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SOME PROBLEMS OF SEVERANCE DAMAGE

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Freeways, limited access highways, super highways, toll roads, sewage disposal plants, housing authorities and other various and assorted modern improvements are giving rise to many problems in the award of severance damage. The answers to these problems make a very substantial difference to the owners whose property is to be condemned, and the purpose of this memorandum is simply to invite attention to some of the existing problems—some of which have, and some of which have not been before our court.

The statutory authority for the award of severance damage is found in 3 Colo. Stat. Ann., c. 61, § 17, which provides, in substance, that an owner is entitled to the value of the property taken, plus any damage to the remainder. Benefits, if any, resulting from the public improvement may be offset against the damage to the remainder, but they may not be offset against the value of the property taken. Nowhere in the statute is there to be found any exact definition of the elements of damage which may be considered, but the general rule of damage has been said to be that "the damages to the residue should be equal to the diminution in the market value of such residue for any purpose to which it may reasonably be put." *Fenlon v. Western Light and Power Co.*, 74 Colo. 521, 223 P. 48 (1924).[1]

At the outset, it should be remembered that the choice of the word "severance" to describe the type of damage which is compensable was advisedly made. For, if a portion of an owner's property is actually taken, he may be entitled to compensation for a diminution in the value of his remaining property, even though his neighbor (no portion of whose property is taken) is denied recovery. This somewhat incongruous result was explained by the United States Supreme Court in *Campbell v. United States*, 266 U. S. 368 (1924), where it was said:

> It is only because of the taking of part of his land that (plaintiff) became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the 5th Amendment giving just compensation does not apply.[2]

The importance of this rule most frequently arises in a situation where the proposed improvement unquestionably benefits the entire community, but it detracts from the particular neighborhood in which the improvement is being built. As a horrible example, assume that the city decides to build a sewage disposal plant in an area which has been planned and subdivided for expensive homes. The proposed plant will chop a few feet off the land of A, but it will come only to the boundary of B's property. Undoubtedly, the value of each owner's property will be substantially diminished as a result

[1] To the same effect is United States v. Grizzard, 219 U. S. 180 (1911).
[2] See also, Gilbert v. Greeley R. Co., 13 Colo. 501, 22 P. 814 (1889).

of the erection of the plant, but A is entitled to the resulting diminution in value of the remainder of his land, while B is entitled to nothing as severance damage.[3]

This type of damage is sometimes referred to in the cases as "damage from the proposed use," and the eligibility of A for an award for this particular damage is discussed in *Grizzard v. United States*, 219 U.S., 180 (1911), where it is said:

> Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.[4]

Symbolic of the rule permitting an award of damages resulting from the proposed use is *United States v. Dickinson*, 331 U.S. 745 (1947), where the War Department constructed a dam on respondent's land and contended that it was liable only for the land actually taken and not for the diminution in value to the remainder of the land resulting from the probability that the dam would cause future erosion. In holding that compensation had to be paid for all land taken and for all value which would be lost in the future as a result of the future erosion, the Court said: "If the government cannot take the acreage it wants without also washing away more, that more becomes part of the taking."

Frequently cited in opposition to the rule that damages resulting from the proposed use are compensable is *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1910), a case subject to as many interpretations as there are parties to the lawsuit. Carefully read, it is submitted that this portion of the *Town of Julesburg* case does nothing more than adopt two general rules: (1) That mere personal inconvenience is not compensable in eminent domain, and, (2) that to be compensable, the damage to the remainder must be special, and must not be a damage shared by the public generally. In that case, the condemnation suit was brought to acquire land for a power house, and the case was apparently tried on a theory of seeking compensation for the inconvenience which would result from the smoke and vapors rather than on the theory of seeking compensation for a resulting diminution in value of the remaining land. The choice of language in the *Town of Julesburg* case is unfortunate, but the case does not appear to depart from the general rule that damages caused by the proposed use are compensable.

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[3] Whether or not B is entitled to damage on some other theory is not within the scope of this memorandum.

[4] Among the Colorado cases permitting an award for this type of damage are Farmers Reservoir & Irrigation Co. v. Cooper, 54 Colo. 402 130 P. 1004 (1913); Denver & S. F. R. Co. v. Hannegan, 43 Colo. 122, 95 P. 343 (1908); Wassenich v. City and County of Denver, 67 Colo. 456, 186 P. 533 (1919); and City and County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

UNITIES REQUIRED FOR ALLOWANCE OF SEVERANCE DAMAGE [5]

A most difficult question, and a question which has not been squarely before our court, is the question of the unities required to permit an award of severance damage. Traditionally, the three essential unities were said to be: (1) unity of ownership; (2) unity of use; and (3) contiguity of the land.

The cases discussing the required unity of ownership to permit an award of severance damage are relatively few, and almost without exception they have applied a hyper-technical rule requiring absolute identity of ownership if severance damage is to be awarded. The results of the application of the rule are often patently unfair, but, unfortunately, the problem is not uncommon in the trial courts. As an example, assume a ranch property acquired at several different times over a period of years. The home place was taken in the husband's name, but, with the growing popularity of joint tenancies, other properties were acquired jointly by husband and wife. If the home place is condemned for a reclamation project, does the difference in formal title prevent an award of severance damage to the remainder of the ranch? Under the great weight of authority, it does,[6] and it is suggested that a lawyer consulted concerning a proposed condemnation should first inquire as to the status of the title and that appropriate conveyances should be made immediately, especially if the case has not as yet been filed.

Unquestionably, unity of use must be present if an award for severance damage is to be made. The land taken and the land remaining must have been devoted to the same use if severance damage is to be awarded; and if the land taken was devoted to an entirely different use from that made of the land remaining, no award for severance can be made.

The perfect illustration of this requirement is *Stockton v. Marengo,* 137 Cal. App. 760, 31 P. 2d 467 (1934). There, a corner of a farm had been separately fenced and used as a service station. A new highway was put through the farm and the service station was rendered almost valueless. The California court held that because of the different uses made of the land taken and the land remaining, no compensation could be allowed for the service station.[7]

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[5] An annotation in 6 A. L. R. 2d 1197, covers many of the cases discussing this problem.

[6] Illustrative of the rule is Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234 (1910), where one tract was owned by a husband and an adjoining tract was owned by husband and wife as tenants by the entireties. The court refused to allow severance damage because, "This cannot be extended to cover lands owned by different proprietors." See also: Tillman v. Lewisburg R. Co., 133 Tenn. 554, 182 S. W. 597 (1916); McIntyre v. Board of Doniphan County, 168 Kan. 115, 211 P. 2d 59 (1949); San Benito County v. Copper Mtn. Min. Co., 7 Cal. App. 2d 82, 45 P. 2d 428 (1935). Perhaps *contra* are Chicago & E. R. Co. v. Dresel, 110 Ill. 89 (1884), and Lavelle v. Town of Julesbury, *supra.*

[7] In Long Beach v. Stewart, 30 Calif. 2d 763, 185 P. 2d 585 (1947), it was held that where the property not taken was zoned differently from the property taken, no severance damage would be allowed in the absence of a showing of a probability that the zoning of the two tracts could have been made uniform.

The third of the traditional required unities is that of contiguity of the land, and it is in this sphere that recent opinions have shown a marked departure from the older rule requiring actual physical contiguity.[8] Loosely stated, the modern rule is that if two pieces of property are closely integrated in use, the fact that they are not physically contiguous does not prevent an award of severance damage, and the properties will be regarded as *constructively contiguous* for the purpose of the award of severance damage.

In fact, the ocean itself has not troubled the judicial mind in deciding that two pieces of real estate are constructively contiguous; for, in *Baetjer v. United States,* 143 F. 2d 391 (1st Cir., 1944), the court had no hesitancy in saying that the island of Vieques, situate 17 nautical miles southeast of Puerto Rico, was contiguous with Puerto Rico for the purpose of awarding severance damage. There, the government seized Vieques which had been used to grow sugar cane milled in Puerto Rico, and the court held that the diminution in value of the Puerto Rican mill caused by the taking of Vieques was compensable in the condemnation suit as severance damage.

The doctrine of constructive contiguity is most important in Colorado with our widespread ranching operations; and, although our court has not discussed the point at length,[9] the Tenth Circuit clearly recognized and applied the doctrine to a farm operation in *Grand River Authority v. Thompson,* 118 F. 2d 242 (1941). Under the modern rule, it seems that severance damage can be awarded for damage to integrated, but non-contiguous ranch property. Certainly, the question will be squarely presented to our court in the not too distant future.

The conclusion to be drawn from the foregoing comments is evident. The Colorado law of eminent domain is sufficiently undeveloped that a lawyer can safely advise a client that there are two (or more) lines of authority and that he has a fighting chance. With the passage of time and the arrival of clients possessed of a competitive spirit and means with which to compete, the many undetermined questions in eminent domain should be determined by further judicial and legislative clarification.

In the meantime, the safest course to pursue is to employ an expert witness, sufficiently versed in appraisal techniques to compete on even terms with the expert employed by the other side.[10] If this safeguard is adopted, there is every reason to believe that

[8] Reference is again made to the annotation in 6 A. L. R. 2d 1197, which reviews most of the cases.

[9] There is at least a suggestion of a recognition of the rule of "constructive contiguity" in that old ambiguous favorite, Lavelle v. Town of Julesburg, *supra.* and in Public Service Co. v. City of Loveland, 79 Colo. 216, 245 P. 493 (1926), the rule is apparently applied. But, see the instruction approved in Board of Commissioners v. Noble, 117 Colo. 77, 184 P. 2d 142 (1947), a case in which the question of constructive contiguity does not appear to have been raised.

[10] See United States v. 257.654 Acres of Land, (T. H.) 72 F. Supp. 903 (1947), for a case in which an expert successfully changed profits into market value, much to the confusion of the trial judge.

the jury will completely disregard the testimony and award either what they think the property is worth or what they think the condemnor can afford to pay.

A word of advice for the lawyer representing an impecunious client, unable to enjoy the luxury of submitting a case to the scrutiny of the Supreme Court, is that Major Goodman has recently taken the position that under the authority of *Wassenich v. City and County of Denver*, 67 Colo. 456, 186 P. 533 (1919) at least in Denver, you can appear in a condemnation case without paying your $5 docket fee. So, all that is required to get the best guess of the trial judge is that the lawyer must have the competitive spirit, and he does not now have to have $5 to go along with it.

NEW REAL ESTATE STANDARD

At a meeting held on July 15, 1952, the Real Estate Standards Committee of the Denver Bar Association promulgated Standard No. 76 relating to inheritance tax liens. Due to recent opinions of the Colorado Supreme Court, the Committee believed that a note must be appended to present Standard No. 47. Standard No. 76 and the Note to Standard No. 47 are set out below and will be presented to the members of the Colorado Bar Association for ratification at the 1952 Convention next October.

STANDARD NO. 76

INHERITANCE TAX—LIMITATION OF LIEN

Problem: The record shows that more than 15 years have elapsed since the date of the death of a decedent owning real estate. No receipt for payment of Colorado Inheritance Tax or waiver or release thereof appears of record. Should an attorney, relying on Section 7, Chapter 145, Session Laws of 1945, render an opinion showing the title free and clear of any lien for Colorado Inheritance Tax accruing as the result of the death of said decedent?

Answer: Yes.

NOTE TO FOLLOW STANDARD NO. 47

In connection with this standard, you are referred to the recent Colorado cases of *Mitchell v. Espinosa* (243 P. 2d 412) and *Johnson v. McLaughlin* (242 P. 2d 812), both decided March 17, 1952. These cases concern a severance of mineral rights prior to a tax sale of land and prior to the issuance of a Treasurer's Deed thereon, and hold that such mineral rights do not pass by Treasurer's Deed unless separately assessed and sold.

In each case, the Treasurer's Deed in question was the source of title of the person in possession of the land, and one of the deeds had remained of record approximately nineteen years and the other deed approximately seventeen years. In each instance, the tax sale and the Treasurer's Deed based thereon did not except any mineral rights.

The court in its opinions made no reference to the limitation statute on which real estate Standard No. 47 is based (Sec. 146, Chap. 40, C.S.A. '35 as amended by Session Laws of 1945, Chap. 101).