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Damages and the Eminent Domain Statute

F. Burdett

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exercises great foresight and conducts himself with great caution.¹³ When an accident is the result of a miscalculation of a voluntary act it may be termed accidental.¹⁴ These rules have been applied by numerous courts in allowing recovery for voluntary acts which result in injuries.¹⁵ However there are also many courts which restrict recovery and hold that something unexpected or unforeseen must occur in the act which precedes and causes the injury.¹⁶ Most courts are in accord that if the injury or death is the natural result of the insured's voluntary act and the only thing unforeseen is the death or injury it does not occur by accidental means.¹⁷ One court has said it makes no difference if the insured did voluntarily set in motion the first of a series of actions which resulted in the injury or death, he can still recover.¹⁸

The tendency to construe an insurance policy against the insurer and to allow recovery when the accident is of such a nature that the layman would consider it an accident is apparently justified on the basis of public policy. For it would seem inequitable to allow an insurance company to escape liability by the use of a technical phrase the meaning of which has not even been determined with any degree of unanimity by the courts.

ROBERT M. LITTLE

DAMAGES AND THE EMINENT DOMAIN STATUTE

In 1934, plaintiff acquired certain property adjoining defendant railroad's switch-yard which has been in use and operation since prior to 1926. The yard comprised two main line tracks, running north and south, and a series of ten tracks adjacent to and west of the main line used as switch tracks. The westernmost of this system of tracks, called a scale track, was within 100 ft. of plaintiff's house. Plaintiff contends that defendant spotted its engine upon the scale track nearer his house than was necessary, and that as a result, quantities of smoke, soot and cinders and noxious vapors were cast upon his property causing him special damage. *Held*, that, a railroad company is not liable to an abutting landowner, under the eminent domain statute, for damages to the property after claims for the original location and construction have been settled or barred by the statute of limitations; and further, the court below erred in holding that the defendant had created an "unnecessary nuisance" or private nuisance rather than a public nuisance. *Thompson v. Kimball*, 165 F. (2d) 677, (C. C. A. 8th 1948).

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13. *Rustin v. Standard Life and Accident Insurance Co.*, 58 Neb. 792, 79 N. W. 712 (1899).
 14. *Joseph A. Coy Co., Inc. v. Younger*, 192 Okla. 348, 136 P. (2d) 890 (1943).
 15. *Murphy v. Travelers Ins. Co.*, 141 Neb. 41, 2 N. W. (2d) 576 (1942); *Griswold v. Metropolitan Life Ins. Co.*, 107 Vt. 367, 180 Atl. 649 (1935); *Whatcott v. Continental Casualty Co.*, 85 Utah 406, 39 P. (2d) 733 (1935).
 16. *Donohue v. Washington Nat. Ins. Co.*, 259 Ky. 611, 82 S. W. (2d) 780 (1935); *Parker v. Provident Life and Accident Insurance Co.*, 178 La. 977, 152 So. 583 (1933); *Losleben v. California State Life Insurance Co.*, 133 Cal. App. 550, 24 P. (2d) 825 (1933).
 17. *Evans v. Metropolitan Life Insurance Co.*, 26 Wash. (2d) 594, 174 P. (2d) 961, (1946).
 18. *Lickleider v. Iowa State Traveling Men's Ass'n.*, 184 Iowa 423, 166 N. W. 363, 3 A. L. R. 1295 (1918), modified, 168 N. W. 884.

The Constitution of the State of Nebraska provides that "The property of no person shall be taken or damaged for public use without just compensation."¹ At the present time, some 24 other states² have similar provisions in their constitutions. Until 1870,³ the state constitutions provided compensation only in the instance of property taken, and in the event lands adjacent to the public work were damaged, the property owner was left without remedy,⁴ unless the injury was actionable as a public nuisance.

The inclusion of the words "or damaged" in the eminent domain provisions has led to a divergence of opinion as to the extent of enlargement of the owners rights. The disagreement is due principally to the interpretation of the word "property". Hohfeld comments, "Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—and with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object."⁵ The importance of the distinction in concepts is reflected when it is considered that under the former there must be an interference with the possession of the object, while in the latter it is sufficient if there is an interference with the owner's legal relations which "constitute his property."⁶

It is the admitted purpose of eminent domain proceedings "to distribute throughout the community the loss inflicted upon the individual by the making of public improvements," in order to "put the injured party in as good condition as he would have been in if the condemnation proceeding had not occurred."⁷ None-

1. Neb. Const., Art I, sec. 21; Wyoming's comparable provision, Wyo. Const., Art. I, sec. 33.
2. Nichols, *Eminent Domain*, sec. 311, (2d. ed., 1917) for a list of the states whose constitutions contain the words "or damaged," or their equivalent; and 10 R. C. L. sec. 145, p. 165.
3. In 1870, the Illinois Constitutional article was framed, the first of its kind including the words, "or damaged;" the purpose of the passage of the article was expressed by W. H. Underwood in recognition of the fact that there existed no remedy against a public corporation in performance of its duties when there was no taking of property, "As I understand this article, it will require compensation to be made for those damages which necessarily and naturally rise to a party in consequence of these public improvements." 2 Debates of the Constitutional Convention of the State of Illinois 1577, (1870), art. 2, sec. 13.
4. *Chicago, B. & Q. R. R. v. Illinois, ex rel Grimwood*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596 (1906); *Bedford v. United States*, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414 (1904); *Slatten v. Des Moines Valley R. R.*, 29 Iowa 148, 4 Am. Rep. 205 (1870).
5. Hohfeld, *Fundamental Legal Concepts*, 23 Yale L. J. 16, 28 (1913).
6. *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 Yale L. J. 221, 223 (1931). The conflict has centered in some courts around the principle: that the clause provides a recovery only where one existed at common law in absence of the statute authorizing the public work. *Austin v. Augusta Terminal Ry.*, 108 Ga. 671, 34 S. E. 853 (1899); *Pennsylvania R. R. v. Marchant*, 119 Pa. 541, 13 Atl. 690 (1888); *Twentieth Century Corporation v. Oregon Short Line R. R.*, 36 Utah 283, 103 Pac. 243 (1909); as compared to those which contend: that a new right has been created where none before existed. *Rigney v. City of Chicago*, 102 Ill. 64 (1882); *Gottschalk v. Chicago, B. & Q. R. R.*, 14 Neb. 550, 16 N. W. 475 (1883); *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295 (1889); *Mason City and Ft. Dodge R. R. v. Wolf*, 148 Fed. 961 (C. C. A. 8th 1906).
7. *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 Yale L. J. 221, 224 (1931).

the-less, some courts will make recovery under the eminent domain provision contingent upon a showing of a direct physical injury to the corpus.⁸ The majority view is expressed in the leading case, *Rigney v. City of Chicago*, indicating that there must be "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value; and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."⁹ While it may appear that the majority view adopted the Hohfeld concept by the use of the words "disturbance of a right," employment of the words "direct," and "physical," effect a conclusion quite opposed to it.¹⁰ This has led courts to the conclusion that the injury must be to the corpus.¹¹

The Nebraska rule¹² further qualifies the majority and moves toward the Hohfeld principle by stating that there need be no "direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate,"¹³ although the Nebraska rule conforms with the majority view in requiring that the owner must sustain a special injury in respect to such property in excess of that sustained by the public at large.¹⁴

Significant for the purpose of this paper, however, are the Nebraska decisions in eminent domain cases, allowing plaintiff to recover after suffering damages caused by smoke, soot, cinders, steam and noxious vapors cast upon his abutting property by a railroad. "The plaintiff has sustained special damages by the construction and operation of the railroad near his premises in excess of that sustained

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8. *Smith v. St. Paul, M. and M. R. R.*, 39 Wash. 355, 81 Pac. 840, 842 (1905); *Farnandis v. Great Northern Ry.*, 41 Wash. 486, 84 Pac. 18 (1906); *Pause v. City of Atlanta*, 98 Ga. 92, 26 S. E. 489, 491 (1896); *Tidewater Ry. v. Shartzer*, 107 Va. 562, 59 S. E. 407 (1907).
 9. 102 Ill. 64, 80 (1882).
 10. In commenting on the *Rigney* case, "It seems unfortunate that the court should retain a physical requirement in the test for an obstruction or injury to what it so carefully points out are intangibles." . . . such a test "indicates the difficulty in abandoning physical concepts in habits of thought." *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 Yale L. J. 221, 245 (1931).
 11. *Pennsylvania R. R. v. Marchant*, 119 Pa. 541, 13 Atl. 690 (1888); *Carroll v. Wisconsin Central R. R.*, 40 Minn. 168, 41 N. W. 661 (1899); *Rigney v. City of Chicago*, 102 Ill. 64 (1882).
 12. It is conceded that the Nebraska decisions are liberal in allowing recovery to abutting landowners for damage from smoke, soot, cinders, and noxious vapors even when the facility is carrying out acts of a public nature. See *Matthias v. Minneapolis, St. Paul and S. S. M. Ry.*, 125 Minn. 224, 146 N. W. 353, 354 (1914); *Austin v. Augusta Terminal Ry.*, 108 Ga. 671, 34 S. E. 852, 854 (1899).
 13. The leading Nebraska case, *Gottschalk v. Chicago, B. & Q. R. R.*, 14 Neb. 550, 16 N. W. 475, 479 (1883).
 14. This requirement exists, say the courts, for many reasons: (1) That the law does not concern itself with trifles, see *Bell v. Ohio and Pa. R. R.*, 25 Pa. 161, 175, 176 (1855). (2) That to allow recovery would cast too great a burden on the public work, see *Carroll v. Wisconsin Central R. R.*, 40 Minn. 168, 41 N. W. 661, 662 (1889). (3) That the land owner must be held to have anticipated the loss, see *Louisville and Nashville Terminal Co. v. Lellyett*, 114 Tenn. 368, 85 S. W. 881, 889 (1905). (4) That to allow recovery would flood the courts with litigation, see *St. Louis, S. F. and T. Ry. v. Shaw*, 99 Tex. 559, 92 S. W. 30, 31 (1906). (5) That such inconvenience must be endured for the public good, see *Pennsylvania R. R. v. Marchant*, 119 Pa. 541, 13 Atl. 690, 698 (1888).

by the community at large. Smoke, soot, and cinders are not thrown upon property situated a few blocks from the road. . . . The fact that the property of a dozen or more owners in the town is materially injured by the location of the defendant's road does not affect the plaintiff's right to compensation for the depreciation in value of his property."¹⁵

An abundance of authority supports the view that a railroad company is not liable to a landowner after damages for the original location and construction of the railway have been settled or barred by the statute of limitations, and from this rule it follows that a grantee of the original owner is likewise barred.¹⁶ Similarly, one whose property is damaged but not taken could stand in no better position.¹⁷

The above rules would preclude plaintiff in the subject case from recovery under the Eminent Domain statutes, but the true conflict arises when plaintiff asserts his cause upon a nuisance theory contending that the structure itself produced no actual damage, but rather, the use and operation thereof is the sole cause, and that since the use is the gist of the action, a cause of action arises when the damage accrues.¹⁸ A majority of courts, however, would find no difficulty in resolving this problem through a "notion" called permanent nuisance which first appeared in *Troy v. Cheshire Railroad Company*,¹⁹ which permitted the plaintiff to recover prospective damages for injury even though the damage had not yet occurred, announcing that, "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated . . ." ²⁰ This theory was at first confined to cases looking to the permanence of the structure,²¹ but it was not long before the application was extended to instances where the nuisance

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15. *Omaha and North Platte R. R. v. Janecek*, 30 Neb. 276, 46 N. W. 478 (1890); *Chicago, K. and N. Ry. v. Hazels*, 26 Neb. 364, 42 N. W. 93, 97 (1889); *Stehr v. Mason City and Fort Dodge Ry.*, 77 Neb. 641, 110 N. W. 701, 702 (1906).
 16. ". . . where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes . . . a subsequent vendee of the (owner) takes the land subject to the burden of the railroad; and the right . . . to damages . . . belongs to the owner at the time the railroad company took possession." *Roberts v. Northern Pacific R. R.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873 (1895); See *Chicago, B. & Q. R. R. v. Englehart*, 57 Neb. 444, 77 N. W. 1092 (1899); for the rule that although the grantor may assign the cause of action to his grantee, action must be brought within the statutory period, see *Peden v. Chicago, R. I. & P. Ry.*, 73 Iowa 328, 35 N. W. 424 (1887).
 17. *Chicago & E. I. Ry. v. Loeb*, 118 Ill. 203, 8 N. E. 460 (1884); *Milwaukee N. R. R. v. Strange*, 63 Wis. 178, 23 N. W. 432 (1885); *Peden v. Chicago, R. I. & P. Ry.*, 73 Iowa 328, 35 N. W. 424 (1887).
 18. *Battishill v. Reed*, 18 C. B. 696, 139 Eng. Rep. 1544 (C. P. 1856); *Bonomi v. Backhouse*, El. Bl. & El. 638, 120 Eng. Rep. 643 (K. B. 1858); for a review of cases, see *Uline v. N. Y. C. & H. R. R.*, 101 N. Y. 98, 4 N. E. 536 (1886), where the court allowed recovery in successive actions because of the wrongful entry, but states a contrary doctrine where the entry is rightful.
 19. 23 N. H. 83, 55 Am. Dec. 177 (1851).
 20. *Id.* at 102, 55 Am. Dec. at 187.
 21. *Peden v. Chicago, R. I. & P. Ry.*, 73 Iowa 328, 35 N. W. 424 (1887); *Gartner v. Chicago, R. I. & P. Ry.*, 71 Neb. 444, 98 N. W. 1053 (1904), a flooding case; *Beronio v. Southern Pac. R. R.*, 86 Cal. 415, 24 Pac. 1093 (1890), construction of a switch line.

resulted from operation of the utility²² and thus effecting the result that the theory not only applied to "mere passive structures," but also to damages resulting from the operation of "factory, plant, railroad, or establishment."

The use of the concept has been twofold: In states where there is no constitutional provision in the eminent domain statutes such as avails in Nebraska, or prior to their enactment, or even supposing that they are not under public charter, it is used as a measure of damages, that is, a device used to obtain damages for injuries not yet accrued.²³

Its second use is to determine when the statute of limitations starts to run, which may make it incumbent upon the landowner to assert his remedy in the form of permanent nuisance, allowing but one recovery, and if he waits until his property is in fact damaged, or if he attempts to recover in successive suits as the damage accrues, he faces the prospect of being barred by the statute of limitations.²⁴ This construction, the courts indicate, is adopted because the original cause of action anticipates that the damages sued for stem from a depreciation in the value of the land caused by the construction and operation of the nuisance.²⁵

Though the instant case does not expressly nor impliedly admit adoption of the permanent nuisance theory, this seemingly harsh decision may be amply justified by its application. And, while there is substantial authority to support the theory, it has been suggested that plaintiff should be permitted to elect to consider the damage as permanent, or to allow him to bring successive actions, thus relieving the heavy demand upon him to foresee the extent of injury to his property prior to its occurrence.²⁶

The court in the subject case indicates by its holding that by a showing of special damages, an action of private nuisance might have been properly maintained. It is anomalous that in actions under the Eminent Domain statute smoke, soot, cinders and noxious vapors are special damages,²⁷ but under the nuisance theory they are not a sufficient showing to sustain the action. It is submitted that the court might have clarified Nebraska law and dispelled doubt as to the possi-

22. *Chicago & E. I. R. R. v. Loeb*, 118 Ill. 203, 8 N. E. 460 (1884); "The injury in this case," says the court in *Elisabethtown L. B. S. R. Co., v. Combs*, 10 Bush 383, 393, 73 Kent. 383, 343 (1874), "if any is permanent and enduring and there is no reason why a single recovery may not be had for the whole injury." See *Ill. Central R. R. v. Grabill*, 50 Ill. 241 (1869) for a similar statement; *Jeffersonville M. & I. R. R. v. Esterle*, 13 Bush 669, 76 Kent. 669 (1878).

23. *Troy v. Cheshire R. R.*, *supra*, note 19, see *Henry v. Ohio R. R.*, 40 W. Va. 234, 21 S. E. 863 (1895), where court distinguishes those nuisances called permanent, and those where successive actions will lie.

24. Though it should be pointed out that a small minority of courts will allow successive suits, *Drake v. C. R. I. & P. R. R.*, 63 Iowa 302, 19 N. W. 215 (1884), an embankment case; *Kafka v. Bozio*, 191 Cal. 746, 218 Pac. 753 (1923), an encroachment case. See *Henry v. Ohio R. R.*, 40 W. Va. 234, 21 S. E. 863 (1895), as to when injury is permanent and when successive suits may be allowed.

25. *McCormick, Damages for Anticipated Injury to Land*, 37 Harv. L. Rev. 574 (1924).

26. *Stehr v. Mason City and Fort Dodge Ry.*, 77 Neb. 641, 110 N. W. 701, 702 (1906).

27. *Omaha and N. P. R. R. v. Janecek*, 30 Neb. 276, 46 N. W. 478 (1890).

bility of recovery by subsequent litigants by adoption of the permanent nuisance theory and thereby obviated a necessity for a distinction between public and private nuisance.

F. BURDETT.

WYOMING STATE BAR SECTION

MINUTES OF THE LEGISLATIVE MEETING OF THE WYOMING STATE BAR

Cheyenne, Wyoming
January 22, 1949

The Legislative Meeting of the Wyoming State Bar was held at the Supreme Court Room in the Supreme Court Building, Cheyenne, Wyoming, on January 22, 1949, pursuant to the call of the President and due notice of the time and place of the meeting having been sent to all members. The meeting was called to order at 9:30 A. M. by President R. G. Diefenderfer who announced that the meeting had been called to consider legislation.

The President then called upon Mr. Erle H. Reid, Chairman of the Legislative Committee. Various members of the Legislative Committee presented the bills considered by the Committee with the recommendations thereon. The bills presented, the recommendations of the Committee, and the action taken by the meeting upon motion, made, seconded and carried in each case, are indicated below.

1. Bill relating to minors committed to State Institutions. Committee recommendation: Approval. Action: approved and recommended to Legislature for passage.

2. Bill relating to causes of action that survive. Committee recommendation: approval. Action: approved and recommended to Legislature for passage.

3. Bill relating to clauses in insurance policies as to insolvent assureds. Committee recommendation: approval. Action: approved and recommended to Legislature for passage.

4. Bill relating to orders to show cause in estates. Committee recommendation: approval. Action: Disapproval. Bill referred back to Sheridan County Bar Association.

5. Bill relating to fees for defending pauper prisoners. Committee recommendation: approval. Action: amended with reference to appointment of counsel for minors prior to a plea of guilty and as amended, approved and recommended to Legislature for passage.

6. Bill relating to residence in divorce cases where the grounds are insanity. Committee recommendation: approval. Action: approved and recommended to Legislature for passage.