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Property: Inverse Condemnation: A Growing Problem

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such a debilitating influence on business financing that the ramifications would be impossible to predict.

Dr. Maurice H. Merrill, in his article entitled "Uniformly Correct Construction of Laws," [45] said that it is imperative that the first decision on each point arising under the CODE be in accordance with the intent of the body which drafted and promulgated it. Thus, an erroneous decision, if followed elsewhere, defeats the painstaking effort of the authors of the CODE.

"There is no way to state a legal proposition except in words, despite their notorious inexactitude. If appropriate words are used in a state statute creating a security interest, that interest must be recognized in bankrupcy courts, whatever the predilictions of the individual judge." [46]

Elizabeth Honnold

PROPERTY: INVERSE CONDEMNATION* A GROWING PROBLEM?

The statement heard by every student of real property that man owns from the heavens to the center of the earth [1] appears to have become increasingly true although such ownership is greately reduced in height.

Over the past twenty years there has arisen a number of condemnation suits based on a "taking" by low flying aircraft.[2] The use of airspace over an individual's land has now been limited only to that point necessary for the full use and enjoyment of the land and the incidents of its ownership, the balance being regarded as open and navigable airspace.[3]

The Supreme Court of the United States opened a new era in condemnation cases, when, in *United States v. Causby*,[4] it decided that flights of military aircraft which were so low and so frequent as to be a direct and immediate interference with enjoyment and use of land, amounted to a "taking," entitling the property owner to compensation within the meaning of the fifth amendment.

Causby owned land near an airport leased to the United States. The

[45] Merrill, *Uniformly Correct Construction of Laws*, 49 A.B.A.J. 545 (June, 1963).
[46] Henson, *op. cit. supra* note 20, at 251, 252.

*Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover value of property taken in fact by the defendant even though no formal exercise of power of eminent domain has been attempted.

[1] BLACK, LAW DICTIONARY 5 (4th ed. 1951). "A Coelo Usque Ad Centrum."
[2] Annot. 77 A.L.R.2d 1355 (1961).
[3] 6 AM. JUR. *Aviation* § 3 (1950).
[4] 328 U.S. 256 (1946).

primary use of his land, besides his dwelling, was the raising of chickens. Causby alleged that the low level flights interfered with the normal use of the chicken farm, and interfered with the night rest of the Causby family.

Justice Black, who dissented, saw a problem:

> I am not willing, nor do I think the Constitution and the decisions authorize me, . . . so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress.[5]

In *United States v. 15909 Acres*[6] the court felt that an air easement had been established. Numerous plaintiffs alleged that flights of jet aircraft over their property impaired the use of the property for residential purposes. The court, taking notice of the reasoning in the *Causby* case, said,

> This reason applies with greater force here, when it is considered that jets were in the experimental stage and were not in the contemplation of the court when it defined the owners rights (United Sattes v. Causby, supra) or of the Congress when it defined the government control of space, . . ., or of the Civil Aeronautics Authority which made regulations applicable to other aircraft.[7]

This brings to the front the problem that troubled Justice Black in his dissent in *Causby*[8] *i.e.* the advancements in aviation development.

Fifteen years after *Causby* the Supreme Court decided in *Griggs v. Allegheny County*,[9] two important points in inverse condemnation suits caused by low flying aircraft. First, the court did not believe that simply because Congress had redefined navigable airspace[10] to include that space necessary for take-off and landing, it would preclude a property owner from a condemnation action based on a taking by low flying aircraft, although the taking occurred in navigable airspace.[11]

[5] *Id.* at 271.
[6] 176 F. Supp. 447 (S.D. Cal. 1958).
[7] *Id* at 448.
[8] United States v. Causby, *supra* note 4 at 271.
[9] 369 U.S. 84 (1962).
[10] 49 U.S.C. § 1301(24).
[11] Griggs v. Allegheny County, *supra* note 9 at 88-89: "But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. . . . Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'super adjacent airspace' will often affect the use of the surface of the land itself."

The second, and perhaps the most important, point is that the Supreme Court refused to find that the airlines or aircraft did the actual "taking" but rather that the promoter, owner, or lessor of the airport was the taker of an air easement, on the theory that it is the local authority which decides to build and where to locate the airport. "We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built." [12]

Again Justice Black dissented. However, he reversed his field and in his dissent condoned the *Causby* holding by agreeing with the decision in the *Allegheny* case to the extent that constant and extremely low overflights interfered with the use and enjoyment of petitioner's property, and amounted to a taking under the *Causby rule*.[13] However, Justice Black felt that the United States, not the Greater Pittsburgh Airport, had been guilty of the taking,[14] under the reasoning that supervision and approval for airport operations came from the Civil Aeronautics Administration of the United States.

This developing body of case law does not appear to favor a party who may have taken ownership of property after an easement in airspace had already been taken. A person buying property in close proximity to an airport with a large amount of air traffic should not be allowed a windfall lawsuit by claiming invasion of airspace. It would certainly seem that the doctrine of *caveat emptor* should apply.

In *Highland Park v. United States*,[15] the court seemed to settle the question by way of dicta when it said, "Of course, if defendants had already taken an easement before plaintiff acquired the property, plaintiff would not be entitled to recover." This seemingly logical reasoning is somewhat diminished by the court in *Avery v. United States* which held that;

> . . . vesting in United States of perpetual easement and right of way for free and unobstructed passage of aircraft over certain land did not preclude award of additional damages for subsequent taking which occurred when new noisier aircraft were introduced and, operations were increased and land values decreased sharply, but physical invasion of sound and shock waves as to nearby land as result of aircraft did not constitute a physical taking but merely nuisance or trespass.[16]

The Tenth Circuit was faced with deciding in *Batten v. United States* [17]

[12] Griggs v. Allegheny County, *supra* note 9 at 89.
[13] Griggs v. Allegheny County, *supra* note 9 at 91.
[14] *Ibid.*
[15] 161 F. Supp. 597, 600 (Ct. Cl. 1958).
[16] 330 F.2d 640 (Ct. Cl. 1964).
[17] 306 F.2d 580 (10th Cir. 1962).

the novel question of whether there could be a "taking" when there had been no physical invasion of the property by direct overflights. Could mere sound disturbances be a "taking" under the fifth amendment for which compensation must be allowed? [18] The court did not think so.

There had been no direct overflights on the plaintiff's property but operations of jet aircraft caused windows and dishes to rattle, smoke to blow into homes during summer months, and noise which interrupted ordinary home activities. Plaintiffs brought their action not in tort or nuisance, but sued under the Tucker Act,[19] alleging a taking of property in violation of the fifth amendment. In denying plaintiff's claims, the court took notice that the activities at the base "do interfere with the use and enjoyment by the plaintiffs of their properties," but said that the damages are no more than a consequence of the operations of the base.

Justice Murrah took a dim view of the decision of his fellow Justices in his dissent,

> . . . they say, that since there is "nothing more than an interference with use and enjoyment" of the property, the admitted damages are merely "consequential." . . . I must inquire at what point the interference rises to the dignity of a "taking?" Is it when the window glass rattles, or when it falls out; when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversations difficult or when it stifles it entirely? In other words, does the "taking" occur when the property interest is totally destroyed, or when it is substantially diminished? [20]

Four months after *Batten,* the Supreme Court of Oregon in *Thornburg v. Port of Portland* [21] rejected the majority opinion in *Batten* and adopted the rationale of the dissent. The court was faced squarely with whether a noise nuisance can amount to a "taking." There was property owned by plaintiff which lay approximately 1,000 feet to the side of a runway

[18] Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958). The court felt that ". . . damages sustained by reason of noise, vibration, fear, anxiety, of nervousness resulting from airplanes operating *near* but *not over* plaintiff's land" are proximity damages and are not recoverable in an action founded upon the fifth amendment to the United States Constitution. (Emphasis added).

[19] 28 U.S.C. § 1346(a)(2). "United States as a Defendant: (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Because this action was brought in the nature of a violation of a fifth amendment "taking" the court felt it was limited to a narrow construction as to what constituted a taking, because what the plaintiff discussed was in the nature of a nusiance and not physical invasion.

[20] Batten v. United States, *supra* note 17, at 587.

[21] 233 Or. 178, 376 P.2d 100 (1962).

used by various aircraft which did not pass directly over this portion of plaintiff's land. The court in its opinion felt that it was immaterial in what manner the property was taken, or what kind of label you placed on the taking, *i.e.* trespass or nuisance. They could see no magic in allowing compensation only in the case of trespass, and yet deny there was a taking by nuisance, even though the disturbances were as great as those caused by the trespass.[22] The court could see no difference between a noise or nuisance coming straight down as a result of overflights than a noise coming from some other direction.[23]

In *Martin v. Port of Seattle*,[24] 196 property owners sought damages for an alleged taking of their property for public use caused by nearby low altitude flights of jet aircraft. The court, in its lucid opinion, said,

> We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrevelant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiffs land. * * * The problem of balancing the interests involved, public and private, seems much the same whether a physical trespass is or is not involved.[25]

The *Martin* case is a complete and total rejection of *Batten*, which adheres to the theory that to be a "taking" there must be a physical invasion of the property. The trend today appears to reject *Batten* and accept a more liberal approach to granting relief in cases where there has been no direct overflight, but where the noise and disturbance is of such a degree as to constitute a taking.

In *City of Jacksonville v. Schumann*,[26] although there were low level flights over the plaintiffs' property (which the *Batten* majority felt was a necessary requirement), the court seemed to grant relief on the theory of nuisance rather than on trespass.

The greater disturbance was not low level flights, but was the tre-

[22] *Id.* at___, 376 P.2d at 106: "Inverse condemnation, . . . provides the remedy where an injunction would not be in the public interest, and where the continued interference amounts to a taking for which the constitution demands a remedy. In summary, a taking occurs whenever the government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated non-trespassory invasions called "nuisances". If reparations are to be denied, they should be denied by reasons of policy which are themselves strong enough to counterbalance the constitutional demand that reparations be paid."

[23] *Ibid.:* A nois coming straight down from above one's land can ripen into a taking of if it is persistent enough and aggravated enough, and the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some other direction other than the perpendicular."

[24] 391 P.2d 540 (Wash. 1964).

[25] *Id.* at 545-46.

[26] 167 So. 2d 95 (Dist. Ct. App. Fla. 1964).

mendous noise and vibrations caused by the planes while preparing for takeoff, and the smoke resulting from such preparation.

In practically every case involving those situations previously mentioned, the defense raised the Federal Aviation Act of 1958[27] which states that the "navigable airspace" of the United States was expressly extended to include any and all airspace needed to insure safety in takeoff and landing of aircraft. This usually unsucessful defense is summed up in *Matson v. United States.*[28]

> . . . We do not think, however, that the change of the definition of navigable airspace affects plaintiffs' causes of action . . . While the usefulness of air transportation admonishes everyone that outmoded concepts of property rights must not limit its development, fairness requires that landowners be compensated reasonably for operations that immediately and directly limit the exploitation of their property.[29]

The increased use of jet air travel[30] and the rush of the airline industry to "keep up with the Joneses" with means of air transportation is causing, and will undoubtedly continue to cause, actions of the nature previously named. Part of the problem undoubtedly lies in the fact that when developers of airport facilities exercised their right of eminent domain they failed to acquire sufficient property to compensate for the inevitable progress.[31]

WHERE DO WE STAND

It is well settled, and practically uncontroverted since *Causby,* that repeated low level flights which deprive a land owner of the use of his property will amount to a "taking" for which compensation must be paid, either under the fifth or fourteenth amendment.

However, new and improved aircraft which may not fly directly over an individual's land, may, through tremendous noise and vibration, fumes, and increased traffic, deprive surrounding property owners of the use of their land under a theory of nuisance. Although *Batten,* which does not support the nuisance theory, has not been expressly overruled, most courts today appear to be rejecting the majority opinion and accepting the dis-

[27] 49 U.S.C. § 1301(24).
[28] 171 F. Supp. 283 (Ct. Cl. 1959).
[29] *Id.* at 286.
[30] Martin v. Port of Seattle, *supra* note 24. The record showed that the first regularly scheduled commercial jet flight was made on October 2, 1959, and the number of jet landings per month increased thereafter from 12 in January 1960, to 1,302 in August 1962.
[31] Griggs v. Allegheny County, *supra* note 9, at 90. "Without the 'approach areas,' an airport is indeed not operable. Respondents in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."