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Eminent Domain - Remedies of Owners of Property - Whether Frequent Low Flights over Private Property in Connection with Municipality Operated Airport Amount to Appropriation of Such Property to a Public Use

H. Q. Rohde

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DISCUSSION OF RECENT DECISIONS

case of State ex rel. Oklahoma Tax Commission v. Rodgers, wherein an appellate court of Missouri held that a revenue law is not penal, for a revenue law defines the extent of the citizen’s pecuniary obligation to the state, in return for the protection afforded him by the state; while the sole object of a penal law is to punish a wrongdoer. The court then concluded that a suit for the collection of taxes was an action in the nature of debt for moneys due, and should be enforceable in a sister state. These conclusions formed the basis for the result reached by the Supreme Court of Illinois in the instant case.

After forty-four years of silence in the Illinois law on the subject, the instant case now exhibits a purpose on the part of the Supreme Court of Illinois to follow the modern and more enlightened viewpoint. Inasmuch as the action for the collection of taxes due a sister state is an action in the nature of debt for moneys due, the simplest ideas of comity would seem to compel the enforcement of the revenue laws of the sister state. The contrary doctrine was the product of an earlier commercial world where two sovereigns were in bitter political and economic competition. Such a doctrine has no place in a union of states such as the United States. A taxpayer who enjoys the protection of the government of a particular state should bear his share of the expense of maintaining that government and should not be allowed to escape this obligation by crossing state lines.

J. Singer

EMINENT DOMAIN—REMEDIES OF OWNERS OF PROPERTY—WHETHER FREQUENT LOW FLIGHTS OVER PRIVATE PROPERTY IN CONNECTION WITH MUNICIPALLY OPERATED AIRPORT AMOUNT TO APPROPRIATION OF SUCH PROPERTY TO A PUBLIC USE—A new question regarding the rights of an owner of realty to the airspace above his property has been answered by the Supreme Court of Washington as a result of its decision in the case of Ackerman v. Port of Seattle. Therein, owners of both vacant and improved realty located in the approach area of a municipally owned airport sought to hold the municipality liable for appropriating their property

Conflict of Laws (1948 Supp.), § 610, pp. 174-5, no opinion is expressly stated but it is said therein that the more desirable result would be to enforce foreign revenue laws.


1—Wash. —, 329 P. (2d) 211 (1958). Mallery, J. filed a dissenting opinion, concurred in by Hill, C.J., and Donworth and Ott, JJ.

2 The plaintiffs also sought to hold all scheduled airlines using the airport liable, but the municipality is the only defendant in this appeal because the airlines have made a settlement with the plaintiffs.

3 A nuisance theory of liability and a trespass theory of liability were also set forth in the complaint, but consideration of these theories is outside the scope of this paper.
by reason of frequent low flights over said property. Although the municipality operated no airplanes, the plaintiffs alleged that it was responsible for the frequent low flights because the airport facilities were inadequate. A demurrer by the municipality was overruled as to the owners of improved land but was sustained as to the owners of vacant land. On appeal, the Supreme Court of Washington reversed the order sustaining the demurrer when it concluded that there was a sufficient taking to amount to an appropriation as to vacant land as well as to improved land.

The property rights of landowners in the airspace above their land have recently required re-examination because of the development of modern air transportation. The common law theory as to the ownership of airspace and the legal incidents thereof is summarized in the maxim "cujus est solum est usque ad coelum", literally, he who owns the soil owns everything above. The ad coelum maxim, however, emanated from cases where the operative facts and conditions were close to the earth as where overhanging structures were erected on adjoining land. While the theory it embodies is still appropriate when applied in cases of overhanging structures, it does not adequately solve cases involving modern air transportation. As a practical matter, all courts have recognized that it is mere dictum with relation to such cases and that the social welfare of the community would be impaired by extending it to such cases.

While it has been recognized that the relationship of modern air transportation to property rights of landowners in airspace is a new problem for which a new solution is needed, the courts have not been entirely in accord as to what the complete solution should be. They have been in substantial agreement that property rights in superjacent airspace must be based upon occupancy, use and enjoyment thereof. To elaborate, most courts agree that the landowner's rights cannot exceed his ability to utilize the superjacent airspace and that the altitude to which they extend therefore depends upon the facts and circumstances of the particular case.

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4 The noise attendant to flights and warm-up and the inherent fear resulting from such flights were also alleged in the complaint to show a taking of private property.


Substantially all courts further agree that the landowner has property rights in airspace when he is presently and actually occupying, using and enjoying it. But the point at which the courts depart is crucial to the principal case. Some courts have contended 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 such use is an accomplished fact. This view is based upon the possible effective possession theory under which it is not decisive that the landowner does not at present make possible effective possession a realized occupation. Other courts have contended that the landowner owns only the airspace he utilizes. This view is based upon the theory that the law should not uphold attempts of landowners to stake out unused spaces in the air in order to protect some future contemplated use. The relative merits of the possible effective possession theory are that it adheres as closely as is practicable to the common law point of view and, by so doing, offers greater protection to the right of the ownership of private property which is basic to American law. The relative merits of the actual use, occupancy and enjoyment theory are that it more effectively promotes the public welfare by facilitating the development of modern air transportation and it does this without encroaching upon the owner’s right to presently use his property. In the principal case, the court adopted the former theory and it therefore held that the owners of vacant land did have property rights in the superjacent airspace above their land. If it had adopted the latter theory, it would seem that it would have held that the owners of vacant land had no such property rights.

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. While there are several cases proceeding on a nuisance theory and several more proceeding on a trespass


8 See cases cited in note 7, ante.


theory, there are almost none proceeding on a taking theory. The first case in which the opinion of the court indicated that it might have been possible to proceed on a taking theory was in the case of Thrasher v. City of Atlanta.\textsuperscript{11} Therein, the court raised the question of whether or not the plaintiff might have been able to recover for permanent injury to his real estate under the constitutional provision against the taking of private property for public purposes without adequate compensation being first paid. The court did not answer the question, however, because the plaintiff did not seek recovery upon that theory.

The first case in which it was held that there was a taking was in the case of United States v. Causby.\textsuperscript{12} Therein, it was held that a landowner has a right to compensation by virtue of the Fifth Amendment to the federal constitution if the approach to the runways of a federal airport is such that frequent low flights directly interfere with the use of his land. It is to be noted that both the Thrasher case and the Causby case proceed upon the possible effective possession theory and that there is dicta in the Causby case indicating that frequent low flights causing a diminution in the value of vacant land would be the basis for a cause of action for a taking of vacant land. More recently, dicta in the case of Gardner v. County of Allegheny\textsuperscript{13} indicated that the holding in the Causby case would be highly persuasive upon state courts. Therein, the court said that it is as clear as crystal under the authority of the Causby case that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land amount to a taking. In the principal case, the court relied mainly upon the Causby case in deciding that property rights in superjacent airspace had been taken under the eminent domain power so that the owner of land had a constitutional right to just compensation. By so doing, the court extended the rule of the Causby case to municipally owned airports. In addition, the holding of the court was in accord with the dicta in the Causby case stating that a cause of action exists for a taking of superjacent airspace over vacant land.

By deciding that the taking of an easement of airspace within the possible effective possession of owners of vacant land by frequent low flights was a taking requiring just compensation, the Supreme Court of Washington strengthened the rights of property owners. In so doing,


\textsuperscript{13} 382 Pa. 88, 114 A. (2d) 491 (1955). The case was actually decided on jurisdictional grounds.
it solved a new problem without departing from principles basic to Ameri-
can law. The right to the ownership of private property and to the free
use and enjoyment thereof was preserved. At the same time, the authority
of the government to take private property for the promotion of the public
welfare was recognized and merely subjected to the usual due process
requirement.

H. Q. Rohde