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RIGHT TO SET-OFF BENEFITS AGAINST DAMAGES TO PROPERTY IN EMINENT DOMAIN PROCEEDINGS

To insure protection of the individual landowner against possible abuse by the state in the exercise of its sovereign power, the law of eminent domain is hedged with specific constitutional and statutory inhibitions, limitations and restrictions. Probably the most fundamentally important safeguard from the standpoint of protection to the landowner in this regard is the requirement that the state pay adequate compensation for the property taken and for any injury done. The law in this respect contemplates that the injured landowner be made whole by an award which, in the universal language of our constitutions, statutes and court decisions on the subject, is termed "just compensation".¹ But the "measuring stick" by which the so-called "just compensation" is to be juridically computed, like most principles in our law is subject to changing variations and interpretations. That the measure of

¹ MCCORMICK, LAW OF DAMAGES (1935) 520.

damages is the difference between the market value of the property immediately before and immediately after the improvement or alteration causing the injury, as it is put by many courts,² is but a loose and fragmentary statement of the law; and although sounding in all-encompassing perspective, it is subject to the limitation that the compensation, as in fact awarded in all our jurisdictions, with probably no more than one exception,³ is made up in part by benefits which accrued to the property and which are not reflected in the valuation placed on it subsequent to the improvement.⁴ The right to set-off these benefits against the aggregate physical damage suffered by the property is the question with which this note primarily proposes to deal.

A careful analysis of the problem here presented requires that certain fundamentals on this phase of the law of eminent domain be inquired into. First, the nature of the invasion of the property right will, depending upon the jurisdiction, have a bearing on the problem. Apparently where some land is taken most jurisdictions permit a set-off of special benefits against both the value of the land actually taken and damages to the residue.⁵ In some states, however, as in New York and Georgia, the land actually taken must be paid for in full, but general and special benefits may be set-off against damages to the remainder.⁶ West Virginia⁷ and many other states, notably Illinois,⁸ Oregon,⁹ Virginia,¹⁰ and Wisconsin¹¹ had adopted the rule that land actually taken must be paid for in full, without reference to benefits; and that special benefits only may be deducted from damages to the remainder. Apparently only one state has gone so far as to permit neither general nor special benefits to be deducted.¹² Statutes which reflect the policy of the particular state through the implementation of provisions in most,

² *Swift & Co. v. Newport News*, 105 Va. 108, 52 S. E. 821 (1906); *Stewart v. Ohio River R. R.*, 38 W. Va. 438, 18 S. E. 604 (1893); *Nelson v. Atlanta*, 138 Ga. 252, 75 S. E. 245 (1912).

³ *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389 (1857); *Sullivan v. Board of Supervisors of Lafayette County*, 61 Miss. 271 (1883).

⁴ *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341 (1896).

⁵ *McCORMICK, LAW OF DAMAGES* 548.

⁶ *Augusta v. Marks*, 50 Ga. 612 (1874); *City of Atlanta v. Glenn*, 17 Ga. App. 619, 87 S. E. 910 (1916); *New York, W. & B. R. R. v. Siebrecht*, 73 Misc. 219, 130 N. Y. Supp. 1005 (1911).

⁷ *Jones v. Clarksburg*, 84 W. Va. 247, 99 S. E. 484 (1919).

⁸ *Gordon v. Highways Comm'rs*, 169 Ill. 510, 48 N. E. 451 (1897); *Department of Public Works & Bldgs. v. Caldwell*, 301 Ill. 242, 133 N. E. 642 (1922).

⁹ *Beekman v. Jackson County*, 18 Ore. 283, 22 Pac. 1074 (1890).

¹⁰ *Williamson v. Read*, 106 Va. 453, 56 S. E. 174 (1907).

¹¹ *Driver v. Western Union R. R.*, 32 Wis. 569, 14 Am. Rep. 726 (1873).

¹² *Penrice v. Wallis*, 37 Miss. 172 (1859).

if not all, state constitutions serve as a basis for the "measuring stick" adopted by the different jurisdictions. While it is true that some courts have taken the view that all damages were contemplated and included in the payment of compensation when the land was taken, and thus that any later damages sustained to abutting property short of an actual taking were *damnum absque injuria*,¹³ the prevailing view is to allow a recovery in such cases.¹⁴ Here also the measure of damages is the same, apparently, where only damage is done and no part of the property is taken as it is where part has been appropriated and part has been left.¹⁵

Consideration of the theory motivating our legislatures and our courts in their treatment of this problem calls also for attempted differentiation between general and special benefits. Special benefits are said to be those resulting from a public work which appreciably enhances the value of the particular tract¹⁶ as distinguished from the general benefits the particular public improvement has brought to the community at large. Our court has said that peculiar benefits "are those that particularly and exclusively affect the particular property," and admits that an exact definition is not susceptible of judicial determination.¹⁷ This concept of special benefits would apparently include all benefits except those the owner derives from the improvement in common with the public at large. General benefits, on the other hand, are universally said to be those that arise from an increase in the value of the land, common to the community generally, from advantages which would accrue to the community from the improvement, and which are conjectural and incapable of estimation, and may never be realized.¹⁸

Though elusive and probably inadequate as a basis for determining into what class named benefits may fall, the distinction just given as to the nature of general and special benefits is sufficient to indicate a valid basis for the rule enunciated in those jurisdictions permitting a deduction of special benefits only.¹⁹ The theory is that the increase in the value of property contiguous to

¹³ Crane v. Harrison, 40 Idaho 186, 232 Pac. 578 (1925); Northern Transportation Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336 (1879).

¹⁴ Jones v. Clarksburg, 84 W. Va. 247, 99 S. E. 484 (1919), and cases cited therein.

¹⁵ Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821 (1906); Hardy v. Simpson, 118 W. Va. 440, 191 S. E. 47 (1937).

¹⁶ Brand v. Union Elevated Ry., 258 Ill. 133, 101 N. E. 247 (1913).

¹⁷ Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341 (1896).

¹⁸ Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040 (1902).

¹⁹ Nelson County v. Loving, 126 Va. 283, 101 S. E. 406 (1919).

a public improvement such as a highway which is common to the whole neighborhood is reflected in the valuation placed on it for assessment purposes, and becomes a part of the tax bill of the owner.²⁰ To permit deduction of general benefits, therefore, would, in effect, be charging the owner twice for the same benefits. Another reason of equal or greater force is that if the rest of the public are to secure free this "unearned increment" from the improvement, so also should the landowner whose property is taken or damaged.²¹ This conclusion is based on the view that it is inequitable to charge the owner whose property is damaged for a benefit which the rest of the community likewise secures but does not pay for. The West Virginia rule, prior to 1933, was founded on this principle, and that irrespective of whether the particular injury to the landowner involved a taking of property or merely damage by virtue of extended use of an existing easement.²² On this latter proposition, to avoid the difficulty experienced in some jurisdictions of stretching existing constitutional provisions providing for compensation for land taken, to include also that damaged,²³ the West Virginia Constitution of 1872 was changed on this point so as to read: "Private property shall not be taken or damaged for public use without just compensation."²⁴ Our statute prior to 1933 specifically provided that in the determination of damages to the residue of land taken special or peculiar, but not general benefits, were to be deducted.²⁵

Despite this well-established principle, a landowner who, in a practical sense, is actually as well off financially after his land has been taken or injured by the improvement can hardly have any very serious ground of complaint, even though the benefit which made him whole was shared generally. Consequently in some states the money appropriated for state highways and other public improvements is made to go further by permitting the state to off-set against the landowner's claim for damages, not only special, but general, benefits as well.²⁶ The 1933 amendment to our statute was

²⁰ *Bancroft v. Boston*, 115 Mass. 377 (1874); *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341 (1896).

²¹ *Swift & Co. v. Newport News*, 105 Va. 108, 52 S. E. 821 (1906); *Jones v. Clarksburg*, 84 W. Va. 247, 99 S. E. 484 (1919).

²² *Compton v. County Court of Marshall County*, 83 W. Va. 745, 99 S. E. 85 (1919).

²³ *Crane v. Harrison*, 40 Idaho 186, 232 Pac. 578 (1925).

²⁴ W. VA. CONST. art. III, § 9.

²⁵ W. VA. REV. CODE (1931) c. 54, art. 2, § 9.

²⁶ *Wade v. State Highway Comm.*, 188 N. C. 210, 124 S. E. 193 (1924); *Nowaczyk v. Marathon County*, 205 Wis. 536, 238 N. W. 383 (1931).

to that effect.²⁷ In view of this express change of legislative policy, the recent West Virginia case of *State v. Jacobs*,²⁸ has raised considerable doubt as to the application of the present statute as regards the deduction of benefits in cases involving damages to land short of an actual taking. In the *Jacobs* case where damage was done to realty by the change in grade of an adjacent highway, the court, in reversing the judgment of the lower court on a verdict of the jury for the State Road Commission, said: "Jury findings in such cases are usually upheld . . . but the res, speaking for itself, tells unmistakably of injury . . . no special benefit to the property is shown, and the general benefits from improving the highway cannot be offset against damages of this character." This latter statement of the court clearly does not encompass the spirit or letter of the present statute unless it should be construed to apply only to cases where there has been damage to the residue of land actually taken, and not to cases in which only damage to the realty by reason of some disturbance of an existing easement such as the alteration in the grade of a highway is involved; and concededly, this may well be considered the result of the decision on the basis of *stare decisis*. That the court intended any such interpretation be given the decision in the *Jacobs* case, however, seems improbable in view of our earlier decisions to the effect that in the two types of cases the measure of damages is the same.²⁹ In support of this view is the provision of our statute on procedure in eminent domain cases which provides for proceedings of the same general character to ascertain damages resulting from the construction or improvement of a highway short of an actual taking, as in the case of land actually taken.³⁰ This factor of itself would seem sufficient to indicate a legislative intent to apply the same section on the question of ascertaining damages. And in fact, the recent case of *Peddycord v. County Court of Marshall County*,³¹ involving damage without a taking as in the *Jacobs* case, and decided only a few months earlier, almost completely negatives this view for there it was said

²⁷ W. VA. CODE (Michie, 1937) c. 54, art. 2, § 9, provides in part as follows: "The commissioners . . . shall ascertain what will be a just compensation to the person entitled thereto for so much thereof as is proposed to be taken, or for the interest therein, if less than a fee, and for damage to the residue of the tract beyond all benefits to be derived, in respect to such residue, from the work to be constructed . . ."

²⁸ 5 S. E. (2d) 617 (W. Va. 1939).

²⁹ *Compton v. County Court of Marshall County*, 83 W. Va. 745, 99 S. E. 85 (1919); *Hardy v. Simpson*, 118 W. Va. 440, 191 S. E. 47 (1937).

³⁰ W. VA. CODE (Michie, 1937) c. 54, art. 2, § 14.

³¹ 3 S. E. (2d) 222 (W. Va. 1939).

by the court that "section 9 of Article III of the state constitution assures to an owner compensation for all damages sustained from the taking or damaging of his property." Even more significant still is the application of the same rule for establishing the *quantum* of damages in this case where no land was taken as is applied in cases involving damages to the residue of land taken. In view of this decision, there is, therefore, hardly any point to the contention that any different application would be made under the amended statute.

That the new statute was not called to the attention of the court in the *Jacobs* case, and so was not considered by it in stating the rule as to the determination of damages seems the more plausible explanation. In the first place no mention of the statute appears in the opinion; and then the possible explanation that this case is distinguishable as indicated above appears very remote. Apparently, on the basis of dictum appearing in the case of *Hardy v. Simpson*,³² decided in 1937, the court was not aware of the 1933 amendment to the statute; for in that case the court said: "In such cases where there are peculiar benefits to the property, the same may be set off against damages." And then again in the *Peddicord* case involving damage short of a taking the court laid down the old rule as to the deduction of benefits without mention of our statute as amended in 1933.

To say the least, these cases leave the law on this point in a confused state. So far as the writer is aware the court has not had before it a case involving this point in which damage to the residue of land taken was involved. Until such a case arises, or until the change in the statute is called specifically to the attention of the court, the exact purport of the *Jacobs* decision must rest more or less in conjecture. Recent cases in other jurisdictions do give point and support to the view of this note. In a recent North Carolina case³³ construing a statute similar to our own on the point, the court held that both general and special benefits shall be assessed as off-sets against damages. To the same effect is an earlier North Carolina case³⁴ applying the same statute, the court saying: "All the landowner can claim is that his property shall not be taken for public use without just compensation; and that is had when the balance is struck between the damages and the benefits conferred on him by the act complained of. To that and that alone he has

³² 118 W. Va. 440, 191 S. E. 47 (1937).

³³ *Bailey v. State Highway Comm.*, 214 N. C. 278, 199 S. E. 25 (1938).

³⁴ *Wade v. State Highway Comm.*, 188 N. C. 210, 124 S. E. 193 (1924).

a constitutional and vested right." A Wisconsin statute on the question of damages provides that in the exercise of eminent domain by the state in the case of streets or highways, damages and benefits shall be allowed and the excess of one over the other shall be stated.³⁵ Construed in a recent case,³⁶ it was held to cover benefits accruing to the general public as well as benefits resulting specially to land taken.

In the later statutes and decisions is manifested a trend toward the policy of considering all benefits in the determination of damages in these cases. This trend, as previously indicated, is nurtured in the present policy of the state in trying to bring down excessive costs of rights-of-way so as to make the money appropriated for roads and other public improvements go as far as possible. Also there has grown up a changed concept of the sacred character of real property ownership which might tend to alter the basic theory of "just compensation" in condemnation cases. But whatever the basis of the present policy may be, this problem is a very real and practical one; and it is unfortunate that our cases on this question decided since the 1933 amendment to our eminent domain statutes have failed to take cognizance of the change. It is submitted that, in view of the evident legislative intent back of the statute, the strong policy of today favorable to public improvement, and the recent trend in other jurisdictions on the question as previously shown, the present West Virginia statute should receive an interpretation in all cases involving damage to property which permits the deduction of both general and special benefits from the aggregate damage suffered by the property.

D. R. K.

STATUTORY LARCENY IN WEST VIRGINIA

Larceny by Embezzlement. There being no embezzlement at common law, statutes have been enacted to rectify certain defects or "loopholes" existing in the law of larceny, so as to apply to the fraudulent conversion of money or property otherwise not reached by the common law. A clear understanding of the statute, "strictly construed",¹ is necessary since embezzlement is generally regarded as a separate and distinct crime, although commission of the offense constitutes larceny.

³⁵ WIS. STATS. (1935) c. 32, § 32.10 (1).

³⁶ Nowaczyk v. Marathon County, 205 Wis. 536, 238 N. W. 383 (1931).

¹ State v. Cantor, 93 W. Va. 233, 116 S. E. 396 (1923).