William & Mary Law Review

Volume 10 (1968-1969)
Issue 3

Article 18

March 1969

Eminent Domain - Consequential Damages - Noise Element - Dennison v. State, 239 N.E. 2d 708 (N.Y. 1968)

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plaintiff was caused by sensory and contemporaneous observance of the accident; and whether the plaintiff and the victim were closely related.[21] It is likely that this opinion will provide the foundation for the development of a new trend in the law favoring recovery for emotional disturbances.

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Eminent Domain—CONSEQUENTIAL DAMAGES—NOISE ELEMENT. In upstate New York the scenic wooded property of the Dennisons lay in the path of a projected highway. The property and homestead were "entirely secluded, quiet and peaceful." The state condemned a portion of the land and built the highway across this portion, necessarily destroying the view, privacy, peacefulness, and a part of the wooded area in the process.

The Dennisons brought suit against the state, claiming consequential damages to the remaining property and demanding compensation for the loss in value due to future traffic noise among other factors.[1] The case was decided in favor of the claimants in the lower courts[2] and was appealed to the Court of Appeals of New York[3] where the state contended that it was error to consider noise as a factor affecting the award of consequential damages.[4] The court of appeals ruled that there was no error in considering traffic noise as an element of consequential damages where there had been a partial taking of property, of the kind present here, for the construction of a highway.[5]

About one-half the states have eminent domain provisions in their

21. *Id.*, 441 P.2d at 920, 69 Cal. Rptr. at —.

1. The claim was based on loss of privacy and seclusion, loss of view, traffic noise, lights, and odors resulting from the highway construction and use.

2. Dennison v. State, 48 Misc.2d 778, 265 N.Y.S. 2d 671 (Ct. Cl. 1965) *aff'd.*, 28 N.Y. App. Div. 2d 28, 281 N.Y.S.2d 257 (3d Dept. 1967).

3. Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708 (1968).

4. The state maintained that, although damages normally are allowed when there has been a partial taking of land, noise damage should not be considered because it is suffered by the general public.

5. The opinion contained much verbiage to the effect that the impracticability of separating the noise element from a group of other, concededly proper, elements of consideration militated against reversing and remanding the case for a new trial. Though confusedly written, the references to this impracticability could at best be considered dicta, although applicability of such dicta is unclear. The court, having ruled that consequential noise damage is compensable, had no need to go into the practicality of separating it from the other factors. The courts below did not err in considering noise, integrated with the elements of loss of view, seclusion and privacy.

constitutions similar to the fifth amendment of the United States Constitution,[6] requiring that there be a partial taking of property before any consequential damages may be had.[7] The remaining state constitutions allow compensation for land "taken or damaged," [8] and court decisions in these states have not required a partial taking before allowing damages. Decisions applying constitutional provisions to compensate landowners for damages caused to their property by noise have been irregular, but courts have been reluctant to allow consideration of noise even when there has been a partial taking of land.[9] Indeed, in those states not requiring an actual physical invasion of property before claiming damages, there have been few decisions which held that noise is compensable.[10] Suits for this type of damage, though such damages are frequently suffered in these times of increasing decibels, have been litigated on surprisingly few occasions. From a survey of those cases which have been decided, it may be concluded that there is a tendency not to allow compensable damages for noise, though there have been enough contrary decisions to encourage future litigation.[11]

6. ". . . [N]or shall property be taken for public use, without just compensation." U.S. CONST. amend. V. New York is among those states following the federal provision. "Private property shall not be taken for public use without just compensation." N.Y. CONST. art. I, § 7 (a).

7. *See* Richards v. Washington Terminal, 233 U.S. 546 (1914). Though this was a railroad case, it became the leading case on the subject of noise damage compensation.

8. *E.g.*, VA. CONST. art. I, § 6, which provides that no persons shall be "deprived of, or damaged in, their property for public use."

9. *See* People v. Presley, 239 Cal. App.2d 309, 48 Cal. Rptr. 672 (1966); Berkeley v. von Adeling, 214 Cal. App.2d 791, 29 Cal. Rptr. 802 (1963); State v. Turk, 366 S.W.2d 420 (Mo. 1963); State v. Hoffman, 132 S.W.2d 27 (Mo. 1939). In these cases there was a partial taking for highway construction and noise damages were held not compensable.

10. *See* Helmer v. Colorado, Southern N.O. & P.R. Co., 122 La. 141, 47 So. 443 (1908) Novich v. Trinity & B.V. Ry. Co., 45 Tex. Civ. App. 664, 101 S.W. 476 (1907); Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907); Fox v. Baltimore & O.R.R., 34 W.Va. 466, 12 S.E. 757 (1890). Though these are railroad cases, the similarity with highway problems is obvious. In these decisions the courts interpreted the "damage" provisions in the constitutions as allowing compensation for noise without an actual taking of part of the claimant's land.

11. *See* Pierpoint Inn, Inc. v. State, 68 Cal. Rptr. 235 (1968); Zaremba v. State, 29 N.Y. App. Div. 2d 723, 286 N.Y.S.2d 379 (1968) (decided on January 22, 1968, little more than five months before Dennison v. State); *In re* Utica, C. & S.V.R. Co., 56 Barb. 456 (N.Y. 1868); Carolina & Y.R.R. Co. v. Armfield, 167 N.C. 464 (1914); Baker v. Penn R. Co., 236 Pa. 479, 84 A. 959 (1912).

In Pierpoint Inn, Inc. v. State, the court said:

> concededly such advantages [freedom from noise] are not absolute rights, but to the extent that the reasonable expectation of their continuance is de-

Dennison v. State falls into the category of decisions contrary to the general tendency of the law. The court appears to have restricted the applicability of the decision by emphasizing the uniqueness of the tract of land in question,[12] and therefore it is unlikely that this case will prove determinative of the allowability of noise damage in all cases where there has been a partial taking.

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Taxation—ARMED SERVICES—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—IMMUNITY OF NONRESIDENT SERVICEMAN FROM STATE SALES AND USE TAXES. As a result of many incidents of sales and use taxation of nonresident servicemen,[1] the United States[2] brought suit against vari-

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stroyed by the construction placed on the part taken the owner suffers damages for which compensation must be paid. 68 Cal. Rptr. at 243.

Some states have decided the question both ways. *Compare* Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907), *with* Lynchburg v. Peters, 156 Va. 40, 157 S.E. 769 (1931); *compare* Fox v. Baltimore & O.R.R. 34 W.Va. 466, 12 S.E. 757 (1890), *with* Gardner v. Baily, 128 W.Va. 331, 36 S.E.2d 215 (1945). The more recently decided cases in each state sited here have disallowed noise damages.

The courts exhibit an inability to commit themselves to any general rule. For two recent decisions manifesting this indecisiveness, *see* Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2nd 324, 391 P.2d 540 (1964), *cert. denied* 379 U.S. 989 (1965). Oregon follows the federal "rule" for awarding damages, and Washington follows the "taken or damaged" criteria. In both of these decisions the courts completely ignored their previous rulings to the contrary and allowed compensation for noise damage where there had been no partial taking. Compare these two aviation cases with McQuaid v. Portland & V. Ry., 18 Ore. 237, 22 P. 899 (1889); and Taylor v. Chicago, Milwaukee & St. Paul Ry., 85 Wash. 592, 148 P. 887 (1915); DeKay v. North Yakima & Valley Ry., 71 Wash. 648, 129 P. 574 (1913); Smith v. St. Paul, Minneapolis R.R., 39 Wash. 355, 81 P. 840 (1905). *See generally* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1404 (1965) for an interesting discussion of these cases.

12. The holding written by Judge Keating accomplished this restriction by implication. The concurring opinion written by Chief Judge Fuld makes it clear that the peacefulness of this particular tract was a unique quality of the land. The emphasis was on the tranquility and privacy which would affect the market value of the property.

This decision is in general keeping with others of similar kind in New York. *Cf.* Zaremba v. State 29 N.Y. App. Div. 2d 723, 286 N.Y.S.2d 379 (1968); South Buffalo Ry. Co. v. Kirkover, 176 N.Y. 301, 68 N.E. 366 (1903). However, the restrictive wording in *Dennison* should be emphasized.

1. Lieutenant Stanley D. Schuman of Nebraska and Commander Kent J. Carroll of Michigan both purchased used motorboats in Connecticut from nondealers. Schuman paid the use tax under protest; Carroll refused to pay. Commander Clyde H. Shaffer of Pennsylvania purchased a new car from a Connecticut dealer who collected the sales tax. Commander Jerome W. Roloff of Wisconsin bought a used car in Florida, and