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CURRENT LEGISLATION AND DECISIONS

Constitutional Law—Eminent Domain—Air Easements for Low-Flying Aircraft

Plaintiff, in an action against the County of Allegheny, Pennsylvania, alleged that there had been an appropriation of his property as a result of aircraft taking off from and landing at the county's airport adjacent to his property. Plaintiff's complaint further stated there had been a substantial invasion of the peaceful use and enjoyment of his property by low-flying aircraft using the airport. The County of Allegheny owned and operated the airport in accordance with rules and standards set up under the National Airport Plan.[1] The airport facilities were used solely for air transport and commercial transit purposes. The flight patterns for take-offs and landings, which served as the basis of Plaintiff's complaint, were established in accordance with the rules and regulations of the Civil Aeronautics Administration (CAA). The Board of Viewers, which was appointed in accordance with Pennsylvania procedure,[2] found that the amount of clearance between Plaintiff's chimney and the bottom of the CAA approved glide path was 11.36 feet.[3] *Held*: Under the Fourteenth Amendment to the United States Constitution, the county, which is the promoter, owner and lessor of the airport, clothed with the power of eminent domain, is liable for any appropriation of air easements over the adjacent property.[4] This is true even though commercial aircraft were making the overflights of the property, and even though the airspace in which they were flying had been placed within the public domain as navigable airspace.[5] *Griggs v. County of Allegheny, Pennsylvania*, 369 U. S. 84, (1962) (7-2), *reversing* 402 Pa. 411, 168 A. 2d 123 (1961).

The Supreme Court granted certiorari on Plaintiff's allegation that the Pennsylvania Supreme Court's decision was in conflict with *United States v. Causby*.[6] It was in that 1946 decision that the Supreme Court established the concept of aircraft "taking" property, in the constitutional sense, by low flying. *Causby* involved a conflict between the federal gov-

[1] Under the provisions of the National Airport Act, 60 Stat. 170 (1946), 49 U.S.C. 1101 et seq., a Master Plan was to be submitted by the county to the CAA for approval. Included in the Plan was an agreement between the CAA and the county whereby, in consideration for federal funds to help construct the airport, the county agreed to prohibit use of adjoining land which would create a hazard to the aircraft taking off and landing at the airport. This was to be accomplished through enactment of zoning ordinances or by the acquisition of easements or other interests in lands or airspace.

[2] Pa. Stat. Ann. tit. 15, § 481 (1958).

[3] The full facts as found by the viewers were that the surface of the approach area as used by aircraft of private airlines was 11.36 feet above the plaintiff's residence, that the possible danger due to these low flights, the noise and vibrations which they caused, and the lights pointing at the premises at night had greatly damaged and depreciated the value of the property. The court assumed that such facts, which were undisputed, showed a sufficiently substantial deprivation to constitute a taking. 369 U.S. 84, 87 (1962).

[4] U. S. Const. amend. XIV: "Nor shall any person be deprived of life, liberty, or property . . . without due process of law. . . ."

[5] Section 1301 (24) of the Federal Aviation Act of 1958 provides: "Navigable Airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this act and shall include airspace needed to insure safety in takeoff and landing of aircraft."

[6] 328 U.S. 256 (1946).

ernment's use of a leased airport (used primarily by heavy Army aircraft) and a landowner whose chicken farm was situated under one of the take-off and landing patterns. The Court of Claims found that the take-offs and landings of the military aircraft had destroyed the use of the property as a commercial chicken farm, and had greatly diminished the value of the land.[7] The Supreme Court held there had been a "taking" in the constitutional sense, of a servitude across the plaintiff's land, which required compensation under the Fifth Amendment.[8] The decision made it clear that the Court would no longer accept the doctrine of *ad coelum*[9] as a basis of recovery; that property rights extend only to a height which the owner of the surface may reasonably require in conjunction with the undisturbed use and enjoyment of the surface; and that the vertical limits of these rights would depend upon the particular circumstances surrounding the property in question. The Court's language in this connection is significant:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. *The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are.* Flights over private land are not a taking, unless they are so low and so frequent as to be a direct interference with the enjoyment and use of the land.[10]

This and other language in the case[11] would seem to indicate that even if flights in excess of 500 feet, or 1,000 feet[12] substantially interfered with the use and enjoyment of the surface there would also be a taking even though this area is clearly within the public domain.[13] However, the possible ramifications of such language are beyond the scope of this Note.

The Pennsylvania Supreme Court[14] in deciding against Griggs agreed there had been a taking, but not by the County of Allegheny. The state court based its decision on an interpretation of *Causby* requiring the plaintiff to look to the owners of the aircraft to be compensated for any damages that might be caused by their over-flights of his property. Therefore, the court reasoned, as the county owned no aircraft operating out of the Greater Pittsburg Airport, the county could not be liable for damages; and because the commercial airlines are not clothed with the power of eminent domain, no liability could accrue to them. The Supreme Court in the *Causby* case was not confronted with the necessity of making any distinction between the owners of the aircraft and the operator of the

[7] 60 F. Supp. 751 (Ct. Cl. 1945).

[8] U. S. Const. amend. V: "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[9] "*Cujus est solum ejus est usque ad coelum et ad inferos.*" To whomever the soil belongs, he owns also to the sky and to the depths. Black, Law Dictionary 453 (4th ed. 1957).

[10] 328 U.S. at 266. (Emphasis added.)

[11] "If . . . [the CAA] prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation." 328 U.S. at 263.

[12] "Except when necessary for take-off and landing, no person shall operate an aircraft below the following altitudes: 1,000 feet over congested areas and 500 feet over other than congested areas." 14 C.F.R. § 60.17.

[13] "A public right of freedom of transit in air commerce through the navigable airspace of the United States." 52 Stat. 980, 49 U.S.C. § 1304. See *supra* note 5.

[14] 402 Pa. 411, 168 A. 2d 123 (1961).

airport since the federal government was both the lessor of the airport and the owner of the aircraft.

Mr. Justice Douglas, who delivered the majority opinion in the instant case, clearly points out that in these circumstances it is the county which takes the air easement. This conclusion is based upon the role of the county, which alone determines airport location, where the runways are needed, and what land and air easements are required for the successful operation of the airport.

Mr. Justice Black in his dissenting opinion agreed with the majority that there had been a taking in the constitutional sense under the *Causby* holding, but thought that it was not the county of Allegheny but the federal government which had been guilty of the taking. The dissent is based upon the fact that Congress has placed the areas needed for take-offs and landings within the public domain.[15] He felt that the actual taking occurred when Congress passed the law declaring the airspace to be within the public domain, not when the airport was opened for business by the county. Because the federal government had already acquired the areas, it was not necessary for the county to reacquire the same airspace. This act, coupled with the comprehensive plans set up by Congress for the administration and regulation of both national and international air commerce,[16] should rightfully place the burden of compensation on the federal government. He also points out that municipalities should not be discouraged from building the airports which have become so important to the national economy. He reasons that it was not Congress' plan in passing these laws to affect the local governments in such a way as to impose large liabilities upon them for following the provisions of the acts.

The majority opinion does not overlook the fact that Congress has placed the areas needed for take-offs and landings in the public domain, but the opinion states:

> [A]s 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 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'[17]

Thus, it would seem that so far as airport liability for taking flight easements is concerned, the effect of the 1958 Federal Aviation Act is of no moment. Actually, this result could have been anticipated from the language of the *Causby* case. In essence, all the new Act did was correct an oversight in the original Act,[18] which did not include in the public domain those areas needed for take-offs and landings. Prior to the change, aircraft flying below 500 feet or 1,000 feet could technically be considered trespassers as they would be operating outside the public domain. This, of course, was not consistent with the purpose of the Act which guaranteed a free right of travel through the navigable airspace.[19] If the purpose of Congress in changing the Act was to remedy an oversight, the instant

[15] See *supra* note 5.

[16] 14 C.F.R. § 60.18.

[17] 369 U.S. 88, 89. (Citation omitted.)

[18] Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), 49 U.S.C. § 401(24) (1958). See *supra* notes 5 and 12.

[19] See *supra* note 13.

case is correct in theory and consistent with the language of *Causby*. The Court further implies that Congress did not intend to pay all the costs of acquiring air easements over adjoining land when municipalities constructed airports.[20] The Court in effect says that the airspace required around these airports may be in the public domain but that there is no compensable taking until the airport is placed there.

The effect of the decision in the instant case on future cases remains to be seen. However, it would seem from this analysis that the decision will only amount to an extension of the property taking concept announced in the *Causby* decision. It will probably be restricted in the future to cases which are closely analogous to the present facts. The decision does not purport to deal with tort liability. In the absence of adequate tort remedies the owners of aircraft and private airports would be immune from liability for this type of interference. However, because these persons have no power of eminent domain, they do not fall within the scope of the decision in the instant case. If any weight is to be given to Congress' declaring areas needed for take-offs and landings to be in the public domain, it would be to prevent suits against the owners of aircraft for trespass.[21] Congress has established highways through the air just as it has established water highways in navigable streams. Some courts will probably continue to grant, under the proper circumstances, injunctive relief or damages or both under the theory of nuisance. Courts generally base their decisions on whether the alleged interference is reasonable under the circumstances, and whether there is an appreciable, tangible injury resulting in actual, physical discomfort, and not merely in a trifling annoyance or inconvenience. It appears, however, that the courts will strictly construe these requirements against the adjoining landowner.[22]

In conclusion, it should be pointed out that at the time of the *Causby* decision the Federal Tort Claims Act[23] had not been enacted. In order to give the landowner a remedy in that case it was necessary to work out the property taking concept.[24] Until the time of the *Causby* decision the courts attacked the problem of flights over land either on the basis of nuisance or trespass. If the facts were such that the case would fit neither theory, then the injury was without remedy as in *Causby*. The Court in that case enunciated the taking theory; it has, in the instant case, clearly stated against whom the theory applies.

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[20] "We see no difference between its responsibility for the air necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan. For, as we have already noted, Congress provided for the payment to the owners of airports, whose plans were approved by the administrator, of a *share* of 'the allowable cost of the project,' including the 'costs of acquiring land or interest therein or easements through or other interest in air space'." 369 U.S. at 89.

[21] Mills v. Orcas Power & Light Company, 56 Wash.2d 807, 355 P.2d 781 (1960); Cheskov v. Port of Seattle, 55 Wash.2d 416, 348 P.2d 673 (1960).

[22] Antonik v. Chamberlain 78 N.E.2d 752 (1947); Atkinson v. City of Dallas, 353 S.W.2d 275 (1961) (injunctions refused).

[23] 60 Stat. 428 (1946).

[24] Rhyne, *Airport Legislation and Court Decisions*, 14 J. Air L. & Com. 289 (1947).

Liability for Ground Damage Caused by Aircraft—Trespass—Ultra-Hazardous Activity—Negligence

Plaintiffs sought a summary judgment to recover for both personal injuries and property damage suffered as a result of Defendant's airplane crashing in the vicinity of Plaintiffs' apartment building. The crash occurred following a mid-air collision with another aircraft belonging to the co-defendant Trans World Airlines. Plaintiffs based their motion for summary judgment on a trespass theory of liability alleging that the "invasion" caused by the falling aircraft, without more, was grounds for recovery. *Held*: summary judgment denied. In order to constitute an actionable trespass there must be an intent to do the very act which results in the immediate damage. *Wood v. United Airlines,* 32 Misc.2d 955, 223 N.Y.S.2d 692 (Sup. Ct.) *aff'd* 226 N.Y.S.2d 1022 (1962).

In presenting their case the plaintiffs were unable to show that the invasion was due to a volitional act of the defendant. The court made a distinction between a forced but intentional landing and the situation where, as in the instant case, the plane falls to earth out of control. The plaintiffs relied heavily upon *Margosian v. U. S. Airlines,*[1] a case in which the injured party was granted summary judgment upon the issue of liability in trespass. The court here pointed out that in *Margosian* the pilot was attempting to make a landing at Idlewild airport when the crash occurred. Hence the intrusion in that case was held to be intentional and distinguishable from the facts in the instant case.

If trespass can be shown the courts in almost all jurisdictions will hold those in control of the aircraft strictly liable for harm which they cause.[2] However, those courts are not at all in agreement on the proper theory of liability to apply in the absence of trespass. About one-half of the states have attempted to solve the problem through legislation. Of those states which do have statutes several impose strict liability through laws modeled primarily on Section 5 of the Uniform Aeronautic Act.[3] The Uniform Act was promulgated by the Commission on Uniform State Laws in 1922, but was withdrawn by the Commissioners in 1943. Hence, those states continue to operate under a law which was tacitly disapproved nearly twenty years ago.[4] In other states in which statutes on this point have been enacted the liability imposed varies from absolute liability for forced landings only,[5] to a presumption of negligence,[6] to recovery only upon proof of negligence.[7]

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[1] 127 F. Supp. 464 (E.D.N.Y. 1955).

[2] See, *e.g.*, State ex rel. Brickhead v. Sammon, 189 A. 265 (Md. Ct. App. 1936).

[3] 9 Uniform Law Ann. XVI.

[4] See, *e.g.*, United States v. Praylou, 208 F.2d 291 (4th Cir.) cert. den. 347 U.S. 934 (1954), quoting § 5 and holding for strict liability. "The owner of every aircraft which is operated over land or waters of this State [South Carolina] is absolutely liable for injuries to persons or property on the land beneath caused by ascent, descent or flight of the aircraft or dropping or falling of any object therefrom whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or owner or bailee of the property injured."

[5] Wyo. Stat. Ann. ch. 3, § 10.33 (1957).

[6] Md. Ann. Code Art. 1A, § 9 (1957).

[7] Ariz. Rev. Stat. Ann. ch. 2, § 2.207 (1956).

The jurisdictions which rely upon common law principles are about equally divided between strict liability and ordinary negligence. The states which apply the rule of strict liability follow the attitude found in the Restatement of Torts published in 1938. According to Section 520 of the Restatement, "aviation in its present state of development is ultra-hazardous" and consequently one of those activities for which liability is imposed without fault.[8]

Possibly the strongest argument in favor of strict liability (one which has a great deal of merit even in the face of the tremendous advances in aviation safety) was set forth in *Prentiss v. National Airlines.*[9] In that case the court held the New Jersey statute[10] constitutional as a valid exercise of the state's police power. The court justified strict liability on the grounds of public policy. The purpose of the statute, it reasoned, was to spread the cost of the damages caused by the enterprise over the industry itself, much on the same theory as workmen's compensation laws which apply to all businesses, hazardous and non-hazardous alike. The court saw no reason why civil aviation should escape liability at the expense of the innocent victim on the ground who is injured by an aircraft accident. There was, even in this case, some reference to the ultra-hazardous nature of aviation, but only in justifying the state legislature's right to govern the industry in this respect and to show that the regulation was not an abuse of legislative power. The court further pointed out that the difficulty in proving negligence in airplane crashes often makes inadequate a plaintiff's remedy which must be predicated on a theory of negligence.

The court in the instant case expressed an opinion which seems to be representative of the reasoning applied in the remaining jurisdictions, one which reflects the modern view concerning liability for ground damage caused by aircraft.

> [I]n light of technical progress achieved in the design, construction, operation and maintenance of aircraft, generally, . . . flying should no longer be deemed to be an ultra-hazardous activity, requiring the imposition of absolute liability, for any damage or injury caused in the course thereof.[11]

In two recent California decisions[12] the courts stated that an airplane was not an inherently dangerous instrument when properly handled by a competent pilot. In Connecticut,[13] Colorado,[14] Florida[15] and Texas[16] the courts have held that in its present state of development, aviation is *not* an ultra-hazardous activity and that the owners and operators of aircraft should be required only to exercise ordinary care.

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[8] See, *e.g.*, Hahn v. U. S. Airlines, 127 F. Supp. (E.D.N.Y. 1954); Parcell v. United States, 104 F. Supp. 110 (S.D.W.Va. 1951). In the Hahn case the plaintiff was granted summary judgment on the basis of a trespass, but the court relied heavily upon Restatement, Torts § 165(c). The rationale of this section is closely related to that found in § 520 dealing with ultra-hazardous activity.

[9] 112 F. Supp. 306 (D.N.J. 1953).

[10] N.J. Stat. Ann. 6: 2-7 (1929). This section was adopted from the Uniform Aeronautic Act § 5 (1922).

[11] 223 N.Y.S.2d at 692.

[12] Southern California Edison Co. v. Coleman, 310 P.2d 504 (Cal. Ct. App. 1957); Boyd v. White 276 P.2d 92 (Cal. Ct. App. 1954).

[13] D' Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954).

[14] Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950).

[15] Grain Dealers National Mutual Fire Ins. Co. v. Harrison, 190 F.2d 726 (5th Cir. 1951).

[16] King v. United States, 178 F.2d 320 (5th Cir.) cert. den. 339 U.S. 964 (1950).

The barnstorming days of 1922, when the Uniform Aeronautic Act was promulgated, and 1938, when the Restatement of Torts first commented on flying have long since passed. Statements that aviation is ultra-hazardous are no longer appropriate. The instant case is one of the better recent comments made in this regard. It seems to be an accurate indicator of the current trend in negligence theories.

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