

that to invade a close by an overhanging structure could not be trespass, because this led to an absurdity, to-wit, trespass in fugitive occupancy of the air. But invading a close for an instant by doing anything to the soil or to what is planted in, or built upon it, or grows out of it, is trespass. Running across or stopping within the soil surface of a close is not differentiated in any respect. Therefore, according to Lord Ellenborough, it is not the same thing to invade one's atmospheric plane as his soil possession.

Take the distinction of plucking fruit from a tree being trespass and taking and carrying it away after it has fallen being larceny. It has become in the latter case personal property because it is not attached to the freehold. But it is as much attached to the superincumbent air in the one situation as the other. It is impregnated, so to speak, with some freehold in every place it is, if, literally, a freehold extends to the sky, and nothing could be severed therein. If one bottled up some of the superincumbent air of A.'s freehold it would be going to an extravagant length to say he was committing larceny, but it would seem no less ridiculous to assert he was trespassing. If he took away A.'s soil or cut down his trees or drained his pond or carried away his mineral water, his act would be trespass.

All of truth there seems to be in the maxim of ownership to the sky is, that within lines extended through all points of soil ownership to the sky is a space of preferential use to the owner of the soil and such use is interfered with only when enjoyment of the soil is diminished.

On this theory a nuisance is abatable when it fills that space with noxious odors, or with concussion that shakes to their damage structures affixed to the soil; but any mere stirring of air that works no harm to occupancy of the soil has, we venture to assert, never been made the basis of any claim in a court.

It has been held, that the common law rule of cattle pasturing upon land whether open or enclosed has not been regarded as applicable to the condition of things in this country, and therefore it is not trespass here for cattle running at large to go upon,