St. John's Law Review

Volume 21
Number 1 *Volume 21, November 1946, Number 1*

Article 14

Eminent Domain--Real Property--Taking of Property by Continuous Flight of Aircraft (United States v. Causby, 90 L.Ed. 971 (1946))

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The principal case is entirely barren of evidence of misconduct on the part of the wife subsequent to the husband's leaving, and the court was unwilling to say, as a matter of law, that the period elapsing between that date and the date of the birth of the child was so far excessive as to conclusively show illegitimacy. The court refused by its judgment to brand an innocent child with the bar sinister unless the evidence was so conclusive as to leave room for no other course.

M. T.

EMINENT DOMAIN—REAL PROPERTY—TAKING OF PROPERTY BY CONTINUOUS FLIGHT OF AIRCRAFT.—On May 11, 1942, the United States Government entered into a lease with the Greensboro-High Point Municipal Airport Authority whereby the United States was to lease ten acres of land adjoining the airport property. The lease began on June 1, 1942, and was to terminate at the expiration of thirty days, but with a privilege of renewal given until June 30, 1967, or until six months after the end of the present national emergency whichever first occurred.

The northwest-southeast runway of the airport is located about 2,000 feet from respondents' property. To reach this particular runway, the petitioners' planes, of necessity, flew directly over the respondents' domain at a height of less than 100 feet. The height at which the planes flew over the property in question, was in accordance with the 30 to 1 safe glide angle [1] approved by the Civil Aeronautics Authority. The frequency with which the northwest-southeast runway was used was determined by the wind direction and velocity so that it was used approximately four percent of the time in taking off and seven percent of the time in landing. The proof shows, however, that large numbers of planes flew frequently over the respondents' property causing considerable loss in the operation of their chicken farm. Production of chickens was materially lessened because of the distraction at night occasioned by the noise and bright glare of the planes in passing. Fatality among the chickens ran high as, in terror, they dashed themselves to death against the side of the barn.

The respondents had previously brought an action in the Court of Claims,[2] and were awarded damages in the amount of $2,000. The award was based on the reasoning that the frequent and regular passage of Army and Navy aircraft over the property of the respondents at low altitudes, constituted a taking of said property within the meaning of the Fifth Amendment. The case came to the Supreme

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[1] A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

[2] Causby v. United States, — Ct. Cl. —, 60 F. Supp. 751 (1945).

Court on a writ of certiorari. *Held,* judgment of Court of Claims reversed. Although the United States Government had taken to itself an easement of flight, there was no precise description as to its nature. In fine, it was not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor was there a finding as to whether the easement taken was temporary or permanent. An accurate description of property taken is essential since that interest vests in the United States. *United States v. Causby,* — U. S. —, 90 L. ed. 971 (1946).

The frequent passage of planes at a low altitude over respondents' property constituted a taking of said property as complete as though the United States had entered upon the surface of the land and had taken exclusive possession of it.[3] A trespass upon the property of another does not, ordinarily, constitute a taking; but if the trespass be a continuing one, or if the intention is shown that the trespass will continue at will, the inference must necessarily be that we have a taking within the meaning of the Fifth Amendment.[4] But the common law concept of *cujus est solum ejus est usque ad coelum et ad inferos,* has been considerably modified. The exigencies of modern civilization have caused a practical application to be made of this doctrine. The view now is that the land owner owns the air chamber above and the minerals below only so far as it is necessary for the full and complete enjoyment of the land itself. Were this ownership to be otherwise construed, then passage through the sky from city to city would subject the operator to innumerable suits. The public interest will not permit this result.

The United States' defense was predicated on the Air Commerce Act of 1926,[5] as amended by the Civil Aeronautics Act of 1938.[6] Under these statutes, the United States has ". . . complete and exclusive national sovereignty in the air space . . ." over this country.[7] By the aforementioned statutes, there is granted to any citizen of the United States ". . . a public right of freedom of transit in air commerce through the navigable air space of the United States." [8] Navigable air space is defined as ". . . air space above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, . . . " [9] It is, therefore, the position of the United States

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[3] *But see* dissenting opinions of Mr. Justice Black and Mr. Justice Burton.

[4] Portsmouth Co. v. United States, 260 U. S. 327, 329, 67 L. ed. 287, 289 (1922) (where Mr. Justice Holmes, delivering the opinion of the court, said: "But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence.").

[5] 44 STAT. 568 (1926), 49 U. S. C. § 171 (1940).

[6] 52 STAT. 973 (1938), 49 U. S. C. § 401 (1940).

[7] 52 STAT. 1028 (1938), 49 U. S. C. § 176(a) (1940).

[8] 52 STAT. 980 (1938), 49 U. S. C. § 403 (1940).

[9] 44 STAT. 568 (1926), 49 U. S. C. § 180 (1940).

that the damage suffered by respondents is merely incidental and that recovery should consequently be denied.[10] This position is not tenable, for if the government had taken an easement of flight over the land of the respondents, and this easement were permanent, then it follows as a natural consequence that the easement would be the equivalent of a fee interest. It would be construed as constituting complete dominion and control over the land.

In the instant case, as in *Portsmouth Co. v. United States*,[11] the damages were not merely consequential in nature. They resulted from a direct invasion of the respondents' domain. As pointed out in *United States v. Cress*,[12] ". . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." Although the meaning of "property" as this term is used in the Fifth Amendment is a federal question, ". . . it will normally obtain its content by reference to local law." [13] According to North Carolina law, sovereignty in the air space rests in the state "except where granted to and assumed by the United States." [14] The flight of aircraft over land is considered lawful unless deemed to be an interference with the beneficial use thereof. Here there was such interference and the Courts' view was that the specific facts would seem to warrant the conclusion that there had been a servitude imposed upon the respondents' land.

The question herein presented has novel aspects and has not heretofore been directly passed upon. Mr. Justice Douglas in delivering the opinion of the Court refers to the case as one of "first impression." The decision will probably lead to additional legislation by Congress on the subject of air travel in view of its ever increasing importance and complexity.

I. L.

INSURANCE — CONTRACTS — RIGHT OF BENEFICIARY TO SUE AFTER PERIOD OF LIMITATION IN POLICY.—The defendant company issued to Jules B. Selden two policies of accident insurance; in one of them the beneficiary was Selden's mother, in the other his estate. He died on December 31, 1941, from a gunshot wound. The policies provided that affirmative proof of loss must be furnished to the company within ninety days after the date of such loss. Proof

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[10] Richards v. Washington Terminal Co., 233 U. S. 546, 58 L. ed. 1088 (1914).

[11] 260 U. S. 327, 67 L. ed. 287 (1922).

[12] 243 U. S. 316, 328, 61 L. ed. 746, 753 (1916).

[13] United States *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 279, 87 L. ed. 1390, 1400 (1942).

[14] GEN. STATS. 1943, § 63-11.