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Current Legislation and Decisions

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Landowners' Rights in Airspace — Crop Dusting — Liability For Trespass

Defendant was to spray nearby cotton fields, but, while flying superadjacent to plaintiff's land, unintentionally sprayed plaintiff's crops and pastures. Plaintiff instituted suit for damages, his sole theory of recovery being the alleged trespass of the defendant. The trial court awarded damages to plaintiff, and defendant appealed. *Held:* Where the pilot of an airplane flying at a "privileged" altitude unintentionally sprayed poison on the crops and pasture of land directly below the airplane, thus damaging the crops and pasture, the landowner may recover damages solely on the theory of trespass. *Schronk v. Gilliam,* 380 S.W.2d 743 (Tex. Civ. App. 1964).[1]

The flight of aircraft above the earth necessarily involves the old, but still unsettled, question of the landowner's rights in the airspace superadjacent to his land.[2] The conflict between the landowner and the aircraft operator assumes numerous forms, and each area in this sea of conflict involves particular legal consequences. Specific areas of conflict include:

1. simple overflights either above or below prescribed minimum altitude levels;[3]

[1] The plaintiff did not raise the question of negligence. His sole basis for recovery was trespass. The appellate court's primary consideration was whether trespass would provide recovery absent a showing of negligence and without the existence of a state statutory minimum altitude. The main decision was followed by defendant-appellant's motion for rehearing which was denied.

[2] The law has evolved from Coke's ad coelum doctrine (he who owns the soil owns everything above) to a general recognition that the landowner's rights in superadjacent airspace are restricted. Authorities are in conflict as to how this restriction may be explained. Rhyne presents five existing views in Airports and the Courts 155 (1944):

a. The landowner owns all the airspace above his property without limit (the ad coelum doctrine).
b. The landowner owns the airspace above his property to an unlimited extent subject to an "easement" or "privilege" of flight in the public (Restatement view).
c. The landowner owns the airspace above his property up to such a height as fixed by statute.
d. The landowner owns the airspace up as far as it is possible for him to take effective possession, but beyond the "possible effective possession zone" there is no ownership of airspace.
e. The landowner owns only the airspace he actually occupies and can only object to such uses of the airspace over his property as do actual damage.

Rhyne asserts that the fifth or "nuisance" theory should be the only reasonable basis for decision, however he points out that the courts are in conflict as to which theory should prevail. For a general discussion of the evolution and modification of the ad coelum doctrine, see 2 C.J.S. *Aerial Navigation* § 5 (1955); 8 Am. Jur. 2d *Aviation* § 4 (1963); Calkins, *The Landowner and the Aircraft—1958,* 25 J. Air L. & Com. 373 (1958).

[3] Some courts have been reluctant to grant recovery when the case involves a mere overflight even when such overflight is below minimum altitude requirements, particularly in the airport cases. Adaman Mutual Water Co. v. United States, 143 Ct. Cl. 921, 181 F. Supp. 658 (1958); Kuntz v. Werner Flying Service, 257 Wis. 405, 43 N.W.2d 476 (1950).

2. flights which may or may not be conducted above minimum altitude levels but which cause damage to the land;[4] and

3. repeated overflights at such levels as to cause harm to the landowner by virtue of noise, dust, and property depreciation.[5]

A landowner may seek an injunction or may institute suit for damages, basing recovery upon negligence,[6] nuisance,[7] trespass,[8] or strict liability,[9] depending upon the particular fact situation. Each of the foregoing areas of conflict has peculiar characteristics which can dictate the choice of a form of recovery. For example, repeated overflights, as in the airport noise cases, ordinarily give rise to suits based on nuisance. The crop spraying incidents usually involve an act or omission upon which an action for negligence is predicated. Air trespass, at present, is an amorphous concept which may transcend several areas of conflict, but which is most useful in single overflights with resulting tangible damage to the landowner's property. Since *Schronk* involves the application of the law of trespass to the particular area of conflict of simple overflight with resulting damage, it is necessary to precede the analysis of *Schronk* by a terse commentary on the present state of air trespass and its manifestations.[10]

Trespass as a form of recovery by a landowner against an aircraft operator is saddled with the requisites of nuisance and clouded by the confusing interpolation of minimum altitude requirements.[11] It has been suggested that air trespass should be abandoned altogether, since nuisance will apparently suffice in those instances where air trespass might be applicable.[12] Air trespass is practical as a form of recovery only when the landowner can show actual damage to his land.[13] That is, he will be entitled merely to a nominal recovery unless he can show tangible effects of such trespass.[14]

[4] This is the most fruitful area for recovery by a landowner. Generally following United States v. Causby, 328 U.S. 256 (1946), the courts have favored the landowner through various theories of recovery when actual damage can be shown. See Matson v. United States, 145 Ct. Cl. 225, 171 F. Supp. 283 (Ct. Cl. 1959).

[5] This was essentially the situation in the *Causby* case, *supra* note 4. The cases involving landowners in close proximity to airports are collected and discussed in Rhyne's book, Airports and the Courts, *supra* note 2.

[6] Recovery through negligence is particularly prevalent in the crop-dusting cases. See Vrazel v. Bieri, 294 S.W.2d 148 (Tex. Civ. App. 1956) *error ref. n.r.e.* In jurisdictions which do not apply strict liability, *res ipsa loquitur* may assist the plaintiff landowners. 8 Am. Jur. 2d § 123 (1963).

[7] Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (Ch. 1942). The *Vanderslice* case required all the elements of nuisance before granting recovery in trespass.

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

[9] Strict liability has been imposed in those jurisdictions which still regard aviation as ultra-hazardous. At present, nine jurisdictions (Delaware, Hawaii, Minnesota, Montana, New Jersey, North Dakota, South Carolina, Tennessee and Wyoming) have strict liability provisions. See Tentative Redraft No. 10, Restatement (Second), Torts § 520(a) (1964) for commentary calling for abandonment of this viewpoint.

[10] For a thorough coverage of the major aspects of air trespass see Anderson, *Some Aspects of Airspace Trespass*, 27 J. Air L. & Com. 341 (1960). See also 8 Am. Jur. 2d § 4 (1963).

[11] See Vanderslice v. Shawn, *supra* note 7; Prosser, Torts, § 13, (3d ed. 1964); Anderson, *supra* note 10, at 355.

[12] Atkinson v. Benard, Inc., 223 Or. 624, 355 P.2d 229 (1960). Tentative Redraft No. 2, Restatement (Second), Torts § 194 (1958).

[13] *Supra* note 10.

[14] Hinman v. Pacific Air Transport, *supra* note 8, at 758-59.

> Any use of such air or space by others (superadjacent airspace) which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy . . . [as] the case differs from the usual case of enjoining a trespass. Ordinarily if a trespass

In addition, the federal government has enacted certain minimum altitude requirements which must be considered when dealing with a potential air trespass.[15] These altitude requirements have had some effect upon those cases involving low-flying aircraft, but even here some courts have applied the test of damages before allowing more than nominal recovery.[16]

The crop spraying cases provide little nourishment for the growth of air trespass, due to the fact that negligence or strict liability usually is available and with more familiar legal ramifications.[17] Many of the crop spraying cases involve wind drift or obviously negligent conduct, or both, and thus preclude the application of trespass as an expedient and practical form of recovery.[18] It is only when negligence is not so apparent and strict liability is not available that the use of trespass as a theory of recovery becomes practical and perhaps even necessary.

Schronk is somewhat unique in that it provides a highly desirable factual situation for the application of trespass. The combination of the direct overflight and the resulting damage is certainly the basis of plaintiff's case, and it is especially significant that the plaintiff was able to show that the aircraft passed directly over his land. It is difficult to determine the exact foundation for the court's decision. The opinion deals extensively with the Restatement of Torts as it existed before the decision in *United States v. Causby*[19] and as it is presently developing.[20] The court acknowledged that the defendant's mere entry into the atmosphere superadjacent to plaintiff's land in itself did not constitute trespass, and the court even went so far as to say that it made no difference whether the situation is "viewed as wrongful act after a rightful entry or as a trespass ab initio."[21] The resulting damage seemed to be the key factor which allowed the court to position this case within the Restatement's definition of a non-privileged flight.[22] The court concluded the opinion by saying:

> The entry of the fuselage, at even a privileged altitude, was accompanied by active and continuous spraying of the poisonous substance which constituted as much a part of the flight as if appellant's aircraft had been dragging a great scythe across the land below it.[23]

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is committed upon land, the plaintiff is entitled to at least nominal damages without proving or alleging any actual damage. In the instant case, traversing the airspace above appellant's land is not, of itself, a trespass at all, but is a lawful act unless it is done under circumstances which will cause injury to appellant's possession.

[15] 72 Stat. 739 (1958), 49 U.S.C. § 1301 (24) (1964).

[16] Anderson, *supra* note 10.

[17] *Supra* note 9.

[18] Gotreaux v. Gary, 232 La. 373, 94 So.2d 293 (1957); Chapman Chemical Co. v. Taylor 215 Ark. 630, 222 S.W.2d 820 (1949).

[19] 328 U.S. 256 (1946).

[20] Comment *e*, under § 159 of the Restatement, Torts (1934) stated that "an unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass." Section 194 of the Restatement (1934) presented criteria upon which a trespass may be founded: "Therefore, a flight at an otherwise permissible height above the surface conducted in such a manner as to be dangerous to the land, or to persons or things thereon is not privileged." After the *Causby* decision, Tentative Draft No. 9 of subdivision 2 of § 159, Restatement, Torts (1946) read: "Flight by aircraft in the airspace above the land of another is a trespass, if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes unreasonably with the other's use and enjoyment of his land."

[21] 380 S.W.2d 743, 745.

[22] *Ibid.*

[23] *Ibid.*

Appellant argued in the motion for rehearing that a judgment based on trespass is not authorized in the absence of a finding that he entered the superadjacent airspace either wilfully or intentionally. Appellant's contention forced the court to consider the question as to whether there may be an actionable trespass where there is an unintentional and non-negligent entry under the Restatement view.[24] The court attempted to show that appellant's initial intention was not controlling by equating the present case with *Mountain States Tel. & Tel. Co. v. Vowell Const. Co.*,[25] which involved the unintentional severing of an underground telephone cable. *Vowell* held that, "the trespass of the common law forms of action based on wilfull and deliberate acts or negligence was not the 'trespass' involved . . . the important thing is that a property right was violated."[26] The court felt that there was a controlling similarity in the facts of *Schronk* to the facts in *Vowell:* "In neither case did the defendant wilfully, deliberately or intentionally invade a property right in the exclusive dominion and possession of the plaintiff. In neither case did the defendant actually intend to inflict the damage."[27] The motion for rehearing produced some confusion when the court chose to emphasize the disturbances within the existing and redraft versions of the Restatement.[28] The court also stated that Texas had not yet adopted the original Restatement. This apparent backtracking causes one to have misgivings about the logic and soundness of the main opinion.

The result of *Schronk* is that a landowner who can show that the crop-spraying aircraft passed over his land with resulting damage to his land may recover in trespass. The adjacent landowner whose land was damaged by drifting spray, as a practical matter, still should rely upon negligence or strict liability if he is unable to show that the aircraft passed over his land, or if in fact the aircraft did not pass over his land.

It is unfortunate that the court in *Schronk* failed to produce a lucid, well-developed basis for its opinion. Certainly the result of the case is correct, when one considers the recent trend in this area. The value of *Schronk* lies not in its contribution to the sound development of air trespass law but as a starting point for the future use of trespass as a basis for recovery by landowners, particularly in similar crop dusting cases. The holding in *Schronk* may provide some ammunition for a two-pronged negligence/trespass attack, or when negligence is not easily shown, may provide the sole basis for recovery.

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[24] The court interpreted appellant's contention as relating to an intention to make the entry, not as an intention to cause damage.

[25] 161 Tex. 432, 341 S.W.2d 148 (1960).

[26] *Id.* at 150.

[27] 380 S.W.2d 743, 746.

[28] *Ibid.*

Sovereign Immunity — Federal Tort Claims Act — Discretionary Exemption Clause

While flying in its prescribed air lane, a regularly scheduled commercial airliner, operated by United Air Lines, collided with a United States Air Force Super Sabre Jet. The Super Sabre, descending from an instrument training mission high above the commercial air lane, was proceeding according to a flight plan prescribed by the Nellis Air Force Base Command. The plan was conceived and executed without regard to commercial air traffic in the training flight area, and was therefore in conflict with Air Force regulations.[1] The accident resulted in the death of all passengers and crew members of both aircraft. Inevitably, numerous wrongful death suits were brought against the Government. The Government contended that the flight of the Super Sabre was a product of discretionary planning by Nellis Command. The Government also contended that it owed no duty to the passengers and crew of the commercial flight, and thus there was no negligent act on the part of the Government. *Held:* Selection of training flight areas by an Air Force base commander operating under policy-making Air Force regulations is an exercise of discretion at the operational level, rather than discretion exercised at the planning level, and is, therefore, not excepted by the Discretionary Exemption Clause[2] from the jurisdiction afforded the courts by the Federal Tort Claims Act.[3] Further, a commander permitting his aircraft to cross a crowded commercial air lane with no inquiry as to the presence of commercial traffic is negligent in sending military aircraft into that air lane.[4] *United Air Lines, Inc. v.*

[1] Air Force Regulation 55-19, 13 July 1956, controls selection of local flight training areas. It is reprinted in full as an appendix to the opinion in the instant case at 335 F.2d 379, 410. The portions pertinent to this note are *infra* at note 32.

[2] 28 U.S.C. § 2680 (1964): Exceptions

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[3] 28 U.S.C. §§ 1346(b), 2671-2678, 2680 (1964). Section 1346(b) provides that the federal district courts are to have, subject to the provisions of the Federal Tort Claims Act,

> exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 provides that, "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

[4] The subject matter of this note is but one of the many areas under consideration by the court. This case is the culmination of twenty-two cases to which the Government was a party. The Government was not a party in nine additional cases arising out of the same accident. The

Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).[5]

The curious "split-level" construction of the Discretionary Exemption Clause is the product of two well-known Supreme Court cases, *Dalehite v. United States*[6] and *Indian Towing Co. v. United States*.[7] The Court in *Dalehite* created the distinction of governmental discretion, splitting planning discretion from operational discretion, and stated that only planning discretion exempted the Government from action by injured plaintiffs.[8] However, the Court also stated that in addition to the exemption afforded the Government by discretionary planning, the legislative history of the Federal Tort Claims Act[9] revealed a congressional intent that the municipal corporations defense of governmental function should still be available to the Government.[10] In *Indian Towing*, government lawyers, probably with *Dalehite* in mind, presented a defense of governmental function, and were rebuffed. The Court held that the proprietary versus governmental function argument was inapplicable in the defense of tort claims against the federal government.[11] The Court expressed a desire to avoid the quagmire of municipal corporations law,[12] wherein liability is determined by whether the act which resulted in damage was proprietary or governmental.[13] *Indian*

litigation has been extensive and highly complex, involving choice of laws, workmen's compensation, measure of damages, contribution and indemnification of joint tortfeasors, contributory negligence, and procedure, as well as negligence and sovereign immunity. See, *e.g.*, Wiener v. United Air Lines, Inc., 216 F. Supp. 701 (S.D. Cal. 1962); United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962); Rhoades v. United States, 216 F. Supp. 732 (S.D. Cal. 1962); Nollenberger v. United Air Lines, Inc., 216 F. Supp. 734 (S.D. Cal. 1963).

[5] The Government was appealing a limitation placed on contribution from United Air Lines. United was appealing denial of indemnity over from the Government.

[6] 346 U.S. 15 (1953).

[7] 350 U.S. 61 (1955). See also Fair v. United States, 234 F.2d 288 (5th Cir. 1956).

[8] 346 U.S. 15, 36 (1953). "Discretionary planning" is defined as a decision made where there is room for policy judgment or decision.

[9] H.R. Rep. No. 2800, 71st Cong., 3d Sess., 13 (1930); *Hearings on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess., 28, 33, 28, 45, 65066 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess., 5 (1945); 86 Cong. Rec. 12021-12022 (1940). The Supreme Court's conclusions concerning the intent of Congress seem, at best, nebulous.

[10] 346 U.S. 15, 27-28 (1953):

> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to persons and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.

[11] 350 U.S. 61, 65-67 (1955). For an excellent brief comparison of *Dalehite* and *Indian Towing*, see generally Vaughn, *The Discretionary-Function Exclusion of the Federal Tort Claims Act*, 1 Wm. and Mary L. Rev. 5 (1957).

[12] 350 U.S. 61, 65-67 (1955). For an example of the confusion prevailing in one jurisdiction, *compare* District of Columbia v. Woodbury, 136 U.S. 450 (1890), in which sidewalk maintenance was held proprietary, and resulting negligence therefore actionable, *with* Harris v. District of Columbia, 256 U.S. 650 (1921), in which negligent street sprinkling was held governmental and thus not actionable. For a case showing the basic irrationality of attempting to make the distinction, see Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). For a philosophic view debunking the basis of the distinction, see Cerri v. United States, 80 F. Supp. 831, 833 (N.D. Cal. 1948):

> The defense that this [Federal Tort Claims] act does not apply to these cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of government activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals to consider this to be the intent of Congress. Certainly the statute itself makes no distinction. . . .

[13] Prosser, Torts § 125 (3d ed. 1964).

Towing thus limited the jurisdictional defenses in relation to causes of action sounding in tort against the federal government to those of the Federal Tort Claims Act.[14] Focus was thereby placed upon the doubtful distinction of operational versus planning discretion rather than the equally doubtful distinction of governmental or proprietary function.

After *Indian Towing*, a plaintiff had to face a new and different obstacle when suing the Government in tort. The question became whether the Government had committed a tort at an operational level or at a planning level. The very fact that the Government can be wrong represents a great advance in tort law. That "the King can do no wrong" was the law in this kingless country for many years, and the familiar phrase is generally regarded as the basis of governmental immunity.[15] Such an idea is obviously erroneous, for the King can do wrong, just as a private individual can do wrong. Over the years, the phrase became altered slightly, and now reads "the King can do wrong, but cannot be made to pay for the damage unless he grants his permission."[16] The tradition of governmental immunity, inherited from our English forebears,[17] has been enduring a slow and painful death at the hands of Congress. The first blow, the establishment of the Court of Claims in 1855,[18] created a tribunal which could find against the Government in certain limited forms of action: those based on contract, a federal statute creating liability, or the invasion of a property right.[19] The action of tort was specifically excluded in an expansion of the court's jurisdiction by passage of the Tucker Act of 1887.[20] Despite

[14] 28 U.S.C. § 2680(a) (1964), *supra* note 2. In addition to the discretionary exemption of subsection (a), the statute provides that the following actions cannot be maintained against the government:

> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters.
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
> (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
> (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
> (g) Repealed, 64 Stat. 1043 (1950).
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
> (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war.
> (k) Any claim arising in a foreign country.
> (l) Any claim arising from the activities of the Tennessee Valley Authority.
> (m) Any claim arising from the activities of the Panama Canal Company.
> (n) Any claim arising from the activities of a Federal Land Bank, a federal intermediary bank, or a bank for cooperatives.

[15] See generally, Borchard, *Governmental Liability in Tort*, 34 Yale L.J. 1 (1924), and Borchard, *Governmental Responsibility in Tort*, VI, 36 Yale L.J. 1 (1926).

[16] See, *e.g.*, Osborne v. Bank of the United States, 22 U.S. 738 (1824).

[17] 1 Pollock and Maitland, History of English Law 518 (2d ed. 1898).

[18] Though created in 1855, the court's power was limited to merely advisory opinions. In 1863 it was empowered to grant judgments.

[19] Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Colum. L. Rev. 722, 723 (1947).

[20] 24 Stat. 505 (1887).

the passage of many private bills permitting the Government to be sued in tort with its permission, and piecemeal legislation designed to relieve especially painful grievances,[21] the average plaintiff was effectively barred from suing the federal government. Thus, the passage of the Federal Tort Claims Act in 1946[22] was a great break with a long-standing tradition. However, the break was not complete, for the Government was not about to allow itself to be sued willy-nilly. Certain exceptions were created in order to protect the Government against suits while engaged in certain activities.[23] The most controversial of these exceptions is the previously discussed Discretionary Exemption Clause,[24] which has led to much litigation of which *United Air Lines v. Wiener* is a part.[25]

Because the Court in *Dalehite* and its companion, *Indian Towing*, created a cloud of doubt over jurisdictional defenses available to the Government,[26] additional defenses are always sought. In situations like the present case, where a statute or regulation is in question, the Government raises the defense of no duty owed the injured party because none was specifically created by statute or regulation. The basic theory behind the "no duty" defense is that in allowing itself to be sued when it could not previously be sued, the Government did not intend that any new or novel forms of action should be foisted upon it by virtue of the Federal Tort Claims Act.[27] This defense has met with some success. In *Kirk v. United States*[28] it was found that the statute[29] which authorized the governmental activity imposed no legal duty of care toward plaintiff. The court stated that no civil liability is to be found even though the statute makes provision for the general public as an entity, unless the statute specifically purports to establish a civil liability.[30] In *Builders Corp. of America v. United States*[31] plaintiff attempted to establish liability through a statute or regulation, and again the court rejected the argument in the absence of an imposition of specific liability. However, *Wiener* is different in that plaintiff was not

[21] Actions were permitted in the case of patent infringement, 36 Stat. 851 (1918); admiralty and maritime, 41 Stat. 525 (1920), 46 U.S.C. §§ 741, 742 (1964); injuries to oyster beds by dredging, 57 Stat. 553 (1943).

[22] 28 U.S.C. §§ 1346, 2671-78, 2680 (1964). It appears that the mounting number of private bills finally brought passage of the Federal Tort Claims Act. See generally, Gellhorn and Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 Colum. L. Rev. 1 (1955). For an excellent "how to" article on maintaining a suit under the Federal Tort Claims Act, see Haas, *The Federal Tort Claims Act and the Private Lawyer*, 1 Practical Lawyers' Negligence Manual 23 (1964).

[23] 28 U.S.C. § 2680 (1964), *supra* notes 2 and 14.

[24] *Ibid.*

[25] See note 4 *supra.*

[26] Courts have struggled with close questions in distinguishing operational and planning exercises of discretion. See, *e.g.*, Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956); Union Trust Co. v. Eastern Air Lines, Inc., 221 F.2d 62 (D.C. Cir.) *aff'd per curiam*, 350 U.S. 907, *rev'd and remanded for decision on other issues*, 350 U.S. 962 (1955), *cert. denied*, 353 U.S. 942 (1957); United States v. Lawter, 219 F.2d 559 (2d Cir. 1955).

[27] See, *e.g.*, National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954).

[28] 270 F.2d 110 (9th Cir. 1959).

[29] 68 Stat. 668 (1954), 33 U.S.C. § 701(b) (1964).

[30] 270 F.2d 110, 117 (9th Cir. 1959): "The general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to construction establishing a civil liability."

[31] 320 F.2d 425 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964).

relying on a statute or regulation. Rather, plaintiff relied upon the failure of the Government to exercise ordinary and reasonable care. The court thus discarded any supposition of duty created by statute, and returned to the common law standard of ordinary care. The Discretionary Exemption Clause defense was defeated by more subtle judicial reasoning than was the defense of no duty. The court in *Wiener* reasoned that policy-level, or discretionary, planning had been accomplished by the authors of Air Force regulations[32] which control in the realm of deciding where to send aircraft on training missions. Thus, Nellis Command, operating under those regulations, was only using its discretion at the operational level, and jurisdiction properly attached.

The rationale of *Wiener* has been applied recently in *Wenninger v. United States*.[33] In *Wenninger*, plaintiff alleged a breach of Air Force Regulation 55-19 and the court decided that jurisdiction attached despite the Discretionary Exemption Clause.[34] Government counsel contended that the decision made by the commander which resulted in the damage complained of was planning discretion because the regulations[35] allowed the commander the discretion of deciding when to employ them.[36] Adhering to the rule of *Wiener*, the court held that a decision based upon the "when necessary" clause meant operational necessity. The Court of Appeals for the Second Circuit concluded that the highly complex process of prescribing areas in which training flights are to take place is no more than operational discretion because an Air Force regulation in substance states that an Air Force commander should be careful when designating local flying areas for training purposes.[37]

An inspection and comparison of the cases indicates that other courts have had problems distinguishing the "split-levels" of discretionary exercise. For instance, it has been held that the completion of a general plan at the detail level is an exercise of planning discretion.[38] The decision of where to place explosives in order to carry out a general plan is discretion exercised at the planning level.[39] However, the decision to fly aircraft at a low altitude in order to carry out a general plan for the Civil Aeronautics Board is

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[32] Air Force Regulation 55-19, 13 July 1956:

* * *

2. Operational Control and Supervision. The commander having jurisdiction over local flight operations will:

* * *

b. Schedule local VFR flight operations in a manner which will minimize potential air collision hazards.

* * *

5. Control of Simulated Instrument Flight Rule (IFR) Approaches. . . .

a. The *commander* will direct maximum use of outlying facilities in order to relieve traffic congestion near local navigational facilities.

[33] 234 F. Supp. 499 (D. Del. 1964).

[34] *Id.* at 503.

[35] Section 1b of AFR 55-19, 13 July 1956, states that the commander will issue notices of heavy military air traffic when he deems it necessary, taking into account local air traffic congestion.

[36] See note 32 *supra.*

[37] See note 35 *supra.*

[38] Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949).

[39] Pacific Nat'l Fire Ins. Co. v. TVA, 89 F. Supp. 978 (W.D. Va. 1950).

operational.[40] *Wiener,* followed by *Wenninger,* places on the operational level the decision of an air base commander of where to send his aircraft on training missions. In the face of such conflict, government counsel have exhibited some reluctance to go into court relying on the Discretionary Exemption Clause, and have settled claims when a valid defense might have been available.[41] The essential result of the conflict and confusion resulting from the decisions is a further erosion of governmental immunity. The struggle of the courts in deciding what is discretionary and what is operational has not yet resulted in a clear definition of the limits of immune government activity.[42] Indeed, such a clear definition might be beyond the power of the courts. At least, the ever-increasing body of case law discussing the Discretionary Exemption Clause would indicate that the answer is not yet in sight.

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[40] Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956).

[41] See Note, 30 J. Air L. & Com. 281 (1964). The Government settled, on a twenty-four per cent basis, claims and lawsuits arising out of a collision between two commercial airliners while in a "holding pattern" over Staten Island. The collision was due primarily to error by government traffic controllers. The situation is similar to the one presented in the *Union Trust* case, *supra* note 26. When testifying before the House Subcommittee on Appropriations for the 1965 budget, former FAA Administrator Najeeb Halaby was questioned on why a settlement was made costing the Government approximately $3 million. He said, "The Department of Justice, after carefully looking over the case, said that the litigation risk of the judge . . . holding the government culpable indicated that we had better settle, so the judge got the parties together and . . . worked out a formula." *Hearings Before the Subcommittee of the Committee on Appropriations,* H.R., 88th Cong., 2d Sess., pt. 1 at 1155 (1964). If it had risked going into court, the Government would have exposed itself to liability of approximately $12 million. It could have argued that the controllers were exercising planning discretion, but apparently felt that the risk of having the activities tagged as operational was not worth a $9 million gamble on unsure law.

[42] Another series of decisions as an additional example concern psychiatric treatment rendered by military hospitals: (the decision not to examine a patient is not actionable) Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964); (withdrawing a guard watching over a psychiatric patient is actionable) United States v. Gray, 199 F.2d 239 (10th Cir. 1952); (decision to release a patient is not actionable) Fair v. United States, 234 F.2d 288 (5th Cir. 1956). In *Fair,* the court refused to say more than that each case must stand on its own facts, and was unable to determine an applicable rule of law. In all of the above cases, plaintiff was injured by error of judgment by an agent of the United States Government.

Conflict of Laws — Lex Loci Delicti — Significant Contact Theory

George H. Hambrecht, a Pennsylvania domiciliary, purchased a round-trip ticket to Phoenix from United Air Lines[1] in Philadelphia. On 11 July 1961, in the course of landing at Denver, Colorado, a scheduled stop, the United DC-8 crashed, causing Mr. Hambrecht's immediate death. The executor of his estate brought an action in the Pennsylvania Court of Common Pleas in assumpsit against United Air Lines and some of its employees for breach of contract of carriage, seeking recovery under the Pennsylvania Survival Statute which allows the recovery of decedent's probable earnings during the period of his life expectancy.[2] The Court of Common Pleas held that the law of the place of the wrong controlled the issue of damages and gave plaintiff leave to amend his complaint in order to conform to the Colorado Survival Statute.[3] Plaintiff appealed to the Pennsylvania Supreme Court. *Held:* Pennsylvania law, the law of the forum, controls the question of damages.[4] *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

The traditional choice of law rule in the torts field, previously followed in Pennsylvania and firmly imbedded in the first Restatement, is the principle of *lex loci delicti*[5] which dictates that the substantive rights and liabilities of the parties are determined by the law of the place of the wrong.[6] This rule has been closely allied with the vested rights theory,[7] under which the rights and obligations incurred under the law of the jurisdiction where the wrong occurs[8] are said to vest in the parties and follow them into any jurisdiction in which suit is brought.[9] In order

[1] United Air Lines is a Delaware corporation which has its principal place of business in Chicago, and is duly authorized to do business in Pennsylvania.

[2] Purdon's Pa. Stat. Ann. tit. 20, § 320.603 (1950).

[3] The Colorado Survival Statute denies recovery for prospective earnings after death. Colo. Rev. Stat. Ann. tit. 7, § 153-1-9.(1) (1963): "[A]nd in tort action based upon personal injury, the damages recoverable . . . shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering or disfigurement, nor prospective profits or earnings after date of death."

[4] In doing so, the court overruled the clear precedent of law for personal injuries which required the application of the law of the place of the wrong in determining whether a person has sustained a legal injury. See, *e.g.*, Vant v. Gish, 412 Pa. 359, 365-66, 194 A.2d 522, 526 (1963); Bednarowicz v. Vetrone, 400 Pa. 385, 162 A.2d 687 (1960); Rennekamp v. Blair, 375 Pa. 620, 101 A.2d 669 (1954); Rodney v. Staman, 371 Pa. 1, 89 A.2d 313 (1952).

[5] Restatement, Conflict of Laws § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

[6] *Ibid.*

[7] See 2 Beale, Conflict of Laws § 377-92 (1935); Restatement, Conflict of Laws § 377-92 (1934); Stumberg, Principles of Conflict of Laws 8 (3d ed. 1963).

[8] Restatement, Conflict of Laws § 377 (1934): "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

[9] Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (Holmes, J.): "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the

for the vested rights theory to function, there must be a way to find a forum which will apply the law of the place of the wrong.[10] This is the purpose that *lex loci delicti* serves, for it applies the law of the place of the wrong to govern all the issues that arise.[11]

Although *lex loci delicti* had been the law of long standing in Pennsylvania,[12] it has undergone recent deterioration elsewhere, because of the inequitable results which are sometimes produced by its mechanical operations.[13] Many courts have met the challenge that is sometimes presented by the "wooden application of a few overly simple rules"[14] of *lex loci delicti*[15] by classifying the substantive issues, including the damages issue, before them as procedural and thereby subject to the law of the forum.[16] One court stated that the survival of a cause of action was not an essential part of the cause of action, but was a matter of enforcement of the claim for damages, and thus a procedural question which falls under the law of the forum.[17] Other courts have found exceptions to the law of the place of the wrong by devising new law rules in tort actions involving questions of intrafamilial immunity from tort liability,[18] workmen's compensation,[19] and decedent's estate law[20] in order to apply their own law rather than that of the place of the wrong. Still another court ignored the place of the wrong rule and applied the state's statutory liability for the act committed where the law of the place of the wrong would not have imposed a liability.[21] In *Auten v. Auten*,[22] the New York Court of Appeals abandoned the traditional choice of law rules in contracts cases in favor

person, and may be enforced wherever the person may be found." Restatement, Conflict of Laws § 377 (1934): "The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

[10] See Covers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 198 (1933).

[11] See note 5 *supra*.

[12] See Barcly v. Thompson, 2 Pen. & W. 148 (Pa. 1830).

[13] See Stumberg, *"The Place of the Wrong"—Torts and the Conflict of Laws*, 34 Wash. L. Rev. 388 (1959). Professor Stumberg cites Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953), as an extreme example of this. In this case the plaintiff, her husband and the defendant, all residents of Texas, were making a flight from New Mexico to El Paso, Texas. The plane overshot El Paso and made a forced landing deep in Northern Mexico. While attempting to take off from the rough terrain, the plane crashed causing serious injuries to the plaintiff. Suit for the injury was brought in a Texas district court where the plaintiff was denied recovery. Upon appeal, the decision of the district court was upheld on the theory that since this was a Mexican tort the law of Mexico controlled. However, the court refused to apply Mexican law because the remedy given was so dissimilar from that afforded under the law of Texas.

[14] Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 801 (1964).

[15] The first Restatement recognized two exceptions to the rule: the forum applies its own procedural rules, Restatement, Conflict of Laws § 585 (1934), and the forum applies its own law when the law of the place of the wrong is contrary to a strong public policy of the forum, Restatement, Conflict of Laws § 612 (1934).

[16] See Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 42, 172 N.E.2d 526, 539, 211 N.Y.S.2d 133, 137 (1961) (damage limitation classified as procedural).

[17] Grant v. McAuliffe, 41 Cal.2d 859, 866, 264 P.2d 944, 949 (1953). In the alternative the court reasoned that survival of tort action is a question of administration of the decedent's estate, hence is governed by the law of the decedent's domicile.

[18] In Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955), a child was permitted to recover from his parent under the law of the domicile. See generally Ehrenzweig, *Parental Immunity in Conflicts of Law*, 23 U. Chi. L. Rev. 474 (1956).

[19] See, *e.g.*, Pacific Employers Ins. Co. v. Industrial Acc. Comm., 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Acc. Comm., 294 U.S. 532 (1935).

[20] See note 17 *supra*.

[21] See Schmidt v. Driscoll Hotel Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) (Dram Shop Act applied to hold innkeeper liable for negligence occurring outside of forum).

[22] 308 N.Y. 155, 124 N.E.2d 99 (1954).

of a "center of gravity" or most significant contacts theory.[23] Finally, in *Babcock v. Jackson*,[24] the same New York court applied the same theory to an action in trespass. Judge Fuld concluded that "justice, fairness, and the 'best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[25] Although practically all of the legal writers are opposed to the retention of the *lex loci delicti* rule, there is disagreement as to the successor to this rule.[26]

If the new "significant contact" theory is applied, the law of the place of the wrong is applicable only if that state has sufficient significant contacts[27] with the parties and events in the case to have an "interest" in the outcome of the litigation. In the instant case, Colorado's only contact was purely fortuitous. Although "the place of the injury may have an interest in the compensation of those who render . . . assistance to the injured party," no such interest arose from the rendering of medical aid since the decedent had been killed instantly.[28] Furthermore, the policy behind the

[23] This newly adopted theory conforms with the position advocated by the Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964) which states that torts should be governed by the local law of the state which has the most significant relationship with the occurrence and the parties, and the local law of the state which has the most significant relationship with the occurrence and the parties and that separate rules apply to different kinds of torts. See, *e.g.*, the discussion in Griffith v. United Air Lines, Inc., 203 A.2d at 802.

[24] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The plaintiff was injured in an automobile accident in Ontario, Canada, while riding as an invited week-end guest in the automobile owned and operated by the defendant's deceased husband, a New York resident. Plaintiff sued the driver, Mr. Jackson, in New York, where plaintiff also resided. After Mr. Jackson's death, Mrs. Jackson, his executrix, was substituted as defendant. The trial court dismissed the case on the grounds that although New York has no guest statute, the Ontario statute, Ont. Rev. Stat. Ch. 172, § 105 (2) (1960), applied and barred recovery. The Court of Appeals reversed. It stated that although the accident took place in Ontario, all other contacts of the parties were in New York. The court reasoned that:

> Although the rightness or wrongness of Defendant's contact may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place. 191 N.E.2d at 281, 240 N.Y.S.2d at 746.

[25] 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[26] Cheatham & Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 (1952); Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1; Currie, *The Disinterested Third State*, 28 Law & Contemp. Prob. 754 (1963); Ehrensweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 Law & Contemp. Prob. 700 (1963); Ehrensweig, *Comments on Babcock v. Jackson*, 63 Colum. L. Rev. 1243 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 Yale L.J. 1155 (1947); Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881 (1951); Reese, *Conflict of Laws and the Restatement Second*, 28 Law & Contemp. Prob. 679 (1963); Stumberg, *supra* note 13.

[27] Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964):

> (1) The local law of the state which has the most significant relationships with the occurrence and with the parties determine their rights and liabilities in tort.
>
> (2) Important contacts that the forum will consider in determining the state of most significant relationship include:
>
> (a) The place where the injury occurred,
>
> (b) The place where the conduct occurred,
>
> (c) The domicil, nationality, place of incorporation and place of business of the parties, and
>
> (d) The place where the relationship, if any between the parties is centered.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevent purposes of the tort rules of the interested states.

Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 Calif. L. Rev. 762 (1963).

[28] 203 A.2d at 807.

Colorado Survival Statute appears to be a desire to prevent its state courts from speculating on the compensation for damages, and to protect its citizens from excessive damage judgments.[29] Since neither of these local policy concerns is present in the instant case, Colorado should not object if Pennsylvania applies its own law.

Pennsylvania could point to significant contacts which gave it a substantial interest in the present case:

1. decedent was domiciled in Pennsylvania,
2. the airline ticket was purchased in Pennsylvania, and
3. his estate was administered there.

Furthermore, the surviving dependents were residents of Pennsylvania.[30] It appears that the court was justified in applying the "significant contact" approach to the litigation.

It is quite possible that the abolishment of the *lex loci delicti* rule will create problems,[31] and that the rule put forth by the court in *Griffith* may not promote the desired consistency.[32] However, these challenges were met quite effectively by the Pennsylvania court when it said that "ease of application and predictability are insufficient reasons to retain an unsound rule,"[33] and "our standards will be no less clear than the concepts of 'unreasonableness' or 'due process' which courts have evoked over many years."[34] It is also contended that the abolishment of *lex loci delicti* will lead to "forum shopping" in order to find the highest damages award. This problem could exist because more than one state may have sufficient significant contacts which will justify the application of its own law.[35] On the other hand, the *lex loci delicti* rule totally ignores the policy considerations of other states which may have significant contacts with the events.

In deciding to apply the law of its jurisdiction, the highest court in Pennsylvania did not attempt to side step the *lex loci delicti* rule as other courts have,[36] but rather it chose to abolish the old rule in favor of the significant contacts theory. The results of such a test seem to far outweigh the effects of the old rule. Of course, the ideal rule is one that is uniform and predictable and produces just results. Although the traditional choice of law rule is uniform and predictable, it is often unjust.[37] The test offered in *Griffith* is designed to produce the just results, although at present, its application will not always be uniform and predictable. However, as the court aptly stated, "ease of application and predictability are insufficient reasons to retain an unsound rule."[38]

John R. Bauer

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[29] *Ibid.*

[30] *Ibid.*

[31] 203 A.2d at 809 (Dissent). See also Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon the Opinion and Its Implications,* 31 Ins. Counsel J. 428 (1964).

[32] *Ibid.*

[33] 203 A.2d at 803.

[34] *Id.* at 806; See also Cheatham, *Comments on Babcock v. Jackson, A Recent Development in Conflicts of Laws,* 63 Colum. L. Rev. 1212, 1229 (1963).

[35] See note 31 *supra; But see* Cravers, *The Changing Choice-Of-Law Process and the Federal Court,* 28 Law & Contemp. Prob. 732 (1963).

[36] See notes 16-19 *supra.*

[37] See note 13 *supra.*

[38] See note 34 *supra.*

Corporate Law — Federal Aviation Act — Is Corporate Control a Thing of Value?

In 1958, National Airlines and Pan American World Airways exchanged large blocks of their stock using voting trustees as the method of exchange.[1] Each airline assigned its stock to a voting trustee who would vote the stock in accordance with the other airline's wishes. The apparent purpose of the trustees was to avoid the appearance of a merger, although the real result was equivalent to an exchange of stock directly between the corporations. The Civil Aeronautics Board viewed the transaction as a merger and ordered the arrangement dissolved.[2] The two companies were ordered to either sell or re-exchange their mutual holdings.[3] The latter course was chosen and National exchanged 353,000 shares of Pan American stock, held by a voting trustee for the use of National which had a value of 12,906,400 dollars, for 390,000 shares of National stock held by a voting trustee for the use of Pan American, valued at 11,115,000 dollars. Plaintiff O'Neill, a shareholder of National, brought a derivative shareholder's action on behalf of National against Mr. Lewis B. Maytag, Jr. and his associate directors, complaining that National's directors had thus cost the corporation approximately 1,791,400 dollars.[4] O'Neill brought his suit in federal court, and in an attempt to avail himself of the theory of pendent jurisdiction,[5] he claimed a breach of Section 10 of the Securities Exchange Act[6] and Section 409(b) of the Federal Aviation Act.[7] *Held:* The exchange of stock did not constitute a breach of section 10 and Rule X-10B-5, and corporate control is not a thing of value under section 409(b); therefore, jurisdiction did not attach. *O'Neill v. Maytag*, 339 F.2d 764 (2d Cir. 1964).

As the basis for his first federal question allegation, O'Neill relied upon

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[1] The use of the voting trustee in the airline industry has brought about much recent corporate infighting and CAB decision-making, particularly in the Howard Hughes-Toolco-Trans World Airlines dispute. See generally Comment, 31 J. Air L. & Com. 133 (1965).

[2] Pan American-National Agreement Investigation, 31 C.A.B. 198, 241 (1960). "The . . . stock agreement . . . which enables Pan American to control National, to restrict competition, to create a monopoly and to jeopardize other air carriers . . . or the public, is found to be adverse to the public interest. . . ."

[3] *Id.* at 207-08.

[4] Plaintiff alleged a breach of fiduciary duty. He further alleged that the directors of National wasted corporate assets in order to secure a better control position for themselves by eliminating a large block of outstanding voting stock. Such allegations state a cause of action under state law. N.Y. Gen. Corp. Law § 61-b; Hausman v. Buckley, 299 F.2d 696 (2d Cir. 1962), *cert. denied*, 369 U.S. 885 (1962).

[5] Pendent jurisdiction, wherein a federal court considers both federal and state causes of action, depends upon a federal question arising out of circumstances which would lead to a state cause of action. See Bell v. Hood, 327 U.S. 678 (1946); Hurn v. Oursler, 289 U.S. 238, 246 (1933); Howard v. Furst, 238 F.2d 790 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957). *Cf.* Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949).

[6] 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1964).

[7] 72 Stat. 768, 49 U.S.C. § 1379(b) (1964).

Rule X-10B-5,[8] promulgated under Section 10 of the Securities Exchange Act,[9] which deals with deceptive and manipulative devices. Although the Supreme Court has not ruled upon the point, it is generally agreed that Rule X-10B-5 gives rise to a civil remedy.[10] The purpose of the rule is prohibition of fraudulent practices in the securities market; it makes such practices a violation of uniform federal law.[11] Within the scope of Rule X-10B-5, a fraudulent act can be express or implied, and the presence of an outright lie is often immaterial.[12] For example, the act of minimizing dividends in order to influence stockholders to sell their stock is fraudulent because lower dividends create the impression of a poor earnings record, rendering the stock an undesirable investment item. The creation of the false impression makes the act deceitful.[13] However, trading corporate assets at a disadvantage to the corporation, with no fraudulent intent or fraud in fact, does not create a false impression and, therefore, Rule X-10B-5 is inapplicable.[14] It is not sufficient for an action under Rule X-10B-5 to allege breach of general fiduciary duty if the breach was not of a fraudulent nature.[15] Mr. Maytag and the other directors may have caused National to suffer a loss in the re-exchange, but the court could not find any set of facts which could be construed as fraudulent in fact or intent. In the absence of federal grounds for relief under Rule X-10B-5, the theory of pendent jurisdiction could not attach to the plaintiff's allegation of a breach of fiduciary duty.

Plaintiff relied upon Section 409(b) of the Federal Aviation Act[16] as the basis for his second federal question allegation. Section 409(b) was

[8] 17 C.F.R. § 240 10b-5 (1964):

> It shall be unlawful for any person, directly or indirectly, by the use of means or instrumentality of interstate commerce, or of the mails, or of any facility of any national security exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[9] 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1964):

> It shall be unlawful . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[10] Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). See the same case and accompanying text in Baker & Cary, Corporations 566 (3d ed. 1959); Annot., 37 A.L.R.2d 649 (1954). For a shareholder's derivative suit under the rule, see Slavin v. Germantown Fire Ins. Co., 174 F.2d 799 (3d Cir. 1949).

[11] Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953).

[12] In Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951), the court held that failure to disclose contemplated liquidation to shareholders is a deceitful act.

[13] Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962).

[14] 339 F.2d at 768.

[15] *Id.* at 767.

[16] 72 Stat. 768, 49 U.S.C. § 1379(b) (1964):

> It shall be unlawful for any officer or director of any air carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or any sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof.

originally enacted as Section 409(b) of the Civil Aeronautics Act of 1938.[17] Part of the original purpose of the Civil Aeronautics Act, which unified the functions of various governmental agencies dealing with aviation,[18] was the tighter regulation of securities transactions within the industry.[19] Consequently, section 409(b) prohibited the directors of carrier corporations from receiving directly or indirectly, any money or thing of value through any dealing in the shares of the carrier. Section 409(b) was re-enacted in the Federal Aviation Act of 1958 with little comment,[20] and it has rarely been the subject of litigation,[21] despite the loose usage of so general a phrase as "thing of value."

In the instant case, plaintiff's attempt to bring his cause under a relatively untried section required a first impression construction of the scope of the phrase, "thing of value" within the purview of section 409(b). He alleged that an increase of control of a corporation was a "thing of value" within the scope of 409(b). The defendants' control of National Airlines had certainly become more secure after the re-exchange of stock. After the original assignment of stock to the voting trustees, it seemed apparent that, pursuant to the terms of the initial stock exchange, operational control of National Airlines was being shifted to Pan American.[22] Pan American had the largest single block of National's voting stock. Furthermore, the two companies had taken preliminary steps toward consolidation of such items as fuel storage, facilities, and operations.[23] Pan American had intended to use the block of stock to exercise substantial control over the day-to-day business operations of National.[24] The question presented to the court was whether the reacquisition of control by National, as ordered by the CAB, represented something of value in the hands of National's directors, and was therefore prohibited by 409(b).[25]

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[17] 52 Stat. 1003.

[18] The Bureau of Air Commerce, regulating safety; Post Office, exercising substantial economic control through the letting of airmail contracts; Commerce Commission, fixing rates, and other economic controls.

[19] H. R. Rep. No. 2254, 75th Cong., 3d Sess. 1 (1938):

> It is the purpose of this legislation to co-ordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air transportation industry in the United States.

See also, S. Rep. No. 1661, 75th Cong., 3d Sess. (1938); Morris, *The Federal Aviation Act of 1958*, 28 U. Kan. City L. Rev. 35 (1960); 37 Mich. St. B.J. 17 (1958); Note, 52 Harv. L. Rev. 137 (1938).

[20] Federal Aviation Act § 409(b), 72 Stat. 768, 49 U.S.C. § 1379(b) (1964). S. Rep. No. 1811, 85th Cong., 2d Sess. 9 (1958): "The present measure makes no substantive change whatsoever in the provisions governing air carrier regulations." It was specifically stated, however, that this action did not represent legislative adoption of previous judicial decisions. H. R. Rep. No. 2360, 85th Cong., 2d Sess. 90 (1958). See also 37 Mich. St. B.J. 17 (1958).

[21] Lehman v. CAB, 209 F.2d 289 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 916 (1954), held that a partner of an underwriting firm issuing carrier stock, who was also a director of the carrier, was realizing a profit from sale of the shares; National Air Freight Forwarding Corp. v. CAB, 197 F.2d 384 (D.C. Cir. 1952), discussed the purpose of both § 409(a) and § 409(b) in controlling interlocking directorates and pooling arrangements; in Bowman v. Alaska Airlines, Inc., 14 F.R.D. 70, 74 (D. Alaska 1952), § 409(b) was mentioned only in a procedural problem, and was not construed.

[22] Pan American-National Agreement Investigation, 31 C.A.B. 198, 201 (1960).

[23] *Id.* at 202.

[24] *Ibid.*

[25] 339 F.2d at 769.

For most purposes, the ability to control a corporation is considered a thing of value.[26] Broadly speaking, among closely held corporations majority stock is more valuable than minority stock. Depending upon local statutes and the charter of the corporation, majority stock controls the activities of the business, with the possible exception of certain corporate decisions,[27] presuming the usual sort of voting requirements for corporate activities in the typical closely held corporation.[28] In large public corporations control is usually not dependent upon a simple majority of voting stock, but is a more subtle question of voting blocks, proxy control, and voting agreements. Therefore, although the stock sold or exchanged may represent only twenty-one per cent of the voting stock outstanding, as was the case in the initial National-Pan American agreement, a large measure of the ability to control a corporation may be represented by a "minority" block of stock. Considering the monumental struggles for control of corporations evident in modern American business practice,[29] it would seem apparent that an acquisition of control of, or, at the minimum, an increase in the ability to control, a large corporation would be a thing of value; and, an increase of control realized through a "negotiation . . . of securities" would be in violation of section 409(b).[30] To hold otherwise is contrary to the congressional intention that mergers and pooling in the air carrier industry be closely controlled.[31]

The courts offered various reasons for holding that, on the facts of this case, control was not a thing of value under section 409(b). The trial court was of the opinion that the phrase meant money or its equivalent—some tangible, marketable thing of value.[32] The appellate court reasoned that even without the disparity of stock values, improved control position would have inured to the directors of National without any breach of duty, and that section 409(b) should not be construed to mean that a completely fair exchange which results in an improved control position is illegal.[33] Perhaps the real reason for the decision can be found in the peculiar facts of the case. O'Neill was attacking as illegal a transfer of stock which the CAB ordered as being in the public interest.[34]

In the instant case, the court defined and construed two different laws

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[26] Royal Trust Co. v. Equitable Life Assur. Soc., 247 Fed. 437, 441 (2d Cir. 1917); Elliot v. Baker, 194 Mass. 518, 80 N.E. 450 (1907); Note, 54 Harv. L. Rev. 548 (1941). See also Baker & Cary, Corporations 590 (3d ed. 1959): "A purchaser is likely to be willing to pay more for a block of shares giving control than not giving control. Control is therefore a thing of value in the hand of the holder."

[27] Very generally, most decisions are made by majority rule in corporations. However, questions of great import, such as liquidation or sale of corporate assets generally require adoption by a much higher percentage of shareholder votes. See, *e.g.*, Ill. Bus. Corp. Act § 157.72(c) (1954) (⅔ vote required for sale of corporate assets).

[28] Excepting major questions, such as those mentioned in note 27, *supra*, majority rule controls. However, charters may be written so that much greater than majority vote is needed, thus giving minority shareholders considerable strength.

[29] Comment, 31 J. Air L. & Com. 133 (1965). See also McDonald, *T.W.A.: The Struggle for the Corporate Cockpit*, Fortune, May 1965, p. 106.

[30] See note 16 *supra*.

[31] See note 2 *supra*.

[32] 230 F. Supp. at 238.

[33] 339 F.2d at 769.

[34] Pan American-National Agreement Investigation, 31 C.A.B. 198 (1960).

in the realm of securities regulation. The decision that Rule X-10B-5 was aimed only at fraud, and not at breaches of fiduciary duty, is an affirmation of majority rule.[35] The construction of Section 409(b) of the Federal Aviation Act is not as clear. In holding that control was not a "thing of value" within section 409(b),[36] the court seemed to deny obvious corporate truths. However, it appears that facts peculiar to the situation where the plaintiff attacks a CAB order to exchange stock influenced the court to say that control was not a thing of value and limited the initial construction of the phrase to this framework. Certainly, if one could allege corporate benefits received through increased control, such as salary increase, executive benefits, or use of corporate facilities, the claim of receipt of a "thing of value" would properly invoke section 409(b) in that control has been used by the offending director to obtain corporate benefits. It appears that this initial construction of the phrase "thing of value" is applicable only to the facts of the instant case and is not of great value as authority for definition of the phrase.

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[35] Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).
[36] 339 F.2d at 769.