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Real Property--Air Easement--Proper Party Defendant

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ship in a state bar association does not afford the public any more protection in patent matters than they already possess by virtue of the rigorous examination given by the Patent Office to all who desire to be licensed by it.\(^1\)

Since it is doubtful whether the Florida Supreme Court appreciated the true significance of its decision in the *Sperry* case,\(^2\) the better view is that expressed by the Franklin County Court of Appeals.\(^3\)

**ARMAND P. BOISSELLE**

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**REAL PROPERTY — AIR EASEMENT — PROPER PARTY DEFENDANT**

*Griggs v. Allegheny County, 369 U.S. 84 (1962)*

Petitioner Griggs alleged that his residential property, adjacent to the Greater Pittsburgh Airport, owned and operated by Allegheny County, was appropriated as a result of extremely low flights of aircraft in take-off and landing procedures. A Board of Viewers\(^4\) reported that the respondent had taken an air easement valued at $12,690 over petitioner's property.

The Court of Common Pleas of Allegheny County dismissed the exceptions of both parties to the Viewers' report.\(^5\) However, the Pennsylvania Supreme Court held that, even if there had been a taking, the respondent was not liable.\(^6\) On certiorari, the United States Supreme Court held that respondent had taken an air easement for which it must pay compensation.

The issue of proper party defendant has been rarely litigated in air easement cases, since most suits have alleged a "taking" by military aircraft on landing and take-off from bases owned by the United States.\(^7\)

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15. Applicants for admission to practice before the Patent Office must be of good moral character and must show by passing an examination that they possess the legal, scientific, and technical qualifications required to enable them to serve patent applicants effectively in the presentation and prosecution of applications in the Patent Office. 37 C.F.R. § 1.341(c) (1960).

Out of 4933 persons who took the examination during the period from April 28, 1952, through February 5, 1962, only 2534 passed (51.4%). Letter from Helen I. Manning, Clerk, Committee on Enrollment, Patent Office, to this writer, December 4, 1962.

16. In the *Sperry* case, the court concluded: "This injunction cannot and shall not in anywise be construed to affect any rights which the respondent has to practice before the Patent Office when done outside this state." 140 So. 2d 587, 596 (Fla. 1962).

17. The court noted: "Were the courts of each state to control practice before the United States Patent Office, thus usurping a right to control that which they cannot authorize in the first instance . . . then the courts of the 50 states, by ignoring the provisions of Article VI of the United States Constitution . . . could render the provisions of Congress in regard to practice before the Patent Office as enacted under the provisions of Article I, Section 8, of the United States Constitution . . . a nullity." Battelle Memorial Institute v. Green, 135 U.S.P.Q. 49, 53 (Ohio Ct. App. 1962).
Once it was established that property had been “taken” in the constitutional sense under the fifth or fourteenth amendment, there were three potentially liable parties in the instant case: (1) the United States; (2) the airlines which flew over petitioner’s property; or (3) the County of Allegheny which owned and operated the airport.

While the opinion in the landmark case of *United States v. Causby* held that, "the inconveniences which it [the airplane] causes are normally not compensable under the Fifth Amendment," the Court went on to award compensation for an air easement. Although the statute defining "navigable airspace" in effect at the time of the *Causby* decision was amended in 1958 to include the airspace needed for landing and take-off, it has been held that this change does not affect a property owner’s cause of action for the “taking” of an air easement over his land.

Justice Black, dissenting in *Griggs*, would have held the United States liable on the theory that Congress, by the Federal Aviation Act of 1958, had “taken” the air easement over petitioner’s property, and “it need not again be acquired by an airport.”

Prior to the present case, several decisions, including *Causby*, held

1. *Pa. Stat. Ann.* tit. 71 § 1573-76 (1919), provides that the county court of common pleas shall appoint three freeholders of the county or borough to sit as viewers to hear evidence and witnesses of all interested parties and then to determine the value of the property taken, injured, or destroyed.
3. *Griggs v. Allegheny County*, 402 Pa. 411, 168 A.2d 123 (1961). The Pennsylvania Supreme Court based its decision in part on the fact that in *United States v. Causby*, 328 U.S. 256 (1946), the Court did not indicate who maintained and operated the airport, which indicated to the Pennsylvania court that the United States Supreme Court believed this issue to be irrelevant. Thus, the respondent was held not liable because it did not own or operate the planes which did the taking.
9. *Id.* at 266.
10. *Id.* at 264, where the Court stated, “the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.”
11. *Air Commerce Act of 1926, 44 Stat. 574* (1926), “‘Navigable air space’ means airspace above the minimum safe altitudes of flight . . .” prescribed by regulations issued under the Act.
the United States liable for "taking" air easements in the landing and take-off of military aircraft, although the airport was owned and operated by a municipality or a municipal authority. Of these cases, only in Matson v. United States was the liability of the owner and operator of the airport discussed. There, the court concluded that while it was desirable that the airport owners, who normally have eminent domain power, should take enough land for a glide area, the "lack of resources and of knowledge as to possible future aviation developments has limited the use of such arrangements." In these cases, while the United States leased the airports jointly or concurrently with other users, the owners and operators of the airports were not parties to the suit; therefore, there was no determination of their liability.

In reversing the Pennsylvania Supreme Court, the United States Supreme Court relied primarily upon its finding of no liability on the part of the United States and the airlines which leased the airport. The Court found the United States was not liable because it was the local government which decided to build the airport and determined where it was to be located. The majority opinion brushed aside the fact that the "master plan" had been approved by the Civil Aeronautics Administration and the fact that the United States agreed to pay the majority of the project costs.

The Supreme Court held the airlines not liable because: (1) their leases gave them the right to land and take-off; (2) no flights violated C.A.A. regulations; and (3) no flights were lower than necessary for safe landing or take-off.

The Court then concluded that by established standards the respondent, Allegheny County, had not acquired the necessary property for the approach areas to the runway. Therefore, the owner and operator of the airport was the party liable for the "taking" of the air easement.

19. Id. at 229, 171 F. Supp. at 286.
21. National Airport Act, 60 STAT. 174-76 (1946). The local authority was required to design the plan for the airport and receive the approval of the Civil Aeronautics Administration. Now the approval must be given by the Federal Aviation Agency Administrator. 72 STAT. 807 (1958), 49 U.S.C. § 1108 (1961).
23. Id. at 86-87.
25. Griggs v. Allegheny County, 369 U.S. 84, 89-90 (1962). The Court made an analogy by stating, "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?"
The Supreme Court has decided that in air easement cases in which neither the United States nor the airlines are negligent, and which are not military in nature, the proper party defendant is the owner and operator of the airport. This decision places the liability on the party best able to assure proper condemnation of property adjoining airports. It would place an intolerable burden on the property owner to require him to prove which airline damaged his property and to what extent. In addition, it would seem unfair to penalize the airlines for acts over which they have no control.

Whether, on the basis of this decision, the owners and operators of airports who lease their fields to the United States for the landing and take-off of military aircraft will be liable for the “taking” of air easements must still be decided. In any event, the owner and operator of an airport is a proper party defendant.

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