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State v. Moran, 384 P.2d 777 (Mont. 1963)

Fred Rathert

schizophrenic by at least four different psychiatrists over a ten year period; shortly after his arrest, he was declared incompetent to stand trial.[23] A mere 43 days later he was considered able to properly defend himself. As was pointed out in the dissent, it was highly improbable, if not impossible, for him to have been cured by the short period of treatment before trial.[24] If the jury had been clearly instructed to consider the seriousness and long history of the defendant's illness, hopefully he would now be undergoing psychiatric treatment designed to rehabilitate him rather than serving a life sentence in the state prison.

It is submitted that the courts, as yet, have not met the challenge of treating a complex problem in a simple and understandable fashion. At the base of the problem are the difficult communication barriers that exist between psychiatrists, attorneys, and lay jurors. Furthermore, many proponents and critics of the tests have allowed their logic to be clouded because of their less than unanimous accord on how to treat persons once they have been adjudged insane. Until these difficulties are overcome, no real development can take place in this field of the law.

DAVID NIKLAS.

GENERAL ADMONITIONS TO JURY NOT TO READ NEWSPAPER ACCOUNTS OF TRIAL HELD SUFFICIENT TO COUNTERACT ADVERSE PUBLICITY.—The defendant was indicted in the District Court of Park County for first degree burglary. A motion for change of venue was granted and the case removed to the District Court of Yellowstone County, where the defendant was convicted of the crime charged. Fifteen counts of error were specified. Included therein were the denial of the defendant's challenge to a member of the jury panel for having formed an opinion as to the guilt or innocence of the defendant and the denial of his motion for a mistrial. The motion for mistrial was founded upon the alleged misconduct of the prosecutor who, at such time as the case was ready for submission to the jury, filed a charge against a third party for embracery of a juror trying the defendant. The charge was headlined in the local newspaper and broadcast over radio and television. Prior to his arrest, the defendant had been the Chief of Police of Livingston, Montana. This factor probably contributed to the widespread publicity which his arrest and trial received. On appeal to the Supreme Court of Montana, *held,* affirmed. There was no showing that the trial court abused its discretion or that there was error prejudicial to the defendant. *State v. Moran,* 384 P.2d 777, (Mont. 1963).[1]

[23] *Id.,* at 507.
[24] *Id.,* at 517.

[1] Because indictment by grand jury is rarely used in Montana, it is significant to note that the defendant in the instant case was so indicted. The last time a reported Montana case dealt with a grand jury was in 1950, in the case of State *ex rel.* Porter v. Dist. Ct., 124 Mont. 249, 220 P.2d 1035 (1950). This case contains an excellent discussion of the grand jury in respect to its history, purpose, and application.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." A similar provision is found in Article III, Section 16 of the Montana Constitution, which provides: "In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same." Therefore, although Montana is not bound by a federal court's interpretation of the Sixth Amendment, it should consider such interpretation when applying Article III, Section 16 of the Montana Constitution.

Finding an impartial jury when matters prejudicial to the defendant are published through public news media provides special problems for the courts. Modern widespread communication brings before the majority of persons all matters of interest. A criminal case involving one who has served in public office, or a crime which arouses emotions and passions, are of interest to all. For this reason, the courts have found it necessary to concede that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is not sufficient to rebut the presumption of an individual juror's impartiality. To hold otherwise would set an impossible standard.[2] However, when a juror states that he has such an opinion, general inquiries during *voir dire* are necessary to determine the nature and strength of the opinion. In such a case care must be exercised to determine the depth of the opinion in order to assure to the defendant a fair and impartial trial.[3]

The line of division between a fair and impartial trial and a denial of the defendant's constitutional rights is one of degree and depends upon the facts and circumstances of each individual case. However, the federal courts have set forth guides to be considered in determining if these rights have been denied and the defendant entitled to some relief. These guides are: (1) whether the burden of adverse publicity was imposed upon him by the improper conduct of the prosecutor or the state;[4] (2) whether it was so widespread and so continuing that a continuance would not serve to guarantee his constitutional rights;[5] and, (3) whether the publicity was engendered at such a time and place that its effect upon the mind of the public could not reasonably have been mitigated by the time of trial.[6]

[2]Irvin v. Dowd, 366 U.S. 717 (1961). The problem before the United States Supreme Court involved in part an Indiana statute. This statute was similar to REVISED CODES OF MONTANA, 1947, § 94-7122, which was interpreted by the Montana Supreme Court in the instant case. Hereinafter, REVISED CODES OF MONTANA are cited R.C.M.

[3]United States v. Accardo, 298 F.2d 133 (7th Cir. 1962). In the *Accardo* case, the publications began with the selection of the jury. The jury was separated each night and exposed to the adverse matter. The appellate court stated that the trial judge could not presume that his general admonitions were effective. He should have made a careful examination of each juror outside the presence of the others. Such an examination would have overcome the reluctance to speak out.

[4]Delaney v. United States, 199 F.2d 107 (1st Cir. 1952); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962).

[5]United States v. Hoffa, note 4 *supra.*

[6]Delaney v. United States, note 4 *supra.*

Although the above prejudicial elements may be present, the defendant may not be entitled to relief if his attorney does not challenge the prejudiced juror during *voir dire*[7] or, if the trial judge has, in his discretion, allowed the defense to examine individually and at length the members of the jury panel.[8]

During *voir dire* jurors having a preformed opinion which prevents them from deciding the case fairly and impartially may be directly challenged for cause and removed. But, when adverse publicity reaches a jury during the course of the trial, such a challenge does not exist. In such a situation, it is encumbent upon the court to examine individually, in the absence of the other jurors, each member to determine the effect of the publications upon them.[9] Failure to eliminate publicity inspired prejudice may require the granting of a new trial.

In the instant case, a prospective juror[10] stated on *voir dire* that he had followed the case through the newspapers and on radio and television and that he had formed an opinion. The trial court asked him whether he could lay it aside. He replied, "Well, I would have to."[11] The defendant's challenge for cause was denied. Prejudicial error was specified. In consideration of this, the Supreme Court of Montana first referred to Section 94-7122 of the Revised Codes of Montana, 1947, which provides that no person is to be held incompetent to serve as a juror by

> . . . reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration, under oath, or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him . . . .

The court then referred with approval to previous decisions[12] which state that it is necessary only that the juror truthfully state that he can and will try the case on the evidence, for such preformed opinions are ". . . usually indefinite and not deeply impressed upon the mind."[13] Although such an interpretation seems justified, a careful consideration of the statute in its historical setting may lead to a different interpretation.

The statute as enacted in 1871 provided that:[14]

[7]Beck v. State of Washington, 369 U.S. 541 (1962) (two dissenting); Rizzo v. United States, 304 F.2d 810 (8th Cir. 1962).

[8]Rizzo v. United States, note 7 *supra.*

[9]Delaney v. United States, note 4 *supra.*

[10]While the juror having the preformed opinion did not sit on the case, for the purpose of deciding whether such a juror was competent, the court decided the issue as if he had. It is necessary therefore to consider the effect this decision will have on the legal rights of future defendants faced with the same or similar problems.

[11]Instant case at 791.

[12]State v. Mott, 29 Mont. 292, 74 Pac. 728 (1903); State v. Byrne, 60 Mont. 317, 199 Pac. 262 (1921); State v. Vettere, 76 Mont. 577, 248 Pac. 179 (1926).

[13]State v. Mott, note 12 *supra;* instant case at 791.

[14]Montana Territorial Criminal Practice Act, 1871, § 286(11).

> A challenge to an individual juror may be for one of the following causes: . . . Having formed or expressed an opinion as to the guilt or innocence of the defendant of the crime charged in the indictment, or on any material fact to be tried, if it appear that such opinion would prejudice or bias the mind of the juror.

This statute was amended in 1887,[15] presumably as a consequence of the Montana Territorial Court's decision in the case of *United States v. Upham*.[16] In the *Upham* case, a juror stated that, " 'If he found them the least guilty, he would cinch them plenty;' or 'I am on the jury in those cases, and will send up the defendant; . . . .' "[17] Counter affidavits were filed to show that the statements had been made in jest or in sport. Upon questioning by the trial court the prospective juror denied that he was biased or prejudiced towards the defendants. The Montana Supreme Court, nevertheless, held that there was no disputing the fact that the juror had talked about the case and that such talk had evidenced prejudice. The juror was held to have been incompetent and a new trial granted.

The necessary result of the 1887 legislation was that a juror admittedly having a prejudicial opinion would be admitted as competent, provided that the opinion was based upon newspaper reports or similar accounts, and, provided that said juror testified under oath that he felt able to render an impartial verdict. This was to be true regardless of the concreteness of the opinion.[18] Although the statute of 1887 was again amended in 1895, no material changes were made,[19] nor have any been made since.[20]

The Legislature's reaction to the *Upham* decision is understandable considering the environment and the circumstances of the era. It was the time of the vigilantes, of isolated communities and limited communications. In 1880, the total population of the Territory was only 39,157. One county had a population of one hundred and eighty. The area of this

[15]Compiled Statutes of Montana, 1887, 3rd Div., § 287(11). "A challenge to an individual juror may be for one of the following causes: . . . Having formed or expressed an opinion as to the guilt or innocence of the accused; but if a juror states that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine such juror as to the ground of such opinion, and if it appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror state, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial, and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

[16]2 Mont. 170 (1874) The court made no specific reference to this statute. However, in the case of Territory v. Kennedy, 3 Mont. 520 (1880), on similar facts, the court cited not only this statute but also the *Upham* case in reaching the same conclusion.

[17]United States v. Upham, 2 Mont. 170, 177 (1874).

[18]State v. Jackson, 9 Mont. 508, 24 Pac. 213 (1890); instant case at 791. Compare note 28 *infra*.

[19]Compiled Statutes of Montana, 1887, 3rd Div., § 287(11), as amended, MONTANA PENAL CODES ANNOTATED, 1895, § 2051. Prior to the amendment of 1895, the statute included as an additional ground of challenge for implied bias: "Having formed or expressed an opinion as to the guilt or innocence of the accused." While this ground of challenge no longer exists, it is in part covered by the statutes for actual bias. See R.C.M. 1947, §§ 94-7119, 94-7122.

[20]R.C.M. 1947, § 94-7122.

same county was 18,100 square miles. The county with the largest population contained only 8,876 people. The total area of the Territory was given as 143,776 square miles,[21] yet this same area had only about 20,000 persons eligible for jury duty.[22] The scarcity of eligible jurors makes apparent the necessity for holding competent a juror having an opinion founded upon newspaper reports or the local gossip. As of 1960, however, the population of the State, for the ages of twenty-one and older, was 451,479.[23] At the present no county has an area larger than 5,580 square miles[24] and no county has a total population less than 890.[25] Further, under present law, a greater percentage of the total population is eligible for jury duty.[26] Consequently, today no practical hardship is imposed on the State in the selection of jury members. It would therefore seem proper to place the emphasis upon the words of the statute ". . . act impartially and fairly upon the matters submitted to him."[27] To place the emphasis elsewhere emphasizes the antiquity of the statute and tends to deprive the defendant of a fair and impartial trial[28] as guaranteed by Article III, Section 16 of the Montana Constitution. Yet, in the instant case the court looked only to the truth of the juror's statement that he could and would set the opinion aside, emphasizing the words ". . . upon his declaration, oath, or otherwise . . ."[29] It did not consider the psychological impact an opinion once formed has upon the mind of the average citizen.[30]

[21]LEESON, HISTORY OF MONTANA 457, 541, and 465 (1885).

[22]This figure is only an approximation. It was reached by dividing the total male population of about 28,200 into the total population, obtaining approximately 72%. Thus if 72% of the population were male and if—as Leeson seems to indicate—only about 27,640 persons were actual citizens, by multipying 27,640 by 72%, the figure of 19,900 indicates the approximate number of eligible jurors. At this period in Montana history, large numbers of Orientals and others of foreign citizenship, having been left unemployed when the great railroads were completed, flocked to the numerous mining camps. All of these were ineligible to serve as jurors. Also, the MONTANA CIVIL CODES ANNOTATED, 1895, § 230, provided: "A person is competent to act as a juror if he be: (1) A male citizen of the United States of the age of twenty-one and not more than seventy years, who shall have been a resident of the state one year, and of the county ninety days before being selected and returned. (2) In possession of his natural faculties, and of ordinary intelligence, and not decrepit. (3) Possessed of sufficient knowledge of the English Language. (4) Assessed on the last assessment roll of the county on property belonging to him." While there were other criteria limiting and exempting certain groups of persons from jury duty, they have not been changed. See R.C.M. 1947, §§ 93-1301-1305.

[23]MONTANA ALMANAC 23 (Stat. Supp. 1962-63).

[24]*Id.*, 5.

[25]*Id.*, 25.

[26]See note 22 *supra*. Under the present statutes both male and female are eligible as jurors.

[27]R.C.M. 1947, § 94-7122.

[28]Irvin v. Dowd, note 2 *supra*. The United States Supreme Court stated that the adoption of a rule by which a juror is not held incompetent for having a preconceived "notion" as to the guilt or innocence of the defendant could not prevent inquiry into the nature and strength of such "notion". In the *Irvin* case, eight jurors admitted to having preformed opinions. One stated that he could not give the defendant the benefit of the doubt, while another stated that it was impossible to forget what you have heard. However, each juror having a preformed opinion indicated that he could render an impartial verdict. In reversing the state court, the Supreme Court stated that while the jurors may have been *sincere* in such statement, it must be considered that an ". . . opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

[29]R.C.M. 1947, § 94-7122.

[30]See note 28 *supra*. See Delaney v. United States, note 4 *supra*, where it is stated that when pretrial publicity of a highly prejudicial nature does exist, the proper remedy

The second specification of error to be considered concerns the defendant's motion for a mistrial.[31] It was founded upon the conduct of the State in filing an embracery charge against a third person and involved a juror trying this case. On the morning of May 3, 1962, the trial court admonished the jury not to read any newspaper accounts nor listen to any radio or television broadcasts of the case. After this admonition the court was recessed to settle instructions. That afternoon the embracery charge was filed. On the morning of May 4, 1962, the defendant moved for a mistrial, offering as exhibits newspapers containing headlines and accounts of the charge. He alleged that the filing of the charge at this time amounted to a serious breach of conduct on the part of the State and deprived him of a fair and impartial trial. The trial judge expressed his confidence in the jury, stating that he was going to ask them only as a matter of precaution whether they had disobeyed his admonitions. He then requested any of them that had so done to raise their hands. No hands were raised. The motion was denied. The court then instructed the jury that they were not to be influenced in any way by any news reports which they may have heard or read. The Supreme Court in affirming the trial court's position noted that there was no showing that any of the jurors had read any of the newspapers or heard any of the broadcasts. It stated that it could not assume that any of them had disobeyed the trial court's admonitions and instructions, that the situation rested in the discretion of the trial court, and that there was no showing of an abuse of that discretion.

Section 94-7603 (3) of the Revised Codes of Montana, 1947, provides that a new trial is to be granted when ". . . the jury has been separated without leave of the court, after returning to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented."[32] There is, however, no statutory provision for granting a new trial where conduct of the state is the im-

is a continuance until such time as the adverse matter may reasonably have been erased from the mind of the public. From this it would seem to follow that a continuance would lessen the probability of preformed opinions. It would also serve to answer the following questions: In the case of extreme widespread publications of a highly prejudicial nature, would the defendant's constitutional rights be better protected by a juror *who admits* to having a preformed opinon but states that he can and will try the case solely upon the evidence presented, than one that admits coming into contact with the prejudicial matter yet states that *he does not have such an opinion,* or one that has taken so little interest in the case, for reasons of mentality or otherwise, that he has not read the newspapers or listened to news broadcasts on the case though he has had ample opportunity to do so? See also Geagan v. Gavin, 181 F. Supp. 466 (D. Mass. 1960). This was a petition for a writ of habeas corpus. Public officials, including state prosecutors, had released for publication accounts of how the Brinks crime was solved and of what role the petitioner had in that crime, petitioner's alibis, prior criminal records, and other prejudicial matter. The court, noting that some foreign countries hold prosecutors criminally liable for such conduct, stated that in this country it may be ground for postponement or for setting aside a judgment of conviction if defendant's motion for a continuance is denied. The court denied the petition, however, because petitioners had not moved for a continuance or for a change of venue and because the trial court had spent many weeks in a careful and patient *voir dire* examination. The court concluded that petitioners were not held in violation of the due process clause of the Fourteenth Amendment.

[31]In the instant case, the motion for mistrial was not made in the presence of the jury.

[32]See State v. Jackson, note 18 *supra,* where it is said that subsection three and not subsection two of R.C.M. 1947, § 94-7603, is to be considered, concerning news matter improperly reaching the jury.

mediate cause of mass publicity which, if it reaches the jury, may prevent a *fair and due consideration of the case.* Yet, courts freely profess that the state and its prosecuting officials owe a duty to the criminal defendant to prevent, where possible, adverse publicity.[33] The prosecutor in the instant case violated this duty in filing the embracery charge during the closing days of the trial.

In 1952, the First Circuit Court of Appeals considered this issue in the case of *Delaney v. United States.*[34] The defendant was a Collector of Internal Revenue for the District of Massachusetts. He was suspended by order of the President and shortly thereafter removed from office. A grand jury returned an indictment charging him with the violation of certain federal laws, including the falsification of tax lien certificates. After this indictment, but prior to the trial, a House Subcommittee on Administration of the Internal Revenue Laws conducted an investigation into and a hearing on the affairs of the defendant. A great amount of publicity, much of it going far beyond matters relevant to the pending indictments, resulted therefrom. The trial judge granted two short continuances, but refused to grant a third. On appeal, the Circuit Court reversed and remanded. The appellate court noted that it was immaterial whether the publicity was generated by the legislative branch of the government or by the prosecuting officials. In either case, the prejudice resulting to the defendant in being brought to trial in such an atmosphere would obviously be as great. Here, the committee was acting within lawful bounds, but in choosing to act at the time and manner it did, it must accept the consequence of postponement. The judiciary is charged by the Sixth Amendment with the duty of guaranteeing to the defendant a fair trial before an impartial jury. It is not in harmony with this amendment to make the defendant stand trial while the damaging effect of the publicity was still within the public mind.

In the instant case, a continuance would be unavailable because the publicity was generated during the course of the trial.[35] Further, this publicity was engendered by the prosecuting officials. Even if the probability of the publicity reaching the jury be minute, prejudice to the defendant will result when the adverse matter is founded in a charge for embracery. The psychological impact on the juror approached may sway him to render a verdict of guilty lest it appear that he accepted the of-

[33]Not only does a public prosecutor have a duty to the citizens of the state, but he also owes a duty of fairness to the accused. Accordingly, this duty prohibts the release of material, which may be prejudicial to the defendant, to news-disseminating agencies. People v. Brommel, 56 Cal. 2d 629, 364 P.2d 845, 849 (1961). See also People v. Rodriquez, 59 Cal. App. 2d 415, 136 P.2d 626, 629 (1943). "Both the district attorney and the court have an affirmative duty to use their respective authority to make certain that through no fault or omission on their part may a defendant be deprived of his guaranteed right to a legal, fair and impartial trial."

[34]Delaney v. United States, note 4 *supra.*

[35]Rizzo v. United States, note 7 *supra* at 815. "Where during a trial it appears that members of a jury have violated the instructions of the Court in the matter of reading newspaper accounts of the trial, it is the proper practice, if not the required practice, for the examination of individual jurors as to that matter to be conducted in the absence of the other jurors . . . . The trial then being under way, the situation is fraught with grave possibilities in the matter of mistrial. In the examination of members of a jury panel in advance of their being selected as jurors in a trial about to start the situation is different. . . ." In the latter situation, the members of the panel having preformed opinions may be directly challenged for cause and removed.

fered bribe. Therefore, extra precautions are necessary. This is precisely the problem presented by the instant case but one which the Montana Supreme Court does not consider.

In response to the defendant's contention that the State's improper conduct deprived him of a fair and impartial trial, the trial court noted only that no showing had been made that any prejudicial matter had reached the jury. Nevertheless the court took the precaution of a general inquiry made in open court, and relied upon the presumption that the jury had obeyed its admonitions, and that if it had not, any prejudice would be cured by an instruction to disregard any news report they may have read or heard. While the law presumes good character, it can also be assumed that outside influences will affect some members of the jury, and may do so as to escape detection.[36] General admonitions and instruction are not sufficient and cannot be assumed to be effective in countering this influence. It is encumbent upon the trial judge in the exercise of his duty to guarantee to the defendant a fair and impartial trial; to do more than merely request any who had not obeyed his instruction to raise their hands.[37]

Each case must be decided upon its own special facts. In the instant case the combination of prosecutor misconduct, the probability that the jury may have come into contact with the prejudicial publications, and the failure of the trial judge to adequately probe this probability warranted additional consideration by the Montana Supreme Court. If the guarantee of a fair trial necessitated the calling of the individual jurors into chambers to be questioned only in the presence of the trial judge to determine whether they had read the publications and whether it had rendered them incompetent, then the law required no less.[38]

In this discussion of th case of *State v. Moran,* two specifications of error have been considered. The denial of the defendant's challenge to the juror may not have been a denial of his rights as guaranteed by Article III, Section 16 of the Montana Constitution. Neither may the misconduct of the prosecuting official. It is difficult to conclude however that the combination of the alleged errors was not prejudicial and should not have resulted in a new trial.

It has been suggested that the Montana Supreme Court in interpreting and applying Article III, Section 16 of the Montana Constitution consider the Federal Courts' interpretation and application of the Sixth Amendment to the United States Constitution. However, the denial of a fair and impartial trial as guaranteed by the Sixth Amendment may be also a denial of due process of law as demanded by the Fourteenth. The failure to observe the constitutional safeguards of the Fourteenth Amendment renders the trial and the conviction of a criminal defendant convicted in a state court illegal and void.[39] The constitutional test of

[36]Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963).

[37]United States v. Accardo, note 3 *supra* at 136. It is insufficient to ask the jury in open court, ''. . . have you followed my direction in that regard?''

[38]United States v. Accardo, note 3 *supra.*

[39]Lane v. The Warden, 320 F.2d 179, 186 (4th Cir. 1963). ''. . . The denial of a fair and impartial trial as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments . . . .''

impartiality required by the Fourteenth Amendment does not depend upon the subjective declarations of the individual jurors.[40] Instead it depends upon the common man's concept of fairness. It is vital that the jury consider the case free from all prejudicial influences.

FRED RATHERT.

STATE NOT REQUIRED TO GIVE COMPENSATION FOR A PARTIAL TAKING OF DEFENDANT'S ACCESS.—In 1959 the defendant leased land adjacent to a major highway for the purpose of constructing a service station. Since the highway and land were on the same level, patrons could easily use the entire 300 foot frontage of the tract. A secondary road along one side of the acreage provided auxiliary access. In 1960 the State informed the defendant that an improved highway was to replace the older way.[1] The new road was to be wider, increase the grade, and utilize a traffic divider.[2] Because of the increase in grade and the resultant limitation of access, the State proposed to build an approach to the tract. The defendant's request for more than one such approach was denied. The State instituted a condemnation proceeding against the defendant which resulted in an award for land and access taken. However, the court refused to instruct the jury that they could not consider the loss to defendant's business due to the difficulty of traffic in crossing the center divider except as the loss might affect the decline in value of the remaining property. On appeal by the State to the Montana Supreme Court, *held,* reversed and remanded. The refused instructions should have been given since, without them, the jury could not have adequately determined the declining value of the land. Also, the State need only pay compensation for access when it has been completely denied or the remaining access is unreasonable. *State Highway Comm'r v. Keneally,* 384 P.2d 770 (Mont. 1963).

Although, in the instant case, the court is quite correct in its final conclusion, it is believed that some foundation for the decision should have been laid. The construction of the interstate highway system in this State will undoubtedly increase the probability of litigation regarding the character of access and the procedure by which it is taken. Thus, such a foundation would have been of considerable value as a guide in deciding future cases dealing with the same subject.

The rights possessed by an owner of land abutting a highway received little attention prior to the development of the "super" or "controlled access" highways.[3] With the advent of such highways, however,

[40]United States v. Smith, 200 F. Supp. 885, 908 (D. Vt. 1962).

[1]Although the highway in the instant case was not of the controlled access variety, the issues posed are the same as if it had been.

[2]This device would eliminate potential customers wishing to make a left turn across the road to the station, except for those who turned left at the frontage road at which point the divider had a separation.

[3]One of the first recorded decisions is found in an 1839 Kentucky case. The Lexington & Ohio Ry. Co. v. Applegate, 8 Dana. 289 (Ky. 1839). English law on the subject evolved somewhat earlier. Woodyer v. Hadden, 5 Taunt. 125, 128 Eng. Rep. (C.P. 1813).