Montana Law Review

Volume 23
Issue 2 *Spring 1962*

Article 4

January 1962

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By full and judicious use of the procedure available to them, the courts of Montana can realize in the case of a Rule 23(a)(3) action the goal of the adoption of the new Rules in Montana—"the just, speedy, and inexpensive determination of every action."[53]

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COMPENSATION FOR TAKING OF FLOWAGE EASEMENTS BY CONDEMNATION

INTRODUCTION

The purpose of this paper is to discuss the issue of whether or not flowage easements are "private property" requiring just compensation for a taking by condemnation under the fifth amendment to the Constitution of the United States. A flowage easement, as the term is used in this discussion, refers to the right of one owner to flow water upon the land of another by maintenance of a dam.

Reduced to its elements, eminent domain is nothing more than the power of the sovereign to take property for public use without the consent of the owner.[1] Anything else found in the numerous definitions which have received judicial recognition merely states a limitation or qualification of the power.[2] Eminent domain as a separate identifiable concept can be traced to the natural law movement of the seventeenth century,[3] although the power to take private property for public use has doubtless been exercised since the days of the Romans.[4] Hugo Grotius apparently originated the phrase "eminent domain" in 1625.[5] He used the term to designate the power of the state over private property within its bounds, and although his theory of eminent domain was not adopted in the United States, it provided a basis for the solution of the problems which have arisen in the integration of the doctrine into our modern law. One writer has said: "Briefly stated, the concept of eminent domain created by the natural law movement rested, no matter whether the superior right of the state over private property or the idea of sovereignty was the basis, upon concepts of the power of government."[6] The Supreme Court of the United States early recognized that in a civil society, the property of a citizen or subject is subject to the lawful demands of the sovereign.[7] Thus the court has said: "The right of eminent domain is the offspring of political necessity and is inseparable from sov-

[53] MONTANA RULE 1, R.C.M. 1947, § 93-2701-1.
[1] Scott v. Toledo, 36 Fed. 385, 394 (C.C.N.D. Ohio 1888).
[2] 1 NICHOLS, EMINENT DOMAIN § 1.11 (Sackman and Van Brunt, 3d ed. 1950). (Hereinafter, NICHOLS, EMINENT DOMAIN (Sackman and Van Brunt, 3d ed. 1950) will be cited NICHOLS.)
[3] 1 THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895).
[4] 1 NICHOLS § 1.12.
[5] 5 DE JURE BELLI ET PACIS, Lib. III, C. 20.
[6] Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942).
[7] Legal Tender Cases, 79 U.S. 457, 551 (1870).

eregnty unless denied to it by its fundamental law.''[8] The power of eminent domain does not require recognition by constitutional provision, but exists in absolute form.[9] And, since the power of eminent domain is considered an inherent attribute of sovereignty, positive assertion of limitations upon the power is required.[10]

While payment of compensation is not an essential element in the *meaning* of eminent domain, it is an essential element in the *valid exercise* of such power.[11] The principle of necessity of compensation to an individual whose property is taken for public use has been one of the most universally recognized principles of justice.[12] It was found in the Roman law, the Code Napoleon, and in the legal systems of the American colonies.[13] The fifth amendment to the Constitution of the United States provides in part: ''. . . nor shall private property be taken for public use, without just compensation.'' The guarantee of this amendment was designed to bar the United States from forcing some persons to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[14] Clearly, the power of the state to take private property, and the right of the property owner to compensation, spring from different sources—the right of the state springs from necessity of government and the right of the individual from natural rights.[15] This difference in origin is important to any consideration and construction of the constitutional command.

The language of the constitutional provision, although apparently clear and without ambiguity, has presented countless questions for judicial determination. Numerous problems have been encountered in defining a ''taking''[16] and in defining ''just compensation.''[17] The problems involved in defining ''private property'' in an age of ever-increasing complexity in all traditional social institutions present even more perplexing and difficult questions.

Probably nowhere is the problem of defining private property more dramatically presented that in the decision of the United States Supreme Court in *United States v. Virginia Electric and Power Company.*[18] In that case, the power company had acquired through mesne conveyances a perpetual and exclusive flowage easement over certain acreage. This acreage adjoined a navigable stream which was contained within an area subsequently acquired by the United States for the site of a dam and reservoir. The

[8]Searl v. School District No. 2 in Lake County, 133 U.S. 553, 562 (1890).
[9]Mississippi, etc., Co. v. Patterson, 98 U.S. 403 (1878); Kohl v. United States, 91 U.S. 367 (1875); New Orleans v. United States, 35 U.S. 662 (1836).
[10]1 NICHOLS § 1.3.
[11]*Id.* § 1.11.
[12]Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).
[13]Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931).
[14]Armstrong v. United States, 364 U.S. 40, 49 (1960).
[15]1 Thayer, *op. cit. supra* note 3, at 593.
[16]See, *e.g.* United States v. Dickinson, 331, U.S. 745 (1947); Sanguinetti v. United States, 264 U.S. 146 (1924); United States v. Cress, 243 U.S. 316 (1916); Bedford v. United States, 192 U.S. 217 (1904); Gibson v. United States, 166 U.S. 269 (1897).
[17]See, *e.g.*, United States v. General Motors Corp. 323 U.S. 373 (1945); United States v. Miller, 317 U.S. 369 (1943); United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); West v. Chesapeake and Potomac Telephone Co., 295 U.S. 662 (1935); Phelps v. United States, 274 U.S. 341 (1927); Archer v. United States, 53 Ct. Cl. 405, *aff'd*, 251 U.S. 548 (1920).
[18]365 U.S. 624 (1961).

fee owner of the acreage agreed to convey to the Government a flowage easement in return for the payment of one dollar. This agreement was made subject to the flowage rights of the respondent power company. The agreement also provided that the Government could elect to acquire its easement by a condemnation proceeding, in which event the agreed consideration of one dollar would be the full amount of the award of just compensation. Exercising this election, the Government instituted condemnation proceedings in the federal district court to acquire a flowage easement over the acreage, and deposited one dollar as the estimated just compensation for the property to be taken. The fee owner acknowledged the settlement contract and agreed to the one dollar compensation. The respondent power company, whose easement was to be destroyed, intervened in the proceedings to contest the issue of just compensation. The district court made a substantial award to the respondent as compensation for the taking of its flowage easement. The judgment was affirmed by the court of appeals for the fourth circuit, on authority of that court's prior decision in *United States v. Twin City Power Co.*[19] Thereafter, the Supreme Court reversed the judgment in the *Twin City* case[20] and vacated the judgment in the *Virginia Electric* litigation, remanding the case to the court of appeals for further consideration in the light of that court's decision in the *Twin City* case.[21] The court of appeals, in turn, remanded the case to the district court with instructions that the district court exclude from the computation of compensation any element of value arising from the availability of the land for water power purposes because it was situated on a navigable stream.[22] On remand, the district court proceeded in accordance with these directions and awarded respondent $65,520. On appeal to the circuit court the judgment was affirmed.[23]

The Supreme Court then granted certiorari to consider the government's claim that the respondent's easement had no compensable value when appropriated by the United States.[24] The Court rejected the argument of the Government in the extreme form presented, but concluded that the judgment should be set aside for a redetermination of the compensation award. The Court declared that ". . . the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. . . . Subject to that maximum, the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. . . ."[25] The Court also said that the lower court ". . . must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project. [Citations omitted.] Accordingly the impact of that event upon the likelihood of actual exercise of the easement cannot be considered."

The Court noted that the Government had acknowledged that a flowage

[19]215 F.2d 592 (4th Cir. 1954).
[20]350 U.S. 222 (1956).
[21]350 U.S. 956 (1956).
[22]United States v. 2979.72 Acres of Land, 235 F.2d 327 (4th Cir. 1956).
[23]United States v. 2979.72 Acres of Land, 270 F.2d 707 (4th Cir. 1959).
[24]United States v. Virginia Electric and Power Co., 362 U.S. 947 (1960).
[25]United States v. Virginia Electric and Power Co., 365 U.S. 624, 635 (1961).

easement is "property" within the meaning of the fifth amendment and that there could be no question that the Government's destruction of that easement would ordinarily constitute a taking of property within the meaning of the amendment.[26] The Government argued, however, that it could not be required to pay compensation for the destruction of the easement in the present case because the easement was subject to the overriding navigational servitude of the United States.[27] The dissenting opinion accepted this argument and concluded that the easement had no value to the power company at the time the Government took it.[28] The language of the dissent cannot be ignored:[29]

> . . . At all events, the clincher is that any right of the power company to "destroy" agricultural uses of these lands consisted solely of its right to dam and back the river's waters upon them, and when the Government determined to construct the dam for its own benefit even that nebulous "right" was gone. Hence, the easement had no possible value—not even a nuisance value—to the power company at the time the Government took it.

The difficult questions presented by this decision and the varying conclusions arrived at by the members of the Court demonstrate the careful consideration which must be given to the interpretation of the language of the fifth amendment. The majority opinion does not discuss the problem as involving any question of whether or not "property" as such is present, but rather bases its discussion solely on considerations of "valuation." The constitutional guaranty deals with the taking of "private property," and, before considering any questions of proper valuation, the Court should first consider the basic issue of whether any property interest which must be recognized as compensable is present in a given case.[30] The real issue in the *Virginia Electric* case was whether or not the power company, under the circumstances, had a "property" interest the taking of which required just compensation by the Government.

It is the object of this paper to discuss some of the definitions which have been given to the term "property" by legal writers and by the federal courts and then to consider the holding of the *Virginia Electric* case in light of these definitions. It is not contended that the decision of the Court in the *Virginia Electric* case was not correct, inasmuch as the Government apparently conceded that a flowage easement constituted "private property" in that case. It is submitted, however, that such concession by the Government was neither a necessary nor a correct view of the serious questions which shall be considered.

SOME SOCIO-LEGAL DEFINITIONS OF "PROPERTY"

It should be noted that in the discussion to follow, "property" will be used to refer only to *interests* in things rather than the things themselves. Any attempt to define the concept of property in fixed and rigid terms is futile. The concept never has been, is not, and never can have a

[26] *Id.* at 627.
[27] *Id.* at 627.
[28] *Id.* at 638.
[29] *Id.* at 640.
[30] 1 LEWIS, EMINENT DOMAIN § 63 (3d ed. 1909).

definite content fixed for all time.[31] Property law and social life are so intimately interrelated that the institution of property is bound to change in response to changes in the society where it exists.[32] Human beings, whether living in a condition where there is no readily cognizable social organization or in an extremely complicated social structure such as our own, have various needs and desires. Many of these relate to external objects with which the persons are in some way associated. The law of property may be looked upon as an attempt on the part of the state to give a systematized recognition of and protection to these attitudes and desires on the part of individuals toward things. The nature and types of property interests vary according to the subject matter of the property.[33] These attitudes and desires are constantly changing. Thus, the concept of property will vary from place to place and from century to century. Any modern institution is a product of accumulated social development and bears the traces and effects of the successive eras of preceding centuries.[34]

Socio-legal thinkers have given much consideration to the formulation of a workable definition and explanation of the concept. The problem is extremely complex. One writer has said that property is "an abstract term, indigenous to a way of thought, has meanings and compulsions of its own; the institution of property is inseparable from the verbal symbol through which the mind attempts to capture its actuality."[35]

Powell, in his work on real property, concludes that the sociologically minded lawyer thinks of property as the cluster of social usages which regulates the distribution of scarcities.[36] It is his contention that we should believe (and act as if we believed) that private property must find its justification solely in its social contribution.[37]

Halowell has described property as a ". . . complex system of recognized rights and duties with reference to the control of valuable objects . . . linked with basic economic processes . . . validated by traditional beliefs, attitudes and values and sanctioned in custom and law."[38] This definition involves four basic variable factors: the persons, the relationships, the objects, and the sanctions.

Hoebel has also considered the matter of the definition of property."[39] He concludes that "property in its full sense is a web of social relations with respect to the utilization of some object (material or non-material) in which a person or group is tacitly or explicitly recognized to hold quasi-exclusive and limiting connections to that object." In this view, the two essential aspects of property are the object and the web of social relations which establish a limiting and defined relationship between persons and objects. Orthodox lawyers and economists have referred to this limiting relationship as an exclusive right of use, but modern economists and most

[31]Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938).
[32]1 POWELL, REAL PROPERTY ¶ 6 (1949).
[33]1 AIGLER, SMITH, AND TEFFT, CASES ON PROPERTY 1 (2d ed. 1942).
[34]1 POWELL, *op. cit. supra* note 32, ¶ 6.
[35]Hamilton, *Property*, in 12 ENCYC. SOC. SCI. 528 (1934).
[36]1 POWELL, *op. cit. supra* note 32, ¶ 7.
[37]*Id.* ¶ 10.
[38]*The Nature and Function of Property as a Social Institution*, 1 JOUNAL OF LEG. AND POLIT. SOC. 115 (1943).
[39]*The Anthropology of Inheritance*, SOCIAL MEANING OF LEGAL CONCEPTS 5 (1952).

legal thinkers today recognize that "absolute" control over any object is relative. The "exclusive right of control" is, at best, a quasi-exclusive right, always limited by implicit claims and restraints imposed upon the property owner by others.[40]

These definitions, while they do not entirely conform with each other, contain no divergencies which are so pronounced as to make them irreconcilable. They give some insight into the bases for the concept of property, but they are of little more assistance in understanding the concept as it is embodied in the fifth amendment than one other interesting definition: "Property is a euphonius collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."[41] More substance is given to the problem by a consideration of the definitions advance by leading writers in the field of eminent domain and by determining the differences among those definitions.

Nichols[42] refers to the definition of Bentham, who wrote that "The integral or entire right of property includes four particulars: (1) Right of occupation; (2) Right of exluding others; (3) Right of disposition, or the right of transferring the integral right to other persons; (4) Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part, to those in whose possession he would have wished to place it."[43] Nichols states that to those who follow such a concept of property, the corporeal object, although the subject of property, is, when coupled with possession, merely the indicia of invisible rights. Property in a specific object, according to such a view, is composed of the rights of use, enjoyment, and disposition of such object to the exclusion of all others.[44] Property has thus been used with reference to the corporeal object which is the subject of ownership and it has been used to indicate the aggregate of rights which an owner possesses in or with respect to such corporeal object. Nichols makes careful note of this distinction.[45]

Lewis defines property as "certain rights in things which pertain to persons and which are created and sanctioned by law."[46] He indicates that he means to assert that property is exactly what the law makes it.[47] The rights included are the rights of user, the rights of exclusion, and the right of disposition.[48] These rights are not possessed in absolute degree, but are limited.[49] Lewis contends that the word "property" in the constitution should be given a meaning that accords with the ordinary usage and understanding of the large body of citizens who gave the instrument vitality by their votes[50] and which will also secure to the individual the largest degree

[40] *Id.* at 9.
[41] Hamilton, *op. cit. supra* note 35, at 528.
[42] 2 NICHOLS, § 5.1[1].
[43] BENTHAM'S WORKS 182 (1943 ed.)
[44] 1 NICHOLS, § 5.1[2].
[45] *Id.* § 5.1[1].
[46] 1 LEWIS, *op. cit. supra* note 30, § 63.
[47] *Id.* § 63 n.5.
[48] *Cf.*, note 44 *supra*.
[49] 1 LEWIS, *op. cit. supra* note 30, § 63.
[50] Lewis indicates that the "understanding of the dullest individual among the people" is that his property in anything is a bundle of rights. People act in reliance of this idea all the time. *Cf.* note 31 *supra*.

of protection against the exercise of the power intended to be restricted. Lewis asserts that his definition is best suited to meet both these requirements.[51]

The difference in the approaches of Nichols and Lewis is evident. Nichols approves a "physical" concept, wherein attention is directed primarily toward things; Lewis adopts a "mental" concept wherein attention is directed to human beings. It will be seen that the courts have tended toward the physical concept. Under the *physical* concept, in order for compensation to be required, the condemnee must be deprived of the possession of land or some other tangible, physical object. Under the *mental* concept, it is necessary, in order to require compensation, only that there be interference with some of the legal relations that, under this concept, constitute his property.[52]

FEDERAL COURT DEFINITIONS

The courts of this nation have been called upon many times to define "property" in order to resolve issues raised under particular fact situations. One writer has stated that "it is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection."[53] This statement may give great insight into the rationale used by the courts in making specific decisions.

The Supreme Court has said that "property" is either the physical thing which is the subject of ownership or is the aggregate of the owner's right to control and dispose of that thing.[54] Under the fifth amendment, the word "property" has been held to denote the group of rights inhering in a citizen's relations with others which result in certain powers over a physical thing, such as the right to possess, use, and dispose of it. The constitutional provision is addressed to every sort of interest that the citizen possesses.[55]

Property has been held to include every kind of right or interest, capable of being enjoyed and recognized as such, upon which it is practicable to place a money value.[56] The mere fact, however, that a specific right or interest has value does not, in and of itself, give it the status of "property" within the constitutional limitation on taking.[57] Ordinarily, a person has "propery" in a thing if he has untrammeled freedom to use it as he wishes and if he may invoke legal sanctions to protect that freedom, irrespective of whether he is likely to make use of that freedom as another person desires, so long as the other has no power to coerce him.[58]

The question of whether there is a taking of private property for public use by the United States within the meaning of the fifth amendment is to be determined in light of the particular facts and circumstances involved.[59]

[51] 1 LEWIS, *op. cit. supra* note 30, § 64.
[52] Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 224 (1931).
[53] Hamilton, *op. cit. supra* note 35, at 536.
[54] Crane v. Commissioner, 331 U.S. 1, 6 (1946).
[55] United States v. General Motors Corporation, 323 U.S. 373, 377-78 (1944).
[56] United States v. 53¼ Acres of Land, 139 F.2d 244 (2d Cir. 1943).
[57] Reichelderfer v. Quinn, 287 U.S. 315 (1932).
[58] Helvering v. Elias, 122 F.2d 171, 172 (2d Cir. 1941).
[59] United States v. Pee Wee Coal Co., 341 U.S. 114 (1951).

The meaning of "property" as used in the amendment is a federal question, but it will normally obtain its content by reference to local law.[60]

The application of these principles has given rise to much litigation, and varying results have been reached. Numerous courts have refused to find the existence of "property." The revocation of a permit authorizing filling in of submerged land in navigable water was held not to constitute a taking of property [without just compensation].[61] A landowner, having been granted a right of eminent domain, had no interest under this unexercised power which gave rise to an estate of "private property."[62] Other cases readily find "property" to exist. A placer mining claim on public lands, perfected according to law, is property for which just compensation must be paid if the claim is taken by the United States.[63] A lessee for years holding under a valid lease has such an interest in the property taken as to be deemed an "owner" in the constitutional sense and to be entitled to compensation for the taking of that interest.[64]

FLOWAGE EASEMENTS

An easement is an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists. The owner of an easement is entitled to protection from interference by third persons in such use or enjoyment. An easement is not subject to the will of the possessor of the land, nor is it a normal incident of any land possessed by the owner of the interest. An easement is capable of creation by conveyance.[65] The use to which an easement entitles its owner may consist of the privilege of positive action within or upon the land subject to it, or it may consist in a right to compel the owner of the land subject to it to refrain from action he could take were his land free from the easement. If the use is of the first kind, the easement is called an "affirmative easement"; if of the second, it is called a "negative easement."[66] A private easement is generally "property" in the constitutional sense.[67] To entitle the holder to compensation for a taking, however, the right must be an easement and not a mere privilege enjoyed at the will of the owner of the servient tenement.[68]

A "flowage right," which is the right of one owner to flow water upon the land of another by maintenance of a dam, is an "easement" which is a liberty, a privilege, or an advantage in lands without profit and distinct from the ownership of the land itself.[69] The question presented in the *Virginia Electric*[70] case was whether such an interest in land riparian

[60]United States v. Causby, 328 U.S. 256 (1945).
[61]Miami Beach Jockey Club v. Dern, 86 F.2d 135 (D.C. Cir. 1936).
[62]United States *ex rel.* Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1942).
[63]United States v. North American Transportation and Trading Co., 53 Ct. Cl. 424 (1918), *aff'd*, 253 U.S. 330 (1920).
[64]Kohl v. United States, 91 U.S. 367 (1875).
[65]RESTATEMENT, PROPERTY § 450 (1944).
[66]2 AMERICAN LAW OF PROPERTY § 8.5 (Casner ed. 1952).
[67]United States v. Welch, 217 U.S. 333 (1910).
[68]NICHOLS, § 5.72.
[69]Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598, 134 A.L.R. 958 (1941).
[70]365 U.S. 624 (1961).

to a navigable stream is compensable within the terms of the fifth amendment, *i.e.*, whether this type of easement is "property" within that clause.

In the *Twin City*[71] decision, which became procedurally involved with the decision in the *Virginia Electric* case, the problem was whether or not the owner of the fee in such riparian lands was entitled to compensation which included an amount for the value of the land as a site for a hydroelectric power operation. The court stated that the interest of the United States in the flow of a navigable stream originates in the commerce clause of the Constitution.[72] That clause speaks in terms of power, not property, but the power is a dominant one which can be asserted to the exclusion of any competing or conflicting claims. The Court has called that power a "dominant sevitude"[73] or a "superior navigation easement."[74] In the *Twin City* case the Court stated that if the owner of fast lands could demand water-power value as part of his compensation, he could get the value of a right that the Government, in the exercise of its dominent servitude, can grant or withhold as it chooses. In other words, whether the right was a valuable one or an empty one depended solely on the action of the United States. What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it. The Court accordingly ruled that water power value was not properly includable in the computation of what should be "just compensation."[75] It is clear that the exact holding of the *Twin City* case is not controlling in a case involving the question presented in the *Virginia Electric* case, but the rationale to be applied would seem to be identical.

Examination of the "private property" for which the power company claimed compensation should be made in light of the definitions and principles enumerated in the earlier parts of this paper. It has acquired a nonpossessory interest in land in which it did not own any other estate or interest. Its only right was to flood the land with waters backed up by a structure built across a navigable stream. Before any such structure could be built, however, the federal government would have to issue a license to the company allowing such construction.[76] When the company acquired its easement, it knew that it might never be able to exercise the easement if the Government should refuse to issue a license. The company did not have the right to "possess, use and dispose" of its interest in a complete sense; nor did it have "untrammeled freedom" to use that interest as it desired. The only possible use which could be made of the easement was dependent wholly on the permission and approval of the federal government. When the Government chose to exercise its dominant right,

[71]350 U.S. 222 (1956).
[72]U.S. CONST. art. I, § 8.
[73]Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).
[74]United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960).
[75]Subsequently, the circuit court ruled in United States v. 2,979.72 Acres of Land, 270 F.2d 707 (4th Cir. 1959), that the holding of the *Twin City* case did not apply to other elements of value, such as value for agriculture or grazing purposes. The court refused to recognize any difference in this respect regardless of whether the question of compensation was a question involving the owner of the entire fee, including all flowage rights, or just the owner of a flowage easement, distinct from complete ownership of the land. This factual difference which is also present in the *Virginia Electric* case is not noted by the Court.
[76]16 U.S.C. § 797(e) (1952).

any right which the power company had was gone forever. Was the situation any different from that which would have resulted if the power company had requested a license (which it had not done here) and was refused by the Government? Clearly not. Without doubt, in that circumstance the company would be entitled to nothing from the Government; the same result should follow here.

It has been noted that the majority opinion discussed the problem merely as one of valuation. It found value in the easement on the ground that the power company had the ability to destroy the agricultural and forestry uses of the land. If the case had been considered as presenting a problem of whether or not a property interest existed, the Court would never have reached the question of valuation. Having reached it, however, it would seem that any value related to the destruction of these uses would inhere only in the owner of the complete fee. The ownership in the land having been divided as it was, it is difficult to see how the destruction value should in any way apply to the holder of a bare flowage easement over the land of the owner of the rest of the fee. The Court, in effect, required the United States "to pay something for nothing" in the *Virginia Electric* case.[77]

CONCLUSION

The definition of "private property" protected by the fifth amendment has not been any less difficult than the definition of property for other purposes. The problem has apparently been further complicated by the desire of the judiciary to see that any "losses" caused by the public acting in any way are not borne by individuals, but by the public itself.[78] The cause of the private "property" owner should not be allowed to triumph over that of the public where no real interest in property exists. Qualified rights should be considered in light of the qualifying conditions under which they exist. In an age of growing complexity in human relations at all levels, a careful reappraisal of the problems involved in this area should be undertaken by the judiciary.

ROBERT CORONTZOS

[77]365 U.S. 624, 645 (1961) (dissenting opinion).
[78]Any such expansion would properly seem to require constitutional amendment.