30 S.Ct. 527
Supreme Court of the United States.

UNITED STATES, Plff. in Err.,
v.
CORA WELCH and David Welch, Her Husband,
Jesse Wilson, Ella Wilson Brown, et al.

No. 147.
|
Argued April 11, 1910.
|
Decided April 25, 1910.

Synopsis

IN ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment awarding damages to the owner of property permanently flooded by a government dam. Affirmed.

The facts are stated in the opinion.

West Headnotes (1)

[1] **Eminent Domain** Easements and Other Rights in Real Property

The owner of a farm, a part of which is permanently flooded by a government dam, must be compensated, in addition to the value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road.

124 Cases that cite this headnote

Attorneys and Law Firms

***333** ****527** Assistant Attorney General **John Q. Thompson** and Messrs. A. C. Campbell and Percy M. Cox for plaintiff in error.

***336** Messrs. **Edward S. Jouett** and W. M. Beckner for defendants in error.

Opinion

***338** Mr. Justice **holmes** delivered the opinion of the court:

This is a proceeding under the act of March 3, 1887, chap. 359, § 2, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 753, to recover the value of land taken by the United States. It is admitted that a strip of about 3 acres of land lying along the side of Four Mile creek, and running east and west, was taken, and is to be paid for. It was permanently flooded by a dam on the Kentucky river, into which Four Mile creek flows. United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. Manigault v. Springs, 199 U. S. 473, 484, 50 L. ed. 274, 280, 26 Sup. Ct. Rep. 127. The plaintiffs owned other land south of and adjoining the strip taken, and had a private right of way at right angles to the creek, northerly, across land of other parties, to the Ford county road, which ran parallel to the creek and at some distance from it. This was the only practical outlet from the plaintiffs' farm to the county road. The taking of the intervening strip of course cut off the use of the way, and the judge who tried the case found that it lessened the value of the farm $1,700. He allowed this sum in addition to $300 for the land taken. The United States took a writ of error on the ground that the former item was merely for collateral damage not amounting to a taking and of a kind that cannot be allowed; that at most it was only a tort. The case is likened to the depreciation in value of a neighboring but distinct tract by reason of the use to which the government intends to put that which it takes. Sharp v. United States, 191 U. S. 341, 355, 48 L. ed. 211, 216, 24 Sup. Ct. Rep. 114.

The petition, like the form of the finding, lends some countenance to this contention, by laying emphasis on the damage ***339** to the farm, although it is to be noted that, even in this aspect, the damage is to the tract of which a part is taken. 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. Miller v. Horton, 152 Mass. 540, 547, 10 L.R.A. 116 23 Am. St. Rep. 850, 547, 10 L.R.A. 116, 23 Am. St. Rep. 850,

a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner; and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Harvard College v. Stearns, 15 Gray, 1; Smith v. Boston, 7 Cush. 254, ect., where it was held, although there are decisions the other way, that a landowner cannot recover for the obstruction of a public water course, the discontinuance of a public way, or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind. Here there is no question of the plaintiffs' private right.

Judgment affirmed.

Mr. Justice Harlan concurs in the judgment only so far as it allows the item of $300.

All Citations

217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A.N.S. 385, 19 Am.Ann.Cas. 680