North Dakota Law Review

Volume 27 | Number 3 Article 9

1951

Eminent Domain - Determination of Market Value - Going Business as Element of Value

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the benefit to the third person is indirect, if it springs from a performance agreed to be rendered to the promisee, then the third party is only an incidental beneficiary and not entitled to sue on the contract.

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EMINENT DOMAIN—DETERMINATION OF MARKET VALUE—"GOING BUSINESS" AS ELEMENT OF VALUE. The city of Dallas instituted condemnation proceedings to secure a portion of the business property of the defendants for the purpose of widening a 20-foot gravelled roadway into a 40-foot concrete street. The trial court excluded expert testimony as to the value of defendant's grocery and liquor business, based among other elements on gross sales and net operating profit, on the ground that damage to a business is not a proper element of compensation. Upon appeal it was *held,* with one justice dissenting, that a "going business" is property for which recovery can be had in eminent domain proceedings and that the evidence should have been admitted. The error being prejudicial, a reversal was ordered. *Priolo v. City of Dallas,* 234 S.W.2d 1014 (Tex. Civ. App. 1950).

It has generally been held in the absence of statute, that the 5th amendment of the Federal constitution and similar provisions in state constitutions do not require that compensation be paid where a business is injured or destroyed in connection with the taking of property for public use under eminent domain proceedings.[1] Thus injury to a business is generally considered *damnum absque injuria*[2] either on the theory that there is no taking and the owner is free to carry on his business elsewhere,[3] or that a business is less tangible in nature than the rights which the constitution undertakes to protect.[4] However, it is proper for a government to pay going concern value where it intends to utilize the business and where the owner is, by the monopolistic nature of the enterprise, deprived of the right to carry on the business elsewhere.[5] The rationale of the so-called public utility cases—that when the taking has the inevitable effect of depriving the owner of the going concern value of his business there has been a compensable taking of property—has been applied to a

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[1] United States v. Powelson, 319 U.S. 266 (1943); Mitchell v. United States, 267 U.S. 341 (1925); United States v. Stephenson Brick Co., 110 F.2d 360 (5th Cir. 1940). For an outline of the various constitutional provisions see Lewis, Eminent Domain §15 *et seq.* (3rd ed. 1909). For an excellent article describing the growth of the concept of "property" in eminent domain proceedings see 41 Yale L.J. 221 (1931).

[2] Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 Pac. 705 (1916).

[3] Mitchell v. United States, 267 U.S. 341 (1925); Cobb v. Boston, 109 Mass. 438, 444 (1872); Ranlet v. Concord Ry., 62 N.H. 561, 564 (1883).

[4] Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52 (1902).

[5] Omaha v. Omaha Water Co. 218 U.S. 180, 202 (1910), (municipal water system taken); Monongahela Navigation Co. v. United States, 148 U.S. 312, 337-341 (1893) (lock and dam appropriated); Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 26 (1929), (toll turnpike condemned for public highway use).

non-public utility case where there was merely a temporary taking.[6] A legislative body is also competent to enact special legislation allowing compensation for injury to business when it feels that justice requires it,[7] as where a watershed is taken and a whole community is wiped out.[8]

It has been suggested that where state constitutions provide that property shall not be taken *or damaged* for public use without just compensation, that the addition of the word "damaged" could be interpreted to allow recovery for such intangibles as injuries to business,[9] but the courts have not attached this significance to the provision.[10] Indeed even where a statute provided in part: "The jury shall determine the compensation proper to be made to the owners and persons interested for the taking or affecting of such real property or damage to business conducted thereon," it was held that this provision did not entitle a landowner an additional element of damages; but that its sole effect was to authorize compensation for one who suffered damage to a business conducted on another person's land for which he could not, apart from the statute, recover any compensation.[11]

In any event, the instant decision cannot be explained by this reasoning because Texas courts have held that "taken" as used in

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[6] Kimball Laundry Co. v. United States, 338 U.S. 1, 13 (1949) (compensation allowed for laundry trade routes). See for law review treatment 4 Wyo. L.J. 133 (1949). *But see*, holding that injury to a business is not compensable where the taking is temporary or where a fee is condemned, United States v. General Motors Corp., 323 U.S. 373, 383 (1945).

[7] Joslin Manufacturing Co. v. Providence, 262 U.S. 668, 675 (1923); State v. Stabb, 226 Ind. 319, 79 N.E.2d 392, 394 (1948); People ex rel. Burhans v. City of New York, 198 N.Y. 439, 92 N.E. 18 (1910).

[8] Earle v. Commonwealth, 180 Mass. 579, 63 N.E. 10 (1902).

[9] 4 Wyo. L.J. 133, 134 (1949).

[10] United States v. General Motors Corp. 323 U.S. 373, 380 (1945): "Even when state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage." St. Louis K. & N.W. Ry. v. Knapp, Stout & Co., 160 Mo. 396, 61 S.W. 300, 304 (1901) (". . . the purpose of the words 'or damaged' . . . . was not to add new elements to the 'just compensation' guaranteed by the constitution . . ."). In at least the following states recovery for injury to a business is denied although the constitutions provide for compensation for "damage" as well as taking: California, Cal. Const. Art. I, §14, Morris v. City and County of San Francisco, 59 Cal. App. 364, 210 Pac. 824 (1922); Georgia, Ga. Const. Art. I, §3, Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896); Illinois, Ill. Const. Art. II, §13, Chicago v. Farwell et al., 286 Ill. 415, 121 N.E. 795 (1918); Virginia, Va. Const. Art. IV, §58, Chairman of Highway Comm. v. Parker, 147 Va. 25, 136 S.E. 496 (1927). For a decision construing "or damage" as allowing recovery in instances where there has been no direct physical injury or taking, as where an owner's property is adversely affected by the construction of a viaduct on a publicly owned street see Rigney v. Chicago, 102 Ill. 64 (1881). Accord: Chicago v. Taylor, 125 U.S. 161 (1888); King v. Stark County et al., 67 N.D. 260, 271 N.W. 771 (1937); Tidewater Ry. v. Shartzer, 107 Va. 562, 565, 59 S.E. 407, 411 (1907).

[11] Morrison v. Cottonwood Development Co., 38 Wyo. 190, 266 Pac. 117, 123 (1928).

the Federal constitution and "taken, damaged, or destroyed" as used in the Texas constitution[12] are synonymous and convertible terms.[13] The bold holding of the instant case that business is property and compensable under eminent domain proceedings is directly contra to the great majority of decisions and to another late Texas decision[14] holding that where the whole of a tract is taken injury to a business is not compensable. In still another Texas case[15] where part of a tract was taken for street widening purposes, the injury to the business was held to be compensable under eminent domain proceedings, although recovery was denied on other grounds, the court relying on *Hart Bros. v. Dallas County*[16] which is also cited as authority in the instant case. Recovery was allowed in the *Hart Bros.* case for losses to a business resulting not from the taking of any part of the land but from an obstruction of the approach to plaintiff's establishment, based on the authority of prior cases of a similar[17] nature and on civil cases between private persons which had allowed recovery for losses to a business through such obstruction.[18]

The Texas court seems to have ignored the essential distinction which generally sets eminent domain proceedings apart from all others. In *City of LaGrange v. Pieratt* the court stated that the same rule applies to condemnation proceedings as applies where a breach of contract or a tort results in damages to an established business.[19] Logically, this argument could be extended to cover cases where a business is injured by the taking of an entire tract. There seems to be little reason for compensating business losses where only a portion of the property is taken but denying recovery when an entire tract is taken and where the business has been moved elsewhere or destroyed.[20] However, in view of the holding in *Reeves v. City of Dallas*,[21] it seems probable that if in the future a claim should be made for compensation for injury to an established business when an entire tract is taken, the instant case would be limited to its facts (partial taking), and recovery denied by a Texas court.

It has been very widely held, contra to the instant case, that business losses are non-compensable and that evidence of profits derived from a business is too speculative and remote to be admitted for detemining the market value of property in eminent domain pro-

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[12] Tex. Const. Art. I, §17.

[13] Reeves v. City of Dallas, 195 S.W.2d 575, 583 (Tex. 1946).

[14] *Id.* at 584.

[15] City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243 (1943).

[16] 279 S.W. 1111 (Tex. Comm. App. 1926).

[17] Powell v. H. & T. C. Ry., 104 Tex. 219, 135 S.W. 1153 (1911).

[18] American Construction Co. v. Caswell, 141 S.W. 1013 (Tex. Civ. App. 1911), and cases there cited. Many states allow compensation for losses to business as a result of breach of contract or tort where damages occasioned by the loss are reasonably capable of ascertainment by competent proof. See *e.g.* Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Hoag v. Jenan, 86 Cal. App. 542, 195 P.2d 451, 455 (1948); City of Corning v. Iowa-Nebraska Light & Power Co., 225 Iowa 1380, 282 N.W. 791, 796 (1938).

[19] City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243 (1943).

[20] Illinois, however, makes such a distinction on this basis, allowing recovery where only a part of the tract is taken and injury results to a business on the remainder, and denying it where the entire tract is taken. Chicago v. Callendar, 396 Ill. 371, 71 N.E.2d 643, 648 (1947); Chicago v. Koff, 341 Ill. 520, 173 N.E. 666, 669 (1930). Research has disclosed no other jurisdictions in which a distinction has been drawn on this basis.

[21] 195 S.W.2d 575 (Tex. Civ. App. 1946).

ceedings,[22] because profits of a business depend upon capital invested, general business conditions, and the skill and business capacity of the owners.[23] This reasoning is undoubtedly sound if business losses are non-compensable.

If, however, it is conceded that injury to a business is compensable, as the instant case holds, there ought to be no quarrel with the admission of such evidence and a showing of its effect on the market value of the property. In fact, where income such as rents and profits is derived from the intrinsic nature of the property itself, and not from a business conducted thereon, such income is an element to be considered in determining market value.[24] And where the business itself is being taken by the condemning authority,[25] or being paid for by statutory command,[26] or where there is no other means of determining market value[27] evidence of profits has been admitted as having probative value.

It is submitted that fundamental changes in policy with regard to allowing recovery for business losses in eminent domain proceedings, where the principle of denial is so universally accepted, should probably be wrought by legislative enactment rather than by judicial decision.

Thomas D. Butler

JUDGMENTS—CONSENT TO JURISDICTION—USE OF HIGHWAY BY NON-RESIDENT MOTORIST AS WAIVER OF FEDERAL VENUE STATUTE. Plaintiffs, residents of Minnesota, were passengers in the vehicle of defendant A who was a resident of California. This vehicle collided in Nebraska with that of defendant B, residents of Iowa. Plaintiff sued in federal court in Nebraska, serving defendant B personally and defendant A by substituted service pursuant to the provisions of the Nebraska non-resident motorist statute.[1] Defendant A appeared specially to object to venue and requested dismissal as to him. Plaintiffs moved to dismiss this motion and requested transfer of the case to the District of Minnesota. In asserting its jurisdiction and retaining the trial, the court *held* that mere use of Nebraska roads by defendant A constituted a waiver of the federal venue privilege.[2] *Kostamo v. Brorby,* 95 F. Supp. 806 (D. Neb. 1951).

Remedial statutes have been passed in all states in an effort to impose liability on "hit-and-run" non-resident drivers. New Jersey

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[22] Los Angeles v. Deacon, 119 Cal. App. 491, 7 P.2d 378 (1932); Gauley & E. Ry. v. Conley, 84 W.Va. 489, 100 S.E. 290, 292 (1919); see note, 7 A.L.R. 164 (1921).

[23] Gauley & E. Ry. v. Conley, *supra* note 22.

[24] Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp., 169 F.2d 641, 644 (1948) (evidence of profits from ranch and farm lands admissible); City and County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999, 1001 (1941) (evidence of profit from livestock raising admissible).

[25] Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W. 2d 22, 26 (1929).

[26] *In re* Board of Water Supply of City of New York, 211 N.Y. 174, 105 N.E. 213 (1914).

[27] *In re* State Reservation, 16 Abb. N.C. 159 (N.Y. 1884).

[1] Neb. Rev. Stat. §25-530 (1943) Cum. Supp. (1949).

[2] 28 U.S.C. §1391 (a) (a civil action wherein jurisdiction is founded only on diversity of citizenship may, . . . be brought only in the judicial district where all plaintiffs or defendants reside).