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Wrongs and Rights in Superterraneous Airspace: Causby and the Courts

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NOTES

WRONGS AND RIGHTS IN SUPERTERRANEOUS AIRSPACE: CAUSBY AND THE COURTS

INTRODUCTION

One of the most salient perplexities to arise in modern property law has derived from the development and perfection of aviation as a commonplace mode of transportation. In adjudicating the relative rights of surface property owners and users of airspace, the courts have struggled to balance conventional concepts of ownership against the economic and social needs of a new era. The process has involved the exhumation and examination of old concepts as well as the postulation of new doctrines. From this synthesis significant decisions continue to emerge, reflecting a transition in the law, while far-reaching governmental regulation has limited the rights of both owners and users. Evaluation of these decisions, however, reveals serious inadequacies, many of which are directly assignable to the persistent premise that airspace is unquestionably a form of real property. It is submitted that the development of sleek and efficient aircraft has had no jurisprudential counterpart, with the result that critical components of the law in this area reflect the needs of the age of the Jenny, not the jet.

THE COMMON-LAW BASIS

A major maxim of the common law was Coke's oft-quoted phrase[1] to the effect that he who owns land owns from the center of the earth to the heavens. Strictly construed, this doctrine would render any invasion of airspace superadjacent to one's property a trespass for which the trespasser would be liable in damages and for which injunctive relief would lie. The obsolesence of this view in an aerospace era is manifest as the courts today recognize. Yet one of the rights presumed to accompany ownership of land is the freedom to utilize some of the airspace above it. Another is to be free of unreasonable interference

1. "And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum ejus est usque al coelum*, as is holden 14 H.8 fo.12. 22 H.6 59, 10 E.4 14. Registrum origin and in other books." 1 COKE UPON LYTTLETON 231 (Thomas ed. 1827).

with one's enjoyment of the surface itself. With common law tools of the trade, the courts first sought to resolve this conflict.

The validity of Coke's maxim as applied to higher altitude flights was attacked and largely discredited in a 1932 case involving the flight of aircraft from a neighboring airport over the plaintiff's land.[2] Disavowing the conclusiveness of such maxims, the court recognized nevertheless that flights could still constitute a trespass if they occurred close to the surface, but concluded that there was much doubt whether a careful interpretation would show the maxim applicable to higher altitudes. Substantiation of this conclusion was inferred by the court from federal legislation which prescribed 500 feet as the minimum flight altitude for airplanes over uncongested areas.[3] An injunction was held to lie, however, as to all flights below 500 feet over the plaintiff's land, despite the occasional necessity of such flights in the course of landing and taking off from the defendant's airport. Foreshadowed was an idea that was later to become prevalent—that of effective use—in the court's statement that:

> Counsel for the plaintiffs have offered no evidence which would indicate that flying at 500 feet would interfere with the confortable enjoyment of their country estate by the plaintiffs . . . It may be that when the practices of the defendants become fixed, it will be necessary, upon the application of the plaintiffs, to designate a higher altitude for defendant's flights. The probabilities of the situation now indicate that the plaintiffs will be amply protected if the flights of the defendants are made at minimum altitudes of 500 feet.[4]

Judicial adherence to the purely trespassatory concept was waning, however, and while injunctions continued to issue for flights below the

2. Swetland v. Curtiss Airports Corporation, 41 F.2d 929 (D. Ohio 1932). The final effect of the injunction was to deny defendants the right to operate an airport (55 F.2d 201), since in the natural course of ascent and descent planes must fly at levels below 500 feet.

3. Air Commerce Regulations § 74 (1926). This provision is now found at 14 C.F.R. § 91.79 (1967). "Except when necessary for take-off or landing, no person may operate an aircraft below the following altitudes: (b) Over Congested Areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1000 feet above the highest obstacle within a horizontal radius of 2000 feet of the aircraft. (c) Over Other Than Congested Areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

4. 41 F.2d at 942.

500 foot level,[5] attention was refocusing on whether or not actual damage from low level flights was shown; and if so, whether it was of substantial severity to justify the injunctive proscription. Thus, as early as 1930 it was held that while planes landing and taking off from an adjacent airfield were trespassing when they came within one hundred and five hundred feet of the plaintiff's property, the remedy lay solely in an award of nominal money damages where no injury to the property was shown and interference with its use was only slight.[6] And it could be stated affirmatively shortly thereafter that:

> When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him.
>
> Any use of such air or space by others which is injurious to his land or which constitutes an actual interference with his possession or his beneficial use thereof would be a trespass for which he would have a remedy. But any claim of the landowner beyond this cannot find a precedent in law, nor support in reason.[7]

The principle here espoused comports with the later cases in precluding recovery of damages without proof of injury. An element of tort law thus displaced one of property, and Coke's maxim[8] became for the most part an innocuous antiquity.

Causby and Griggs: Constitutional Liability

One of the collateral effects of the Second World War was the great amount of impetus given to aeronautics both qualitatively and quantitatively. The potential for controversies arising from the use of airspace by airplanes was proportionately increased, yet aviation's status as a strategic element of the defense effort accorded it concomitant protection; and attempts at enjoining or impeding flight operations all

5. Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949). Injunctive relief is generally unavailable today as a matter of public policy. See Loma Civic Club v. American Airlines, 39 Cal. Rptr. 708, 394 P.2d 548 (1964).

6. Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).

7. Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).

8. *Supra* note 1.

but ceased during the period. The cessation of hostilities, however, brought the problem to the forefront again, and the fact that in the postwar period there has been no general disarmament, plus the nature of military type aircraft, have made the United States a frequent party defendant in airspace cases. Passage in 1946 of the Federal Tort Claims Act[9] provided a remedy where the theory of the action is injury from a negligent or wrongful act. But the decision which has attracted the most attention and has provided the legal foundation for federal airspace cases for the last two decades is *United States v. Causby*,[10] a case predating the FTCA. Brought under the Tucker Act of 1877 which expressly excludes tort liability,[11] *Causby* stands for the proposition that the government may be constitutionally liable where it is found that for all practical purposes land has been "taken" by overflights of aircraft under its control.

It has been justifiably contended that the extent to which the *Causby* decision went in establishing the proposition that aerial activity may result in a "taking" of property under the fifth amendment[12] has "resulted in a formalism and conceptualism that is giving great trouble [to the courts] in understanding the respective rights and liabilities of those engaged in aviation activities and those who own real property." [13] Factually the case presents what could be classified as a tort action,[14] provided one assumes a duty to refrain from interfering with another's use of his property. Causby, the proprietor of a chicken farm situated less than one-half mile from an airport, allegedly suffered monetary loss and physical discomfort due to the flight of Army air-

9. 28 U.S.C. § 1346 (1964). Jurisdiction is granted to the Federal District Courts to hear actions against the United States for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

10. 328 U.S. 256 (1946).

11. 28 U.S.C. § 1491 (1964). "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States 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."

12. ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

13. D. BILLYOU, AIR LAW, 52 (2d ed. 1964).

14. A breach of some duty owing the plaintiff, in the absence of a contractual relationship, the proximate result of which is damaging to him. BLACK'S LAW DICTIONARY 1660 (4th ed. 1951).

craft over his property at altitudes as low as 83 feet. The noise and lights from such flights assertively caused the proprietor and his family fear and loss of sleep, while many of the chickens were driven by fright to self-destruction. But while the holding was that these flights and the resultant damages constituted the compensable taking of an easement or servitude, the Court failed to make clear whether the taking was of real property or airspace, or both. It is stated that "the result was the destruction of the use of the property as a commercial chicken farm," [15] although "it was only an easement of flight which was taken." [16] The link between ownership of land and ownership of the airspace over it was again perpetuated, albeit the invasion of the airspace was at all times privileged except where it interfered materially with the enjoyment of the land beneath. Airspace is a "public highway," said the Court adding, however, that:

> [I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material . . . While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.[17]

Whereas earlier cases had attempted to limit the height of possible ownership by construing the federal regulations in a manner supporting preemption of airspace above 500 feet in the name of the public,[18] the prevailing opinion in *Causby* sought a more flexible standard for the determination of relative rights, while avoiding any obstacle to

15. United States v. Causby, 328 U.S. 256, 259 (1946).

16. *Id.* at 261.

17. *Id.* at 264.

18. Swetland v. Curtiss Airports Corporation, *supra* note 2. See also Thrasher v. City of Atlanta, 178 Ga. 531, 173 S.E. 817 (1934).

future aviation development. Allowance of recovery, however, came at the expense of reinforcement of a property theory of recovery which was to prove troublesome in subsequent cases. This aspect was illuminated by Mr. Justice Black's dissent which noted that the majority opinion indicated that merely low flight in itself did not constitute a taking, leaving, consequently, only a tort or nuisance action for the damages from the noise and glare.[19] In addition, the majority opinion supports an inference that the *Causby* doctrine relates to taking easements of servitudes only where the flight has been directly over the surface property. Obfuscation of judicial rationale was inevitable.

Causby style liability was extended to state and local governmental agencies that operate airports in the important case of *Griggs v. County of Allegheny, Pennsylvania*,[20] even though the agency operated none of the offending aircraft. Between the two cases, however, a congressional redefinition of navigable airspace had occurred which expanded the term to include space below 500 feet where it was necessary for planes to utilize such space in the course of taking off or landing.[21] The federally-approved approach and departure pattern for the Allegheny County Airport caused aircraft to fly regularly at low altitudes over the Griggs house, the clearance between the bottom of the glide slope[22] and the top of the chimney being a meagre eleven feet. In bringing suit against the county it was shown that the sound was "comparable to the noise of a riveting machine," that window panes shook, plaster fell out, and sleep was impossible, and that abandonment of the house had been necessitated.

At issue was the question of whether the redefinition of navigable airspace precluded a recovery, and if not, whether the county, as operator of an airport, was liable for a taking where the approach path had been established under federal regulations, and the aircraft operated by commercial airlines rather than by the defendant, as in *Causby*. The Court again eschewed a preemptive interpretation of the Congressional declaration, noting that "as we said in the Causby case, the use of land

19. 328 U.S. at 270.

20. 369 U.S. 84 (1962).

21. 49 U.S.C. § 1301 (24) (1964). "Navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." For the current regulations issued under this section see note 3, *supra*.

22. An imaginary path which extends longitudinally and vertically on an angle from the runway, the bottom of which increases in height from the ground at approximately a 30-1 ratio (one foot in height for each thirty in length). Its purpose is to delineate the course to be followed by aircraft approaching for a landing.

presupposes the use of some of the airspace above it." [23] An easement was held to have been taken and the burden of liability placed squarely on the defendant county for failing to acquire sufficient land for the operation of its airport.

> We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. 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.[24]

The *Griggs* decision has been described as "eminently correct." [25] Indeed, a logical sustentation of the *Causby* doctrine would admit of no other conclusion, and the case may be viewed as in keeping with the trend of rendering fifth amendment rights applicable to the states via the fourteenth. Again there had been no contention of tort liability, and again the implications of airspace being in the public domain were disregarded. Previous state decisions holding local governmental bodies liable for the taking of air easements in the operation of airports[26] were sanctioned, and the doctrine of a property "taking" given new viability. It appeared beyond doubt that *Causby* was indeed the law, as recognized by the altered Restatement view.[27] Despite the ramifications of these cases, however, or perhaps because of them, no adequately compre-

23. Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 88 (1962).

24. *Id.* at 89.

25. Hill, *Liability for Aircraft Noise*, 19 MIAMI L. REV. 1 (1964).

26. Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960).

27. RESTATEMENT OF TORTS § 159, comment *f* (1934). "A temporary invasion of the air space by aircraft, for the purpose of travel through it or other legitimate purpose, if done in a reasonable manner, and at such a height as is in conformity with legislative requirements and does not interfere unreasonably with the possessor's enjoyment of the surface of the earth and the airspace above it, is privileged." RESTATEMENT (SECOND) (1965) substitutes the following test under § 159: "Flight by aircraft in the airspace above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land."

hensive theory of recovery was developed. Rather, the legal legacy of *Causby-Griggs* left much that was neither black nor white; an invitation for the exercise of inferior court discretion and its converse.

State and Federal Remedies

The sometime inequitable character of the easement or servitude concept became readily apparent in *Batten v. United States*,[28] where its strict application deprived homeowners of a recovery because the offending flights had not penetrated the airspace exactly above their property. Prior cases had similarly distinguished the "federal rule" in situations involving non-negligent injuries.[29] In *Batten*, jet aircraft on the warmup pad of an adjoining Air Force Base produced noise, smoke, and vibrations of such severity as to merit probable recovery had there been an overflight. The use and enjoyment of the property was unquestionably impaired, with the dimunition in property values running as high as 55.3 per cent in some instances.[30] Recognizing the existence of an injury, the Court nevertheless denied recovery, noting that:

> *Causby* contains nothing indicating that recovery could be had for noise, vibration, or smoke . . . The vibrations which cause the windows and dishes to rattle, the smoke which blows into the homes . . . and the noise which interrupts ordinary home activities do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking. The damages are no more than a consequence of the operations of the Base . . ." [31]

The Court implied, however, that recovery might lie had the plaintiffs been forced to abandon their homes, as had Griggs, or if the action were characterized other than as one sounding in property.

> No amount of sympathy for the vexed landowners can change the legal principles applicable to their claims. We do not have either a tort or a nuisance case. The plaintiffs sue under the Tucker Act and whether the applicability of that Act depends on a taking without compensation in violation of the Fifth Amend-

28. 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

29. *E.g.*, Pope v. United States, 173 F.Supp. 36 (N.D. Texas 1959) (denying recovery for noise, vibration, and fumes from a test cell operated by an adjoining Air Force Base, although damages awarded for overflight easements); Sullivan v. Commonwealth, 335 Mass. 619, 142 N.E.2d 347 (1957) (not allowed for concussion damage due to blasting).

30. 306 F.2d at 583.

31. *Id.*

> ment or on an implied promise to pay for property taken, the claims are founded on the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." [32]

It is patently clear that one landowner may suffer as much or more impairment of the use and enjoyment of his land from low flying aircraft or noise and fumes from an adjacent airport as another landowner, over a corner of whose property an aircraft wingtip chances to pass. To permit the latter a recovery, but deprive the former of a remedy, is to ignore reality. Nevertheless the rule in the federal courts today in cases alleging a constitutional taking of property is in accord with *Batten*,[33] documenting a major deficiency under *Causby*.

The Federal Tort Claims Act[34] has not provided an alternate route to bypass the stringent servitude requirements imposed under *Causby* since invasion of airspace is not per se a wrongful or negligent act. In addition, the FTCA actions are greatly delimited by state substantive law.[35] However, recovery was granted under the FTCA to a plaintiff who suffered damage to her property from sonic booms created by Government aircraft, but not involving an overflight of her property, in the somewhat bizarre case of *Neher v. United States*.[36] The requisite negligence under the Act was alleged to be the failure of the United States to establish a corridor for supersonic flights over a sparsely populated area rather than over a city, when the former was readily feasible. The Act's discretionary exemption,[37] which had precluded recovery in

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32. *Id.*

33. *Accord*, Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Bellamy v. United States, 235 F.Supp. 139 (E.D.S.C. 1964); United States v. Certain Parcels of Land in Kent County, Michigan, 252 F.Supp. 319 (W.D. Mich. 1966).

34. *Supra* note 9.

35. *E.g.*, Soldinger v. United States, 247 F.Supp. 559 (E.D. Va. 1965). Low flying jet aircraft from the nearby Norfolk Naval Air Station allegedly caused noise, fright, and mental anguish, as the result of which property owners suffered extreme nervousness and high blood pressure. Held: even if negligence could be shown there can be no recovery under Virginia law for mental anguish unaccompanied by contemporaneous physical injuries, unless the wrong committed is willful, wanton and vindictive.

36. 265 F.Supp. 210 (D. Minn. 1967).

37. Judicial construction of the Act has inferred legislative intent to protect the Government from claims that affect the essence of governmental functions. "It excepts acts of discretion in the performance of governmental functions or duty whether or not the discretion involved be abused. Not only agencies of government are covered but all employees exercising discretion." Dalehite v. United States, 246 U.S. 15, 33 (1953).

previous cases,[38] was held to have been waived where there was no reference to it in the answer, the court stating that invocation of the exemption is an affirmative defense and must be pleaded. While relegated to its facts by the procedural defect, there is evidenced an inclination to allow a recovery under a tort theory even to the derogation of sovereign immunity.

A few decisions also have allowed recovery under the FTCA for ground damage from aircraft on the basis of state statutes assigning strict liability to aviation as an ultra-hazardous activity.[39] This approach to the problem was extended in a 1965 case to include ground damage from aircraft noise, alleviating the necessity of alleging and proving negligence.[40] But it would be premature to read into these cases any major departure from *Batten*. Actions against state or federal governments for violation of property rights are generally held insufficient where invasion of the overhead airspace within the immediate reaches of the surface and resultant substantial curtailment of the use and enjoyment of the land are not shown.[41]

State courts, on the other hand, have been neither bound nor convinced by *Batten*. It has been sustained, with an admonition that operation of an airport for the public good will be subjected to a less stringent standard in determining the existence of a nuisance than one operated for private gain.[42] Conversely, the *Batten* dissent has received judicial approval elsewhere.[43] The requirement of a physical invasion of the superadjacent airspace was flatly rejected in *Thornburg v. Port of Portland*,[44] where noise from jet aircraft departing an adjoining airfield interfered with enjoyment of property. The planes passed about one thousand feet to one side of the plaintiffs' land. The court concluded:

> We believe the dissenting view in the Batten case presents the better reasoned analysis of the legal principles involved, and that

38. Huslander v. United States, 234 F.Supp. 1004 (W.D. N.Y. 1964); Schwartz v. United States, 38 F.R.D. 164 (D. N.D. 1965).

39. United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954); Pendergast v. United States, 241 F.2d 687 (4th Cir. 1957); Hahn v. U.S. Airlines, 127 F.Supp. 951 (E.D. N.Y. 1954).

40. Long v. United States, 241 F.Supp. 286 (D. S.C. 1965). *Noted in* 8 WM. & MARY L. REV. 314 (1966).

41. Cases cited note 33 *supra*. See also Leavall v. United States, 234 F.Supp. 734 (E.D. S.C. 1964); Schubert v. United States, 246 F.Supp. 170 (S.D. Tex. 1965).

42. Louisville and Jefferson County Air Board v. Porter, 397 S.W.2d 146 (Ky. 1965).

43. Board of Education of Morristown v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (1965); City of Atlanta v. Donald, 111 Ga. App. 339, 141 S.E.2d 560 (1965).

44. 233 Or. 178, 376 P.2d 100 (1962), *reaffirmed*, 415 P.2d 750 (1966).

> if the majority view in the Batten case can be defended it must be defended frankly upon the ground that considerations of public policy justify the result: i.e., that private rights must yield to public convenience in this class of cases. The rationale of the case is circular. The majority said in effect that there is no taking because the damages are consequential, and the damages are consequential because there is no taking.[45]

Another state case contra to *Batten* is *Martin v. Port of Seattle*,[46] which held that no overflight was necessary to maintain an inverse condemnation action against the defendant airport owner for an easement taken by the noise and vibration of low flying jet aircraft. The Supreme Court of Washington discounted the alleged difference between a "taking" and a "damaging," a distinction considered critical in the federal as well as most state jurisdictions. A distinguishable facet of the case in this respect is the express proscription in the Washington constitution against either type of interference with property rights without compensation. However, by characterizing all such interference as a "taking," actions alleging substantial damage to use and enjoyment of land will be brought within the purview of the fourteenth amendment. The basis for the federal rule was not rejected, but the court found that while both *Causby* and *Griggs* involved penetration of overhead airspace,

> . . . it is not clear that the reasoning and approach of those cases is so limited . . . The reliance placed upon the high noise level by the Supreme Court in both decisions, without detectable preoccupation with its angle of incidence, strongly indicates that the holdings are not limited to those instances where the aircraft passes directly over the land.[47]

And a Florida court supported an award of damages under circumstances similar to those above but in the absence of a constitutional provision like that of Washington's.[48] Characterizing the interference as an "appropriation," the opinion stressed the moral as well as the legal obligations of American democracy; that "where the sovereign has a right to condemn for private use, it will not be permitted to appropriate except by orderly processes." [49] These enlargements of the federal rule

45. 376 P.2d 100, 104.
46. 64 Wash.2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).
47. *Id.* at 545.
48. City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1964).
49. *Id.* at 103.

provide a broader basis for recovery in some state jurisdictions than is available against the United States. Abandonment of strict concepts of property ownership in airspace has resulted in a better balancing of interests. Aviation development and use of the public domain remain unfettered, but individuals are not deprived of their rights by "a shorter cut than the constitutional way." [50]

Application to Related Problems

Collateral issues of significance have raised questions both substantively and procedurally under the *Causby* approach. If, for example, there is a constitutional taking of an air easement over one's property by a government agency and compensation received therefor, is the existence of the easement a defense to future actions by the landowner beneath seeking an additional recovery because the holder of that right is flying noisier airplanes than previously? And if one's enjoyment of his property is in fact contingent on a property interest in the air overhead, what will be the time limitation on asserting that interest, and at what point will the running of this limitation be commenced?

The first question was originally answered affirmatively[51] on the basis that it was within the scope or extent of the easement as created,[52] since the condemning party in the case was a permanent military airfield and one could normally expect the possibility of larger and louder planes being utilized in the future, according to the court. The wisdom of this view was somewhat discredited by a subsequent determination of when the statute of limitations begins to run. In *Klein v. United States*,[53] on a motion for reconsideration, the Court of Claims reversed its earlier conclusion that the date of the original taking was determinative, and held instead that the cause of action does not accrue until the extent of the taking of the easement has been ascertained. Allowance for the unforeseeable was finally made in a 1964 case permitting a subsequent recovery where a subsequent taking from the use of louder air-

50. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

51. Adaman Mutual Water Co. v. United States, 181 F.Supp. 658 (Ct. Cl. 1958).

52. The general rule of real property is that use of an easement will not be found excessive if it is within the scope of the use permitted by the easement in its creation. Excessive use does not extinguish the easement, but damages and an injunction may lie. Smith, Real Property Survey 288 (1956). The latter remedy is unavailable against aircraft flying at federally-assigned altitudes. Loma Civic Club v. American Airlines, *supra* note 5.

53. 152 Ct. Cl. 221 (1961), *cert. denied*, 366 U.S. 936 (1961). See also Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961).

craft was shown.[54] As a matter of practice, therefore, easements now often purport to vest in the taker a right to fly aircraft of any kind or number over tracts of land, but that such terminology will be given more than evidentiary weight is open to doubt. In conformity with the property approach, flights lower than the floor of the previously acquired easement will always constitute a new taking where the substantial interference test is met.[55]

Subsequent takings are not cumulative, and each must be brought within the applicable statute of limitations.[56] Here the property approach produces the untenable thesis that there may be extensive interference with use and enjoyment of land without liability for so much as one penny of compensation provided the magnitude of the offending element is increased slowly over a period of years, no increase or combination of increases achieving in themselves the level of substantial interference within the statutory period. While there appears to be no case directly in point, the implications of *Robertson v. United States*[57] clearly substantiate this view. In that case it appeared that the property owners had acquiesced in the Government's taking of an air easement by failing to contest low level F-86 fighter jet aircraft flights within the six year period of limitations. When the F-86's were replaced by noisier F-102's, the property owners were prompted to action. Their claim was denied, however, on the grounds that the difference between the noise levels of the two aircraft was insufficient in itself to constitute a new "substantial interference," the court noting in dead seriousness that "although there is some evidence to the contrary, the greater weight of the evidence shows that the noise and disturbance created by the F-86 and the F-102 on takeoffs is so loud and disturbing that the human ear can barely distinguish any difference in the intensity of the sound created by these aircraft when flying over plaintiffs' land at low altitudes." [58] Similarly, the plaintiff will be precluded from showing the highest and best use of his land as of the date of the taking as a basis

54. Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964).

55. A. J. Hodges Industries, Inc. v. United States, 355 F.2d 592 (Ct. Cl. 1966).

56. Statutes governing real property actions are not applied. Court of Claims jurisdiction under the Tucker Act provides a six year limitation. 28 U.S.C. § 2501 (1964). Federal Tort Claims actions must be brought within two years. 28 U.S.C. § 2401(b) (1964). State remedies are widely varied, ranging from a suit for damages under a tort claims act (New York) to mandamus compelling institution of condemnation proceedings (Virginia). For a comprehensive compilation of state procedure see MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY (1964).

57. 352 F.2d 539 (Ct. Cl. 1965).

58. *Id.* at 542.

for a determination of damages, where operation of an airport had previously limited the use of the land to a lessor degree.[59]

A distinction exists between regulation of property under the police power and a constitutional taking or damaging under the power of eminent domain. But regulation may be of such a degree as to constitute a taking. The *Causby* test of substantial interference is sometimes applied by the courts where regulation of rights in airspace under the police power is at issue.

The prime regulator of airspace over the contiguous United States is, of course, the Federal Government. The federal regulatory system has preempted state control over navigable airspace, thus a local ordinance prohibiting flights below a certain altitude is invalid.[60] The regulatory agency is the Federal Aviation Administration,[61] and the Administrator is empowered to establish standards to prevent landowners from using their property in any manner which could be hazardous to flight in navigable airspace,[62] as well as to protect generally the declared public right of freedom of transit through it.[63] In accordance with this authority, federal "zoning" rules have been promulgated which require the landowner to notify and receive the approval of the Administrator before construction in excess of specified heights is undertaken.[64] Under *Causby* it would appear that there is no assertable right against the Government for the establishment and protection of airways except where their use interferes substantially with enjoyment of the land beneath.

However, zoning which deprives one of practically any feasible use of his land for the purpose of protecting navigable airspace within an airport runway approach area has been held unconstitutional as a taking, although the cases are in conflict as to where the line is to be drawn.

59. Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962).

60. Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2nd Cir. 1956).

61. Formerly the Federal Aviation Agency. The FAA is now part of the Department of Transportation.

62. 49 U.S.C. § 1501 (1964).

63. 49 U.S.C. § 1304 (1964).

64. 14 C.F.R. § 77 (1967) et seq. Under present rules, for example, the Administrator must usually be notified when the construction or alteration is to be more than 200 feet in height above ground, or any higher than an imaginary line extending upward and outward from runways a horizontal distance of 20,000 feet, with a climb ratio of one foot vertically for each 100 feet horizontally. (14 C.F.R. § 77.13). Other sections provide absolute limits on height of construction ranging from 100 to 1000 feet above ground. These regulations are complex and assume some understanding of air navigation terminology.

Thus, in a 1965 case *Causby* was cited as authority for the premise that the reasonable and ordinary use of airspace above land is a property right which cannot be taken without compensation.[65] Here a toll road had been constructed at a height of 29 feet above the surrounding surface when the allowable limit under the zoning law was 18 feet. Compensation also has been required where height restrictions confined use of the land adjacent to an airport to agriculture or single family dwellings.[66] But it has been denied where airport zoning established a building height of 28 feet.[67] Recognition of a compensable property interest within the immediate periphery of superadjacent airspace, then, is at best conditionally relative to aviation airspace requirements; and the *Causby* language establishing an enforceable right in so much of the airspace as can be occupied in use or connection with the land is for the most part meaningless in this area.

Conclusion

The *Causby* doctrine of analogizing land use interference to condemnable property interests in the form of easements or servitudes through airspace has revealed in the last decade a number of inequities when applied by the courts. Liability to landowners is too often dependent upon artificial distinctions and overly formalized requirements which embrace property theories of recovery or ignore them to the bias of the injured party. Concepts of private ownership in the public domain are applied which have no analogue in property law. Resultant decisions are erratic and often unsatisfactory, especially where no corporeal invasion of superadjacent airspace is shown. The burden of paying for the nation's advancing air transportation system is too often foisted upon individuals rather than the people.

Approaching is an era of commonplace supersonic air travel which will compound these deficiencies. While a few state jurisdictions have developed more realistic bases of recovery under tort and nuisance theories, the trend remains inchoate. Federal judicial reluctance to equate an undue quantum of land use restriction with a constitutional taking under the fifth and fourteenth amendments may require legis-

65. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965).

66. Roark v. City of Caldwell, 87 Id. 557, 394 P.2d 641 (1964). *But cf.* Yara Engineering Corp. v. Newark, 132 N.J.L. 370, 40 A.2d 559 (1945) (Needs of aviation held an inappropriate basis for zoning).

67. Sarasota-Manatee Airport Authority v. Harrell's Candy Kitchen, U.S. Av. 294 (Fla. 1959). See also United States v. 357.25 Acres of Land, 55 F.Supp. 461 (W.D. La. 1944).

lative expansion of the Government's immunity waiver under the Tort Claims Act. States as well may find themselves able to provide remedial eligibility under the FTCA through legislative action.

Cognizance that the only property right of real value is one's ability to use and enjoy his land should force the conclusion that it is this interest which needs protection. The test is then reduced to "whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone." [68]

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68. Batten v. United States, 306 F.2d 580 (10th Cir. 1962) (dissenting opinion).