

period of five years, with renewal privileges for five more years. Counsel for the owners (who were also counsel in the preceding case) candidly stated that since their "before and after" method of measuring damages was unsuccessful in the Fulmer case, they were trying this case on the theory that the correct measure of damages was the potential sign rental income, capitalized at a normal rate of interest.

Appraisers awarded the owner \$1,500 and the State appealed to a district court. When that court ruled the owner was not entitled to any compensation, he appealed to the supreme court.

The appellate court held that the "before and after" method was the proper measure of damages and that the value of the easement could not be determined separately. It pointed out that there was no evidence that the land was worth any less after the taking than before because its agricultural productivity was unaffected and no inconvenience resulted from the taking. It was not shown that the control of advertising would to the slightest degree influence a prospective purchaser's estimate of the fair market value of the farm land. There was never a sign on the land and no promise that one would ever be erected on it. The owner received no sign rental income and whether or not he would ever receive any was very speculative.

The court, therefore, ruled that the owner was not entitled to any substantial damages. He might have been entitled to nominal damages in recognition of a legal wrong but he never asked for any. (Mathis v. State, 135 N.W.2d 17, May 1965)

178-3 FEDERAL DISTRICT COURT RULES GAS COMPANY NOT ENTITLED TO COMPENSATION WHEN FORMER STREET UNDER WHICH ITS PIPELINE WAS LAID WAS CONDEMNED

The United States condemned a parking lot that was owned by the City of Portsmouth, New Hampshire. Allied New Hampshire Gas Company had a pipeline running under the lot, which it was required to relocate. The company claimed a part of the compensation awarded for the land as damages sustained in relocating its pipeline. All parties (the Federal Government, the city, and the company) had stipulated as to the fair value of the property, including the pipeline. The Government was a mere stakeholder which asked the United States District Court, D. New Hampshire, to determine whether it should pay the entire compensation to the city, or whether the company was entitled to a certain portion.

The record showed that the pipeline site, which was presently a parking lot, had formerly been a street which was platted and dedicated to the public in 1834. The pipeline was laid in that street by the company's predecessor in 1851 after it had received authority to do so under an act of incorporation passed by the New Hampshire Legislature in 1850. There were no recorded grants of easement rights to the predecessor from landowners who abutted the street at the time, and apparently no record of any legal action by abutters against the predecessor.

In 1954 the city took the property abutting the street by eminent domain, discontinued the street and turned the area into a parking lot. The city, as owner of the lot, claimed the entire compensation. The company, however, contended that maintenance of its pipeline under the former street was a "valuable right" for which it should receive compensation. It argued that since abutters on the street retained the fee title underlying the street, it had obtained an easement through adverse use against the fee holders.

The court stated it was true that under New Hampshire law, abutters owned the fee underlying a street established by dedication. It was also uncontested that the company had used the street for a period greatly in excess of 20 years (the length of time it took to obtain an easement through adverse use). The court ruled, however, that the company's use was not "adverse" because the abutting owners could not have sued the company for trespass or damages since the laying of the pipeline was a "viatic [highway] use". The court agreed that this was the modern view, but it thought that the same view would have been taken in the 19th Century, when the pipeline was laid, because the New Hampshire court had consistently attributed to the State very broad powers over use of roads within the State, requiring only that the powers be exercise in a reasonable and non-arbitrary fashion. The earliest annotation on the subject which was available to the district court was in 56 American Reports 250 (1887) which revealed that several 19th Century courts concluded that legislatures and other governing bodies could authorize installation of pipelines in city street without compensation to abutters, as part of the public's easement thereon, in the interest of public health and welfare.

The court went on to state that the company's predecessor's franchise conferred no greater rights than were ordinarily granted to utilities and, under the common law, a utility located its facilities subject to the risk of removing and relocating them at its own expense to make way for a proper governmental use. The court pointed out that the Federal Government was not appropriating the company's right to lay its pipelines in the streets of the city, but was merely requiring it to move one such pipeline. It, therefore, concluded that the company was not entitled to compensation by the United States for removal of the pipeline and its relocation elsewhere. (United States v. Certain Land in City of Portsmouth, 247 F.Supp. 932, May 1965)

178-4 NEW YORK COURT RULES CITY MUST PAY COSTS OF RELOCATING UTILITY FACILITIES REQUIRED BY CLOSING OF STREET IN CONNECTION WITH URBAN RENEWAL PROJECT WHICH WAS A PROPRIETARY FUNCTION

In connection with an urban renewal project, the City of Binghamton acquired title to 29 acres of land and closed the street in question, necessitating the relocation of lines belonging to a telephone company. The property that was acquired was conveyed to a limited dividend corporation for development as a middle income housing project to be financed pursuant to the National Housing Act. The closing of the street was admittedly not for highway purposes.