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Flight on Aircraft as a Taking of Property

J. L. Thorpe

this statement it may be inferred that *Bull v. United States* is still good law but that the Supreme Court will not expand the doctrine beyond what the facts of that case warrant. The Court mentions the *McEachern* case only incidentally, by pointing out that it seemed to direct a result for the Collector. Consequently, so far as tax matters are concerned, in order for a barred claim to be allowed as a recoupment against an adverse claim which is not barred, the fact situation must conform to either the *Lewis v. Reynolds* case or to the *Bull v. United States* case. The test to be applied in the Lewis case would be whether the main claim arose in the *same tax year* as the recoupment claim. The test to be applied under *Bull v. United States* is whether the main claim arose out of the *same transaction* as the recoupment claim, and this requirement must be strictly construed according to the instant case. If the fact situation will not fit either test outlined above, recoupment will probably be denied.

CHESTER S. JONES

FLIGHT OF AIRCRAFT AS A TAKING OF PROPERTY

Plaintiff was the owner of a chicken farm in North Carolina situated near an airport which was leased by the United States in June, 1942, for the duration of the national emergency. Constant landing and taking off of military planes flying at low altitudes[1] over plaintiff's farm caused a decrease in production, and frequently chickens became frightened to the extent that they would fly against buildings and were killed. As a result plaintiff was forced to abandon the chicken business. He brought an action against the United States in the Court of Claims alleging an appropriation of his property, and recovered a judgment.[2] On certiorari the United States Supreme Court *held,* by a six to two decision, that a servitude had been imposed upon the land, and that there had been a taking of property within the meaning of the fifth amendment of the United States Constitution. *United States v. Causby,* (1946) 328 U.S. 256, 66 Sup. Ct. 1062, 90 L. Ed. 971.

This was the first case in which any court had held that the noise and glare of low flying aircraft would constitute a taking of property. Regarding the ancient common law maxium, *cujus est solum ejus est usque ad coelum,* meaning literally that surface ownership extends vertically to the heavens, the court stated that the doctrine had no place in our modern world,[3] although the landowner's property right in superadjacent airspace is well recognized when inter-

1. Following the 30-1 glide angle, which means one foot of elevation for every thirty feet of horizontal distance, the planes passed over the complainants property at an average altitude of 83 feet. This was only 67 feet above the house and 63 feet above the barn.
2. Causby v. United States (Ct. Cl. 1945) 60 F. Supp. 751 (The court awarded damages to the plaintiff in the sum of $2,000.00, or one half the total value of the plaintiff's property).
3. United States v. Causby, (1946) 328 U.S. 256, 66 Sup. Ct. 1062, 1065, 90 L. Ed. 971. (The decision of the Court of Claims was reversed because it was not clear whether the easement taken was temporary or permanent and consequently the Supreme Court did not determine whether or not the award of damages was proper).

ference by others hinders his current use and enjoyment of the property below.[4] The Supreme Court had previously held that where United States coastal defense batteries had fired projectiles over private property, there had been a taking.[5] In the instant case the court relied heavily on this previous decision and reasoned that using the airspace close to the surface would tend to "limit the utility of the land and cause a diminution in its value",[6] and that the damage would be direct and not merely consequential. The theory of the previous decision is that the flight of an object over private property is, in itself, a taking. On the other hand, the theory in the instant case appears to be that it is not the flights alone, but rather the resulting noise and glare that constitutes the taking. Other cases have held that where the use of property is merely restricted it may constitute a taking for which the owner should be compensated.[7] The instant case shows this to be true even though only an easement of flight has been taken and the consequence of its use has resulted in the damage. A recent case held that a taking existed where the government condemned the occupancy of a leased warehouse and in the dismantling process certain fixtures and permanent equipment depreciated in value or were destroyed.[8] However, to constitute a taking there need not be an actual physical invasion of the property,[9] and compensation must be paid for any direct physical disturbance which interferes with the owner's use of his property.[10]

This decision gives rise to a new remedy for property owners claiming recurrent interference from aircraft operation. Prior decisions on this question

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4. See Smith v. New England Aircraft Co., Inc. (1930) 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300 (Where the court assumed that the landowner had property rights to superadjacent airspace to the extent necessary for developing the underlying land). Swetland v. Curtiss Airports Corp. (C.C.A. 6th Cir. 1932) 55 F. (2d) 201, 203, 83 A.L.R. 319, 325 (Where the court said that property rights in the airspace must be determined, "in relation to the necessities of the period.") Thrasher v. City of Atlanta (1934) 178 Ga. 514, 529, 173 S.E. 817, 825; Rochester Gas and Electric Corp. v. Dunlop (1933) 148 Misc. Rep. 849, 266 N.Y.S. 469.

5. Portsmouth Harbor Land and Hotel Co. v. United States (1922) 260 U.S. 327, 43 Sup. Ct. 135, 67 L. Ed 287.

6. United States v. Causby (1946) 328 U.S. 256, 66 Sup. Ct. 1062, 1066, 90 L. Ed. 971.

7. Pumpelly v. Green Bay and Mississippi Canal Co. 13 Wall. 166 (U.S. 1872), 20 L. Ed. 557 (Held, "Where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having an artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking," and compensation must be allowed.) United States v. Lynah (1902) 188 U.S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539 (Held, where the value of the lands of an individual were substantially destroyed there was a taking and compensation was allowed.)

8. United States v. General Motors Corp. (1945) 323 U.S. 373, 65 Sup. Ct. 357, 89 L. Ed. 311 (where the court held that property in an accurate sense denotes the owners right to possess, use, or dispose of his interest in the property, and that destruction was tantamount to taking.)

9. In re Sansom Street of Philadelphia (1928) 293 Pa. 483, 143 Atl. 134 (making it impossible for a property owner to build or improve his property.) Yara Engineering Corp. v. City of Newark (1945) 132 N.J.L. 370, 40 A. (2d) 559 (restricting height of structures placed upon property.)

10. Illinois Iowa Power Co. v. Rhein (1938) 369 Ill. 584, 17 N.E. (2d) 582 (where company placed structures on only small portion of the owners land but farming was made inconvenient on the entire tract.) State v. Ahaus (1945) 223 Ind. 629, 63 N.E. (2d) 199 (where a road improvement project caused surface water to flow onto lands other than those condemned.

have invariably involved private individuals and were actions in tort for trespass,[11] or nuisance,[12] or for injunctive relief against such torts.[13]

The dissenting justices, Black, J. and Burton, J., were of the opinion that the effect of this decision would be to impose new constitutional barriers upon legislation and regulation pertaining to air commerce, that the old concepts of private ownership of land should not be introduced into the field of air regulation, and that the allegations of noise and glare relied on by the complaint constituted, at best, an action in tort.

The transitory period that followed the introduction of the automobile and the train caused similar difficulties. Domestic animals were frightened at the sight and the sound of the new machines. The airplane is now as much a part of our modern world as either the train or the automobile, and it is believed that fowls will eventually become accustomed to planes in the same manner that domestic animals have become accustomed to other machines.

Since the United States had not given its consent to be sued in tort the complainant based his claim on the constitutional ground of taking of property. However, since this decision has been handed down, Congress has passed the Federal Tort Claims Act[14] which allows actions against the government without its consent where claims are made on account of damage to or loss of property caused by the acts of government employees acting within the scope of their employment.

In view of these premises, since the landowner has not been wholly excluded from the use and enjoyment of his land, and since it is the consequence of the object in flight that has caused the damage, it would seem that granting relief on this constitutional ground may have been premature.

J. L. THORPE

RESTRICTION ON EMPLOYEE'S USE OF CONFIDENTIAL INFORMATION GAINED DURING COURSE OF EMPLOYMENT

Plaintiff spent $240,000.00 on exploration and geological surveys of a portion of Oklahoma, to obtain information which was regarded as confidential. Defendant had been employed as a geologist by plaintiff to help acquire this knowledge, and subsequent to his employment defendant disseminated the information to the general public and plaintiff's competitors. In an action to stop

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11. Cory v. Physical Culture Hotel Co. (C.C.A. 2nd Cir. 1937) 88 F. (2d) 411, U.S. Av. R. 15; (1938) Hinman v. Pacific Air Transport Co. (C.C.A. 9th Cir. 1936) 84 F. (2d) 755, Cert. denied (1936) 300 U.S. 654, 57 Sup. Ct. 431, 81 L. Ed. 865; Smith v. New England Aircraft Co. (1930) 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300; Burnham v. Beverly Airways (1942) 311 Mass. 628, 42 N.E. (2d) 575.
12. People v. Dycer Flying Service (1939) U.S. Av. R. 21; Vanderslaice v. Shawn (Del. Ch. 1942) 27 A. (2d) 87.
13. Swetland v. Curtiss Airports Corp. (C.C.A. 6th Cir. 1932) 55 F. (2d) 201, 83 A.L.R. 319; Delta Air Corp. v. Kersey (1942) 193 Ga. 862, 20 S.E. (2d) 245; Burham v. Beverly Airways Inc. (1942) 311 Mass. 628, 42 N.E. (2d) 575; Thrasher v. City of Atlanta, (1934) 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158.
14. Chap. 753, Public Law 601, Title IV, United States Code, Congressional Service (1946).