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Eminent Domain—What Constitutes an Interference Sufficient to Constitute a Taking.—Cities Service Oil Co. et al. v. City of New York

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expressly included seems well founded by the use of 1 U.S.C. § 1 and the theory of necessary implication.[14]

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Eminent Domain—What Constitutes an Interference Sufficient to Constitute a Taking.—*Cities Service Oil Co. et al. v. City of New York.*[1] —An action was brought by the owner and the lessee of a gasoline station to enjoin the City of New York and the New York Transit Authority from locating and maintaining bus stops in front of the entrances to the station which was located on the corner of two streets, with an entrance on each. The Supreme Court, Kings County dismissed the complaint, the dismissal being affirmed by the Appellate Division, Second Judicial Department and The Court of Appeals. HELD: That the temporary and partial blocking of the entrances did not constitute a taking of property, being merely an interference with a use of property of the type that must be borne by the land owner for the larger benefit of the community and the general public.

The distinction is to be drawn between eminent domain which involves the taking of property for public use, and regulation or interference with property falling short of a taking.[2] The *Cities Service* case falls into the latter category. Although the principle by itself is relatively simple, the application of this principle to concrete cases is much more difficult since it is a question of degree of interference.

In determining whether there has or has not been an interference amounting to a taking, each case must be decided on its own facts. There was no taking when the state rerouted traffic, although the result adversely affected established business.[3] In *Jones Beach Blvd. Estate v. Moses,*[4] cited with approval in *Cities Service,* a more onerous burden was placed on the plaintiff when left turns and U-turns were so limited that one entering the parkway from plaintiff's property and desiring to travel northward was compelled to drive in the opposite direction for five miles before he could turn around. This case, like *Cities Service,* was dismissed. When however, in *Holmes v. State,*[5] a street was closed not leaving a suitable

[14] United States v. A & P Trucking Co., et al., supra note 8, at 124: "The conclusion is not lightly to be reached that Congress intended that some carriers should not be subject to the full gamut of sanctions—merely because of the form under which they were organized to do business."; United States v. Adams Express Co., supra note 7, at 389-390, where the court reasoned that 18 U.S.C. § 835 applied to joint stock companies without the aid of 1 U.S.C. § 1 holding, "But if it [the statute] imposes upon them the duties under the words 'common carrier' as interpreted, it is reasonable to suppose that the same words are intended to impose upon them the penalty . . ."

[1] 5 N.Y.2d 110, 154 N.E.2d 814 (1958).

[2] Bent v. Emery, 173 Mass. 495, 53 N.E. 910 (1899); Pennsylvania Coal Co. v. Mahon et al., 260 U.S. 393 (1922); Wolff v. Mortgage Commission, 270 N.Y. 428, 1 N.E.2d 835 (1936); Nichols, Eminent Domain § 6.3 (3rd ed. 1950).

[3] Clark County v. Mitchell, 223 Ark. 404, 266 S.W.2d 831 (1954); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (Ct. App. 1st D. 1951).

[4] 268 N.Y. 362, 197 N.E. 313 (1935).

[5] 282 App. Div. 278, 123 N.Y.S.2d 179 (1953).

means of access, there was a taking. Some courts hold that when the grade of a road is changed with consequential damage to abutting property both in the form of decreased valuation and of difficulties of access, it constitutes a taking,[6] while other courts have held to the contrary.[7] These cases are not different in their application of the principle discussed above, but on the application of the facts to this principle and, therefore, difficult to reconcile.

In all cases there appears to be a balancing of the burden to the property holder against the benefit to the public. The benefit to the public outweighed the burden to the plaintiff in *Cities Service*. The result of this case is based on the judgment of the court as to the degree of interference and as to whether or not it was an interference sufficient to establish a taking. This degree of interference necessary to constitute a taking is not easily defined. The court considers the extent of the diminution of value of the property. "When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain . . ."[8] "The rule seems to be deducible from the decisions of the courts . . . that if the owner of property, because of the permanent physical improvement itself, suffers damages . . . distinguished from mere inconvenience, he has a right to action . . ."[9] "On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided"[10] the determination of whether there is a taking is reached. The judgment of the court as to the degree of interference necessary to constitute a taking depends on the diminution of property value, permanency of the interference, the nature of the act itself and whether the act is beneficial to the public. Thus the judgment of the court in *Cities Service* was determined.

IRWIN N. ALBERTS

Food, Drug and Cosmetic Act—Statutory Construction—Coal-Tar Colors—Standard of Adulteration.—*Flemming v. Florida Citrus Exchange*.[1]—A petition was brought to review an order of the Secretary of Health, Education and Welfare, which disallowed the use of coal-tar in the coloring of oranges. The United States Court of Appeals for the 5th Circuit set aside the order,[2] holding that, even though the coal-tar coloring (Red 32) was per se toxic, it did not adulterate the oranges as proscribed by the Food, Drug and Cosmetic Act of 1938,[3] since the quantity of poison

[6] Boal v. Chicago, 301 Ill. App. 536, 23 N.E.2d 237 (1939); Tulsa v. Hindman, 128 Okla. 169, 261 Pac. 910 (1927); Cucurullo v. City of New Orleans, 229 La. 463, 86 So.2d 103 (1956).

[7] State v. Snider, 131 W. Va. 650, 49 S.E.2d 853 (1948); Cantrell v. Pike County, 255 S.W.2d 988 (Ky. 1953).

[8] Pennsylvania Coal Co. v. Mahon et al., supra note 2, at 413.

[9] Tulsa v. Hindman, 128 Okla. 169, 171, 261 Pac. 910, 911 (1927).

[10] Rideout v. Knox, 148 Mass. 368, 374, 19 N.E. 390, 393 (1889).

[1] 358 U.S. 153 (1958).

[2] Florida Citrus Exchange v. Folsom, 246 F.2d 850 (5th Cir. 1957).

[3] Act June 25, 1938, c. 675, § 1, 52 Stat. 1040, 21 U.S.C. §§ 301-392.