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In view of the conflict that exists in this area of the law, legislative action seems desirable. Of the three parties involved, only the governmental body has power to discharge and appoint public officers and to control the election machinery. Therefore, it can be charged with the responsibility of preventing such disputes. The task of the legislators should be to impose this responsibility upon governmental bodies. This can be done by a statute which provides that (1) the de jure officer shall be allowed to recover his back salary from the governmental body in all cases of wrongful exclusion from office, except where he has barred his recovery by waiver or estoppel;[30] and (2) where the de facto officer has acted in bad faith, the de jure officer may elect whether to sue the de facto officer or the governmental body. As between the de jure officer and the governmental body, this rule is based upon sound legal principles, and is in accord with public policy because the governmental body will be encouraged to prevent such disputes through efficient handling of elections and appointments. As between the de jure officer and the de facto officer who acts in good faith and under color of title, this statute will finally abolish a harsh rule which the courts have felt compelled to apply.

J. T. TATE, JR.

CONDEMNATION: DAMAGES FOR IMPAIRMENT OF ACCESS TO LAND

There is a need for a definite statement of the law relating to the compensation of abutting owners of land on a free access highway when that highway is changed to one of limited access. The land owner's loss may arise from either a complete or a partial taking of land formerly abutting the highway. Moreover, the problem is not limited to the taking of actual land, but includes the complete or partial taking of the rights of direct access and the resulting diminution of property value.

This area of the law of condemnation[1] was reviewed in the recent case of *Arkansas State Highway Comm'n v. Bingham.*[2] The petitioners

[30]See note 8 supra for a discussion of what constitutes waiver or estoppel.

[1]"The law of condemnation is said to be grounded upon the realization that eminent domain is government interference with, and the taking by it under its authority, of private property for public use safeguarded by constitutional requirement of due process and just compensation." In re Cross-Bronx Expressway, 195 Misc. 842, 82 N.Y.S.2d 55, 65 (Sup. Ct. 1948).

[2]333 S.W.2d 728 (Ark. 1960).

were the lessees and lessor of land abutting a highway serving traffic between Benton and Little Rock, Arkansas. The leessees operated a prosperous filling station on the property from 1955 to 1958. In 1958 the State Highway Commission condemned land to provide access roads to proposed Interstate Route 30, designed to be a limited access road. The condemnation destroyed the petitioners' previous direct access, took the land up to the gas pumps and resulted in a more circuitous route to the new highway. The jury awarded the lessees $30,000 and the lessor $9,000 damages basing the verdicts on estimates of value of the property, investment loss, and diversion of traffic.[3] On appeal the Arkansas Supreme Court modified the verdicts to $8,800 and $6,150 respectively, these being the amounts suggested by the Commission's own witness.[4] The court recognized the majority American rule that the right of access is a compensable property right when taken by the state under the power of eminent domain,[5] but denied the compensation prayed for. In finding that the rights of access were not deprived the court reasoned that:(1) there was a taking of the direct access; (2) a new access road replaced the previously direct way to the highway; and (3) since there was still access (even though indirect) to the highway, a mere diversion was created and compensation on that ground was denied. The more basic reason for the court's conclusion was the public policy favoring the building of superhighways as shown by the following language of the court: "For us to hold that such loss by Leessee is compensable would amount to erecting an almost intolerable barrier in the way of further construction of super-highways."[6]

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[3]Id. at 734.

[4]In some jurisdictions when a verdict is thought to be excessive by the appellate court a remittitur is requested in which case the plaintiff may either refund the excess money within a specified time or the case will be remanded for a new trial. City of Sherman v. Gnadt, 337 S.W.2d 206, 215 (Tex. Civ. App. 1960). However, a general method of modifying a judgment which is based on improper evidence as to damages alone is for the appellate court to modify and then affirm. 3 Am. Jur. Appeal and Error § 1173 (1936).

[5]People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953); Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1953); State Roads Comm'n v. Franklin, 201 Md. 549, 95 A.2d 99 (1953); Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56 (1954). See generally, Annot., 43 A.L.R.2d 1072 (1955). Most states have constitutional provisions to compensate a land owner when either the state or one acting under authority of the state condemns land for public or private use. For a more comprehensive view of the basis for such compensation a compilation of state constitutions is found in McCormick, Damages § 132 n.1 (1935). North Carolina and New Hampshire have imposed this requirement through judicial opinion. 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). The Federal Constitution provides a similar protection. See U.S. Const. amend. V.

[6]333 S.W.2d at 734.

In advocating the opposite view the dissenting justice stated that there was a taking of the direct access and the resultant diversion was merely incidental to that taking. He further said that property rights such as rights of access should be protected irrespective of the financial burden to the state.[7]

The abbuting owner and the public share the same right to the general use of the highway. In addition to this general right to the use of the adjoining highway, the abutting owner has such exclusive rights to the use and enjoyment of his property as access, light, air and view.[8] When the state appropriates means of access from the abutting owner in the exercise of its power of *eminent domain,* a majority of courts hold that compensation is paid only when there is a taking of land in addition to a taking of the rights of access.[9] Compensation is due whether the right of access has been totally appropriated[10] or substantially impaired by the public taking.[11] Conversely, compensation for deprivation of access has been denied where there has been no taking of the abutter's land.[12] Therefore, the relocation of a highway,[13] which causes the traffic to be diverted from the old highway, and the construction of a median strip,[14] which prevents traffic from crossing the road at all places, are construed as true diversions of traffic or circuities of travel which are not compensable deprivations

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[7]Id. at 736.

[8]10 McQuillin, Municipal Corporations § 30.56 (3d ed. 1950). In this comment only the right of access that the abutter possesses is considered.

[9]State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945); State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955). Cf. McMinn v. Anderson, 189 Va. 289, 52 S.E.2d 67 (1949).

[10]Pike County v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957).

[11]State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Mississippi State Highway Comm'n v. Finch, 114 So. 2d 673 (Miss. 1959).

[12]Jahoda v. Florida Road Dep't, 106 So. 2d 870 (Dist. Ct. App. Fla. 1958); Brady v. Smith, 139 W. Va. 259, 79 S.E.2d 851 (1954) (by implication).

[13]Hempstead County v. Huddleston, 182 Ark. 276, 31 S.W.2d 300 (1930); Tuggle v. Tribble, 177 Ark. 296, 6 S.W.2d 312 (1928); Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569 (1894); State ex rel. Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955).

[14]City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187 (1938); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Hamilton v. Mississippi State Highway Comm'n, 220 Miss. 340, 70 So. 2d 856 (1954); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958); Brady v. Smith, 139 W. Va. 259, 79 S.E.2d 851 (1954).

of access. The direct right has not been interfered with or impaired.[15] Finally, compensation has been denied where a valid exercise of the *police power* regulated the rights of access.[16] The distinction between police power and the power of eminent domain is narrow. Police power is defined as the power *to regulate* people and property in order to prevent harm to the public.[17] On the other hand, eminent domain is the power to return land to the state in order to benefit the public.[18]

There is a difference of opinion among other courts that have faced the same problems presented in the principal case. The different views are illustrated by the three cases of *State ex rel. Morrison v. Thelberg*,[19] *Jahoda v. Florida State Road Dep't*,[20] and *Carazalla v. State*.[21]

In *Thelberg* the abutter suffered a partial taking of his land for a limited access highway. The old access was destroyed and replaced with a more circuitous route by means of an access ramp.[22] Upon finding that the value of the remaining property was greatly reduced, the Supreme Court of Arizona affirmed a $10,750 verdict as compensation for the impairment of access, stating:

> "When the controlled-access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or *substantially impaired,* he may recover damages therefor .... Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount

[15]This line of reasoning has generally been held to include situations where land has been taken, but the direct access has not been changed as a result of the taking, such as in the principal case. The famous case of Jones Beach Blvd. Estate v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935), presented the situation wherein the abutter was forced to go five miles out of his way to turn back to the side of the highway on which he lived, because of being deprived of a left turn to his property. The court held that the inconvenience was not compensable since the direct access to one side of the road (the owner's) had not been interfered with. As to one-way streets, see Chissell v. City of Baltimore, 193 Md. 535, 69 A.2d 53 (1949); Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51 (1926).

[16]Mulger v. Kansas, 123 U.S. 623 (1887); State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

[17]Black, Law Dictionary (4th ed. 1951). The area in which the police power may be exercised is unclear. See Pennsylvania Coal Co .v. Mahon, 260 U.S. 393 (1922). But see Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1918).

[18]MacVeigh v. Multnomah County, 126 Ore. 417, 270 Pac. 502 (1928)).

[19]87 Ariz. 318, 350 P.2d 988 (1960).

[20]106 So. 2d 870 (Dist. Ct. App. Fla. 1958).

[21]269 Wis. 593, 70 N.W.2d 208, rev'd on rehearing, 269 Wis. 593, 71 N.W.2d 276 (1955).

[22]An access ramp is a service road which provides safer means of access to a limited access highway. It is generally more circuitous than that possessed before the closing of direct access. The terms service road and access road are synonymous.

which would be just under the circumstances.... Other means of access may mitigate damages... but does not constitute a defense to the action...."[23]

Although a taking of land generally warrants compensation for a concurrent deprivation of access,[24] one court has specifically rejected this view. In *Jahoda v. Florida State Road Dep't* the court denied compensation to an abutting owner who had suffered a partial taking of land *and* a deprivation of access on the ground that one who loses both land *and* access loses no more because of the loss of access than does one who is only deprived of access.[25] Since no compensation is allowed in the latter situation, none should be allowed in the former. The reasoning is as follows: if A and B are owners of adjacent filling stations and a condemnation takes land from A but not from B, while both are deprived of direct access, under the *Thelberg* doctrine A would recover and B would not. Because this result is inequitable, compensation will be denied to both under the *Jahoda* theory.[26]

Carazalla v. State[27] represents the third approach to the problem. In that case the state had condemned a portion of the abutter's land for the relocation of a highway which divided the plaintiff's land. The relocated highway was to be of a limited access type and no access points were provided where the highway was to cross the abutter's land. Therefore a more circuitous route via the old highway had to be followed to reach the largest part of the land. The Wisconsin court granted compensation to the plantiff on the ground that the taking of the land for the new highway had caused a reduction in

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[23]State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 992 (1960) (Emphasis added.) The rule laid down in the Thelberg case has been previously announced in somewhat different form in two other jurisdictions. Thus, state appropriation of an abutter's land which resulted in a substantial impairment of access was held compensable in Iowa State Highway Comm'n v. Smith. 248 Iowa 869, 82 N.W.2d 755 (1957), wherein access to the abutter's land could only be gained by traveling across the lot of his adjoining filling station. The court felt that unless a better means of access was provided, the state would be obliged to pay just compensation for taking the right of access to the residence. A similar view was expressed in Pike County v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955), which held that the issue of damages resulting from the diversion of traffic was a proper question for the jury. In California there is doubt as to the actual status of the question. Compare People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943), with People v. Ayon, 5 Cal. R. 151, 352 P.2d 519 (1960). See generally, Annot., 73 A.L.R.2d 689 (1960); Annot., 43 A.L.R.2d 1072 (1955).

[24]See note 9 supra.

[25]See note 20 supra.

[26]In the Jahoda case the Florida court adopted the dissenting opinion of Pike County v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955).

[27]See note 21 supra.

value to the remainder of the property.[28] However, on rehearing, the supreme court reversed itself by stating that no compensation would be allowed where a diminution in property value was caused by the exercise of *police power*. The plaintiff contended that the loss was occasioned by the taking of land which deprived him of direct access to the separate portion of his land. The court rejected this contention by stating that the land appropriated for the relocated highway was taken under *eminent domain* and was paid for by the state, but the right of access was obtained by use of the *police power* for the general welfare.[29] Since a loss of access due to the exercise of police power is not compensable, the plaintiff was precluded from recovery for this element of his alleged damage.[30] The real impact of the statement referring to use of the police power is that it may by implication refer to *all* takings in this type of case. If this reasoning were followed, the public right would be the dominant force over the private right of the abutter, and compensation for deprivation of access as to limited access roads could be denied. This theory has been suggested by one writer[31] as a method of curtailing superhighway construction cost. It would eliminate the expense of compensating the abutter for his loss of access rights by simply not recognizing those rights. However, there is no direct authority to substantiate this line of reasoning.

Thus the decisions vary greatly on the subject of the direct access rights of the abutter. They range from a liberal protection to a strict curtailment of abutter's rights. The *Bingham* case appears to recognize access rights to a limited degree and illustrates the difficulty the courts face in deciding questions in this area.

This whole problem must be analyzed in the light of the times in which it arises. Today a tremendous burden has been placed on the state and federal governments to meet the demands of increased traffic. The protection of the fundamental property right involved is thought prohibitive by some and necessary by others. Whichever line of reasoning is followed will result in inequities, but the issue remains—does the state owe to its citizens the right to make a living within its territorial sovereignty? If this question is answered in the affirmative, it may be argued that the state will be subsidizing a single

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[28]Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208, 211 (1955).

[29]Carazalla v. State, 269 Wis. 593, 71 N.W.2d 276, 278 (1955).

[30]Id. at 278.

[31]Moody, Condemnation of Land for Expressway or Highway, 33 Texas L. Rev. 357 (1955). Moody suggests that the rights of access may not be recognized in condemnation suits for expressways unless the condemnor (state) is willing to recognize that right at the time of the taking. Id. at 368.