

on the easement area) could not recover damages because of the alleged unsightly appearance of the line on land which did not belong to it, and it found that there was no damage to the remainder of the cemetery tract as a result of the line crossing the corner of the tract. (There were no burial lots in that area.)^{1/}

A Georgia court of appeals held that noise, smoke, dust and the like could not be taken into consideration in determining severance damages to the remainder if they existed only during the period of construction. In order for these factors to be considered they had to be continuous and permanent in which case they might adversely affect the market value of the remaining property.

The appellate court also ruled that evidence as to the location of the new church of the condemnee some three blocks away from the condemned property should not have been admitted for the purpose of showing inconvenience to the condemnee occasioned by the condemnation because the location of the new church was wholly irrelevant to the issues of compensation for the taking and for damages to the remaining property.^{2/}

An Illinois appellate court remanded a case for a new trial because the only witness for the condemnees based his opinion of severance damages on the improper elements of danger and inconvenience in crossing a road.

The condemnees contended that the diversion of traffic from other township roads would cause an increase of traffic on the road on which his property fronted and, therefore, it would be more difficult and riskier to transport machinery and grain across that road. The court noted that a diversion of traffic, resulting in either increased or decreased traffic, was not compensable because the State's police power was involved. Besides, the elements of danger and inconvenience were too remote or speculative.^{3/}

190-2 CONSEQUENTIAL DAMAGES -- NOISE, INCONVENIENCE, ETC.

The Supreme Court of Oregon stated that it had previously held in this case that if there was a substantial interference with the use and enjoyment of the owner's property due to the overflights of airplanes using the Portland International Airport, which resulted in a decrease in the market value of that property, this would amount to a taking for which a remedy in inverse condemnation would lie. The purpose of the second trial was to determine whether the owner's facts measured up to her theory of recovery. Upon denial of any damages, she again appealed to the Supreme Court.

That Court stated that while social utility of the airport was not a matter to be ignored, it was also not a matter in serious controversy. It ruled that the trial court erred in telling the jury, in effect, to consider the airport's utility in deciding whether the owner's property had been depreciated in value

^{1/} United States v. Easement & Right-of-Way over 1.0 Acre of Land, 248 F.Supp. 702, December 1965.

^{2/} State Highway Dept. v. Hollywood Baptist Church, 146 S.E.2d 570, December 1965.

^{3/} Department of Pub. Works & Bldgs. v. Bills, 213 N.E.2d 110, December 1965.

by the airport's activities. The case was again remanded for a determination as to whether there was an interference with the owner's use and enjoyment of her land which was substantial enough to result in a loss of market value. If there was, the jury had to determine the monetary compensation. The court could instruct the jury in this type of case that there was a difference between negligible, or inconsequential, interferences which all property owners must share and the direct, peculiar, and substantial interferences which resulted in a loss of market value to the extent that a disinterested observer would characterize the loss as a taking.^{1/}

The United States Court of Claims ruled that there was a new taking of an avigation easement for larger and noisier aircraft in the airspace in which an easement had already been acquired over the subject property, and because flights of the larger aircraft caused a diminution in the value of the property, the owners were entitled to compensation in the amount of \$61,000 (plus interest).

The property was adjacent to Barksdale Air Force Base in Louisiana. The owners filed a suit in April 1962 in which they alleged that the United States took an avigation easement in the airspace above their tract of approximately 566 acres. The Government conceded that it had taken such an easement but it contended that the claim was barred since the action was not instituted within six years after it accrued.

The court found that the type of aircraft used at the base from 1943 to 1953 did not interfere substantially with the use and enjoyment of the property so that the flights over the land did not constitute the taking of an avigation easement. It found that the low flights of B-47's over the property beginning in September 1953 resulted in the taking of an easement in the airspace, but the owners could not be paid compensation for such taking because their action was barred by the six-year statute of limitations.

The court also found that beginning sometime in December 1956, the B-47's were flown at a lower altitude than previously. Because of these lower flights, there was an additional taking by the United States at that time of an avigation easement in the airspace over the subject land and this taking occurred within the six-year period immediately preceding the filing of the owners' action. However, the record in the case did not contain any evidence showing that the fair market value of the land just after the taking of that additional easement was any less than the fair market value of the property just before the additional avigation easement was taken. Since the owners had the burden of proving that they sustained actual damages, but did not do so, the court concluded that there was no diminution in the value of the land by virtue of the taking of this additional easement of flight.

The court decided that the use of B-52's, starting in March 1958, caused damage to the property. That type of airplane developed approximately twice as much thrust as the engines of the B-47. It was noisier than any type of plane that had previously been used at that base. It created such turbulence as it went through the air that heavy vibration was caused to persons and objects on the ground in the vicinity. When the wind was right, smoke and the scent of

^{1/} Thornburg v. Port of Portland, 415 P.2d 750, June 1966.

burning fuel drifted from the engines of the aircraft to the ground. The cattle on the property had been stampeded by B-52's flying low over the property, although the cattle became accustomed to such flights within four or five weeks after being brought on the property. In addition, the noise of a B-52 flying low above the property made conversation on the ground below impossible. Even a person who was yelling at such a time could not be understood. The flights of these aircraft above the property at a low altitude caused an interruption of farm work while the aircraft was overheard, as the workmen had to use their hands to protect their ears at such a time.

Even though the B-52's were not flown any lower than the B-47's, the court held that the former had a substantially greater effect upon the use and enjoyment of the property and this amounted to the taking of a new easement for such flights.

The court decided that the portion of the tract which was best suited for agricultural use continued to be best suited for that purpose. While the B-52 flights over the property at low altitudes interfered somewhat with the farming operations, there was nothing in the record which permitted such interference to be measured in monetary terms. However, the part of the land which could have been used for subdivision purposes could only be used for agricultural purposes after the beginning of the B-52 flights. Because of this, there was a decrease in the market value of that portion of the tract for which the owners were compensated.^{1/}

The Illinois Supreme Court held that the owner of an outdoor movie was not entitled to recover damages caused by brilliant lights located on a toll-road service center adjacent to its property (the lights making it impossible to properly exhibit outdoor movies) because damages were not payable if the property involved was not being used for an ordinary purpose. In addition, even though the State's constitution provided that private property should not be damaged for public use without just compensation, there were certain injuries, necessarily incident to the ownership of property, which directly impaired the value of private property for which the law did not afford any relief, examples being the depreciation caused by the building of fire houses and police stations. Such injury was deemed to be loss without injury in the legal sense on the theory that the property owner was compensated for the injury sustained by sharing the general benefits which inured to all from the public improvement.^{2/}

The United States condemned some school property for an Interstate highway, but the prime contention by a condemnee was that "the noise, vibration, obstruction to sight and vision, dirt and filth coming from said highways * * * are so intense, severe and great as to render the said 'Union High School' ineffective and useless for the purpose of educating students in said facility." The United State District Court, W. D. Michigan, S.D., ruled that the condemner was not entitled to a summary judgment because the issue for decision was whether or not the interference with the condemnee's property was so substantial as to

^{1/} A. J. Hodges Indus., Inc. v. United States, 355 F.2d 592, January 1966.

^{2/} United States v. Certain Parcels of Land, 252 F.Supp. 319, March 1966.

be a taking, and thus compensable under the Fifth Amendment to the Federal Constitution, or of such a lesser character as to make the interference only a consequential damage for which no compensation was payable. An "invasion" of the property was not a necessary element of recovery because the determinative factor was the extent of the damage to the property. The condemnee would be permitted to submit evidence to substantiate its contention that the damage was so great as to constitute a wholly unreasonable and substantially destructive interference with the property.^{1/}

Similarly, the New Jersey Supreme Court ruled that a determination could not be made as to whether the construction of a section of an Interstate highway with some interchanges and ramps would be so damaging to the property of a school board as to amount to a taking.^{2/}

Previously, the appellate division of the superior court had ruled that a trial court should not have dismissed a board of education's suit, but should have made a determination as to whether the board's allegation that the school could no longer be used because of the construction of the highway was true, and, if so, the board would be entitled to compensation even though there was no actual physical invasion of the school property.

The highest court noted the present plans of the highway department (which were not available to the superior court) revealed that there would be physical invasion of the school premises and that the school would not be encircled by the new highway or the access roads or ramps. (The board of education had contended that the school would be so surrounded by the highway that it would become a virtual island.)

The Supreme Court stated that study of the entire record gave rise to the inescapable conclusion that at the present time the issue sought to be presented by the board was purely hypothetical. The effect of the school, as a school, if any, was speculative. It would continue to be so until the construction work was completed and sufficient time had elapsed to permit an informed judgment to be made as to whether any damage had been suffered by the board in the constitutional sense of a taking. (The New Jersey constitution provides for the payment of compensation only when private property is taken for a public use.) It, therefore, held that the present action was premature, but pointed out that the dismissal of that action did not mean that the board could not bring another action, if deemed advisable, at an appropriate time after completion of the highway project and after its use for the designed purpose.

The highest court stressed the fact that it was expressing no view as to whether the conditions described in the superior court's opinion could be considered such a taking as would expose the highway department to liability to pay compensation to the board. Decision on that issue was reserved for a future time if the board did bring a new action.

Testimony that the sound of passing trucks on a highway would be upsetting to high bred horses and colts, and that such a situation would interfere with the peace and quite essential to horse breeding, was characterized by the Kentucky

^{1/} United States v. Certain Parcels of Land, 252 F.Supp. 319, March 1966.

^{2/} Board of Educ. of Town of Morristown v. Palmer, 218 A.2d 153, March 1966.

Court of Appeals as flimsy, invalid and illusory. Accordingly, a judgment of \$6,000 was reversed where only .82 acres out of a total of 47 acres was taken, and where the before value of the farm was found to be \$46,000.^{1/}

The Supreme Court of South Dakota ruled that homeowners near a rezoned area suffered no compensable damages incident to the exercise by a municipality of its rezoning powers since, as a general proposition, the exercise of such powers is in the public interest and property owners have no vested right to the continuance of a prior zoning classification. The Court was probably swayed to a considerable degree in this case by the fact that only 16.1 percent of the property owners in the area objected to the rezoning.^{2/}

Finding that the trial court adequately assessed the actual loss of market value of the remaining part of the landowner's property, a Louisiana court of appeal held that the owner is not entitled to compensation for non-economic "consequential injuries" such as discomfort, disturbance or loss of esthetic value unless such consequential damages diminish the market value of the property. The court upheld the trial court's disregard of two of the landowner's experts as comparatively unqualified and agreed that the comparable values and expropriations relied upon by landowner were dissimilar under the circumstances. Thus, the court refused additional damages because the landowner's "beautiful and exceptionally attractive homesite has now been converted into an ordinary-sized lot without the unusually pleasant feature of the spacious and well-landscaped surrounding grounds."^{3/}

A Texas court of civil appeals ruled that the State's objection to certain testimony by the landowner was not properly preserved in the trial court. The testimony, which was erroneously admitted, was the landowner's statement about uninvited and undesirable persons coming to his home from the newly constructed highway, and that "we had other difficulties such as undesirable people traveling on the road and breaking down and coming in the house at all times of the night."^{4/}

A Georgia court of appeals held that where there was no evidence of probative value that the value of a landowner's property would be permanently diminished by noise, smoke, dust, etc., caused by autos traveling the new highway, it was error for the trial court to instruct the jury that such noise, smoke, and dust be considered if shown to adversely affect the property. The court further upheld the trial judge's ruling that testimony regarding clay which washed from the construction upon land of condemnee was inadmissible since no evidence was shown that this condition would be permanent or a necessary concomitant of the road design, and the trial court's instruction that consequential damages caused by negligence or improper construction were not proper elements to be considered in a condemnation proceeding but may be the subject of a separate suit for damages.^{5/}

Finally, the Supreme Court of Ohio upheld the decision that the landowner was not entitled to be compensated for the alleged damage to her residential property which she contended resulted from the disturbance of the earth when a

^{1/} Commonwealth Department of Highways v. Cleveland, 407 S.W.2d 417, October 1966.

^{2/} Tillo v. City of Sioux Falls, 147 N.W.2d 128, December 1966.

^{3/} State Dept. of Highways v. Babineaus, 189 So.2d 450, September 1966.

^{4/} State v. Curtis, 409 S.W.2d 622, October 1966.

^{5/} Hollywood Baptist Church of Rome v. State Highway Department, 150 S.E.2d 271, July 1966.

highway was reconstructed because the State's constitution provided for payment of compensation only when there was a taking of private property for public use. Nothing was payable when property was damaged by reason of a public work which was justified by a lawful exercise of the powers of government.^{1/}

^{1/} State ex rel. Fejs v. City of Akron, 213 N.E.2d 353, January 1966.