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SURVEY OF RECENT DEVELOPMENTS IN THE NORTH CAROLINA LAW OF EMINENT DOMAIN

DALE A. WHITMAN*

The recent opinions of the North Carolina appellate courts include a strikingly large proportion of eminent-domain cases. Two factors combine to explain the unusual frequency with which these cases are tried and appealed. The first is the elaborate activity of the federal government in funding local and state projects involving the acquisition of land. The Interstate Highway program¹ probably accounts for the predominant portion of this activity, with other shares attributable to urban renewal,² public housing,³ and airport improvement.⁴ When the more traditional activities of local government, such as street-widening and other public improvements, are added to the above list, eminent domain assumes a major role in the spectrum of litigation in state courts.

The second factor explaining the large number of eminent-domain cases, and one that probably accounts for many appeals that would not otherwise be taken, is the morass of divergent procedures that may be used by governmental entities in North Carolina to acquire land. The perplexities arising from this lack of procedural uniformity have been previously documented.⁵ Because nice questions of procedure that may be litigated on appeal by one condemnor do not necessarily apply in actions brought by other types of governmental units, the law develops slowly and uncertainly, with a good deal of needless expenditure of legal talent and fees.

PROCEDURAL DIFFICULTIES

*North Carolina State Highway Commission v. Matthis*⁶ illustrates

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¹ Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 101-36 (1964).

² Housing Act of 1949, 42 U.S.C. §§ 1450-65 (1964), as amended, 42 U.S.C. §§ 1450-69c (Supp. IV 1965-68).

³ United States Housing Act of 1937, 42 U.S.C. §§ 1401-36 (1964).

⁴ Federal Airport Act, 49 U.S.C. §§ 1101-19 (1964).

⁵ Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action*, 45 N.C.L. Rev. 587 (1967). Professor Phay states that there are eighteen separate procedures of general applicability, plus numerous procedures contained in special legislation and in city charters.

⁶ 2 N.C. App. 233, 163 S.E.2d 35 (1968).

the nature of the procedural difficulties which may be encountered. A brief discussion of the case's statutory background may be helpful. Prior to 1960, the Highway Commission utilized the provisions of chapter 40 of the North Carolina General Statutes⁷ as the procedure for highway takings. Effective July 1, 1960, article 9 of chapter 136⁸ became the procedural framework for the Highway Commission's takings; chapter 40 remains in effect for use by a wide variety of other governmental units.⁹ Under chapter 40, the condemnor's petition must state that "the corporation has not been able to acquire title [to the land], and the reason of such inability."¹⁰ The absence of such an allegation has been held to be a jurisdictional defect rendering the complaint subject to dismissal at any time.¹¹ The general provision of chapter 136 giving condemnation powers to the Highway Commission also presupposes failure of voluntary acquisition efforts:

Whenever the Commission and the owner or owners of the lands . . . are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn the lands . . . and procedure of article 9 of this chapter shall be used by it exclusively.¹²

However, article 9 of chapter 136 begins with a section listing in detail the allegations and statements that must be contained in the complaint and the declaration of taking to be filed by the Highway Commission,¹³ and there is no requirement that the Commission allege inability to acquire the land by private negotiation.

In *Matthis* the Commission's complaint and declaration made no mention of any prior attempt to purchase the property. On appeal from a jury trial, the defendant condemnee argued, apparently for the first time, that the absence of such an allegation rendered the entire proceedings below without jurisdiction and urged that the complaint be dismissed.

⁷ N.C. GEN. STAT. §§ 40-1 to -53 (1966).

⁸ N.C. GEN. STAT. §§ 136-103 to -121 (1964).

⁹ N.C. GEN. STAT. § 40-2 (1966).

¹⁰ N.C. GEN. STAT. § 40-12 (1966). The new rules of civil procedure do not control condemnation pleading in cases in which specific eminent domain statutes apply. N.C.R. CIV. P. 1.

¹¹ *Red Springs City Bd. of Educ. v. McMillan*, 250 N.C. 485, 108 S.E.2d 895 (1959); *City of Winston-Salem v. Ashby*, 194 N.C. 388, 139 S.E. 764 (1927). See N.C.R. CIV. P. 12(h)(3): "Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

¹² N.C. GEN. STAT. § 136-19 (1964).

¹³ N.C. GEN. STAT. § 136-103 (1964).

The court of appeals concluded that the absent allegation made the complaint "a defective statement of a good cause of action";¹⁴ the defect was, however, held to be non-jurisdictional, and while the defendants might have originally demurred and forced an amendment of the complaint, they had waived any objection by (1) filing an answer admitting the power of the Commission to condemn the land, and (2) by withdrawing the sum paid into court by the Commission as its estimate of just compensation.¹⁵

A short time later the same court reached a different result in *City of Charlotte v. Robinson*,¹⁶ in which the city was proceeding under a charter power that incorporated article 9 of chapter 136 by reference. In their answer the condemnees raised the absence of an allegation of prior attempts to acquire the property by negotiation. Because the question had been timely raised, the court of appeals held that the complaint should be dismissed with leave to amend and also found that the defendants were entitled to an order restraining the city from taking their property before a sufficient amended complaint was filed.

Thus this little controversy over the allegation of prior negotiation has been resolved, at least on the facts presented in *Matthis* and *Robinson*. But it is not difficult to imagine factual variants of these cases that will require still further appellate litigation. It is certainly arguable that in cases in which a specific statute sets forth the necessary allegations of a complaint, a holding that further allegations are required for a good statement of a cause of action is needless formalism and achieves nothing more than an opportunity for the condemnee's attorney to wear down the state with technicality.

But the more fundamental criticism of these cases is simply that no condemnee's attorney should have the opportunity to consume his client's money and the time of the state's attorney and the court of appeals in litigating such trivia. This problem is, unfortunately, not amenable to judicial solution. It is intrinsic in the existence of the present hodgepodge of eminent domain procedures and can be solved only by the General Assembly. An attack on this problem is incumbent upon that body during its next session.

¹⁴ North Carolina State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 243, 163 S.E.2d 35, 41 (1968).

¹⁵ *Id.* at 243-44, 163 S.E.2d at 41-42.

¹⁶ 2 N.C. App. 429, 163 S.E.2d 289 (1968).

EVIDENCE OF VALUE

Time Lapse

Under North Carolina law the date on which property must be evaluated in fixing the compensation for a taking is the date on which the taking occurred.¹⁷ Of course, it is rare that an appraisal is made on precisely that date. Several recent cases have dealt with the admissibility of evidence of value determined on other dates. In *Wilson Redevelopment Commission v. Stewart*,¹⁸ the court of appeals held that appraisals made eighteen months and forty months prior to the taking were admissible when the evidence showed that no substantial changes had taken place in the property or its value between the appraisals and the date of taking. The test applied by the court was whether appraisal "fairly points to the value of the property at the time of the taking."¹⁹

The condemnor's attorney frequently will attempt to get before the jury evidence of the amount paid by the present owner when he acquired the property. The condemnee would usually prefer to exclude such testimony since if he has owned the property for any length of time, the price he paid is almost certain to be substantially lower than the damages he seeks.²⁰ In *North Carolina State Highway Commission v. Moore*,²¹ the court of appeals held admissible the condemnee's response to the state's attorney's cross-examination as to the amount paid for the land some seven years earlier. The condemnee had testified that the property and its environs had not changed over the seven-year period. Perhaps the only satisfactory tactic for tempering the disadvantageous impact of such a question is for the owner to be prepared to testify plausibly that *some* factors—if nothing else, the general inflation experienced by the nation's economy—have caused the property's value to rise over the intervening period. Such testimony might result in the sustaining of an objection to the question of the price paid. Even if the owner is required to answer the question, his explanation of the changed value will mitigate the impression created in the minds of the jurors. It seems unlikely that the answer can be excluded entirely since the court of appeals in *State High-*

¹⁷ *North Carolina State Hwy. & Pub. Works Comm'n v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954).

¹⁸ 3 N.C. App. 271, 164 S.E.2d 495 (1968).

¹⁹ *Id.* at 275, 164 S.E.2d at 497.

²⁰ See note 73 *infra*.

²¹ 3 N.C. App. 207, 164 S.E.2d 385 (1968).

*way Commission v. Lane*²² recently held that, irrespective of the relevance of the answer on the issue of value, the question is a proper means of testing the witness' capacity of recollection on cross examination. In that case, the trial judge instructed the jury that the owner's answer was not substantive evidence but merely went to the witness' credibility. Realistically, however, such a cautionary instruction is probably worthless; the jurors may still be unduly impressed by the low price paid by the owner.²³

The court of appeals has dealt recently with two other sources of opinion as to value. In *State Highway Commission v. Matthis*,²⁴ the expert appraiser first visited the property about three years after the taking of a portion of it for highway purposes. In the meantime the highway and embankment had already been constructed across the land. The court held that an objection was properly sustained to a question asking the appraiser's opinion of the fair market value of the property prior to the taking. And in *State Highway Commission v. Mode*,²⁵ it was held erroneous to permit an expert appraiser to give an opinion of the highest and best use of the property when that opinion was based in part on the evidence given in the trial of the case. The ground for the holdings in both cases seems essentially the same: even an expert witness should not be permitted to offer an opinion of the type involved without basis in personal knowledge.

Prospective Uses

More difficult questions arise when a witness is asked to evaluate property on the basis of a use which was not being made of the land at the time of the taking. A rather novel example of this situation is found

²² 5 N.C. App. 507, 168 S.E.2d 473 (1969).

²³ The impact of the price paid upon the jury's deliberations is suggested by the following data from the records of *Lane* and *Moore*. In both cases, the original cost figure shown is the owner's cost of his entire tract, prorated for the amount of land being taken by the state.

	<i>State's offer or testimony</i>	<i>Owner's offer or testimony</i>	<i>Original Cost</i>	<i>Jury Verdict</i>
Lane	\$1700-2400	\$11,633-12,030	\$1025	\$3750
Moore	\$3700	\$55,000	\$1820	\$5100

Although in neither case did the verdict go below the state's non-cost evidence, both verdicts were much closer to the state's evidence (and to the original cost) than to the owner's evidence.

²⁴ 2 N.C. App. 233, 163 S.E.2d 35 (1968).

²⁵ 2 N.C. App. 464, 163 S.E.2d 429 (1968).

in *State Highway Commission v. Mode*,²⁶ which involved the taking of a portion of the defendant's farm and woodland. After the taking and during construction of the highway, the Highway Commission's grading contractor discovered in the right-of-way large quantities of valuable stone, suitable for crushing, which had previously been unknown to all parties. The court of appeals ruled admissible testimony regarding the value of the stone as it affected the land, but held that the witness should not have been permitted to arrive at the incremental value of the stone deposit by estimating the value per ton of the stone in the ground and multiplying by the estimated number of tons in the deposit. It is true that this method of calculation generally has been disapproved by the courts,²⁷ and this result is clearly sound in cases in which the price per ton given by the appraiser is a severed or retail price. In *Mode*, however, the appraiser was asked his opinion of the fair market value "of the merchantable stone in the ground,"²⁸ a matter quite different from retail value. The value of the stone in the ground excludes, of course, any speculation about such uncertainties as the expense of removal and the possibility of fluctuations in the retail market. Only a few courts have been willing to distinguish these two types of "value."²⁹ Because the rule against the method of computation offered in *Mode* is so well settled, it is perhaps understandable that the court of appeals chose to follow it.

An issue that arises with much greater frequency is the admissibility of evidence of value, usually offered by the condemnee's expert, based on the site's potential for a particular type of future development; perhaps the most common hypotheses are future residential subdivisions and shopping centers. These situations are distinguishable from the facts in *Mode*, in which the land's usefulness as a stone quarry was an established and indisputable fact; the admissibility of more speculative potential land uses is not so predictable. In *City of Statesville v. Bowles*,³⁰ the city sought to take an easement for a sewer line which, when installed, would prohibit grading to the depth necessary for construction of commercial buildings. The condemnee's expert appraiser testified that in his opinion the highest use of the land in question was as a new shopping center or as an extension

²⁶ *Id.*

²⁷ P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 13.22[2] (J. Sackman ed. 1962).

²⁸ 2 N.C. App. at 469, 163 S.E.2d at 432.

²⁹ See *Iske v. Metropolitan Util. Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968); *In re Appropriation of Easement*, 108 Ohio App. 423, 162 N.E.2d 190 (1958).

³⁰ 6 N.C. App. 124, 169 S.E.2d 467 (1969).

of an adjacent center. The land was apparently undeveloped, and the condemnee gave no evidence of having made plans or taken any affirmative steps to develop a shopping center on the site, nor was there any evidence that the owner of the existing adjacent shopping center had any plan or desire to expand. Yet the court held that the testimony respecting commercial development of the site in question was not unreasonable or speculative.

An instructive comparison may be made with *North Carolina State Highway Commission v. Matthis*,³¹ discussed above. The land in question in that case was adjacent to an existing residential subdivision that had been developed by the condemnee. The site of the taking had been graded for residential purposes, rough streets had been cut, and a sewer line had been installed to serve many of the proposed lots. A subdivision plat had been prepared, but had not been placed on record at the time of the taking. Ironically, the owner's reason for delaying the filing of the plat was that he feared the resulting dedication of the streets, some of which fell within the highway right-of-way being taken, would result in a denial of compensation to him for the street sites. Relying heavily on the fact that the plat had not been recorded and no streets had yet been dedicated, the court of appeals found the property to be a mere "paper subdivision" and sustained the trial court's refusal to permit the owner to use the map of the subdivision to illustrate the effect upon his lots of the highway construction.

In cases in which a landowner argues that the potential for future development enhances the value of presently undeveloped land, the evidence he may offer can be arranged on a continuum of objectionability. First, he may offer evidence that, for example, residential development is the highest and best use of the property. This evidence does not depend upon any particular steps having been taken to actually develop the property. Such testimony was admitted in *Matthis* without objection.

Second, the owner may offer a map or other testimony designed to show his anticipated development of the property in order to illustrate the impact of the state's taking. It is on this point that *Matthis* and *Bowles* conflict. In *Bowles* evidence of the limitations on commercial structures over the sewer easement was held admissible while in *Matthis* the impact of the taking on the proposed subdivision was held excludable. If any distinction could properly have been made between the cases, it should

³¹ 2 N.C. App. 233, 163 S.E.2d 35 (1968).

have been in favor of admitting the plat of the subdivision in *Matthis* since that map was prepared prior to and independent of the litigation, was based on the actual work-product of engineers and surveyors, and was apparently a concrete and realistic projection of the development.³² The owner in *Bowles* had made no such efforts to establish the suitability of his property for a specific commercial development.

The third and most dubious category of evidence that a landowner might offer would involve using the subdivision plat not merely for illustrative purposes but in order to assign a retail value to each lot. That figure would be multiplied by the number of lots lost by condemnation to yield the total damage. In order to make such a computation sensible, it is, of course, necessary to take into account the anticipated expenses in developing and marketing the lots of the subdivision. In cases involving totally undeveloped land, the courts have been virtually unanimous in their exclusion of this kind of testimony³³ on the ground that the costs of developing and marketing are too speculative to justify their presentation to the jury. Perhaps the objection is sound in light of today's widely varying (mostly upward) costs in money, taxes, labor, and building materials.³⁴ If the landowner's evidence is based on present levels of these expenses, his estimate of anticipated profits may be unduly optimistic. On the other hand, rising retail land values, especially for residential lots, may more than offset increased developmental costs.³⁵ And the fact that these profits are still in the future suggests that they should be discounted to present value—that is, the date of the taking—at some appropriate interest factor. Perhaps all of the foregoing is sufficient to convince the reader that the rule against profit-per-lot evaluation is a sound one.

Yet the application of the rule to *Matthis* is not as clear as the opinion of the court of appeals suggests. The owners' attorney excepted to the following language in the trial court's charge to the jury:

³² Maps of proposed subdivisions were held admissible on similar facts in *Arkansas Louisiana Gas Co. v. Morehouse Realty Co.*, 126 So. 2d 830 (La. App. 1961) and *Iske v. Metropolitan Util. Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968). See also *North Carolina State Hwy. Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965), in which the court approved exclusion of a plat of a proposed subdivision but implied that a more professionally-drawn map might have been admissible in the trial court's discretion.

³³ *Barnes v. North Carolina State Hwy. Comm'n*, 250 N.C. 378, 109 S.E.2d 219 (1959); P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 12.3142[1] (J. Sackman ed. 1962).

³⁴ See generally NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* (1969).

³⁵ See note 73 *infra*.

[T]he expense of cleaning off and improving the land, laying out streets and dividing it into lots, advertising and selling the same, the holding it and paying taxes and interest until all the lots are disposed of cannot be ignored, and is too uncertain and conjectural to be computed. . . .³⁶

On appeal, the owners made the point that many of the expenses mentioned were not at all conjectural, but were precisely ascertainable because they had already been paid out.³⁷ But other expenses, not yet accrued, would ultimately have reduced profits on sale of the lots. These expenses included the cost of paving, curbs and gutters, and other off-site improvements and the cost of marketing the property and of holding it during the marketing period. The difficult question, to which the court of appeals did not address itself, is: how far must the owner go in making actual expenditures before the remaining costs are reasonably ascertainable and the whole package can be sent to the jury? Certainly if development had progressed to the point at which, say, ten lots in a twenty-two-lot subdivision had already been sold, the expenses relating to the remaining lots could be estimated with reasonable accuracy.

Under this analysis, the question whether the subdivision plat has or has not been recorded is of trivial importance. Nevertheless, the court of appeals in *Matthis* seemed to lay great stress on the non-recording of the plat, apparently on the ground that recording would signify a firm commitment by the owner to proceed with development. Yet subdivision attorneys know that recording does not lead inexorably to actual subdivision; a great many platted subdivisions have later been abandoned or replatted. The disappointing feature of the court's treatment of the issue of subdivision was its failure to delineate a sound analytical framework for the guidance of the bar on the admissibility of evidence relating to future development. The opinion simply did not answer the fundamental questions.

DENIAL OF ACCESS TO STATE HIGHWAYS

A large share of the highway condemnations occurring today involve the widening of an existing right of way to accommodate a multi-lane controlled-access highway. The abutting owner commonly loses not only

³⁶ Record at 92-93, North Carolina State Hwy. Comm'n v. *Matthis*, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

³⁷ Brief for Defendant Appellant at 17, North Carolina State Hwy. Comm'n v. *Matthis*, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

a strip of his land lying alongside the existing highway, but also his legal right of direct access to that highway. Typically the owner will not be landlocked, but his access after the taking will be to a service or frontage road connecting to the improved highway at a point several thousand feet or several miles distant from his property.³⁸

The test of whether a denial of access is compensable³⁹ is stated in *North Carolina State Highway Commission v. Raleigh Farmers Market, Inc.*:⁴⁰ "if the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuitry of travel to reach a particular destination"⁴¹ In applying this test to various factual patterns, the North Carolina courts have evolved a distinction based on the nature of the remaining access in relation to the size and shape of the land. The cases have consistently held non-compensable the denial of direct access to a reasonably compact parcel even though the route of access remaining may be quite long.⁴² But when the land from which the taking occurs is widespread and the denial of access necessitates the building by the owner of a long road on his *own land* in order to connect with the outside world that portion of the land from which access has been taken, the courts have found the taking compensable.⁴³ The distinction, in effect, is whether the condemnee or the state will provide the service road.⁴⁴ In cases involving compact parcels and the supplying of the service road by the state, the North Carolina courts have not distinguished between agricultural or residential uses, for which a longer route of access

³⁸ The Highway Commission's power to take land for widening a limited-access highway is derived from N.C. GEN. STAT. § 136-89.52 (1964).

³⁹ Compensation is arguably required by statute in every case in which an abutting owner's easement of access is injured, however slightly, by the Highway Commission. See N.C. GEN. STAT. § 136-89.53 (1964). But neither the Commission nor the courts have construed the statute so literally.

⁴⁰ 263 N.C. 622, 139 S.E.2d 904 (1965).

⁴¹ *Id.* at 625, 139 S.E.2d at 906.

⁴² *Moses v. North Carolina State Hwy. Comm'n*, 261 N.C. 316, 134 S.E.2d 664, *cert. denied*, 379 U.S. 930 (1964) (additional travel to motel .65 mile or 1.65 miles, depending on direction); *North Carolina State Hwy. Comm'n v. Wortman*, 4 N.C. App. 546, 167 S.E.2d 462 (1969) (additional travel of 560 feet to 4,500 feet, depending on direction and whether inbound or outbound); *North Carolina State Hwy. Comm'n v. Rankin*, 2 N.C. App. 452, 163 S.E.2d 302 (1968) (additional travel of .70 mile).

⁴³ *North Carolina State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc.*, 263 N.C. 622, 139 S.E.2d 904 (1965) (owner would have to build road 3000 feet); *North Carolina State Hwy. Comm'n v. Yarborough*, 6 N.C. App. 294, 170 S.E.2d 159 (1969) (owner would have to build road 1,858 feet).

⁴⁴ See *North Carolina State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 21, 155 S.E.2d 772, 788 (1967).

is of little importance, and certain commercial uses such as motels,⁴⁵ upon which a more circuitous access may have a disastrous economic impact.

When a new limited-access highway is constructed in a location where no road previously existed, it would not seem sensible to award the condemnee damages for the denial of his right of access. Assuming that he still has the same accessibility to other roads as previously, his net right of access has been neither damaged nor benefited by the taking of the new right of way across his land. Yet in *North Carolina State Highway Commission v. North Carolina Realty Corp.*,⁴⁶ the court reasoned that since the owner of land abutting a highway has a special right of access, the denial to him of that right, even with respect to a newly-built highway, is a compensable taking.⁴⁷ This doctrine is strange since the purported taking occurs earlier in time than the opening of the highway. Moreover, the court's opinion made no explanation of the procedure for computing the damage. Presumably the condemnee can recover the incremental amount by which the value of his property would have been increased if the new highway had been made freely accessible to him. Such a holding is contrary to the great weight of American authority⁴⁸ and is nothing less than a waste of state funds.⁴⁹

SUBSTITUTE CONDEMNATION

The first North Carolina decision dealing with the concept of "substitute condemnation" is *North Carolina State Highway Commission v. Asheville School, Inc.*⁵⁰ As a part of a highway project, the state took a portion of the school's land and also some land from the adjacent owner, one Mashburn. The state sought to take a small additional strip from the school, not needed for the highway project, to provide a driveway

⁴⁵ See *Moses v. North Carolina State Hwy. Comm'n*, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930 (1964); *North Carolina State Hwy. Comm'n v. Wortman*, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

⁴⁶ 4 N.C. App. 215, 166 S.E.2d 509 (1969).

⁴⁷ Language supporting this view is found in *North Carolina State Hwy. Comm'n v. Gasperson*, 268 N.C. 453, 455, 150 S.E.2d 860, 862 (1966). But in *Gasperson*, the new highway bisected the defendants' property and cut off reasonable travel from one portion of the land to another. This situation is quite different than a mere denial of access to the new highway itself.

⁴⁸ P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 10.2211[4] (J. Sackman ed. 1962).

⁴⁹ N.C. GEN. STAT. § 136-89.52 (1964) provides that along new highways the denial of rights of access "shall be considered in determining general damages." But this language cannot reasonably be held to require compensation when no actual injury can be shown.

⁵⁰ 5 N.C. App. 684, 169 S.E.2d 193 (1969).

for Mashburn's property, which otherwise would have been left landlocked by the original taking. The school attacked the condemnation of its land for the driveway as being an unconstitutional taking for a private purpose.⁵¹

The court of appeals held the taking for the Mashburn driveway "within the scope" of the public project, and therefore, constitutional. The court also held the taking within statutory authority. The court relied on a provision of the General Statutes giving the Highway Commission authority "to acquire . . . a sufficient amount of land . . . as it may determine to enable it to properly prosecute the work"⁵² The construction seems strained in this case since the drafters of the statutory language probably contemplated the taking of land for the storage of equipment, for the dumping of excess earth, and for drainage culverts or the like. The taking of the driveway in this case was not strictly necessary, but it saved the state a good deal of money, as evidenced by one of the state's witnesses who testified that Mashburn was paid only 8,300 dollars for his property whereas he might have been entitled to as much as forty thousand dollars if the state had not provided the driveway for him.

While few courts have had difficulty finding substitute condemnation constitutional, a fair number of them have foundered over the lack of specific statutory authority.⁵³ The court of appeals in *Asheville School* brought the taking within the statute by arguing that the state had damaged Mashburn's land by taking the access to it and then had chosen to repair the damage rather than to pay compensation for it. The repairing took the form of taking the school's land and giving it to Mashburn. The result is commendable although it represents a rather striking departure from the old maxim, so frequently quoted in the North Carolina decisions, that the power of eminent domain granted by statute is to be strictly construed.⁵⁴

⁵¹ A rough analogue is *Austin v. Shaw*, 235 N.C. 722, 71 S.E.2d 129 (1952), in which the city was held within its powers to contribute funds for the construction of a cross-line railroad track outside the city limits as a substitute for grade crossings within the city that were to be eliminated by the railroad at the city's order. The city would normally have had no power to contribute to extra-territorial improvements.

⁵² N.C. GEN. STAT. § 136-19 (1964).

⁵³ See Annot., 20 A.L.R.3d 862, 883 (1968); Comment, *Substitute Condemnation*, 54 CAL. L. REV. 1097 (1966).

⁵⁴ See, e.g., *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 167 S.E.2d 385 (1969), in which the court found no legislative authority for the North Carolina Department of Administration to condemn land for a federally owned park.

AIRPORT EASEMENTS

The growth of air transportation and the advent of passenger jets during the last decade⁵⁵ have given rise to serious conflict between airports and owners of surrounding land. Owners may be disturbed⁵⁶ and their property values depreciated by the noise, vibration, and air pollution resulting from flights overhead, flights nearby but not invading the landowner's airspace, or from warmups and other ground activities at the airport. If the airport operator has the power of eminent domain, it is perfectly possible for it to condemn the necessary interests, whether in fee or by way of easement, to assure the airport immunity from liability resulting from its activities. But airport authorities have rarely taken the initiative to exercise this power except when necessary to condemn a physical structure that interfered with the approach or takeoff pattern.⁵⁷ Direct purchase or condemnation of easements for noise or overflights generally has been avoided, probably because consistency would have required acquisitions over large land areas with resulting heavy expenditures. In general, airports would prefer not to publicize their liability, for obvious reasons. If the aggrieved property owner seeks legal redress, he may choose among several theories—including inverse condemnation, trespass, and nuisance—depending on the circumstances and the precise remedy that he wants.

Inverse Condemnation

The theory used most commonly and most successfully in other jurisdictions is inverse condemnation.⁵⁸ The concept underlying this approach

⁵⁵ The shift to jets is illustrated by the drop in consumption of gasoline by domestic scheduled air carriers from 922 million gallons in 1960 to 223 million in 1967. During the same period, those carriers increased their jet fuel consumption from 988 million gallons to 5,324 million. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 569 (1969).

⁵⁶ A vivid description of the impact of air operations on family life is found in *Martin v. Port of Seattle*, 64 Wash. 2d 309, 312, 391 P.2d 540, 543 (1964), cert. denied, 379 U.S. 989 (1965). See also *Hearings on H.R. 3400, H.R. 14146 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st & 2d Sess., ser. 90-35 (1968).

⁵⁷ See, e.g., *Greensboro-High Point Airport Authority v. Irvin*, 2 N.C. App. 341, 163 S.E.2d 47 (1968), in which the airport sought an easement to cut trees obstructing its approach path. The court affirmed an order restraining the cutting of timber pending final resolution of the landowner's claim that the airport lacked authority to condemn the easement. See also *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967). City and county airports derive their power of eminent domain from N.C. GEN. STAT. § 63-5 (1965).

⁵⁸ *Griggs v. Allegheny County*, 369 U.S. 84, rehearing denied, 369 U.S. 857

is that if a governmental agency takes private property without the usual formalities of an eminent-domain action, the owner is entitled to bring his own action for compensation for the property taken. In doing so, he is virtually conceding the power of the government to take his land and is demanding the payment due him under the Constitution. In North Carolina, no special procedures are set up by statute for the inverse-condemnation suit; it is an ordinary civil action.⁵⁹

That inverse condemnation would be available to a private owner injured by aircraft flights was first suggested by the North Carolina Supreme Court in *City of Charlotte v. Spratt*.⁶⁰ In this case the city brought a condemnation action to acquire some of the defendant's land in fee; by answer she attempted to make an additional claim for damages for a flight easement that the city had allegedly taken over other land. The court held that she could not appropriately claim the additional damages in the city's action, but suggested that she might proceed in a separate action on inverse condemnation theory.

Recently the North Carolina Supreme Court has squarely held that such a course is available to a landowner. In *Hoyle v. City of Charlotte*⁶¹ the court followed the lead of earlier United States Supreme Court cases⁶² and permitted the owner to recover for diminution in value of his property resulting from low overflights. The case raises a number of problems intrinsic in the inverse-condemnation approach. The first and most obvious is that only money damages can result from such an action. The owner must admit that the airport's activities are legal and may complain only of not having been compensated for their impact on his land. The inverse-condemnation suit provides no forum for an assertion that the airport should be required to abate or modify its activities. Thus the individual plaintiff may be fairly compensated by the judgment he wins, but

(1962); *United States v. Causby*, 328 U.S. 256 (1946), noted in Note, *Aviation—Liability of Airport for Low Flying—Flights Through Airspace as Taking of an Easement*, 25 N.C.L. REV. 64 (1946); *Palisades Citizens Ass'n v. Civil Aeronautics Bd.*, 420 F.2d 188 (D.C. Cir. 1969); *Trippe v. Port of New York Authority*, 17 App. Div. 2d 472, 236 N.Y.S.2d 312 (1962). The literature in the field is vast. See, e.g., Bohannon, *Airport Easements*, 54 VA. L. REV. 355 (1968); Kettelson, *Inverse Condemnation of Air Easements*, 3 REAL PROP., PROB. & TR. J. 97 (1968).

⁵⁹ *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370-71 (1968); *Midgett v. North Carolina State Hwy. Comm'n*, 260 N.C. 241, 249, 132 S.E.2d 599, 607 (1963).

⁶⁰ 263 N.C. 656, 140 S.E.2d 341 (1965).

⁶¹ 276 N.C. 292, 172 S.E.2d 1 (1970).

⁶² E.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

the rest of society, and particularly other owners disturbed by aircraft, get no benefit at all from the plaintiff's efforts. Moreover, the judgment won by the plaintiff may not be truly adequate since the trier of facts will usually conclude that the land in question still has some residual value with the flight easement imposed upon it. Thus the owner will rarely be awarded the land's full value in fee.⁶³ Yet as a practical matter, the market for the land may be so constricted as to be negligible.

Other problems arise with the inverse-condemnation theory. It is, of course, available only against an entity that itself has the power of eminent domain; thus it is useless against most privately-owned airfields. Indeed, the question of who is a proper defendant might have been a serious one although it has not turned out to be so. The United States Supreme Court rejected the argument that the aircraft operators or the federal aviation authorities were the only proper defendants and held that the owner of the airport itself was the "taking" agency.⁶⁴ The North Carolina court in *Hoyle* followed this reasoning.⁶⁵ Another difficulty arises if the flights in question do not physically invade the plaintiff's theoretical air space, but pass to one side. Obviously the noise and pollution can be equally disturbing, yet some courts have held that if the flights are not overflights, no "taking" by eminent domain can occur.⁶⁶ *Hoyle* did not raise this problem since the plaintiff was careful to allege and prove actual overflights;⁶⁷ and the citation by the North Carolina court of cases from other jurisdictions that disregard the overflight-sideflight distinction⁶⁸

⁶³ For example, in *Hoyle* the plaintiff's witnesses testified that the unencumbered value of the property was in the range of fifty thousand dollars and its value subject to the overflights was about five thousand dollars. The jury verdict was 16,800 dollars, which was probably excessively low even considering the normal bias of witnesses for plaintiffs.

⁶⁴ *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Yet great particularity in pleading may be required to subject the airport to liability. The Georgia cases, for example, have required the plaintiff to allege that the aircraft were under the control of the airport, that the airport made the overflights necessary, and exactly what actions of the airport operator made them necessary. *Atlanta v. Donald*, 221 Ga. 135, 143 S.E.2d 737, *rev'd*, 111 Ga. App. 339, 141 S.E.2d 560 (1965); *Dyer v. Atlanta*, 219 Ga. 538, 134 S.E.2d 585 (1964).

⁶⁵ 276 N.C. at 300-02, 172 S.E.2d at 6-7.

⁶⁶ *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Ferguson v. Keene*, 108 N.H. 409, 238 A.2d 1 (1968), *noted in Note, Airspace—Aircraft Noise—Inverse Condemnation Absent Overflight*, 8 NAT. RES. J. 561 (1968).

⁶⁷ 276 N.C. at 296, 172 S.E.2d at 3.

⁶⁸ *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540, *cert. denied*, 379 U.S. 989 (1965) (*dictum*).

may indicate the court's willingness to find a taking without a physical invasion of plaintiff's airspace.⁶⁹

The court in *Hoyle* treated the time of the taking as of considerable importance since damages must be evaluated as of that date.⁷⁰ But in cases involving airports, the time of taking may be very difficult to ascertain. For example, in *Hoyle* overflights of the plaintiff's property began in 1937 when the Douglas Municipal Airport opened. However, the plaintiff testified that it was not until 1962 or 1963, when commercial jets began to use the field frequently, that he was first inconvenienced and his property first devalued by the flights. The action was commenced in 1967. The trial court's jury instructions were based on the assumption that the proper compensation was the difference between the value of the property without the flight easement and the value subject to the flight easement on the date of trial.⁷¹ The supreme court reversed and ordered a new trial; it held that the date of taking was 1962—when the use by commercial jets began—and that damages should be assessed as the difference in value with and without the (jet?) overflights on that date.

The latent problem in cases such as *Hoyle* is that of the "creeping" taking. Suppose at the new trial the plaintiff alleges and offers proof that the taking occurred in 1962. The airport then offers proof that, in fact, propeller-driven aircraft had been flying over the plaintiff's property for many years prior to 1962 and had already depreciated his property by twenty-five per cent. Assume that the increment of depreciation resulting from the flights of jets beginning in 1962 was an additional twenty-five per cent. Since the measure of damages is the difference in value before and after the taking, will the plaintiff be limited to recovery of only twenty-five per cent of the property's unencumbered value? To forestall such a result, the plaintiff would be well advised to take two precautions: first, to allege and prove a series of takings, one occurring each time the airport's operations changed so as to result in additional disturbance to his property; and second, to define carefully the scope of the easement

⁶⁹ See also *McKinney v. City of High Point*, 239 N.C. 232, 79 S.E.2d 730 (1954); *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E.2d 440 (1953), which both hold that inverse condemnation need not be based on physical invasion despite the "respectable authority" to the contrary. The "taking" in these two cases resulted from the reflection of the sun's rays onto the plaintiff's property from a water tank erected by the city.

⁷⁰ 276 N.C. at 307, 172 S.E.2d at 11.

⁷¹ The trial court's position seems to be supported by *Wagner v. Town of Conover*, 200 N.C. 82, 156 S.E. 167 (1930), despite the headnote to the contrary in the official report of that case.

alleged to have been taken by each change. This procedure is admittedly cumbersome, but it appears necessary so long as the courts adhere to the necessity for establishing a definite date of taking.

Such an approach by the plaintiff raises the possibility that if some flights had commenced as early as twenty years prior to the filing of the inverse-condemnation action, the airport would have acquired a prescriptive easement to the extent of those early flights.⁷² Another disadvantage to the plaintiff of the "serial-taking" approach is that some of the takings will be assessed at the value of the property in an earlier era when the dollar's purchasing power and the generalized demand for land were much different than today.⁷³ The plaintiff will apparently be entitled to interest from the date of each taking,⁷⁴ but six per cent per annum⁷⁵ may not be sufficient to compensate for inflation and the loss in productivity of the property over the intervening years.

If plaintiff is successful in an inverse-condemnation action against the airport and later the overflights become even more onerous, can he file a new action on the ground that the easement for which the airport previously paid is being surcharged? Such a case is not improbable: the sonic boom of the supersonic transport (SST) may make today's jets seem quite innocuous! A later recovery should be permitted,⁷⁶ and a few cases have so held.⁷⁷ To preserve this remedy plaintiff should exert his best

⁷² The court in its opinion in *Hoyle* assumed that a prescriptive easement could be acquired in this manner. 276 N.C. at 307, 172 S.E.2d at 11. The twenty-year period is taken by analogy from the adverse-possession statute, N.C. GEN. STAT. § 1-40 (1969). See *Survey of North Carolina Supreme Court Decisions 1952*, 32 N.C.L. REV. 379, 482 (1954).

⁷³ During the 1960-1969 decade, prices of typical homesites rose ninety-five per cent nationwide. The increase was 173 per cent in Charlotte, North Carolina, and sixty-nine per cent in Greensboro, North Carolina. U.S. NEWS & WORLD REPORT, March 9, 1970, at 54.

⁷⁴ *Red Springs City Bd. of Educ. v. McMillan*, 250 N.C. 485, 108 S.E.2d 895 (1959); *De Bruhl v. North Carolina State Hwy. Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958). See Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action*, 45 N.C.L. REV. 587, 634 (1967).

⁷⁵ N.C. GEN. STAT. § 24-1 (1965).

⁷⁶ The problem is quite analogous to a series of North Carolina cases in which the landowner had conveyed a right-of-way easement to a railroad that in turn permitted a communications company to install poles and lines along the right-of-way. The owner was permitted to recover permanent damages from the communications firm for the additional burden on the easement. *Query v. Postal Telegraph-Cable Co.*, 178 N.C. 639, 101 S.E. 390 (1919); *Teeter v. Postal Telegraph-Cable Co.*, 172 N.C. 783, 90 S.E. 941 (1916); *Hodges v. Western Union Tel. Co.*, 133 N.C. 225, 45 S.E. 572 (1903).

⁷⁷ *Aaron v. United States*, 340 F.2d 655 (Ct. Cl. 1964); *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964).

efforts to see that the judgment order in his first suit, as well as the pleadings and proof supporting it, make perfectly clear the scope of the easement taken by the airport to the date of the trial. The scope of the easement should be defined, perhaps, by the type of aircraft, altitude, and noise level in decibels. Since the plaintiff's recovery is limited by the use being made of his property at the trial date, he should see that it is made clear that the airport has acquired no greater right of use.

Trespass and Nuisance

In addition to inverse condemnation, two other theories have been utilized by landowners aggrieved by airport operations—trespass and nuisance. Both of these approaches have two advantages to the plaintiff over inverse condemnation. They can be asserted against non-governmental airport operators, and they may support equitable relief as well as damages; thus these two theories provide the potential for some relief to other members of the community in addition to the plaintiff.

Trespass was specifically recognized as an appropriate alternative by the supreme court in *Hoyle*;⁷⁸ the language is dictum, but, even so, is quite significant since the court made some point in its opinion of deference to the regulations of the Federal Aviation Agency, which permit flights lower than five hundred feet over congested areas "when necessary for takeoff or landing"⁷⁹ The wording of the regulations might have been thought to make intrusions into private airspace by craft landing or taking off non-actionable in trespass,⁸⁰ but the court in *Hoyle* decided otherwise. However, an action in trespass is no panacea for the plaintiff. It is likely to be quite difficult to convince a property-minded judge that a trespass can exist through "mere" sideflights but with no invasion by aircraft of the plaintiff's airspace;⁸¹ the task, however, may not be impossible. For a possible analogy, the plaintiff might cite two North Carolina cases in which the court was willing to treat air pollution as a trespass.⁸²

A plaintiff in a trespass action might frame his prayer for monetary relief in two alternative ways: his first option might be to seek "temporary"

⁷⁸ 276 N.C. at 307, 172 S.E.2d at 11.

⁷⁹ 14 C.F.R. § 91.79 (1969), authorized by 49 U.S.C. § 1301 (24) (1964).

⁸⁰ See *Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958).

⁸¹ See, e.g., *id.*

⁸² *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939); *Dayton v. City of Asheville*, 185 N.C. 12, 115 S.E. 827 (1923).

damages for a continuing trespass.⁸³ In an aircraft-overflight case, for example, the plaintiff might allege business losses or mental injury computed on an annual basis. His recovery in any given year for damages suffered to that date would not preclude a later suit for additional damages if the overflights continued and he sustained still more injury. An important restriction on recovery of temporary damages for continuing trespass is the three-year statute of limitations,⁸⁴ which would probably be held to bar any recovery for injury occurring more than three years prior to the action's commencement.⁸⁵ The statute, on the other hand, probably would not be construed to bar all recovery for continuing flights merely because the *first* flights began more than three years before commencement of the suit.⁸⁶

The other option open to the plaintiff would be to seek permanent damages for a "permanent" trespass.⁸⁷ The damages assessed under this theory would reflect depreciation in the value of the property; they would give the defendant, in effect, an easement to continue his activities without future liability. The result is the virtual equivalent of inverse condemnation, although there may be significant differences in the application of the statute of limitations and the method of computing damages. The court deciding *Hoyle* stated that the action in that case would have been barred by the three-year statute of limitations if it had been brought on a trespass theory.⁸⁸ If the court's statement refers to permanent trespass, it seems impossible to reconcile with many earlier trespass cases involving air and stream pollution and intermittent flooding of land.⁸⁹ The application of the statute of limitations in these earlier cases may be summarized as follows: if defendant has committed no wrongful acts within three years of the commencement of the action, the claim is arguably totally

⁸³ See Dobbs, *Trespass to Land in North Carolina Part II. Remedies for Trespass*, 47 N.C.L. REV. 334, 344 (1969) [hereinafter cited as Dobbs] and cases cited therein.

⁸⁴ N.C. GEN. STAT. § 1-52(3) (1969).

⁸⁵ Cf. *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942); *Davenport v. Drainage Dist. of Pitt County*, 221 N.C. 237, 19 S.E.2d 880 (1941); *Hooper v. Carr Lumber Co.*, 215 N.C. 308, 1 S.E.2d 818 (1939).

⁸⁶ Cf. *Oakley v. Texas Co.*, 236 N.C. 751, 73 S.E.2d 898 (1953).

⁸⁷ See Dobbs at 344-68. There is some thought that permanent damages are available to the plaintiff only if the defendant is a public or quasi-public agency. See *Morrow v. Florence Mills*, 181 N.C. 423, 107 S.E. 445 (1921); *Webb v. Virginia-Carolina Chem. Co.*, 170 N.C. 662, 87 S.E. 633 (1916).

⁸⁸ 276 N.C. at 307, 172 S.E.2d at 11.

⁸⁹ See cases cited notes 90 & 91 *infra*.

barred.⁹⁰ If the wrongful acts have continued to take place into the three-year period prior to the commencement of the action, even though they were begun long before, plaintiff may get permanent damages computed as the difference between the value of his land at the date of trial and its value three years before the action was commenced.⁹¹ This method of computation, it will be observed, is radically different than that used in *Hoyle* under the inverse-condemnation theory. In *Hoyle* the court insisted on the fixing of a *date* for the taking and computed damages as the difference between the encumbered and unencumbered values on that date. It must be conceded that several North Carolina cases involving trespass support the method of computation used in *Hoyle*.⁹² The approach in *Hoyle* would be more generous to the plaintiff in many, but not necessarily all, situations; and when the three-year computation is more favorable in a case involving taking by an airport, there seems to be no basis for denying it. This method has an advantage over the technique used in *Hoyle* in that it avoids the rigmarole of pleading and proving a series of takings, each more onerous than those before, when the airport's operations have steadily increased in magnitude, but in order to be considered under this approach, the increase must have occurred during the last three years.

It is apparent that permanent damages for trespass are frequently much more attractive to the plaintiff than temporary damages. Whether they can be recovered depends on whether the trespass results in a condition permanent in nature.⁹³ A permanent condition should not be an

⁹⁰ See *Teseneer v. Henrietta Mills Co.*, 209 N.C. 615, 184 S.E. 535 (1936) (flooding). But see *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942) and *Query v. Postal Telegraph-Cable Co.*, 178 N.C. 639, 101 S.E. 390 (1919), in which the court treated the three-year statute as totally inapplicable to actions for permanent-trespass damages and applied only the twenty-year prescriptive period.

⁹¹ *Teseneer v. Henrietta Mills Co.*, 209 N.C. 615, 184 S.E. 535 (1936); *Lightner v. City of Raleigh*, 206 N.C. 496, 174 S.E. 272 (1934) (stream pollution). See *Oakley v. Texas Co.*, 236 N.C. 751, 73 S.E.2d 898 (1953) (statute of limitations issue only). See also *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939) (air pollution), in which the court applied a similar measure of damages under a city charter's two-year limitations period.

⁹² *Clinard v. Town of Kernersville*, 215 N.C. 745, 3 S.E.2d 267 (1939) (stream pollution). The approach in *Hoyle* is more commonly used when the trespass is in the nature of a structure built on the plaintiff's land. *E.g.*, *Lambeth v. Southern Power Co.*, 152 N.C. 371, 67 S.E. 921 (1910) (power line installed on plaintiff's land). See also *Parker v. Norfolk & C.R.R.*, 119 N.C. 677, 685, 25 S.E. 722, 725 (1896) (flooding).

⁹³ *Rhodes v. City of Durham*, 165 N.C. 679, 680, 81 S.E. 938, 939 (1914). See *Dobbs* at 345. See also *Wiseman v. Tomrich Constr. Co.*, 250 N.C. 521, 109 S.E.2d

especially difficult matter to establish in a case in which the airport has invested in permanent runways since their directions establish flight patterns to a substantial extent. Plaintiff can argue that neither climatic conditions nor technological innovations are likely to bring a material diminution in flights over or near his property. There is some authority that, unless the defendant consents, the plaintiff may not require permanent damages from a defendant lacking the power of eminent domain.⁹⁴ Whether this proposition is true, the defendant in many cases will prefer to have permanent damages assessed so that it will be guaranteed freedom from later liability for the continuation of its present operations.

In principle, an injunctive order should also be available as an alternative remedy to a plaintiff in a trespass action. But the courts have enjoined trespasses only with reluctance,⁹⁵ and cases of disturbances by airports do not seem to be very promising ones for injunctions. In the trespass area, injunctions have not been thought of as especially flexible devices. The issue is simply: should the acts be enjoined? As a matter of practical politics, it is very difficult to imagine a superior court judge's enjoining the use of an important runway at a major airport. Several techniques may be used by the court to avoid issuing an injunction. First and most obvious, an injunction is a discretionary remedy requiring the judge to balance the respective harm and benefit that would accrue to the parties—and perhaps to the public. Second, the court may find that the plaintiff's remedy at law is adequate.⁹⁶ (Such a finding may simply be another way of saying that the court is unwilling to subordinate the interests of the defendant and the public to those of the plaintiff.)

Another obstacle to the plaintiff who seeks an injunction may be the defendant's insistence that the court assess permanent damages instead. There is some authority that at least a defendant having eminent domain powers may entirely avoid an injunction by demanding that it be allowed to pay permanent damages.⁹⁷ A more accurate interpretation of the cases

248 (1959), in which the court suggested that the act damaging the plaintiff must already have been completed in order for him to recover permanent damages. But even under this rule, plaintiff can argue that the original construction of the runways was the significant "act."

Perhaps none of the analysis is especially meaningful since *Hoyle* is clear authority that plaintiff can recover permanent damages by casting his complaint in inverse-condemnation terms.

⁹⁴ *Clinard v. Town of Kernersville*, 215 N.C. 745, 3 S.E.2d 267 (1939).

⁹⁵ See *Dobbs* at 351-59.

⁹⁶ *Id.* at 354.

⁹⁷ See *Rhodes v. City of Durham*, 165 N.C. 679, 680, 81 S.E. 938, 939 (1914).

is probably that even if the defendant has general condemnation powers, an injunction should issue if, on balance, the public interest would not be seriously disserved.⁹⁸ But this test might be difficult to satisfy if the contemplated injunction would seriously cripple an airport's operation.

To a plaintiff seriously interested in abating, to the extent practical, the annoyance caused by aircraft, a nuisance theory would be considerably more promising than one of trespass. Although the nuisance-trespass distinction has not always been clearly observed in North Carolina, the courts in nuisance cases are accustomed to much greater flexibility in fashioning orders:

Where a nuisance is private and arises out of the manner of operating a legitimate business or undertaking, a court of equity will, of course, do no more than point to the nuisance and decree adoption of methods calculated to eliminate the injurious features In other words, a court of equity will not outlaw the entire operation if a decree restricting the time or method of operation will eliminate the injury. But if regulation will not abate the nuisance, the entire operation will be enjoined.⁹⁹

A "regulatory" injunction makes a great deal of sense in a case involving disturbance by an airport. For example, the court's order might require that the use of a particular runway be limited to certain types of aircraft or that specific air-traffic patterns be observed to minimize noise or that aircraft be fitted with noise-suppression devices. There is no need that such an order be final. The court could retain jurisdiction, could require periodic reports and the monitoring of noise and pollution levels with scientific equipment, and could reserve the right to modify its decree if it proved unworkable or if circumstances changed. Implementing this sort of decree would require an energetic judge, ingenious counsel, and probably the employment of well-qualified expert witnesses. But it seems more likely than any other judicial technique to achieve a practical accommodation of the competing public and private interests.

Other factors also commend the nuisance theory to the plaintiff's at-

⁹⁸ See *id.* See also *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932). In these cases the court spoke of the injunctive power being withheld if "the interest of the public is of . . . an exigent nature." Both cases rely on the doctrine of nuisance, but the same principle would probably apply to the issuance of an injunction against trespass.

⁹⁹ *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 691, 140 S.E.2d 387, 391 (1965). Despite the grand talk about regulation, the court approved a blanket injunction against construction of an auto race track near a country church.

torney. A 1949 case, *Barrier v. Troutman*,¹⁰⁰ provides concrete authority for the proposition that an airport may be operated in such a manner as to constitute a private nuisance, that the plaintiff's remedy at law may be inadequate, and that injunction is an appropriate remedy. In *Barrier* the trial court enjoined the use of a particular runway, at least in the direction of the plaintiff's property. Apparently the airport made no effort to persuade the court that a less heroic sanction would have been sufficient. The impact of such an order could well be disastrous to a small private airport and could work much hardship on a larger installation.

Perhaps because the airport in *Barrier* was privately operated, the defense attorneys made no motion that permanent damages be assessed and that the airport be given a perpetual easement over the plaintiff's land. Such a motion seems generally more difficult to support when the injunctive alternative is a "regulatory" order leaving relatively unimpaired the public-service function of the airport. Indeed, it is possible that the option to pay permanent damages in lieu of an injunction is simply not open to any defendant against whom an injunction for nuisance is sought.¹⁰¹ In any event, the injunctive alternative seems a much more realistic possibility when it will not have the effect of closing down the airport.¹⁰² Application of the statute of limitations to an injunctive action appears to be more favorable to the plaintiff than its application to an action for damages; arguably the enjoining of a nuisance is barred only by the twenty-year prescriptive period.¹⁰³

¹⁰⁰ 231 N.C. 47, 55 S.E.2d 923 (1949).

¹⁰¹ See *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932) (lake pollution by sewage discharge):

The power of eminent domain does not imply the power to condemn property for unlawful purposes, such as the creation of a private nuisance. Such an undertaking is subject in proper cases to equitable restraint. . . .

.....

A system of drainage which discharges raw and untreated sewage into water used by a multitude of people even for a limited period cannot be regarded of such an exigent nature as to deny relief by abatement when irreparable damage is done. The plaintiffs, therefore, have not lost their right to insist upon an abatement of the alleged nuisance.

Id. at 46, 164 S.E. at 587.

The same rationale could apply readily to an airport being operated as a nuisance. Both sewage disposal and air transportation are in the public interest, but neither should be free of equitable regulation at the instance of injured landowners.

¹⁰² Both permanent damages and an injunction may be appropriately sought in a nuisance action. *Poovey v. City of Hickory*, 210 N.C. 630, 188 S.E. 78 (1936) (stream pollution).

¹⁰³ *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932); cf.

Perhaps the blanket injunction approved in *Barrier* should not be taken as too serious an indication of present judicial attitudes; the case was decided over twenty years ago in an era when commercial air transportation had neither the economic importance nor the public support that it enjoys today. The case involved a small private flying field that was not a part of a major metropolitan area and that probably handled no scheduled commercial flights. Yet the principles of nuisance and trespass should provide formidable weapons for a plaintiff's attorney today, provided he is willing to grapple with conflicting lines of authority on such matters as the computation of damages, the right of the defendant to demand an assessment of permanent damages in lieu of an injunction, and the statute of limitations. The advantage of being able to secure specific relief for his client may well justify the attorney's additional effort.

Love v. Postal Telegraph-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942); Query v. Postal Telegraph-Cable Co., 178 N.C. 639, 101 S.E. 390 (1919).