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siders illegal cannot be prosecuted under the Sherman Act, the Hobbs Act may acquire a greater significance than it would have otherwise. It may be that henceforth the predominant question to arise in an analysis of the wrongful activities of labor will no longer be whether or not there was a restraint of trade under the Sherman Act, but rather whether or not there was robbery or extortion in interstate commerce as defined in the Hobbs Act.

WILLIAM B. AYCOCK.

Aviation—Liability of Airport for Low Flying—Flights Through Airspace as Taking of an Easement

With the end of World War II, there has been a great advance in the field of commercial aviation both on a national and international scale. This in turn will bring about an increasing amount of litigation over problems incident to air commerce, and result in further development of a body of law peculiar to this type of commerce.

A case of interest in this field was recently decided by the United States Supreme Court,¹ and although the case arose out of facts created by war conditions, the decision is significant as our highest court's first holding on a problem which will be present as long as we have airports and aircraft. That problem is the proper adjustment of the conflicting rights of adjacent landowners and airport operators.

This particular case was an action by one Causby against the United States for an alleged taking by the defendant of the plaintiff's home and chicken farm which was adjacent to the Greensboro, North Carolina, municipal airport, leased by the defendant for use as an Army and Navy air base. The taking complained of was caused by frequent flights of government aircraft at low altitudes while taking off and landing. The noise of the planes, and the glare of the landing lights at night made it impossible to use the land as a chicken farm, and the Court of Claims found that the plaintiff's property had depreciated in value as a result of this, and held that the United States had taken an easement in the airspace from the commencement of the lease, the value of which was \$2,000.00.² The Supreme Court sustained the Court of Claims as to the taking of an easement for which plaintiff should be compensated,³ but reversed the case in order that the nature of the easement

¹ *United States v. Causby*, 326 U. S. —, 66 Sup. Ct. 1062, 90 L. ed. 971 (1946). (Justices Black and Burton dissenting.)

² *Causby v. United States*, 60 F. Supp. 751 (Ct. Cl. 1945). (Judge Madden dissenting.)

³ This was not a taking of an easement by prescription, but an implied taking giving rise to a suit under the Tucker Act [24 STAT. 505 (1887), 28 U. S. C. §250(1) (1940)] which gives jurisdiction to the Court of Claims for actions against the United States ". . . founded upon the Constitution of the United States, . . . not sounding in tort. . . ." However, it would seem possible in the light of this

as to permanency could be more clearly determined and it could be decided whether the award made was proper.⁴

The legal basis for the decision is not new, for as the law of airspace rights has developed in this country, the general rule seems to be that the landowner's rights to the surface are subject to the public right of flight in the airspace above so long as it does not interfere with the effective use of the surface.⁵ Under this theory repeated flights over the land of another at such low altitudes as to be dangerous to the health and life of the owner have been held to constitute a nuisance, and this is true though such low flights are necessary in order to use an adjoining airport.⁶ However, unless actual damage to the property is shown

decision that if the low flights continued for the prescriptive period, the landowner would be without remedy. This is distinguishable from the negative easement of light and air which has never been recognized in this country. See 4 TIFFANY, REAL PROPERTY (3rd ed. 1939) §1194 and cases there cited; also *Lindly v. Bank*, 115 N. C. 553, 20 S. E. 621 (1894). Tiffany recognized that the taking of an easement by frequent flights over one's land would present difficulties since the flights of necessity would have to vary as to linear space and altitude, but goes on to say: "But whether such reasons are sufficient to preclude in all cases the acquisition of a prescriptive right of way through the airspace is, it seems, doubtful." *Id.* §1203. *But see Hinman v. Pacific Air Transport*, 84 F. (2d) 755, 759 (C. C. A. 9th, 1936), *cert. denied*, 300 U. S. 654, 81 L. ed. 864, 57 Sup. Ct. 430 (1937) (where the court says "... it is not legally possible for appellees to obtain an easement by prescription through the airspace above the appellants' land").

*The Court of Claims found that the easement was permanent saying: "... that upon the expiration of its current lease, defendant no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so." 60 F. Supp. 751, 758. This language was looked at as conjecture, and it would seem justly so for the United States would hardly be expected to pay for an easement over the adjoining land after the lease of the airport had expired. The present case is not the first claim which has been made against the government for damages due to low flying army planes. In *Decision of the Comptroller General*, 3 Comp. Gen. 234, 1928 U. S. Av. Rep. 46 (Washington, 1923), a claim for damages due to frightening cattle by a low flying army plane was denied where no negligence was shown. This is in accord with the general rule that there can be no recovery for fright induced in an animal which spends itself in the animal as is seen in *Nebraska Silver Fox Corp. v. Boeing*, 1932 U. S. Av. Rep. 164 (D. C. D. Neb. 1931) where no recovery was allowed for fright to plaintiff's silver foxes allegedly caused by defendant's low flying planes and resulting in their aborting their young. However, when the negligence of the defendant in flying his dirigible below the statutory minimum was alleged to have frightened plaintiff's horses resulting in injury to plaintiff it was held that there was good cause of action. *Neiswonger v. Goodyear Tire and Rubber Co.*, 35 F. (2d) 761 (D. C. N. D. Ohio, 1929). These cases are somewhat similar to the principal case in that it involved the frightening of the plaintiff's chickens; however, the recovery here was not the damage to the business for the loss of the chickens, but for the special value of the land due to its adaptability for use for this business.

⁵This is the theory set out by the Uniform Aeronautics Act which has been adopted in whole or in part by 22 states. See UNIFORM AERONAUTICS ACT, §§3, 4, 11 U. L. A. North Carolina adopted both of these sections verbatim; N. C. GEN. STAT. (1943) §§63-12, 63-13, and the Supreme Court recognizes that the holding that there is a taking here is in accord with the local law of North Carolina as set out in these statutes.

⁶*Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S. E. (2d) 245, 140 A. L. R. 1352 (1942) (where the facts were very similar to the present case in that the airport runway was so aligned that planes had to pass at low altitudes over plaintiff's house in landing and taking off, and the court reversed a nonsuit for in-

as a result of the low flights, no relief will be granted,⁷ except where continued flights at altitudes less than the statutory minimum altitude are considered trespasses, and then injunction and nominal damages will be granted even though no actual damage is present.⁸ After low flights have been going over the property for some time, the landowner will be enjoined from erecting spite structures which interfere with the flights and are dangerous to the occupants of the planes,⁹ but he cannot be enjoined from using his land in a proper manner, and thus a power company could not be prevented from erecting power lines on their land adjoining an airport.¹⁰ An airport will not be considered a nuisance *per se*, and no relief will be granted where the suit is brought in anticipation of a nuisance arising from the construction of an airport near the property of the plaintiff.¹¹ It may, however, become a nuisance if not operated in a proper manner.¹² Thus the result of the present case is in accord with existing principals, for the frequent passage of government planes over the land so interfered with its existing use that it depreciated in value, and this should entitle the owner to compensation whether it be on the theory that the flights are a nuisance or that they constitute a taking of an easement in denial of constitutional rights.¹³

junction and damages against the city of Atlanta on the theory that such low flights would constitute a nuisance and thus interfere with the owner's use of his land). *Vanderslice v. Shawn*, 27 A. (2d) 87 (Del. Ct. Ch. 1942) (where the low flights over the plaintiff's land were enjoined when they interfered with the "existing use" of the land).

⁷ *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817 (1934) (where the court said mere apprehension of injury from the low flights was not enough to give a right to recover).

⁸ *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N. E. (2d) 575, 135 A. L. R. 750 (1941); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300 (1930). The *Burnham* case recognizes that it is not in accord with the nuisance doctrine, where there is a right until it actually interferes with the existing use of the property. The view of these cases is recognized in the Restatement of Torts (1938) §159, comment e, and §194. There would seem to be little reason for calling flights across a person's land at altitudes below statutory minimum in order to take off and land, trespasses and enjoining them unless there was some injury to the surface, particularly in the light of the public nature of aviation in these times. Thus the Massachusetts view would seem to be somewhat out of line with the law of most jurisdictions.

⁹ *United Airport Co. v. Hinman*, 1940 U. S. Av. Rep. 1 (U. S. D. C. S. D. Cal. 1939); *Penn. ex rel. Schnader v. Bestecki*, 1937 U. S. Av. Rep. 1 (Ct. Comm. Pleas, Dauphin County, Pa., 1937); *Tucker v. Iowa City*, 1936 U. S. Av. Rep. 10 (D. C. Johnson County, Iowa, 1935).

¹⁰ *Guith v. Consumer's Power Co.*, 36 F. Supp. 21 (E. D. Mich. 1940); *Capital Airways v. Indiana Power and Light Co.*, 215 Ind. 462, 18 N. E. (2d) 776 (1939).

¹¹ *Warren v. City of Detroit*, 308 Mich. 460, 14 N. W. (2d) 134 (1944); *Batchellor v. Commonwealth*, 176 Va. 109, 10 S. E. (2d) 529 (1940).

¹² See note 6 *supra*; 2 C. J. S. Aerial Navigation, §29.

¹³ The dissenting opinion of Justice Black (326 U. S. —, —, 66 Sup. Ct. 1062, 1069, 90 L. ed. 971, 978) takes the view that this is not the taking of property in a constitutional sense, but a suit in tort for damages due to a nuisance and thus the Court of Claims was without jurisdiction. (See note 3 *supra*.) This year Congress passed the Federal Tort Claims Act, part 3 of which gives the federal district courts jurisdiction, sitting without jury, to hear and adjudge any claim against the United States for money only, arising ". . . on account of

Since such an easement of flight has been recognized as a property interest in eminent domain proceedings by the Federal Government,¹⁴ the holding that it is also protected by the Fifth Amendment¹⁵ seems logically to follow.

Since an increasing number of airports are now owned by either municipal or county governments,¹⁶ the decision in this case creates a new remedy for the landowner adjoining these airports, for if damages can be shown to his property by low flying planes he may be able to prove a taking entitling him to compensation under the Fourteenth Amendment,¹⁷ whereas in the past he has been limited to suit on either the nuisance¹⁸ or trespass¹⁹ theories. The fact that the airports are owned by the city or county, however, gives them certain remedies for protecting the airport approaches which can prevent a suit of this nature ever arising; for since it is generally held that the operation of an airport by a city or county is for a public purpose,²⁰ or even in the nature of a public utility,²¹ certain rights accrue to them which would not ordinarily be given to a privately owned airport.

The first and obvious remedy to prevent suits of this nature would be to acquire enough land by purchase or eminent domain proceedings

damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. . . ." The act also provides for appeal either to the circuit court of appeals or the Court of Claims by the losing party. Chap. 753, Public Law 601, Title IV, United States Code Congressional Service, Advance Sheet No. 6 (1946). Under this law it would seem that should a person wish to bring a suit of this nature against the Federal Government he could bring it either under the theory of the principal case or merely as a suit in tort for damages under the nuisance theory. If it were brought under the latter theory, however, he would be limited to damages, for the consent to be sued is for money only, and this would not include injunctive relief.

¹⁴ *United States v. 357.25 Acres of Land*, 55 F. Supp. 461 (W. D. La. 1944) (where the government recognized that such an easement existed as a property right by bringing condemnation proceedings to procure an easement of navigation above 25 feet over property adjoining an airport). In this case all compensation was denied the landowner, since there was already a zoning ordinance which restricted the use of the land above 25 feet and thus the property owner suffered no further damage from the condemnation of the easement.

¹⁵ UNITED STATES CONST. AMEND. V.

¹⁶ Rhyne, AIRPORTS AND THE COURTS, National Institute of Municipal Law Officers, (1944) Chap. I-III.

¹⁷ U. S. CONST. AMEND. XIV, §1.

¹⁸ See note 6 *supra*.

¹⁹ See note 8 *supra*.

²⁰ *Krenwinkle v. City of Los Angeles*, 4 Cal. (2d) 611, 51 Pac. (2d) 1098 (1935); *People ex rel. Curren v. Wood*, 391 Ill. 237, 62 N. E. (2d) 809 (1945); *Wichita v. Clapp*, 125 Kan. 100, 263 Pac. 12 (1928); *Dysart v. City of St. Louis*, 321 Mo. 514, 11 S. W. (2d) 1045 (1928); *Heese v. Rath*, 249 N. Y. 436, 164 N. E. 342 (1928); *Turner v. Reidsville*, 224 N. C. 42, 29 S. E. (2d) 211 (1944); *Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803 (1946); *Clintock v. City of Roseburg*, 127 Oregon 698, 273 Pac. 331 (1929).

²¹ *State v. Johnson*, 117 Neb. 301, 220 N. W. 273 (1928); *State v. City of Cleveland*, 26 Ohio App. 265, 160 N. E. 241 (1927); *Pierce v. Storms*, 191 Okla. 410, 130 P. (2d) 523 (1942); and in *Thrasher v. City of Atlanta*, cited *supra* note 7, the court speaks of airports as "indispensable public utilities."

at the initial planning stage so that the airport approaches would be protected and there would never be any question of interference with the adjoining landowners. There are a great number of cases upholding municipalities' right to condemn land under eminent domain proceedings for the purpose of building airports on the theory that it is for a public use,²² and this is expressly authorized by statute in some jurisdictions.²³ As a practical matter this may not work out, though, for acquisition of complete title to land adjoining the airport would result in a great deal of unnecessary expense.

A second, less expensive, and increasingly popular method is merely to procure the airspace rights above a certain altitude over the adjacent land by purchase or eminent domain. The latter of these two methods is exemplified in a proceeding brought by the Federal Government in Louisiana to acquire such rights over land adjoining an airport which was being built.²⁴ A substantial number of states now provide for this by statute, either as a general power given to municipalities in addition to their power to condemn the land for the airport itself,²⁵ or as a part of a law for zoning the approaches to airports.²⁶ The only difficulty with this type of remedy is in determining the value of the rights acquired in order to compensate the owner of the land over which the easement is taken. The result of this type of remedy is similar to the

²² *Burnham v. Mayor and Aldermen of Beverly*, 309 Mass. 388, 35 N. E. (2d) 242, 135 A. L. R. 750 (1941) (where a statute gave city the right to establish municipal airport, but did not expressly give power of eminent domain for this purpose; the court implied the power to condemn property under general powers given city to condemn property for any public purpose). See also *Howard v. City of Atlanta*, 190 Ga. 730, 10 S. E. (2d) 190 (1940); *In re Airport of City of Utica*, 134 Misc. 60, 234 N. Y. S. 668 (1929); *Spokane v. Williams*, 157 Wash. 120, 288 Pac. 258 (1930); and *Central Hanover Bank and T. Co. v. Pan American Airways*, 137 Fla. 808, 188 So. 820 (1939) (where the court allowed a private corporation to condemn land for use as an air terminal).

²³ This is provided for in the Uniform Airports Act, Section 3 of which has been adopted by Florida, Georgia, Minnesota, South Carolina, and Utah. UNIFORM AIRPORTS ACT §3, 11 U. L. A. North Carolina expressly provides that an airport is for a public purpose and that cities have the right to acquire lands for them by eminent domain. N. C. GEN. STAT. (1943) §65-5. For a general discussion of this problem and the laws applicable to different states see Rhyne, *op. cit. supra*, note 16, Chap. II; and Hunter and Ulman, *Airport Legal Developments* (1942) 13 JOURNAL AIR LAW 116.

²⁴ *United States v. 357.25 Acres of Land*, cited *supra* note 14.

²⁵ *Laws Del.* 1945, c. 300, §2; *CODE OF IOWA* (1946) §330.5; *GEN. STAT. KAN.* (Corrick, 1945 Supp.) §3-113; *MINN. STAT.* (1941) §360.28; *NEB. REVISED AIRPORTS ACT* (1945) §11(2); *OHIO GEN. CODE* (Page, 1938) §3939; *CODE OF S. C.* (Michie, 1942) §7112-37.

²⁶ *CODE OF ALA.* (1940) tit. 4, §30; *Colo. Laws* (1945) c. 4, §8(a); *ILL. STAT. ANN.* (Smith-Hurd, 1942 Supp.) c. 15½, §46; *LA. GEN. STAT.* (Dart, 1946 Supp.) §27.49; *REVISED STAT. ME.* (1944) c. 21, §15; *Laws of Mont.* 1945, c. 152, §19; *REVISED LAWS OF N. H.* (Rumford, 1942) c. 51, §86; *N. M. STAT. ANN.* (1941) §47.210; 23 *CONSOL. LAWS OF N. Y.* (McKinney, 1946 Supp.) §§355, 356; *N. C. GEN. STAT.* (1943) §63-36; *OKLA. STAT. ANN.* (1946 Supp.) §3-113; *PA. STAT. ANN.* (Purdon, 1945 Supp.) §1563; *LAWS OF S. D.* 1943, c. 2, §9; *TENN. CODE ANN.* (Williams, 1945 Supp.) §2726.38; *UTAH CODE ANN.* (Moore, 1943) §4-0-59; *VA. CODE ANN.* (Michie, 1946 Supp.) §3775; *Laws of Wash.* 1945, c. 174, §13.

result reached in the principal case, in that after the condemnation proceedings are complete the landowner is compensated for the right of flight over his land, and the political subdivision which is operating the airport acquires an easement for the benefit of the general public.

A third way to protect the approaches to airports and thus in effect acquire easements over adjoining land is the passage of zoning legislation restricting the height of structures within certain distances from the airport. A number of states have passed this type of statute now as a practical and inexpensive solution to the airport approach problem.²⁷ Statutes of this type do not completely prevent the result reached in the principal case, however, for it is conceivable that even though the landowner complied with the zoning ordinances and did not build a structure above the maximum height, if the low flights over the land constituted a nuisance and caused his land to materially depreciate as a result, it would still seem to constitute a taking under the theory of the principal case. This would not be so in the second remedy mentioned, for where there is an outright condemnation of the easement, the owner is compensated for the right of flight over the land, and its interference with his use of the land and possible nuisance effect would be considered in determining the amount of compensation he should get for easement. The fact that these zoning ordinances limit the activity of the landowner on the surface by limiting the height to which he can build within a certain distance from the airport in effect places a servitude on the land which might well be called an easement for the benefit of the general public. There seem to be no appellate decisions questioning the constitutionality of these statutes,²⁸ but they would seem to fall within the

²⁷ Twenty-six states have passed these statutes. See: CODE OF ALA. (1943 Supp.) tit. 4, §20(14); ARKANSAS STAT. (Pope, 1941 Supp.) p. 979; FLA. STAT. ANN. (1943) §149.10; ILL. STAT. ANN. (Smith-Hurd, 1942 Supp.) c. 15½, §38 *et seq.*; IND. STAT. ANN. (Burns, 1943 Supp.) §14-606; LA. GEN. STAT. (Dart, 1946 Supp.) §27.40 *et seq.*; REVISED STAT. ME. (1944) c. 21, §8 *et seq.*; ANN. CODE MD. (1939) Art. 1-A, §58; ANN. LAWS MASS. (1945 Supp.) c. 90, §40; MICH. CODE ANN. (Henderson, 1945 Supp.) §10.251; MISS. CODE ANN. (1942) §7540; LAWS MONT. 1945, c. 152, §19; REVISED LAWS OF N. H. (Rumford, 1942) c. 51, §78 *et seq.*; N. M. STAT. ANN. (1941) §47.201 *et seq.*; 23 CONSOL. LAWS OF N. Y. (McKinney, 1946 Supp.) §§355, 356; N. C. GEN. STAT. (1943) §63-29 *et seq.*; OKLA. STAT. ANN. (1946 Supp.), §3-101 *et seq.*; OREGON COMPILED LAWS ANN. (1943 Supp.) §45-505; PA. STAT. ANN. (Purdon, 1945 Supp.) §1550 *et seq.*; LAWS OF S. D. 1943, c. 2, §1 *et seq.*; TENN. CODE ANN. (Williams, 1945 Supp.) §2726.47 *et seq.*; LAWS OF VT. 1945, No. 50; UTAH CODE ANN. (Moore, 1945 Supp.) §4-0-68 *et seq.*; LAWS OF WASH. 1945, c. 174, §1 *et seq.*; LAWS OF WIS. 1945, c. 235, §59-97; LAWS OF WYO. 1941, c. 110. For a discussion of the Model Airports Zoning Act as adopted in North Carolina, see (1941) 19 N. C. L. REV. 548.

²⁸ In *Mutual Chemical Co. v. City of Baltimore*, 1939 U. S. Av. Rep. 11 (Cir. Ct. Baltimore, 1939) the court held unconstitutional the Maryland zoning act as a violation of the Fourteenth Amendment of the United States Constitution in that it restricted the use of private property without compensation and was thus a taking of the property. This case would seem to overlook the fact that airports are considered to be for a public purpose when operated by a municipality for the use of the general public (see note 20 *supra*), and thus the adjoining landowners would have to yield some rights for public safety and public transportation.

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 Act³¹ 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).