Washington Law Review

Volume 41
Issue 3 *The Common Market—A Symposium; Annual Survey of Washington Law*

6-1-1966

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DETERMINATION OF TIME OF TAKING OF AVIGATION EASEMENT

Plaintiffs, owners of property lying under the flight path of planes using the airport owned and operated by defendant,[1] brought inverse condemnation[2] actions alleging defendant had acquired an avigation easement. Having concluded that the date of the taking was, as a matter of law, when the first regularly scheduled use of the runways in question began, the trial court dismissed the complaints because plaintiffs acquired their properties after that date. On appeal, a unanimous court reversed and remanded. *Held*: The taking of an avigation easement occurs, not when the first regularly scheduled commercial use of an airport commences, but when low flights become continuing and frequent over the affected servient lands. *Anderson v. Port of Seattle*, 66 Wash. Dec. 2d 443, 403 P.2d 368 (1965).

Although most courts recognize the futility of applying dated theories of trespass or nuisance to airport noise problems,[3] they generally attempt to adjust to avigation easement problems by resort to some unfortunate hybridization of these traditional common law concepts.[4] In the landmark case, *Martin v. Port of Seattle*,[5] the Washington Supreme Court recognized the right to recover in inverse condemnation in such situations as being derived from the state constitution.[6]

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[1] Ackerman v. Port of Seattle, 55 Wn. 2d 400, 348 P.2d 664 (1960), established that the Port of Seattle, a municipal corporation, was the proper defendant in an action in inverse condemnation, despite the fact that the Port does not actually own or operate aircraft. The Port was held liable on the theory that it could have exercised eminent domain and failed to do so adequately. Holding the owner-operator liable is theoretically and practically superior to holding numerous and changing airlines who use the airports. See Note, 65 COLUM. L. REV. 1428, 1438-39 (1966). For similar holdings, see Matson v. United States, 150 Ct. Cl. 389, 171 F .Supp. 283 (1959); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962). See also Comment, 39 WASH. L. REV. 920, 928-32 (1965).

[2] "Inverse condemnation" is an eminent domain proceeding in which the property owner brings suit to compel condemnation of his property, in whole or in part, and to recover the value of the private land which has been appropriated to public use, but which has not been fully condemned. See Martin v. Port of Seattle, 64 Wn. 2d 309, 310 n.1, 391 P.2d 540, 542 n.1 (1964).

[3] See generally Note, *Airport Noise: Problem in Tort Law & Federalism*, 74 HARV. L. REV. 1580 (1961); Note, 47 MINN. L. REV. 889 (1963).

[4] See, *e.g.*, City of Newark v. Eastern Airlines, 159 F. Supp. 750 (D.N.J. 1958) (trespass); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942) (nuisance); Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942) (trespass); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962) (nuisance).

[5] 64 Wn. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965), 39 WASH. L. REV. 398 (1964). For an extended discussion, see Comment, 39 WASH. L. REV. 920 (1965).

[6] WASH. CONST., art. 1, § 16 provides: "No private property shall be taken or damaged for public or private use without just compensation having first been made...."

The right exists whenever there is a decline in market value due to impaired use and enjoyment of the land resulting from the taking of an avigation easement.

Since the parties in the principal case stipulated the existence of the easement, the only question raised was the time of the taking. The court grounded its holding upon *Ackerman v. Port of Seattle*,[7] which held that "continuing and frequent low flights" over appellant's land amounted to the taking of an air easement above the land. *Ackerman* also established the measure of damages applied in the principal case. This was stated as "the difference between the value of [the] property before the airport was extensively used and the value thereafter, plus interest from that date."[8]

It can be argued that persons purchasing land adjacent to a runway after the start of commercial flight operations should be said to have assumed the risk that conditions will deteriorate.[9] Such an approach is cogent only if the time of the taking is assumed to be when the first commercial airplane flew over a particular plaintiff's property with the intent on the part of defendant to continue such flights.[10] This was essentially the view of the lower court in the principal case.[11] While this simplistic approach may demand fewer intellectual machinations by judges and attorneys, its factual unsoundness is demonstrated by the evidence in the principal case. Plaintiffs made it quite clear that when flight operations commenced in 1947 there was insufficient interference with the use and enjoyment of their lands to precipitate decline in market value.[12] Since *Martin* established decline in market value as the primary basis for recovery in an inverse condemnation action, it follows that the flight of a single commercial aircraft with the requisite intent[13] should not be sufficient to constitute a taking. The "first flight" analysis would virtually immunize the airport from liability to all who became purchasers after the date of the first commercial flight

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[7] 55 Wn. 2d 400, 348 P.2d 664 (1960).

[8] *Id.* at 413, 348 P.2d at 672.

[9] Comment, 47 MINN. L. REV. 889, 898 (1963). Consider PROSSER, TORTS § 92 (3d ed. 1964), concerning the plaintiff who has "come to the nuisance."

[10] The "first plane" approach was taken in Highland Park v. United States, 150 Ct. Cl. 389, 161 F. Supp. 597, 600 (1958), which held that the taking was complete and the prescriptive period began to run "...when the first jet bomber flew over plaintiff's property, with the intent on the part of the defendant to continue to fly them over it at will."

[11] Brief for Appellants, pp. 30-31.

[12] Brief for Appellants, p. 25. Indicative that plaintiffs did not think that flights were "frequent and continuous" in 1947 is that there were 341 flights in 1947, and 90,120 in 1958. They contended that the taking occurred during 1952-1953.

[13] See text accompanying note 10 *supra*.

—even though there was in fact no such interference as would have given the purchaser the benefit of reduced purchase price. Such a result could be a trap for the unwary who did not include in the contract of sale an assignment of their grantor's pre-existing cause of action, if any.[14]

The desirability of the result in the principal case lies ultimately in policy considerations. Implicit in the holding is the idea that, since the airport exists for the good of the community, the community and not the individual landowners should bear the cost of its operation.[15] The court clearly considers the public interest in air travel, commercial terminals, and civic growth to be subordinate to the public interest in the sanctity of private property. In addition, since a contrary result could have the effect of freezing land ownership due to unreasonable investment risks, greater freedom of alienability is promoted.

Although the court appears to have reached an equitable result—indeed, the only result possible given the language of *Ackerman* coupled with the progressive approach demonstrated in *Martin*—the decision is conspicuous in its brevity and silence. It seems obvious that the lower court had trouble in determining what constituted "continuing and frequent" low flights within the meaning of *Ackerman*; it seems equally obvious that the appellate court might have reformulated the *Ackerman* language. On the other hand, resort to such concepts as

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[14] Although there is no direct Washington holding on the point, it appears that a grantor's cause of action in inverse condemnation is assignable. In Silverstone v. Harn, 66 Wash. 440, 120 Pac. 109 (1912), it was stated that the right to compensation for a taking in eminent domain vests in the owner of the land at the time of the taking, and is assignable. A cause of action for damage to real property has long been regarded as assignable. Jordan v. Welch, 61 Wash. 569, 112 Pac. 656 (1911). Indicative of the liberality of the Washington court vis-à-vis assignability of a cause of action is Cooper v. Runnels, 48 Wn. 2d 108, 291 P.2d 657 (1955), holding that a cause of action for damages to personal property is assignable. In *Cooper*, the court stated the test of assignability as being whether the cause of action would survive to the personal representative of the assignor under common law or statute. Since *Cooper*, the survival statute has been considerably broadened. WASH. REV. CODE § 4.20.046 (1965) provides:

> All causes of action by a person ... against another person ... shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise *on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment* of this section ... [Emphasis added.]

Clearly, it appears that even if the right to assign a cause of action in inverse condemnation did not exist prior to 1961, which seems contrary to the above cases, the right does exist under literal reading, at least, of WASH. REV. CODE § 4.20.046 (1965).

[15] This attitude was made clear in Martin v. Port of Seattle, 64 Wn. 2d 309, 319, 391 P.2d 540, 547 (1964) (dictum), where the court said: "When the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay."

"direct and immediate"[16] or "substantial"[17] would not solve jury instruction problems of a trial court. Thus, it is probably fortunate that the court retained its earlier language, thereby relying upon future cases to expand the legal points involved. Perhaps the most realistic approach at this early state of the law of avigation easements was taken in *Thornburg v. Port of Portland*,[18] where the Oregon court said:

> In submitting to a jury a case such as we have before us, the trial court is confronted with the need to verbalize rules as abstract as any to be found in the law, but... the ingenuity of trial judges in formulating meaningful instructions to juries is usually equal to the task.[19]

While this admittedly begs the question of what should go into a proper jury instruction, it has the advantage of allowing time and different fact situations to clarify the test for finding a taking.

The Washington court seems clearly correct in selecting one of the last in a series of possible value-affecting events (which would appear to include, sequentially, the announcement of airport plans, completion of airport, first commercial flight, continuing and frequent low flights, et cetera) as fixing the critical time of accrual of a cause of action. The continuing and frequent low flight test seems considerably narrower than the simple decline-in-market-value formula and appears to be the appropriate rule. Under this rule, before collecting, a landowner may have to wait for a few years beyond the commencement of an actual decline in neighborhood land values, but there seem to be clear countervailing benefits.[20] In short, the best approach to value-affecting alternatives seems to be to pick an event which is both sufficiently specific,

[16] See, *e.g.*, United States v. Causby, 328 U.S. 256, 266 (1946), where the Court spoke in terms of direct and immediate interference as a measure of taking.

[17] See, *e.g.*, Herring v. United States, 142 Ct. Cl. 695, 162 F. Supp. 769 (1958); Ackerman v. Port of Seattle, 55 Wn. 2d 400, 348 P.2d 664 (1960), which involved the concept of substantiality of interference.

[18] 233 Ore. 178, 376 P.2d 100 (1962), 41 TEXAS L. REV. 827 (1963).

[19] 376 P.2d at 110.

[20] The benefits appear to be the following: (1) If the original owner continues to hold, he does eventually collect. (2) If he sells before low flights become continuing and frequent, and if land values have already dropped, he may increase the price he would otherwise get by passing the clear prospect of a cause of action on to his grantee. See note 14 *supra*. (3) If the price received reflects the full market value decline with regard to the cause of action, so long as the rule is clearly established, the grantor can rely on the benefits of a reservation in the contract of sale of rights to part or all of the prospective award. (4) On the other hand, if land values have not yet dropped, fixing the accrual of the cause of action at a relatively late event minimizes the possibility that a grantor will sell without having exercised an already accrued right, thereby depriving the grantee redress when the land value actually drops. (5) Moreover, if the decline in value is spaced over a series of events, picking a late event minimizes conceptual difficulties in giving an award theoretically attuned to the impact of the fully-operating airport upon land values when, in fact, there is little interference with use and enjoyment.

so that in the future landowners can frame their sale arrangements in deliberate reliance on it, and as late as possible in the chain of value-affecting events, so that the unwary will not find themselves without redress or with only partial redress for an actual decline in value.

The Washington cases continue to leave open the question whether a cause of action accrues whenever there is a major change in the quality of user of the prescriptive easement, as by a change from propeller driven aircraft to jets or from jets to rockets or such mammoths as supersonic transports. As has been pointed out,[21] *Martin* opened the door to an affirmative answer in such cases. Since the court in the principal case did not abrogate any of its earlier pronouncements, the answer seems still to be an affirmative one. Although this may evoke *in terrorem* responses, the result is in keeping with the policy, integral to the result in the principal case, that the public pay for what it takes.

ESTABLISHMENT OF INTEREST IN INTESTATE DECEDENTS' ESTATE

Plaintiff, surviving member of a thirteen year meretricious relationship with defendant's decedent, brought an action to establish a half-interest in the estate, consisting of both real and personal property. She stated alternative theories of recovery—including resulting trust, partnership, joint venture, and a pooling agreement—all but the first being contractually based. Although most of the assets of the estate were accumulated during their cohabitation, plaintiff was unable to prove by "clear, cogent, and convincing" evidence the existence of any significant monetary investment from her personal funds. The evidence indicated that her contribution to the accumulated assets consisted primarily of labor, including assisting her partner, a masonry contractor, in building, finishing, and landscaping their home, and in some of his commercial ventures. The trial court, in denying recovery, found that no specific agreement existed, and that it was impossible to trace the funds used to purchase the property. On appeal, the Washington Supreme Court affirmed, over vigorous dissents, in a 5-4 decision. *Held:* When title to property acquired during a meretricious relationship is held by a decedent, the survivor who seeks to establish a half-interest in the property, but is unable to demonstrate a contractual arrangement, will be unable to recover the value of services

[21] Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?*, 39 WASH. L. REV. 920, 938 (1965).