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Eminent Domain - Effects of (Airplane) Noise and Vibration - Necessity of Overflights for Fifth Amendment Taking

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cases establishing this rule are rather old, and while the reasoning may have been justified in their time, the developments of modern medicine and psychology weaken the support of that argument since insanity is now generally regarded as a disease.[22] The logical conclusion is that a death resulting from the insured's insanity should place the same liability on the insured as would a death resulting from cancer or any other disease not specifically excluded by the insurance contract.

Dictum in an early North Dakota case[23] indicated a preference for the majority view. The court in a later decision, however, apparently adopted the minority view in holding the insurer liable for the self-destruction of the insane insured even though the policy specifically excluded all deaths resulting from mental disease.[24]

CARLTON J. HUNKE

EMINENT DOMAIN—EFFECTS OF (AIRPLANE) NOISE AND VIBRATION—NECESSITY OF OVERFLIGHTS FOR FIFTH AMENDMENT TAKING —The plaintiff owned residential property within 2,000 feet of a portion of Shaw Air Force Base, South Carolina, on which jet engines were continually tested. She alleged her property was "taken" within the meaning of the fifth amendment to the United States Constitution because it was rendered uninhabitable by the incessant jet noise and vibration. The United States District Court for the Eastern District of South Carolina *held,* that there could be no taking without flights over the plaintiff's land. *United States v. Leavell,* 234 F. Supp. 734 (E.D.S.C. 1964).

That the technical trespass of direct overflight is necessary before there can be a "taking" under these circumstances has been read into the two Supreme Court decisions in this area. The first, *United States v. Causby,*[1] held that although the land might have been used for other purposes, there was a "taking" when the glide path of the aircraft crossed the plaintiff's land at an altitude below that classified by statute as "navigable airspace,"[2] rendering the plaintiff's chicken farm unproductive. Subsequently, Congress added the airspace necessary for takeoffs and landings to the "navigable airspace."[3] But in the second of these two decisions, *Griggs v. Allegheny County,*[4] the Court found that although the new limits

Northwestern Mut. Life Ins. Co., 120 N.C. 141, 27 S.E. 39 (1897).
22. 24 NOTRE DAME LAW. 92 (1949).
23. Clemens v. Royal Neighbors of America, 14 N.D. 116, 103 N.W. 402, 404 (1905).
24. Weber v. Interstate Business Men's Acc. Ass'n., 48 N.D. 307, 184 N.W. 97 (1921).

1. 328 U.S. 256 (1946).
2. Civil Aeronautics Act of 1938, ch. 601, § 3, 52 Stat. 973. See also, Air Commerce Act. of 1926, ch. 344, § 10, 44 Stat. 568 (establishing free right of air transit for interstate and foreign commerce).
3. Federal Aviation Act of 1958, 49 U.S.C. § 1301 (24).
4. 369 U.S. 84 (1962).

were not exceeded, there was still a "taking" because interference with the airspace above the property consituted interference with the legitimate use of the property, which would be unconsitutional without compensation. Both cases involved overflights and both found liability. The Supreme Court has never said there can be no liability without the overflights.

Lower federal courts, however, have consistently interpreted the above decisions so as to deny a remedy where overflights have not been present,[5] although at least one[6] has used language indicating liability might be found in the absence of overflights if the property were rendered uninhabitable. No allegation that a plaintiff was unable to continue living on residential property has been made previous to the instant case.[7] It was made here; and by refusing to consider this argument the court became the first explicitly to hold that overflights would be required to find a "taking," regardless of other circumstances.[8]

Why should overflights be required before a "taking" may be found? A vigorous dissent in *Batten v. United States*[9] argued that the requirement is unrealistic and unnecessary. The dissenting judge stated that the true test of whether a "taking" has occurred is whether a servitude has been imposed on the property, and where this is the case, the property should be considered "taken," regardless of the presence or absence of overflights.

The reason given by the lower federal courts for this requirement is that finding liability where there have been no overflights would destroy the distinction between a "taking" and consequential damages.[10] But the distinction is not found in the vector of the force which does the taking. In rejecting a holding that shock waves traveling horizontally cannot constitute "taking" while shock waves traveling vertically and having the same effect may do so,[11] a court would be clarifying, not destroying, the distinction. When a government-owned dam on government property backs up water and destroys the value of private property, the damage cannot be

5. Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963); Bellamy v. United States, 235 F. Supp. 139 (E.D.S.C. 1964); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964).

6. Batten v. United States, *supra* note 5.

7. In some of the cases, however, the interference has been similarly great. See, *e.g.,* Bellamy v. United States, *supra* note 5.

8. In cases involving overflights resulting in compensation, the compensation has been given on the basis of the extent of the interference with the property. See Davis v. United States, 155 Ct. Cl. 445, 295 F.2d 931 (1961). And there is no recovery where overflights occur but do not interfere with the use of the property. Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).

9. 306 F.2d 580, 585 (10th Cir. 1962).

10. *E.g.,* Avery v. United States and Bellamy v. United States, *supra* note 5.

11. Batten v. United States, *supra* note 5, at 584, "The plaintiffs argue that the actual damage in Causby resulted from noise and vibrations and that if recovery is permitted for sound and shock waves travelling vertically, it should also be allowed for such waves travelling laterally." The court relied on Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956) in rejecting this argument. But the court in the *Nunnally* case did not distinguish between vertical and horizontal shock waves.

called consequential.[12] The water has physically invaded the property and a "taking" has occurred.[13] Shock waves flowing from a government air base similarly invade neighboring property. It would seem that where the invasion is so great that residential property can no longer be used for that purpose, the property has been "taken" just as effectively as if it were flooded. Where interference stops short of entire deprivation of the normal use of the property, it may be classified as consequential damage.[14] This is the proper line of distinction between damage and a "taking."

The dissent in the *Batten* case, which argued that a distinction between noise and shock waves traveling vertically and those traveling horizontally was unreal, has been called the better view by two state supreme courts.[15] One of them,[16] at least, felt this would be the position taken by the Supreme Court if it rules on the question.

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LANDLORD AND TENANT—OPTION TO PURCHASE PREMISES—ACTION FOR DAMAGES WITHOUT TENDERING PERFORMANCE—The plaintiff agreed to lease certain lands for three years with an option to purchase at any time during the term. Eight months later the defendant-lessor repudiated the lease, including the option, and requested the plaintiff to vacate the premises. In an action for damages to recover the difference between the option price and the fair market value of the property, motion for judgment of involuntary nonsuit was granted because until the plaintiff had exercised the option, there could be no breach and therefore no recoverable damages. The Supreme Court of Oregon, with two justices dissenting,[1] *held* that a tender of the purchase price was not necessary because it would require the plaintiff to make his election before the term he had bargained for had lapsed. And despite the fact that the plaintiff might not have exercised his option, the defendant, whose repudiation of the option created this element of uncertainty, could not be relieved of liability on the ground that the damages were speculative. *Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964).

12. United States v. Lynah, 188 U.S. 445 (1903); *accord,* Pumpelly v. G.B. & M. Canal Co., 80 U.S. (13 Wall.) 166 (1891).

13. United States v. Dickinson, 331 U.S. 745 (1947); United States v. Lynah, *supra* note 12.

14. See Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

15. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964).

16. Martin v. Port of Seattle, *supra* note 15.

1. Goodwin, J. dissents on the ground that damages are too speculative. Repudiation of the agreement did not terminate the option and the plaintiff still has the remainder of the term in which to exercise it. Even if the optionor no longer had the power to perform (which is not the case) the better rule would require the optionee to exercise the option before bringing an action for damages.