SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 19 | Issue 4

1968

Eminent Domain--Taking or Injury of Property as Grounds for Compensation--Navigational Servitude [*United States v. Rands*, 389 US. 121 (1967); *Goldberg, Inc. v. State*, 62 Cal. Rptr. 401, 432 P.2d 3, *cert. denied*, 390 U.S. 949 (1968)]

Harold R. Weinberg

EMINENT DOMAIN — TAKING OR INJURY OF PROPERTY AS GROUNDS FOR COMPENSATION — NAVIGATIONAL SERVITUDE

United States v. Rands, 389 U.S. 121 (1967); *Colberg, Inc. v. State*, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968).

It might be assumed that every substantial taking of a private property interest for a public use must be compensated pursuant to a constitutional provision. If this assumption were limited to those interests taken by exercise of the sovereign power of eminent domain, it would be correct.[1] *No compensation* is the rule, however, when the federal and some State governments take or impair certain private property interests in the exercise of their navigation powers.[2]

The federal privilege of no compensation, which has alternately been termed a "superior navigational easement,"[3] a "dominant servitude,"[4] or an "easement of navigation,"[5] is often rationalized on the theory that when the federal government exercises its navigation power and a property interest burdened by the dominant servitude is taken, there is no damage within the meaning of the fifth amendment because the taking is a result of the lawful exercise of a power to which the interest has always been subject.[6] The privilege may be invoked only when the power is exercised upon a navigable body of water[7] and for a purpose beneficial to navigation.[8]

---

[1] *See* 1 C. NICHOLS, EMINENT DOMAIN § 1.3 (rev. 3d. ed. 1964).

[2] The federal government derives its power to control and protect the country's navigable waters from the commerce clause of the Constitution. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The States' navigation power is based upon ownership of the land beneath their territorial waters. *See generally* Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS § 36.4(A) (Clark ed. 1967).

[3] United States v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[4] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); United States v. Commodore Park, Inc., 324 U.S. 386 (1945).

[5] United States v. Twin City Power Co., 350 U.S. 222 (1956).

[6] *E.g.*, United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592 (1941).

[7] This limitation does not greatly restrict the scope of the privilege. Navigable bodies of water have been held to include not only those which are navigable in fact, but also those which may become navigable after improvements are made. United States v. Appalachian Power Co., 311 U.S. 377 (1940). Waterways once navigable remain so regardless of their actual condition. *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

[8] Again, the limitation is not stringent; the benefit to navigation need not be the

Furthermore, only a limited class of property interests may be taken without compensation. The courts originally held that only those interests in land below the high-water mark of a navigable body of water were burdened by the dominant servitude; hence, if fast lands — those above the high-water mark — were taken, the owner would have to be compensated.[9] This federal power has been extended, however, to make any value in riparian land arising from the land's proximity to a navigable body of water subject to its exercise.[10] *United States v. Rands*[11] is a recent case which turned on the broadened federal dominant servitude.

Respondent Rands owned land along the Columbia River in Oregon. The land was leased, with an option to purchase, to the State which contemplated the creation of an industrial park which would possess its own port facilities. The option was never exercised because the land was condemned by the United States for use in a river development project.[12]

In determining that the port site value of Rands' land was not compensable, the Supreme Court, in reversing the Ninth Circuit, found the case of *United States v. Twin City Power Co.*[13] to be controlling. In *Twin City*, the United States condemned land upon which the power company had intended to construct a powerplant. The Court held that the government was not obligated to compensate the landowner for the element of value arising from the land's potential as a powerplant site because this element was "a value *in the flow of the stream*,"[14] thus subservient to the federal

exclusive or even the major purpose of the project. *See* United States v. Grand River Dam Authority, 363 U.S. 229 (1960). A congressional declaration of navigational purpose is virtually conclusive of the applicability of the federal privilege under the commerce clause. *See, e.g.*, Arizona v. California, 283 U.S. 423 (1931).

9 *See* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 39 (1963) [hereinafter cited as Morreale].

10 *See id.* at 41; United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592, 595 (1941).

11 389 U.S. 121 (1967).

12 Rands' land was conveyed to Oregon pursuant to 33 U.S.C. § 578 (1964). At the subsequent condemnation proceeding the district court overruled Rands' motion to amend his pleading in order to challenge the right of the United States to condemn property. The district court held that the land's use was not compensable as a port site. United States v. Rands, 224 F. Supp 305 (D. Ore. 1963). The court of appeals reversed and remanded, holding that Rands should have been given an opportunity to raise the defense under FED. R. CIV. P. 71A, and that the Government was required under the fifth amendment to compensate Rands for the fair market value of the land as a port site. Rands v. United States, 367 F.2d 186 (9th Cir. 1966).

13 350 U.S. 222 (1956).

14 *Id.* at 225.

navigational servitude. The Court in *Rands* reasoned that port site value also derived from the accessibility of riparian land to navigable waters and for the same reason must also be noncompensable.[15]

This conclusion appears correct. Access to a body of water is the cardinal element of powersite value and should therefore go uncompensated when it stands alone as well as in combination with other noncompensable values. Furthermore, had the United States destroyed respondent's access to the river by building a structure in the water in front of his land,[16] or by changing the course of the river,[17] respondent's loss would, in either case, have been uncompensated.

Perhaps more significant than the holding in *Rands* was the overruling by the Court of *United States v. Chandler-Dunbar Water Power Co.*[18] This decision stood for the dual proposition that while the value of riparian land attributable to an operative powerplant is not compensable, the value derived from locks and canals is. The rationale demanding this distinction was not articulated by the Court and several writers have attempted to fill this void. The best of these explanations concluded that the holding was "untenable."[19] The *Twin City* Court suggested that the dual holding in *Chandler-Dunbar* was based on the fact that the locks and canals were in aid of navigation.[20] Despite this explanation, several commentators suggested that *Twin City* overruled *Chandler-Dunbar* sub silentio.[21] This observation has been borne out. In the principal decision, the Court said in reference to the lock and canal awards: "That aspect of the decision has been confined to its special facts, and, in any event, if it is to any extent inconsistent with *Twin City*, it is only the latter which survives."[22] In the future it is highly unlikely that the Court will make nice distinctions between various values in riparian land that, in fact, derive their value from the flow of a stream.[23]

---

15 389 U.S. at 124-25.

16 *See* Gibson v. United States, 166 U.S. 269 (1897).

17 *See* South Carolina v. Georgia, 93 U.S. 4 (1876).

18 229 U.S. 53 (1913).

19 *See* Morreale at 48-49, 52.

20 350 U.S. at 226-27.

21 *See* Morreale at 52-53 & n.297.

22 389 U.S. at 126-27.

23 The propriety of compensating Rands for the agricultural value of his land was not questioned. If such land were dependent on water from the river for irrigational purposes, presumably its agricultural value would also be noncompensable.

Subsidiary to the federal navigation power is the States' power to control the navigable waters within their territorial limits.[24] Several State courts have reasoned that an exercise of the State navigation power may also be accompanied by a privilege of no compensation.[25] In limiting the operation of this servitude to certain riparian interests, and permitting the privilege to be exercised only in aid of navigation, these courts have adopted limitations akin to those placed on the federal servitude.[26] The Supreme Court of California, in *Colberg, Inc. v. State*,[27] permitted the State to invoke its privilege of no compensation in conjunction with a project which *did not* benefit navigation.

Petitioner Colberg, Inc., for more than 60 years had operated a shipyard riparian to the Upper Stockton Ship Channel — a waterway having only one access by water to the Pacific Ocean. The State proposed to construct a pair of freeway bridges across the channel at a point between petitioner's facilities and this sole access. The proposed bridges were to have a clearance of 45 feet. Eighty-one percent of petitioner's business involved ships with superstructures in excess of 45 feet from the waterline. Anticipating the destruction of his business, petitioner sought a declaratory judgment to ascertain, prior to construction of the bridges, whether he would have a cause of action for damages under the law of eminent domain.

In an unreported opinion, the trial court held that the construction of the bridge was an exercise of the State's rightful control over the use of its territorial waters and would not be compensable as a taking or damaging under the California constitution.[28] The court of appeals reversed, holding that the proposed bridge project

---

[24] *See* note 2 *supra*. *See also* Sato, *Water Resources — Comments Upon the Federal-State Relationship*, 48 CALIF. L. REV. 43 (1960).

[25] *E.g.*, Beidler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904); Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936); Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961); State *ex rel.* Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

[26] *See* 26 AM. JUR 2D *Eminent Domain* § 191 (1966); Annot., 89 A.L.R. 1156 (1934). Though the no-compensation rule is inapplicable because a project is not in aid of navigation, damage to a private owner may still not be compensable. *See* State *ex rel.* Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964), where the relator's loss was not sufficient to constitute a "taking" within the meaning of OHIO CONST. art. I, § 19.

[27] 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968).

[28] *See* Colberg, Inc. v. State, 55 Cal. Rptr. 159, 161 (Ct. App. 1967). The eminent domain provision of the California Constitution states: "Private property shall not be taken or damaged for public use without just compensation . . . ." CAL. CONST. art. I, § 14.

was not an exercise of the State's navigational power and that in an appropriate condemnation proceeding, plaintiff could be awarded compensation upon demonstrating compensable damage.[29]

The California Supreme Court, with two justices dissenting, stated that "the State's power to regulate and control its navigable waters is not limited to purposes of navigation, and the servitude in its favor is of a commensurate scope."[30] The implications of the holding are significant. By removing one of the three usual limitations placed on the operation of the doctrine of dominant servitude — that the servitude may be exercised only in aid of navigation — the court suggested that the privilege of no compensation is available for any project benefiting commerce which takes or damages any of those interests customarily subject to the dominant servitude.

The line of reasoning followed by the court may be illustrated as follows: (A) The State's power to regulate its navigable waters is *broader* than the federal government's paramount regulatory powers in these waters; (B) the privilege of no compensation may accompany the exercise of the federal government's paramount powers; and therefore (C), the privilege of no compensation which may accompany the exercise of a State's power is *broader* than the federal government's privilege.

The court's major premise is sound. The power of a State to perform acts consistent with the trust under which it owns its navigable waterways is considered absolute until Congress acts on the same subject.[31] The minor premise is also correct and constituted the broad principle upon which the *Rands* case was decided. The validity of the court's conclusion is questionable since true syllogistic logic was not employed. Though numerous courts have held that their respective jurisdictions have the benefit of a dominant servitude,[32] none have given this servitude the scope that the California servitude was held to possess.

The court initially sought to support its conclusion by a group of cases which purportedly held "that the state's servitude operates upon certain private rights . . . whenever the state deals with its navigable waters in a manner consistent with the public trust under which they are held."[33] However, none of these decisions involved

[29] Colberg, Inc. v. State, 55 Cal. Rptr. 159, 167 (Ct. App. 1967).

[30] 432 P.2d at 14 n.17, 62 Cal. Rptr. at 412 n.17.

[31] *See* 56 AM. JUR. *Waters* § 204 (1947); Sato, *supra* note 24.

[32] *See* cases cited note 25 *supra.*

[33] 432 P.2d at 11-12, 62 Cal. Rptr. at 409-10.

an application of the doctrine of navigable servitude. Instead, four of the decisions are representative of cases restricting the power of the State, or an individual, to alienate the bed of a navigable body of water by holding that such a conveyance is subject to the power of the State to utilize this area for a public purpose.[34] A fifth dealt with a similar principle applicable to tidelands — riparian land which is submerged at high tide.[35] The remaining two cases contain dicta suggesting the doctrine of navigational servitude is available for the general purpose of promoting commerce, but neither case was actually decided on that basis.[36]

It is arguable that some of these precedents require the loss of Colberg to go uncompensated. None provide support, however, for achieving this end by casting out the "navigational purpose" limitation. The elimination of this limitation was based primarily upon policy.[37]

The majority viewed the "navigational purpose" limitation as

---

[34] *E.g.*, Lovejoy v. City of Norwalk, 112 Conn. 199, 152 A. 210 (1930); Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307 (1918), *aff'd*, 249 U.S. 540 (1919). Both cited cases held that an individual who leases underwater land from a municipality for the purpose of propagating oysters will not be compensated if the same municipality frustrates the lessee's purpose by dumping sewage into the waters. For a discussion of the "oyster" cases see 1 POWELL, REAL PROPERTY § 160 (1949) [hereinafter cited as POWELL] and Annot., 3 A.L.R. 762 (1919).

In Crary v. State Highway Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953) plaintiff possessed the statutory privilege of growing oysters and erecting a bathhouse on the river bottom adjacent to her riparian land. Though this privilege became worthless because of the construction of a bridge, the court denied plaintiff compensation for an alleged taking because it viewed the bridge as an additional public use upon property already set aside for a public purpose. Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942) involved a nonriparian owner who possessed the right to utilize the water of a public lake for activities such as boating and bathing. The court held that his rights were not inviolate in the face of regulatory ordinances passed by a municipality for the benefit of the public welfare. A general discussion of these "public purpose" decisions will be found in 1 POWELL § 160; Stone, *supra* note 2, at 196-98; 32 MINN. L. REV. 484, 491-92 (1948).

[35] In City of Newport Beach v. Fager, 39 Cal. App. 2d 23, 102 P.2d 438 (1940), appellant's access to navigable water was cut off when the municipality reclaimed and filled tideland. In an action to quiet title the court held that any right of access over publicly owned tidelands may be terminated whenever the public purpose so requires. For a discussion of tideland decisions, see 1 POWELL § 163, at 657-60.

[36] *See* Milwaukee-Western Fuel Co. v. City of Milwaukee, 152 Wis. 247, 139 N.W. 540 (1913) and Frost v. Washington County R.R., 96 Maine 76, 51 A. 806 (1901) where both courts reasoned that federal approval of a bridge was conclusive on the question of whether the bridge harmed navigation and that if it did not harm navigation it could not be considered a nuisance. The *Frost* case further reasoned that although a party's access to his wharf was destroyed by the construction of a federally approved structure, he suffered no compensable loss because his loss was the same as that of any other "persons who might have occasion, however seldom, to navigate the channel." *Id.* at 86, 51 A. at 809. The conclusion is highly questionable.

[37] *See* 432 P.2d at 12, 62 Cal. Rptr. at 410.

having originated in an era when the bulk of the demands placed on navigable waters by commerce was for surface transportation. The diversified, burgeoning demands of modern commerce upon navigable waters, particularly in densely populated areas, impelled the court to expand the doctrine beyond its traditional limits.

What considerations will a court in another jurisdiction have to make prior to adopting the holding in *Colberg*? First, it will have to overcome the repugnance of shifting the cost of a project which benefits commerce from public or commercial interests to a single or small handful of private citizens.[38] This future court will next have to be convinced that the increased demands of commerce upon navigable waters in populous areas militate for this shift, and not for cost distribution through taxation, tolls, license plate fees, or similar means.[39] Finally, it must be satisfied that a rationale which permits the State to build a bridge that destroys the business of a shipyard without compensation to the owner is not anomalous in light of the fact that had the bridge approach ramps been placed on the same property, the law of eminent domain would have required compensation.[40]

A judge might choose to go even further in his analysis and consider the soundness of the doctrine of navigational servitude when kept within its traditional limitations. Although the doctrine has often been applied by the Supreme Court in decisions such as *Rands*, and has been expanded by a respected State supreme court in *Colberg*, it has also been criticized.[41] Although there is some historical justification for the no-compensation privilege,[42] the courts have never articulated convincing reasons for its continued application.[43] The rationale most often presented to justify the privilege is not well founded because in a sense all private property

[38] The court might also consider the caveat of Professor Nichols:

> [T]he practice of denying compensation for the taking of property for the public use on the ground that it is merely the exercise of a public right is capable of such unlimited possibilities of abuse as to be a dangerous one, and should not be extended in the absence of an unquestioned historical foundation for the public right claimed. 2 C. NICHOLS, *supra* note 1, § 5.795[2], at 295-96.

[39] *See* 432 P.2d at 15, 62 Cal. Rptr. at 413 (dissenting opinion).

[40] The dissent in *Colberg* also pointed out that the law of eminent domain in California would require that Colberg be compensated if its *access to the highway* were cut off by a public works project. This is another anomaly. *See id.* at 17-19, 62 Cal. Rptr. at 415-17.

[41] *See* Morreale at 19-31; Sato, *supra* note 24, at 47, 57. *See also* 55 MICH. L. REV. 272, 275 (1956); 13 MONT. L. REV. 102, 108 (1952).

[42] Morreale at 25-31.

[43] *See id.* at 21-22.