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State Highway Comm'r v. Keneally, 384 P.2d 770 (Mont. 1963)

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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.

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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).

considerable litigation on the character and extent of these rights arose, the resulting decisions often being quite contradictory. The situation has been aptly described by the United States Supreme Court:[4]

> The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.

The landowner's right of access to a highway is usually viewed as a property right[5] although the courts are not entirely in accord as to the character of the "right". In some instances access is characterized as a mere license from the state to the individual which allows him to leave his land and travel elsewhere.[6] At other times it is considered an easement.[7] A third approach, although infrequently employed, defines access as the enjoyment of two licenses: the first, in conjunction with the public, is the right to use the highway generally; the other is the license of direct access. If there is any change of position because of the second license, it becomes, in essence, an easement, irrvocable and enforcible in equity.[8] It is obvious this latter view is simply a combination of the two theories earlier described. Whether access is characterized as an easement, a license, or the enjoyment of two licenses depends upon the facts of the particular situation and the objectives the individual courts are trying to reach.

In determining the extent of the right of access, the generally accepted rule is that an abutter does not have the right of ingress and egress at every point along his frontage but only a right of reasonable access.[9] "Reasonableness", say the courts, is determined with re-

[4]Sauer v. New York, 206 U.S. 536, 548 (1906); Clarke, *The Limited-Access Highway*, 27 WASH. L. REV. 111, 115 (1952).

[5]Access is a property right. 25 AM. JUR. *Highways* § 154 (1940); 39 C.J.S. *Highways* § 141 (1944); Los Angeles v. Geiger, 94 Cal. App. 2d 180, 210 P.2d 717 (1949), Schnider v. State, 231 P.2d 177 (Cal. 1951). Access has also been called an "easement appurtenant" with the individual holding the servient estate while the state holds the dominate estate. The destruction of such an easement requires compensation. 28 C.J.S. *Easements* § 1-4 (1941). SMITH, SURVEY OF THE LAW OF REAL PROPERTY, ch. 14, 259 (1956); 25 AM. JUR. *Highways* § 154 (1940); 39 C.J.S. *Highways* § 141 (1944). Further, the right of access is not limited to the owner of the land, but accrues to his patrons and clients as well. Longenecker v. Wichita Ry. & Light Co., 80 Kan. 413, 102 Pac. 492, 496 (1909).

[6]In Ark. State Highway Comm'n. v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960), the court stated there was no damage to the property right of ingress and egress for there was an alternate access available though it was more than one mile away. A similar case is Transylvania University v. Lexington, 38 Am. Dec. 173 (1842), where a college was allowed to close a street running through the main part of its campus over the objection of the city because there was other access.

[7]Access as an easement is held by a majority of the courts. See *e.g.*, People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); State *ex rel.* Rich v. Fonburg, 80 Idaho 269, 328 P.2d 60 (1958); McMoran v. State, 55 Wash. 2d 37, 345 P.2d 598 (1959).

[8]RESTATEMENT, PROPERTY §§ 519(4) & 524 (1944); 3 POWELL, REAL PROPERTY § 429 at 521 (1952); 109 U. PA. L. REV. 120, 124 (1960).

[9]See note 3 *supra*.

gard to the circumstances of each situation.[10] Nevertheless, when there is a material impairment of access a "taking" or a "damage" can be said to have resulted for which compensation may be allowed.[11]

A state may "take" property in two different ways: (1) through an eminent domain proceedings, or (2) through the use of a State's police power. If there is a taking by the employment of eminent domain, compensation is required by law.[12] However, if the taking comes under the theory of a State's police power, no payment is necessary.[13]

The use of police power is rationalized on the ground that an individual, as a member of society, should be counted upon to bear a reasonable cost when there is an improvement that will benefit both him and his fellow citizens.[14] The concept is imparted in the phrase, *damnum absque injuria,* which indicates that an individual's interest must give way to accommodate the public although there is no compensatory payment.[15]

[10]In Iowa State Highway Comm'n. v. Smith 248 Iowa 869, 82 N.W.2d 755, 760 (1957), it was declared the commission is "entitled to deference because of its superior knowledge of highways and traffic matters." However, the decision must still turn on the particular facts of the situation. *In re* Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N.E.2d 411 (1952). Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959).

[11]In determining compensation where a deprevation of private property has occurred, states seem to follow one of two rules, depending on whether their constitution refers to the requirement of "taking" of private property or simply the "damaging" or "injuring" of private property. In the first instance there must be a literal, physical taking, whereas in the latter case all there need be is *some* damage or injury. Jurisdictions which fall into the first category have generally followed what is called the Massachusetts rule. See, *e.g.,* Thompson v. Androscoggin River Improvement Co., 54 N.H. 545 (1874); Selden v. Jacksonville, 28 Fla. 558, 10 So. 457 (1891); McCullough v. Campbellsport, 123 Wis. 334, 101 N.W. 709 (1904). Cases exemplary of the second rule are: Montgomery v. Townsend, 80 Fla. 489 (1886); Svanson v. Omaha, 38 Neb. 550, 57 N.W. 289 (1894). Also it has been indicated there is no "redress" under the Fifth Amendment to the Federal Constitution as applied to the States. Sauer v. New York, 206 U.S. 536 (1906). See generally, 2 NICHOLS, EMINENT DOMAIN Ch. IV particularly at § 6.38 - 6.441 (3rd ed. 1950). MONT. CONST. art. III, § 14 provides—"Private property shall not be *taken* or *damaged* for public use without just compensation having been first made to or paid into court for the owner." (emphasis added) Thus it becomes apparent that the distinction existing between *taken* and *damaged* is almost negligible in this state, as both words are used.

[12]See notes 4 and 10 *supra.*

[13]The distinction between eminent domain and police powers has been made in a number of cases: Dallas v. Hallum, 285 S.W.2d 431 (Tex. 1955); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958). State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960) state there is compensation because of an eminent domain action, whereas in State Highway Comm'n. v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960), there is no compensation because police power was used. A comprehensive treatment of these two cases may be found in 109 U. PA. L. REV. 120 (1960).

[14]The general considerations supporting this view are the protection of the public health, safety, morals and general welfare. With regard to access specifically it is said a governmental authority has "the power to regulate, at least reasonably, in the public interest and without illegal discrimination, the extent of an abutter's private right of access . . . ." 73 A.L.R.2d 640, 657 (1960); See also Wilson v. Alhambra, 158 Cal. 430, 111 Pac. 254 (1910) (where a city government was allowed to make such regulation); State *ex rel.* Gibelin v. Dep't. of Highways, 200 La. 409, 8 So. 2d 71 (1942) (in which the state was allowed to make such regulation).

[15]11 AM. JUR. *Constitutional Law* § 266 (1937).

It becomes evident at this point that there is a conflict between public and private rights.[16] Courts must balance the "relative interests" of the parties involved so as to arrive at a just conclusion. In the final analysis the only test will be the particular facts and circumstances of the case supported by the court's ultimate objectives.[17] Underlying the entire scheme, nonetheless, is the generally controlling policy commitment that society is loath to make any one individual support an excessive public burden without recompense.

The measure of damages in an eminent domain proceeding is normally represented by the decrease in the market value of the land due to the taking. The usual way to decide the increment of decrease is to find the difference between the past and present market value of the land.[18] In Montana the law is controlled by a statute which in effect states the present-past test.[19] What to consider in determining the market value is, of course, the question.[20]

The Montana Supreme Court has held that damages which are too "contingent," "speculative" and "remote" may not be regarded in computing market value,[21] and further that the myriad of elements comprising the market value of land are not to be considered separately, but must be taken as a whole.[22] One may say, then, that in so far as the impairment of access lessens the market value of the property, there

[16]The concepts of police power and eminent domain have rather weighty public policy arguments behind them. On one side there is a definite public need for highway improvements at the lowest cost possible. Also there is the belief that a property owner cannot expect the status quo to remain the same indefinitely. On the other side is the belief that the property owner has relied on his right of access in improving his property and that its taking without compensation could destroy him entirely; or make dangerous "inroads" into the area of private property rights generally. 109 U. PA. L. REV. 120, 123 n.8 (1960). Since most roads and streets are constructed for the public good, it seems natural for the rights of the public to supersede those of the private individual. Thus the private right of access is enjoyed subject to the paramount right of the public to use and improve the street or highway. LEWIS, EMINENT DOMAIN 125-126 (1888).

[17]Note that this test is the same as the one employed to determine the nature of the property right of access.

[18]2 NICHOLS, EMINENT DOMAIN § 6.441(11) (3rd ed. 1950).

[19]REVISED CODES OF MONTANA, 1947, § 93-9913:

> For the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its *actual value* at that date shall be the measure of compensation of all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected . . . . (emphasis added)

The actual value, it seems, could only be ascertained by taking into consideration the past and present value of the land.

[20]See note 18 *supra.*

[21]Lewis & Clark Co. v. Nett, 81 Mont. 261, 263 Pac. 418 (1928); State v. Bradshaw Land & Livestock Co., 99 Mont. 95, 43 P.2d 674 (1935). In effect this position holds there must be a damage to the present market value of the land if there is to be any compensation.

[22]Wright v. Butte, 64 Mont. 362, 210 Pac. 78 (1922).

should be compensation.[23] On the other hand, courts have held that if there is alternate access, there may be no compensation.[24]

Though the impairment of access may be claimed as a damage to the market value of the land in an eminent domain proceeding, the re-routing of traffic may not.[25] Such a re-routing is an element of the State's police power. Nonetheless, when compensation is given on the remainder of the property, as in the instant case, using the present-past market value test, loss of business due to deviation of traffic is vicariously considered and may have a direct effect upon that market value.

It is submitted that in the instant case the distinction between the impairment of access and the diversion of traffic is theoretically defensible, but, as a practical matter, is too subtle to be adequately handled by a jury of lay persons. Viewing the situation realistically, the distinction should not be used except in cases in which *only* traffic diversion is being claimed as the damage.

It is further submitted that courts have not made it clear whether they characterize access as a license or easement and allow this determination to control the nature of the proceeding; or conversely, whether the type of proceeding is defined and the nature of the property right simply made to fit. It appears no general procedure prevails. However, courts are more likely to decide the type of action before the character of the property right if the character of the right is considered at all.

HORTON B. KOESSLER.

JURIES ARE NOT CAPABLE TRIERS OF TESTAMENTARY CAPACITY OR UNDUE INFLUENCE IN WILL CONTEST CASES. — The testator, a successful opthalmologist, was married and had two sons aged 12 and 14 years. Five years before his death, the testator's wife obtained an interlocutory decree of divorce which precipitated from an intimate relationship between the testator and his receptionist.

[23]Mollandin v. Union Pac. Ry. Co., 14 Fed. 394 (1882); Idaho & W.N.R.R. v. Nagle, 184 Fed. 598 (9th Cir. 1911); Lund v. Idaho & W.N.R.R. 50 Wash 574, 97 Pac. 665 (1908). All the decisions were made under constitutional provisions which provided for both taking and damage. One court in determining compensation has said:

> When . . . ingress and egress to abutting property has been destroyed or substantially impaired he (the abutter) may recover damage therefore. The damages may be merely nominal or they may be severe. Other means of access . . . may be taken into consideration in determining the amount which would be just under the circumstances. (citing cases) Other means of access may mitigate damages (citing cases), but does not constitute a defense to the action.

State v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 992 (1960).

[24]See note 12 *supra*. It is also interesting to note, if a new road is constructed where none existed before and insufficient or no access is provided, there may be no claim for compensation because there was no access prior to the construction of the road. Schnider v. California, 38 Cal. 2d 439, 241 P.2d 1 (1952); see generally 43 A.L.R.2d 1068 (1955).

[25]See generally, 73 A.L.R.2d 680 and following annotations. 118 A.L.R. 921 indicates some contrary holdings which are in the minority.