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Ralph M. Wade

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It appears that many courts tend to lighten the plaintiff's burden of proof in their instructions to the jury by means such as the establishment of presumptions concerning the use of firearms and the shifting of the burden of proof to the defendant by allowing the plaintiff to base his case on evidence sufficient only to support a case under the doctrine of res ipsa loquitur.

An increasingly severe attitude in the courts, concerning hunting accidents, coupled with broader and more particularized criminal statutes,[32] concerned with negligence, have caused more and more hunting accidents to be the subject of criminal rather than civil liability in recent years.[33] Civil liability suits on the other hand have decreased because the record of unsuccessful defendants in such cases has prompted a greater number of out of court settlements. We may conclude that it is desirable that strict liability should be imposed upon the hunter in his use of firearms because, as Harris says in his article *Liability Without Fault:*

> The best way to secure proper care and caution in present day society is to throw the risk of damage upon the person who chooses to act.[34]

ROBERT C. KELLY

ARE THERE INDIVIDUAL PROPERTY RIGHTS IN CLOUDS?

Technical advances in weather control and particularly that phase known as rain-making have posed many new and interesting problems for the lawyer as well as for the scientist.[1] The former is confronted with such problems as whether or not individual rights have been affected by the prevention of rain, excessive rain, accidents arising out of hazardous highways, and destruction of crops as a result of man's interference with natural rain fall. Unfortunately the attorney will find no reported cases to help him with such problems.

One recent case, *Southwest Weather Research, Inc. v. Rounsaville, Texas*[2] has, however, raised the unique question of a property owner's right to the clouds over his land. The plaintiffs, ranchers residing in a west Texas county, were granted a temporary injunction against owners and

32. Variously termed (depending upon the jurisdiction) as negligent homicide, involuntary manslaughter, second degree manslaughter, or manslaughter arising from an act of culpable negligence.
33. The treatment of these subjects by the American Law Reports Series indicate a trend. Civil liability has not been the subject of an annotation since 1928 (53 A.L.R. 1205) but the 1929 annotation on criminal liability (63 A.L.R. 1232) has benn superceded by a new annotation as late as 1952 (23 A.L.R.2d 1402). The fact that both the anotations on criminal liability are later than the one on civil liability indicate that the field of criminal liability for hunting accidents is growing and that a greater number of cases worthy of note are found in that field.
34. Harris, Liability Without Fault, 6 Tulane L. Rev. 337, 368 (1932).

1. Weather Under Control, Fortune Magazine (Feb. 1948).
2. 320 S.W.2d 211 (Tex. Civ. App. 1958).

operators of equipment used in what they called a "weather modification program" and those who contracted for their service. The latter were also ranchers whose aim was to prevent widespread damage from hail storms which frequently occurred in that section of Texas. Plaintiffs alleged that the weather modification activities interferred with the clouds and the precipitation which might come therefrom while over their land. They asked the court to protect them in their right to the benefit and enjoyment of their land.

The trial court found that the operators were flying over plaintiffs' land and into the clouds above and engaging in activities that did change their content and cause them to dissipate and scatter. The clouds were thus prevented from following their usual and natural course of developing rain over the plaintiffs' land.

The case was appealed by the defendants, who protested the issuance of the injunction on the ground that they were following a lawful occupation, had every right to protect their crops from hail and that the evidence did not justify the issuance of the injunction. They further contended that appellees had no right to prevent them from flying over their land, that no one owned the clouds unless it be the state and finally that the injunction was too broad in its terms.

The appellees urged that the owner of the land also owns in connection therewith certain so-called natural rights and cited a quotation from *Spann v. City of Dallas*:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.[3]

The higher court recognized appellees rights to the clouds over their property but narrowed the injunction to the extent necessary to prevent appellant from seeding clouds directly over appellees' land.

In order to establish a property right in moveables, property law has long required the assertion of control through occupancy and the intent of the occupier to appropriate for his own use.[4] Many things, such as air, runing water, the sea, flying birds and animals' *ferae naturae* remained outside the realm of private property because they are physically beyond occupancy. Blackstone stated it as follows:

> Fire, light, air and water . . . a man can have no absolute property in these as he may have in the earth and land; since there are of a vague and fugative nature, and therefore can admit only of a

3. 111 Tex. 350, 235 S.W. 513 (1921).
4. Chases' Blackstone, Commentaries on the Laws of England, 213 (4th ed. 1914).

> precarious and qualified ownership, which lasts so long as they are in actual use and occupancy, but no longer.[5]

Considered on this basis it would seem that clouds in their natural state are not subject to private ownership, hence one would have no cause for an action based upon an interference therewith. However, it has been held that a landowner can have rights in some elements that are beyond occupancy. The right is based upon the theory that the owner of land has a right to be protected from unreasonable interference[6] with the use of his property in its natural condition, including the water of a flowing stream thereon.[7] In some jurisditcions the right has been upheld upon the basis of a trespass theory; in others one riparian owner cannot prevent the use of water by another unless he can establish that unreasonable use by the latter has deprived him of a beneficial use.[8]

Among other commonly recognized rights of a landowner where occupancy and control are not require are: (1) the right to the support of land;[9] (2) the right to natural drainage of land;[10] (3) the right to natural diffusion of air free from smoke, dust or pollution;[11] (4) the right to use the land for a reasonable purpose such as farming.[12]

It would seem to follow from the basic principles of property law deevloped in riparian right, support and pollution cases that all forms of natural precipitation are elements of the natural condition of the land and as such contitute rights which the courts will protect as essential to the owner's use and enjoyment. However, in an early weather modification case, *Slutsky v. City of New York*,[13] the plaintiff, a resort owner in the watershed area over which clouds were being seeded, sought to enjoin permanently the City of New York from continuing its cloud seeding to increase precipitation. The court denying the petition set forth the following pertinent remarks in its opinion:

> This court must balance conflicting interests between a remote possibility of inconvenienec to the plaintiffs' resort and its guests with the problem of maintaining and supplying the inhabitants of the City of New York and surrounding areas with a population of 10 million inhabitants, with an adequate supply of pure wholesome water. The relief which the plaintiffs ask is opposed to the general welfare and public good; and the dangers which plaintiffs apprehend are purely speculative. This court will not protect a positive public advantage.[14]

5. Lewis' Blackstone, Commentaries on the Laws of Englands, 395 (Book II, 1900).
6. Minnesota Loan & Trust Co. v. St. Anthony Falls Waterpower Co., 82 Minn. 505, 85 N.W. 520 (1901).
7. Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907); I Stan. L. Rev. 53-56 (1958).
8. Gilis v. Chase, 67 N.H. 161, 31 Atl. 18 (1892).
9. Sime v. Jensen, 213 Minn. 476, 7 N.W.2d 325 (1942).
10. Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976 (1893; Duenow v. Lindeman, 233 Minn. 505, 27 N.W.2d 421 (1947).
11. Evans v. Reading Chemical and Fertilizing Co., 160 Pa. 209, 28 Atl. 702 (1894).
12. 1 Wiel, Water Rights in Western States, 774 (3d ed. 1911).
13. Slutsky v. New York, 97 N.Y. Supp.2d 238 (1950).
14. Ibid., 240.

The court also stated without further discussion or citation of legal authority, that plaintiff clearly had no vested property rights in the clouds or the moisture therein. The latter remark would appear to be *dictum* in view of the above quotation embodying the thinking with respect to the public advantage as opposed to possible private injury. It would further appear that the court's decision is based not only the above consideration but also upon the failure of the plaintiff to establish actual rather than possible harm to his business.

In the Texas case, the holding recognized a property right to natural rainfall, but the court expressly stated that the injunction to protect such rights would issue only for interference with clouds over plaintiffs' property, thus in effect adopting a theory of trespass.[15]

It is of interest to note that in a Washington case[16] which is quite similar factually to the Texas case the court refused to grant a permanent injunction to the plaintiffs when it concluded, on the basis of expert meterological testimony presented, that the cloud seeding to prevent hail had not brought about exceptional rainfall and flash floods on the farms adjacent to the hail prevention target area. Plaintiffs later voluntarily dismissed their suit for damages.

In most of the litigated cases to date, and they are certainly few in number,[17] the actions have been brought to secure damages for too much rain, rather than deprivation of natural rainfall as in the Texas case. For example in *Samples v. Irving P. Krick, Inc.*,[18] an Oklahoma case, the theory of the plaintiff was negligent in cloud seeding under existing weather conditions. Not proving his case to the satisfaction of the jury the verdict was for the defendant.

Currently there seems to be no generally accepted theory which would establish a landowner's property rights in the clouds or even to the moisture therein. Should the courts adopt a theory analogous to the reasonable use doctrine of a riparian land-owner's right to water, said owner would not have to prove that injury occurred while the clouds were over his land. In the case of water in a running stream it is sufficient for the riparian owner to prove unreasonable depletion even though it occurred upstream. It is admitted that, with respect to clouds, it would be very difficult to prove that injury actually occurred while the clouds were over the plaintiff's land. Approached from the reasonable use doctrine the *Slutsky* case could be rationalized because the determination of what constituted a reasonable

15. Southwest Weather Research, Inc. v. Rounsaville, 320 S.W.2d 211 (Tex. Civ. App. 1958).
16. Auvil Orchard Co. v. Weather Modification, Inc., and Apple Weather, Inc., Cause No. 19268, Superior Court, Chelan County, Wash. (1956).
17. Oppenheimer, Considerations In Weather Modification, State Government (May, 1957).
18. Civil Nos. 6212, 6223, 6224, W.D. Okla. (1954).

depletion was based upon public policy measured in terms of social benefit.[19]

In the few reported cases arising out of weather control activities the reasoning has usually been based upon traditional legal rules about the law of torts (negligence) to property, doctrines of equity and current ideas about public policy. However, it must realized that the current concept of property rights is the result of growth or evolution as new situations have arisen. The law of real property developed in response to need. Property rights in clouds were not determined either by statute or decisional law prior to the advent of rainmaking because no problems involving such rights arose.

If property is viewed as a cluster of usages which operate to distribute the supply of available scarcities, new property rights should arise whenever technological advances or social changes reveal a new scarcity.[20] To illustrate, the doctrine of *ad coelum,* which asserts that he who owns the surface of the land also owns the space to the sky above, was for many years unchallenged because no problem arose therefrom. With the coming of modern aviation, however, came the realization that the doctrine would retard its development. Consequently it was urged that ownership be limited to the "lower air space" that which was necessary and convenient for the enjoyment of the land.[21] It is apparent then, that this ancient common law doctrine cannot be appropriately applied to establish ownership in clouds.

Today as a result of technological advancement, radio and television stations have allotted certain wave lengths or frequencies upon which to broadcast. Whether or not a station has a property right in the signal it disseminates is currently a matter of litigation.[22] Certainly such intangibles are not subject to possession or occupancy in the same manner as a piece of land. Statutory and court made law will eventually provide the answer.

In 1951 the Wyoming Legislature, cognizant of the technological advances in weather modification, enacted legislation that explicitly lays a legal foundation for the treatment of water in the clouds within the State's boundaries like water in its streams.[23] Such water or moisture was expressly claimed for the use of its residents and the State's best interests.[24] The statute's wording bears a strong resemblance to the Constitutional provision relative to the appropriability of "water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state. . . ."[25]

19. Cosley, Property-Rights of Private Landowners To Rainfall, 4 Vill. L. Rev. 603 (1959).
20. Powell, The Law of Real Property, Vol. I, 23 (1949).
21. Hinman v. United Air Lines Transport Co., 84 F.2d 755 (1936).
22. Property Rights Test Filed, Broadcasting, 78 (May 4, 1959).
23. Final Report, Advisory Committee on Weather Control, Vol. II, 216 (1957).
24. § 9-267, W.S. 1957.
25. Wyo. Const. Art. VIII.

Apparently one objective of the statute is to encourage research and experimentation with artificial rainmaking and weather modification and to obtain and record scientific data which will contribute toward protection of life, property and the public interest. At the same time it declares that nothing in the act should be construed to impose or accept liability or responsibilility on the part of the state or its employees for any weather modification activities carried on by private persons or groups. Furthermore, the law is not to affect in anyway any contractual, tortious or other legal rights or liabilities between private persons or groups.[26]

In conclusion it may be emphasized that while at present there is no clear-cut doctrine relative to a landowner having a property right in a cloud over his land, the courts have held that he does have, subject to paramount social interests, a right to the amount of moisture therefrom which would in the natural course of affairs benefit his land. This right may be safeguarded through an action for tresspass but whether this remedy is adequate is certainly questionable.

RALPH M. WADE

26. §§ 9-267, 276, W.S. 1957.