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Injunctions--Airports--Nuisance

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ments, however, may be modified by custom. Did not the parties enter into the formal agreement subject to the well-known practice of banks to use such deposits in the same manner as if they were general deposits?[4]

The Texas court has recognized the practical import of the situation presented here.[5] In the cited case that court declared that no difference in fact exists between a deposit for a specific purpose and a general deposit. This appears to be the practical method of handling the problem since the transaction has the effect of a general deposit. In the case of a special deposit the depositor is entitled to receive back the identical thing deposited and the bank is considered a mere bailee to whom the title to the fund does not pass.[6] In such a situation the recovery by means of the trust device is satisfactory if the fund is traceable. However, in the "specific purpose" situation a use of the trust device to create a preference appears to be unsound because there is no wrongful commingling.

The principal case is supported by the numerical weight of authority but it is submitted that the minority view as set out in the Texas case represents the sounder logic and a more common-sense application of the law to business transactions.[7]

—FREDERICK H. BARNETT.

INJUNCTIONS — AIRPORTS — NUISANCE. — Defendants were establishing an airport, not fully developed at the time of trial, on 272 acres of land contiguous to Cleveland, Ohio. Plaintiffs, owners of 135 acres of adjoining land, which they used for agricultural and residential purposes, applied for an injunction against the opening of the airport, on the ground that it would be a

[4] "It is the custom of banks, upon receiving money for a specific purpose, as to pay a note, to mingle the funds with their own, and to pay the note at the proper time, just as they would a check; the funds are not kept separate. There is no practical difference between such a deposit and a general deposit, and it seems clear that the bank should be held to the same liability as for a general deposit." MORSE ON BANKS AND BANKING (6th ed. Voorhees, 1928) § 210.

[5] First State Bank of Seminole v. Shannon, 159 S. W. 398 (Tex. Civ. App. 1913).

[6] Alston v. State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659 (1891); McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185 (1907); Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168 (1821); Gibson v. Erie, 196 Pa. 7, 46 Atl. 102 (1900).

[7] See generally 1 PATON'S DIGEST (1926) § 1789.

nuisance, and against repeated flights over their land, on the ground that they would be trespasses. It appeared that there would be much annoyance to plaintiffs, from noises made by warming up, taking off, and low flying over their land, but the lower court granted only partial relief, enjoining the raising of unnecessary dust, the dropping of circulars, and flights over plaintiff's land below 500 feet.[1] On cross appeal the plaintiffs showed annoyance and discomfort already suffered, and a property depreciation of $65,000, whereupon the Circuit Court of Appeals enjoined all operation of the airport, as located, as a nuisance. *Swetland v. Curtiss Airport Corp.*[2]

The recent rapid growth of aviation has presented many judicial problems, most of them turning on the conflict of aerial navigation with property rights characterized broadly by the famous Latin maxim, "*Cujus est solum ejus est usque ad coelum.*" Many arguments have been advanced for the freedom of the airspace,[3] and considerable legislation has been drafted with the intention of strengthening the rights of the aviator as against those of the landowner.[4] On the other side of the question are numerous decisions applying the famous maxim to trespasses committed above the surface of the land.[5]

Common sense makes it obvious that the landowner is not much concerned with any theoretical right he may have to object to, or at least to sue for, occasional high flights over his property. Yet it is equally clear that he is vitally interested in the safe and comfortable enjoyment of the land he owns or occupies. The lower court in the *Swetland* case indicated a height at which ownership of space becomes subject to the public right of navigation, basing its decision on § 10 of the Air Commerce Act of 1926,[6] and on the Ohio Aeronautics Act of 1929,[7] apparently considering the question almost entirely one of technical trespass, and in effect, ignoring the rights of the adjoining landowners against unreasonable noise and apprehension of danger. Height fixation for aerial

[1] Swetland v. Curtiss Airport Corp., 41 F. (2d) 929 (D. C., N. D. Ohio, 1930).

[2] 55 F. (2d) 201 (C. C. A. 6th, 1932).

[3] *Supra*, n. 2, at 202, n. 1, for a reference to some of the literature on the subject.

[4] FED. AIR COMMERCE ACT, 49 U. S. C. A. §§ 171-231 (Supp. 1931). (Note especially § 180); UNIFORM AERONAUTICS ACT, 9 UNIF. LAWS ANN. 13-21.

[5] Hannabalson v. Sessions, 116 Iowa 457, 90 N. W. 93 (1902); Smith v. Smith, 110 Mass. 302 (1872); Hoffman v. Armstrong, 48 N. Y. 201 (1872).

[6] 49 U. S. C. A. § 173 (e) (Supp. 1931).

[7] OHIO GEN. CODE (Page, Supp. 1932) §§ 6310-38—6310-49.

navigation is a regulatory measure, and while an unmarked, almost unascertainable line might furnish a workable basis for a traffic rule, it would seem unsound when transferred from the field of the police power and applied as a conclusive measurement of property rights, which is the ultimate result of this decision.[8]

Turning to the decision of the Circuit Court of Appeals, we find the first application of the nuisance theory to the flight of aeroplanes.[9] However, novel as that theory may appear as employed with reference to aviation, it is a theory which has been resorted to by courts in dealing with every device in any way comparable to an airport. Mining and manufacturing corporations and railroads have in turn been forced to adapt their methods and equipment to the standards involved in the nuisance concept.

Frequently, analogies are drawn between railroads and aerial navigation, with a view to defeating the application of injunctive principles to the latter. The fallacy of such analogies lies in the attempted comparison of established railroad lines with airports. Railroads have, by legislation, been given the right of eminent domain. After they have exercised that right, the operation of their lines, however offensive to the owners of adjoining property, is not subject to injunction. The right of establishing corporate airports may ultimately be derived under the same power of condemnation, when air transportation has become a public utility.[10] It is to be noted, however, that the peculiar rights of railroads do not prevent the injunction of roundhouses and switchyards, when they are nuisances in themselves.[11] In the principal case, an airport was dealt with in the same way, and apparently such a method proved to be an effective safeguard for the private rights involved, without being too great an affront to corporate and public needs.

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[8] The lower court held the avigation legislation in question constitutional, on the ground that it is merely regulatory in nature. *Supra* n. 1, at 938.

[9] Apparently the first action of this kind ever bought on the theory of nuisance was Smith v. New England Aircraft Co., 170 N. E. 385 (Mass. 1930). In that case the injunction was denied because the noise, proximity, and number of aircraft were not such as to be harmful to the health and comfort of ordinary people, and fright and apprehension of danger or injury to live stock or property were not present.

[10] W. VA. REV. CODE (1931) C. 8, art. 11, § 3 makes provisions for the condemnation of land for airports by counties, cities, towns, and villages.

[11] Richards v. Washington Terminal Co., 233 U. S. 546, 34 S. Ct. 654 (1914); Baltimore and Potomac Railroad v. Baptist Church, 108 U. S. 317, 2 S. Ct. 79 (1883); 137 U. S. 568, 11 S. Ct. 185 (1891).