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THE RIGHT OF ACCESS TO NAVIGABLE WATERS— COMPENSABILITY UNDER EMINENT DOMAIN

Whether a state must grant compensation when it damages or takes a riparian landowner's right to access to navigable waters when condemning property for public use is a question which has been answered differently in the several states.[1]

The state of California has a provision similar to the fifth amendment to the Constitution of the United States which prohibits the taking or damaging of private property without just compensation.[2] In *Colberg, Incorporated v. State*,[3] the Supreme Court of California was recently called upon to determine the right of an individual to compensation for damages done to his right of access by an act of the state. The case was an action for declaratory judgment sought by two plaintiff shipyard owners to determine whether they had any cause of action based on eminent domain against the state for impairment of their right of access to a deep water channel. The two shipyards were located on a cul-de-sac 5,000 feet up the channel from a turn basin which gave them their only access to the navigable waters of the world. At a point between the turning basin and the plaintiffs' shipyards the state proposed to construct two low-level parallel bridges. The bridges were to be erected 45 feet above the mean high water mark. The plaintiffs alleged that 81% and 35% of their respective established business was with ships in excess of 45 feet in height. Both plaintiffs alleged damage and loss as a result of this impairment and alleged a right to compensation. The supreme court, in affirming the trial court judgment on the pleadings, held that although there may be a private right as against another private person, such right is burdened not only with a navigational servitude, but also with a servitude as extensive as the state's power to control its navigable waters and is therefore not compensable when the act is done by the state.[4] In so holding the court said:

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[1]*E.g.*, Richards v. New York, N.H. & H. R.R., 77 Conn. 501, 60 A. 295 (1905); Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Ct. App. 1959); Tomlin v. Dubuque, B. & M. R.R., 32 Iowa 106 (1871); Stevens v. Paterson & N. R.R., 34 N.J.L. 532 (Ct. Err. & App. 1870); Clark v. Peckham, 10 R.I. 35 (1871); See 2 NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963).

[2]CAL. CONST. art. 1, § 14.

[3]432 P.2d 3, 62 Cal. Rptr. 401 (1967).

[4]"[W]e hold that such right is burdened with a servitude in favor of the state which comes into operation when the state properly exercises its power to control, regulate, and utilize such waters." *Id.* at 410-11.

> We deem is [sic] unnecessary to decide this question [of private versus private right], for we have determined that, whatever the scope of plaintiff's right of riparian access *as against other private persons,* that right must yield without compensation to a proper exercise of the power *of the state* over its navigable waters.[5]

While the states are divided on the rule of right to compensation for loss of access to navigable waters, the federal rule is well established. As first promulgated by the Supreme Court, the federal rule is that no compensation need be given if there is no physical encroachment upon or taking of land and if the governmental act is to improve navigation.[6] The federal immunity is based on the navigational servitude of any right of access to navigable waters[7] and has been held not to violate the fifth amendment to the Constitution which provides that private property may not be taken or damaged by the government without just compensation.[8] This navigational servitude was first construed strictly but has been increasingly expanded by the federal courts. As early as 1945 the Supreme Court in *United States v. Commodore Park, Incorporated*[9] held that depositing of sand and silt in a stream which completely blocked a navigable waterway was an act in aid of navigation. There the government, in the process of expanding a naval land base in Virginia, dredged a bay to accomodate sea planes and deposited the silt in a nearby navigable stream to provide room for land expansion. The district court held that the act of dredging was to improve navigation but that the act of depositing silt across a navigable stream was not to aid navigation and was thus compensable. The Supreme Court reversed, holding that the entire project was within the federal government's power over navigable waters. In 1960 the Supreme Court held that the construction of a hydroelectric dam which completely blocked a navigable stream was an act within the navigational servitude.[10] The rule has been so expanded that federal immunity from making compensation extends to nearly any act so long as there is no physical encroachment upon the land.

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[5]*Id.* at 406.

[6]United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, *per curiam,* 313 U.S. 543 (1941); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897); *cf.* United States v. Twin City Power Co., 350 U.S. 222 (1956).

[7]Cases cited note 6 *supra.*

[8]U.S. CONST. amend. V.

[9]324 U.S. 386 (1945).

[10]United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); *see* 29 A C.J.S. *Eminent Domain* § 115 (1965).

Nearly all states have provisions similar to the fifth amendment in their constitutions,[11] but all do not follow the federal rule. While all states agree that they need not make compensation if the purpose is to improve navigation, jurisdictions disagree as to whether a private right of access is superior to a state's right to use waters in behalf of the public for any other purpose for which it could lawfully devote any other portion of the public domain.

A majority of states follows the rule that if the work is not to aid navigation, the riparian landowner may recover for any right lost or damaged.[12] While the states have not adopted the expansive interpretations developed in the federal courts, there have been liberal constructions adopted in two of the majority jurisdictions which limit the private right and operate in favor of the state. New York and Massachusetts have held that there is a right of access only to water adjoining the riparian owner's property.[13] Consequently no compensation is required if the obstruction which limits access to water is not directly appurtenant to the riparian landowner's property since no private right has been taken or abridged. Both the New York and the Massachusetts decisions involved the construction of bridges with facts nearly identical to those in *Colberg*. It can be seen then that the majority rule can be extended to the point of no compensation as is the case with the federal rule. However, instead of expanding the navigational servitude immunity, these state courts have constricted the private right and held that the right of access to the entire stream is a general right held by the public which can be taken for the good of the public in general.

A minority of states, on the other hand, follows the rule that there can be no private rights in the public domain and, therefore, that no compensation is necessary.[14] These courts hold that the right of

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[11]*See, e.g.*, ALA. CONST. art. 12, § 235; ARIZ. CONST. art. 2 § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. 1, § 14; COLO. CONST. art. II, 15; GA. CONST. art. I, § 3; ILL. CONST. art. 2, § 13; KY. CONST. § 13; MINN. CONST. art. 1, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; UTAH CONST. art. I, § 22; VA. CONST. art. IV, § 58.

[12]*E.g.*, Beidler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904); Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), *aff'd per curiam*, 280 App. Div. 1021, 116 N.Y.S.2d 778 (Sup. Ct. 1952); State *ex rel.* Anderson v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964); Clark v. Peckham, 10 R.I. 35 (1871); *see* 2 NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963).

[13]United States Gypsum Co. v. Mystic River Bridge Authority, 329 Mass. 130, 106 N.E.2d 677 (1952); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), *aff'd per curiam*, 280 App. Div. 1021, 116 N.Y.S.2d 778 (Sup. Ct. 1952).

[14]*E.g.*, Lovejoy v. City of Norwalk, 112 Conn. 199, 152 A. 210 (1930); Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Ct. App. 1959); Tomlin v.

access to navigable waters is a public right which is held in trust by the state and which is contingent upon the state's allowing it to continue. This is very similar to the liberal construction given to the majority rule, but a distinction can be made. The minority rule is saying that, as a matter of law there can never be any private right of access to public owned navigable waters, while the liberal construction of the majority rule is that on the facts of a particular case there is no private right which is superior to the state's power to control or regulate its navigable waters.

In *Colberg* the Supreme Court of California went against the great weight of current authority and aligned itself with the minority jurisdictions. After stating that any private right must yield to a proper exercise of the state's power over its navigable waters,[15] the court then examined the extent of the state's power over such waters. The opinion points out that the federal power over state navigable waters is limited to navigation and that, therefore, federal immunity from liability for compensation is limited to acts within that power, *i.e.* improvements of navigation. State power, however, is not so limited. Since the waters and beds of the streams are held in trust by the state for public use, state power is broader and therefore its immunity greater. The state has the responsibility not only of improving navigation but also of protecting commerce and fishing. The court conceded that federal power is paramount but concluded that state power is more pervasive. If the federal government has not acted to preempt, state power is plenary. The court also pointed out that there was federal endorsement of the state action because the Secretary of the Army and the Chief of Engineers had issued a permit to build these bridges.[16]

The court rejected the plaintiff's comparison with the right of access to public highways.[17] Under California law a plaintiff would be entitled to compensation for damage to that right.[18] The court relied on a comparison with an earlier California case in which a plaintiff was denied compensation for loss of access over tidelands

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Dubuque, B. & M. R.R., 32 Iowa 106 (1871); Frost v. Washington County R.R., 96 Me. 76, 51 A. 806 (1901); Stevens v. Paterson & N. R.R., 34 N.J.L. 532 (Ct. Err. & App. 1870); Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539 (1891); Milwaukee Western Fuel Co. v. City of Milwaukee, 152 Wis. 247, 139 N.W. 540 (1913); *see* 2 NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963).

[15]432 P.2d 3, 62 Cal. Rptr. 401, 406 (1967).

[16]*Id.* at 404 (but see dissenting opinion at 416-17).

[17]*Id.* at 411. For full discussion of compensation for loss of right of access to land cases in California see Note, 38 S. Cal. L. Rev. 689 (1965).

[18]Bredert v. Southern Pac. Co., 61 Cal. 2d 569, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

which, to improve navigation, were filled in by the city of Newport Beach, a political sub-division of the state. That case held that "no such right exists in favor of such littoral owner as against the state or its grantee in the exercise of a lawful use or purpose."[19] The lawful use to which that court alluded, however, *was to improve navigation.* A second case[20] relied on by the court may also be distinguished in the same manner. The only other case[21] cited by the court involved a question of assessing damages when compensation is being given for the condemnation of all the owner's littoral land. There the question involved the measure of damages, not whether compensation would be paid.

Colberg seems significant in that California, in denying compensation, has gone against the greater weight of authority and aligned itself with a minority of jurisdictions. However, it is suggested that whatever distinction there once was between the federal, majority and minority rules, they now appear to be nearly one rule. As noted earlier, the federal rule has been so liberally construed that nearly any act involving navigable waters can be contrued as an improvement of navigation. The majority jurisdictions also seem to be moving toward a liberal construction in favor of the state by limiting a private right of access to only the water adjoining a riparian owner's property.

It is interesting to note that the Supreme Court of California could have reached the same conclusion by use of the federal, majority or minority rule. The court could have followed the federal rule by considering the promotion of commerce in a shipping area by the construction of the bridges as an aid to navigation, since more freight would move on the waterway. The court could have adopted the liberal construction employed by New York, a majority rule jurisdiction, in *Marine Air Ways, Incorporated v. State*[22] which involved very similar facts. There the New York court held that a plaintiff who was partially cut off from a deep channel by a bridge built some distance from his property had a right of access only to the waters in front of his property. The California court, instead, followed the minority rule in finding that, as a matter of law, there is no right in the public domain and consequently no need for compensation. The

[19]City of Newport Beach v. Fager, 39 Cal. App. 2d 23, 102 P.2d 438, 441 (1940).

[20]Henry Dalton & Sons v. City of Oakland, 168 Cal. 463, 143 P. 721 (1914).

[21]People v. Hecker, 179 Cal. App. 2d 823, 4 Cal. Rptr. 334 (1960).

[22]201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), *aff'd per curiam,* 280 App. Div. 1021, 116 N.Y.S.2d 778 (Sup. Ct. 1952).