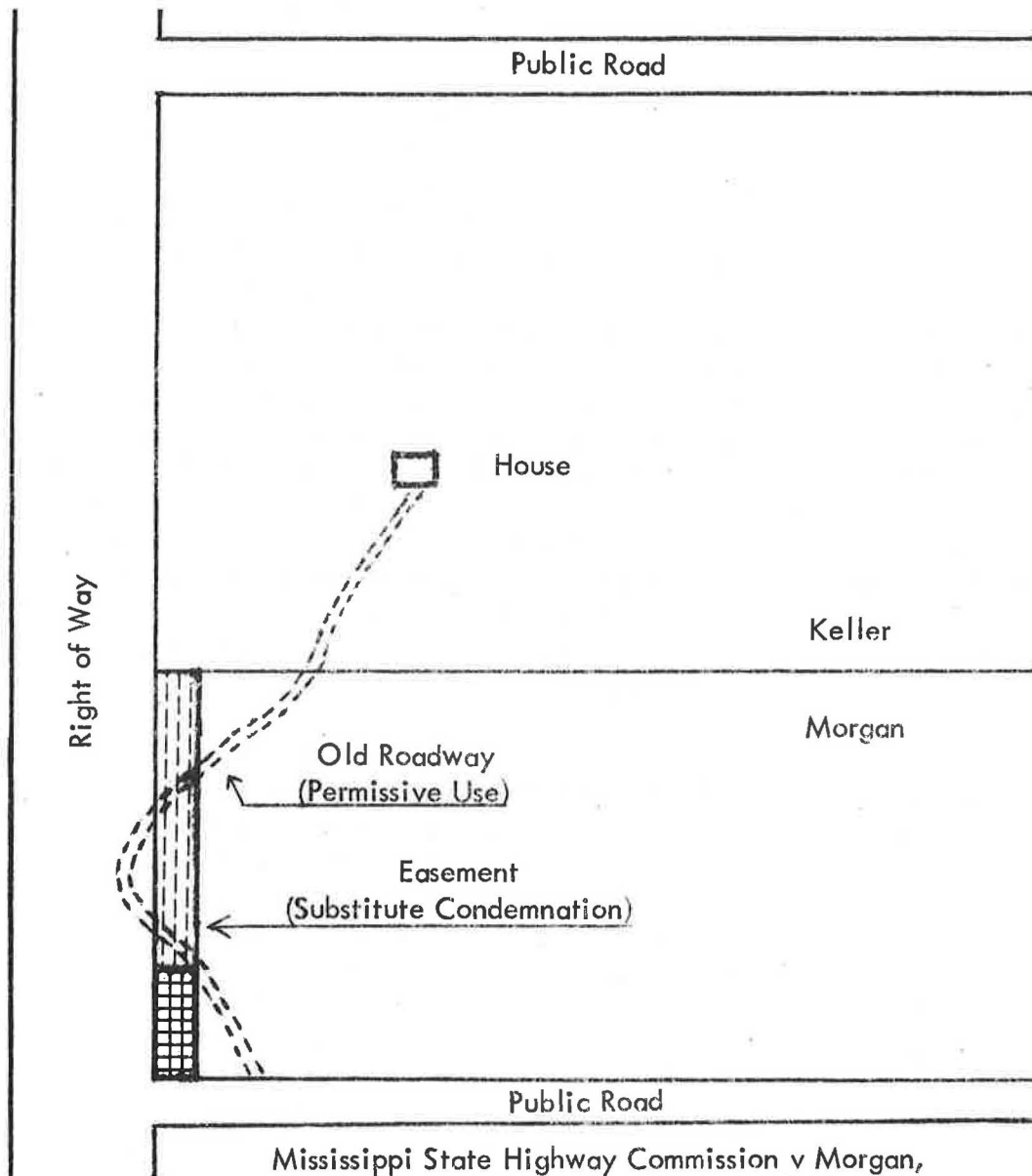


CONSTITUTIONALITY OF CONDEMNATION FOR A SUBSTITUTE USE

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When substitute condemnation is sought for a use which in itself would not warrant the exercise of eminent domain, two major questions arise. Is substitute condemnation an appropriate form of compensation to a landowner who has lost property under eminent domain? Can substitute condemnation withstand the constitutional prohibition that private property may not be condemned for a private use? For substitute condemnation to be appropriate, the facts must show a compensable injury to property for which money damages would be inadequate.(1) The constitutionality of condemnation, whether direct or substitute, depends upon a judicial finding that the taking is for a public use.(2) The narrow view of public use limits it to some physical taking or occupancy by the public, e.g., right-of-way necessary for construction of highways. The more liberal approach finds a public use merely wherever benefits accrue to the public. One example outside the field of highways is the condemnation of blighted land and its disposition for redevelopment to private redevelopers. Substitute condemnation has been upheld as constitutional under both tests.(3)

In Mississippi State Highway Comm'n v. Morgan,(4) a case of first impression, the court held that condemnation of an easement to replace a permissive highway access served a proper public purpose. The record showed that Keller had used a trail across Morgan's land to reach an east-west county road for a number of years, although this use had not ripened into a prescriptive easement. Condemnation of part of Morgan's land for interstate highway purposes destroyed a portion of this trail, and Morgan withdrew permission to use the path. However, Keller's land was not landlocked, since it abutted a county road along its northern boundary. The Commission instituted proceedings to condemn an easement across an additional portion of Morgan's land to replace the access which was destroyed. Morgan sought and obtained a writ of prohibition to halt the proceedings on the ground that the condemnation was for a private use. Over a dissent, the supreme court discharged the writ. Analysis of the Morgan case and those in other jurisdictions raises the questions of whether the court misapplied the public use test in upholding the substitute condemnation, and whether functional criteria can be developed to clarify the rule governing use of substitute condemnation.



Mississippi State Highway Commission v Morgan,
175 So.2d 606 (1965)

Compensable Injury to Property(5)

Nichols does not discuss the quantum of property and damage necessary to sustain a substitute proceeding, but speaks in general language, as follows:

"Under certain extraordinary conditions the conventional method of compensating an owner whose property is taken by proceedings in eminent domain by paying him the value thereof is completely inadequate."(6)

Instances in which condemnation for right-of-way leave nearby landowners, who otherwise are unaffected by the taking, without access to their land, and with little or no prospect of purchasing a new or equivalent way of access over neighboring lands present the question of whether money damages are adequate as compensation. So, for example, impairment of an easement in a private road was sufficient to ground a substitute condemnation in Pitznogle v. Western Maryland R. Co.(7) Several landowners were dependent on an easement in a private road for access to a pike. The condemnor, a railroad possessing powers of eminent domain under a Maryland statute, condemned the private road for railroad purposes, destroying the easement. To compensate the landowners, the railroad commenced proceedings to condemn a substitute private road to replace the road which was destroyed. Claiming that the substitute condemnation was for a private use, the substitute condemnee brought prohibition. The Maryland Court of Appeals held that when the landowners' sole means of access to the pike had been an easement in a private road, substitute proceedings to condemn a replacement private road ought to be regarded as "a public use within the meaning of the Constitution."(8)

At the other extreme, where the beneficiary of the substitute condemnation does not have a vested property right his loss is not compensable. Board of County Comm'rs v. Sykes, (9) a New Mexico case decided less than a year prior to Morgan, held that permissive use of a borrow ditch for irrigation purposes alongside a highway "vested in [the user] no property right as against the public,"(10) and that its destruction was not compensable by substitute condemnation. In Sinclair Pipe Line Co. v. United States, (11) the pipe line company held a license to maintain its pipes across the land of the condemnee, and the Court of Claims held that destruction of the pipe line was not compensable, either in damages or by substitute condemnation of a replacement right-of-way.

Morgan thus appears to run contrary to authority, by holding that a permissive use is a sufficient property interest to ground a substitute condemnation. Moreover, it substituted an easement for a permissive right-of-way, and thus raised the issue of whether the condemnor exceeded his acknowledged authority for substitute condemnation, and went beyond the point justified by the precedents of the Pitznogle case and others. The trial court felt that condemnor had abused its discretion; the supreme court, however, justified a different view by saying:

"Public officials, in the exercise of their right to take private property for public use, ought undoubtedly to minimize such damages as far as is reasonably possible and in keeping with their duty not to expend public moneys needlessly. The Court is mindful that, in such dilemmas, a wide measure of discretion must be recognized...It must also be kept in mind that the acquisition of an easement or right-of-way for the benefit of parcels of land incidentally cut off from all or some means of access to an existing way, is a mere by-product of laying out the highway, which is essential for the purpose of accomplishing its purpose."(12)

While disposing of the instant case to the apparent satisfaction of the court, the effect of this rationalization would seem to place in doubt a number of guidelines that heretofore have been considered useful in determining the propriety of substitute condemnation. These include the proposition that substitute condemnation may be sought only where vested property rights, as distinct from licenses or permissive ways, are involved; that it is appropriate only where access is destroyed, as distinct from instances where reasonable access remains at another point on the property; and that it should return the beneficiary of the condemnation to his original or an equivalent position, rather than confer a greater property right. And, it leaves unclarified the matter of how the adequacy or inadequacy of money damages as compensation is to be determined where the right in question is terminable at will.

Substitute Condemnation as Incidental

Cases(13) sustaining the constitutionality of condemnation under eminent domain from attack on the ground that the taking was for a private purpose have grounded their holdings upon the general rule that

"the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of the power."(14)

Substitute condemnation has been held to be for a public use because it is "closely connected"(15) and necessary to the direct condemnation, and because it is "incident to and results from"(16) the primary condemnation. Thus it derives some degree of support from the public purpose of the direct condemnation out of which it arises. Only if substitute condemnation is appropriate on the facts, however, can it be related in this way to the direct condemnation. Whether substitute condemnation serves a public use, then, depends on whether it is appropriate under the circumstances. In the Pitznogle case, for example, the court held that the substitute condemnation was "incident to and result[ing] from" the direct proceeding only after it found a destruction of an easement affording the sole means of access to a public road.

In the Morgan case, the majority did not discuss the effect of Keller's existing access to the county road along the northern edge of his land, but relied on the broad observation that

"When it is remembered how the country is now so completely dependent upon roads for travel both for business and for pleasure -- and this must also take into consideration the safety of persons and property -- one is readily overwhelmed in the conviction that public necessity exists in the present instance. Even though public necessity in the early days of the country did not require such takings, it assuredly does so in these modern days."(17)

By inference, the majority opinion suggests that any substitute condemnation which aims at restoration of a previously functioning means of access serves a public purpose, subject only to the qualification that the condemnor must refrain from fraud and abuse of discretion.(18) It is this far-reaching result which the dissenting justices in the Morgan case singled out as their opposition to the decision.

Conclusion

The court in the principal case found that the condemnation of an easement to replace a permissive highway access destroyed by eminent domain was incidental to the primary purpose of condemnation for an interstate highway right-of-way. Citing the general rule that an incidental private benefit will not vitiate a condemnation when the public

purpose is primary and paramount, the court sustained the substitute condemnation under the public use test. By adopting such a broad view of public use as apparently could justify any substitute condemnation for access ways which accompanies a direct condemnation of land for highway purposes, this decision would seem to create uncertainty regarding the status of several principles that heretofore have been relied upon in determining the appropriateness of substitute condemnations. These questions -- relating to the quantum and character of property and property damage which must be involved, and the inadequacy of money damages -- must be reconciled if the approach adopted by the majority in the Morgan case is to become a constructive element in eminent domain law.

Footnotes

- (1) 2 Nichols, Eminent Domain, §7.226 (3d rev. ed. 1963) [hereinafter cited as Nichols].
- (2) For a discussion of federal due process, see 2 Nichols, §7.1[3]. Miss. Const. art. 3, §17 provides that "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial one...." Section 17 has been construed to prohibit by implication condemnation of private property for a private use. See Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. Co., 89 Miss. 84, 43 So. 292 (1907). For a collection of cases in other jurisdictions, see 2 Nichols, §7.1.
- (3) 2 Nichols, §7.1.
- (4) Miss. _____, 175 So. 2d 606 (1965), modifying 248 Miss. 631, 160 So. 2d 77 (1964).
- (5) Bentham presented the concept of "property" as a collection of rights: the right of occupation, the right of excluding, the right of disposition, and the right of transmission. 3 Bentham's Works 182 (1843). His work is helpful to an understanding of the following analysis.
- (6) 2 Nichols, §7.226.
- (7) 119 Md. 673, 87 Atl. 917 (1913).
- (8) Id. at 679, 87 Atl. at 920.
- (9) 74 N.M. 435, 394 P. 2d 278 (1964). New Mexico statutes authorize private persons, at their own expense, to condemn lands for irrigation purposes. N.M. Stat. Ann. §§75-1-3, 75-14-1 et seq.(1953).
- (10) Board of County Comm'rs v. Sykes, supra note 9, at 438, 394 P.2d at 280. Cf. People v. Lundy, 47 Cal. Rptr. 694 (Cal. App. 1965).
- (11) 287 F.2d 175 (Ct Cl. 1961).
- (12) Miss. _____, _____, 175 So. 2d 606, 609.

- (13) Culley v. Pearl River Industrial Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959). For a collection of cases in other jurisdictions, see 2 Nichols, §7.222 n.1.
- (14) 18 Am. Jur. Eminent Domain §41 (1938).
- (15) Brown v. United States, 263 U.S. 78, 81 (1923).
- (16) Pitznogle v. Western Maryland R. Co., op. cit. supra note 7, at 679, 87 Atl. at 919-20.
- (17) _____ Miss. _____, 175 So. 2d 606, 610.
- (18) Ibid., p.610, 614. See also Culley v. Pearl River Industrial Comm'n, op. cit. supra note 13; Ham v. Bd. of Levee Comm'rs, 83 Miss. 534, 35 So. 943 (1903). Note, however, that the burden of establishing fraud or abuse of discretion rests upon the protesting condemnee.