

ing the close would be by an action on the case; otherwise it would follow that an aeronaut would be liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passed in the course of his voyage. Lord Ellenborough's dictum was questioned fifty years later in *Kenyon v. Hart*, [1865] 6 B. & S. 249, 252, wherein Blackburn, J. (as he then was), said, "I understand the good sense of that doubt, though not the legal reason of it"; and it is difficult to see how *Pickering v. Rudd* is an authority of assistance to the argument that flight over a person's land is not an act of trespass. From the judgment of Lord Ellenborough it is clear that he was of opinion that, although no action of trespass would lie, the proper remedy would have been by an action on the case. It must not be forgotten that this case was decided in the year 1815, when, as was recently observed in the Court of Appeal, the form of an action was of the utmost importance in the eyes of the court, and when there was no machinery by which an action of trespass could be turned into an action on the case. The old distinction between an act which itself occasioned a prejudice and an act a consequence from which was prejudicial, was abolished by the rules of the Supreme Court under the Judicature Acts, and the one action of trespass now covers both an action of trespass and an action on the case.

It is submitted that the occupier of land is entitled to the free user of the air above his land. Although there is no right to air under the Prescription Act, or as an easement by prescription from the time of legal memory, it has been held that a vestry or a board of works in whom is vested the management and control of the streets situate within their district are entitled to so much of the air above the streets as is compatible with the ordinary user thereof. In *Wandsworth Board of Works v. United Telephone Co.*, [1884] 13 Q.B.D. 904, the defendants suspended from chimneys telephone wires across a street. An injunction restraining the defendants was granted by Stephen, J., which was dissolved by the Court of Appeal, the *ratio decidendi* being, not that the air above the surface of the street was