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Property

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A. Aircraft Noise as Inverse Condemnation[1]

Two federal district court cases[2] involved claims under the Tucker Act[3] by owners of residences situated near air force bases for damages to property caused by noise and vibration resulting from ground tests of jet engines. Recovery was denied on the ground that since there were no overflights as in *United States v. Causby*[4] and *Griggs v. Allegheny County*,[5] there had been no trespass and therefore no compensable taking of private property within the fifth amendment. The opinions in both cases rely on *Batten v. United States*,[6] a decision to the same effect from the tenth circuit court of appeals, in which Chief Judge Murrah dissented. Although at least two state courts[7] have allowed compen-

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1. Inverse condemnation has been defined as the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.

City of Jacksonville v. Schumann, 167 So. 2d 95, 98 (Fla. 1964).

2. Bellamy v. United States, 235 F. Supp. 139 (E.D.S.C. 1964); Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964).

3. 28 U.S.C. § 1346 (a)(2)(1952) gives district courts original jurisdiction, concurrent with the Court of Claims, over a claim against the United States not exceeding 10,000 dollars in amount, "founded . . . upon the Constitution . . . or upon any express or implied contract with the United States." The last clause of the fifth amendment to the Constitution reads: "nor shall private property be taken for public use, without just compensation."

4. 328 U.S. 256 (1946).

5. 369 U.S. 84 (1962).

6. 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). Indicating that under some circumstances there might be a recovery without overflight, the court said:

> In discussing the meaning of the word 'taken', the court said in United States v. General Motors Corp., 323 U.S. 373, 378 . . . that governmental action short of occupancy was a taking 'if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter.' In the instant case there is no total destruction and no deprivation of 'all or most' of the plaintiffs' interests. The plaintiffs do not suggest that any home has been made uninhabitable or that any plaintiff has moved because of the activities at the Base. The record shows nothing more than an interference with use and enjoyment.

306 F.2d 580, 584 (10th Cir. 1962). The opinions in both *Leavell* and *Bellamy* note that while the plaintiffs sustained substantial damage, there was no taking within the stated test.

7. Thornburg v. Port of Portland, 232 Ore. 482, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964). In *Batten*, after noting the distinction between a taking and consequential damages, the court stated:

sation where overflight was lacking, *Batten* represents the prevailing rule of the federal courts.

In *Leavell v. United States*[8] a further count was brought under the Federal Tort Claims Act[9] for personal injuries. Recovery was denied on the ground that "the plaintiffs herein have failed to prove that the government employees . . . were guilty of any negligent or wrongful act or omission in connection with the program for testing jet engines on the air force installation."[10] The court found that "the decision as to where to locate the 'jet engine trim pad' was a discretionary function which falls within the exception to the Tort Claims Act and cannot be the basis of a tort claim against the United States."[11]

B. Boundary Dispute

Douglas v. Perry,[12] a disputed boundary case, reaffirms the well settled principle that in an action of trespass to try title, the plaintiff "must recover, if at all, on the strength of his own title;

Because of this rule which denies the recovery of consequential damages in the absence of any taking, many state constitutions provide in substance that private property shall not be taken or damaged for public use without compensation. However, the federal obligation has not been so enlarged either by statute or by constitutional amendment.

306 F.2d 580, 583 (10th Cir. 1962). In *Thornburg* recovery was allowed in the absence of overflight despite the fact that the Oregon Constitution, art. I, § 18, does not permit the recovery of compensation for property "damaged" for a public purpose. The court said:

> If we accept, as we must upon established principles of the law of servitudes, the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.

376 P.2d 100, 106 (1962). While Washington Constitution, art. I, § 16 does provide compensation for a "damaging" of property, in *Martin* the Washington court indicated recovery would be allowed without overflight on the theory of a "taking":

> We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumsatnces engendered by the nearby flights which interfere with the use and enjoyment of their land.

64 Wash. 2d 309, 312, 391 P.2d 540, 545 (1964).

8. Leavell v. United States, *supra* note 2.
9. 28 U.S.C. § 1346(b) (1962).
10. 234 F. Supp. 734, 742 (E.D.S.C. 1964).
11. *Id.* at 741.
12. 245 S.C. 486, 141 S.E.2d 348 (1965).

and the burden [is] upon him to prove paramount title to the land."[13] The circuit judge held not only that the plaintiff had failed to establish paper title, but also that defendant had title by adverse possession. The South Carolina Supreme Court affirmed.

C. Dedication—Permissible Use of Dedicated Land

In *Knoerr v. Crews*[14] the question was whether the city of Seneca might construct parking facilities on land which by deed in 1873 had been dedicated for "open squares for the convenience of the public and the said Railway Company . . . ."[15] The deed was one conveying a railway right of way and the dedication was of lands retained by the grantor. A portion of the dedicated land had long been used as a parking area while the remainder, now sought to be so used, had been used as a park maintained by the city and planted by private citizens and garden club groups.

In holding that the city might construct parking facilities, the court thus stated the rule:

> Generally when property is dedicated to the public, the intent of the dedicator as to the use to which it may be put controls. Where such intent is clearly expressed and is specific and restricted, no deviation from such use may be permitted no matter how advantageous the changed use may be to the public . . .; however, where the intention of the dedicator is uncertain or the dedication is in general, unrestrictive terms, the property can be used for any public purpose as determined by the proper legal authority, and the fact that the property has been devoted to one use does not deprive its devotion to other more comprehensive uses.[16]

Applying the stated rule, the court found that "use of the property for public parking is consistent with the object to which the property was dedicated and the fact that a portion . . . has been used for park purposes over a long period of time does not impair the right of the city to use the land for other public purposes consistent with the dedication."[17]

13. *Id.* at 488, 141 S.E.2d at 349. The quoted statement of course, presupposes that the plaintiff or his predecessor was not wrongfully deprived of possession by the defendant. See *e.g.*, Nicholson v. Villepegue, 91 S.C. 231, 74 S.E. 506 (1912).

14. 246 S.C. 174, 143 S.E.2d 120 (1965).

15. *Id.* at 176, 143 S.E.2d at 120.

16. *Id.* at 177, 143 S.E.2d at 120.

17. *Id.* at 177, 143 S.E.2d at 121.

D. Eminent Domain—Damage to Owner's Retained Land

In *South Carolina State Highway Dep't v. Westboro Weaving Co.*,[18] the department condemned for highway purposes land which defendant textile plant had acquired in 1939 as a proposed site for pretreating its waste products should such become necessary. The regulations of the sewer district require pretreatment of plant waste before discharge into the sewers if, in the opinion of the district, such pretreatment becomes necessary. About ten years prior to trial, the district communicated with the defendant relative to pretreatment of defendant's waste but such was never required and the defendant "has no plans to construct in the immediate future, within a reasonable time, or possibly ever, such plant."[19]

The land condemned lies below the level of the plant and could be used as a pretreatment area without the necessity of pumping the wastes thereto whereas other available sites would necessitate the employment of pumps. The agreed value of the land condemned was 1,176 dollars, and the sole issue was whether expert testimony regarding damage to defendant's retained land[20] was too remote and speculative. This testimony was to the effect that the availability of a waste disposal site was a factor affecting present market value of the plant and that the lack of such a site would reduce the plant's value by 15,000 dollars. By a three-to-two decision, the lower court's exclusion of the proffered testimony was affirmed. The majority concluded that "the site had been acquired as insurance against the day, if ever, when it would be required to pretreat its waste, which is too remote and speculative."[21] The dissenting justices reasoned:

> [T]he testimony dealt with the impact which the loss of the site had on the *present* market value of the remaining property. Since the . . . sewer district has the right to require pretreatment whenever in its judgment such should become necessary, . . . a prospective purchaser would be vitally interested in the means at hand to meet such need if it should be made. . . . Perhaps the demand will never be made, but the contingency and the impairment of the means

18. 244 S.C. 516, 137 S.E.2d 776 (1964).

19. *Id.* at 518, 137 S.E.2d at 778.

20. S.C. CODE ANN. § 135 (1962) provides: "In assessing compensation and damages for rights of way, only the actual value of the land to be taken therefor and any special damages resulting therefrom shall be considered."

21. *Supra,* note 18 at 522, 137 S.E.2d at 779.

at hand to meet it result, logically and according to the expert testimony, in depreciation in market value. This is *present*, instead of remote, and no more speculative than *any* opinion testimony as to the depreciation in the market value of real estate.[22]

E. Estate in Fee Simple Conditional

Scarborough v. Scarborough[23] concerned certain aspects of the fee simple conditional[24] estate as it exists in South Carolina. In a suit for partition of land, the disputed item of the will contained three sentences which for convenient discussion have been numbered:

> [1] I . . . devise . . . all of my Real property . . . in equal shares to my wife [L] and my daughter [J]. [2] My wife . . . shall take the real estate so devised to her . . . during her natural life and at her death to my daughter [J]; and if my said daughter . . . should die leaving no heirs of the body, then the same shall revert back to the heirs of the Testator. [3] My daughter . . . shall take the real estate so devised to her . . . and at her death to the Heirs of her body, and if my said daughter . . . die leaving no Heirs of the body, then and in that event, the real property so devised to her . . . shall revert back to the Heirs of the Testator.[25]

The lower court held that subject to the wife's life estate in one half the land, the daughter took a fee simple conditional estate in both moieties. This was on the theory that the third sentence[26] of the quoted item applied not only to the equal share given the daughter in the first sentence, but also to the daughter's remainder interest in the equal share given the mother for life

22. *Supra*, note 18 at 523, 137 S.E.2d at 780.

23. 246 S.C. 51, 142 S.E.2d 706 (1965).

24. In *Scarborough*, as in most of the South Carolina cases, the estate is designated fee conditional. The preferred designation, it would seem, is fee simple conditional. RESTATEMENT, PROPERTY Ch. 5, Introductory Note (1940); CASNER & LEACH, CASES & TEXT ON PROPERTY 276 (1st student ed. 1959). The latter designation is employed in Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959).

25. Scarborough v. Scarborough, *supra* note 23, at 53, 142 S.E.2d at 707.

26. S.C. CODE ANN. § 57-2 (1962), which abolishes the Rule in Shelley's Case, is inapplicable to instruments executed prior to October 1, 1924. Since the will was executed in 1909, the rule applied to sentence three of the item, thus giving the daughter an estate in fee simple conditional rather than a life estate. Strother v. Folk, 123 S.C. 127, 115 S.E. 605 (1922). The operation of the rule is discussed in the circuit decree (Record, p. 25) but not in the opinion of the supreme court.

in the second sentence. However, the supreme court found that the third sentence was not intended to modify the specific estate devised the daughter by the second sentence. Therefore, the daughter held the remainder following the wife's life estate in fee simple, subject to an executory devise[27] to the heirs of the testator should the daughter die leaving no heirs of the body. Since the daughter died survived by children her interest passed under her will as a fee simple absolute.

Both the circuit judge and the South Carolina Supreme Court agreed that sentence three[28] of the item gave the daughter an estate in fee simple conditional which the court said she could alienate during her life, but could not dispose of by will. The daughter did not alienate during her lifetime and her will was ineffective to pass the fee conditional estate. The same passed in accordance with the form of the gift, continuing fee conditional in her children. . . ."[29]

While the quoted statement accords with earlier South Carolina decisions,[30] a later case, *Blume v. Pearcy*[31] had engendered confusion as to whether the estate continues in the heirs of the body as a fee simple conditional or descends to them in fee simple absolute. *Scarborough* holds that the land descends in fee simple conditional: "[W]e do not think the court [in *Blume*] intended to change or modify the rules adhered to in the foregoing decisions."[32]

One question which it was unnecessary to reach in *Scarborough* remains for later decision. Even though the estate continues as a fee simple conditional in the issue of the tenant granted such an estate, may the issue convey in fee simple absolute before they themselves have been the parents of children? Although the

27. Executory devise rather than possibility of reverter (the court's designation) would seem a more accurate description of the qualifying language following the devise of the fee in sentence two. See *e.g.*, Drummond v. Drummond, 146 S.C. 194, 143 S.E. 818 (1928).

28. Since the daughter was survived by children, the executory devise should she die leaving no heirs of the body was inoperative. Such executory devise following an estate in fee simple conditional is valid since enactment of the definite failure of issue statute of 1853. S.C. CODE ANN. § 57-3 (1962). Cannon v. Ballenger, 222 S.C. 39, 71 S.E.2d 513 (1952); Dukes v. Shuler, 185 S.C. 303, 194 S.E. 817 (1938); Selman v. Robertson, 46 S.C. 262, 24 S.E. 187 (1896); Note 5 S.C.L.Q. 69, 71 (1952).

29. *Supra* note 23, at 57, 142 S.E.2d at 709.

30. Warnock v. Wightman, 1 Brevard 331 (S.C. 1804); Withers v. Jenkins, 14 S.C. 597 (1880).

31. 204 S.C. 409, 29 S.E.2d 673 (1944). For a collection of citations bearing on the question see Note 5 S.C.L.Q. 313, 353, n.146 (1), (2) (1953).

32. *Supra* note 23, at 58, 142 S.E.2d at 710.

South Carolina cases appear not to have considered the question,[33] there is authority that issue of the tenant in fee simple conditional have power by deed (but not by devise) to convey in fee simple absolute before they themselves have had issue, although if no such conveyance is made the estate continues as a fee simple conditional.[34] It is to be hoped that the South Carolina court will so hold in a proper case. Certainly there is no modern justification for the continued existence of the estate in fee simple conditional. Therefore, a rule which facilitates the conversion of such an estate into a fee simple absolute is indeed worthy of adoption when such may be done consistent with precedent.

F. Lease Cancellation

In *Stalvey v. Pure Oil Co.*[35] the lessee of a petroleum service station had been licensed to use as a customer parking area, and to install petroleum pumps on, a municipally-owned strip of land lying between the highway and the leased premises. Upon the widening of the highway, the license was terminated and as a result lessee's use of the leased premises as a service station for motor trucks was no longer profitable.

A clause in the lease provided in part:

> If, at any time during the term of this lease or any extension hereof, the use of the leased premises as a service station for the sale of petroleum products, automobile accessories and service, shall be prevented, suspended or limited by any zoning statute or ordinance, or any other Municipal or Governmental action, law or regulation; or if the use of said premises for such purposes be affected or impaired by the widening, altering, or improving of any streets fronting or adjoining said premises; then in any of such events Lessee may cancel this lease by giving thirty days written notice thereof to Lessor.[36]

The Lessee contended that the clause authorized its cancellation of the lease; the lessor that cancellation was not permitted since

33. However, see the court's statement of argument of counsel in Adams v. Chaplin, 1 Hill's Eq. 265, 267 (S.C. 1833).

34. CHALLIS, REAL PROPERTY 266 (Sweet's ed.); 1 Cruise, Digest 28, tit. 2 c. 1, § 7 (1st Am. ed. 1808); Co. Litt. 19a; 2 Blackstone 100 *semble* (10th ed. 1787). See Nevil's Case, 7 Co. Rep. 33a, 77 Eng. Rep. 460, 464 (1604).

35. 234 F. Supp. 185 (E.D.S.C. 1964), *aff'd.*, 346 F.2d 1009 (4th Cir. 1965).

36. 346 F.2d 1009, 1010 (4th Cir. 1965).

no part of the premises described in the lease had been taken. In the lessor's suit for rent, which was removed to the federal district court, Judge Hemphill held that the lessee was entitled to cancel despite the fact that the changes took place outside the described lot of premises, since the lease agreement clearly indicated that the acts or actions or changes affecting the use of the premises need not be confined to the described lot, or directly operate on it.

G. Mortgagee's Assertion Against Mortgagor of Title to Mortgaged Land

In *May v. Jeter*[37] the circuit judge concluded that a mortgagee who purchased at a tax sale and thereafter occupied the mortgaged premises until his death some twenty-six years later had not acquired title by adverse possession against the mortgagor, sister of the mortgagee's wife. This was on the theory that no evidence established that the adverse holding had been brought home to the mortgagee beyond the period of the statute of limitations. Nevertheless, the mortgagor's interest was held to be barred by laches because of the long delay in asserting her claim.

On appeal the South Carolina Supreme Court affirmed, finding that the doctrine of laches had been correctly applied. The court stated the rule as to adverse possession:

> [It] is well established, at least in this jurisdiction that where a mortgagee enters with the permission, either express or implied, of the mortgagor, he occupies the premises in the quasi character of trustee for the mortgagor and cannot hold adversely to the rights of the mortgagor until he distinctly disavows and repudiates his mortgagee relationship and notice thereof is brought home to the mortgagor. While such trustee relationship continues, the mortgagee cannot acquire title to the property by virtue of a tax deed alone.[38]

The court further noted that the result of the circuit decree was sustainable on the additional ground that mortgagee's exclusive occupancy for more than twenty years presumed an ouster which, unrebutted by the record, would confer title by presumption of a grant upon the mortgagee.

Still another problem was whether an instrument in the form of a deed executed and given by mortgagee to his niece was

37. 245 S.C. 529, 141 S.E.2d 655 (1965).
38. *Id.* at 536, 141 S.E.2d at 658.

intended to operate as a deed of conveyance. The court found that it was not so intended:

> [W]e think it clear that the terms of the instrument itself reserved to [mortgagee] not just a life estate, as argued by [the niece] but the right to sell and dispose of various portions, if not all, of the property during his lifetime. In brief, neither the instrument itself, nor the circumstances surrounding its execution show an intent . . . to immediately pass . . . any estate or interest in the land.[39]

H. Rent—Recovery of Mistaken Overpayments

McDonald's Corp. v. Moore[40] was a diversity action in the federal district court by a tenant against his landlord for the recovery of rental overpayments. Upon discovery of the mistake, the defendant refused to return the overpayments and credited them to the final months of the term which would end in 1991. District Judge Wyche found the testimony to establish that the overpayments "were made under an honest mistake of a material fact and were not voluntary payments but were mistakenly made as the result of forgetfulness, inadvertence, oversight and a clerical error . . . ."[41] Since there had been no change of position on the defendant's part, it was held that the plaintiff might recover the overpayments together with interest from the time of demand for return.

I. Residential Restrictive Covenants—Beauty Parlor As Breach

In *Cothran v. Stroman*[42] restrictive covenants in a deed, among other things, provided:

> 1. No lot shall be used except for residential purposes. . . .
> 7. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood, or that may affect the value of the property.[43]

The court held that operation of a one-operator beauty parlor on the premises, even though it did not constitute a noxious or

39. *Id.* at 541, 141 S.E.2d at 661.
40. 237 F. Supp. 874 (W.D.S.C. 1965).
41. *Id.* at 877.
42. 246 S.C. 42, 142 S.E.2d 368 (1965).
43. *Id.* at 44, 142 S.E.2d at 368.

offensive activity, was a commercial activity which violated the covenant restricting the premises to use for residential purposes, and enjoined the defendants from conducting such enterprise in their home.

J. Surface Water Damage Caused by Highway Improvements

In *Lail v. South Carolina State Highway Dept.*[44] the court held as a matter of law that the plaintiff had failed to establish that surface water damage to her land was caused by the defendant's construction of highway improvements. "[T]he proper test to be . . . applied as to causal connection is whether or not the damages sustained by the plaintiff would have been sustained had it not been for the construction work done by the defendant."[45] After reviewing the evidence, the court concluded that the circuit judge erred in not directing a verdict for defendant.

K. Legislation

Act No. 383[46] is legislation designed to control pollution of the air of South Carolina. Administration of the provisions of the act is delegated to the authority formerly known as the Water Pollution Control Authority of South Carolina, the designation of which is changed to the Pollution Control Authority of South Carolina.

44. 244 S.C. 237, 136 S.E.2d 306 (1964).
45. *Id.* at 247, 136 S.E.2d at 312.
46. S.C. ACTS & J. RES. 1965, p. 687, amending S.C. CODE ANN. § 70 (1962).