

CHAPTER TEN
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Outline

TRESPASS TO LAND: one is liable to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters the land in the possession of the other, or causes a third thing or person to do so, (b) remains on the land or (c) fails to remove a thing he is under a duty to remove.

Tort is against possession not ownership, possessor (even adverse possessor) has the cause of action.

No damage to the land is necessary and nominal damages may be recovered.

Intent is the intent to enter the land.

Mistake as to right to enter or as to possessor is no defense.

Intent may be transferred.

Trespass may be of persons or things, direct or indirect, and may result from failure to remove a thing or to leave when requested.

The trespass must generally be of a tangible thing _ no smoke or particles.

All damages to person or property actually occurring on the land and harm to possessor and his family are recoverable.

Trespass ab initio also works here.

Old rule was that land was held "from the heavens to the center of the earth"

HEAVEN

Airplanes may now fly over land without trespassing (Federal statute).

Two views of rights of landowners to airspace:

Possessor possesses all he may use of the airspace

Possessor possesses all he is using of the airspace

Relief from loud airplanes:

Injunction for trespass _ not too likely, not in public interest

Inverse condemnation on nuisance theory _ (a) continuous invasion and (b) substantial deprivation then (c) damages for loss of property value.

HELL

Two views:

Even if not reachable, underground still belongs to possessor of surface

If not reachable, there is no underground trespass

MEDIA TRESPASS

If there is no right of entry given to any media, then there is no right of entry to any media * **DEFENSE OF REAL PROPERTY**

Reasonable force only and only after request to leave is made, unless request would be futile.

Threats of deadly force may be used.

In some states, physical force may be used to terminate trespass and deadly force to terminate violent crime (burglary, arson).

Traps and spring_guns not permitted unless owner would have been privileged to use deadly force.

Vicious dogs are different, being more common although an innocent trespasser may still recover.

* ULTRA HAZARDOUS ACTIVITIES

* TOUCHSTONES:

Dangerous activity

Inappropriate to Area

Cannot be controlled by reasonable care

Damage will be significant

Activities like blasting or (until recently) airplane flights.

* WHERE IS THE LINE FOR LOSSES DRAWN

Damage must result from risk of the type which makes activity ultra hazardous.

Use of the land damaged must be normal (no eggshell/mink plaintiffs)

Trespassers do not recover

People who put themselves in harm's way do not recover

Ultra hazardous activities undertaken at the instance of the state are immune.

NUISANCE

Private Nuisance

Substantial interference with the right to use and enjoy land, which may be intentional, negligent or ultra hazardous in origin, and must be a result of defendant's activity

LAND ONLY.

Does not require physical entry or entry by tangible object but must be continuous or recurrent.

* DAMAGE MAY BE TO

Property (blasting)

Occupant's:

Health (unsanitary conditions)

Peace of mind (warehouse, stored explosives)

Physical comfort (smoke/smells)

Conduct may be intentional, negligent or ultra hazardous.

Intentional here means continuing after notice of problem is given.

If claim arises under negligence, contributory negligence may be a factor.

Balancing of interests _ Plaintiff and Defendants right to use their respective land as they wish.

Public policy may be a factor here.

Nuisance must be one that a normal person would suffer and would result from normal uses of land _ no eggshell plaintiff.

AT COMMON LAW, WITHOUT STATUTE

Aesthetics don't count

Natural conditions don't count

Zoning results in type of activity not being a nuisance, but method of operation may be a nuisance if unreasonable.

Legislation may overrule even zoning (e.g., homeless shelters), but method of operation must still be reasonable.

Remedy may address public policy concerns _ balancing the equities of two types of uses.

"Coming to the Nuisance" _ a factor, but only with all other things being equal.

*** PUBLIC NUISANCE**

Injury to right common to public (clean air, water, public highway)

Damage which is different in kind from public in general:

Physical harm to person or property

Damage to established business making direct commercial use of public interest (fishermen, shrimpers/water)

Obstruction to right of way

Obstruction is intentional _ Recovery

Obstruction is negligent _ No Recovery

or perhaps there is no longer any recovery for obstruction

Separate right of ingress and egress

Must be intentional and blockage must be immediate

*** PRIVILEGE OF NECESSITY**

Person reasonably believes tort is necessary to prevent:

Public necessity _ Public calamity (blowing up building to prevent spread of fire)

Private necessity _ Prevent damage to person or property (tying to dock in storm)

*** PUBLIC NECESSITY:**

Destruction must be reasonable, reasonable mistake is permissible

Compensation need not be paid unless by statute (not a taking)

Invaded interest may be a property (blowing up building) or personal (quarantine of contagious person) interest

*** PRIVATE NECESSITY:**

Compensation must be paid

Property interests only may be invaded

Interests in property damaged must be smaller than those preserved

NOISE

Freedom from excessive noise is a legislatively expressed environmental concern. California Health & Safety Codes (H&SC) 24180 and 24181 prohibit any non-emergency takeoffs and landings by aircraft which fail to meet federal noise limits.

The California Noise Control Act of 1973 (H&SC 46000 et seq.) makes elaborate provision for noise control programs. The Act establishes the Office of Noise Control (H&SC 46040), the duties of which include studying and monitoring noise (H&SC 46050 et seq.), assisting local agencies in the enactment and enforcement of noise control ordinances (H&SC 46060 et seq.), and coordinating the noise control activities of state and federal agencies (H&SC 46070 et seq.).

In United States v. Causby (1946) 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, Government

military planes, coming in to a nearby airport, flew so low over plaintiff's poultry farm that chickens were frightened and killed, and plaintiffs themselves were so disturbed that the business was ruined. The U.S. Supreme Court held that this invasion of the lower airspace was as much the taking of an easement as an invasion of the land itself, and was compensable.

The doctrine of the Causby case was extended in Griggs v. Allegheny (1962) 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585, to apply to commercial airliners, and to impose liability on the county which designed and constructed the airport. The county contended that since construction was in conformity with the federal statute (National Airport Plan) and subject to the approval of the Federal Aviation Agency Administrator, it was the United States that did the taking. Two dissenting justices agreed, but the majority declared that the county, as promoter, owner and lessor of the airport, chose the site, determined the length and direction of runways, and the land and navigation easements needed, hence "took the air easement in the constitutional sense."

In Sneed v. Riverside (1963) 218 C.A.2d 205, 32 C.R. 318, defendant county adopted an ordinance establishing height limits for structures in the approach area. Plaintiff, a property owner in the area, brought an action in inverse condemnation, contending that the ordinance was not a police power regulation of height limits but the taking of an air easement without compensation. Held, a cause of action was stated, under Griggs v. Allegheny, supra. The police power may be exercised to fix height limits where there is no invasion of the airspace above; where that airspace is used by aircraft, payment of compensation for the easement is the more acceptable practice.

The public entity immunity defense was sustained in Loma Portal Civic Club v. American Airlines (1964) 61 C.2d 582, 39 C.R. 708, 394 P.2d 548. Lindbergh Field in San Diego is a major terminal used by commercial airlines flying passenger jets. Plaintiffs, property owners near the airport, filed a complaint to enjoin low altitude flights in close proximity to their homes. Held, summary judgment for defendants affirmed. No issue was raised concerning any right to damages from operators of the aircraft, or compensation from the operator of the airport. The complaint sought only injunctive relief. The court said: "We hold here that under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally certified, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." (61 C.2d 591.)

In Nestle v. Santa Monica (1972) 6 C.3d 920, 101 C.R. 568, 496 P.2d 480, over 700 plaintiffs sued defendant city for property and personal injury damages caused by defendant's operation of its airport. They alleged that vibration, fumes and noise emanating from takeoff and landing of jet aircraft interfered with the free enjoyment of their property and resulted in physical pain, suffering and emotional disturbance. The complaint asserted four theories of recovery (inverse condemnation, negligence, zoning violations and nuisance), but the main holding was on nuisance, reversing the judgment for defendant. The court observed at the outset: "This action vividly demonstrates the difficulties encountered in engrafting traditional common law theories of recovery onto proceedings involving injuries peculiarly contemporary in nature."

In Aaron v. Los Angeles (1974) 40 C.A.3d 471 at 485, 115 C.R. 162, the court examined the federal and state case law, and upheld recovery for excessive noise resulting from jet flights at a municipal airport. The conclusion is stated as follows: "In summary we hold that the municipal operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the

use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. Whether the interference is substantial enough to meet this standard is a mixed question of fact and law for the trial judge to determine. The owner need not prove there were direct overflights of the property. The fact that the federal government controls the flight of aircraft does not relieve the airport owner and operator of liability where the operation of the airport is a substantial cause of the property owner's damage."

In San Jose v. Superior Court (1974) 12 C.3d 447, 115 C.R. 797, 525 P.2d 701, plaintiffs, property owners in the flight pattern of the San Jose Municipal Airport, filed an action on behalf of themselves and other owners against the city of San Jose. The complaint was based on theories of nuisance and inverse condemnation, and recovery was sought for diminution of the market value of their property caused by aircraft noise, vapor, dust and vibration. Defendant moved for an order declaring the action inappropriate as a class action. The judge found it appropriate and ordered notification of class members. Defendant sought an extraordinary writ to prevent the action. The California Supreme Court held that a class action was not proper and dismissed the lawsuit. The instant case was based on facts peculiar to each prospective plaintiff; i.e., recovery in a nuisance or inverse condemnation suit depends on a myriad of individualized evidentiary factors: "Development, use, topography, zoning, physical condition, and relative location are among the many important criteria to be considered. No one factor, not even noise level, will be determinative as to all parcels." Thus, noise might not affect land used for industrial use, but it would affect residential land.

Greater Westchester Homeowners Assn. v. Los Angeles (1979) 26 C.3d 86, 96, 100, 160 C.R. 733, 603 P.2d 1329, the claims for personal injuries caused by noise from aircraft using city-owned airport were not preempted by federal control of aircraft flight as the "proprietor exception" governs. Greater Westchester Homeowners Assn. stresses the narrow construction consistently given to C.C. 3842. The action was brought by homeowners in the area of runways of defendant city's airport, for personal injuries caused by noise from aircraft using the facility. (1) The planning, location, construction, and operation of airports and the flight procedures of aircraft are regulated by both federal and state law; but the statutes do not create a legislative sanction for their maintenance as a nuisance. (2) The argument that aviation and noise are necessarily inseparable, and that governmental approval of aviation implies legislative approval of noise, is unconvincing; both federal and state authorities have sought to abate such noise.

Baker v. Burbank Glendale Pasadena Airport Authority

(1985) 39 Cal.3d 862, 705 P.2d 866; 218 Cal. Rptr. 293; 16 ELR 20373; 23 ERC 1415

OPINION

MAJORITY: (written by Justice REYNOSO)

We are asked to resolve two questions: whether a public entity lacking the power of eminent domain may nonetheless be liable in inverse condemnation; and, whether a plaintiff may elect to treat commercial airport noise and vibrations as a continuing, rather than a permanent, nuisance. For the reasons set forth below, we answer both questions in the affirmative.

Plaintiffs are homeowners who live adjacent to defendant Burbank_Glendale_Pasadena Airport. The airport became a public entity in 1978 when it was purchased by the three cities pursuant to Government Code section 6500 et seq. In 1982, plaintiffs filed suit for inverse condemnation and nuisance caused by noise, smoke, and vibrations from flights over their homes. The trial court sustained demurrers to both causes of action, dismissing the inverse condemnation action because defendant is prohibited by statute from exercising the power of eminent domain, and dismissing the nuisance action as barred by the statute of limitations covering permanent nuisances. Plaintiffs appeal.

1. Inverse Condemnation

Defendant contends that because "inverse condemnation" is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted", it should follow that if an entity lacks the power to condemn by eminent domain, it cannot be liable in inverse condemnation. Indeed, there is some authority for this mechanical view. As defendant is prohibited from exercising eminent domain power,(2) it therefore contends that it cannot be subject to suit for inverse condemnation.

Their authorities are not controlling. They fail to recognize that the term, "inverse condemnation," describes an action grounded not on statutory condemnation power, but on the constitutional proscription against the taking (U.S. Const., 5th Amend.) or the taking or damaging (Cal. Const., art. I, § 19) of property for public use without just compensation. A landowner whose property has been invaded by a public entity that lacks eminent domain power suffers no less a taking merely because the defendant was not authorized to take.

We have previously recognized the constitutional basis of an inverse condemnation action. In Rose v. State of California, we held that mere failure of the Legislature to enact a statute authorizing an inverse condemnation suit did not entitle the state to disregard the constitutional imperative; we therefore allowed the action even though the state had not consented to be sued. Similarly, the court in Sutfin v. State of California, held that liability in inverse condemnation did "not depend upon a showing that there is statutory authority in the defendant entity to exercise affirmative eminent domain powers to accomplish the same result. All that is necessary to show is that the damage resulted from an exercise of governmental power while seeking to promote "the general interest in its relation to any legitimate object of government."" We later explicitly recognized what was implicit in Rose and Sutfin: "[t]he authority for prosecution of an inverse condemnation proceeding derives from article I, section 19, of the California Constitution" (3)

We therefore conclude that plaintiffs' inverse condemnation action may be maintained although defendant lacks eminent domain power. (4) As the inverse condemnation claim was filed within the five_year statute of limitations, the trial court erred in dismissing this cause of action.(5)

2. Nuisance

Plaintiffs' second cause of action alleges that defendant's activities became a nuisance as of January 29, 1978 — the date defendant became a public entity. Because plaintiffs did not file their complaint until 1982, a question arises as to whether their nuisance claim was timely filed. The answer depends on whether the nuisance is characterized as continuing or permanent.

The trial court ruled that because this particular nuisance is not subject to judicial abatement (6) it is a permanent nuisance upon which the statute of limitations (Gov. Code, § 911.2, Code Civ. Proc., §§ 338, subd. 2 and 340) had run at the time plaintiffs filed their claim.

It does not follow, however, that simply because commercial flights operated in compliance with federal law may not be enjoined, the nuisance at issue is a permanent one. Whether a nuisance will be classified as continuing or permanent depends not on the offending party's interest in continuing the nuisance, but on the type of harm suffered.

Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where "by one act a permanent injury is done, [and] damages are assessed once for all." , quoting Beronio v. Southern Pacific R.R. Co. The cases finding the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching upon the plaintiff's land, (7) a steam railroad operating over plaintiff's land, (8) or regrade of a street for a rail system. In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence.

On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable.

The classic example of a continuing nuisance is an ongoing or repeated disturbance, such as the one before us today, caused by noise, vibration or foul odor. [vibration, noise and noxious soot, smoke and gases emanating from pottery factory].⁹ Indeed, even more substantial physical invasions of land have been held to be continuing in character. [deflection of rain water and emission of noxious odors and fumes from neighbor's pipes and furnace]. (10) As emphasized in Tracy, the distinction to be drawn is between encroachments of a permanent nature erected upon one's lands, and a complaint made, not of the location of the offending structures, but of the continuing use of such structures. The former are permanent, the latter is not.⁽¹¹⁾

In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. The importance of the plaintiff's election has long been recognized. As the United States Supreme Court noted in Dickinson, a case in which a landowner sued to recover damages after the government flooded his land, "[i]f suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim ... is not a single event; it is continuous."

Another contingency running against the plaintiff is the statute of limitations. In Spaulding we expressed concern that "if the initial injury is slight and plaintiff delays suit until he has suffered substantial damage and the court then determines that the nuisance was permanent, the defendant may be able to raise the defense that the statute of limitations ran from the time of the initial injury. On the other hand, if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that it will continue." We then emphasized that "[b]ecause of these difficulties, it has been recognized that in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not."

Defendant contends, however, that this is not a case to which election applies because Spaulding separately categorized privileged activity nuisances as permanent. Defendants read too much into the Spaulding opinion. Although Spaulding contains language suggesting that election is unavailable when the nuisance arises as a result of privileged activity, (12) this isolated aspect of the opinion must be viewed in context. First, the purported exclusion is dictum only. Spaulding did not involve a question of privilege. In Spaulding, the defendant, a private landowner, negligently maintained piles of dirt on his property which caused mudslides on the plaintiff's land when it rained. The trial court ordered the nuisance abated but also awarded prospective damages for permanent diminution in the value of plaintiff's property. Thus, the issue was the necessity of election, not whether privilege precluded such election.

Second, Spaulding's election discussion is based, in part, on Phillips, a case involving "privileged" governmental activity. In Phillips we held that even assuming the city could not be required to remove a road block obstructing access to Phillips' property, it could not be said as a matter of law that the gate was a permanent nuisance since it apparently "could have been removed at any time." It is difficult to reconcile this case, affirmatively relied upon in Spaulding, with an interpretation of the latter as absolutely barring election when privileged activity is at issue. The two opinions are more realistically viewed as focusing the election inquiry on the ability to abate rather than on the possibility of a court order requiring abatement.

Third, public policy militates against defining a nuisance as permanent or continuing on the basis of privilege alone. As noted, the purpose of nuisance law is to provide a means of recovery for harm suffered. The doctrine of election is designed to facilitate just and equitable recovery. Though the traditional remedy of injunctive relief may be unavailable in a given case, the damage suffered is no

different than in a case involving identical but nonprivileged activity. Both victims are harmed in the same way, and both may seek damages for such harm. Where the nuisance is a continuing one, both victims, therefore, should be able to bring successive actions as damages accrue. To hold that the statute of limitations applies to one continuing nuisance but not the other is to put the burden on the victim to choose his or her tortfeasor wisely. Nuisance law neither requires nor supports such a harsh result.

Moreover, we should be particularly cautious not to enlarge the category of permanent nuisances beyond those structures or conditions that truly are permanent. Where some means of abatement exists, there is little or no incentive to make remedial efforts once the nuisance is classified as permanent. Such a result is at odds with tort law's philosophy of encouraging innovation and repair to decrease future harm.

Finally, the privilege alluded to in *Spaulding* is quite different from the privilege claimed in the present case. In a word, the *Spaulding* privilege is absolute. *Spaulding* referred to an "offending structure or condition [] maintained as a necessary part of the operations of a public utility" as a clear permanent nuisance, "[s]ince the utility by making compensation is entitled to continue them."

We do not deal with such an extensive privilege. Federal preemption of local regulation of airport noise is not absolute. In *Greater Westchester*, we concluded that federal preemption does not operate to wholly eliminate local responsibility for airport noise control. We based this conclusion, in part, on the distinction drawn by the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal*, between a municipality's exercise of the police power and its proprietary efforts to reduce airport noise. Federal law preempts only the former. The message of *City of Burbank* and *Greater Westchester* is clear: state law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules.

Moreover, recovery is not limited to damages for permanent nuisance only. In *Greater Westchester* we affirmed damage awards totalling \$86,000 for personal injuries sustained during the period 1967_1975 by persons living near Los Angeles International Airport. Although we did not otherwise identify the nuisance as permanent or continuing, the time frame given strongly suggests the latter.

The airport operator's separate duty to reduce noise, and hence, separate nuisance liability, is particularly compelling in the present case. Defendant is a public entity charged with responsibility for the "acquisition, operation, repair, maintenance, improvement and administration" of the airport as a public airport. (Gov. Code, § 6546.1.) Not only does defendant play a proprietary role in the airport's operations, but it is expressly required by statute to make all reasonable efforts to curb noise pollution at the airport. "In operating the airport, the separate public entity ... shall not permit or authorize any activity in conjunction with the airport which results in an increase in the size of the noise impact area ... and shall further comply with the future community noise equivalent levels prescribed by [the California Administrative Code]. ... [¶] In addition, the entity shall diligently pursue all reasonable avenues available to insure that the adverse effects of noise are being mitigated to the greatest extent reasonably possible." Thus, despite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or other noise reducing devices. The privilege is not absolute.

Airport operations are the quintessential continuing nuisance. Although federal law precluding interference in any way with flight patterns and schedules adds an element of permanency to an otherwise continuing problem, it does not mandate that the overall nuisance is a permanent one. Thus plaintiffs may elect whether to treat airport noise and vibrations as a continuing or as a permanent nuisance.

Because plaintiffs elected to treat the airport as a continuing nuisance, we conclude that the statute of limitations does not bar their nuisance claims.

For the foregoing reasons, the judgment is reversed as to both causes of action.

DISSENTING:

by Justice MOSK

Concurring and Dissenting.

I agree with the majority that plaintiffs may maintain a cause of action for inverse condemnation even though defendant lacks the power of eminent domain.

I am compelled to dissent, however, from their discussion and disposition of the nuisance cause of action. They effectively ignore principles that have guided the courts of this state and other jurisdictions in the task of classifying nuisances, and thus err in concluding that plaintiffs' claim is timely. Moreover, they potentially subject this airport to repeated and vexatious litigation based on the same nuisance.

Plaintiffs allege that defendant's activities became a nuisance as of January 29, 1978 — the date defendant became a public entity. If a nuisance is deemed "permanent," a plaintiff must — within the applicable statute of limitations — sue for all past, present, and future damages in one action. If, by contrast, a nuisance is deemed "continuing," a plaintiff may sue only for damages suffered before the action was filed, but he will not be barred from pressing future claims so long as the nuisance continues.

In Spaulding v. Cameron, Justice Traynor prescribed the test for determining whether a nuisance is continuing or permanent, and discussed the policy of the law: "In early decisions of this court it was held that it should not be presumed that a nuisance would continue, and damages were not allowed for a decrease in market value caused by the existence of the nuisance but were limited to the actual physical injury suffered before the commencement of the action. [Citations.] The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action.

"The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once." (*Id.*, at p. 267, italics added.)

Thus, if a use of property alleged to be a nuisance is likely to continue indefinitely because its owner cannot be compelled to abate, the nuisance is deemed permanent and the plaintiff is given a single cause of action for his damages past, present, and future. This test for classifying nuisances as either continuing or permanent turns on whether the nuisance is reasonably abatable. It is the rule followed not only in this state, but in other jurisdictions as well. It is also approved by commentators: "But if the nuisance can not be abated, or is such that the court will not enjoin its continuance, all damages must be obtained in one action."

Under these principles, the nuisance alleged here must be deemed permanent. First, injunctive relief is not simply inappropriate, it is unavailable. As this court observed in Greater Westchester Homeowners Assn. v. City of Los Angeles, "commercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law."

Second, successive actions are plainly undesirable. As the Supreme Court of Wisconsin recently held in Krueger v. Mitchell, an airport noise case, "The injured party must ... present his ... entire claim for past and future damages in one action. This limitation on such a damage action is necessary in order to protect airport proprietors from repeated and vexatious litigation based on the same nuisance."

In some cases classification may be doubtful; in such cases, the Spaulding court observed, a

plaintiff should be allowed to elect whether to treat the alleged nuisance as continuing or permanent. Recognizing that their claim here would be barred by limitations if the asserted nuisance is characterized as permanent, plaintiffs insist this case is within the class defined in Spaulding as "doubtful," and hence that they may avoid the limitations bar by treating the alleged nuisance as continuing.

Spaulding allows such an election only if, inter alia, "the defendant is not privileged to continue the nuisance" establishes, defendant's use of its property may not be enjoined as a nuisance: there are no allegations that defendant either is not subject to or has failed to comply with federal regulations. Thus, defendant is privileged to continue the nuisance alleged here.¹

Nor is defendant's privilege to continue the alleged nuisance diminished by its ability to adopt means within its power to mitigate the allegedly offensive noise. Although the federal government has apparently not preempted all facets of noise control, it is clear that permissible local regulation may be imposed only by airport proprietors, and not by third parties. Thus in City of Burbank v. Lockheed Air Terminal, the United States Supreme Court invalidated a municipal ordinance that purported to regulate noise by imposing a take-off curfew on a privately owned airport. City of Burbank plainly establishes that the delicate federal/local proprietor noise control scheme currently in effect will not tolerate private suits seeking mandatory imposition of local noise controls. [state may not direct an airport proprietor to exercise its noise abatement power].

Thus, plaintiffs may not elect to treat the alleged nuisance as continuing: defendant is privileged to continue the nuisance and it must therefore be classified as permanent. [injunctive relief against airport noise unavailable; plaintiff may claim damages for permanent nuisance only].²

Claims against public entities alleging injuries to persons or personal property must be brought by the 100th day after the accrual of the cause of action; all other claims — including those for real property damage — must be brought within 1 year after accrual of the cause of action. (Gov. Code, § 911.2.) As plaintiffs implicitly admit, their nuisance cause of action accrued when the public entity undertook operations on January 29, 1978; from that date, plaintiffs claim, defendant's operations have "substantially interfered" with the use and enjoyment of their properties. Because the limitations period began to run at that time, it is clear that plaintiffs' 1982 complaint is untimely.

I would accordingly affirm the order dismissing the nuisance cause of action.

Lucas, J., concurred.

FOOTNOTE 1. The cities' joint powers agreement was specifically authorized by Government Code section 6546.1, which provides in relevant part: "In the County of Los Angeles, any agency, commission, or board provided for by joint powers agreement entered into by cities pursuant to Article 1 (commencing with Section 6500) of this chapter for the purpose of the acquisition, operation, repair, maintenance, improvement and administration of the Hollywood_Burbank Airport as a public airport, pursuant to the Federal Aviation Act of 1958, as amended, may carry out such purpose and may authorize the issuance of revenue bonds, pursuant to this article, to pay for acquiring, repairing, improving, financing and refinancing such project, including all facilities and improvements and all expenses incidental thereto or connected therewith. ..."

FOOTNOTE 2. Government Code section 6546.1 provides in part that defendant "shall not authorize or permit ... the purchase of fee title to condemned real property zoned for residential use" Moreover, we cannot agree with plaintiffs that Public Utilities Code section 21652 authorizes defendant to take by condemnation the air space easements at issue here. Although that section recognizes air space easements may be acquired by condemnation when "necessary to permit imposition ... of excessive noise, [or] vibration ... due to the operation of aircraft to and from the airport" (id., subd. (a)(2)), the section also specifies that only persons "authorized to exercise the power of eminent domain" may acquire such air space easements. (Id., subd. (a); italics added.) This section, therefore, cannot be construed as granting to defendant the power of eminent domain to take the subject easements.

FOOTNOTE 4. The instant case does not involve allegations of unreasonable zoning or regulatory permit activity — the remedy for which, of course, is not an inverse condemnation suit for damages, but declaratory relief or mandamus. Clearly, in cases of physical invasion an inverse condemnation action is appropriate.

FOOTNOTE 5. United States v. Clarke (1980) supra, 445 U.S. 253, does not suggest a contrary result. In Clarke the court granted an injunction against a state's continued invasion of a plaintiff's land for use as a road.

The court held that the state had no defense to the requested injunction on a theory of inverse condemnation; it did not address the question whether the plaintiff had a remedy in inverse condemnation.

Defendant's reliance on City of Los Angeles v. Oliver (1929) 102 Cal.App. 299 [283 P. 298], for the proposition that the constitutional guarantee of just compensation does not require an inverse condemnation remedy so long as a "reasonably efficient remedy remains" (id., at p. 315) is similarly misplaced. Oliver concerned only procedures for calculating just compensation after the state exercised its right of eminent domain; it had nothing to do with the right to bring an inverse condemnation action.

FOOTNOTE 6. "[C]ommercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law."

FOOTNOTE 9. See also Wade v. Campbell (1962) 200 Cal.App.2d 54, 59 [19 Cal.Rptr. 173, 92 A.L.R.2d 966] (noxious smells, disturbing noises, flies and mosquitoes associated with dairy); Williams v. Blue Bird Laundry Co. (1927) 85 Cal.App. 388, 395 [259 P. 484] (loud noise, offensive odors and heavy black smoke emitted from laundry).

FOOTNOTE 10. See also Guttinger v. Calaveras Cement Co. (1951) 105 Cal.App.2d 382, 387 [233 P.2d 914] (emission of dust and gases from cement plant injuring neighbor's cattle); Bourdieu v. Seaboard Oil Corp. (1941) 48 Cal.App.2d 429, 436 [119 P.2d 973] (illicit use of facilities on plaintiff's land to process oil and gas); Collins v. Sargent (1928) 89 Cal.App. 107, 116_117 [264 P. 776] (regular use of explosives in gravel quarry shaking plaintiff's house and throwing gravel upon his land.)

FOOTNOTE 11. Even solid structures have been considered nuisances where it appeared that the structures could have been removed. (Phillips, supra, 27 Cal.2d at p. 107 [city installed barrier blocking access to plaintiff's property]; Kafka v. Bozio (1923) 191 Cal. 746, 751_752 [218 P. 753] [encroaching structure pushing plaintiff's building out of alignment]; Strong v. Sullivan (1919) 180 Cal. 331, 334 [181 P. 59] [lunch stand erected daily obstructing plaintiff's property].)

FOOTNOTE 12. In discussing the continuing/permanent distinction and the basis of election, the court noted in passing: "The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once. [Citation.]" (Spaulding, supra, 38 Cal.2d at pp. 267_268.)

FOOTNOTE 1. Since "privileged" in this context merely means not reasonably abatable (see Spaulding, supra, 38 Cal.2d at pp. 267_268), the majority's claim to the contrary (ante, at pp. 870_872) is manifestly specious.

FOOTNOTE 2. Nestle v. City of Santa Monica (1972) 6 Cal.3d 920 [101 Cal.Rptr. 568, 496 P.2d 480], does not support a contrary conclusion. In Nestle we held, inter alia, that a nuisance action based on airport noise was improperly dismissed on the basis of government immunity, and suggested that the plaintiffs on remand might be able to demonstrate a continuing nuisance. This dictum, of course, preceded the United States Supreme Court's noise control preemption decision in City of Burbank (1973) supra, 411 U.S. 624; moreover, the court was not asked to consider Spaulding's first requirement for election

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UNITED STATES v. CAUSBY
328 U.S. 256 (1946)

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondent, one judge dissenting. 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwest_southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property_which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle¹ approved by the Civil Aeronautics Authority² passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. ³ The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six [328 U.S. 256, 259] months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport_bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The north_west_southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four_motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was \$2,000. [328 U.S. 256, 260] I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. 171 et seq., 49 U.S.C.A. 171 et seq., as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. 401 et seq., 49 U. S.C.A. 401 et seq. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 U.S.C. 176(a), 49 U.S.C.A. 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce⁴ through the navigable air space of the United States.' 49 U.S.C. 403, 49 U.S.C.A. 403. And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. 180, 49 U.S.C.A. 180. And it is provided that 'such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation.' Id. It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe_Cujus [328 U.S. 256, 261] est solum ejus est usque ad coelum. ⁵ But that doctrine has no place in the modern world. The ai is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at

the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United States v. Powelson*, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. 6 It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

We agree that in those circumstances there would be a taking. Though it would be only an easement of flight [328 U.S. 256, 262] which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, L.R.A.1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value. 7 That was the philosophy of *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims which dismissed the petition on a demurrer, holding that 'the specific facts set forth would warrant a finding that a servitude has been imposed.' 8 260 U.S. at page 330, 43 S.Ct. at page 137. And see *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245, 140 A.L.R. 1352. Cf. *United States v. 357.25 Acres of Land, D.C.*, 55 F.Supp. 461.

The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. 180, 49 U.S.C.A. 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, 61.7400, 61.7401, Code Fed.Reg.Cum.Supp., Tit. 14, ch. 1) and from 300 to 1000 feet for [328 U.S. 256, 264] other aircraft depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, 60.350_60.3505, Fed.Reg.Cum.Supp., supra. Hence, the

flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

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 a remedy in case overhanging structures are erected on adjoining land. 9 The landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected [328 U.S. 256, 265] an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. 10 The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface. 11

In this case, as in *Portsmouth Harbor Land & Hotel Co. v. United States*, supra, the damages were not merely consequential. They were the product of a direct invasion of respondents' do_ [328 U.S. 256, 266] main. As stated in *United States v. Cress*, 243 U.S. 316, 328, 37 S.Ct. 380, 385, '... 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.'

We said in *United States v. Powelson*, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, that while the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.' If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.' Gen.Stats. 1943, 63_11. The flight of aircraft is lawful 'unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' Id., 63_13. Subject to that right of flight, 'ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.' Id. 63_12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

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 and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court [328 U.S. 256, 267] of Claims plainly establish that there was a diminution in value of the property and that the frequent, low_level flights were the

direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

II. By 145(1) of the Judicial Code, 28 U.S.C. 250(1), 28 U.S.C.A. . 250(1), the Court of Claims has jurisdiction to hear and determine 'All claims (except for pensions) founded upon the Constitution of the United States or ... upon any contract, express or implied, with the Government of the United States.'

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, supra. If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine. See Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 67, 5 S.Ct. 717, 721; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 269; Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 21, 60 S.Ct. 413, 415. Thus, the jurisdiction of the Court of Claims in this case is clear.

III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. United States v. Cress, supra, 243 U.S. 328, 329, 37 S.Ct. 385, 386, and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. United States v. Esnault_Pelterie, 299 U.S. 201, 205, 206 S., 57 S.Ct. 159, 161, 162; United States v. Seminole Nation, 299 U.S. 417, 422, 57 S.Ct. 283, 287. Findings of fact on every 'material issue' are a statutory [328 U.S. 256, 268] requirement. 53 Stat. 752, 28 U.S.C. 288, 28 U.S.C.A. 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States 'no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so.' (60 F. Supp. 758.) That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. United States v. Esnault_Pelterie, supra, 299 U.S. at page 206, 57 S.Ct. at page 162.

Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

REVERSED.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

The Fifth Amendment provides that 'private property' shall not 'be taken for public use, without just compensation.' The Court holds today that the Government has 'taken' respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty_three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court's decision is [328 U.S. 256, 269] to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

The following is a brief statement of the background and of the events that the Court's opinion terms a 'taking' within the meaning of the Fifth Amendment: Since 1928 there has been an airfield some eight miles from Greensboro, North Carolina. In April, 1942, this airport was taken over by the Greensboro_High Point Municipal Airport Authority and it has since then operated as a municipal airport. In 1942 the Government, by contract, obtained the right to use the field 'concurrently, jointly,

and in common' with other users. Years before, in 1934, respondents had bought their property, located more than one-third of a mile from the airport. Private planes from the airport flew over their land and farm buildings from 1934 to 1942 and are still doing so. But though these planes disturbed respondents to some extent, Army bombers, which started to fly over the land in 1942 at a height of eighty-three feet, disturbed them more because they were larger, came over more frequently, made a louder noise, and at night a greater glare was caused by their lights. This noise and glare disturbed respondents' sleep, frightened them, and made them nervous. The noise and light also frightened respondents' chickens so much that many of them flew against buildings and were killed.

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a 'taking'. Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property. But the allegation [328 U.S. 256, 270] of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute,¹ or were the result of negligence.² But the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract. And there is no implied contract here, unless by reason of the noise and glare caused by the bombers the Government can be said to have 'taken' respondents' property in a Constitutional sense. The concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. Even the one case in this Court which in considering the sufficiency of a complaint gave the most elastic meaning to the phrase 'private property be taken' as used in the Fifth Amendment, did not go so far. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. [328 U.S. 256, 271] 327, 43 S.Ct. 135. I am not willing, nor do I think the Constitution and the decisions authorize me to extend that phrase so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress.

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable, is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation, is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below.³ No rigid Constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace. Congress has already acted under that power. It has by statute, 44 Stat. 568, 52 Stat. 973, provided that 'the United States of America is ... to possess and exercise complete and exclusive national sovereignty in the [328 U.S. 256, 272] air space (over) the United States.' This was done under the assumption that the Commerce Clause of the Constitution gave Congress the same plenary power to control navigable airspace as its plenary power over navigable waters. H. Rep. No. 572, 69th Cong., 1st Sess., p. 10; H. Rep. No. 1162, 69th Cong., 1st Sess., p. 14; *United States v. Commodore Park, Inc.*, 324 U.S. 386, 65 S.Ct. 803. To make sure that the airspace used for air navigation would remain free, Congress further declared that 'navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation,' and finally stated emphatically that there

exists 'a public right of freedom of transit ... through the navigable airspace of the United States.' Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts. Congress and those acting under its authority were the only ones who had power to control and regulate the flight of planes. 'Navigable air_space' was defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. 180, 49 U.S.C.A. 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. This power derives specifically from the Section which authorizes the Authority to prescribe 'air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.' 49 U.S.C.A. 551. Here there was no showing that the bombers flying over respondents' land violated any rule or regulation of the Civil Aeronautics Authority. Yet, unless we hold the Act unconstitutional, at least such a showing would be necessary before the courts could act without interfering with the exclusive authority which Congress gave to the administrative agency. Not even a [328 U.S. 256, 273] showing that the Authority has not acted at all would be sufficient. For in that event, were the courts to have any authority to act in this case at all, they should stay their hand till the Authority has acted.

The broad provisions of the Congressional statute cannot properly be circumscribed by making a distinction as the Court's opinion does between rules of safe altitude of flight while on the level of cross_country flight and rules of safe altitude during landing and taking off. First, such a distinction can not be maintained from the practical standpoint. It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making cross_country flights, while at the same time it left the more hazardous landing and take_off operations unregulated. The legislative history, moreover, clearly shows that the Authority's power to prescribe air traffic rules includes the power to make rules governing landing and take_off. Nor is the Court justified in ignoring that history by labeling rules of safe altitude while on the level of cross_country flight as rules prescribing the safe altitude proper and rules governing take_off and landing as rules of operation. For the Conference Report explicitly states that such distinctions were purposely eliminated from the original House Bill in order that the Section on air traffic rules 'might be given the broadest construction by the ... (Civil Aeronautics Authority) ... and the courts.' 4 In construing the statute narrowly the Court [328 U.S. 256, 274] thwarts the intent of Congress. A proper broad construction, such as Congress commanded, would not permit the Court to decide what it has today without declaring the Act of Congress unconstitutional. I think the Act given the broad construction intended is constitutional.

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid Constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, [328 U.S. 256, 275] the courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a Constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and

national problems. In my opinion this case should be reversed on the ground that there has been no 'taking' in the Constitutional sense.

Mr. Justice BURTON joins in this dissent.

Footnotes

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

[Footnote 2] Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. *Cameron v. Civil Aeronautics Board*, 7 Cir., 140 F.2d 482.

[Footnote 3] The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.

[Footnote 4] 'Air commerce' is defined as including 'any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.' 49 U.S.C. 401(3), 49 U.S. C.A. 401(3).

[Footnote 5] 1 Coke, Institutes, 19th Ed. 1832, ch. 1, 1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621.

[Footnote 6] The destruction of all uses of the property by flooding has been held to constitute a taking. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Lynah*, 188 U.S. 445, 23 S.Ct. 349; *United States v. Welch*, 217 U.S. 333, 30 S.Ct. 527, 28 L.R.A., N.S., 385, 19 Am.Cas. 680.

[Footnote 7] It was stated in *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 156 A.L.R. 390, 'The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. 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.' The present case falls short of the *General Motors* case. This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes.

Cf. *Warren Township School Dist. v. Detroit*, 308 Mich. 460, 14 N.W.2d 134; *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 69 A. L.R. 300; *Burnham v. Beverly Airways, Inc.*, 311 Mass. 628, 42 N.E.2d 575.

[Footnote 8] On remand the allegations in the petition were found not to be supported by the facts. 64 Ct.Cl. 572.

[Footnote 9] *Baten's Case*, 9 Coke R. 53b; *Meyer v. Metzler*, 51 Cal. 142; *Codman v. Evans*, 7 Allen 431, 89 Mass. 431; *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278, 61 Am.St.Rep. 298. See Ball, *The Vertical Extent of Ownership in Land*, 76 U.Pa.L.Rev. 631, 658_671.

[Footnote 10] It was held in *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716, 11 L.R.A.,N.S., 920, 116 Am.St.Rep. 563, 9 Ann.Cas. 858, that ejection would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. The court stated pages 491, 492 of 186 N.Y., page 718 of 79 N.E.: '... an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'

[Footnote 11] See Bouve, *Private Ownership of Navigable Airspace Under the Commerce Clause*, 21 Amer.Bar Assoc.Journ. 416, 421_422; Hise, *Ownership and Sovereignty of the Air*, 16 Ia.L.Rev. 169; Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 Boston Univ.L.Rev. 414.

[Footnote 1] *Neiswonger v. Goodyear Tire & Rubber Co.*, D.C., 35 F.2d 761.

[Footnote 2] As to the damage to chickens, Judge Madden, dissenting from this judgment against the Government said, 'When railroads were new, cattle in fields in sight and hearing of the trains were

alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway.'

[Footnote 3] The House in its report on the Air Commerce Act of 1926 stated: 'The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of adjacent or subjacent soil'. House Report No. 572, 69th Congress, First Session, page 10.

[Footnote 4] The full statement read: 'The substitute provides that the Secretary shall by regulation establish air traffic rules for the navigation, protection, and identification of all aircraft, including rules for the safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft. The provision as to rules for taking off and alighting, for instance, was eliminated as unnecessary specification, for the reason that such rules are but one class of air traffic rules for the navigation and protection of aircraft. Rules as to marking were eliminated for the reason that such rules were fairly included within the scope of air rules for the identification of aircraft. No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules that would fall within the scope of air traffic traffic rules, as, for instance, lights and signals along airways and at air_ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts.' House Report No. 1162, 69th Congress, 1st Session, p. 12.

That the rules for landing and take_off are rules prescribing 'minimum safe altitudes of flight' is shown by the following further statement in the House Report: '... the minimum safe altitudes of flight ... would vary with the terrain and location of cities and would coincide with the surface of the land or water at airports.' Id. at p. 14.