The Exercise of Police Power in Highway Cases

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• IT is believed by some that when a lawyer becomes a judge he knows all the answers; rather, it must be said, he finds the problems. The truth is that in numerous cases the problems have never been judicially determined. Circumstances in particular cases differ. Procedural rules, presentation of facts by counsel, and deliberations by juries, all are factors that must be accepted as variables. The answers depend upon established rights correlated through such variables. Mr. Justice Cardozo, in his book "The Growth of the Law" said: "We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expectant. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin."[1]

Mr. Justice Sutherland wrote "that liberty and order are the most precious possessions of man, and the essence of the problem of government is reconciliation of the two." Many basic legal questions arising out of the National System of Interstate and Defense Highways require application of this principle. Generally speaking, the backbone of this Federal-state system is premised primarily upon the policy of access control. This presents the pressing problem, pinpointed by Mr. Justice Sutherland, of reconciling conflicting interests—that of private land use versus public highway use.

The two great powers of government involved—eminent domain and the police power—are antithetical; the line of demarcation between their valid exercise is not always well defined[2] and must be determined by "established rights" correlated through the always present "accepted variables." Hence, we turn to the subject of this paper, "The Exercise of Police Power in Highway Cases."

Application of controlled-access statutes to fact situations produces legal questions of great magnitude relating to the restriction of access of abutting owners, frontage roads, new highways where none previously existed, roadside zoning and control of land use in interchange areas, relocating utilities, and utilization of air space over highways. In all these areas, the traditional police power doctrine is currently under tension.

In discussing the extent the police power may be exercised to solve some of these problems, let us begin by asking the following questions and attempting to answer them, keeping in mind Mr. Justice Cardozo's statement that certainty is neither possible nor expectant, and that principles or precedents are generated by a quest for probabilities.

What is the police power? How is it exercised, and what are its limitations? What is an abutter's right of access, and may it be restricted by the police power? Can the two rights, the private right of the abutter and the right of the state to promote public safety, be harmonized? What are the rights of utilities? What about roadside zoning?

The term "police power" is not susceptible to definition with circumstantial precision and is subordinate to constitutional limitations. It is a governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury. It rests upon the fundamental principle that every owner holds his property under the implied limitation that

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[1] Cardozo, "The Growth of the Law," pp. 69,70.
[2] Pumpelly v. Green Bay Company, 80 U.S. 166, 20 L.Ed. 557.

Paper sponsored by Special Committee on Highway Laws and presented at the 43rd Annual Meeting.

its use may be so regulated as to not be injurious to the safety, health, morals and general welfare of the community in which he lives.[3] The power extends to the entire property and business within a state's jurisdiction. Both are subject to it in proper cases.[4] The police power belonged to the states when the Federal Constitution was adopted. They did not surrender it and they have all of it now. Nor did the states, by ratification of the Fourteenth Amendment, impose restrictions upon the exercise of their power for the protection of the safety, health or morals of the community, where the regulation invoked is reasonable and bears a fair relationship to the object sought to be attained.[5]

The landmark case of Mugler v. Kansas clearly outlines the distinction between eminent domain and the police power. A taking in eminent domain contemplates just compensation; a restriction or prohibition upon the use of property under the police power leaves the owner uncompensated. While every regulation necessarily speaks as a prohibition[6] and deprives the owner of some rights theretofore enjoyed and is in that sense an abridgment by the state of rights in property without compensation, such a restriction or prohibition imposed to protect public safety from danger threatened is not a "taking" in the constitutional sense.[7] The rule is stated: "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest."[8]

The property so restricted remains in the possession of the owner. The state does not appropriate it or make any use of it. It merely prevents the owner from making a use which interferes with the paramount right of the public safety previously ascertained by state action. Whenever the use prohibited ceases to be noxious—as it may because of future changes in economic or social conditions—the restriction can be removed and the owner will be free to enjoy his property as theretofore.[9] If a regulation is otherwise a valid exercise of the state's police power, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.[10] Nor is it of controlling significance that the use prohibited is a "use" upon the soil as opposed to a "use" of the soil itself.[11] Nor that the use prohibited is arguably not a common-law nuisance.[12]

Except for the familiar standard of "reasonableness," courts have generally refrained from declaring any specific area in which the police power may be invoked, but the classical statement of the rule in Lawton v. Steele[13] (1894) is still valid today, and I quote: "to justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[14]

This is not to say, however, that state action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.[15] Hence, we come to the elusive question: Where does police power end and eminent domain begin? There is no precise answer to the question. Each case must be con-

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[3] Panhandle Co. v. Highway Comm'n, 294 U.S. 613, 79 L.Ed. 1091.
[4] Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L.Ed. 336.
[5] Mugler v. Kansas, 123 U S. 623, 31 L.Ed. 205; Martin v. Davis, 187 Kan. 473, 484, app. dis. 368 U.S. 25, 7 L.Ed.2d 5.
[6] Goldblatt v. Hempstead, 369 U.S. 590, 8 L.Ed. 2d 130.
[7] Mugler v. Kansas, supra.
[8] Chicago Burlington &c R'D v. Chicago, 166 U.S. 226, 254, 255, 41 L.Ed. 979, 991; Mugler v. Kansas, supra.
[9] Goldblatt v. Hempstead, supra; Penna. Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322; Transportation Co. v. Chicago, supra.
[10] Walls v. Midland Carbon Co., 254 U.S. 300, 65 L.Ed. 276; Reinman v. Little Rock, 237 U.S. 171, 59 L.Ed. 900; Mugler v. Kansas, supra; Goldblatt v. Hempstead, supra.
[11] U.S. v. Central Eureka Mining Co., 357 U.S. 155, 2 L.Ed.2d 1228.
[12] Reinman v. Little Rock, supra.
[13] Lawton v. Steele, 152 U.S. 133, 38 L.Ed. 385.
[14] Goldblatt v. Hempstead, supra.
[15] Penna. Coal Co. v. Mahon, supra.

sidered on its own merits. If a line can be drawn between the exercise of these two powers, Mr. Justice Holmes, in Penna. Coal Co. v. Mahon,[16] had this to say:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clause are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. (p. 325.) (Emphasis supplied.)
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> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . . As we already have said, this is a question of degree and therefore cannot be disposed of by general propositions. (p. 326.) (Emphasis supplied.)

In the recent Goldblatt case,[17] Mugler v. Kansas was quoted and approved, and it was said: "There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sabastian, supra, where a diminution in value from $800,000 to $60,000 was upheld." See, also Erie R. R. Co. v. Public Util. Commrs,[18] where an expenditure of over $2,000,000 was required to insure public safety.

One of the most obvious purposes for the exercise of the police power by the states is that they have a constitutional duty to insist that the streets and highways shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.[19] From this duty stems the right of legislative control over public highways and the right to invoke the police power which is not "inaptly termed the law of overruling necessity."[20]

Controlled-access statutes, in the best sense, are mere police regulations deemed essential to the protection of the lives and property of our citizens against the unrestrained exercise by any citizen of his own right. They were enacted to meet the needs of social and economic conditions brought about by twentieth century urbanization and the perfection and increased use of the motor vehicle. They contain broad grants of power and were intended to embrace all details for the safe, convenient and efficient movement of traffic. Their purpose was to have highways constructed in such a manner that their use would not be dangerous to traveling America. Old highways were to be relocated and reconstructed, and new highways were to be located and constructed. There would necessarily be contacts with railroads, telegraph, telephone and electrical transmission lines, and with pipe lines for transportation of oil, gas and water. These highways were to be free from abutter's access except at designated interchange areas or cross-overs, and were designed to serve the traveling public and not the land over which they pass. The general grant of power to deal effectively with an enterprise of this magnitude in the interests of public safety is paramount, and the statutes are not to be interpreted in any narrow, technical or illiberal manner.

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[16] Penna. Coal Co. v. Mahon, supra.
[17] Goldblatt v. Hempstead, supra.
[18] Erie R. R. Co. v. Public Util. Comm'rs, 254 U.S. 394, 410, 65 L.Ed. 322, 333.
[19] Erie R. R. Co. v. Public Util. Comm'rs, supra.
[20] Chicago Burlington &c R'D v. Chicago, supra.

The right of access can be said to be a common-law right in property which declares that an abutter to an existing street or highway possesses a right as an incident of ownership, of access to and from the street or highway. The right has been given the status of property, which may not be taken from the owner without just compensation. It is a judicially declared right, created and adopted by common law to conditions existing at the time of the judicial decisions. But conditions change, and the common law follows apace.

On this point, the Supreme Court of Kansas said:

> One of the basic characteristics of the common law is that it is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystalized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society . . .. In his book entitled The Growth of the Law, page 20, Mr. Justice Cardozo, with poetic imagery, gave the following expression on that thought: ". . .. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[21]

But accepting the nature of the right as it is now recognized by most courts, its enjoyment, like all property rights, is subject to regulation by the state, where facts demonstrate its free and unrestricted exercise would be detrimental to public safety. The right of the abutter must bend to the right of the public to safe and efficient travel upon the public way. It is universally held that acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though these consequences may impair its use, do not constitute a taking within the meaning of the constitutional provision, or entitle the owner to compensation from the state, or give him any cause of action.[22]

How far the abutter's right of access must accommodate itself to the public need is the decisive question. As lawyers who face the task of advising your agencies so that highways may be constructed with some knowledge of the legal and financial consequences, I need not remind you of the difficulty of stating a definitive answer. Courts have placed the fulcrum at various points along the balance between the public need and the private right, but time does not permit a discussion of the numerous cases which are no doubt familiar to you.

No hard and fast rule can be stated, but courts must weigh the relative interests of the public and the individual and strike a just balance so that government will not be unduly restricted in its function for the public good, while at the same time, give due effect to the policy of eminent domain to insure the individual against an unreasonable loss occasioned by the exercise of police power.[23] The question depends upon the particular facts of the case. Obviously, if there is a total blocking of access, the restriction would appear to be unreasonable and the abutter entitled to compensation. Where, however, the restriction does not substantially interfere with the abutter's ingress and egress,[24] or where frontage or connecting roads are provided,[25] the abutter is not entitled to compensation. While an abutter may have the right of access to the public highway system, it does not follow that he has a direct-access right to the main traveled portion thereof; circuity of travel, so long as it is not unreasonable, is non-compensable.[26] Likewise, loss of access due to change in grade in an existing right-of-way is not compensable.[27]

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[21] Hoffman v. Dautel, 189 Kan. 165, 168, 368 P.2d 57.
[22] Transportation Co. v. Chicago, supra; 29 C.J.S., Eminent Domain, § 111, pp. 919, 920.
[23] Iowa State Highway Comm. v. Smith, 248 Iowa 869, 877, 82 N.W.2d 755 (1957).
[24] Moore v. State Highway Commission, 191 Kan. 624; Nick v. State Highway Comm., 13 Wis.2d 511.
[25] Blaylock v. State Highway Commission, 191 Kan. 183; State ex rel. v. Silva (N.M., 1962), 378 P.2d 595.
[26] State v. Lavasek (N.M., 1963), 385 P.2d 361.
[27] Smith v. State Highway Commission (N.C. 1962), 126 S.E.2d 87.

In determining the reasonableness of a state regulation, courts would want to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic steps, and the loss which the owner will suffer from the imposition of the regulation.[28] The presumption is in favor of the validity of the regulation and the burden is upon the abutting owner to show that it was not necessary for the protection of the public safety and welfare.[29] Cases dealing with eminent domain proceedings must be put to one side.[30]

I have the notion that when the public authorities design and establish a controlled-access highway, or establish a controlled-access facility where none previously existed, their resolutions and findings of traffic conditions and the nature and extent of each abutter's access should be fully determined and reduced to writing in the records of the commission, and notice should be given to the public and to each abutter, of the findings and action of the commission. The recent case of State, ex rel. v. State Road Comm., 128 S. E. 2d 471, decided by the Court of Appeals of West Virginia, seems ample authority to support this statement. I recommend your careful study of that case.

I further suggest that controlled-access statutes be amended to aid the courts in balancing private rights and public rights. It seems to me that the Wisconsin statute contains provisions most helpful in this respect.

Time does not permit the discussion of other questions, and in conclusion I briefly summarize: the supervision of public safety is a governmental power, continuing in its nature, to be exercised through the police power as the special exigencies of the moment may require, and the largest legislative discretion is allowed.

Controlled-access statutes form the basis for a different approach to the solution of questions concerning access rights than courts have had in some of their opinions. Heretofore they have approached the questions largely on the basis of individual interest alone. Under these statutes properly applied, courts must now approach them on the basis of the convenience and safety of the people of the states without losing sight of the limited or restricted use the individual may make or has the right to make of access to such highways. Broad statements found in some opinions that the abutter has the absolute right of unrestricted ingress and egress to and from streets and highways must be modified to harmonize with the declaration of these statutes. The change is an appropriate one for legislatures to make. Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others.

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[28] Goldblatt v. Hempstead, supra.
[29] Penna Coal Co. v. Mahon, supra; Goldblatt v. Hempstead, supra.
[30] State Highway Comm. v. Panhandle Eastern P.L. Co., 139 Kan. 185, 189, 29 P.2d 1104.