Madison on Property

March 29, 1792

INTRODUCTION

Then-Congressman James Madison's newspaper essay on property emphasizes that word's wide-ranging meaning, which covers not just land and buildings but opinions, conscience, and rights. "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." Madison expanded property in its narrow sense of material possessions to include property "[i]n its larger and juster meaning" of opinions and speech.

The notion that the Founders were obsessed with property as material possessions is an unfortunate legacy of Marxist historians such as Charles Beard. The broad conception of property in Madison's essay in fact accords with that of John Locke, in his influential *Second Treatise on Civil Government* (1689). With Locke, Madison focused less on possessions themselves but rather more on the personal qualities needed for gaining material and other forms of property.

This conception of property as rights and thus the ability to acquire, opine, and think would lead to a flourishing of individual talents and a dynamic and prosperous society. Thus, any attack on property rights also assails what Madison called "the most sacred of all property"—conscience—and the property right in "the safety and liberty of [one's] person."

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"Property"
James Madison

National Gazette
March 29, 1792

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man's land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own.*

According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants

First

32.09 Rules Governing Determination of just compensation.

In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(1) The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by s. 32.05(7)(c) or 32.06(7).

(1m) As a basis for determining value, a commission in condemnation or a court may consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this subsection if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

(2m) In determining just compensation for property sought to be condemned in connection with the construction of facilities, as defined under s. 196.491 (1)(e), any increase in the market value of such property occurring after the date of evaluation but before the date upon which the lis pendens is filed under s. 32.06 (7) shall be considered and allowed to the extent it is caused by factors other than the planned facility.

(3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of damages described under sub. (6).

(4) If a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation may be paid for such depreciation except as expressly allowed in subs. (5)(b) and (6) and s. 32.19.

(5)(a) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(b) Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property.

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

(f) Damages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be

allowed where the public improvement includes fencing of right-of-way without cost to abutting lands.

(6g) In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) where shown to exist.

(6r)(a) In the case of a taking of an easement in lands zoned or used for agricultural purposes, for the purpose of constructing or operating a high-voltage transmission line, as defined in s. 196.491(1)(f), or any petroleum or fuel pipeline, the offer under s. 32.05(2a) or 32.06(2a), the jurisdictional offer under s. 32.05(3) or 32.06(3), the award of damages under s. 32.05(7), the award of the condemnation commissioners under s. 32.05(9) or 32.06(8) or the assessment under s. 32.57(5), and the jury verdict as approved by the court under s. 32.05(10) or (11) or 32.06(10) or the judgment under s. 32.61(3) shall specify, in addition to a lump sum representing just compensation under sub. (6) for outright acquisition of the easement, an amount payable annually on the date therein set forth to the condemnee, which amount represents just compensation under sub. (6) for the taking of the easement for one year.

(b) The condemnee shall choose between the lump sum and t0.2 (a) 0.0.2 (s) -Q q 0.24 (on) -3 (l) 0.2 ( ) -

2. If lands which are zoned or used for agricultural purposes and which are condemned and compensated by the annual payment method of compensation under this paragraph are no longer zoned or used for agricultural purposes, the right to receive the annual payment method of compensation for a high-voltage transmission line easement shall cease and the condemnor or its successor in interest shall pay to the condemnee or any successor in interest who has given notice as required under subd. 1 a single payment equal to the difference between the lump sum representing just compensation under sub. (6) and the total of annual payments previously received by the condemnee and any successor in interest.

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

(a) Highest and best use of the property.

(b) Applicable zoning.

(c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.

(d) Severance damage, if any.

(e) Maps and pictures to be used.

(f) Costs of reproduction less depreciation and rate of depreciation used.

(g) Statements of capitalization of income where used as a factor in valuation, with supporting data.

(h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.

(i) A recitation of all damages claimed by owner.

(j) Qualifications and experience of witnesses offered as experts.

(9) A condemnation commission or a court may make regulations for the exchange of the statements referred to in sub. (8) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between parties for the purpose of simplifying the issues at the commission hearing or court trial.

In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

107 Va. 562
Supreme Court of Appeals of Virginia.

TIDEWATER RY. CO.
v.
SHARTZER.

Nov. 21, 1907.

Error to Circuit Court, Roanoke County.

Condemnation proceedings by the Tidewater Railway Company against Julia A. Shartzer. From an order confirming an amended report of the commissioners appointed to ascertain the damages to certain property not taken, the railway company brings error. Affirmed.

West Headnotes (7)

[1] **Eminent Domain**
Necessity of making compensation in general

Under a constitutional provision forbidding the Legislature to pass any law whereby private property may be taken "or damaged," without just compensation, the Legislature has full power to require any company exercising the power of eminent domain to make compensation to any person whose property is damaged by the proposed improvement, whether any portion of the property is actually taken or not. The Legislature has full legislative power, except so far as restrained by the constitution expressly, or by necessary implication.

1 Cases that cite this headnote

[2] **Eminent Domain**
Constitutional provisions

The fact that a certain interpretation of the Constitution relating to the power of the Legislature as to eminent domain proceedings might lead to an indefinite number of claims for damages to property not taken, is not a ground for giving it a different construction.

Cases that cite this headnote

[3] **Eminent Domain**
Constitutional provisions

The fact that the constitutional guaranty of compensation for property "damaged" will give rise to an infinite number of claims, is no valid objection to its enforcement. The right to compensation is coextensive with the damage or injury, both in space and in amount. No arbitrary rule on the subject can be laid down, but it will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case, whether or not there has been such damage to property as should be compensated.

4 Cases that cite this headnote

[4] **Eminent Domain**
Elements of Compensation for Injuries to Property Not Taken

The provision of Const.1902, art. 4, § 58, prohibiting the General Assembly from enacting any law whereby private property shall be taken or damaged for public uses without just compensation, was not a grant of power, but a limitation; and the Legislature is clothed with full legislative authority, except as to the restriction. Hence a statute declaring that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for property taken, but for adjacent or other property of the owner, and also for damages to property of any other person, is within the legitimate scope of the legislative power.

4 Cases that cite this headnote

5 Cases that cite this headnote

[5] **Eminent Domain**
Effect of smoke, foul odors, noise, or vibration

In view of the terms of the prior Constitution and statutes, Const.1902, art. 4, § 58 [Va.Code 1904, p. ccxxii] inserting "or damaged" in the provision prohibiting the General Assembly from authorizing property to be taken without just compensation, and Code 1904, § 1005f, providing for assessing compensation for damages to adjacent property not taken, was intended to enlarge the rights to compensation, and embraces and gives a remedy for impairment of property by noise, smoke, dust, and cinders arising from the lawful operation of a railroad, and was not intended merely to cover such damages as would have previously formed the basis of an action at common law or under the general statutes.

2 Cases that cite this headnote

[6] **Eminent Domain**
Effect of smoke, foul odors, noise, or vibration

The constitutional inhibition against taking or damaging private property for a public use without making just compensation therefor, and the statute passed in pursuance thereof, embrace and give a remedy for every physical injury to property, whether by noise, smoke, gases, vibration or otherwise, and every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, causing special pecuniary damage to the owner, for which an action would lie at common law. There need be no physical invasion of the owner's real property, but the owner may recover if the construction and operation of the improvement would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential.

[7] **Eminent Domain**
Effect of smoke, foul odors, noise, or vibration

Where the use and operation of a railroad will depreciate the market value of property by reason of the smoke, noise, dust and cinders arising from the ordinary and lawful operation of the road, the property is "damaged" within the meaning of the constitution and the statute passed in pursuance thereof, and the owner of such property is entitled to compensation.

2 Cases that cite this headnote

Attorneys and Law Firms

***407** Robertson, Hall & Woods and F. W. Christian, for plaintiff in error.

A. A. Phlegar and McClung & McClung, for defendant in error.

Opinion

KEITH, P.

Upon the motion of the Tidewater Railway Company the circuit court of the county of Roanoke appointed commissioners to ascertain what would be a just compensation for "such part of the land, of the freehold whereof Jeremiah Shartzer is tenant, and for such other property as is proposed to be taken by the Tidewater Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, ***408** from the construction and operation of the company's works."

So much of their report as we are concerned with is as follows: "To the lands of Julia A. Shartzer, no part of whose land is taken: Damages to dwelling, land, and

business conducted thereon, for annoyance from smoke, noise, dust, cinders, and danger from fire resulting from the construction and operation of the road in a lawful manner, $600. We did not allow anything to Julia A. Shartzer for damages for interference with means of access to her property, as we do not think she is damaged in this respect."

The Tidewater Railway Company excepted to this report as to the allowance made to Julia A. Shartzer, and thereupon, "the court being of opinion to sustain the exceptions and recommit the said report on account of the form thereof, and because the same included damages to the business of the said Julia A. Shartzer, by consent of parties it is agreed that the said report be amended and treated as if it read as to her property as follows: 'To the lands of Julia A. Shartzer, no part of which are taken, we fix the damages at the sum of $600, and in ascertaining said damages we took into consideration the proximity thereof to the said railroad, and find that the difference in the market value of said property before the construction and operation of said railroad and afterwards will be the sum of $600, and that said depreciation in said market value and consequential damages to said property will be caused by smoke, noise, dust, and cinders arising from the proper, ordinary, and lawful operation of said road.'"

To the report as amended by this decree the applicant again excepted, and on consideration of the said exception it was overruled by the court, and the report, as amended, confirmed. From that order a writ of error was allowed by one of the judges of this court.

The specific constitutional provision upon the subject of taking property for public uses, as it existed prior to 1902, is found in Const. 1869, art. 5, § 14, which reads as follows: "The General Assembly shall not pass *** any law whereby private property shall be taken for public uses without just compensation."

It was uniformly held, under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property no part of which was actually taken. This construction resulted in much hardship, and was a denial of justice in cases where the use, the enjoyment, and the value of property were greatly impaired under conditions which were held not to amount to a taking within the meaning of the law as it then existed.

Influenced by these considerations, the convention which framed the Constitution of 1902 amended section 14, art. 5, which now appears as section 58, art. 4, of the Constitution of 1902, by which is prescribed certain prohibitions on the powers of the General Assembly, and among them that "it shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation"; and the General Assembly, when it came to legislate upon the subject and give effect to this constitutional provision in section 1105f, cl. 5, Code 1904, provided, where a corporation authorized to have land condemned for its uses has complied with the requirements of the preceding section, for the "appointment of commissioners to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. ***"

With respect to the statute we shall first observe that, if the Constitution of the state were to be construed as a grant of power to the Legislature, the statute just quoted could be maintained as being a reasonable and proper exercise by the Legislature of the delegated power. But such is not the rule of construction, as applied to the Constitution of the state. The Legislature is clothed with full legislative authority, except so far as it is restrained by some provision of the Constitution, either expressed or necessarily to be implied from the terms of that instrument. When, therefore, the Constitution says that the Legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, a statute which declares that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for the land or other property proposed to be condemned for its uses and damages, if any, resulting to the adjacent or other property of the owner, but also for damages to the property of any other person, is within the legitimate scope of the legislative power.

Coming, then, to a consideration of the statute, it cannot be doubted that by the change of the law in the Constitution and statute it was plainly intended to enlarge the right to compensation.

"Of this," says Lewis on Eminent Domain, at section 232, speaking of similar amendments, "there can be no question. Any other construction would render the words nugatory. They are an extension of the common provision for the protection of private property. The words 'injured or destroyed' were not used in vain and without meaning. It was intended that they should have effect, and, unless they operate to impose a liability not previously existing, they are without operation. The Supreme Court of the United States, referring to the Constitution of Illinois,

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says: 'The use of the word "damaged," ***409** in the clause providing for compensation to the owners of private property appropriated to public use, could have been used with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution."' 1 Lewis on Em. Dom. (2d Ed.) § 232, and authorities there cited.

The same author says: "The words in question should be liberally construed. The provisions of the Constitution requiring compensation to be made for property taken, injured, or damaged for public use are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted." Section 232a.

It will be observed that in the discussion of this subject text–writers and adjudicated cases use the words "damaged," "injured," and "injuriously affected" as being equivalents and meaning in substance the same thing.

Considering the terms of the Constitution and of the statute as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code are not difficult of interpretation, and should be held to embrace and give a remedy for every "physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise." Lewis on Em. Dom. § 236.

It is contended on the part of plaintiff in error that "the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words 'or damaged' mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an interference with some right, public or private, appurtenant to the property."

To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, "so use your own property as not to injure the rights of another." Broom's Leg. Max. (7th Ed.) p. 364.

But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its "inability to agree on terms of purchase with those entitled" to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised.

It appears that the language of our Constitution was taken from that of Illinois, which was adopted in 1870, and had been the subject of judicial construction by the courts of that state and of the United States.

In Rigney v. City of Chicago, 102 Ill. 64, the city had constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first–named street from the plaintiff's house and lot over and along the street intersected, except by means of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value, by reason of being deprived of such access. It was held that the city was liable in damages for the injury, and in the discussion of the case rights as they existed under the Constitution of 1848 and those rights as extended by the Constitution of 1870 are compared; the court saying: "The restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the Constitution of 1848, which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The Constitution of 1870, however, provides that 'private property shall not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the Constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action."

In Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511, the court observes: "It is needless to say our decisions have not been harmonious on this question, but in the case of Rigney v. Chicago, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great

Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that ***410** the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States, in Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, referring to the Illinois cases, says: "We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution."

In Baker v. Boston Elevated Ry. Co., 183 Mass. 178, 66 N. E. 711, it is held that under St. 1894, p. 764, c. 548, § 8, providing for compensation for damage caused by the construction, maintenance, or operation of the lines of the Boston Elevated Railway Company, "noise which, operating with other causes, would constitute a private nuisance to abutting property, if it were not authorized, is special and peculiar damage, for the whole of which compensation can be recovered, without seeking to determine how much of the effect is due to that part of the noise which alone would not constitute a liability and how much to the excess." In the course of its opinion the court in that case says:

"In dealing with the question which is presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and so long as it is not excessive it is not unlawful. But when it is so great as to become a nuisance to property in the vicinity it is actionable. It is judged by its effect, and not merely by its cause. In England, the difference in effect between damage which, as between private persons, would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority. *** Disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise, which is unlawful by reason of its excess, may well be considered unlike the detriment which is so slight as to be legally permissible in the ordinary use of property.

"In the case at bar it is found that, but for the statutory authority, the noise 'would constitute a private nuisance of a grave character to the petitioner's said estate.' At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public, who are also affected by it, and he is entitled to compensation in damages. *** We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damage under this statute, which entitles the landowner to compensation."

In Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404, this court said: "Where private property has been simply damaged by a public improvement, but no part thereof has been taken, the measure of damages is the diminution in the value of the property by reason of the improvement–difference between the fair market value of the property immediately before and after the construction of the public improvement."

But, as was said by the Supreme Court of California, in Eachus v. Los Angeles Consol. El. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, quoted with approval by Lewis on Em. Dom. § 236: "The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he

has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed," says Lewis on Eminent Domain (same section), "in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations, or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere ***411** depreciation, caused by the proximity of a public improvement, afforded no ground for redress."

No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust, and cinders arising from the ordinary and lawful operation of a railroad, are the subject of compensation, under the provisions of our Constitution and laws.

"The operation of a railroad," says Lewis on Em. Dom. § 230, "the switching of cars to and fro, the use of coalbins, stockyards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking we have already considered. But, whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent Constitutions. Where the use and operation of a railroad *** depreciates the value of property by reason of the noise, smoke, vibration, etc., his property is damaged within the Constitution, and he is entitled to compensation."

Such being, as we think, the proper interpretation of the Constitution, the thought at once arises that it will give rise to an indefinite number of claims. We cannot state this proposition more satisfactorily than is done by the author from whom we have already quoted so extensively.

In section 227, Lewis on Em. Dom., it is said of this contention that it is without merit. "The Constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the McCarthy Case (McCarthy v. Metropolitan Bd. of Wks., 8 C. P. 191), and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £>>1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?'"

Lord Penzance, in the same case, observes: "It was asked in argument where are the claims to compensation to stop, if the rule is so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attaches to the premises in question by reason of their proximity to or relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking; for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." That case dealt with the obstruction of a highway, but its reasoning applies as well to the diminution in value occasioned by smoke, noise, dust, and cinders.

It is impossible to lay down any arbitrary rule upon the subject–certainly none based upon mere measurements. It will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated. Of course, claims without merit will not be preferred; but it will be the duty of those intrusted with the administration of the law–commissioners, juries, and courts–to separate those deserving of compensation from those which are without

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merit.

For these reasons, we are of opinion that there is no error in the judgment of the circuit court, and it is affirmed.

Affirmed.

Parallel Citations

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8100 EMINENT DOMAIN: FAIR MARKET VALUE (TOTAL TAKING)

The sole question in the Special Verdict asks "What was the fair market value of the property on (date of evaluation)?"

In answering this question, consider only the price for which the property would have sold on (date of evaluation) by a seller then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the seller or his or her unwillingness to sell the property.

You should consider the use to which the property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the property is the use to which the property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon speculation, theory or conjecture. You should consider every element that establishes the fair market value of the property.

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To determine appropriate compensation for the partial taking of property, the jury must determine the fair market value of the entire property on the date of evaluation and the fair market value of the remaining property on the date of evaluation, assuming completion of the public project. Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W. 2d 809 (Ct. App. 1996).

Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648.

For additional discussion of the unit rule, see Comment, Wis JI-Civil 8100.

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