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Property - Eminent Domain - Surrounding of Cemetery by Airport Not a Taking

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Clark [24] would appear to be the simple solution since laymen look upon the certificate as property. The argument that the share is located in the state of incorporation fails to take into account that frequently little if any corporate property is actually located in that state.

North Dakota has the usual escheat statutes.[25] Statutes also state that the state owns all property which has no owner.[26] The state under the escheat laws acquires property by reversion and not by succession.[27] In addition the state has an unusual statute prohibiting farming by corporations[28] and providing for an escheat of such farm land in the event the corporation fails to dispose of it.[29] If the problem should arise in North Dakota, the courts might do well to hold contra to the instant case and provide for the escheat in the jurisdiction in which the certificates are located. It would seem wise to avoid the legal gobbledygook which has developed around the concept of the intangibility of stock certificates and treat the certificates as the property with a location of its own. This would tend to recognize the practice of most people including lawyers, outside the court room, of dealing with the certificates as property since they can be disposed of for money. In the present tax-minded era, however, no doubt the courts would follow the decision of the instant case should the case of first impression be one in which the stock certificates of a domestic corporation were located elsewhere.

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Property — Eminent Domain — Surrounding of Cemetery by Airport Not A Taking. — The defendant city acquired by eminent domain all of the land surrounding a cemetery for a municipal airport. The cemetery corporation, contending that a taking had occurred, brought an action of mandamus to compel the city to condemn the cemetery and compensate the corporation. The lower court dismissed the petition. On appeal it was *held*, that the damages were only consequential and that a taking had not occurred. A dissenting opinion expressed the view a taking had occurred. On motion for clarification of the opinion ,the court decided per curiam that the basic issue was whether mandamus would lie, and answered in the negative. *Friendship Cemetery of Ann Arundel County v. City of Baltimore*, 81 A.2d 57 (Md. 1951).

Legal problems arising from the operation of aircraft have increased proportionately with the increase in the number of airports which have sprung up to accomodate the expansion of flying. Closely connected with the establishment of municipal airports under eminent domain proceedings is the vexing question of what constitutes a taking of property. Thus, though the court eventually decided the case on other grounds, the present decision presents a problem of considerable importance.

"Taking," under an early view,[1] was effected only when there was an

24. 282 Fed. 300 (E.D. Pa. 1922), *aff'd.*, 2 F.2d 442 (3d Cir. 1924).
25. N.D. Rev. Code §§56-0114, 54-0102 (1943).
26. N.D. Rev. Code §§47-0110, 54-0102 (1943).
27. Delaney v. State, 42 N.D. 630, 174 N.W. 290 (1919).
28. N.D. Rev. Code §10-0601 (1943).
29. N.D. Rev. Code §10-0606 (1943); Asbury Hospital v. Cass County, 326 U.S. 207 (1945) (constitutionality upheld).

1. *See* Philadelphia & Trenton Railroad Co., 6 Whart. 25, 46 (1840).

immediate divestment of title or a physical appropriation of the property. The broad modern view is that a "taking" may include an abridgement, injury or destruction of an adjacent landowner's rights or privileges,[2] such as easements. Hence a taking may occur without actually divesting a landowner of his title or possessory interest therein. The United States Constitution provides that private property shall not be taken without compensation,[3] but the definition of "taking" has been made by the courts.[4] The federal provision against "taking" has been said to apply only to the legislative branch of government.[5] Most states have similar provisions in their constitutions, as does Maryland.[6] Material interference with access,[7] or light, air, and view [8] by abutting owners or government bodies is generally considered to be a taking, but these conditions were not present in the instant case, since an improved road continued to serve the cemetery.

In regard to airspace, the old common law doctrine that an owner of land owned it *usque ad coelum* has necessarily been greatly modified with the advent of air travel as a common mode of transportation.[9] Four widely varying theories have been applied to aviation airspace cases: [10] (1) The zone theory,[11] which divides the air into stratas that vary with the facts in the case; (2) The actual interference view,[12] under which flights under one hundred feet of altitude have not been considered to be transpasses; [13] (3) The nuisance theory,[14] giving the landowner no interest in the superjacent air, and allowing recovery only in an action for nuisance or negligence; and (4) the Restatement view,[15] part of the Uniform State Law for Aeronautics, which admits unlimited ownership in the landowner, subject to a supervening right of flight in the public, when the invasion is made in a reasonable manner for a legitimate purpose, and complies with the regulations of state and federal authorities.

While an airplane is not a nuisance per se,[16] it may become such when flown at low altitudes over certain areas.[17] Civil Air Regulations provide for minimum altitudes under certain circumstances.[18] Exceptions are made for

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2. United States v. Causby, 328 U.S. 256 (1946); Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942).
3. U.S. Const. Amend. V.
4. Grove Hall Savings Bank v. Dedham, 284 Mass. 92, 187 N.E. 182 (1933); Baltimore v. Bregenzer, 125 Md. 78, 93 Atl. 425 (1915).
5. 2 Nichols, Eminent Domain §6.1 (3d ed. 1950).
6. Md. Const. Art III, §40.
7. Birmingham v. Evans, 221 Ala. 469, 129 So. 50 (1930); S.H. Chase Lumber Co. v. Railroad Commission, 212 Cal. 691, 300 Pac. 12 (1931).
8. Butler v. Frontier Tel. Co., 186 N.Y. 486, 79 N.E. 716 (1906).
9. Nichols, Eminent Domain §5.781 (3d ed. 1950); Prosser, Torts 86 (1941).
10. Prosser, Torts 86 (1941).
11. Hackley, *Trespassers in The Sky*, 21 Minn. L. Rev. 773 (1937); 21 Minn. L. Rev. 572 (1937).
12. Advocated by Bouve, *Private Ownership of Air Space*, 1 Air L. Rev. 376 (1930); Trabue, *The Law of Aviation*, 9 A.B.A.J. 777 (1923).
13. Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).
14. See Wherry and Condon, *Aerial Trespass Under the Restatement of the Law of Torts*, 6 Air L. Rev. 113 (1935); Newman, *Aviation Law and the Constitution*, 39 Yale L.J. 1113 (1930); 15 Minn. L. Rev. 318 (1931).
15. Restatement, Torts §194 (1934).
16. *See* Frink v. Orleans Corp., 159 Fla. 646, 32 So.2d 425, 430 (1947); Warren TP. School Dist. No. 7 v. Detroit, 308 Mich. 460, 14 N.W.2d 134, 137 (1944).
17. Brooks v. Patterson, 139 Fla. 263, 31 So.2d 472 (1947); Warren TP. School Dist. No. 7 v. Detroit, 308 Mich. 460, 14 N.W.2d 134 (1944).
18. Civ. Air Reg. §60.17.

takeoffs and landings.[19] It is the low flying after takeoffs and before landings that give rise to suits by adjacent landowners.[20] Illustrative is *Causby v. United States*,[21] in which both direct and consequential damages were allowed for a "taking" and for loss of chickens killed and the forcing of the plaintiff out of the poultry business. In the *Causby* case plaintiff lived directly in line with a runway and his air space was invaded, causing repeated disturbances among his poultry when planes passed over at low altitudes. The instant case is easily distinguished, since there was no showing in it that there was a direct invasion of airspace, nor was the point in issue.

In Maryland, when property is not physically taken or the owner not divested of title, compensation for consequential damages is not allowed [22] unless there is a serious interference with use such as a flooding.[23] The rule is different in states which require compensation for "taking or damaging." [24] Since the airplane has become such a vital force to the comfort, convenience and national safety of the people, it is submitted that the actual interference view, effecting a compromise between the nuisance theory, the zone theory, and the Restatement position, is the most practical and beneficial to all parties. Universal adoption of such a view would allow aircraft freedom of operating activity without subjecting the operator to technical suits, but at the same time would allow the landowner a more suitable method of recovery than the nuisance theory.

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SUBPOENA *Duces Tecum* — LIABILITY FOR FAILURE TO PRODUCE PAPERS IN OBEDIENCE TO SUBPOENA — PRODUCTION OF DOCUMENTS BY WITNESS. In a recent case the Supreme Court of the United States decided that the Department of Justice is privileged to keep its records private in the face of a subpoena *duces tecum* issued by a federal district court. Attempting to get his release from a state prison, the plaintiff brought habeas corpus proceedings against the warden. In the course of the trial, he had the court issue a subpoena *duces tecum* and it was served on the F.B.I. agent in charge of the Chicago office of the Department of Justice.[1] The agent answered the subpoena, but refused to produce the records demanded by the court. He was accordingly adjudged in contempt. On certiorari, the Supreme Court *held* that department regulations forbade disclosure and that the agent rightfully withheld the records from the court. *United States* ex rel *Touhy v. Regan*, 71 S.Ct. 416 (U.S. 1951).

There is a federal statute [2] that allows the Attorney General to make lawful

19. *Ibid.*
20. See Causby v. United States, 60 F.Supp. 751 (1945); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).
21. 60 F.Supp. 751 (1945), *rev'd.*, 328 U.S. 256 (1946) (remanded to determine value of easement); 75 F.Supp. 262 (1948).
22. Baltimore v. Himmelfarb, 172 Md. 628, 192 Atl. 595 (1937).
23. Northern Cent. Ry. Co. v. Oldenburg & Kelley, 122 Md. 326, 89 Atl. 601 (1914).
24. *E.g.*, Cal. Const. Art. I, §14; Ill. Const. Art II, §13.

1. The subpoena was also addressed to the Attorney General, but he apparently was not personally served and did not appear.
2. 5 U.S.C. §22 (1946) "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, . . . and the custody, use and preservation of the records, papers, and property appertaining to it."