WILLIAM J. BATTEN AND KATIE M. BATTEN, his wife,
v.
UNITED STATES OF AMERICA[1]

Air Force jet noise — Constitutional taking requires a physical invasion — Adjoining landowners not deprived of any portion of their property — Whether a taking of property requiring compensation.

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Most democratic governments have made provision for compensation to private persons when their property is taken for public purposes.[2] However, not all damages or injuries to property, even though of a permanent nature, will constitute a taking within the meaning of the law.[3] The public interest and demand for social progress may require a disproportionate sacrifice by a few individuals for the common good.[4] This was observed with the development of railroads, highways, and airports for conventional aircraft where the peace and quiet of adjacent residences was most certainly disturbed but not considered compensable.[5] Each advancement seemed to introduce a new and more penetrating sound with attendant discomforts. Although the contribution to social needs and public good may have been correspondingly greater, nonetheless, the sacrifices, discomforts, and consequential damages[6] suffered by the community adjacent to such activities were also greater.

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[1]United States Court of Appeals, Tenth Circuit, July 10, 1962, 8 Avi 17, 101; Consolidated in this action are nine other actions representing claims of landowners in the same subdivision as Mr. Batten. This action is brought under the *Tucker Act*, 28 USC 1346a(2).

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[2]5th Amendment to the U.S. Constitution: "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." *cf.* (Canada) *Expropriation Act*, R.S.C. 1952, c. 706, s. 1; *The Acquisition of Land (Authorisation Procedure) Act*, 9-10 Geo. VI, 1946, c. 49 (U.K.).

[3]*Sharp v. United States* (1903) 191 U.S. 341.

[4]G. Nathan Calkins, Jr., "The Land Owner and the Aircraft—1958", 25 J. Air L. & Com. 373, ar page 397: "Undoubtedly, the jet noise in the neighborhood diminished the value of the land as homesites, but every diminution of land value is not necessarily compensable as a taking. Zoning ordinances have been sustained which had the effect of curtailing land values by more than five times. *American Wood Products Co. v. City of Minneapolis*, 35 F. 2d 657 (C.A.-8, 1929)."

[5]*Richards v. Washington Terminal Co.* (1913) 233 U.S. 546.

[6]"Consequential damages is the term applied to damages to, or destruction of, property not actually taken, and they arise when properry is not actually taken or entered but an injury occurs as the natural result of an act lawfully done by another. . ." "They are, in general, recoverable only where statutory or constitutional provisions require the payment of compensation for property damaged or injured." 29 C.J.S. 919.

William J. Batten and the other nine property owners directly involved in this case purchased their homes during the period 1949 to 1955 in a subdivision adjoining Forbes Air Force Base which is located at Topeka, Kansas. During World War II the installation was used as a temporary airbase for the training of personnel in the operation of propeller-driven aircraft. The base was deactivited prior to 1948 and in that year a tract adjoining the base was platted and the plaintiffs purchased homes in this residential subdivision. The base was reactivated for use during the Korean War and a project was begun to enlarge the base to accommodate jet aircraft. The project required the acquisition of additional land adjacent to the subdivision in which the plaintiffs lived. The lengthened runway and a warmup ramp for jet aircraft were placed in operation during the fall of 1955 and the spring of 1956. The jet operations from the ramp and runway produced noise and vibrations which disrupted sleep and normal conversation. Further the use and enjoyment of the telephone, television, and radio facilities were seriously impaired during certain periods. The noise emanated from points 2000 feet or more from the property of the nearest plaintiff. At times, sound pressure levels measured from 90 to 117 decibels on the plaintiffs' property. Ear plugs are recommended for Air Force personnel when the sound pressure level reaches 85 decibels and are required at or above 95 decibels. During the summer months, black smoke emitted from jet engines during take-off would drift over plaintiffs' property depositing an oily film. The property owned by the various plaintiffs was diminished in value from 40.8% to 55.3%. These facts in the case were not in dispute.

The novelty of this case is that the plaintiffs did not assert that their property had been taken because of flights over their property but rather that the invasion of their property by noise, vibration, smoke, and soot emitted from jet aircraft in warmup, maintenance, taxiing, takeoff, and flying operations so prevented their full use and enjoyment as to constitute a taking of their property for which just compensation had to be paid under the 5th Amendment to the Constitution.[7]

The growth and development of air transport has required extensive reexamination and peculiar application of traditional or classic concepts of the laws protecting private property interests.[8] This period has seen a declaration by the courts that the principle of *Cuius est solum, eius est usque ad coelum* was never a part of common law as applied in the United States.[9] The classic common law rules of trespass when applied to airspace and private proprietary interests therein resulted in an additional element being required.[10] The air-

[7]*Supra*, note 2.

[8]Anderson, "Some aspects of Airspace Trespass" (1960) 27 J. Air L. & Com. 351.

[9]*Hinman v. Pacific Air Transport Corp.* 84 F. 2d 755, 1 Avi. 640, [1936] U.S.Av.R. 1 (C.A.-9 1936); *cert.* denied, 300 U.S. 655; *Swetland v. Curtiss Airports Corp.* 55 F. 2d 201, 1 Avi. 316, [1932] U.S.Av.R. 1 (C.A.-6 1932).

[10]*Smith v. New England Aircraft Co.* 170 N.E. 385, 1 Avi. 197 (Mass. Sup. Jud. Ct., 1930). The Court acknowledged that a trespass existed but would grant no relief in the absence of proof of damage.

space over private property above certain minimum heights was declared by legislation to be in the public domain.[11]

Noise, dust, vibration, smoke, powerful lights, and flights through airspace at low altitude over nearby private property are matters which are necessarily incidental to normal air operations in and around airports. However, the inconveniences, discomfort, and prejudice to the use and enjoyment of property and the resulting loss in property values gave rise to claims for damages by reason of trespass and nuisance. One class of cases involved the assertion that flights at low altitude over private property constituted a taking of property requiring compensation under the 5th Amendment to the Constitution. The United States Supreme Court in *US v. Causby*[12] laid down the rule that flight over private property below 500 feet[13] and within the immediate reaches of the surface which results in damage to the surface shall constitute a taking of property requiring compensation. The *Causby* case, *supra*, has been cited and followed in numerous cases and it seems well settled in United States law.

The present case placed squarely before a United States appellate court for the first time a demand for compensation where substantial damages resulting from noise, vibration, and smoke were proven but no flight operations took place in or through the airspace over the plaintiffs' property. In a divided opinion the majority of the Court decided against the plaintiff-appellants and no relief was granted. The basis of the decision was the distinction between a taking of property and consequential damages resulting from a lawful activity conducted in a reasonable and authorized manner. The *Causby* case was cited by the Court for the principle that a physical invasion of plaintiffs' property was required and the extent or amount of damage is not a consideration. The Court stated:[14]

> Congress has placed the navigable airspace in the public domain and has authorized administrative regulation of minimum altitudes of flight . . . *Causby* contains nothing indicating that recovery could be had for noise, vibration, or smoke coming from the same vertical distances.
>
> Each of these disturbing conditions is brought to the plaintiffs' properties through the air and they do not effect an actual displacement of a landowner from space within which he is entitled to exercise dominion consistent with recognized concepts of real property rights. Such a displacement is a fact when occasioned by repeated airplane flights.

From the existing cases, the elements for a taking of property for public purposes through air operations requiring compensation seem reasonably well defined.[15] They may be stated as follows:

a. Flight must be through the airspace over private property.

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[11]*Federal Aviation Act* 1958; Pub. Law 85-726, 72 Stat. 731; *cf.* Section 40(1) of *The Civil Aviation Act*, 12, 13, 14 Geo. VI, 1949, c. 67 (U.K.).

[12][1945] 328 U.S. 256.

[13]Airspace above 500 feet at the particular location in question was in the navigable airspace under the *Civil Aeronautics Act*, 1938, as implemented by the Civil Aeronautics Authority.

[14]*Supra*, note 1, p. 17, 104.

[15]*U.S. v. Causby*, *supra*, note 12; *City of Newark, et al v. Eastern Airlines, et al* 159 F. Supp. 750, [1958] U.S. & C. Av. R. 30 (D.C.-N.J. 1958); *Highland Park, Inc. v. United States* 161 F. Supp. 597, 5 Avi. 17, 935, [1958] U.S. & C. Av. R. 483 (Ct. of Claims 1958); *Freeman v. U.S.* 167 F. Supp. 541, 6 Avi. 17, 230, [1959] U.S. & C. Av. R. 158 (D.C.-Okla. 1958); *Fitch v. U.S.* [1957] U.S. & C. Av. R. 94 (D.C.-Kan. 1957).

b. The flights must be frequent and within the immediate reaches of the surface.[16]

c. The flights must result in damages to the use and enjoyment of the surface.

Application of these elements to factual situations did not solve all questions presented. At least one further hurdle remained. This problem appeared in a case where each of the elements enumerated above was present but flights at all times were within the navigable airspace as provided by law. In *Matson v. US*,[17] the US Court of Claims stated:

> We do not think, however, that the change in the definition of navigable airspace affects plaintiffs' causes of action. The Government's easement over plaintiffs' property may be perpetual. Although today navigable airspace with its public rights of transit . . . includes the glide, its use by the United States or other aeroplane operators at heights below the minimum altitudes of flight except where necessary for take-off or landing, may require compensation . . .
>
> While the usefulness of air transportation admonishes everyone that outmoded concepts of property rights must not limit its development fairness requires that landowners be compensated reasonably for operations that immediately and directly limit the exploitation of their properties.

The Court in the *Matson* case held that there could be a taking of subjacent property requiring compensation under the 5th Amendment through the use of airspace which Congress had declared to be in the public domain. There was no question raised of the constitutional authority of Congress to grant a public right of transit in airspace over private property. The Court did not discuss the rule that to constitute a taking there must be a physical invasion or penetration of private property. However, the case stands for the proposition that where aircraft frequently fly over private property within the immediate reaches of the surface and cause substantial damage there will be a taking, notwithstanding the fact that such flights are within the navigable airspace. While adhering to the established principles in the *Causby* case, the Court in the *Matson* case seemed ready to balance the rights of private owners against the public demand for air transport through a test of fairness to both, *i.e.* in return for exercising the right of flight within and through the lower reaches of airspace, payment must be made for damages to the subjacent surface owner.

The dissenting judge in the *Batten* case seemed to free himself from earlier precedents to apply a test of fairness and justice in his interpretation of the constitutional provision. Murrah, C. J. stated as follows:[18]

> As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.

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[16]For a discussion of the effect of the *Highland Park* case, *supra*, on this element see Calkins, *op. cit.*, *supra*, note 4, at page 393.

[17][1959] U.S. & C. Av. R. 1, at p. 4, 171 F. Supp. 283, 5 Avi 17, 310 (Ct. of Claims 1959) at 17, p. 311.

[18]*Supra*, note 1, at p. 17, 106.

To support his opinion, Murrah, C. J. referred to a rule which has been recognized and recited in most opinions involving a taking of property, including the majority view in this case. Stated simply it is if through a government activity or act a person is wholly deprived of the use of his property, there is a taking.[19] The rule was recited in *US v. Welch*[20] as:

> To constitute a taking of private property such as inhibited by the 5th Amendment to the Constitution, unless just compensation is made, it must be shown that the owner is wholly deprived of the same.

In *US v. General Motors Corp.*,[21] the United States Supreme Court stated:

> Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

In *Richards v. Washington Terminal Co.*[22] the Court, in reciting that there was no exclusive and permanent appropriation of any portion of plaintiff's land, stated:

> And since he is not wholly excluded from the use and enjoyment of his property, there has been no "taking" of the land in the ordinary sense.

Again the Court in this case stated:

> Sound waves, shock waves, and smoke pervade the property neighboring that on which they have their source but the disturbance caused thereby is only a neighborhood inconvenience unless they are intentionally directed to some particular property . . . or unless they force the abdication of the use of space within the landowner's dominion.[23]

Although the Court acknowledged the rule, it was merely observed that none of the plaintiffs had in fact been driven from their homes.

At this point it would be helpful to combine the elements required to constitute a taking of private property, the rules applied by the Court in *US v. Matson*,[24] and the principle that one must be deprived of the whole of the property taken. It seems clear that if a person is wholly deprived of any portion of his property interest, such deprivation constitutes a taking within the meaning of the 5th Amendment. Once a taking has occurred, the owner is not only entitled to payment for the parcel or interest taken but also the resulting damages to that portion of the tract not taken.[25] By treating surface property and the superjacent airspace within the immediate reaches of the land as a single tract or parcel, it is apparent that the subjacent landowner has been wholly deprived of a portion of his property interest (*i.e.* airspace within the immediate reaches of the surface) because of frequent aerial flights

[19]See 29 C.J.S. 921, note 48; also *U.S. v. Causby*, *supra*, note 12.

[20](1910) 217 U.S. 333, at p. 334.

[21](1945) 323 U.S. 373, at p. 378.

[22]*Supra*, note 5, 233 U.S. 546, at p. 552.

[23]*Supra*, note 1, p. 17-104.

[24]*Supra*, note 17.

[25]*U.S. v. Welch*, *supra*, note 19; *Sharp v. U.S.*, *supra*, note 3.

overhead. It therefore follows that under the law the owner is entitled to compensation for damages to the entire tract which includes both the airspace and the surface beneath.

The same reasoning could apply in the *Matson* case, even though the take-off and landing operations complained of were included in the navigable airspace. The *Federal Aviation Act* of 1958[26] did not deprive private landowners of their property interest in the superjacent airspace within the lower reaches although it did authorize under certain conditions the use of that area by others. Further, the use of the airspace as authorized by the Act may at the time of use wholly deprive a landowner of a portion of his property interest. Accordingly, it could be said that the court in the *Matson* case determined that the subjacent owner had been wholly deprived of his interest in the airspace within the immediate reaches of his surface property and was therefore entitled to payment not only for the interest taken (*i.e.* easement through airspace) but also for resulting damages to the remaining portion of the tract which was the potential surface development.

Applying these precedents to this case, for the plaintiffs to recover on the basis of a taking they must show that they have been wholly deprived of a portion of their property interest. The plaintiffs' use of the airspace within the immediate reaches of the surface was not limited or obstructed by any physical penetration. Likewise nearby aircraft operations placed no restriction on their movements about the surface of their property. They could literally possess every inch of the land and the lower reaches of the airspace above. The Court in applying established and traditional concepts of deprivation and invasion could reach no other conclusion but to deny recovery.

However, perhaps the law is sufficiently flexible now to recognize new forces and new rights based on possible uses or activities which one is entitled in this present day to carry on within his property. Energy carried through the air can deprive one of the use of his radio. An expensive television set with all its potential for indefinite home entertainment can be reduced to relative worthless home decoration through unseen or unheard disturbances. Sound pressure waves are capable of inflicting physical damages and if sufficiently intense, ear plugs are recommended for health and safety. Radioactive particles are invisible, silent, and insidious in their deadly process of contamination.

In times past a man's home often was referred to as his castle. Laws rendering it unlawful for the unauthorized invasion of that home by person or physical object adequately protected his right to full enjoyment. But now modern living has introduced a new era. Discovery and development has made the air one of the principal vehicles transporting forces and energy and power used by our society. To name just a few: radar, radio, television, jet

[26]*Supra*, note 11; the *Federal Aviation Act* of 1958 defines navigable airspace as including airspace needed to insure safety in take-off and landing of aircraft.

power, light rays, and heat rays all of which may in some degree be transmitted through the air.

Although the Court in this case did not find it appropriate or necessary to discuss the effect of such forces on the time-established principles of deprivation and invasion, perhaps the time is not far away for the law to recognize that penetration of a person's property by such forces to his damage may be an invasion or a deprivation of a right as surely as if the invasion had been by a physical object. The sonic boom clearly illustrates the point. The force created by pressure waves moving through the air at extreme velocities can, upon striking a window or other stationary object, cause damage as effectively as if a rock had been thrown.

The United States Supreme Court has said,[27] "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." In looking at the character of the invasion, it may now be possible to talk in terms of an invasion by a force. Although invasion by physical objects occupies space and deprives one of the use of the space so occupied, invasion by a force may effectively fill the area or space with so many undesirable or harmful characteristics that the owner is wholly deprived of its use. To apply such a principle would necessitate determination of the degree of deprivation required of this force before it could be said as a matter of law that a person has been wholly deprived of an interest or a right in property so as to constitute a taking. Murrah, C. J., in his dissenting opinion, stated:[28]

> . . . 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?

The theory of this dissent has now been adopted by the Supreme Court of Oregon in the case of *Thornburg v. The Port of Portland*.[29] In considering the elements necessary for a taking of property the Court was faced with the question of whether noise from aircraft passing over adjacent land could constitute a taking. While observing that the *Batten* case is not necessarily the final view of the federal courts, the Oregon Court stated:

> Therefore, unless there is some reason of public policy which bars compensation in cases of governmental nuisance as a matter of law, there is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with use and enjoyment of one's land as to amount to a taking of private property for public use.[30]
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> The real question was not one of perpendicular extension of surface boundaries into the airspace, but a question of reasonableness based upon nuisance theories. In effect, the inquiry

[27] *U.S. v. Cress* 243 U.S. 316, 328.

[28] *Supra*, note 1, at p. 17, 106. See also portion of opinion of Murrah, C. J., quoted *supra*.

[29] 8 Avi 17, 281, (Sup. Ct. of Ore. 1962).

[30] *Ibid.*, 285.

> should have been whether the government had undertaken a course of conduct on its own land, which in simple fairness to its neighbors, required it to obtain more land so that the substantial burdens of the activity would fall upon public land, rather than upon the involuntary contributors who happen to lie in the path of progress.[31]

Clearly, the *Thornburg*[32] case departs from the generally accepted requirements for a taking as applied in the *Causby* case.[33] Essentially the distinction is one of placing greater emphasis on the extent of interference with the use and enjoyment of land and less emphasis on the source and manner of such interference.

It would seem to this writer that it would be no large step for the law to recognize that there can be an invasion of one's property by unseen or unheard forces travelling freely through the air. Once such a recognition takes place, the door is clearly open to examine the magnitude of such an invasion to determine if, under minimum standards of our modern society, a person has effectively been deprived of a right to the use and enjoyment of his property.

The Court in this case was not required under existing precedent to take notice of an invasion of property by sound waves. However, it is respectfully submitted that the facts and the law would have permitted the Court to entertain a theory of effective and substantial deprivation of the use and enjoyment of property through a regular and frequent invasion by intense sound levels. Although the Court did not choose to accept such a theory, the principles of reasonableness and simple justice will eventually require recognition of the invasion of property not only by movement of a mass but also by forces from other types of energy such as sound pressure waves, radio frequencies, and radioactivity.

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[31] *Ibid.*, 286, 7.

[32] *Ibid.*

[33] *Supra*, note 12.