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## Current Legislation and Decisions

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## CURRENT LEGISLATION AND DECISIONS

### Wrongful Death—Limitation on Recovery—Conflict of Laws

Plaintiff, a New York administratrix, brought suit against the defendant airline company, a Massachusetts corporation, for the death of her husband in a plane crash in Massachusetts. Plaintiff's cause of action was based on the Massachusetts Wrongful Death Act,<sup>1</sup> which provides that damages be awarded with reference to the degree of defendant's culpability, and which places minimum and maximum limits on recovery at \$2,000 and \$15,000 respectively.<sup>2</sup> The trial court refused to limit recovery to the maximum provided in the Massachusetts statute.<sup>3</sup> The trial court's decision was reversed on appeal by the United States Court of Appeals for the Second Circuit,<sup>4</sup> but on rehearing the Second Circuit, sitting in banc, affirmed. The Second Circuit permitted the federal district court in New York to apply a Massachusetts statute giving a cause of action for wrongful death, and at the same time allowed it to refuse, for reasons of New York state policy, to follow a provision of the Massachusetts statute which would limit recovery. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (1962).

The court based its decision on *Kilberg v. Northeast Airlines, Inc.*,<sup>5</sup> a case brought in a New York state court which involved a wrongful death action arising out of the same accident. In the *Kilberg* case the New York Court of Appeals said *in dicta only* that the New York courts were to disregard the Massachusetts limitation on recovery. Under *Erie RR. v. Tompkins*<sup>6</sup> and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>7</sup> a federal court must apply the choice of law doctrine of the state in which it sits. However the *Erie* doctrine does not apply to *dicta*.<sup>8</sup> Realizing the weakness in blind adherence to the dicta of a state court decision the court

<sup>1</sup> Mass. Ann. Laws c. 229 § 2 (1949). This section of the Massachusetts General Statutes reads: Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers . . . cause the death of a passenger, he or it shall be liable in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions therein specified.

<sup>2</sup> The statute has since been amended to raise the minimum recovery to \$3,000 and the maximum to \$30,000. Mass. Acts 1962, c. 306. (effective Jan. 1, 1963).

<sup>3</sup> *Pearson v. Northeast Airlines, Inc.*, 199F. Supp. 539 (S.D.N.Y. 1961).

<sup>4</sup> *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131 (2d Cir. 1962). The court reasoned that the full faith and credit clause of the Constitution required a federal court in one state to enforce the statutory wrongful death dollar limits of another state where the wrongful death occurred. Even though the law of the forum has no limitation for recovery in wrongful death the federal district court erred, according to the appellate court, in applying the conflict of laws rule of the forum. This rule provided that the statutory limitation in the sister state's wrongful death act would not be applied to citizens of its own state, despite the fact that the wrongful death action itself was controlled by the substantive law of the foreign state.

<sup>5</sup> 9 N.Y.2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1962).

<sup>6</sup> 304 U.S. 64 (1938).

<sup>7</sup> 313 U.S. 487 (1941).

<sup>8</sup> It was never imagined that it was the duty of the federal courts to follow dicta or to enter into speculation as to what the state courts might decide. If the state court has not decided the question it is the duty of the federal court to decide it in the light of the state law without regard to dicta or the idiosyncrasies of state judges in the faith that a right decision would be that at which the courts might ultimately arrive. 1A Moore, Federal Practice ¶ 0.309 [1-2] (2d ed. 1961).

in the instant case made an elaborate justification of the ruling in the *Kilberg* case. It stated that the "decision" in the state court was a proper exercise of the state's power to develop conflict of laws doctrine, and that the court's refusal to apply the limitation of recovery provision in the Massachusetts statute was a constitutional exercise of such power not prohibited by the full faith and credit clause.<sup>9</sup> The dicta in *Kilberg* is contra to the decisions of most cases in which the problem of the proper law to govern the damages recoverable in wrongful death actions has been considered. The majority view has been that questions concerning the measure of damages recoverable or limitations on such amounts are as much a question of substantive law as is the *right* to recover for wrongful death. Hence, these questions should be governed by the law of the place where the fatal injury was inflicted.<sup>10</sup> Previous New York cases have followed the majority view. In *Faron v. Eastern Airlines, Inc.*,<sup>11</sup> with a fact situation almost identical to *Kilberg* and *Pearson*, a New York executrix brought suit against the airline company under the Connecticut Wrongful Death Act.<sup>12</sup> The act contained a \$20,000 limitation on the amount of damages recoverable. In that case the court held the limitation binding saying,

The law of the place where the wrong causing death occurred governs the right of action for death. . . . The right to bring a death action is purely statutory. It did not exist at common law and depends upon the existence of a statute creating a right of action at the place where the "force impinged" causing injury and death.<sup>13</sup>

The idea of *lex loci delicti* being determinative of damages was adopted by the Second Circuit in *Maynard v. Eastern Airlines, Inc.*,<sup>14</sup> in another action arising from the Connecticut crash.

Several theories have been used in the various decisions to justify the application of the *lex loci delicti* to the measure and limitation of damages. First, if each state were allowed to apply its own law of damages a different law might be applied to each action resulting from a common disaster, whereas application of the law of the *lex loci delicti* the same law will apply to all those injured in a particular state.<sup>15</sup> Second, a constitutional question is raised when one state refuses to give full faith and credit to the "public acts" of another state.<sup>16</sup> A sister state statute may be a "public act" within the meaning of the full faith and credit clause and its implementing

<sup>9</sup> U.S. Const. art. IV § 1.

<sup>10</sup> *Northern Pac. R.R. v. Babcock*, 154 U.S. 190 (1894); *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120 (1904); The statute of the place where fatal injury or wrongful death occurred which limits the recovery to a specified amount will control to the exclusion of the law of the forum which contains no such limitation. 15 A.L.R.2d 762. For a New York case holding contra see *Wooden v. Western N.Y. & Pac. R.R.*, 126 N.Y. 10, 26 N.E. 1050 (1891). This decision was later criticized by Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918) in which he stated that local public policy considerations should be narrowly confined. He said, "Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right . . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

<sup>11</sup> 84 N.Y.2d 568, 193 Misc. 395 (Sup. Ct. 1948).

<sup>12</sup> Conn. Gen. Stat. c. 319 § 1005h (1945).

<sup>13</sup> *Faron v. Eastern Airlines, Inc.*, 84 N.Y.S. 2d 568, 570 (Sup. Ct. 1948).

<sup>14</sup> 178 F.2d 139 (2d Cir. 1949).

<sup>15</sup> Goodrich, *Public Policy in the Law of Conflicts*, 36 W.Va. L.Q. 156, 165 (1930).

<sup>16</sup> U.S. Const. art. IV § 1.

statute.<sup>17</sup> However, the United States Supreme Court has not made the recognition of "public acts" uniform in all cases, and full faith and credit probably does not require New York to apply the Massachusetts limitation. Even where full faith and credit does not apply, the tendency of the courts has been to give as much credit to a sister state statute as it would give to its own.<sup>18</sup> Finally, the application of the measure of damages of the *lex fori* encourages forum-shopping and the public policy advantages derived from applying local law might not offset the basic need for uniformity of decisions to which the law of conflicts is devoted.<sup>19</sup>

To justify the *Kilberg* case the court in the instant case searched for an exception to the general rule that the law of the place of the wrongful act governs the extent of liability as well as its existence. The court began its task by aligning the limitation on recovery with the statute of limitations and survival or abatement of actions. In the latter instances, courts generally apply the law of the forum.<sup>20</sup> In its comparison the court had to characterize both statutes of limitation and survival or abatement of actions as substantive law rather than procedural because of the decisions which hold that damages are a part of the substantive right and not merely a remedy.<sup>21</sup> The majority cited *Wells v. Simonds Abrasive Co.*<sup>22</sup> in which the forum was permitted to apply its own statute of limitation to a death action arising in another state, even though the foreign wrongful death statute contained a special limitation on actions brought under it. Such "built-in" limitations have frequently been considered part of the substantive right.<sup>23</sup> The fact that the United States Supreme Court in the *Wells* case permitted this type of limitation to be ignored by the forum shows an unwillingness to accord constitutional status to vested right concepts of choice of law in tort cases.<sup>24</sup>

The question of full faith and credit was more easily dismissed by the court than the distinction between substantive and procedural law. It correctly applied the view expressed in *Alaskan Packers Ass'n v. Industrial Acc. Comm.*,<sup>25</sup> that, for purposes of full faith and credit, statutory causes of action are generally subject to the general choice of law rules. The court in *Pearson* surpassed the authorization given by *Alaskan Packers* and accepted the Massachusetts law in part and rejected it in part. In other words the majority gave *some* faith and credit to the Massachusetts law but not *full* faith and credit. Professor Currie expressed agreement with this approach in an article "The Constitution and Choice

<sup>17</sup> 28 U.S.C. § 1738 (1958); *First Nat'l Bank of Chicago v. United Airlines, Inc.*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951).

<sup>18</sup> *Bradford Electric Light & Power Co. v. Clapper*, 286 U.S. 145 (1932).

<sup>19</sup> Paulsen and Govern, *Public Policy In the Conflicts of Laws*, 56 Colum. L. Rev. 696 (1956). Allowing public policy to limit the application of certain conflict of laws rules is an idea which threatens the fundamental concepts underlying the entire field of conflict of laws. This limitation means that local policy could control a situation entirely foreign to the concerns of the forum.

<sup>20</sup> For statutes of limitation see *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); for survival or abatement of actions see *Richards v. United States*, 369 U.S. 1 (1961), and *Grant v. McAuliffe*, 264 P.2d 944, 41 Cal. 2d 859 (1953).

<sup>21</sup> *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). The court said, "The question of the proper measure of damage is inseparably connected with the right of action." See also, *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120 (1904); *Northern Pac. R.R. Co. v. Babcock*, 154 U.S. 190 (1884).

<sup>22</sup> 345 U.S. 514 (1953).

<sup>23</sup> *The Harrisburg*, 119 U.S. 199 (1886).

<sup>24</sup> Cheatham, *Federal Control of Conflicts of Laws*, 6 Vand. L. Rev. 581 (1953).

<sup>25</sup> 294 U.S. 532 (1935).

of Law: Governmental Interest and Judicial Sanction."<sup>26</sup> Also in *Watson v. Employers Liability Corp.*<sup>27</sup> the United States Supreme Court recognized that a single "transaction" may contain within itself several different "issues" legitimately made subject to the law of more than one state.

The court's reasoning in the instant case failed to overcome the policy reasons for applying the *lex loci delicti*, especially the desire to promote uniformity of law and to prevent forum-shopping. However, an analysis of the interests involved in this particular case justifies its decision. A wrongful death statute manifests a state's recognition of the wrong done to the dependents of the deceased and provides compensation for their future welfare. If they are left impoverished they may become burdens upon the state. Since the dependents here are residents, New York is directly concerned with the outcome of the litigation.<sup>28</sup> Bearing in mind that the place of an airplane crash is completely fortuitous, the results in terms of this policy seem to be just. A \$15,000 limitation or any other arbitrary limitation is an unreasonable standard by which to measure the lives of all human beings. Furthermore it is doubtful that the application of the Massachusetts statute in a case such as this, where there is no negligence after the crash and no ground damage, would have any real effect on any interest within that state.<sup>29</sup> Should not a way be sought to reach this desired result without opening the flood gates to forum-shopping? The obvious solution is suggested by the *Kilberg* case, *i.e.*, adopting the contract approach by statute. Such legislation could be enacted to provide that an airline company selling tickets within the state impliedly obligates itself to take the passenger safely to his destination. The breach of this duty would then give rise to a cause of action in contract in which the damages recoverable would be unlimited. A possible alternative would be for Congress to provide for wrongful death recovery by federal statute through its power over interstate commerce.<sup>30</sup>

Robert L. Trimble

## Constitutional Law — Eminent Domain — Consequential Injury

Plaintiffs, owners of ten homes adjacent to Forbes Air Force Base in Pauline, Kansas, brought suit against the United States under the Tucker Act for an alleged appropriation of their property.<sup>1</sup> Their complaint stated

<sup>26</sup> 76 U. Chi. L. Rev. 9, 63 (1958).

<sup>27</sup> 348 U.S. 66, 72 (1954): Justice Black in the opinion of the court said,

"As a consequence of the modern practice of conducting widespread business activities throughout the entire United States this court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interest of its own people even though other phases of the same transaction might justify regulatory legislation in other states."

<sup>28</sup> *Alaskan Packers Ass'n v. Industrial Acc. Comm.*, 294 U.S. 532 (1935).

<sup>29</sup> Cf. Stumberg, *Conflict of Laws* § 202 (2d ed. 1951).

<sup>30</sup> Comment, 36 N.Y.U.L. Rev. 723 (1961).

<sup>1</sup> The Tucker Act provides that an action may be maintained against the United States for a claim "not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2) (1952).

that the operation and maintenance of the Base caused interferences with the use and enjoyment of their property sufficient in law to constitute a "taking" for which just compensation was due.<sup>2</sup> The property owners, who acquired their homes prior to the enlargement of the Base to accommodate jet aircraft,<sup>3</sup> did not rely upon flights over their homes to sustain their claims. The interferences which served as the bases of their complaint were (1) the violent vibrations and sound waves which were transmitted from the jet engines; (2) the exhaust fumes and heavy black smoke which were emitted from the aircraft and which blew over on their houses; and (3) the frequent operation of the jets at high RPM ranges which endangered their health and safety.<sup>4</sup> The trial court found that the diminution in value of the ten homes ranged from \$4,700 to \$8,800.<sup>5</sup> Held: the interferences about which the Plaintiffs complain are not severe enough to be considered a "taking." In order to maintain an action for damages under the Fifth Amendment there must be either a direct encroachment on the property by a physical object, or government action so complete as to deprive the owner of "all or most"<sup>6</sup> of his interest in the land. *Batten v. United States*, 306 F.2d 580 (1962), *cert. denied*, 371 U.S. 955 (1963).

The power of eminent domain permits the sovereign or his delegate<sup>7</sup> to condemn lands for the public use without the owner's consent.<sup>8</sup> It is nothing more than an inherent political right founded upon grounds of common interest and necessity to preserve the sovereign's existence in perpetuity.<sup>9</sup> Because it is an inherent attribute of sovereignty no recognition is required in the Constitution.<sup>10</sup> The exercise of this power by the United States Government is only restricted by the provisions found within the Fifth Amendment of the Constitution.<sup>11</sup> This amendment places the economic loss created by the exercise of the power upon the public rather than upon those from whom the property is taken.<sup>12</sup> It is evident that the framers of the Constitution injected this provision only to protect the elements which they deemed essential to the value of property. Therefore, the government "takes" property when it destroys one of those essential property rights.<sup>13</sup> Thus it is the character of the invasion, and not the amount of damages which determines whether the

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<sup>2</sup> 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."

<sup>3</sup> Aircraft movements averaged about 4,000 monthly, and of these, 70% were jets.

<sup>4</sup> In the maintenance operations jet engines were run at various power settings ranging from 50% to 100%. During a typical month the engines were operated for 84 hours in the 100% RPM range, at which time the sound pressure level on the plaintiff's property varied from 90 to 117 decibels. The Air Force recommends that their personnel use ear plugs when the sound pressure level reaches 85 decibels, and requires their use at or above 95 decibels. Substantial ear damage may result from failure to use the plugs.

<sup>5</sup> Stated in terms of percentages the diminution in value ranged from 55.3% to 40.8%.

<sup>6</sup> *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

<sup>7</sup> 1 Nichols, *Eminent Domain* § 3.1 (3d ed. 1950).

<sup>8</sup> *Scott v. Toledo*, 36 Fed. 385 (N.D. Ohio 1888); *Dept. of Public Works and Bldg. v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611 (1953).

<sup>9</sup> *Kohl v. United States*, 91 U.S. 367 (1876).

<sup>10</sup> *James v. Dravo Contracting Company*, 302 U.S. 134 (1937); *United States v. Finn*, 127 F. Supp. 158 (S.D. Cal. 1954).

<sup>11</sup> See *supra* note 2.

<sup>12</sup> *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

<sup>13</sup> *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921).

land has been taken.<sup>14</sup> Nevertheless, as the cases demonstrate, the damages must be substantial.<sup>15</sup>

The important questions to be decided in cases arising under the Fifth Amendment are whether there was a "taking," and if so, whether that which was taken was "property." The courts have long recognized that the government may act so as to deprive citizens of their ownership rights without taking the physical property itself.<sup>16</sup> In this area the courts are careful to distinguish between damages which are only an incidental result of lawful governmental action,<sup>17</sup> and those acts which substantially impair a person's right to use, enjoy and dispose of his private property.<sup>18</sup> This doctrine was enunciated by the United States Supreme Court in two earlier decisions. In *Baltimore and P.R.R. v. Fifth Baptist Church*,<sup>19</sup> the Supreme Court held that there had been a taking of the plaintiff's church as a direct result of the disturbances created by the operation of the defendant's engine house. The interference was of sufficient magnitude to destroy completely the value of the building as a place of worship. The court ruled that the use to which the defendant put his land was unreasonable, and that although the plaintiff might use the building for other purposes, there was no requirement that he do so.<sup>20</sup> Later, in *Richards v. Washington Terminal Co.*,<sup>21</sup> the Court held that even though Congress could legalize what would otherwise be a public nuisance, it could not confer immunity from action for a private nuisance which amounted to a taking of private property. It further stated that no such grant of authority affected the claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. However, the Court in establishing this remedy did not set out any rigid distinctions between that which is "taken" and that which is merely "damaged." The decisions have been governed by the peculiar circumstances in each case.

As a result of these two decisions many states have inserted into their constitutions provisions which allow recovery for land which has been "taken" or "damaged" by governmental interference.<sup>22</sup> However, in those

<sup>14</sup> *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960).

<sup>15</sup> *Ibid.*

<sup>16</sup> *United States v. Kansas City*, 339 U.S. 799 (1950); *United States v. Cress*, 243 U.S. 316 (1917).

<sup>17</sup> Damages which are an incidental result of lawful government action, without any direct invasion of private property, are consequential; they do not constitute a taking under the Fifth Amendment. *Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Nunnally v. United States*, 239 F.2d 521 (4th Cir. 1956); *Freeman v. United States*, 167 F. Supp. 541 (W.D. Okla. 1958).

<sup>18</sup> It is generally held that when a part of an owner's parcel or track of land is taken for a public improvement the owner is entitled to be compensated for the part taken and for consequential damage to the part not taken even though the consequential damage is of a kind suffered by the public at large. *State Highway Comm. v. Bloom*, 77 S.D. 494, 93 N.W.2d 572 (1958).

<sup>19</sup> 108 U.S. 317 (1883). See also *Cerigheno v. State*, 75 Cal. App. 2d 217, 370 P.2d 694 (1962).

<sup>20</sup> 108 U.S. at 330.

<sup>21</sup> Plaintiff alleged damages to his property resulting from the maintenance of a railroad operation by the defendant company. The defendant's railroad ran into a tunnel near, but not adjacent to, the plaintiff's property. An exhaust fan was constructed to drive the smoke and fumes out of the tunnel and directed them in such a manner that they came on and across the plaintiff's property. This action by the plaintiff was founded on nuisance. The Court held that Congress could not grant immunity where the private nuisance was of such special inconvenience as to amount to a taking of private property. 233 U.S. 545 (1914).

<sup>22</sup> 2 Nichols, *Eminent Domain* § 6.44 (3d ed. 1950); Kansas was the only state in the Tenth Circuit which did not have the "damaged" provision.

jurisdictions such as Kansas which have not adopted the "damaged" provision, the courts are bound through the application of the Fourteenth Amendment<sup>23</sup> to consider the Supreme Court's decisions in *Richards* and *Baltimore and P.R.R.*<sup>24</sup>

The instant case represents nothing more than an attempt by the Plaintiffs to place the interference created by the Air Base within the definition of acts which will constitute a taking. The district court<sup>25</sup> in deciding against Batten indicated that the above decisions were of small significance in light of the Supreme Court's holding in *United States v. Causby*.<sup>26</sup> In *Causby*, the Court found that there could be no taking of private property unless the flights in question were directly over the property and were so low and frequent as to be a direct interference with the enjoyment and use of the land.<sup>27</sup> The lower court reasoned that *Causby* had considered the interference created by the aircraft as a "legalized nuisance."<sup>28</sup> Therefore, without a physical trespass onto what is considered the dominion of the property owner there cannot be a "taking" in the constitutional sense.

Judge Breitenstein, who delivered the majority opinion in the instant case, did not exclude from consideration the doctrine set out in *Richards*. He denied recovery solely upon the ground that the disturbances were not great enough to be considered substantial. He based this conclusion upon two important factors. First, the interferences of which the Plaintiffs complained were considered as only general in nature because they were of the same character as those experienced in varying degrees in the surrounding area. Second, the Plaintiffs did not show that their homes were made uninhabitable because of the activities at the Base. Therefore, the majority reasoned, there had not been a deprivation of "all or most" of the Plaintiff's interest, and the interferences must be considered as only consequential. The fact that the homes had diminished in market value had no effect in determining whether the property had been taken.<sup>29</sup>

The majority opinion did not overlook the Supreme Court's decisions in *Causby* and *Griggs*. The plaintiff had contended that since recovery was permitted for sound and shock waves travelling vertically, it should also be allowed for such waves travelling laterally. The court rejected this argument merely by stating that it was unable to find any decision or interpretation of the theory set forth in *Causby* and *Griggs* which would indicate that it could be applied without an actual physical trespass.<sup>30</sup>

Chief Judge Murrah in his dissenting opinion stated that the court's definition of what is to be considered "substantial" is far too rigid in light of the facts presented in the instant case. His language in this connection is significant:

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<sup>23</sup> U.S. Const. amend. XIV: "Nor shall any person be deprived of life, liberty or property . . . without due process of law. . . ."

<sup>24</sup> 1 Nichols, Eminent Domain § 4.1 (3d ed. 1950).

<sup>25</sup> Brief for Appellant, p. 14, *Batten v. United States*, 371 U.S. 955 (1963).

<sup>26</sup> 328 U.S. 256 (1946); See also *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

<sup>27</sup> 328 U.S. at 266.

<sup>28</sup> Brief for Appellant, p. 19, *Batten v. United States*, 371 U.S. 955 (1963).

<sup>29</sup> See *supra* note 14.

<sup>30</sup> *Matson v. United States*, 171 F. Supp. 283 (Ct. Cl. 1959); *Herring v. United States*, 162 F. Supp. 769 (Ct. Cl. 1958); *Highland Park v. United States*, 161 F. Supp. 597 (Ct. Cl. 1958); *United States v. 257.654 Acres of Land*, 72 F. Supp. 903 (D. Hawaii 1947).

I must inquire at what point the interference rises to the dignity of a "taking?" Is it when the window glass rattles, or when it falls out; when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversation difficult, or when it stifles it entirely? In other words, does the "taking" occur when the property interest is totally destroyed, or when it is substantially diminished?

He seems to believe that there can be a "taking" of the property at some time before it is rendered completely uninhabitable. The court should strike a balance between the interests of the State and the private property owner. He states that there is no reason to grant recovery under the doctrine of *Causby* and then to deny compensation in the instant case, especially when the economic interests which have been invaded are of the same variety as those in *Causby*.

The views of the dissenting opinion were further emphasized<sup>31</sup> by the Supreme Court of Oregon in its decision in *Thornburg v. Port of Portland*.<sup>32</sup> That decision was handed down after the Tenth Circuit had rendered its opinion in *Batten*, but before the Supreme Court had denied certiorari. The question before that court was similar to the question in the instant case. The Oregon high court contended that the rationale used by the majority in *Batten* was circular. They felt that in effect all the majority in *Batten* had said was that "there was no taking because the damages are consequential, and the damages are consequential because there was no taking."<sup>33</sup> The court emphasized that the test to be applied under such circumstances was one of reasonableness based upon a balancing of the interests of the parties concerned. It concluded that *Causby* was not decided upon the ground of physical trespass. The extent of the vibrations and noise were considered determinative of the question of taking. The court in this regard stated:

It is sterile formality to say that the government takes an easement in private property when it repeatedly sends aircraft directly over the land at altitudes so low to render land unusable by its owner, but does not take an easement when it sends aircraft a few feet to the right or left of the perpendicular boundaries. The line which marks the land owner's right to deflect surface invaders has no particular relevance when invasion is a noise nuisance.

The decision in *Batten* practically forces every landowner into litigation to determine whether he has a cause of action. In other words, the uncertainty of what should be considered "substantial" interference may lead to a great many lawsuits, each turning on its particular facts. Note however that this decision did not deal with any suggestion of tort liability. By bringing suit under the Tucker Act only the property owners were precluded from any possible relief based either on nuisance or trespass.<sup>34</sup> There was no indication by the court that the Plaintiffs in the instant case could not have asked for relief under the Federal Tort Claims

<sup>31</sup> "In view of the importance of the question presented in the *Batten* case, and in view of the strong dissent by the chief judge, it would be premature to speculate now upon the final direction the federal courts will take. We believe the dissenting view in the *Batten* case presents the better-reasoned analysis of the principles involved, and that 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." 376 P.2d at 104.

<sup>32</sup> — Ore. —, 376 P.2d 100 (1962).

<sup>33</sup> 376 P.2d at 104.

<sup>34</sup> 306 F.2d at 583.

Act.<sup>35</sup> Tort relief has been somewhat limited in the field of Air Law because of the possible conflict with the Government's power to enact air traffic rules.<sup>36</sup> Since Congress has declared that any altitude above 500 feet over open areas and 1,000 feet over congested areas is public domain,<sup>37</sup> courts are reluctant to grant injunctive relief which would have the effect of imposing a minimum altitude on flight above that height.<sup>38</sup> Mandatory injunctions generally will not be allowed unless the court determines that health and safety are imperiled and that an injunction is the only possible remedy.<sup>39</sup> On the other hand money damages should not adversely effect rules which are designed to promote flight safety.

In an action for damages based on trespass there must be evidence not only that the aircraft passed over the land in question, but also that there was an unlawful invasion of the "immediate reaches" of the owner's property.<sup>40</sup> Since the doctrine of *ad coelum*<sup>41</sup> is no longer in use, it will be necessary to prove that the airplane actually invaded the space which the owner might reasonably use and occupy.<sup>42</sup> Most courts in considering the question of damages have been more liberal in granting recovery under a doctrine of nuisance.<sup>43</sup> Whether there is a cause of action for nuisance usually depends upon whether the interference which the landowner has suffered was reasonable under the circumstances.<sup>44</sup> The fact that the airport is being operated properly or that its operation constitutes only a reasonable use of the land upon which it is located is of no moment.<sup>45</sup>

If the rationale of the majority is followed with any uniformity, the effect which the decision will project into this area of the law would be substantial. It would definitely restrict the doctrine set forth in *Causby*. The court in the instant case indicated that relief would be granted only if there were a direct physical invasion and a frequent interference with the plaintiff's use and enjoyment of his land.<sup>46</sup> While the decision did not establish any firm definition of what would be considered "substantial" disturbance, it will require property owners in the future to take a hard look at the facts to determine if their injury is more serious than that described in the facts of the *Batten* case.

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<sup>35</sup> 60 Stat. 428, 28 USC § 2672 (1958).

<sup>36</sup> 72 Stat. 739, 49 USC § 1301 (1958).

<sup>37</sup> 14 C.F.R. § 60.17 (1947).

<sup>38</sup> Calkins, *The Landowner and the Aircraft—1958*, 25 J. Air L. & Com. 373 (1958).

<sup>39</sup> See *Anderson v. Souza*, 38 Cal.2d 825, 243 P.2d 497 (1952); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245 (1945); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

<sup>40</sup> "We have said that the airspace is a public highway. Yet it 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. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States v. Causby*, 328 U.S. at 264. (Emphasis added).

<sup>41</sup> "Cujus est solum ejus 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).

<sup>42</sup> *Dlugas v. United Airlines Transp. Corp.*, 53 Pa. D. & C. 402, 409 (C.P. 1944); *City of Newark, New Jersey v. Eastern Airlines*, 159 F. Supp. 750 (D.N.J. 1958).

<sup>43</sup> See Note, *Airplane Noise*, 74 Harv. L. Rev. 1582 (1961); *Atkinson v. Bernard, Inc.*, 233 Ore. 624, 355 P.2d 229 (1960).

<sup>44</sup> The court in the instant case might have denied recovery for nuisance by reasoning that the interferences sustained by the plaintiffs were reasonable since they were not substantial.

<sup>45</sup> *Gay v. Taylor*, 19 Pa. D. & C. 31 (C.P. 1932).

<sup>46</sup> *United States v. 3.08 Acres of Land*, 209 F. Supp. 652, 658 (N.D. Utah 1962).