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JUDICIAL LEGISLATION IN AIRPORT LITIGATION — A BLESSING OR DANGER?

Gerald L. Hallworth*

In general, law adapts to changing conditions little by little. The evolution of the law is a long, hard process, and one that requires the mellowing of time. "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries."¹

Occasionally, however, there comes a great technological change or advance that requires a rapid re-orientation of the law — a change so sweeping that the older rules and procedures cannot be allowed to have their modification measured in terms of many decades, yet alone in centuries. The change cannot be allowed to move with the ". . . power and pressure of the moving glacier."² Rather it is more like the sudden burst of energy that occasions a snow slide. Such an instance involves the growth of the "flying contraption," from the original one hundred twenty feet and twelve seconds at Kitty Hawk,³ to the needle-nosed craft that flirts with the boundaries of outer space. This great technological advance called for a re-shaping of the law. Involved was a fundamental principle of the Anglo-American heritage: the right to have, use, and enjoy property. A right that the Constitution recognized could be abridged, but only if "just compensation" was to be forthcoming.⁴ Those owning and using property around and near the developing air terminals were assaulted in their enjoyment and use. An assault that began with a noise like that of a washing machine; a noise that was to develop into the full-throated roar of mighty, gasoline-powered engines; a roar that was to climax in a blazing crescendo of the jet — a window-shattering and house-withering noise from the new monsters of the sky. From the earliest attempts at Kitty Hawk in 1903 to the beginnings of the thunder over the Thomas Griggs' property was but fifty short years;⁵ but five decades that saw the law making an adaptation to a radically new position. From this new position, a continued adaption was made. This adaption led to the final conclusion that airplane noise is "destructive" of property. The culmination was a final holding that noise is a taking, thus meeting the latest advance from the gasoline to the kerosene engine. From the deep-throated roar of the propeller to the swoosh and whine of the jet, this is the story that is revealed in *Griggs v. Allegheny County*.⁶

In 1946, Thomas P. Griggs bought 19.2 acres of pleasant, rolling land, far away from the hustle and bustle of the metropolis of Pittsburgh.⁷ In 1952,

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1 CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 25 (1921).

2 *Ibid.*

3 PAYNE, *AIR DATES* 10 (1957).

4 U.S. CONST. amend. V.

5 The Wright Brothers made their first flight on December 7, 1903. PAYNE, *op. cit. supra* note 3, at 10. The Greater Pittsburgh Airport opened June 1, 1952. *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491, 493 (1955).

6 369 U.S. 84 (1962).

7 Lambert & Joost, *Aviation Law: Comments On Recent Aviation Cases*, 29 NACCA L.J. 354 (1963).

the Greater Pittsburgh Airport, owned and operated by Allegheny County, opened for business.⁸ As the jet-age moved forward, Griggs could watch from his bed as huge jet-liners left the end of the runway, three thousand feet distant, appeared to fly directly at the bedroom window, then, with the distinctive screech of the jet engine, rose and passed overhead with an all but deafening sound.⁹ Griggs and others brought action on grounds of nuisance, and they sought injunctive relief.¹⁰ The Viewers¹¹ report in the first case held that: "The power to appropriate 'land' therefore, carried with it the power to appropriate an easement over land and the laying out of that easement by a plan constituted an act of dominion or condemnation by the County of Allegheny."¹²

In this first case, the Viewers report was not followed and injunctive relief was denied to the nine property owners.¹³ Griggs then pressed on against Allegheny County on the grounds that there had been a "taking" within the meaning of both the Pennsylvania and the United States Constitutions. The Pennsylvania Supreme Court agreed that a "taking" had occurred. But it was their opinion that the United States had "taken," as the Congress of the United States had declared that all the air space necessary for the safe flying (the safe minimal level to be determined by the Civil Aeronautics Authority) is within the public domain and included in such public domain is that air space necessary for take-off and landing operations.¹⁴

Griggs asked for, and received, review by the Supreme Court of the United States.¹⁵ The Court held, Douglas writing the opinion with Black and Frankfurter in dissent, that:

1. A taking had occurred.¹⁶
2. Air easements are as necessary for airplane runways as are approaches to a bridge.¹⁷
3. Allegheny County, the owner and operator of the air terminal had been the "taker."¹⁸

A decision such as *Griggs* that takes into account a great technological "leap forward" is truly a momentous one. But even here, the law, when changing rapidly, must build from the past. It must find its analogy from the "like" case. Constitutional law, American style, is more flexible than case or statute

8 Apparently the buildings on the Griggs' property were constructed by this time. "Their properties were bought and their homes built before the ground was acquired for an airport." *Gardner v. Allegheny County*, *supra* note 5, at 493. Griggs was one of the property holders in the above case.

9 Lambert & Joost, *supra* note 7, at 354.

10 *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491 (1955).

11 Under Pennsylvania law, in cases of damage to property by governmental entities, the petitioner requests, from the Court of Common Pleas, the appointment of a Board of Viewers to assess the amount of the alleged damage. The Viewers opinion may be appealed to the Court of Common Pleas where the action may be heard *de novo*. *Griggs v. Allegheny County*, 402 Pa. 411, 168 A.2d 123, 124 (1961).

12 Cited in Trimble, *Airport Approach and Eminent Domain in Pennsylvania As Observed By Viewers*, 30 PA. B.A.Q. 371, 374 (1959).

13 *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491 (1955).

14 *Griggs v. Allegheny County*, *supra* note 11, at 125.

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

16 *Id.* at 90. Black and Frankfurter agreed with this point.

17 *Ibid.*

18 Black and Frankfurter felt the United States did the taking. *Id.* at 94.

law in development of new doctrine to handle new and radical cases.¹⁹ But even in constitutional law there must be a foundation, although at times it may be a fairly shaky foundation. The finding in the *Griggs* case, that noise is a destruction of property requiring compensation, had to be based on past decisions for its rationale. It is this short historical background that must be sketched if an understanding and an appreciation of all the complex aspects of the *Griggs* case is to be forthcoming.

The state of air law and property owners' rights is such that in almost all jurisdictions the surface owner is probably regarded as owner of the superadjacent space to a reasonable height. Even in light of the *Griggs* decision, this is still an accurate description of the state of the law. How did we get here? This study will now be concerned with understanding fully the forces at work and recognizing fully the path the law has traveled to reach this point. The spotlight will move from the early period, pre-1946, to *Causby*,²⁰ then to the period between *Causby* and *Griggs*. Then on to post-*Griggs*. Finally, the writer will draw some conclusions, personal and otherwise.

Early History and Problems

It was recognized early that noise was going to present a problem in future aircraft and airport development.

The greatest bugaboo, of course, is the noise. How long the aircraft will continue to be accompanied by such overwhelming and overpowering noise, is a matter which only the engineers and their patron saint, St. Patrick, can answer. * * * While airplanes were new and novel, the question of noise was one of slight importance. They were entertaining. But when the novelty wears off and when night flying with its departure and arrival of planes at all hours, as at our union stations, has become an accomplished fact, the householder whose home adjoins the airport is going to find that his days are hideous and his nights are sleepless.²¹

This was written in 1929, some fourteen years before *Causby's* chickens were to kill themselves by flying wildly into the side of their coops, and thirty years before nights at the *Griggs* house were to become a long succession of sleepless nightmares. Prophetic words, but at the same time there were several complicating factors that precluded any quick resolution of the conflict between "rights of flight" and "property rights."

One of these complications was the ancient belief that a landowner owned all the land beneath his property to the center of the earth and all the space above his land to the heavens.²² "From the fires of hell to the heights of heaven." In the original this Latin doctrine read: *Cujus Est Solum Ejus Usque Ad Coelum*. There were those as late as 1930 who still considered "ad coelum"

19 LEVI, AN INTRODUCTION TO LEGAL REASONING 10 (1961).

20 United States v. *Causby*, 328 U.S. 256 (1946).

21 From a speech by George B. Logan to the American Bar Association in 1929. 54 A.B.A. REP. 869, 876-77 (1929).

22 Historical accounts of this doctrine may be found in: Klein, *Cujus Est Solum Ejus Est . . . Quousque Tandem?*, 26 J. AIR L. & COM. 237 (1959) and Abramovitch, *The Maxim "Cujus Est Solum Ejus Usque Ad Coelum" As Applied in Aviation*, 8 MCGILL L.J. 247 (1962). An able discussion of the place of the doctrine in aviation law just prior to the *Causby* decision is: Lashbrook, *The "Ad Coelum" Maxim As Applied To Aviation Law*, 21 NOTRE DAME LAWYER 143 (1946).

as the law in air space controversies.²³ To believe this was good common law in the Coke-Blackstone tradition, but the tradition placed an obstacle in the path of the resolution of the conflict.²⁴ The effects of this belief are seen by noting that the "ad coelum" theory was the first argument put forth by aggrieved landowners from the first case in 1922²⁵ until the "unification" of the law in 1946.²⁶ The continued advancement of the theory meant that a dubious concept was given increased validity by the very fact that the courts were time and time again forced to reject the claim that the landowner owned the sky over his head to the "heights of heaven."

A second entangling factor was the belief that the right to flight was as inalienable as the right to property — a right that was not to be abrogated by other men; a right that was to have all the solidity and validity as the right of private property. "Nor is this freedom [of the air] the basis of a mere privilege which a person must justify. It is the basis of a right of equal dignity with that of the ownership of the land."²⁷

A third complicating factor was that, until 1946 and *Causby*, the landowner had to rely on trespass and nuisance as grounds for relief.²⁸ Trespass deals, of course, with the movement of aircraft through air space that is presumably owned by the landowner.²⁹ A nuisance would derive from actual airport operation and originate within the confines of the airport property itself.³⁰ The attempts to use these forms met with defeat, and for very important reasons. The inconvenience of the nuisance to the individual landowner was usually felt to be far outweighed by the common good, or public interest, involved in the continued operation of the airports. Another aspect of the difficulties inherent in the use of the nuisance complaint came from an analogy to the railroads. The courts had not favored the landowners in suits against railroads that alleged the creating of a nuisance, and thus there did not exist a convenient foundation for building favorable results in a reasonably similar area. Indeed, the courts had gone so far as to indicate that the noise, dust, disturbance from the railroads was a "legalized nuisance" and hence did not constitute a "taking."³¹ If no "taking" resulted, then just compensation could not, of course, be required to be paid.

Another factor that delayed the concept of an air easement was the belief that such easement would either leave ". . . the right of the aviator in an extremely nebulous state,"³² or, it was impossible of accomplishment. "Gen-

23 Hise, *Ownership and Sovereignty of the Air*, 16 IOWA L. REV. 169 (1930).

24 Hackley, *Trespassers In the Sky*, 21 MINN. L. REV. 773 (1937).

25 Commonwealth v. Nevin, 2 Pa. D. & C. 241 (1922).

26 United States v. Causby, 328 U.S. 256 (1946). Use of "ad coelum" as first argument noted in 16 SW. L.J. 346 (1962).

27 Green, *Trespass By Airplane*, 31 ILL. L. REV. 499, 502 (1937). Leon Green was, at the time of the cited article, Dean of the Northwestern University Law School. Compare this with an earlier pronouncement by Dean Green: "There is every reason to conceive of flight as a right, in the sense of freedom or liberty, rather than a privilege." 29 ILL. L. REV. 590 (1935).

28 Note, 21 TEMP. L.Q. 62, 63 (1947).

29 Mace, *Ownership of Airspace*, 17 U. CING. L. REV. 343, 345 (1948).

30 *Ibid.*

31 See *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) for a discussion of this point.

32 Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. & COM. 329, 353 (1932).

erally it has been said that the gaining of an easement of flight through the air space over land is not possible."³³ If a thing is not "possible," then there would appear to be little reason to consider it. Consequently, there was little consideration of air easements during this period.

It can be seen that the early attempts by the publicists to meet the problems involved were confounded by the wide variety of opinions that were set forth. The diversity of the writers on the subject was but a reflection of the confusion of the courts. Massachusetts interpreted low flights as being "technical trespasses."³⁴ Delaware held that low flights were "unprivileged" excursions into the superadjacent air space and as such they were trespasses.³⁵ The earliest federal case on flying craft saw the court holding that the landowner owned the air space below the minimum altitude for safe flight as had been set by the Civil Aeronautics Board.³⁶ A later federal court decision used the theory of possible effective possession.³⁷ That is, how much air space could the landowner possibly hold? A state court arrived at the same solution during this pre-*Causby* period.³⁸ Another federal court adopted the "actual use" test of ownership.³⁹ "The owner of the land owns as much of the space above him as he uses, but only so long as he uses it."⁴⁰

Several theories of land and superadjacent air space ownership were put forward during this period. First, of course, was the ancient doctrine that the landowner possessed property from the center of the earth on outward to the upper limits of the sky—the "ad coelum" doctrine. Second was the theory that the landowner possessed the air space as long as he used the air space—the "actual use" test. A third theory was that of the possible effective ownership. How much can the landowner possibly effectually use? The fourth theory was the concept that ownership of air space did rest with the landowner below the minimum safe altitude levels set by the Civil Aeronautics Board. Thus in brief compass, we have been brought forward to the Supreme Court's first pronouncement on this problem.

*United States v. Causby*⁴¹

Briefly stated the facts of the case were: Causby bought 2.8 acres of land in 1934. At that time an airstrip was located one-third of a mile distant. The airstrip then presented no great noise problem to either the Causbys or their means of livelihood, the raising of chickens. In April of 1942 the airstrip became the Greensboro Municipal Airport, but the effects of the flights still were not severe enough to cause great discomfort or annoyance to the chickens or Causby. In May, 1942, the United States assumed control of the airport under a leasing

³³ Kingsley & Mansham, *The Correlative Interests of the Landowner and the Airman*, 3 J. AIR L. & COM. 374, 378 (1932).

³⁴ Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E.2d 575 (1942); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 393 (1930).

³⁵ Vanderslice v. Shawn, 2 Del. Ch. Rep. 225, 27 A.2d 87, 90 (1942).

³⁶ Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929). Involved here was a lighter-than-air craft.

³⁷ Cory v. Physical Culture Hotel, 14 F. Supp. 977 (W.D. N.Y. 1936).

³⁸ Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

³⁹ Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).

⁴⁰ *Id.* at 758.

⁴¹ 328 U.S. 256 (1946).

agreement with the airport, and began the flights of huge four-engine, long-range bombing craft. This caused discomfort to the personal life of the Causbys, and additionally, it marked a decline in egg production. Beyond this, it was so frightening to the chickens that many of them flew wildly into the side of their coops and literally dashed themselves to death.

The Court in holding that an air easement had been taken,⁴² decided four major points. First, the Court rejected the "ad coelum" doctrine as being without value.⁴³ The Court then affirmed the established doctrine that it is the character of the invasion that determines whether or not there has been a "taking."⁴⁴ In other words, as long as the damage is substantial, there is a "taking."⁴⁵ There can be, then, a partial "taking" in the same sense as there can be a "temporary taking."⁴⁶ "If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land."⁴⁷ The problem with "taking" is, of course, the tendency to associate "taking" with the actual physical handling of property. "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed."⁴⁸ What is involved here is a "mental taking."⁴⁹ "You take my life when you take the means whereby I live."⁵⁰

The Court has long held that there need not be an actual physical invasion for a taking. In *Pumpelly v. Green Bay*⁵¹ the Court noted that it would be to "pervert" the Constitutional intent if "taking" did not also mean destruction of the usefulness of property.⁵² Again:

It is conceivable that the first [property right] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.⁵³

The general rule is that there need not be an actual physical "taking," but a restriction in the use of value of the land with an attendant conferring of the property rights upon the public does constitute a "taking."⁵⁴

The third point in the *Causby* decision was reached by analogy. The Court cited and relied greatly upon *Portsmouth Land & Hotel Co. v. United States*.⁵⁵ There it was held that a "taking" had occurred due to repeated firings of cannon shots over a resort hotel. A ". . . continuance of them [the

42 *Id.* at 266.

43 *Id.* at 260-61.

44 *Id.* at 266.

45 *United States v. Cress*, 243 U.S. 316, 328 (1917).

46 *Duckett & Co. v. United States*, 266 U.S. 149 (1924).

47 *United States v. Cress*, 243 U.S. 316, 328-29 (1917).

48 *Mr. Justice Holmes in Block v. Hirsh*, 256 U.S. 135, 155, (1921).

49 *See, Cormack, Legal Concepts in Cases of Eminent Domain*, 41 *YALE L.J.* 221 (1932).

50 SHAKESPEARE, *MERCHANT OF VENICE*, Act IV, Scene 1.

51 80 U.S. 166 (1872).

52 *Id.* at 177-78.

53 *United States v. General Motors*, 323 U.S. 373, 377-78 (1945).

54 60 *MICH. L. REV.* 98, 99 (1961). *See, United States v. Great Falls Manufacturing Co.*, 112 U.S. 645, 656-57 (1884) and *United States v. Lynah* 188 U.S. 445, 470, 474 (1903).

55 260 U.S. 327 (1922).

cannon shots] in sufficient number and for a sufficient time may prove it [the 'taking']. Every successive trespass adds to the force of the evidence."⁵⁶ Thus, even though the Court did not specifically hold that repeated flights would be necessary, the implication is quite clear.

The fourth major aspect of the decision saw the Court setting up a zonal concept of air space.⁵⁷ The lower zone is owned by the landowner, and the upper zone is in the public domain. The lower zone is, at least, that part of the air space that is necessary for the landowner's enjoyment and use of his land. It was clear that this zone was violated in *Causby's* instance.

The *Causby* decision marked the great breakthrough. "Ad coelum" is rejected and a more equitable concept is applied to the continually increasing problem of airports and landowners.

Causby to Griggs

The period from the decision in *Causby* (1946) to the decision in *Griggs* (1962) was a period that saw many decisions handed down dealing with the question of air space ownership, or landowner v. aviator. It is to this *Causby-to-Griggs* period that we now turn for an examination.

Comments on the quality of the *Causby* decision⁵⁸ ranged from those who saw it as "unifying" air-law⁵⁹ and those who saw the court as taking a "devious" path,⁶⁰ to those who wrote that it creates "substantial confusion."⁶¹

If opinions were varied as to the merits of the decision, and they were, then we could reasonably expect that the proffered solutions would have also varied greatly in content, and they did. One called for an "education" of the public apparently to accept a new, higher, noise level or to count their blessings when their eardrums were assaulted.⁶² Another suggested that chickens would adjust to noisy flights in much the same fashion as cows and other domestic animals had adjusted to automobiles, trains, and other technological advances.⁶³

Others advanced substantive or procedural changes that would forestall future difficulties of this type. ". . . [L]itigation of this type [*Causby*] may be avoided in the future by use of remedies available to municipalities as agents

56 *Id.* at 329-30.

57 328 U.S. at 263-64. See, 35 CALIF. L. REV. 110 (1947).

58 The *Causby* case brought forth a veritable flood of articles, notes, and shorter comments. Most of this material is mentioned below. For comments on the Court of Claims phase of the controversy, see, 45 COLUMN. L. REV. 121 (1946) and 58 HARV. L. REV. 1252 (1945). On the Supreme Court decision, see: Nagel, *The Causby Case and the Relation of Landowners and Aviators — A New Theory For the Protection of the Landowner*, 14 J. AIR L. & COM. 112 (1947); Mace, *Ownership of Space*, 17 U. CINC. L. REV. 343 (1948); Precker, *Airports As Nuisances*, 71 N.J.L.J. 289 (1948); Thorpe, *Flight of Aircraft As A Taking of Property*, 1 WYO. L.J. 148 (1947); Wolf, *Property: Landowner's Right To Air Space*, 30 MARQ. L. REV. 193 (1947); Notes and Comments, 25 N.C.L. REV. 64 (1946); Note, 21 TEMP. L.Q. 62 (1947); Comment, 95 U. PA. L. REV. 224 (1946); 35 CALIF. L. REV. 110 (1947); 25 TEXAS L. REV. 91 (1946); 20 TEMP. L.Q. 156 (1946); 22 NOTRE DAME LAWYER 228 (1947); 12 MO. L. REV. 70 (1947); 32 VA. L. REV. 1191 (1946); 31 MINN. L. REV. 384 (1947); 21 ST. JOHN'S L. REV. 92 (1946); 26 NEB. L. REV. 123 (1946).

59 Anderson, *Some Aspects of Air Trespass*, 27 J. AIR L. & COM. 341 (1960).

60 35 CALIF. L. REV. 110, 115 (1947).

61 Note, 74 HARV. L. REV. 1581, 1584 (1961).

62 Fraleigh & Goddard, *Airport Planning and Management*, 23 J. AIR L. & COM. 156, 161 (1956).

63 Thorpe, *Flight of Aircraft As A Taking of Property*, 1 WYO. L.J. 148, 151 (1947).

of the states operating the airports for a public purpose."⁶⁴ The principal remedy seen in this case was prior purchase of the air space.⁶⁵ Another saw that "aviation easements offer a solution to the problem and in many cases should be obtained . . . —"⁶⁶ preferably in advance, it might be added. A more optimistic note was struck by a writer who saw the solution in the "progress" of building improved airports and airplanes. This progress ". . . will virtually eliminate such causes of action as dust, noise, brilliant illumination and congregation of crows, leaving only the menace of low flying as a complaint."⁶⁷

During this period, two independent complicating factors arose. The first was the arrival of the jet with its increased noise factor. In addition to the increase in noise, the larger planes needed more room in which to turn and they needed a longer, shallower glide path at take-offs and in landings.⁶⁸ Indeed, the increased noise factor of the jets approached the threshold of causing serious physical damage to an average individual's ear.⁶⁹ The second complication came with the passage of the Federal Aviation Act of 1958.⁷⁰ In the *Causby* case, the Court's decision was made easier by the fact that in legally defined terms airport glide paths were below the minimal "safe altitude" as set by the Civil Aeronautics Board.⁷¹ The new legislation specifically included the glide paths within the national control as "safe altitudes."⁷² Because the new law can be affirmatively placed in time, the scrutiny of court decisions in the post-*Causby* but pre-*Griggs* period can be divided into two periods: pre-1958 and post-1958.

There were two state court decisions that appear to have the greatest significance in the first sub-period. The California courts held that an air easement could exist for one type of plane and for a certain altitude.⁷³ In other words, the court would logically be able to separate the quieter propeller craft from the noisier jet aircraft. The other significant state decision was the immediate forerunner to the *Griggs* case: *Gardner v. Allegheny County*.⁷⁴ Here the court held that injunctive relief could not be granted.⁷⁵ The thing to note in *Gardner* is that the property owners were still attempting at this date to gain injunctive relief.

The federal courts also contributed to the further re-defining of air law during this period. It was held that failure to sell property was not conclusive proof that aircraft noise would interfere with any other use that the landowner might be able to make of his property.⁷⁶ In other words, damages could not be levied on anticipated profits.

64 Note, 25 N.C.L. REV. 64, 70 (1946).

65 *Ibid.*

66 German, *The Conflicting Interests of Airport Owners and Nearby Property Owners*, 20 U. KAN. CITY L. REV. 138, 152 (1951).

67 Precker, *Airports As Nuisances*, 71 N.J.L.J. 289, 299 (1948).

68 Fraleigh & Goddard, *supra* note 62, at 159.

69 Anderson, *supra* note 59, at 348.

70 72 Stat. 731, 49 U.S.C. §§ 1301-1542 (1958).

71 328 U.S. 256, 264-66.

72 72 Stat. 739, 49 U.S.C. § 1301 (24) (1958).

73 O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10 (1948).

74 382 Pa. 88, 114 A.2d 491 (1955).

75 *Id.* at 504.

76 *Homestead Warehouse Corp. v. United States*, 98 F. Supp. 572 (Ct. Cl. 1951).

Also, cemetery land became difficult to "take." Construction of an airport adjacent to an established cemetery did not mean a diminution of that land's value as a burial place.⁷⁷ This period also witnessed an attempt to gain injunctive relief in federal court.⁷⁸ The attempt, as might have been anticipated, was a failure. The court did go on to say, however, that their decision did not preclude the possibility that a "taking" might occur in the future and if it did occur, then compensation would be necessary.⁷⁹ It was also held that a prescriptive easement could be enlarged from the original, and compensation would then be due on the enlargement.⁸⁰ In the same case it was held that the first overflight, plus the intent to continue, constituted the beginning of the taking.⁸¹ A federal court also held that lateral interference was not covered by *Causby*.⁸² Another federal court also decided that navigable air space means that a privilege to travel in and out of air space does exist, and, this privilege does not necessarily mean public ownership of the airspace.⁸³ However, the surface owner has a claim to the air space at any altitude from which interference emanates.⁸⁴ This was the general state of the law prior to the then-new Congressional enactment.

One of the first decisions rendered after passage of the new legislation saw a court interpret the enactment to mean that Congress had intended to pre-empt the legislative field in this area.⁸⁵ Thus, a municipality could not proceed against airlines in an attempt to abate the noise problem, as Congress desired uniformity of law. The courts also re-affirmed earlier decisions by holding that "taking" could only occur where the flights were directly over the landowner's property.⁸⁶ Lateral interference was not covered by the *Causby* principle. Also, the violation of an air easement over vacant land was not compensable.⁸⁷ In other words, the courts were not ready to award damages on the basis of what the owner of a vacant strip of land said he might do with the land. Another series of opinions also tended to tie down when "taking" actually began.⁸⁸ All agreed that the "taking" occurred with the first flight; however, two opinions held that intent to continue was also important in the determination.⁸⁹

This brings the survey down to the *Griggs* decision.

*Griggs v. Allegheny County*⁹⁰

This portion of the study will deal primarily with some questions raised

77 *Friendship Cemetery v. Baltimore*, 200 Md. 400, 90 A.2d 695 (1952).

78 *Allegheny Airlines Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956).

79 *Id.* at 816-17.

80 *Herring v. United States*, 162 F. Supp. 769 (Ct. Cl. 1958).

81 *Id.* at 772.

82 *Freeman v. United States*, 167 F. Supp. 541 (W.D. Okla. 1958).

83 *United States v. 15,909 Acres of Land*, 176 F. Supp. 447 (S.D. Cal. 1958).

84 *Id.* at 448.

85 *City of Newark v. Eastern Airlines*, 159 F. Supp. 750 (D.C.N.J. 1958).

86 *Pope v. United States*, 173 F. Supp. 36 (N.D. Tex. 1959); *Moore v. United States*, 185 F. Supp. 399 (N.D. Tex. 1960).

87 *Matson v. United States*, 171 F. Supp. 283 (Ct. Cl. 1959).

88 *Bacon v. United States*, 295 F.2d 936 (Ct. Cl. 1961); *Davis v. United States*, 295 F.2d 931 (Ct. Cl. 1961); *Matson v. United States*, *supra* note 87.

89 *Davis v. United States*, *supra* note 88 and *Matson v. United States*, *supra* note 87.

90 369 U.S. 84 (1962).

by other commentators about the *Griggs* decision. The factual situation has been canvassed earlier and does not need further elaboration at this point.⁹¹

One writer has raised a question of prime importance with respect to the *Griggs* case. "The opinions and the form of the order in *Griggs* do not indicate the basis for Supreme Court jurisdiction."⁹² He partially answered his own question by noting that through the fourteenth amendment, the fifth amendment "just compensation" clause might be protected against state encroachment. "Presumably that part of the Fifth Amendment that requires 'just compensation' has been read into the Fourteenth Amendment and controls the states."⁹³ (Emphasis added.) Compare "presumably" with:⁹⁴

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial of a right secured to the owner by that instrument.

Or compare "presumably" with:⁹⁵

We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation, then due process of law was denied him, contrary to the Fourteenth Amendment.

It would appear that the law would be fairly well settled. The Supreme Court has jurisdiction, through the fourteenth amendment, when compensation is not made in property "taking" instances. This has not always been the law but has been, presumably, since 1897.⁹⁶

The same writer also questions when the claim "became actionable."⁹⁷ That is, when did the taking occur? The silence of the Court on this matter can be fairly construed to mean that they acquiesce in the mounting body of opinion that holds "taking" to occur with the first flight over the property.⁹⁸

Another writer raises the question of why the suit was not grounded in a nuisance action.⁹⁹ To bring suit in a nuisance proceeding would have involved injunctive relief. Injunctive relief would have probably been denied on the grounds that Congress had defined the navigable air space to include the space

91 *Supra* at notes 2-4, p. 289-90.

92 Dunham, *Griggs v. Allegheny County In Perspective: Thirty Years of Supreme Court Expropriation Law*, in SUPREME COURT REVIEW 1962 63, 84 (Kurland ed. 1962).

93 *Id.* at 85.

94 *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

95 *McCoy v. Union Elevated Ry. Co.*, 247 U.S. 354, 363 (1918).

96 Prior to 1897 the Court had ruled: "If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this [the due process clause] was taken." Davidson v. New Orleans, 96 U.S. 97, 105 (1878). See, ROBERTS, *THE COURT AND THE CONSTITUTION* 70-72 (1955).

97 Dunham, *supra* note 92, at 86.

98 *Supra* note 88 and cases cited therein.

99 Note, 42 B.U.L. REV. 565, 570-71 (1962).

needed for landing and taking off.¹⁰⁰ Additionally, as was pointed out earlier, the raising of the nuisance issue could easily result in a declaration of "legalized nuisance" and thus no compensation could be awarded. Though damages would have been higher in a nuisance judgment,¹⁰¹ the risks of gaining no damages were out of proportion to the risks involved in the path that was followed in the search for "justice."

A far more difficult question has been raised. Why was Allegheny County held responsible for the "taking"? In the light of the Congressional definition of air space, it would appear that the United States did the taking. What makes this question difficult of resolution is that Justices Black and Frankfurter agreed with the rest of the Court, that a taking occurred; but they reasoned that the taking had been by the United States. They did not accept the logic of Justice Douglas who said ". . . that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense."¹⁰² Douglas said that there was ". . . no difference between its responsibility for the air easements necessary for the operation of the airport and its responsibility for the land on which the runways were built."¹⁰³ He pointed out that "the glide path for the northeast runway [over the Griggs' property] is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam."¹⁰⁴ He approvingly noted language from a state court: "An adequate approach way is as necessary a part of an airport as is the ground on which the airstrip is constructed."¹⁰⁵

The Black-Frankfurter argument was simply that Congress had adopted a national plan regulating air space, and in that plan Congress had appropriated the air space. Thus, if Congress had appropriated, there is no need for Allegheny County to appropriate.

In answer to this argument, the agreement between the United States and the County is fairly difficult to explain away, and it gives the impression that all responsibilities for "easements or other interests in land or air space" are with the County. The pertinent points of the agreement between the United States and the County are as follows:¹⁰⁶

(i) insofar as is within its power and reasonably possible, the sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, take-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either

100 Butler, *The Landowner v. The Airport: Property Rights in Airspace In Light of Griggs v. Allegheny County*, 24 U. PRR. L. REV. 603, 615 (1963). See, *City of Newark v. Eastern Airlines*, *supra* note 85, where it was held that Congressional intent was uniformity and thus injunctive relief was not granted.

101 Note, 42 B.U.L. REV. 565, 570-71 (1962).

102 *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962).

103 *Id.* at 89.

104 *Id.* at 90.

105 *Ibid.*, quoted from *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 348 P.2d 664, 671 (1960).

106 *Griggs v. Allegheny County*, 402 Pa. 411, 168 A.2d 123, 133-34 (1961).

by the adoption and enforcement of a Zoning Ordinance and regulations, or by the acquisition of easements or other interests in land or airspace, or by both such methods.

A more oblique attack on the Black-Frankfurter position was launched by Douglas in a footnote.¹⁰⁷ Douglas noted that "[i]n circumstances more opaque than this we have held lessors to their Constitutional obligations,"¹⁰⁸ citing the case of *Burton v. Wilmington Parkway Authority*.¹⁰⁹

In that case the Court held that a lessor had to desegregate his cafe on the grounds that he had leased the space from the Wilmington Parking Authority, a governmental entity. The cafe was in a building that was occupied in part by the public parking facility, though within the walls there was not an entrance into the cafe from the parking area. Here, then, a lessor more removed from the immediate scene and having less responsibility for the over-all operation, was held as having to fulfill his Constitutional obligations, or at least those obligations as seen by the majority of the Court. If under these circumstances a private individual must meet Constitutional requirements, then, certainly, a governmental unit should be expected to follow the same general rule.

It has also been queried: "What constitutes the taking of an air easement; can Congress or the states void the taking . . . ?"¹¹⁰ There have been other points raised elsewhere that can be employed in answer to the question of "voiding." It has been noted that in the airplane decisions "corrective justice," or, ". . . the righting of wrongs already accomplished,"¹¹¹ has been the goal. Another publicist, writing after *Causby*, noted: "The decision appears . . . to take out of the legislative realm the problem of fixing property rights in the air and to preserve this prerogative to the courts."¹¹² In effect, that is what was done in the *Griggs* case. If this is the attitude of the Court, and apparently it is, then corrective justice is all that can be applied and a taking could not be voided. It is doubtful, under any circumstances, whether or not a voiding of a court-declared "taking" could be accomplished by legislative enactment. A ". . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹¹³

Before leaving the *Griggs* decision, an examination of a strikingly "like" case¹¹⁴ would appear to be in order. There have been many critics of the Court's reasoning in the two landmark cases of *Causby* and *Griggs*.¹¹⁵ Some of these critics have left the general impression that the Court indulged in the construction of Constitutional principle out of straws, paying too little regard to

107 369 U.S. 84, 89 n. 2.

108 *Ibid.*

109 365 U.S. 715 (1961).

110 Butler, *supra* note 101 at 611.

111 Harvey, *Landowner's Rights In The Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1331 (1958).

112 Comment, 95 U. PA. L. REV. 224, 227 (1946).

113 *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

114 *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

115 *E.g.*, Thorpe, *Flight of Aircraft As A Taking of Property*, 1 WYO. L.J. 148 (1947); Note, 74 HARV. L. REV. 1581 (1961); 42 B.U.L. REV. 565 (1962); 57 NW. U.L. REV. 346 (1962); 47 MINN. L. REV. 889 (1963).

the historical basis of their decision.¹¹⁶ One critic has written that the Court devised a doctrine after determining what "equitable justice" demanded.¹¹⁷ In other words, there was no basis in law or history for their decision. While the dispensation of "equitable justice" is not to be deplored, neither is it sufficient answer in itself for understanding, or explaining, the decision reached in *Griggs*. The Court does not, and cannot, exist or work in a vacuum. A large part of the Court's frame of reference, regardless of other pressures, is in the law and legal principles. Part of the larger frame of reference is a smaller one which involves similarities in "like" cases.

*Richards v. Washington Terminal Company*¹¹⁸ supplies a most similar case to the *Griggs* case in substance, issue, and holding. The Washington Terminal Company, like Allegheny County, was to acquire "the lands and property necessary for all and every the purposes contemplated . . ."¹¹⁹ The "purposes contemplated" were the construction, operation, and maintenance of a railroad terminal. A railroad terminal is a transportation center, much the same as an airport terminal, which is used by common carriers not directly involved in the building or operation of the facilities. To assist in the successful operation of the terminal, the Court noted that ". . . Congress has authorized, and in effect commanded, defendant to construct . . . a tunnel with a portal located in the midst of an inhabited portion of the city."¹²⁰ The Court recognized that the single portal of the tunnel was spewing forth smoke and ash on Richards' property and thereby rendering the property useless. Congress commanded, the Terminal Company obeyed and the landowner lost the usefulness of his property. Congress ordained, Allegheny County obeyed and the landowner lost the usefulness of his property. The Court held that the property, in the *Richards* case, had been taken and the "taking" had been accomplished by the Terminal Company — in spite of the Congressional edict. "If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation . . . and pending its acquisition defendant is responsible."¹²¹ It is difficult to determine any substantial difference in the basic outline of this decision and the *Griggs* case. It is difficult, therefore, to accept the implication that would seem to indicate that the Court was working in the dark when it handled the problem presented in the *Causby* and *Griggs* cases.

However, one problem that is still unsolved does remain. That difficulty is best seen in light of the slight developments since *Griggs*.

Post-Griggs

The remaining question will be examined in its reflection as revealed in two court decisions. In a federal case, the court reaffirmed an earlier

¹¹⁶ E.g., Hays, *United States v. Causby: An Extension Thereof*, 36 W. & M. L. REV. 36 (1961); Nagel, *The Causby Case and the Relation of Landowners and Aviators — A New Theory for the Protection of the Landowner*, 14 J. AIR L. & COM. 112 (1947).

¹¹⁷ Hays, *supra* note 116, at 60.

¹¹⁸ 233 U.S. 546 (1914).

¹¹⁹ *Id.* at 552.

¹²⁰ *Id.* at 557.

¹²¹ *Ibid.*

principle by holding that a "taking" can only occur when flights are directly over the property of the landowner.¹²² The second court decision, in a state court, marks a movement away from the general principle requiring direct overflight of property for "taking." "[I]nterference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular."¹²³ Thus, despite the "genius" of the courts in fitting old law to new circumstances, a singularly large, and difficult, problem area remains. The solution to the issue might be aided by another matter, or multi-matter, that, in a manner of speaking, was created by the *Griggs* case.

Aggrieved landowners, apparently triggered by the successful litigation of Thomas P. Griggs, have swung into action against the nation's airports. One newspaper has counted one hundred and sixty suits involving airplane noise that have been actually filed and has estimated that two hundred and fifty more suits are pending. Twenty-eight million dollars is being asked for in the way of damages.¹²⁴ From the diversity that is surely represented in the accumulated number of lawsuits there will, beyond a doubt, emerge a unity in the future treatment of "noise." Thus, the second "problem" will aid the successful resolution of the first.

Conclusions

From its prosaic beginnings with an overhanging pear tree¹²⁵ air law has evolved into a rather comprehensive and complete set of rules. The development has been rapid, and it has been necessarily so. At one time a letter from the Postmaster General of the United States was sufficient to move aircraft flights from their low passage over a chicken farm to a higher altitude that was more amenable to egg production.¹²⁶ The modern era has required a different method of concluding the same problem. If common law practice is the pouring of new content into old concepts,¹²⁷ then the development of air law, or at least that portion of air law under discussion, is an outstanding example of the common law at work. The job, of course, is not completed.

There remains, for instance, the large question of the property owner who, in wing-tip to wing-tip measurement, falls outside the glide path of aircraft. His property is not overflown. But the damage to his property, as expressed in terms of usefulness, is real. Should he be denied legal recourse because the law has become rigidified? "It is sterile formality to say the government takes an easement in private property when it repeatedly sends aircraft directly over the land at altitudes so low as to render the land unusable by its owner, but does not take an easement when it sends aircraft a few feet to the right or left of the perpendicular boundaries (thereby rendering the same land

122 *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962).

123 *Thornburg v. Port of Portland*, 376 P.2d 100, 106 (Ore.) (1962).

124 *Pittsburgh Press*, Dec. 19, 1962, p. 23, col. 3, cited in Bruce, *The Landowner v. The Airport: Property Rights In Airspace In Light of Griggs v. Allegheny County*, 24 U. PITT. L. REV. 603, 615 (1963).

125 Hackley, *Trespassers In The Sky*, 21 MINN. L. REV. 773 (1937).

126 Sweeney, *Adjusting The Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. & COM. 329, 331 (1932).

127 WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 166 (1942).

equally unusable).¹²⁸ The Air Force calls the noise the "sound of Freedom."¹²⁹ The airline industry, including airport management, calls it the "price of progress."¹³⁰ Those who live near and around airports, both military and commercial, call it "sheer hell."¹³¹ If the noise is to be likened to the infernal regions, then surely the torment is the same for the property owner who lives next door to the glide path as it is for the landowner directly under the glide path.

The ultimate solution to the noise problem will arrive when science delivers us into the age of noiseless flight. Until scientific knowledge advances the permanent solution, the temporary solution must be sought within legal terms. Legal terms that must be defined on a national basis. Schemes or solutions that involve local regulations are shortsighted in nature.¹³² "A way of travel which quickly escapes the bound of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past."¹³³ To put it simply, the airplane transcends federalism.

Additionally, the solution will have to be sought through the courts,¹³⁴ moving in *ad hoc* fashion, and basing their determinations on reasonableness and interest-balancing.¹³⁵ In other words, in much the same fashion as has been pursued to this point. "Reasonableness is so inherent in the judicial balancing of interests in the airport cases that most of the decisions . . . simply proceed to investigate the facts and then grant or deny relief upon the basis of the reasonableness of one interest yielding to another in a given case."¹³⁶ This is operating within the common law tradition. To use the traditional methods of the common law necessarily means that the law will "lag" behind scientific and technological achievements. The "lag" is neither to be deplored nor to be condemned,¹³⁷ but it is to be understood as part of the total development of a nation. The forward thrust of a nation involves far more than scientific and technological advance. And law, as the embodiment of "the story of a nation's development"¹³⁸ must take into account more than scientific and technical knowledge. Law must express the human experience that is involved in the forward movement.

The willingness to rely on the courts for solution of the air space problem is also based on a generalization that emerges from this study of conflicts be-

128 *Thornburg v. Port of Portland*, 37 P.2d 100, 109 (1962).

129 *Time*, March 17, 1962, at 65.

130 *Ibid.*

131 *Ibid.*

132 Advocating the use of local zoning ordinance, see, 60 MICH. L. REV. 98 (1961). Advocating individual state legislation, see, Note, 74 HARV. L. REV. 1581, 1596 (1961).

133 *J. Jackson in Chicago & Southern Air Line v. Waterman Corp.*, 333 U.S. 103, 107 (1948).

134 Favoring uniformity through Congressional enactment, see, Note, 21 TEMP. L.Q. 62, 64-65 (1947). Favoring uniformity by administrative agency, see, Note, 42 VA. L. REV. 1115 (1956).

135 Judicial *ad hoc* determination also argued for in: 30 FORDHAM L. REV. 803 (1962) and Note, 47 MINN. L. REV. 889 (1963).

136 *Atkinson v. Bernard, Inc.*, 223 Ore. 624, 355 P.2d 229, 232 (1960).

137 C. J. Warren "deploras" the "lag." Warren, *Science and Law: Change and the Constitution*, 12 J. PUB. L. 3 (1963).

138 HOLMES, *THE COMMON LAW* 1 (Howe ed. 1963).

tween science and the individual. The continued growth of air law has been characterized by the willingness of the judiciary to use their talents in the search for solution. The decisions truly appear “. . . to take out of the legislative realm the problem of fixing property rights in the air and to preserve this prerogative to the courts.”¹³⁹ The Supreme Court has turned to the Constitution in an effort to give some degree of justice and protection to the landholder who finds his holdings facing extinction at the hands of rapid transportation. “. . . [T]he holding in *Griggs* is clearly that a landowner’s constitutional right to just compensation for a taking of his property can not be avoided by a Congressional declaration as to the limits of navigable airspace.”¹⁴⁰ From the Court that is both the “protector” and “guarantor” of the Constitution, nothing less could be expected.

139 Comment, 95 U. PA. L. REV. 224, 227 (1946).

140 Bruce, *supra* note 124, at 610.