North Dakota Law Review

Volume 35 | Number 1 Article 6

1959

Highways - Right of Abutting Owners - Right of Access

William F. Hodny

convincing arguments to the contrary,[10] or where a contrary and valid interpretation exists.[11]

North Dakota is not faced with the problem of the principal case. In drafting N.D.R.Civ.P. 25, the two-year time limit was omitted and it was provided merely that if substitution is not made within a "reasonable time", the action "may" be dismissed as to the deceased party. The problems arising from this version of the rule are, of course, *sui generis.*

BENJAMIN OSTFIELD.

HIGHWAYS — RIGHT OF ABUTTING OWNERS — RIGHT OF ACCESS. — The owner of a parking garage on a corner lot with vehicular access to a street on one side of lot was denied access to the other street. The basis of the denial was a city ordinance providing that no permit shall be isued for the construction of any curb cut or driveway leading onto portions of designated streets. He sought a writ of mandamus against the city of San Antonio to compel the issuance of a permit. The Supreme Court of Texas *held,* two justices dissenting, that the ordinance was a valid exercise of the city's police power. *San Antonio v. Pigeonhole Parking,* 311 S.W.2d 218 (Tex. 1958).

The weight of authority is that the right of access is an easement appurtenant[1] to the abutting land[2] and a valuable property right[3] which cannot be taken except by the exercise of the power of eminent domain upon payment of just compensation.[4] Although complete prohibition of the right of access is a taking of property without due process[5] this right may be

---

10. Gertler v. United States, 18 F.R.D. 307 (S.D.N.Y. 1955).

11. Bowles v. Tankar Gas, 5 F.R.D. 230 (D.C. Minn. 1946). It should be noted that dismissal in accordance with Rule 25 is not an adjudication on the merits. United States v. Saunders Petroleum Co., 7 F.R.D. 608 (W.D. Mo. 1947) and consequently does not bar the commencement of another action on the same claim through any application of the principles of res judicata. *In re* Hoover Co., 30 C.C.P.A. (Patents) 927, 134 F.2d 624, 628 (1943). Although in many instances further litigation would undoubtedly be barred by the statute of limitations regulating the life of the claim, this result is not directly attributable to Rule 25 itself.

1. Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942); Minnequa Lumber Co. v. Denver, 67 Colo. 472, 186 Pac. 539 (1920); Howell v. Board of Comm'rs, 169 Ga. 74, 149 S.E. 779 (1929); Continental Oil Co. v. Twin Falls, 49 Idaho 89, 286 Pac. 353 (1930); O'Brien v. Central Iron and Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953); State v. Department of Highways, 200 La. 409, 8 So.2d 71 (1942); Wenton v. Commonwealth, 335 Mass. 78, 138 N.E.2d 609 (1956); Hillerege v. Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957); Shawnee v. Robbins Bros. Tire Co., 134 Okla. 142, 272 Pac. 457 (1928); State, By and Through State Highway Comm'n v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); Newman v. Mayor of Newport, 73 R.I. 385, 57 A.2d 173 (1948); Gulf Refining Co. v. Dallas, 10 S.W.2d 151 (Tex. 1928); Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943); Royal Transit, Inc. v. West Milwaukee, 266 Wis. 271, 63 N.W.2d 62 (1954).

2. "When no land intervenes between the land of the abutter and the street, his property is said to abut." 10 McQuillin, Municipal Corporations, § 30.55, (3rd ed. 1950).

3. Pure Oil Co. v. Northlake, 10 Ill.2d 241, 140 N.E.2d 289 (1957); Anzalone v. Metropolitan Dist. Comm'n, 257 Mass. 32, 153 N.E. 325 (1926); Cummings v. Minot, 67 N.D. 214, 271 N.W. 421 (1937).

4. Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Breining v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938); Newman v. Mayor of Newport, 73 R.I. 385, 57 A.2d 173 (1948). *Contra,* Alexander Co. v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946).

5. Brownlow v. O'Donoghue Bros., Inc., 276 Fed. 636 (D.C. Cir. 1921); Pure Oil Co. v. Northlake, 10 Ill.2d 241, 140 N.E.2d 289 (1957); Cummings v. Minot, 67 N.D. 214, 271 N.W. 421 (1937). *But see* Alexander Co. v. Owatonna, *supra* note 4.

regulated[6] if the regulation is reasonable and consistent with the public good.[7]

In the instant case it cannot be said that the court has asserted the right to prohibit all vehicular access should the public good require it; it has denied only additional access, leaving the owner with access enjoyed to the other street.[8] This is regulation of the number and location of access points which has long been held to be valid.[9]

The origin of the right of access is obscure, but it seems to have been introduced by court decisions declaring that such a right exists and recognizing it as a matter of policy.[10] The right has been condemned as having no modern justification for its existence,[11] and the decisions supporting it are called a mass of bad and confusing law.[12] The argument for strict or liberal determination of an abutter's rights may appeal to the court with greater force in one type of case than it does in another. Examples of strict and liberal determination under variant facts may be found in the same jurisdiction with the result of conflicting and irreconcilable case law.[13]

Access rights have assumed renewed significance with the advent of the limited access way. The benefits to the public of the limited access way are many[14] and the course of future development will be profoundly influenced by judicial definition of abutter's rights.[15] Any expansion of these rights will place the burden of unreasonable cost on much needed public improvements.[16]

---

6. Brownlow v. O'Donoghue Bros., Inc., *supra* note 5; Burke v. Metropolitan Dist. Comm'n, 262 Mass. 70, 159 N.E. 739 (1928); King v. Stark County, 66 N.D. 467, 266 N.W. 654 (1936).

7. Pure Oil Co. v. Northlake, 10 Ill.2d 241, 140 N.E.2d 289 (1957); King v. Stark County, *supra* note. 6.

8. Four of five cases cited as precedent by the majority serve as authority only for the denial of additional access. See Breinig v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938) where in affirming Farmer's-Kissinger Market House Co. v. Reading, 310 Pa. 493, 165 Atl. 398 (1933) the court says, "We did, however, mention the fact that the owner had other means of access." Wood v. Richmond, 148 Va. 400, 138 S.E. 560 (1927); Tilton v. Sharpe, 85 N.H. 138, 155 Atl. 44 (1931). *But see* Alexander Co. v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946) where it was held that a city may, in the interest of public safety impose such restrictions as it may find necessary to the preservation of the public safety even to the extent of denying vehicular access to property of an abutting owner, and under such circumstances the denial of access does not violate due process. Here too one of the dissenting judges advanced the argument that the case precedent, including the above cases which were cited in the principal case, used by the majority as authority for the denial of the right of access, only claimed to do so when the abutting owner had other means of access.

9. Burke v.Metropolitan Dist. Comm'n, 262 Mass. 70, 159 N.E. 739 (1928); King v. Stark County, 66 N.D. 467, 266 N.W. 654, 656 (1936) "While an abutting owner has the right of access, this is not paramount to the right of the state. It is subject to the superior right of the public even to the extent that the state may designate, in the interest of public safety and public rights, portions where access will not be permitted."

10. Bacich v. Board of Control of Cal., 23 Cal.2d 343, 144 P.2d 818 (1943).

11. Cunnyngham, *The Limited-Acess Highway From A Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 33 (1948) After denouncing this property right the author continues, "It may not be too late for some enterprising lawyer with a pioneering urge to convince a state court that no constitution-given right really belongs to abutters to demand this gift of property; and that there is no corresponding duty upon motor-vehicle-users to either give, or pay for, any such property right on all highways."

12. Clarke, *The Limited Access Highway*, 27 Wash. L. Rev. 111, 115 (1952); *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298, 311 (1951).

13. Sauer v. New York, 206 U.S. 536 (1906); See, *e.g.*, People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

14. Cunnyngham, *supra* note 11.

15. Clarke, *supra* note 12, at 129.

16. *Cf.* Rose v. State, 19 Cal.2d 713, 123 P.2d 505, 1942); *Freeways and the Rights of Abutting Owners, supra* note 12.

In the controversy over strict versus liberal determination of access rights as applied to particular facts is ever-present the conflict between the public safety and convenience, and the rights of abutting owners. It is up to the courts to balance these two forces in an attempt to produce overall justice without causing undue hardship to either the public or the individual.[17] The courts must recognize that the right of access has its origin in policy and that modern policy may require extensive regulation and limitation for the public good.

WILLIAM F. HODNY.

INTERNAL REVENUE — EFFECT OF ERRONEOUS RETURNS — STATUTES OF LIMITATION ON ASSESSING DEFICIENCIES ON INCOME TAXES. — Taxpayer had sold certain lots for residential purposes and had overstated the "basis" of such lots by erroneously including in their cost certain unallowable items of development expense. Action was commenced more than three but less than five years after the return was filed. There was no claim that the returns were fraudulent. The government claimed a special five-year statute of limitations[1] applied as taxpayer's miscalculation of profits exceeded 25% of gross income. The Supreme Court of the United States *held,* two justices dissenting, that the tax assessments were barred by the general three-year statute of limitations.[2] *Colony, Inc. v. Commissioner,* 357 U.S. 28 (1958).

Section 275 (c) of the 1939 Code has been the subject of a considerable amount of litigation. The difficulty arises in the interpretation of the words "omits from gross income" which is the deciding factor of the Commissioner's right to maintain suit for tax deficiencies after the three-year statute has run.

The Tax Court consistently upheld the Commissioner's interpretation of section 275 (c) that an overstatement of deductions constitutes an omission from gross income.[3] The decisions of the Circuit Courts were irreconcilable.[4]

A taxpayer in his return stated his total income correctly but overstated deductions. His *gross* income was increased by an amount in excess of 25% resulting from disallowance of deductions from *gross* income claimed. The court held that this constituted an omission from gross income and the five-year statute applied.[5]

In contrast, a taxpayer stated his gross income correctly but claimed total

---

17. See Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394, 405 (1945), "Instances may arise where the acquisition of such a right might completely eliminate the value of the dominant estate."

1. Int. Rev. Code of 1939, § 275 (c), 53 Stat. 86. "Omission from gross income. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

2. Int. Rev. Code of 1939, § 275 (a), 53 Stat. 86. "General rule. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

3. For example, see the Tax Court opinion on the instant case. 26 T.C. 30 (1956) *citing* Estate of J. W. Gibbs, Sr., 21 T.C. 443 (1954).

4. Reis v. Commissioner, 142 F.2d 900 (6th Cir. 1944); Ketcham v. Commissioner, 142 F.2d 996 (2d Cir. 1944); supporting the Commissioner. But, Uptegrove Lumber Co. v. Commissioner, 204 F.2d 570 (3d Cir. 1953); Davis v. Hightower, 230 F.2d 549 (5th Cir. 1956); rejected the view of the Commissioner.

5. Corrigan v. Commissioner, 155 F.2d 164 (6th Cir. 1946).