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length of the delay would be only a matter of months or weeks, as in tort actions, and an impending action threatened to consume the entire estate.

Therefore, in the absence of any statutory provision or judicial decision to the contrary, and in order to reach a fair and equitable result in the majority of instances likely to arise, KRS 413.180(3) should be interpreted to allow any action against the personal representative of a person against whom an action has accrued prior to death, which is commenced within one year after his qualification, though such qualification does not occur until after the regular period of limitation has expired.

The possibility that, on an extremely rare occasion, the consequences of such an interpretation might be somewhat inconvenient is not enough to justify an opposite conclusion.

John T. Bondurant

REVERSE EMINENT DOMAIN: A NEW LOOK AND RE-DEFINITION

*Introduction*¹

In Kentucky, the rule of sovereign immunity prevents recovery against a sovereign arm when an injury occurs to a citizen or his property while the sovereign is carrying on a "governmental function." Some relief from this harsh rule is given by a doctrine called "reverse eminent domain" which permits recovery in cases where the sovereign

may grant administration to a creditor, or to any other person, in its discretion.

Ky. Rev. Stat. sec. 395.050(1) (1956) provides:

If no executor is appointed by the will, or if all the executors die, refuse the executorship or fail to give bond the court may grant administration with will annexed to the person who would have been entitled to administration if there had been no will. . . .

These provisions allow a person who has a cause of action against the decedent to take some affirmative steps to see that a personal representative of his estate is appointed, where the heirs and/or devisees seem reluctant to do so. However, the relief they afford is at best incomplete, since it often depends to a great extent on circumstances not within the control of the party entitled to sue and may necessarily be invoked too late to secure qualification before the regular period of limitation has elapsed. For a general discussion of the scope and applicability of these statutes, see *Adams v. Readover*, 134 Ky. 230, 120 S.W. 279 (1909).

¹ A very comprehensive series of three articles entitled "Claims Against the State of Kentucky" by Paul Oberst and Thomas Lewis appear in 42 Ky. L.J. 65, 163, 334 (1953-54). General reference is made to the second article in that series, 42 Ky. L.J. 163 (1953), in which the authors discuss the theory and development of reverse eminent domain. That article is extremely thorough in its treatment of the Kentucky cases on the problem of reverse eminent domain and is an invaluable research aid on the subject.

injures private property, provided the owner can bring his case within sections 13 or 242 of the Kentucky Constitution. These sections limit the power of a sovereign or its appointed agency to appropriate private property to a public use by requiring the sovereign to pay for property so appropriated.

The theory behind reverse eminent domain is that, if the Constitution prohibits the taking of private property without compensation and the sovereign does so anyhow, the sovereign by so acting must have consented to a suit by the landowner.² Under ordinary eminent domain principles, the property is first condemned and payment made before the property is used. Under reverse eminent domain, the use of the property precedes the payment.

As said before, reverse eminent domain arises out of sections 13 and 242 of the Kentucky Constitution. Section 13 provides:

. . . nor shall any man's *property* be *taken* or applied to *public use* without the consent of his representatives, and without just compensation being previously paid to him. (Emphasis added)

It has been held that this is the only section that can be invoked against the Commonwealth and its unincorporated agencies.³ Section 242 provides:

Municipal and other corporations, and individuals invested with the privilege of taking private property for *public use*, shall make just compensation for *property* taken, injured or destroyed by them; . . . (Emphasis added)

This section is held to apply to counties as well as to the enumerated entities.⁴

In reading the cases, it is extremely difficult to get a clear understanding of the law on the subject of reverse eminent domain, especially in regard to such critical matters as:

1. What constitutes a "taking"?
2. What is meant by "property"?
3. What is meant by "public use"?

It should be noticed that both sections 13 and 242 require that "property" be appropriated to "public use". However, the two sections differ since the claimant must show a "taking" when he sues the Commonwealth or its unincorporated agencies under section 13, but need only show an "injury" when he sues a lesser governmental arm under section 242.

² Layman v. Beeler, 113 Ky. 221, 67 S.W. 995 (1902).

³ Commonwealth v. Kelley, 314 Ky. 581, 236 S.W. 2d 695 (1951).

⁴ Layman v. Beeler, *supra* n. 2.

Reverse Eminent Domain Critized

In the recent case of *V.T.C. Lines Inc. v. City of Harlan*,⁵ the court indicated its dissatisfaction with the doctrine as it has been applied in recent years. In that decision the court discussed two cases in which injuries were inflicted by the State Highway Department upon land lying adjacent to the highway. Both cases involved section 13 with its requirement of a "taking". In one case⁶ complainant suffered damages when dust was caused to settle upon his tobacco crop. In that case, the court declined to grant relief upon reverse eminent domain principles. In the second case⁷ there was a flooding of complainant's land as the result of a faulty culvert. In that case plaintiff recovered. The court in *V.T.C. Lines* remarked that the two decisions were irreconcilable and Moremen, C. J., stated:

This indicates that we should either abandon . . . governmental immunity or should cease to contrive artificial distinctions and decide the cases by judicial fiat.⁸

This language serves to point up the difficulty involved in trying to determine what the law is in regard to reverse eminent domain. It further shows that the court feels that something should be done to remedy the situation. It is submitted that a remedy lies in a judicial re-definition of the doctrine.

What Is a Taking?

As said before, a claimant must show a "taking" under section 13, while he need only show an "injury" under section 242. We must, then, face the question of what is a "taking". Is it necessary to show more than a mere "injury" such as a temporary trespass? Is any "injury" a "taking" to the extent that damages have been inflicted upon a recognized property right? Or, must there be something approaching a total ouster from possession?

The word "taking" has received varying constructions in different courts. Some states construe the term in its strictest sense and compensate only when private property is seized and the owner divested

⁵ 313 S.W. 2d 573 (Ky. 1958).

⁶ *Commonwealth v. Moore*, 267 S.W. 2d 531 (Ky. 1954).

⁷ *Commonwealth v. Kelley*, *supra* n. 3.

⁸ *V.T.C. Lines v. City of Harlan*, 313 S.W. 2d 573, 577 (Ky. 1958). Another instance in which the court expressed dissatisfaction with the doctrine as it is presently applied is *Curlin v. Ashby*, 264 S.W. 2d 671 (Ky. 1954). In that case the court said at 672,

Consideration of the cases, especially those based on negligence of the Commonwealth's agents, leaves use with grave doubts as to their soundness.

of all right, title and interest.⁹ In these jurisdictions, there must be a total ouster from the affected land by physical ejection. Other states adopt a less stringent construction of the word "taking" and recognize a serious invasion of property rights as grounds for compensation.¹⁰ Here, there is no requirement of a total ouster from possession, but the ouster must be substantial and, usually, it must be permanent. Other jurisdictions adopt a liberal construction of the term and allow compensation to the owner for injuries to a recognized property right even though there be no permanent physical ouster.¹¹ Kentucky took this view as early as 1878.¹²

Obviously, in those states which subscribe to the view that any interference with a protected "property right" must be compensated, no inquiry is necessary on the question of what is a "taking". The emphasis is shifted to the question of whether there has been a deprivation of a legally protected "property right". This is so even though the word "taking" is used in a constitutional provision. The Kentucky Court in recent years has emphasized that there must be a "taking" before injuries inflicted by the Commonwealth or its agencies will be compensated.¹³ However, the court has been quite consistent in permitting recovery for mere temporary trespasses¹⁴ and have allowed compensation where there is no direct physical invasion of the adjacent land, as where the "rights" of ingress and egress have been impaired.¹⁵ It would seem from these decisions that the distinction between an "injury" under section 242 and a "taking" under section 13 is merely illusory and makes no real difference in the final outcome of the suit. It is submitted that no distinction should be made between the two words and that any attempted distinction is unwarranted, as the following inquiry into the genesis of the doctrine will reveal.

⁹ *Cushman v. Smith*, 34 Me. 247 (1852).

¹⁰ *Smith v. Erie R.R.*, 134 Ohio St. 135, 16 N.E. 2d 310 (1938).

¹¹ *United States v. Causby*, 328 U.S. 256 (1946); *East Coast Lumber Terminal, Inc. v. Town of Babylon*, 174 F. 2d 106 (2d Cir. 1949). This also appears to be the view in Connecticut, Pennsylvania, Illinois, Ohio, Indiana, Wisconsin, California and Utah.

¹² *Kemper v. City of Louisville*, 77 Ky. (14 Bush) 87 (1878).

¹³ *Keck v. Hafley*, 237 S.W. 2d 527 (Ky. 1951); In *Department of Highways v. Corey*, 247 S.W. 2d 389 (Ky. 1952), the court said at 390,

Unless the physical damage detailed in the testimony is of such a nature as to amount to a 'taking' . . . Mrs. Corey was not entitled to a judgment. . . .

The court made an award in this case involving the mere temporary flooding of claimant's land.

¹⁴ *Department of Highways v. Corey*, *supra* n. 13; *Keck v. Hafley*, *supra* n. 13; *Commonwealth v. Kelley*, *supra* n. 3; *Lehman v. Williams*, 301 Ky. 729, 193 S.W. 2d 161 (1946).

¹⁵ *Commonwealth v. Tate*, 297 Ky. 826, 181 S.W. 2d 418 (1944).

What Is "Property"?

Perhaps the most illuminating opinion to be found anywhere upon the subject of what is property is *Eaton v. B.C. & M. R.R.*,¹⁶ decided in New Hampshire in 1872. In *Eaton* the defendant, a railroad company invested with the power of eminent domain, laid its road through plaintiff's land and plaintiff was paid his damages. Later, the railroad company, in constructing their road, cut through a ridge north of plaintiff's farm. During the rainy seasons, waters occasionally came through this opening from a river on the other side, causing quantities of earth and stones to settle upon plaintiff's land. In deciding for plaintiff, the court said:

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property. . . . To constitute a 'taking of property' it seems to have sometimes been necessary held that there should be . . . 'a complete ouster'. . . . These views seem to us to be founded on a misconception of the meaning of the term 'property' as used in the various State constitutions.

In a strict legal sense, land is not 'property,' but the subject of property. The term 'property' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' . . . 'Property is the right of any person to possess, use, enjoy, and dispose of a thing'. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.'¹⁷

In the above case, the court placed its decision upon the ground that the plaintiff as owner of his farm had the "right" to have the protection of the natural barrier left as it was, and that this right was a part of the property in his land, and that the acts of the railroad company amounted to a "taking" of this right and consequently a taking of his property in the land.

The court in *Eaton* cited *Pumpelly v. Green Bay Co.*,¹⁸ a Supreme Court case decided in 1871. In that case the Court, in criticising the cases requiring a "total ouster" said:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent . . . because, in the narrowest sense of that word, it is not *taken* for the public use.¹⁹

¹⁶ 51 N.H. (3 Shirley) 504 (1872).

¹⁷ *Id.* at 511.

¹⁸ 80 U.S. (13 Wall.) 166 (1871).

¹⁹ *Id.* at 177, 178.

To get the feelings of the Kentucky court during this time, it was felt necessary to give these two quotations as general background. In the first clear Kentucky case on the point, the Kentucky court, as did the court in *Eaton*, cited *Pumpelly* as authority for holding that the flooding of land by a sovereign arm was sufficient to constitute a taking of property for which compensation must be made. That case is *Kemper v. City of Louisville*,²⁰ decided in 1878. True, the action was against a municipality. However, the court was forced to construe what is now section 13, so the question of what is a "taking of property" was involved. *Kemper*, like *Eaton* and *Pumpelly*, involved a flooding of plaintiff's land. In that case it was said:

While the citizen can claim no damages for the mere inconveniences that may result from the construction or repairs of streets, where the city so constructs an improvement as to interfere with the *private rights* of the citizen, thereby causing an *injury*, the city must answer in damages.²¹ (Emphasis added)

It should be noticed that no reference is made to the word "taking" in this language of the court. The main consideration in reaching the decision was whether or not one of the plaintiff's "private rights" had been abridged. The court has now, apparently, lost sight of this original and more easily applied test, and has shifted its emphasis to a consideration of the word "taking". The fallacy of that test is that nobody really knows what a "taking" is except as it relates to the term "property". In a case arising out of section 13, the inquiry should be, not what is a "taking", but what is a taking of "property". If "property" is the sum of all the interests one holds in the land or chattel, then the whole must be appropriated before there is a "taking". But if "property" is any one or more of the sticks in a bundle of rights, as the *Eaton* case so cogently says it is, then the word "taking" can just as easily apply to an appropriation of such right or rights. In either case, the word "taking" can be given its dictionary meaning, which will eliminate any confusion on the point.

Intention of the Framers of the Present Section 13

The inquiry naturally arises as to the intention of the framers of the 1892 Kentucky Constitution as to the legal effect to attach to section 13. The present section is stated in the identical words of the corresponding section under the 1850 Constitution. *Kemper v. City of Louisville* was a case arising under the previous section. Can it not be presumed that the framers intended to assert their approval of the test

²⁰ *Supra* n. 12.

²¹ *Kemper v. City of Louisville*, 77 Ky. (14 Bush) 87, 91 (1878).

laid down in that case, since they re-enacted the language without change? Under usual tenets of constitutional construction, this seems the only conclusion possible.²² Certainly, this possibility should be reckoned with. At any rate, a re-definition of the doctrine is imperative, as the cases will reveal. It is hoped that the above reference to the history of the doctrine has proved efficacious in that regard.

Consequential Damages

In cases of reverse eminent domain, it is important to look to see whether or not there has been a conveyance of a right-of-way prior to the infliction of the damages. If there has, the damages might be deemed to be consequential only, in the absence of a showing of negligence or bad faith. The Kentucky court has said that the Commonwealth, in acquiring a right-of-way deed, also acquires the privilege of inflicting certain types of damages if those damages are the natural result of prudent road construction. An excellent example of this is *Commonwealth v. Moore*.²³ in which claimant had conveyed a portion of his land to the Highway Department for road construction. In the course of building the road, dust was caused to settle upon claimant's tobacco crop, destroying it. The court, in deciding against the claimant, said:

The right to cause dust in the proper construction or reconstruction of a highway is one of the incidental rights the Commonwealth acquired with the land purchase. . . . [W]hen property is appropriated for public use the compensation to which the landowner is entitled embraces consequential damage to his remaining land, including covering it with debris.²⁴

The court held that the right to cover claimant's tobacco crop with dust had already been purchased. It held that the right to impose all the necessary and incidental inconveniences which result from prudent road construction were purchased along with the right-of-way. Similarly, the court has held that, in actions against counties under section 242, no compensation would be allowed where there is a raising of the level of the road, thus interfering with ingress and egress.²⁵ It has further been held that the removal of lateral support and the

²² Framers of a new Constitution who adopt provisions contained in a former Constitution, to which a certain construction has been given, are presumed as a general rule to have intended that these provisions should have the meaning attributed to them under the earlier instrument. The embodiment in a Constitution, without change of verbiage, of provisions found in previous Constitutions precludes the court from giving their language a meaning different from that ascribed to the previous constitutional provisions. . . . 11 Am. Jur. Constitutional Law, sec. 67 (1937).

²³ 267 S.W. 2d 531 (Ky. 1954).

²⁴ *Id.* at 532.

²⁵ *Fallis v. Mercer County*, 236 Ky. 315, 33 S.W. 2d 12 (1930).

sliding of claimant's remaining land is an instance of consequential damage.²⁶ However, it is necessary that the activity which produces the damage be restricted to the land which the governmental arm has purchased under its right-of-way deed.

If the claimant can plead and prove negligence or bad faith, he can recover in spite of the fact that the conveyance under the deed would ordinarily work an estoppel.

Public Use

As to the question of what is the appropriation of property for a "public use" the courts have been reluctant to commit themselves to any set definition, feeling, probably, that any definition which the courts might give may be inappropriate as times and conditions change.²⁷

In *V.T.C. Lines, Inc. v. City of Harlan*,²⁸ the city was cleaning its swimming pool by sandblasting, with the result that emery dust being used settled in great quantities on the bus station of plaintiff and caused damage to working parts of diesel engines used in buses. The court recognized that personal property as well as realty is subject to eminent domain. In the opinion of the court, it was said:

We believe that it is not an action where our rule of 'reverse eminent domain' should apply. It falls more properly into the group of cases which concern the responsibility of a city for its negligent act. . . . We further believe that the property destroyed was not of the type which ordinarily may be devoted to *public use*.²⁹ (Emphasis added)

In *T. B. Jones & Co. v. Ferro Concrete Construction Co.*,³⁰ claimant, a construction company, sued the City of Louisville to recover for damage to its machinery which was covered by water by an independent contractor who had contracted to lay a sewer for the city. In denying recovery under reverse eminent domain, the court said:

[T]he provision [section 242] has reference to property taken under the power of eminent domain; it has no reference to property which was not taken and could not be taken under the power of eminent domain.³¹

This language is consistent with the holding in *V.T.C. Lines* insofar as it states that this particular personalty, the machinery, was not subject to the power of eminent domain and could not, under these circumstances, be appropriated to a "public use". Still, neither case lays down

²⁶ *Snyder v. Whitley County*, 255 Ky. 741, 75 S.W. 2d 373 (1934).

²⁷ *Jahr, Eminent Domain*, 15 (1953).

²⁸ 313 S.W. 2d 573 (Ky. 1958).

²⁹ *Id.* at 579.

³⁰ 154 Ky. 47, 156 S.W. 1060 (1913).

³¹ *Id.* at 51, 156 S.W. 1062.

any test for guidance on the question of whether property, in a given case, has been appropriated to a "public use".

In *City of Covington v. Parsons*³² the city, operating through an independent contractor, dug a sewer line close to plaintiff's house. The foundation of the house was weakened as a result of the excavation. As to whether or not the property of plaintiff had been appropriated to public use, the court said:

In the case at bar, the digging of the ditch was *necessary* and the very thing the city contracted to have done, and the damages resulting to appellee's property was the *natural consequence* of the removing of the earth by excavating and digging the ditch, *which was done in accordance with the plans and specifications* of the city, and, the power of eminent domain being involved, it is immaterial whether the contractor did the work prudently or negligently.³³ (Emphasis added)

The inference is that the property will be deemed to have been appropriated to a "public use" when the injury arises out of a project necessary to be performed in the public interest, provided the injury is the *natural consequence* of performing the project *according to the plans and specifications*. It is submitted that this is the proper test. The government should be presumed to have well considered the plans and specifications under which the work was done and to have decided upon the most efficacious way to do it. It should be presumed that the government chose a reasonable way to accomplish the end and, if the damage was the *natural result* of executing the work according to those plans, then it must be presumed that the resulting damage was a part of those plans. If it be decided that the injury was not the natural result of the performance of the function according to the plans, then the injury will probably be the result of: (1) A complete abandonment of the plans, or (2) An injury to property which, by its nature, could not be taken into account in the formulation of the plans.

Under the test laid down in *City of Covington v. Parsons*, the policy underlying the eminent domain provisions will be given effect by prohibiting the government from planning a public endeavor in such a way as to secure a public advantage without paying for it. The rule would have the following desirable effects:

1. It would result in more prudent planning on the part of the government.
2. It would eliminate the long line of "negligence" cases which are now being criticized by the court.³⁴
3. It would result in a test under which potential plaintiffs might predict the outcome of litigation.

³² 258 Ky. 22, 79 S.W. 2d 353 (1935).

³³ *Id.* at 28, 79 S.W. 2d 355, 356.

³⁴ See n. 8.

Application of the Rule: Illustrations

1. "B's" land is badly eroded because flood water was diverted onto his land as the result of debris which collected around the supports of a state-maintained bridge.

Here, the bridge is a necessary public facility and it will be presumed the supports are situated where they have to be in order to hold the bridge up. It will further be presumed that the injury is the natural result of the *collection of debris* around the bridge support. Still, the collection of the debris was not a part of the *plans and specifications*, but resulted from an independent agency, the flood. The defect is one that arises in course of time. If anything, the flooding resulted from negligence on the part of the agent of the State in failing to remove the debris as it accumulated.

2. In excavating for a road bed, employees of a contractor for the State Highway Department use explosives, resulting in damage to "B's" house from rocks cast upon his land. Use of explosives was contemplated by the plans. All contractors of the State were instructed to use hemp nets while blasting in order to prevent flying debris, which instructions were not obeyed. The damage is attributable to the State Highway Department since it was the natural result of the execution of the work as planned. In such cases, minor departures from the execution of the plans should not be considered as a complete abandonment of the plans.

3. The State Highway Department plans and constructs a culvert in such a way that water is forced upon "B's" land causing damage to a movable chattel. Since the damage is fortuitous to the extent that it results from the fact that movable personalty happens to be where it is, the planning could not take its presence into consideration. Here only an action under the Torts Claims Act for negligence could be maintainable.

4. In excavating for a road bed, the Department of Highways, in accordance with plans and specifications, removes dirt from a bank below "B's" house. The digging is confined to the Department's right-of-way and no incroachment is made upon "B's" land. As a result of the removal of the lateral support to "Bs" property, his house tumbles into the road. The Department is liable. The damage is the natural result of a necessary project which was performed according to the plans and specifications.

(5) In reconstructing a road, the Highway Department plans specify that the location of the road at a point fronting B's land should be confined to the right-of-way previously acquired for that purpose. Through the negligence of the employees of the State High-

way Department or its independant contractors, the road is made to inroach upon the land of B. The State is liable since the case is one which qualifies in any jurisdiction as an ACTUAL taking or occupation of the land.

Conclusion

Reverse eminent domain, in its present ambiguous form, is a trap for unwary litigants. Litigants may forego their rights under the Kentucky Claims Act in order to secure the advantages which lie in the doctrine of reverse eminent domain. Under that doctrine, the award is limited only by the damages suffered while, under the Claims Act, recovery is limited to \$10,000. Also, under reverse eminent domain, the liability of the government is absolute while the claimant must show negligence if he proceeds under the Claims Act. However, in choosing reverse eminent domain as the remedy to pursue, the litigant is buying a "pig in a poke". A clarification of the doctrine is essential and the following summary is a re-definition which it is hoped states the true nature of the doctrine under the cases.

1. There is no distinction between a "taking" under section 13 and an "injury" under section 242. Consideration of the cases makes this conclusion inevitable.

2. The real consideration is, and should be, what is "property" under the two sections. Property is, and should be, any right which the owner holds in relation to his land limited only by the fact that the damage to the "property" might be of a consequential nature, due to the fact of estoppel by prior conveyance.

3. The next consideration should be whether or not the property was appropriated to a "public use." In this respect, the inquiry should be whether or not the damage to the property is the natural consequence of the execution of the plans under which the work was carried on. Such a test would justify the decision in *V.T.C. Lines* and would make it extremely difficult to ever recover under reverse eminent domain for damages to movable personalty. Its recognition would necessitate the overruling of the so-called "negligence" cases in which the injury results solely from the tortious acts of the agents of the Commonwealth.

Charles E. Goss

TRIAL JURY—THE POSSIBLE PREJUDICIAL EFFECT OF NEWSPAPER ARTICLES ON JURIES IN CRIMINAL CASES

The Sixth Amendment to the Constitution of the United States guarantees trial by an impartial jury to an accused in a federal criminal