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same classification as other zoning ordinances which have been upheld on the basis that they are authorized restrictions on the individual's land for the benefit of the general public under the police power of the state.[29] These ordinances do not affect existing structures above the limited height, since such would be a taking of property without due process of law, but they generally have a provision that any structure in the zoned area above the limited height may be condemned and the owner compensated therefor.[30]

It is seen then, that the result of the principal case is not one which is new in our law, for it has been recognized by statute in a majority of our states that an easement of avigation is a necessity, both to protect the general public from hazards surrounding airports and to protect the adjacent landowners from invasions due to low flights over their land in taking off and landing. It is submitted, however, that litigation of this type may be avoided in the future by the use of remedies available to municipalities as agents of the states operating the airports for a public purpose. Should a similar case arise against the Federal Government, it would now be unnecessary to bring it on the implied taking theory, for the Federal Tort Claims Act[31] gives the consent of the Government to be sued in tort, and the litigant could bring his suit on the theory that the low flights damaged his property as a nuisance.

C. D. HOGUE, JR.

Federal Declaratory Judgments in Disability Insurance Cases—Determination of Jurisdictional Amount

The federal district courts have jurisdiction of cases involving a federal question and of diverse citizenship cases only where the "matter in controversy" exceeds, exclusive of interest and costs, the sum or value of $3,000.[1]

In suits by and against insurance companies under the Federal Declaratory Judgment Act the federal courts are not in accord on the question of what constitutes the "matter in controversy." The problem centers around the inclusion or exclusion of future benefits in determining whether the matter in controversy exceeds $3,000; *i.e.*, shall benefits due to date of suit only be considered, or shall the value of the matter in controversy be determined by benefits accrued plus future benefits, based on the life expectancy of the insured? Two recent decisions in the Circuit Court of Appeals for the Fifth and Ninth Circuits serve to illustrate this problem.

[29] Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114, 71 L. ed. 303 (1926).
[30] See note 26 *supra*.
[31] See note 13 *supra*.

[1] 36 STAT. c. 91 (1911), 28 U. S. C. A. §41(1).

In *Fowles v. Commercial Casualty Insurance Co.*[2] suit was brought under the Federal Declaratory Judgment Act for the purpose of obtaining a declaration of the defendant's liability to pay weekly disability benefits and hospital expenses under the provisions of its insurance policy. The plaintiff alleged that benefits were due which amounted to less than $3,000; his life expectancy of twenty-nine years, and that he would be entitled to receive, under the terms of the policy, benefits amounting to $38,000 if he lived the expectancy period. The plaintiff further alleged that the defendant refused to pay, claiming that the plaintiff had lost his right to disability benefits by reason of changing his occupation. The district court held that plaintiff's claimed right under the policy to disability benefits during his life if permanently and totally disabled was placed in doubt by the company's claim that it had been lost because the insured had changed his occupation. The district court concluded that this right was the matter in controversy and the value of this right exceeded the $3,000 jurisdictional requirement. The Circuit Court of Appeals for the Ninth Circuit reversed this decision, holding that "no right to such future benefits existed at the time the action was commenced. No one at that time knew or could have known whether such a right would ever exist. Therefore, as to such future benefits, there was, and could have been at that time, no controversy."[3] The court did not mention the plaintiff's allegation that the defendant refused to pay because it claimed the plaintiff lost his right as a result of a change of occupation.

Travelers Insurance Co. v. Greenfield[4] was another action under the Federal Declaratory Judgment Act to determine the insurer's liability for disability benefits. Only $515 in accrued benefits plus a reasonable attorney's fee was alleged to be due at the time the suit was filed. The plaintiff proved his life expectancy of six years, and showed that assuming he would fulfill his life expectancy, he would be entitled to benefits of not less than $3,100. Plaintiff also alleged that payment of premiums was waived under the terms of the policy if disability existed, but that defendant denied plaintiff's total disability, and threatened to consider the policies lapsed if plaintiff failed to pay. Plaintiff alleged that such

[2] 59 F. Supp. 693 (E. D. Wash. 1945).

[3] Commercial Casualty Ins. Co. v. Fowles, 154 F. (2d) 884 (C. C. A. 9th, 1946).

[4] 154 F. (2d) 950 (C. C. A. 5th, 1946). In *New York Life Ins. Co. v. Greenfield*, 154 F. (2d) 953 (C. C. A. 5th, 1946), suit was brought to recover $1,250 accrued benefits plus a reasonable attorney's fee. The district court took jurisdiction but the circuit court of appeals reversed the decision with instructions to the lower court to dismiss the complaint for lack of jurisdiction. It does not appear that any evidence was offered as to the actuarial value of future benefits if any should become payable and the circuit court of appeals held no reasonable attorney's fee could bring the amount claimed over $3,000. The Federal Declaratory Judgment Act was not involved.

a threat is equivalent to a threat of cancellation of the policy and thereby brings into controversy the entire face value of the policy which exceeded $3,000. The court held that the allegation attempting to measure the amount in controversy by disability payments during the life expectancy of the insured, plus the reserve it is alleged the company must set aside, plus the amount of premiums to be waived in the future, in the absence of an attempt by the insurer to cancel the policy, are insufficient to show a present, or actual controversy involving an amount in excess of $3,000.

These two cases illustrate the need for a clear definition of the "matter in controversy" to avoid the loss of time and expense involved in prosecuting such suits through the district and circuit courts, and the delay in deciding petitions for removal to the federal courts. In each case the district court had determined that the "matter in controversy" exceeded $3,000, and in each case the circuit court of appeals held otherwise. The plaintiffs must now commence their actions anew in the state courts if they wish a final determination of their claims.

The federal courts have variously interpreted the phrase "matter in controversy" when applying this language to suits involving disability benefits under insurance policies. There is a conflict as to whether the legal necessity of maintaining a reserve in excess of $3,000 to meet disability claims satisfies the jurisdictional requirement.[5] There is also a conflict as to whether future payments should be considered in determining the jurisdictional amount.[6]

[5] The following cases held legal reserve incidental and collateral to suit and not the matter in controversy: Berlin v. Travelers Ins. Co. of Hartford, Conn., 18 F. Supp. 126 (Md. 1937); Eddleman v. Travelers Ins. Co. of Hartford, Conn., 21 F. Supp. 209 (Md. 1937); Small v. New York Life Ins. Co., 18 F. Supp. 820 (N. D. Ala. 1937); Shabotsky v. Mass. Mut. Life Ins. Co., 21 F. Supp. 166 (S. D. N. Y. 1937); Huey v. Prudential Ins. Co. of America, 23 F. Supp. 708 (N. D. Ala. 1938); Stockman v. Reliance Life Ins. Co. of Pittsburgh, Pa., 28 F. Supp. 446 (W. D. S. C. 1939); Travelers Ins. Co. v. Wechsler, 34 F. Supp. 721 (S. D. Fla. 1940); Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1942); Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940).

Contra: Jensen v. New York Life Ins. Co., 50 F. (2d) 512 (C. C. A. 8th, 1931); Ross v. Travelers Ins. Co., 18 F. Supp. 819 (E. D. S. C. 1936); Struble v. Conn. Mut. Life Ins. Co. of Hartford, 20 F. Supp. 779 (S. D. Fla. 1937); Penn. Mut. Life Ins. Co. of Philadelphia v. Joseph, 5 F. Supp. 1003 (Minn. 1934); Thackelson v. Aetna Life Ins. Co., 9 F. Supp. 570 (Minn. 1934).

[6] The following cases support view that future payments are included: Thompson v. Thompson, 226 U. S. 551, 57 L. ed. 347, 33 S. Ct. 129 (1913) (suit by wife for alimony payments). The court held the jurisdictional requirement met by regarding the actuarial value of possible future payments as the matter in controversy. Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 96, 79 L. ed. 219, 55 S. Ct. 1 (1934); Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. (2d) 388 (C. C. A. 5th, 1940); Penn. Mut. Life Ins. Co. of Phila. v. Joseph, 5 F. Supp. 1003 (Minn. 1934); Franzen v. E. I. Du Pont de Nemours & Co., Inc., 36 F. Supp. 375 (N. J. 1941), *aff'd,* 146 F. (2d) 837 (C. C. A. 3d, 1944).

Contra: Wright v. Mutual Life Ins. Co. of New York, 19 F. (2d) 117 (C. C. A. 5th, 1926), *aff'd,* 226 U. S. 602; Equitable Life Assur. Soc. of U. S. v. Wilson,

The starting premise in these cases is that the collateral or probative effect of the judgment is not to be considered in determining the value of the matter in controversy. This rule was laid down by the Supreme Court in an analogous situation in *Town of Elgin v. Marshall*[7] and seems to influence those courts which limit the matter in controversy to accrued benefits. However, the Supreme Court has in *Thompson v. Thompson*[8] and *Brotherhood of Locomotive Firemen v. Pinkston*[9] approved an actuarial valuation of a claim as the test. These decisions guide the courts broadly construing "matter in controversy" to include future payments.

In the *Pinkston* case the Supreme Court made a distinction between actions at law to recover overdue installments and a suit in equity to

81 F. (2d) 657 (C. C. A. 9th, 1936) (complaint seeking $750 benefit due under $2,500 policy; *held:* jurisdictional amount could not be attained by adding face of policy to such payments even though answer alleged lapse of policy for nonpayment of premiums); Colorado Life Co. v. Steele, 95 F. (2d) 535 (C. C. A. 8th, 1938); Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940); La Vecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 F. Supp. 588 (S. D. N. Y. 1932); Hines v. Fidelity Mut. Life Ins. Co., 6 F. Supp., 692 (E. D. N. Y. 1934); Moon v. Pacific Mut. Life Ins. Co., 28 F. Supp. 199 (S. D. W. Va. 1939); Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1943); Mitchell v. Mutual Life Ins. Co. of N. Y., 31 F. Supp. 441 (W. D. La. 1940); Burton v. Mutual Life Ins. Co. of N. Y., 48 F. Supp. 168 (W. D. Ky. 1943) (where the court recognized that it was departing from its own ruling in two previous cases neither of which had been reported).

Sometimes the form of the state judgment given in like cases may determine whether the "matter in controversy" includes future payments. Thus in *Franzen v. E. I. Du Pont de Nemours & Co., Inc.*, 36 F. Supp. 375 (N. J. 1941), *aff'd*, 146 F. (2d) 836 (C. C. A. 3d, 1944) the court held, where plaintiff was suing under the Louisiana Workmen's Compensation Act, that in that state a judgment under the Act for weekly benefits until death or remarriage is erroneous; proper judgment being for death benefits for the full period of 300 weeks, and the fact that death or remarriage would cut off future benefits is immaterial. Hence judgment for 300 weeks at $14.30 per week, or $4,270, met federal jurisdictional requirement. Only $729.30 was due at the time suit was brought.

However, in Asbury v. New York Life Ins. Co., 45 F. Supp. 513 (E. D. Ky. 1942), the federal court held that the unique Kentucky rule whereby if plaintiff succeeded in establishing his claim of permanent disability, he gets a declaratory judgment in respect to his right to waiver of future premiums did not apply in determining the "matter in controversy" in a federal jurisdictional controversy.

[7] 106 U. S. 578, 27 L. ed. 304, 2 Sup. Ct. 1 (1882) (suit to recover $1,660.75 allegedly due on coupons detached from municipal bonds issued by defendant). Although judgment would include the disputed liability on principal sum, not yet due, the court declined to take jurisdiction, holding that statute limiting federal jurisdiction had reference to the matter directly in dispute, and not the collateral or probative effect of the judgment.

[8] 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. 129 (1913) (suit by wife for alimony payments). The court held the jurisdictional requirement met by regarding the actuarial value of possible future payments as the matter in controversy.

[9] 293 U. S. 96, 79 L. ed. 219, 55 Sup. Ct. 129 (1934) (suit brought by a widow to preserve her right to participate in a fund from which she was entitled to pension so long as she did not remarry). The court held that the amount in controversy was the present value of her interest calculable from the amount of her monthly payment and her life expectancy. The court said that this was not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund, and if the value of that right exceeds $3,000, the district court has jurisdiction.

preserve and protect a right to future participation in a fund. This distinction has generally been accepted in the insurance cases. Thus in ordinary suits at law for accrued benefits, the generally accepted rule is that only the amount due is considered in determining the jurisdictional amount.[10] This result is reached by applying the rule that the collateral or probative effect of the judgment is not the test. However, when the validity of the policy is in issue, as in suits to cancel the policy for fraud, the face amount of the policy, or the maximum liability is the test.[11] When this distinction is made, the apparent conflict between many of the decisions is reconciled. However, the failure of some of the federal courts to make this distinction accounts to some extent for the conflict.

Hence in suits under disability policies, where the only issue is the fact of disability, the only "matter in controversy" is the amount of accrued benefits. In this type of case, the insurer merely denies that the insured has met the conditions prescribed in the policy. Future benefits are not in issue. However, if the insurer relies on any other defense, such as fraud or non-coverage, the matter in controversy would be the maximum possible liability if the insurer's position is not upheld. Here the insurer is not merely denying that the insured has met the conditions of the policy, but that, assuming he has, he is still not entitled to benefits, past or future. The insurer, by this defense, puts the insured's right to future benefits in issue. However, in cases of this latter type, the criterion is not the face amount of the policy, but the amount of benefits both past and future to which the insured would be entitled so long as he is disabled. The use of the insured's life expectancy in evaluating the matter in controversy is no more speculative than considering the face amount of the policy[12] which is the generally accepted test in suits to cancel ordinary life insurance policies.

In *Fowles v. Commercial Casualty Insurance Co.*,[13] since the insurer did not merely put in issue the fact of disability, which would be a proper case for limiting the amount in controversy to accrued benefits, but went further and maintained that the insured had lost his right to all benefits, it seems that the case is a proper one for measuring the "matter in controversy" by both past and future benefits. The insurer was not merely denying the insured's right to past benefits, but also denying that insured would ever have any right to disability benefits. Thus it is clear that the accrued disability benefits were not the sole

[10] Mutual Life Ins. Co. of N. Y. v. Moyle, 116 F. (2d) 434 (C. C. A. 4th, 1940); Stevenson v. Equitable Life Assur. Soc., 92 F. (2d) 406 (C. C. A. 4th, 1937); Shabotsky v. Mass. Mut. Life Ins. Co., 21 F. Supp. 166 (S. D. N. Y. 1937).

[11] Anno: 81 L. ed. 214-216.

[12] See note (1943) 8 MISSOURI L. REV. 131, criticizing use of face value of policy as test.

[13] See note 2 *supra*.

"matter in controversy," but in fact the maximum liability of the insurer for past and future disability payments was at stake.

Travelers Ins. Co. v. Greenfield[14] seems to be a proper case for limiting the "matter in controversy" to accrued benefits. Here the only controversy was over the question of disability; the insured claiming that he was totally disabled, and the insurer denying this claim. By a mere denial of disability the insurer did not put future benefits in issue, but merely denied insured's right to accrued benefits. There was no controversy as to future benefits, hence the court properly excluded them in determining the value of the "matter in controversy." The court, although not specifically mentioning the alleged threat of the insurer to cancel the policy, did not consider the face value of the policy as the matter in controversy. This result is in accord with the Supreme Court's ruling in *N. Y. Life Ins. Co. v. Viglas*.[15] There the insurer denied the insured's claimed disability and consequently refused to waive the payment of premiums. When the insured failed to pay a premium, the insurer noted on its records that the policy had lapsed. The insured treated this as a repudiation of the entire contract and brought suit for damages. The insured attempted to measure the damages by the surrender value of the policy plus the future benefits to become due under the terms of the policy if the insured remained totally disabled. The Supreme Court held that the action of the insurer, even though mistaken, did not amount to a repudiation of its entire contract but only to a breach of the obligation to pay benefits. Hence the damages recoverable by the insured did not exceed the benefits due at the commencement of the suit.

In the *Greenfield* case, the alleged threat of the insurer to cancel the policy, even if disability were established by the insured, would amount to no more than a breach of the obligation under the disability provisions of the policy. This breach of the contract would be only as to accrued benefits, since the insurer based his action solely on the belief that the insured was not totally disabled. The insurer had not repudiated its obligation to pay benefits in the future if the insured became totally disabled.

It is suggested that the "matter in controversy" in suits brought under the Federal Declaratory Judgment Act should depend on the nature of the defense of the insurer just as it depends on the nature of its claim if it initiates the action. If the defense is a mere denial of disability, then accrued benefits are only to be considered. However, if the insurer denies liability on any other ground, then the actuarial value of the disability provisions in the policy should govern.

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[14] See note 4 *supra*.
[15] 297 U. S. 672, 80 L. ed. 971, 56 Sup. Ct. 615 (1936).