In *Corbett v. Hill* (1870)²⁶ plaintiff owned two adjoining pieces of real property and conveyed one of them to defendant. The structure upon the property which plaintiff retained projected over the property conveyed. The defendant commenced to build upon the property conveyed to him in such manner as to avoid the projection and erect above it. The plaintiff brought trespass, but judgment was for the defendant, Sir W. M. James, V. C., holding that "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." Although many more cases like the foregoing might be cited, those already discussed are sufficient to indicate the diversity of opinion among the early English judges concerning the *ad coelum* maxim.

We believe a reading of the various statements of the maxim, the remarks of commentators, and the discussions of judges and text writers lead to the following conclusions

1. That the maxim crept into the law by reason of the profuseness of early writers in describing the incidents of the ownership of real property—the conception of ownership extending indefinitely upward being an attractive exaggeration to enforce the thought of the completeness of the dominion of the proprietor.

2. That since its origin far antedates any use of the air or air space such as we know, it could not possibly have the meaning sometimes attributed to it.

3. That its judicial application has been largely, if not entirely, in the solution of problems arising in connection with structures upon or attachments to the soil, or the passage of objects over the soil in close proximity thereto, as distinguished from the flight of aircraft at considerable distance above the ground.

This controversy over the meaning and application of the *ad coelum* maxim so far as it applies to flight of aircraft has happily been stopped in Great Britain by the enactment of The British Air Navigation Act of 1920 already referred to in its international

²⁶ 9 Equity Cases (L. R.) 671, 22 L. T. 263.

aspect.²⁷ The provisions of this Act as it affects the national law of Great Britain are no less important. Section 9 reads in part as follows.

“(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with, but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered.”

This is tantamount to saying that the aviator may fly, but that the owner of the aircraft is liable for any damage to persons or property on the ground as though the damage were in fact wilful, unless the damage was caused or contributed to by the person injured. To state the matter another way and to emphasize how it abrogates the *ad coelum* maxim so far as flight is concerned,²⁸ there is no legal liability for mere flight over the land of another at reasonable height and in a reasonable manner, but absolute liability of the owner for damage to person or property on the land unless caused or contributed to by the person injured.²⁹

Coming now to the situation in the United States, the Uniform State Law of Aeronautics previously referred to reiterates the doctrine of the *ad coelum* maxim, but in modified form. The pertinent sections of this law read as follows.

“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

²⁷ See note 10 *supra*.

²⁸ For a comparatively recent decision in the High Court of Justice, Chancery Division, applying the *ad coelum* maxim to a projecting sign in holding it to be a trespass, see *Gifford v. Dent* (1926), weekly Notes 336.

²⁹ What is said to be the first case arising under the British Air Navigation Act of 1920—*Roedean School Ltd. v. The Cornwall Aviation Co., Ltd.*—is commented upon in *The Solicitor's Journal* (Eng.) July 10, 1926.

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 owners, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided by Section 5."

"Section 5. Damage on Land.

"The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is cause in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner, or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it."

The ground proprietor's ownership of the air space above is asserted, but flight through such air space is declared to be lawful unless at such low altitude as to interfere "with the then existing use" or "unless so conducted as to be imminently dangerous" The liability imposed by Section 5, *supra*, is essentially the absolute liability of the British Air Navigation Act of 1920. It cannot yet be assumed that the conception of ownership of air space, lawfulness of flight, and the attendant liability as embodied in the sections of the uniform law quoted above will become universal in this country. The standing committee on aeronautical law of the American Bar Association reporting to that body at its 1931 meeting, submitted a uniform aeronautical code which contains some important changes with respect to the matters we are considering. Section 3, *supra*, is purposely omitted because, as the committee believes, "the statement as to ownership of air space proclaims a legal untruth." To take the place of Section 4, *supra*, Section 1 of the proposed uniform code contains a provision on "Lawfulness of Flight" as follows

“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 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).”

It is the thought of the framers of the code that the rule providing minimum safe altitudes of flight should not only be uniform among the several states but should also conform to the rule on the same subject promulgated by Federal authority. Effective September 19, 1930, the Department of Commerce prescribed the following rule

“Section 69.

“The minimum safe altitudes of flight in taking off or landing, and while flying over the property of another in taking off or landing, are those at which such flights by aircraft may be made without being in dangerous proximity to persons or property on the land or water beneath, or unsafe to the aircraft.

“Minimum safe altitudes of flight over congested parts of cities, towns or settlements are those sufficient to permit of a reasonably safe emergency landing, but in no case less than 1,000 feet.

“Minimum safe altitudes of flight in all other cases shall be not less than 500 feet.”

Comparing Section 4, *supra*, of the uniform state law with Section 1, *supra*, of the proposed uniform code, it is evident that the latter section more clearly describes the air space in which flight is lawful. The Federal minimum safe altitude regulation, *supra*, is particularly noteworthy because of its treatment of flight in taking off and landing. From the standpoint of the operator of aircraft (and until such time as heavier-than-air machines which rise vertically become prevalent for commercial use), it is essential that flight under some conditions be lawful at the very low altitudes required for taking off and landing. The Federal regulation, *supra*,

aims to permit the ascent and descent, but to limit such permission by considerations of safety

Except as broadly suggested in what has been said respecting the limitations on the right of flight, we will not discuss herein the various sorts of legal liability, both of contract and of tort, which arise through navigation of the air space.³⁰ The precedents pertaining to particular classes of liabilities on which actions may be maintained are as yet inconsiderable. Certainly they are not presently numerous enough to be cited as rules of decision. But we cannot doubt that rules adequate for the protection of personal and property rights in the new situations created by use of the air space will evolve. The body of our law as it exists today, both that which is inherited and that which is indigenous, manifests a remarkable adaptability to changing time and circumstance. At least from the time of the Statute of Westminster II,³¹ English law and our law have evinced a purpose that no wrong should be without a mode of redress.

The progress of our law toward the ideal of completeness is no less pronounced today. As Judge Ellis has well said:³²

“It is the boast of our law that there can be no right without a corresponding remedy. When the right is once created, the common law furnishes the remedy.”

*RAYMOND W. CLIFFORD,
Of the Olympia Bar.

³⁰ A well considered case involving the legal liability for flight over the land of another is *Sweetland v. Curtiss Airports* (Ohio), 41 Fed. (2d) 929 (1930). See also *Smith v. New England Aircraft Co.* (Mass.), 170 N. E. 385 (1930).

³¹ 13 Ed. I, Chap. 24, Sec. 2 (1285)

³² *State ex rel. Chicago, Milwaukee & St. Paul Railway Co. v. Public Service Commission*, 94 Wash. 274, 287, 162 Pac. 523 (1917)