Buffalo Law Review

Volume 1 | Number 3 Article 12

4-1-1952

Eminent Domain—Private Property Destroyed Pursuant to Scorched Earth Policy—Held Compensable

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EMINENT DOMAIN—PRIVATE PROPERTY DESTROYED PURSUANT TO SCORCHED EARTH POLICY—HELD COMPENSABLE

Five days following Pearl Harbor, the United States Army seized the Plaintiff's oil supply in Manila. Some of this oil was used for military purposes. On December 27, 1941, the Army notified the Plaintiffs that the remaining stock and facilities were being requisitioned for destruction to prevent seizure by oncoming Japanese forces. On December 31, a few hours before the Japanese took Manila, the installations were destroyed. The Government has conceded liability for the oil consumed. Plaintiffs sue to recover for that portion of the oil supply and those facilities which were destroyed. Held (3-2): There was a taking within the meaning of the Fifth Amendment and the Government must compensate Plaintiffs for the property destroyed. *Caltex (Phillipines) Inc. v. United States,* 100 Fed. Supp. 970 (Court of Claims—Nov. 6, 1951).

The determination of the *Caltex* case was based on the authority of *Grant v. United States,* 1 Ct. Cl. 41, 2 Ct. Cl. 551 (1863) and *Wiggins v. United States,* 3 Ct. Cl. 412 (1867). In the *Grant* case, the Plaintiff had been furnishing commissary supplies to the Union Army. When Confederate Forces were about to occupy the territory, property belonging to the Plaintiff was destroyed under a military order. The theory relied upon by the Government was that destruction occurred under conditions of "overruling necessity," and consequently a "taking" was not incurred. However, the Court held that the "law of overruling necessity" was applicable only to private actions (drawing an analogy to self defense) and not relevant to Governmental acts. State decisions dealing with privately conducted destruction to prevent disaster were thereby distinguished; for example, destruction of certain buildings to check the spread of fire. See, *Hale v. Lawrence,* 3 Zabriskie (N. J.) 590 (1851); but *cf. Russell v. The Mayor,* 2 Denio 461 (N. Y. Ct. of Errors 1845).

The Court in the *Grant* case then extended its analysis to situations in which damages were incurred during war time. It distinguished between damages caused by the State and those caused by the enemy. The former, whether taken for utilization or destruction, it held compensable; the latter noncompensable. The Court viewed property confiscated for war purposes as subject to a "taking," for which compensation must be given to the same extent as property taken for any other public benefit. "When property is to be put to the good of the nation, the public generally should bear the cost" (p. 44). The test as promulgated by the Court in the *Grant* case was without regard to conditions under which the taking occurred.

The dissenting judges in the instant case refused to follow the broad distinction set forth in *Grant v. United States, supra.* They proposed that governmental destruction in the face of an impending military encounter was noncompensable. Their position is well summarized in the words of Jones, C. J.:

> "This Court has been zealous in upholding the force of the eminent domain provision of the Fifth Amendment. We have not been unmindful of the principle that the Amendment is not suspended in time of war, and I do not propose that we should be. However, a scrupulous regard for the Amendment does not require us to say that property destroyed by military action was 'taken for public use.' I think that the loss for which compensation is sought here, considered in its context of time and place, must be regarded in law what it was in fact—a loss incident to battle, a loss—'inflicted by our own or enemy forces in the conduct of a campaign.'" (p. 982).

The issue, to those dissenting, was whether the remaining oil and the permanent facilities were taken for public use or whether they were destroyed as an inevitable result of existing battle conditions. Reliance was placed on *United States v. Pacific Railroad,* 120 U. S. 227, 7 Sup Ct. 490 (1886), which involved the destruction by Union Troops of certain bridges located on Claimant's land, in order to prevent the advance of the Confederate Army. There, the Supreme Court in discussing the right to compensation for the military destruction of Claimant's property declared:

> "Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, were lawfully ordered. The safety of the State in such cases overrides all considerations of private loss." (p. 234).

The Supreme Court in the *Pacific Railroad* case did not rely on the holding of the *Grant* case. Instead, the Court chose to base its decision on the authority of two cases heard before Congress at a time when there was no Court of Claims, and recovery was by Act of Congress. The first case, *Am. State Papers,* Class XIV, Claims p. 199, involved destruction by United States Forces of an American Claimant's property which had been seized by the enemy. Congress in disallowing the claim characterized the loss as a "suffering from the general ravages of war." Had the test of the *Grant* case been applied, there would have been recovery, since the damage was not inflicted by the enemy. The second case decided by Congress involved substantially the same facts as the first. Recovery was denied on the grounds that the loss was sustained in "necessary operations of war." *Am. State Papers,* Class XIV, Claims p. 835; *Annals of Congress,* 17th Cong., 1st Sess., Part I, p. 311 (1822).

Summarizing the wisdom of these Congressional cases, the Supreme Court in

United States v. Pacific Railroad, supra, said: "The Government cannot be charged for injuries to, or destruction of, private property caused by *military operations of armies in the field, or measures taken for their safety and efficiency*——." (Italics supplied) (p. 239).

The language of the Congressional cases and that of the Supreme Court in the *Pacific Railroad* case shows the test there employed to be substantially at odds with the test set out in the *Grant* case and adhered to by the Majority in the instant case. The precedent—value of either line of reasoning is relatively weak, since military destruction of American citizens' property is a novel fact situation in our law, and cases concerned with this issue have been rarely litigated.

The facts of the principle case show that the approach of Japanese forces necessitated a military decision. The choice was to stay and fight or retreat. Had the decision been to fight, and during the battle had the property in question been destroyed, no compensation would be required. Retreat was the wiser alternative, and as a part of this maneuver the oil was destroyed. The Fifth Amendmen should not be applied without regard for the realities of the situation under which the alleged taking occurred. The circumstances here involved reveal that Plaintiff's property was not taken for any public benefit but was destroyed as a result of a hostile engagement between our forces and those of the enemy.

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ADMIRALTY—CONTRIBUTION DENIED IN NON-COLLISION CASE

Libellant, a shipfitter's employee was injured through the joint negligence of his employer and the owner of the ship on which he was working. Libellant sued the shipowners who sought contribution from the shipfitting company. The trial judge refused to follow a jury finding of comparative negligence but held the shipfitting company liable for contribution to the extent of one half of libellant's total injuries. *Halcyon Lines v. Haenn,* 89 F. Supp. 765 (E. D. Penn. 1950). The Court of Appeals upheld the right to contribution but modified the amount libellant could recover to a sum that he would have received if he had elected to sue under the Longshoreman's and Harbor Worker's Act, 44 Stat. 1424 U. S. C. A. Sec. 901, *Baccile v. Halcyon Lines,* 187 F. 2d 403 3rd Cir. 1951).

The Supreme Court through Justice Black (7-2) denied the right to contribution, finding that congressional action would be the appropriate way to create that remedy, in view of the great amount of admiralty legislation. *Halcyon Lines v. Haenn,* 72 S. Ct. 277 (1951).

The common law rule is that joint tortfeasors are not entitled to contribu-