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JUDICIAL AND REGULATORY DECISIONS

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REMEDIES AGAINST THE GOVERNMENT FOR VIOLATIONS OF PROPERTY RIGHTS

IN furtherance of military objectives, the United States, in 1950, acquired Hunter Field from the city of Savannah, Georgia. In February of 1952, a land development Corporation purchased seventy-five and one-half acres of land located one mile east of Hunter Field. In December, 1953, the United States began operating jet aircraft from Hunter Field in such a manner as to fly directly over the Corporation's property. Landing and take-off flight patterns of these jet craft brought them over the Corporation's property at altitudes lower than propeller driven planes, which have formerly operated out of the field.¹ Unable to sell many lots,² as a result of the proximity of the jet flights, the Corporation filed suit alleging that the flights did substantially interfere with the use and enjoyment of the land and that this action constituted a taking. In *Highland Park v. United States*,³ the court held that an easement was taken on the arrival of the jet craft.⁴

The easement theory is not the only one available to aggrieved parties.⁵ Since the passage of the Federal Tort Claims Act, the United States has waived immunity in the common law tort field with a few exceptions.⁶ Actions in tort applicable to this particular inquiry are trespass and nuisance. In addition to discussing the possibility of successfully suing the United States under these theories, the article contains some discussion of problems that may arise after one judgment has been secured against the government and the same party is seeking further relief due to a change in conditions.

EASEMENT

Congress has provided a procedure for suing the United States in the easement cases, often called inverse condemnation, in the District Courts,

¹ The aircraft, ninety in number, also created greater noise, and more vibration. People in the area complained of windows rattling, interruptions of conversations, interference with television and radio reception and other uncomfortable incidents.

² Prior to the arrival of the jets, February, 1952, until 1954, 40 lots were sold. In the years 1954 and 1955 only 8 lots were sold. Furthermore, money lending institutions were not willing to grant loans for the sale of this property or the construction of homes thereon.

³ *Highland Park Inc. v. United States*, 161 F. Supp. 597 (Ct. Cl. 1958).

⁴ The court relied on *United States v. Causby*, 328 U.S. 256 (1946). A United States Air Base was located near the plaintiff who was a chicken farmer. The noise and light given off by the airplanes greatly disturbed production, and many chickens killed themselves by running into walls. The plaintiff also complained of personal disturbances and pointed out to the court that the purpose the land was purchased for could no longer be accomplished. The court held that the United States had taken an easement in the property and allowed the plaintiff recovery. Damages in these cases is the decline in value of the land due to the easement.

⁵ The concepts expounded in the *Causby* and *Highland Park* cases are peculiarly a part of public law. Private persons do not deal with the Fifth Amendment. U. S. Const., amend. V, ". . . nor shall private property be taken for public use without just compensation." One may grant an easement to another for compensation or not. After a length of time, under certain conditions one may have an easement in another's property without compensating the holder of the fee. The only remedy available to one whose property is invaded in a private situation analogous to the *Highland Park* case would be an action in trespass or an injunction to prohibit further incidents of this nature. At common law, one could not waive the tort and sue on a theory of quasi-contract when real property was involved, as they could with personal property.

⁶ 28 U.S.C. § 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.

as well as in the Court of Claims;⁷ thus eliminating the problem of sovereign immunity. The easement taken by the United States in these cases is an *interest* in property, the *extent* of which is determined by the judgment granted by the Court. In the *Highland Park* case the judgment was stated as follows:

"Defendant is vested with a perpetual easement of flight over the plaintiff's property at an elevation of 100 feet or more above the ground with airplanes of any character."

If the defendant began to fly planes at fifty feet, a new problem would exist. If the judgment gave the defendant a right to fly propeller driven planes, and then the defendant began to fly jets,⁸ the plaintiff no doubt would seek further relief. The case of *Newton v. Manufacturers' Ry. Co.*, contains a problem similar to that presented here.⁹ The city of Toledo, Ohio, held an easement in the property owned by the plaintiff and created a public park. The defendant then took a right-of-way in the property and had begun constructing a railroad thereon. The court held that there was an additional servitude on this land entitling the plaintiff, owner of the fee, further compensation.¹⁰ The indication of this case being that if the government exceeds the rights granted by the judgment and imposed an additional servitude on the land, a new cause of action will not be barred by the first recovery. A most obvious case where an additional servitude is placed upon the land is where the judgment allows single engine propeller driven planes to be flown over the plaintiff's land, and defendant begins flying six-engine jet aircraft. The increase in noise and vibration would certainly seem to give rise to a new cause of action.¹¹

TRESPASS

In the *Highland Park* situation, the trespass¹² is the recurring flights at low altitudes over the plaintiff's real estate. Not all courts consider this type of activity to be a trespass.¹³ Those jurisdictions that do recognize this activity to be a technical tort provide the plaintiff with nominal damages unless actual damages can be shown.¹⁴ In no cases of this type have actual damages been shown. A case like *Highland Park*, where there was actual detriment to the value of the property, is no doubt the type of damages which the courts are seeking.¹⁵

⁷ 28 U.S.C. § 1346 (a) (2), 1491.

⁸ In *Herring v. United States*, 162 F. Supp. 769 (Ct. Cl. 1958), the court stated the interest taken as follows: "Upon payment thereof defendant shall have an easement of flight for light, propeller-driven, single engine airplanes at a minimum elevation of 45 feet above the surface of the ground and higher." This judgment is rather narrow and does not allow the defendant room to expand without subjection to further liability.

⁹ 115 F. 781 (6th Cir. 1902).

¹⁰ A similar result was reached in *Hatch v. Railway Co.*, 18 Ohio St. 92 (1868), where a canal company sold its right-of-way to a railroad company.

¹¹ See note 8, *supra*.

¹² Suits under the Federal Tort Claims Act are limited to recovery of monetary damages. 28 U.S.C. § 1346 (b).

¹³ The court in *Hinman v. Pacific Air Transport Co.*, 84 F. 2d 755 (9th Cir. 1936), specifically rejected this doctrine. The defendant operated out of the Los Angeles airport and flight activity was quite heavy. There are apparently no cases where the "recurring low flights" theory of trespass was advanced under the F.T.C.A.

¹⁴ *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 2d 385 (1930), recurring flights at one hundred feet was trespass. In *Delta Air Corp. v. A. L. Kersey*, 193 Ga. 862, 20 S.E. 2d 245 (1942), flight at twenty-five to one hundred feet is a trespass, (dictum).

¹⁵ See note 2, *supra*. Also see note 4, *Causby*. In that case a chicken farmer was unable to use his property for the purposes purchased, because of annoyance of airport.

In an action where actual damage can be shown, the plaintiff may recover against the federal government by satisfying the criteria of the Federal Tort Claims Act. The pertinent section of the Federal Tort Claims Act is as follows:

“ . . . for injury on loss of property or personal injury or death caused by the *negligence* or *wrongful act* or omission of an 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.” (emphasis added)¹⁶

Traditionally trespass is a form of action where plaintiff need not allege and prove negligence or a wrongful act; it is a form of strict liability. The question has arisen under the statute which requires negligence or a wrongful act, whether the government will be liable for trespass due to unknown causes. In *United States v. Praylou*, a government plane on official business crashed onto plaintiff's land damaging his property and injuring his children.¹⁷ A South Carolina statute imposed strict liability in this type of situation. The government argued that the plaintiff would have to show negligence or a wrongful act before recovery could be had. The court held that trespass was within the purview of the statute and found the government liable applying South Carolina law. Another approach was found in *United States v. Hull*, where *res ipsa loquitur* was invoked when a window fell on a customer's hand in the post office.¹⁸ Traditionally in these cases where the wronged party would have difficulty in proving negligence, but most probably negligence did exist, the court raises this doctrine and leaves it to the defendant to prove freedom from negligence. Although still in the realm of negligence, by changing the burden of proof, the court approached strict liability.

Dalehite v. United States contains language that the government would not be liable without a showing of negligence although the case was not decided on this point.¹⁹ In *United States v. Inmon*, plaintiff's son was injured by a blasting cap found on land formerly occupied by the government.²⁰ Although not a trespass case, a theory of strict liability was advanced. Citing *Dalehite* for the proposition that the government would not be liable unless there was a showing of negligence, the court held for the government.²¹ The trespass occurring due to unknown causes must be sustained on a theory of strict liability and is much different than the *Highland Park* situation. The recurring low flights are intentional acts and surely come within the purview of the statute, which only requires an act of negligence or wrongful act.

¹⁶ See note 12, *supra*.

¹⁷ 208 F. 2d 291 (4th Cir. 1953).

¹⁸ 195 F. 2d 64 (1st Cir. 1952).

¹⁹ 346 U.S. 15 (1953). In this case an order to produce a certain fertilizer known as F.G.A.N. emanated from an administrative agency. The basic ingredient of the fertilizer was ammonium nitrate often used as a component in explosives. The product was loaded onto two ships off the Texas City docks. A tragic explosion occurred the following day. The court held that the injury was within an exception, 28 U.S.C. § 2680 (b), “Any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute of regulation, whether or not such regulation or statute be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency of an employee of the Government, whether or not the discretion involved be abused.” (emphasis added).

²⁰ 205 F. 2d 681 (3rd Cir. 1953).

²¹ In *Harris v. United States*, 265 F. 2d 765 (10th Cir. 1953), the government, while attempting to spray property adjacent to the plaintiff's, sprayed the plaintiff's crop with an injurious insecticide. The plaintiff had to allege and prove negligence. *Heale v. United States*, 207 F. 2d 414 (3rd Cir. 1953), same result.

NUISANCE

The very essence of nuisance is that it does not necessarily arise out of a negligent or wrongful act. The wrong in a nuisance case is usually choice of location. The tortfeasor may employ the most modern methods, and conduct his affairs in a most careful manner, but this is no defense in a nuisance suit. It is difficult to see how a nuisance case could be sustained against the government. The courts are looking for some wrongful act or negligence of the type found in automobile collision cases. Nuisance sounds too much like strict liability to expect courts to invoke the Federal Tort Claims Act.

Another obstacle in the way of a successful suit against the government under the Federal Tort Claims Act is the "discretionary function" exception, as expounded in *Dalehite v. United States*.²² In that case, the court considered the whole process of production, sale, and shipment of fertilizer to be of a discretionary nature and within the statutory exception. In *Williams v. United States*, a case sounding in trespass, a jet exploded in midair, some particles falling to the ground and damaging the plaintiff's real estate.²³ The court reasoned that since the cause of the explosion was in the nature of a military secret and could not be disclosed, the incident fell within the "discretionary function" exception.

On the basis of the *Dalehite* and *Williams*' cases, a prediction as to whether the "discretionary function" doctrine would be invoked in the *Highland Park* type case is pure conjecture, but certainly within reason.

To recover a judgment in trespass, the court will have to recognize recurring low flights to be a trespass in fact. Furthermore, there will have to be actual damages or else the recovery will be limited to nominal damages. The court will have to decide whether the nature of the tort is not within the "discretionary function" exception. The same would apply to a nuisance case, except a further obstacle, holding the government to strict liability, would enter the case.

The theory has been advanced that perhaps the United States can be enjoined from flying over one's real estate or in fact enjoined from operating an air base. Congress has not provided a procedure for enjoining the United States. The problem of sovereign immunity is the principal obstacle. In *Goltra v. Weeks*, the plaintiff sought a temporary injunction to restrain an army officer, who acting under authority of the Secretary of War, seized the plaintiff's property.²⁴ In that case, which is similar to what has been suggested here, the court had to either deny the suit because of sovereign immunity or allow the suit and not consider the United States a party. The court did the latter, however, dissolving the injunction by deciding the case in favor of the defendants on the merits. *Goldberg v. Daniels*, was a suit for mandamus to order the Secretary of the Navy to deliver to the plaintiff a ship.²⁵ Bids were solicited and plaintiff's bid, although the highest, was not accepted by the Secretary. The court there held that although the Secretary may have committed a wrongful act, the action must fail because of sovereign immunity. In *Larson v. Domestic & Foreign Corp.*,²⁶ an action for specific performance of a contract, the United States Supreme Court stated in discussing the problem:

"Since we must therefore resolve the conflict in doctrine we adhere to the rule applied in the *Goldberg* case and to the principle which has been frequently repeated by this Court both before and after the *Goltra* case . . ."²⁷

²² See note 19, *supra*.

²³ 115 F. Supp. 386 (N.D. Fla. 1953).

²⁴ 271 U.S. 536 (1926).

²⁵ 231 U.S. 218 (1913). The plaintiff in *Land v. Dollar*, 330 U.S. 731 (1947), sued to recover stock certificates claimed to be unlawfully held by the United States Maritime Commission. The court held that there was jurisdiction.

²⁶ 337 U.S. 682 (1949).

²⁷ *Ibid.*, at page 701.

It is unlikely that a court will take jurisdiction in a suit for injunction. Even if jurisdiction was not denied, there are policy reasons for not halting the operations of an airfield. National security has become a problem of the utmost importance. Any judge must weigh this heavily.

Another unsettled issue in this field is *res judicata* or successive suits between the same parties. There is the problem of recurring trespasses; a recovery for nuisance and then additional disturbances arising; and the recovery under an easement theory and then additional disturbances arising.²⁸ In *Bartlett v. Grasselli Chemical Co.*, the court recognized that when public institutions are being sued for nuisance or trespass the courts allow one recovery for all time.²⁹ The measure of damages is the value of the property before the nuisance or trespass has begun less the value of the property once they have arisen.³⁰ Although there are no airplane cases on this point, there have been cases dealing with railroads, and no doubt these problems will soon arise in the field. A typical case is *Fowle v. New Haven & Northampton Co.*, wherein the defendant railroad constructed an embankment to protect its track.³¹ The embankment caused flooding of the plaintiff's land. The court held that the jury in the first proceeding gave the plaintiff damages forever, considering the nuisance to be of a permanent nature. They further stated:³²

"As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage."

The success of a litigant who has once recovered against the government will depend on what the court considered in the first action and whether or not the further disturbances complained of fall within the purview of the prior judgment.

CONCLUSION

The precedent established in *Causby*, magnified by the *Highland Park* case, must be very appealing to the lawyer who has a similar problem. As is pointed out, there appears to be other remedies available against the United States, however there are too many inroads leading to possible failure. If one proceeds in nuisance or trespass, there is the possibility that the court will find that under the Federal Tort Claims Act, negligence must be shown, or that the government activity was of a discretionary nature. Therefore in these cases of recurring low flights, the easement theory, while not the only alternative, is the most established in precedent, and undoubtedly will be utilized by aggrieved landowners.

²⁸ Cases are not uncommon where parties successful in one suit for trespass or nuisance sue again when additional disturbances or further trespasses occur. As yet, there are no cases where the owner of the fee sues the holder of an easement for nuisance or trespass due to changes in conditions. The procedure is apparently available, and is theoretically sound.

²⁹ 92 W.V. 445, 115 S.E. 451 (1922). Much stated here is applicable to private as well as public law, because the courts usually consider activities of terminals and carriers to be of a quasi-governmental nature.

³⁰ *Choctow, O. & G. R. Co. v. Drew*, 37 Okla. 396, 130 P. 1149 (1913). In *McLaughlin v. City of Hope*, 155 S.W. 910 (1913), the court stated at p. 912, "Since the city's action in constructing its sewer system so as to turn sewage into said branch indicates an intention to acquire a permanent right to continue to so use it and pollute the stream, the damages to the owner should be assessed upon that basis and as though the city were proceeding to acquire it under its power of eminent domain."

³¹ 112 Mass. 334 (1873).

³² *Ibid.*, page 338.