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Indiana Law Journal

Volume 6 | Issue 5 Article 6

2-1931

Condemnation-Property Rights in Space Under Sidewalk

CONDEMNATION—PROPERTY RIGHTS IN SPACE UNDER SIDEWALK—Appellant had built a ten story building on a corner, and with permission of the city, by furnishing the proper support, built a vault under the sidewalk which was 18½ feet wide, extending the entire length of the building. Wells were drilled in this basement, furnishing the buildings water supply, the heating and lighting systems were installed therein and there were several very valuable rooms for rental purposes. The city notified appellant that ten feet of the sidewalk was to be taken for street purposes, and that appellant must either fill in part of his basement, or furnish adequate steel support. The loss of this space would greatly inconvenience appellant as well as put him to considerable expense, and the alternative of furnishing support would cost $12,500. Appellant claims property should be condemned by the city, and compensation given. *Held*, city may require evacuation without compensation because the easement of the public is paramount to any private use of abutting owners, where fee is in the abutting owner, and where the fee is in the municipality, the abutting owner could have no more than a mere license, and revocable at will without compensation. *Swain v. City of Indianapolis*, Supreme Court of Indiana, 171 N. E. 871.

There are several questions which help in determining this problem—whether or not there is a difference between the use of servitude as a sidewalk and as a street, and whether the change from the use as a sidewalk to that of a street for vehicular traffic is such an added burden as entitled the owner of the fee to compensation. Also, there is the question as to whether or not the easement extends below the surface of the street, and last what are the peculiar rights of the public in an easement.

There is an abundance of authority to the effect that the street includes all the easement from property line to property line, with no distinction between that part used for pedestrian traffic and that used for vehicular traffic, as it effects the burden on the servient estate. *City of Kokomo v. Mahan*, 100 Ind. 242; *Coburn v. New Telephone Co.*, 156 Ind. 90; Elliott on "Roads and Streets," Vol. I, sec. 23. The courts go far in allowing added uses of streets without considering it an additional servitude. In *Magee v. Overshiner*, 150 Ind. 127 the court held that placing of telephone poles in curb constituted no additional servitude for which the owner of the fee might be entitled to compensation. Still more liberal was the Massachusetts court in *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 27, in holding that where the city built a tunnel under the street to accommodate additional traffic, necessitating the abandonment of many vaults and valuable usages of abutting owners, there was no additional servitude and no taking without due process of law. Cooly on Constitutional Limitations, pp. 556, says, "When land is taken or deducted for a street it is unquestionably appropriated for all the ordinary purposes of a town street—not merely the

purposes to which such street was formerly applied, but those demanded by new improvements and new wants." In Elliott on Roads and Streets, 4th Ed. Vol. 1 Sec. 20 it is said "The right of the public is by no means confined to the surface of the way, and this all who set apart land for a street are conclusively presumed to know. 'Street' means more than surface, it means the whole surface and so much of the depth as is and can be used, not unfairly, for the ordinary purposes of a street." Again, the principle is expounded, as follows: "The lot owners rights are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extended . . . to all beneficial, legitimate street uses, as the public good or convenience may from time to time require. The use of the streets . . . might be seriously affected by the recognition of a right of an abutting owner to make at pleasure openings in, or even under the street or sidewalk, except subject to unreasonable regulations." Dillon—Municipal Corporations (14th Ed.) p. 699.

The abutting owner cannot complain for consequential damage done by change of grade or other improvements, if there is no negligence or lack of skill or added burden. *Morris v. City of Indianapolis*, 177 Ind. 369; *Snyder v. Town of Rockport*, 6 Ind. 236; *Macy v. City of Indianapolis.*

Hence it appears that the abutting owner cannot complain for consequential damage done by improving the street unless there is an additional servitude, negligence or lack of skill, and that the change is of a sidewalk or part thereof to use as part of the street for vehicular traffic is not an added burden or servitude for which there must be compensation—also that the use and control of the easement is not limited merely to the surface but extends as far below and above as is necessary to the use of the city for street purposes.

The case of *Coburn v. New Telephone Co.*, 156 Ind. 90, though not cited by the court in the opinion in the case under discussion, is almost directly in point, except that there the abutter had not completed the vault under the sidewalk, but the additional use imposed was even more questionable than here, being the laying of a telephone cable five feet under the sidewalk, encased in a concrete vault; of course done with permisson of the city. The court held there was no additional servitude, nor taking of property without compensation and claimed recovery.

So the principal case is supported in its legal principals by almost universal authority as well as direct Indiana precedent.