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may be taken of the positions followed in the instant case[20] at least it can be said that there is a limit—"Liberty of speech and press is . . . not an absolute right, and the state may punish its abuse."[21] That the *Terminiello* case did not hold the boundary of permissible expression to have been exceeded may be unfortunate—"There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[22] However, what does appear clear is that the instant case is another in a series of liberal pronouncements by the Court—and, when the case is considered in the light of the factual background, with perhaps an even greater leaning to the left than has heretofore been evidenced.

THEOPHILE J. WEBER.

LOSS OF GOOD WILL AS DAMAGES IN CONDEMNATION PROCEEDINGS

The United States condemned the Kimball Laundry in Omaha, Nebraska, for use by the army for an initial term of eight months, to be extended from year to year at the election of the government. It was extended several times. As the laundry had no other means of serving its customers it suspended business during this time. The measure of damages was held by the United States District Court for the District of Nebraska to be, primarily, the rental value of the property.[1] The Court of Appeals for the Eighth Circuit affirmed the district court on appeal by the Laundry, which claimed as damages the loss to the company due to the destruction of its "trade routes" or business "good will." The Supreme Court of the United States granted certiorari. *Held,* that while the measure of damages (rental value plus depreciation) is correct, under the "just compensation" clause of the Fifth Amendment the Laundry should also be compensated for the loss of its "trade routes." *Kimball Laundry v. United States,* 69 Sup. Ct. 1434 (1949).

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20. It should be noted that the majority (and liberal) block of Justices Douglas, Black, Reed, Murphy and Rutledge, has now been reduced to a possible minority—pending the revelation of the attitudes of the successors to the latter two jurists.

21. Near v. Minn., 283 U.S. 697, 707, 51 Sup. Ct. 625, 628, 75 L. Ed. 1357 (1930). Also " . . . the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom." Gitlow v. N.Y., 268 U.S. 652, 666, 45 Sup. Ct. 625, 630, 69 L. Ed. 138 (1924).

22. From Jackson's dissent, 337 U.S. 1, 69 Sup. Ct. 894, 911, 93 L. Ed. 865 (1949).

1. A board of appraisers appointed by the district court according to Nebraska law set the rental value to the United States at $74,940 a year. The Government and the Laundry both appealing the award, in trial by jury an annual rental of $70,000, and $45,776.03 for damages to the plant were awarded, plus interest at 6 per cent on the rental for the initial term from the time the army took possession until the first renewal, on the rental for each year after that from the beginning of the year until paid, and on damage to the plant from the date of verdict.

Mr. Justice Douglas, writing a dissenting opinion with which the Chief Justice, Mr. Justice Black, and Mr. Justice Reed concurred, held that business good will should not be compensated in this temporary taking, as the Supreme Court had long construed the Fifth Amendment to require no such compensation in a permanent taking,[2] even when there was no other possible location for the business to continue,[3] unless the taker itself intended to run the business and so benefit from such good will,[4] or a state legislature allowed such compensation by statute.[5] The dissent also pointed out that in *United States v. General Motors Corp.*[6] the Supreme Court had held that a permanent and a temporary taking should be treated the same in this respect.

Many state constitutions,[7] like Wyoming's,[8] and unlike that of the United States,[9] provide that proerty shall not be taken *or damaged* for public use without just compensation. The addition of the word "damaged" could be interpreted to allow recovery for such intangibles as business good will, especially in a temporary taking, where this good will is damaged, rather than taken or destroyed. As the United States Supreme Court has formerly allowed no compensation for good will destroyed in a permanent taking, however, reasoning leading to such allowance by state courts in case of damage would probably be fallacious, although research has disclosed no case in which this point was covered in the decision.

Wyoming, besides including the broader term "damaged" in her constitution, has a statute stating that compensation shall be made for the "taking or affecting

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2. United States v. Powelson, 319 U.S. 266, 282, 63 Sup. Ct. 1047, 1056, 87 L. Ed. 1390 (1943); United States v. Petty Motor Co., 327 U.S. 372, 378, 66 Sup. Ct. 596, 600, 90 L. Ed. 729 (1946); Mitchell v. United States, 267 U.S. 341, 344, 45 Sup. Ct. 293, 294, 67 L. Ed. 644 (1925); Bothwell v. United States, 254 U.S. 231, 233, 41 Sup. Ct. 74, 75, 56 L. Ed. 238 (1920); Joslin M'f'g. Co. v. Providence, 262 U.S. 668, 675, 43 Sup. Ct. 684, 686, 67 L. Ed. 1167 (1922).
3. Mitchell v. United States, supra.
4. Omaha v. Omaha Water Co., 218 U.S. 180, 30 Sup. Ct. 615, 620, 54 L. Ed. 991, (1909); Denver v. Denver Union Water Co., 246 U.S. 178, 38 Sup. Ct. 278, 283, 62 L. Ed. 649 (1917); " . . . there is an element of value in an assembled and established plant, doing business . . . over one not thus advanced . . . This element of value is a property right and should be considered in determining the value of the property . . ." Des Moines Gas Co. v. Des Moines, 239 U.S. 153, 35 Sup. Ct. 811, 815, 59 L. Ed. 1244 (1914) ("Good will" in general is distinguished from "going concern value" in this case; "going concern value" was allowed compensation).
5. Earl v. Commonwealth, 180 Mass. 579, 63 N.E. 10, 57 L.R.A. 292 (1902); Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019 (1925).
6. United States v. Petty Motor Co., 327 U.S. 372, 384-385, 66 Sup. Ct. 596, 602-603, 90 L. Ed. 729 (1946); ". . . the value of good will . . . in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning." United States v. General Motors Corp., 323 U.S. 373, 383, 65 Sup. Ct. 357, 362, 89 L. Ed. 311, 356 A.L.R. 390 (1944).
7. ARIZ. CONST. Art. II, Sec. 17; CAL. CONST. Art I, sec. 14; COLO. CONST. Art II, Sec. 15; N.M. CONST. Art II, Sec. 20; OKLA. CONST. Art II, Sec. 24; TEX. CONST. Art. I, Sec. 17; UTAH CONST. Art I, Sec. 22; WASH. CONST. Art I, Sec. 16.
8. "Private property shall not be taken or damaged for public or private use without just compensation." WYO. CONST. Art. 1, Sec. 33.
9. " . . . nor shall private property be taken for public use, without just compensation." UNITED STATES CONST. Fifth Amendment.

of such real property *or damage to business conducted thereon."*[10] The italicized part of this statute was interpreted, however, to refer only to the injury to the business of tenants on the property, and not to apply to damage to the business of the owners of it.[11] This Wyoming case is concerned with a permanent rather than a temporary taking, however, and it is apparently mainly on this point that the distinction was drawn in the instant case.[12]

State cases on permanent taking, disallowing compensation for good will, are plentiful.[13] Numerically, apparently, the weight of authority, even under state constitutions, is that good will is not compensable. Some few state cases have held otherwise, however.[14] Cases on temporary taking for a span of years are comparatviely few. These hold temporary and permanent taking to be the same as to compensation for good will, which was not allowed.[15] There may be an analogy to such temporary taking in the taking of part of one's property,[16] rather than the whole, though the taking of the part is in fee. Many cases deal with a temporary interruption of business, usually by a blocking of the entrance to it, or a temporary disturbance to the realty. In these there could be an analogy to the temporary taking of the business. Though the numerical weight of authority in these temporary interruption cases seems to be that the loss of business due to such interruption is not compensable, some hold otherwise;[17] but the analogy is weak in that such cases the interruption is the *only* compensable element, as the sovereign has taken nothing but merely damaged business by a temporary interference.

Coupling a temporary with a permanent taking seems more logical than coupling it with a temporary interference. This the Supreme Court did in

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10. " . . . 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." Wyo. Comp. Stat. 1945, Sec. 3-6308.
11. Morrison v. Cottonwood Development Co., 38 Wyo. 190, 266 Pac. 117, 123 (1928).
12. "It [temporary instead of permanent taking] is a difference in degree wide enough to require a difference in result." Kimball Laundry v. United States, 69 Sup. Ct. 1434, 1442 (1949).
13. Cobb v. Boston, 109 Mass. 438, 444 (1872); Edmands v. Boston, 108 Mass. 535, 549 (1871); Williams v. Commonwealth, 169 Mass. 364, 47 N.E. 115 (1897); Robins v. Scranton, 217 Pa. 577, 66 A. 977, 979 (1907); Pemberton v. City of Greensboro, 208 N.C. 466, 181 S.E. 258, 260 (1935); Maynard v. Northampton, 157 Mass. 218, 31 N.E. 1062, 1063 (1892); Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52, 53 (1902).
14. "States have not infrequently directed payment of compensation in similar situations." Mitchell v. United States, 267 U.S. 341, 345, 45 Sup. Ct. 293, 294, 67 L. Ed. 644 (1925); "It is proper to take into consideration . . . all matters arising out of the proceedings which affect the value of or income from the [land]." (The facts of the case, however, deal with taking a part of one's property, and so interfering with the use of the remainder). Chicago v. Koff, 314 Ill. 520, 173 N.E. 666, 669 (1930).
15. United States v. General Motors, 323 U.S. 373, 65 Sup. Ct. 357, 87 L. Ed. 311, 156 A.L.R. 390 (1944); United States v. Petty Motor Co., 327 U.S. 372, 66 Sup. Ct. 596, L. Ed. 729 (1946).
16. Chicago v. Koff, 314 Ill. 520, 173 N.E. 666, 669 (1930); Chicago v. Graney, 137 Ill. 628, 25 N.E. 798, 799 (1890).
17. Chicago v. Graney, supra. Williams v. Brooklyn Ry. Co., 47 Hun. 591, 10 N.Y. Supp. 927, 930 (1890); Bradley v. N.Y. Cent. R.R. Co., 296 Ill. 383, 129 N.E. 744, 745 (1921).

United States v. General Motors Corp., which the dissent believed should be followed in the instant case.

In the Kimball Laundry case the majority of the Court felt that because the taking was temporary, the reasoning which denies the owner the value of the good will (that he can go into business elsewhere) is not applicable. While the Court has held that this rule applies though no other place of business can be found which is as desirable,[18] and, in at least one case, no other place at all can be found,[19] it apparently feels that some injustice was suffered; and so, regardless of a holding that a temporary and a permanent taking should be treated alike in this respect,[20] the Court prefers to use this distinction to arrive at what it feels to be a more equitable result. Thus, the instant case, in effect, although not expressly, overrules the *General Motors* case on this point.

The implications of the *Kimball* decision are even more far-reaching, however. The Court quoted Chief Justice Holmes as saying: "And the question is, what has the owner lost? not, What has the taker gained?"[21] Under this principle, the line of holdings in which good will was not compensated is wrong, for in the permanent as well as the temporary taking of the business the good will is at least partially lost to the owner due to necessary delays in service, change of address, etc., even if not utilized by the taker. When the Court says: "We think that this case comes within that [Holmes'] principle," it does not base that belief upon any similarity in the fact situations in the two cases, for the case in which Chief Justice Holmes made that statement was one in which the United States bought many tracts of land, each, in itself, of little value; and it was held that the value to the owner of each seperate tract, not its value as part of the whole, was just compensation to him; thus, what the owner lost, which was little, not what the United States gained, was compensable.[22] If this principle is to be followed, however, it should enure to the financial benefit of the owner in such a case as this, as it did to the taker in that case. If, however, it is to be followed, precedent is wrong not only in failure to compensate for loss of good will, and for temporary interference, but also for partial loss of good will due to the enforced moving of a business, and for expenses of moving, which have been denied.[23]

Market value, or an approximation thereof, is usually stated as the value to be paid.[24] It is a fact that in the selling of a business from one private owner to another the market value includes the value of the good will. In some businesses, such as restaurants, the good will is very valuable. If the market value is to be given, good will, it seems, must be included in the compensation. After

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18. Joslin M'f'g. Co. v. Providence, 262 U.S. 668, 676, 43 Sup. Ct. 684, 688, 67 L. Ed. 1167 (1923); Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52 (1902).
19. Mitchell v. United States, 267 U.S. 341, 45 Sup. Ct. 293, 67 L. Ed. 644 (1925).
20. United States v. General Motors, supra note 6.
21. Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 Sup. Ct. 459, 54 L. Ed. 725 (1909).
22. Ibid.
23. Joslin M'f'g. Co. v. Providence, supra note 18.
24. Kimball Laundry Co. v. United States, 69 Sup. Ct. 1434, 1438 (1949).

quoting Chief Justice Holmes' statment the Court further commented: "If benefit to the taker were made the measure of compensation, it would be difficult to justify higher compensation for farm land taken for a firing range than for swamp or sandy waste equally suited for the purpose."

The dissent recognized the far-reaching effect of the majority opinion saying: "The truth of the matter is that the United States is being forced to pay not for what it gets but for what the owner loses." Obviously, there is a wide difference in these two viewpoints: the dissent following precedent in that good will which is not used by the government need not be compensated: that it should pay for what it gets; and the majority holding that justice is served only by paying for what the owner loses. The dissent has stated, in effect, the converse of Chief Justice Holmes' statement: The question is what the sovereign has received, not what the owner has lost; and precedent, in compensating for good will only when the business has been continued by the taker, bears this out. Thus, the issue is made very clear. It is true, also, that the Fifth Amendment calls for compensation for that "taken," not that "lost," and if the business is not continued for the public by the government the good will, while destroyed, is not "taken."

Certainly, however, farm land taken for a shooting range would command a higher price than swamp land taken for the same purpose. Market value would be paid for both. Market value here is a measure of what the owner has lost. While the good will of a business has not been compensated in the past, unless used, the reason was that it was not "taken," for the owner, hypothetically, at least, could move his business elsewhere, taking its good will with him. It is obvious that this would be more difficult to do in a temporary taking of uncertain duration than in a permanent one, and so there is logic in the distinction. There is a basic confusion, however, illustrated in the arguments of the majority and the dissent as to whether the owner is paid for what he loses, or for what the government gains. In tangible property he is apparently paid for what he loses, and while intangibles have been granted compensation on occasion,[25] for the most part he is apparently paid for what the government gains, in that if the business is continued by the government he is paid for the good will, but not otherwise.

The Wyoming case already mentioned[26] deals with a permanent taking. The Wyoming Supreme Court followed precedent in allowing no compensation for business good will, the weight of authority being against such compensation by the federal government, and also, numerically at least, by state governments. The instant case deos not, in terms, disturb this majority holding as far as permanent taking of the fee is concerned. While most of the reasoning could apply equally well to such taking, it is definitely distinguished by the court. If, how-

25. Galveston Electric Co. v. Galveston, 258 U.S. 388, 398, 42 Sup. Ct. 351, 355-356, 66 L. Ed. 678 (1922); Des Moines Gas. Co. v. Des Moines, 238 U.S. 153, 165, 35 Sup. Ct. 811, 815, 59 L. Ed. 1244 (1914); McCardle v. Indianapolis Water Co., 272 U.S. 400, 414, 47 Sup. Ct. 144, 149, 71 L. Ed. 316 (1926).

26. Morrison v. Cottonwood Development Co., 38 Wyo. 190, 266 P. 117 (1928).

ever, the reasoning is correct and leads to justice, it should also lead to such compensation for permanent taking to the extent the good will of the business is damaged by change of location or difficulty and loss of time in obtaining a new location, with full payment for it in case of impossibility in finding such location. This case seems to be a first step toward a reversal of policy in payment for business good will, even in a taking of the fee, and were the policy reversed the conflict existing as to whether the government pays for what it gets or for what the owner loses would be resolved in favor of the latter.

Virginia Van Benschoten.

TERMINATING THE STATUS OF GUEST UNDER GUEST STATUTES

Plaintiff's daughter, while riding in an automobile with defendant upon his invitation, discovered that he was drinking, and demanded loudly to be let out of the car. This demand was ignored, defendant speeded up and, while attempting to pass a truck, collided with another truck, causing the injuries complained of. Plaintiff, as guardian ad litem for her minor daughter, sued for damages arising out of personal injuries sustained by her daughter as result of defendant's negligence. Defendant's general demurrer, based upon the guest statute,[1] was sustained and plaintiff appealed. *Held,* that the guest statute is applicable, for, when she became a guest of the driver, she became a guest for the entire journey and did not terminate the host-guest relationship by her demands. *Akins v. Hemphill,* 207 P. (2d) 195 (Wash. 1949).

In the instant case there is a strong dissent based upon the grounds that the status of invited guest terminated upon appellant's demand to be let out of the automobile, she therefore being in the position of a person being forcibly abducted.[2]

The case is not without precedent. A previous decision by the same court, under similar facts, reached the same conclusion.[3] However, that case received

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1. (Wash. 1937) Rem. Rev. Stat. Ann vol. 7A, sec. 6360-121: "No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on part of said owner or operator; Provided That this section shall not relieve any owner or operator of a motor vehicle from liability while the same is being demonstrated to a prospective purchaser."
2. Akins v. Hemphill, 207 P. (2d) 195, 197 (Wash. 1949).
3. Taylor v. Taug, 17 Wash. (2d) 533, 136 P. (2d) 176 (1943), is different from the instant case in that the acceptance of the ride was with knowledge of the driver's drinking and consequently the court held that the guest assumed the risk and was guilty of contributory negligence, whereas in the instant case the court admitted the evidence would justify a claim that appellant did not assume the risk and was not guilty of contributory negligence, but was nevertheless a guest. Also, assuming that a request to stop the auto and let the guest out would terminate the relationship, there was no evidence of such a request or failure of driver to comply. However, with all the above noted distinctions, the court in the Akins case followed the Taylor case.