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Eminent Domain--Limitations on Compensation for a Partial Taking (Boyd v. United States, 222 F.2d 493 (8th Cir. 1955))

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of the best interests of the child. However, in all probability, the Court based its decision on the fact that the mother's intended remarriage would afford her a greater opportunity to provide her children with motherly care.[37] This was the reasoning which the court adopted in the *Schmidt*[38] case under similar circumstances. If this was the rationale of the Court, then, though the decision may work a hardship on the father, nevertheless, it is consonant with the principle that the child's welfare is the paramount consideration in custody litigation. However, the Court did not indicate whether or not it considered that the child's welfare may be affected by moral implications of the mother's intended remarriage. Certainly, in any case where the parent having custody intends to remarry, the courts cannot ignore their duty to weigh these considerations against such advantages as may seem to accrue to a child from the proposed remarriage.

EMINENT DOMAIN — LIMITATIONS ON COMPENSATION FOR A PARTIAL TAKING.—The United States condemned 15.7 acres of appellants' 82 acre farm as part of the site for an air base. The District Court awarded damages for the taking and severance. Appellants sought additional compensation for the diminution in value of their remaining land caused by the particular use to which the land taken was put. The Court of Appeals *held* that there could be no additional recovery, since the land taken was only on the periphery of the air base and was put to no specific use.[1] *Boyd v. United States,* 222 F.2d 493 (8th Cir. 1955).

Eminent domain is the power of the sovereign to take private property for public use without the owner's consent.[2] An entire tract,[3]

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[37] Respondent-mother pointed out in her petition to the Court that her intended remarriage permitted her to resign her position (which she held to support herself and the children), thereby making it possible to devote all her time to the children. Transcript of Record, p. 22, Freed v. Freed, 309 N.Y. 668, 128 N.E.2d 319 (1955).

[38] 346 Ill. App. 436, 105 N.E.2d 117 (1952).

[1] For purposes of brevity the phrase "specific use" will be used in this article to denote the rule ". . . which limits recovery to the damages resulting from the construction and operation of such part of the public works as has been erected on the land taken from the particular owner." 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 56 (2d ed. 1953). See United States v. Grizzard, 219 U.S. 180 (1911).

[2] See 1 NICHOLS, EMINENT DOMAIN § 1.11 (3d ed. 1950).

[3] See Sharp v. United States, 191 U.S. 341 (1903); Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946); United States v. 25.936 Acres Of Land, 153 F.2d 277 (3d Cir. 1946).

or any part thereof,[4] may be taken by the exercise of this power. However, the fifth amendment of the Federal Constitution,[5] and the constitutions of forty-six states [6] require that compensation be made for the land taken. North Carolina and New Hampshire have imposed this requirement through their judicial opinions.[7] The purpose of compensation is complete indemnification,[8] *i.e.*, "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." [9] This concept precludes overpayment as well as underpayment.[10]

The amount of compensation for the land taken is measured by the market value,[11] which is the amount a willing buyer would pay a willing seller under normal market conditions.[12] However, in the absence of an existing contract to sell, what is fair market value is generally a "mere matter of opinion." [13] The problem of compensation or indemnification is further complicated by the fact that the public use to which land taken is put often causes the market value of the surrounding area to decline. This problem is not encountered where all or none of the complainant's land is taken. If all the owner's land is taken, he no longer has any interest to be damaged. Similarly, if none of the complainant's land is taken, indemnification is unnecessary since no recovery may be had for damage *resulting solely from the proximity of a public work*.[14] Serious difficulties are encountered, however, where only a part of the complainant's land is taken.[15] In

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[4] See Campbell v. United States, 266 U.S. 368 (1924); United States v. Grizzard, *supra* note 1; United States v. Waymire, 202 F.2d 550 (10th Cir. 1953).

[5] ". . . [N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[6] See 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 1 (2d ed. 1953).

[7] See Opinion Of The Justices, 66 N.H. 629, 33 Atl. 1076 (1891); Staton v. Norfolk & C.R.R., 111 N.C. 278, 16 S.E. 181 (1892).

[8] Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (dictum); see JAHR, EMINENT DOMAIN § 35 (1953).

[9] United States v. Miller, 317 U.S. 369, 373 (1943).

[10] *Id.* at 375; Bauman v. Ross, 167 U.S. 548, 574 (1897) (dictum).

[11] United States v. Miller, *supra* note 9 at 374 (dictum); Continental Land Co. v. United States, 88 F.2d 104, 110 (9th Cir.) (dictum), *cert. denied*, 302 U.S. 715 (1937); see 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 36 (2d ed. 1953).

[12] United States v. Miller, *supra* note 9 at 374 (dictum). Four factors are usually considered in ascertaining market value: Sales, Income, Cost and Use. See 4 NICHOLS, EMINENT DOMAIN § 12.1[5] (3d ed. 1951).

[13] Savings & Trust Co. v. Pennsylvania R.R., 229 Pa. 484, 78 Atl. 1039 (1911).

[14] See, *e.g.*, Hughes v. United States, 230 U.S. 24 (1913); Salliotte v. King Bridge Co., 122 Fed. 378 (6th Cir. 1903).

[15] There are three separate formulas for measuring just compensation in partial-taking cases: (1) damages to remainder included in value of parcel taken, (2) the value of the part taken added to the damage to the remainder, and (3) the difference between the market value before and after the taking. See 1 ORGEL, *op. cit. supra* note 11, §§ 48-51.

such cases compensation is awarded for the land taken, and severance damages are allowed for any depreciation of the remainder *caused by the separation of the part from the whole.*[16] Where part of one's land is taken but not put to a specific physical use, no additional compensation can be had for the damage caused by the proximity of the public work.[17] The theory behind this denial of recovery is that the condemnee has suffered no damage over and above that suffered by his neighbors whose land was not taken.[18] However, damages to the remainder *caused by the specific use to which the taken tract is put* are recoverable.[19]

In the leading case of *United States v. Grizzard,*[20] a public road provided the means of access to a farm. As a result of a dam being built by the Government, a part of the farm and a portion of the road were flooded, thereby rendering ingress and egress more difficult. Compensation was allowed for damage to the remainder caused by the denial of this easement of access. In *United States v. Chicago, B. & Q.R.R.,*[21] the Federal Government constructed a dam which caused water to rise upon a railroad embankment to within 3.45 feet of the tracks. In an action by the United States to condemn the land actually flooded, compensation was also awarded for damage to the tracks. In *West Virginia Pulp & Paper Co. v. United States,*[22] the Government condemned 44 acres of a 413-acre tract owned by the paper company. The land was to be used as a site for the storage of gasoline by the air force. The court awarded compensation for the depreciation of the remainder caused by the proposed use of the land. It was said that the company was to be put ". . . in as good position pecuniarily as it would have been in if its property had not been taken." [23] From these cases it can be seen that compensation will be awarded when the taken tract is used specifically to the detriment of the remainder.

In the instant case, the applicable rule, though just in most cases, was applied in a manner that led to an unjust result. The Court

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[16] United States v. Miller, 317 U.S. 369, 376 (1943) (dictum); United States v. Grizzard, 219 U.S. 180, 183 (1911) (dictum); Sharp v. United States, 191 U.S. 341, 351-52 (1903) (dictum); Bauman v. Ross, 167 U.S. 548, 574 (1897) (dictum); United States v. 11 Acres Of Land, 61 F. Supp. 373, 375 (E.D. N.Y. 1945) (dictum).

[17] See Boyd v. United States, 222 F.2d 493 (8th Cir. 1955); 4 NICHOLS, EMINENT DOMAIN § 14.21[1] (3d ed. 1951).

[18] Haggard v. Independent School Dist., 113 Iowa 86, 85 N.W. 777, 779 (1901) (dictum).

[19] United States v. Grizzard, *supra* note 16 at 183 (dictum); West Virginia Pulp & Paper Co. v. United States, 200 F.2d 100, 103 (4th Cir. 1952) (dictum); United States v. Crary, 2 F. Supp. 870, 873 (W.D. Va. 1932) (dictum); see Stephenson Brick Co. v. United States *ex rel.* TVA, 110 F.2d 360 (5th Cir. 1940).

[20] *Supra* note 16.

[21] 82 F.2d 131 (8th Cir. 1936).

[22] *Supra* note 19.

[23] 200 F.2d at 103.

based its denial of compensation on the fact that the taken parcel had ". . . no specifically demonstrative and directly effective utilization or function." [24] The Court reasoned that the depreciating injury to the remainder was, in a legal sense, only a consequence of the proximity of the air base generally, and not a result of the use to which the taken tract was put. Under the facts in the instant case, such a finding appears unrealistic. There is no doubt that land may be utilized without constructing or depositing something on its surface.[25] An air base could not well serve its purpose unless there were open lands surrounding it to permit planes to approach the runway proper and to provide a buffer zone for planes disabled on takeoff or landing. Viewed in this light, the land taken from the appellants was put to a "specific use."

The Court suggested that the complainants may have a future cause of action for damages resulting from the operation of the air base. Compensation for the present taking, however, is in no way affected by the existence of this possible future action; the action could be brought irrespective of whether there had been a prior taking.[26] In order completely to indemnify the appellants, they must be returned to the position they occupied before a portion of their property was condemned. That, it is submitted, cannot be done without compensating them for the damages sustained because of the use of the taken land as part of an air base.

EQUITY — CONSTRUCTION LOAN AGREEMENTS SPECIFICALLY ENFORCEABLE.—Plaintiff-borrower sued for specific performance of a construction loan agreement. The plaintiff failed to allege inadequacy of remedy at law. The Court, denying a motion to dismiss the complaint, *held* that construction loan agreements are specifically enforceable and are exceptions to the rule that equity will refuse to exercise jurisdiction to enforce loan contracts because of adequacy of remedy at law. *Southampton Wholesale Food Terminal, Inc. v. Providence Warehouse Co.*, 129 F. Supp. 663 (D. Mass. 1955).

Equity developed as an extraordinary medium for granting relief which was otherwise unavailable to aggrieved parties because of the rigid and formalistic character of actions at law.[1] Because of its

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[24] Boyd v. United States, 222 F.2d 493, 495 (8th Cir. 1955).

[25] See Cormack, *Legal Concepts In Cases Of Eminent Domain*, 41 YALE L.J. 221 (1931).

[26] See, *e.g.*, Causby v. United States, 109 Ct. Cl. 768, 75 F. Supp. 262 (1948).

[1] See CLARK, EQUITY § 5 (1954); RE, SELECTED ESSAYS ON EQUITY xi (1955).