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Eminent Domain--Constitutional Taking-- Recovery Against Municipal Airport by Adjacent Property Owners

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at the hands of the parent'". *Mesite v. Kirchenstein*, 109 Conn. 77, 84, 145 A. 753, 755 (1929), as quoted in the principal case at 243.

The policy, as above stated, is clearly for the benefit of society, yet it is denied application in this instance, not on the basis of merit, but rather upon a technical distinction of legal relationships. It is difficult to visualize a valid reason for such a distinction. If the rational foundation of the rule is at all sound, it must be equally sound when applied to circumstances involving a stepparent standing in loco parentis. The undesirable conditions sought to be prevented by the application of this rule are present indeed in the situation presented by the principal case.

W. E. M.

EMINENT DOMAIN—CONSTITUTIONAL TAKING—RECOVERY AGAINST MUNICIPAL AIRPORT BY ADJACENT PROPERTY OWNERS.—Action by owners of vacant and unoccupied land adjoining a municipally owned airport to recover the diminution in value of their land caused by the fact that airplanes passed over the land at low altitudes while taking off and landing. Claims were stated in trespass and nuisance but the essence of the action was based primarily on the theory that the flights constituted an unconstitutional taking of property. *Held*, that the alleged continuing and frequent low flights over the land amount to a taking of an air easement for the purpose of flying airplanes over the land. The municipality had the power to acquire an approach way by condemnation but failed to exercise that power with the result that the continuing flights constituted an unconstitutional taking by the municipality. *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960).

The fundamental problem presented in this case was one of first impression in Washington, extending and settling areas of dispute raised in a previous case. *Anderson v. Port of Seattle*, 49 Wash. 2d 528, 304 P.2d 705 (1956). For a report of the principal case on the first hearing, see *Ackerman v. Port of Seattle*, 329 P.2d 210 (Wash. 1958).

Two conflicting fundamental principles are involved in the instant case, one being the ownership of private property and the right to the free use and enjoyment thereof, the other being the authority of the government to regulate the use and utilization of private property for the promotion of the public welfare. The

problem is further complicated by the established doctrine exempting governmental units from being subjected as defendants to ordinary actions in the courts. *United States v. Lee*, 106 U.S. 196 (1882). Perhaps in no other area of law are cases so often lost because of the failure of practitioners presenting them to see the theory of liability upon which a successful suit could be based.

A study of cases wherein property owners have sought recovery against operators of airports for the operation of planes over land adjacent thereto discloses that relief has been sought by the aggrieved property owners upon the theories of trespass, nuisance, and constitutional taking. *United States v. Causby*, 328 U. S. 256 (1946); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Hyde v. Somerset Air Service*, 1 N.J. Super 346, 61 A.2d 645 (1948). The *Smith* case, *supra*, perhaps the earliest adjudication concerning the relative rights of the aviator and the landowner, recognized an invasion at low altitudes of unoccupied airspace as constituting a technical trespass. Apparently the common law doctrine, (as expressed in the phrase, *cujus est solum ejus est usque ad coelum*) that ownership of the land extends to the periphery of the universe, was followed. The common law maxim, a product of the pre air-traffic age was developed in cases involving overhanging eaves and other physical trespasses, as illustrated by the case of *Hannabalsen v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902), where the plaintiff in a dispute with his neighbor extended his arm over a common fence. This was held to be a trespass entitling the defendant "gently and without unreasonable force" to remove the offending arm.

However, vital the *ad coelum* doctrine was in our law, it was tersely rejected by the Supreme Court of the United States in the *Causby* case, *supra*, the court holding that the doctrine has no place in the modern world, that the air is a public highway within limits, and that recognition of private claims to the airspace would seriously interfere with the public interest and transfer into private ownership that to which only the public has a just claim. Thus the modern rationale is that there exists a public right of aviation over the lands of all owners and such aviation cannot be said to be a trespass without taking into consideration the question of altitude.

In determining whether the landowners' use and enjoyment of the surface have been subjected to unreasonable interference, it is apparent that the theory of nuisance as a basis of relief is

equally available with trespass in cases involving invasion of the surface area. In *Hyde v. Somerset Air Service, supra*, in a suit for an injunction to restrain the operator of an airport from operating airplanes over complainants' land, it was held that the flights of the planes unreasonably and unjustifiably impaired the use and occupation of the land, entitling the complainants to injunctive cases involving flights over land, the law of private nuisance is a law of degree, hence projecting in each case the factual question whether there is an appreciable and substantial injury causing material discomfort and annoyance.

While the cases thus discussed illustrate that the uniqueness of the relationship of modern air transportation to property rights of land owners has been recognized, the decisions of the courts have not clearly established the relative rights of the two interests. However, it has been established that the landowner in the present day owns at least as much of the superadjacent airspace as he can occupy and utilize in connection with his land. *United States v. Causby, supra*; *Delta Air Corp. v. Dersey*, 193 Ga. 862, 20 S.E.2d 245 (1942); *Hyde v. Somerset Air Service, supra*; *Yoffe v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956); *Gardner v. County of Allegheny*, 382 Pa. 520, 114 A.2d 491 (1955). Recognizing that the landowner owns some interest in the airspace the theory of recovery used in the principal case illustrates the proposition that, within some zone or airspace, repeated invasions by planes may constitute a taking of property; the rationale of such a theory being that over a period of time the airplane operator could acquire a prescriptive right to repeated flights.

The concept of constitutional taking in order to protect the landowner who complained of intrusions in the air above him apparently originated in a case where guns had been fired over land. *Portsmouth Co. v. United States*, 260 U.S. 327 (1922). The theory was also alluded to in at least two cases involving intrusions by airplanes. *Delta Air Corp. v. Kersey, supra*; *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). In neither of the latter two cases was there any holding to the effect that recovery might be had on a constitutional basis as recovery was sought on other grounds. In any event, the authority for allowing recovery on a constitutional basis was established in the *Causby* case, *supra*, the court holding that the continued use of airplanes over the property constituted a taking of the property by the United States.

A major point of controversy in the principal case was presented in deciding the relative possibility of recovery in situations where the landowner is not actually using the airspace. As previously indicated, some courts hold that the landowner has property rights in as much airspace as he is able to occupy or use in the enjoyment of his land regardless of whether the land is actually being used. *Thrasher v. City of Atlanta*, *supra*; *Smith v. New England Aircraft Co.*, *supra*. Other courts have contended that the landowner has a property interest only in the airspace he actually utilizes. *Brandes v. Mitterling*, 67 Ariz. 349, 196 P.2d 464 (1948); *Delta Air Corp. v. Kersey*, *supra*. Thus, it is clear that before a decision can be reached on whether a taking has occurred, an initial question to be resolved is whether a landowner has any property interest in the superadjacent airspace. The relative merits of the two views are parallel to the basic concepts of private ownership and enjoyment of property and the public interest in the development of modern air transportation and have presented a real difficulty to the courts when called upon to resolve issues involving these diverse and competing interests.

The question which next arises is whether these property rights were taken under the eminent domain power so that the owner of the land has a constitutional right to just compensation. It is no doubt true that private convenience must often yield to public convenience but private comfort, health, and safety are still precious in the eyes of the law, and it is equally true that private property cannot be taken or damaged for public use without just compensation. *Hardy v. Simpson*, 118 W. Va. 440, 190 S.E. 680 (1937); *Reilley v. Curley*, 75 N.J. Eq. 57, 71 Atl. 700 (1908); *Hennessey v. Carmony*, 50 N.J. Eq. 616, 25 Atl. 374 (1892). As to the requirement of compensation, the Fifth Amendment of the Federal Constitution requires the payment of compensation only when private property is *taken* for public use but many of the state constitutions, including that of West Virginia, require compensation when private property is *taken* or *damaged* for public use. "Private property shall not be taken or damaged for public use, without just compensation;" W. VA. CONST. art. III, § 9. Without further analysis it appears that the provisions of the state constitutions of the type mentioned afford a broader protection to landowners than does the Fifth Amendment of the Federal Constitution.

In deciding that property rights were taken under the eminent domain power of the state, the court in the principal case based

its decision on the presupposition that the municipality, having power to condemn property so as to provide an adequate approachway, failed to do so with the consequent result that the landowners property was being used and appropriated as an approachway without just compensation having been paid therefor. The court concluded that not only was an unconstitutional taking alleged but also a taking by the municipality, although the municipality itself operated no airplanes.

The principal case, in holding that the continuing flights over vacant land amounted to a taking of an air easement, fortified the rights of property owners even though each case will pose the enigmatic query as to the extent of a property owners' interest in the superadjacent airspace. If the findings show a protected interest, the airport owners, as well as the airplane owners, may be held liable for the diminution in real estate values which occur in the vicinity of airports. The opinion of the Washington court represents a highly skillful solution, adjusting the rights of two diverse interests, wherein the right to the use and enjoyment of private property was preserved while at the same time the promotion of the public interest in the development of modern air transportation was achieved, by recognizing the right of the government to take private property but subject to the due process requirements of the constitution.

H. S. S., Jr.

EVIDENCE—PERSONAL INJURY CASES—BLACKBOARD SUMMATION.—*P's* counsel, in an action for injuries, employed the use of a blackboard during his summation, upon which he placed an itemized list of figures, some of which were supported by evidence and others derived from his own calculations. *Held*, reversing and remanding for a new trial concerning the quantum of damages, a blackboard may be used in summation arguments to place thereon figures supported by evidence, but placing amounts thereon representing pain, suffering, and mental anguish involved speculation on the part of counsel and was putting before the jury matters not in evidence. *Certified T.V. & Appliance Co. v. Harrington*, 109 S.E.2d 126 (Va. 1959).

Two pertinent problems in this case merit discussion in relation to each other. One involves the discussion of pain and suffering in monetary terms before the jury and the other is the use of a blackboard in counsel's closing argument.