St. Mary's Law Journal

Volume 3 | Number 2 Article 13

12-1-1971

The Mere Announcement of Impending Condemnations, Coupled as It May Well Be with Substantial Delay and Damage, Does Not, in the Absence of Other Acts Which May be Translated into an Exercise of Dominion and Control by the Condemning Authority, Constitute a Taking so as to Warrant Awarding Compensation.

Shelby A. Jordan

The *Kelsey-Seybold* decision would seem to overrule precedent in Texas with regard to the right of a child to maintain an action for damages resulting from the alienation of his parent's affections. The effect of the decision in the instant case is a recognition of the right of a child to bring an action for alienation of affections. In view of the fact that Texas has recognized the right of the wife to sue for alienation of her husband's affections,[65] there seems to be no theoretical reason why the child should not be granted a right to the affections of his parents. In accord with the modern outlook on domestic relations, it has been contended that the interest of the child in an undisturbed family life is at least of equal importance with that of his parent's, and is entitled to equal consideration and redress.[66] The only objections to this position may come from the considerations which underlie the trend to limit, if not abolish, the cause of action for alienation of affections. Whether these considerations are strong enough to inhibit the application of a theoretically sound rule is a matter of opinion.[67]

Jan Weaver Busby

EMINENT DOMAIN—URBAN RENEWAL—DE FACTO TAKING—THE MERE ANNOUNCEMENT OF IMPENDING CONDEMNATIONS, COUPLED AS IT MAY WELL BE WITH SUBSTANTIAL DELAY AND DAMAGE, DOES NOT, IN THE ABSENCE OF OTHER ACTS WHICH MAY BE TRANSLATED INTO AN EXERCISE OF DOMINION AND CONTROL BY THE CONDEMNING AUTHORITY, CONSTITUTE A *Taking* SO AS TO WARRANT AWARDING COMPENSATION. *City of Buffalo v. J. W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

In 1954 the claimant's property was included in an area designated as "blighted" by the city of Buffalo, New York, for urban renewal purposes under the Buffalo Redevelopment Project. The claimant, J. W. Clement, was and is in the business of printing national magazines, including TIME and LIFE. With the enormous equipment needed for such operations, moving plant and equipment was not something that could be postponed until the last minute. Beginning in 1954, and

65 Norris v. Stoneham, 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932, no writ); Burnett v. Cobb, 262 S.W. 826 (Tex. Civ. App.—Amarillo 1924, no writ); *cf.* Nickerson v. Nickerson, 65 Tex. 281 (1886). Due to the similarity of the status of the wife and child at early common law, it seems that the child's right to bring action for alienation of affections should be analogous to that recognized in favor of the wife. At early common law both the wife and child were viewed as servants of the husband or father and neither was entitled to his "services." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 873, 881, 886 (4th ed. 1971).

66 Note, 39 CALIF. L. REV. 294, 297 (1951). *See* Note, 32 BOS. U.L. REV. 82, 88 (1952).

67 These considerations were criticized as being unconvincing in a note in 20 CORNELL L.Q. 255 (1935) but seemed to be convincing to the author of the note discussing the *Morrow* case in 83 U. PA. L. REV. 276 (1934).

continuing through April 1963, when the claimant had completed his move to new facilities, the city of Buffalo frequently announced through letters, news releases and open hearings, its intention of condemning the claimant's property. When the condemnation of properties actually began in 1957, and the claimant had made such efforts as he could to be excluded from the project, he then began to look for a suitable place to relocate. Beginning in 1960 the claimant was informed by project officials that his property would be condemned by 1964. But in 1961 this date was shortened to 18 to 24 months. The claimant's relocation project was completed by 1962, although he did not completely vacate the Buffalo, New York, plant until April 1963. The claimant alleged that inasmuch as his property was unrentable and unsalable, and surrounding properties were in a severe state of decay, the protracted delay of condemnation destroyed the value of the property and made the property no longer fit to the defendant as he had been using it and planned to use it in the future. The lower court held there was a "de facto taking" of Clement's property by the city in April 1963, "inasmuch as the City's acts forced Clement to move from its property at that time, rendering the property not only unsalable but unrentable yielding no income whatever."[1] The judgment award totaled $2,030,306.96. Held—*Modified and remanded.* A *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.[2]

Accordingly, the mere announcement of impending condemnation, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation.[3]

The sovereign's right of eminent domain is limited by the fifth amendment to the United States Constitution. The fifth amendment reads "[N]or shall private property be taken for public use, without just compensation"[4] and thus, without further explanation, leaves every term to judicial determination. The crucial problem of when private property is "taken" was first determined in *Transportation Company v. Chicago*,[5] where the Supreme Court held that when the overflow of land through the erection of a dam made the continued use of the property impossible, a "taking" is recognized. But this rule limited a

1 City of Buffalo v. J. W. Clement Co., 311 N.Y.S.2d 98, 106 (Sup. Ct. 1970).
2 City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971). (Court's emphasis.)
3 *Id.* at 904.
4 U.S. CONST. amend. V.
5 99 U.S. 635, 25 L. Ed. 336 (1879).

"taking" to a physical invasion and a practical ouster of possession of the land. This interpretation has subsequently been expanded two ways. First, many state constitutions have added the word "damaged" after the word "taken" to provide that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."[6] Second, the due process clause has been extended to the protection of property and the taking of a beneficial use is now treated as tantamount to a taking.[7]

The particular dilemma of ascertaining when a "taking" occurs under urban renewal projects has been the issue in litigation since the constitutionality of urban renewal was first upheld.[8] Generally, under federal case law, the date of taking for which compensation is to be paid is the date on which:

> [T]he verdict is confirmed, the deed executed, and award paid .... [But] where the actions of a governmental body are such as to amount to a taking of private property, regardless of whether there is an eminent domain proceeding, . . . in such situations, compensation is given for the taking when it occurs.[9]

This was illustrated in *Sayre v. United States*,[10] in which the court held that an abuse in exercising eminent domain would amount to a taking if the abuse "directly and proximately contributes to, hastens, and aggravates . . . the deterioration and decline in value of the area and the subject property."[11] Thus, the majority of federal courts recognize

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6 TEX. CONST. art. I, § 17. Other state constitutions which include the word "damage" are: Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wyoming.

7 *See* 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 4.1, at 428 (3d ed. 1964). The due process clause in the fifth amendment only has application to the federal courts. In 1868, however, the fourteenth amendment to the Federal Constitution was adopted, which expressly provided that no state should deprive any person of "life, liberty or property without due process of law."

8 The cleaning of urban slum areas and their redevelopment for new public uses had its impetus with the Housing Act of 1949. Pub. L. No. 81-171, 63 Stat. 413 (codified in scattered sections of 12, 42 U.S.C.). The constitutionality of urban renewal was tested and upheld in Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). Since then, numerous slum clearance or urban renewal programs have resulted from state legislation, followed by litigation in the state courts testing their constitutionality. Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1950). The court held that no provision of the Constitution of Texas prohibits the Legislature from creating a governmental agency and body politic as provided in the urban renewal statute under consideration. *Id.*

9 Foster v. City of Detroit, 254 F. Supp. 655, 662 (E.D. Mich. 1966). Under the exception to the general rule, such "actions of Governmental Body" cited to are as follows: commencing a condemnation action, prolonging it while the city encourages deterioration by lax police protection, garbage pickup, filing a *lis pendens*, tearing down buildings, ordering welfare tenants to move, then abandoning the project and commencing a new proceeding at which the awards are based solely on value at that (latter) time.

10 282 F. Supp. 175 (N.D. Ohio 1967).

11 *Id.* at 185.

that when there are actions by the condemning authority which tend to directly depreciate the value of the claimant's property before actual condemnation proceedings are commenced, it can amount to a "de facto taking."[12]

The majority of state courts having litigation on the issue of "de facto taking" under urban renewal projects recognize that certain acts on the part of the condemning authority can amount to a "de facto taking." The State of Ohio, in agreement with federal decisions, recognizes that "[S]ince a property owner may not profit from an increase in value resulting from improvement, he may not be made to suffer the depreciation of his property occasioned by a public project in which his property is included."[13] Another Ohio court ruled that the "standard for measuring the compensation to be awarded [should be] the fair market value of it as it was immediately before the city of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property."[14] The Michigan courts have upheld "de facto taking" when a city, by "calculated actions"[15] reduced the value of private property and thereby deprived the owner of just compensation. In *Jersey City Redevelopment Agency v. Kugler*,[16] the court upheld a statute which, in effect, eliminated any possibility

12 Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970). Where the plaintiff owned apartment buildings in an urban renewal area, the court found there was a "de facto taking" because the totality of these acts by the city (extensive or protracted delay, failing to safeguard property to prevent deterioration, removing all indicia of a residential area, making the property practically inaccessible by blocking streets) contributed to and accelerated the decline in value of plaintiff's property, as to constitute a taking of the property within the fifth amendment to the United States Constitution. *Id.* at 370. *See also* Drake Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970), where there was pending legislation of possible condemnation of the claimant's land. The National Park Service, after deliberately thwarting the claimant's subdivision attempt by applying pressure on private purchasers not to purchase because of pending condemnation legislation, refused to purchase the land. The court held it was intended for the Park Service in this case to deal with the plaintiff from the outset in one of the designated fashions, purchase, exchange or option contract. Failure to do any of these and at the same time to deal with the plaintiff as opinions and findings describe was a taking. *Id.* at 586.

13 Becos v. Masheter, 283 N.E.2d 548, 551 (Ohio 1968).

14 City of Cleveland v. Carcione, 190 N.E.2d 52, 57 (Ohio Ct. App. 1963). In this case, the "active steps" referred to by the court included the city's instructions to welfare recipients to move or forfeit their allotments, destruction of surrounding buildings, lack of police protection resulting in extensive vandalism and protracted delay in condemning the property. *Id.* at 54.

15 City of Detroit v. Cassese, 136 N.W.2d 896 (Mich. 1965). Although the court recognized a "de facto taking," they held certain acts which have constituted a "de facto taking" in other jurisdictions as not sufficient to amount to such in this jurisdiction. The issue of satisfactory performance of such services as lax police protection, reduction in refuse collection, street cleaning and street repair would *not* be relevant in absence of proof of "calculated actions" or specific directives by city officials for the purpose of reducing the value of appellant's properties. The court included among "calculated actions" such acts as sending letters to tenants, filing *lis pendens*, intense building department inspections and citations against owners for any violations of the building code, and refusal to permit a long established business to continue in a building because it was going to be condemned at a future date. *Id.* at 900.

16 267 A.2d 64 (N.J. Super. 1970).

of a "de facto taking." The statute set the date for valuation of compensation as no less than the value thereof on the final date of declaration of blight by the municipality concerned.

As cited earlier, many state constitutions include the word "damaged" after the word "taken."[17] The twenty-five states in this category are void of any litigation directly on point, but it is highly probable that these states will establish a more liberal view on "de facto taking." A Texas case, *Kirschke v. City of Houston*,[18] cites a United States Supreme Court case interpreting the constitutional provisions of Illinois, which like Texas, include the words "or damaged." The Texas court adopted the holding that:

> [U]nder this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and use of an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the . . . improvement is the cause of the damage, though consequential, the party may recover.[19]

This holding extends the word "damages" to include a taking without a physical entry, or in other words, a "de facto taking." Although the mere threat of condemnation will not constitute a taking,[20] the rule that a property owner is not entitled to extra compensation for enhanced value arising from any project, and inversely, that the property owner should not be made to suffer the adverse effect upon the value of his property by acts of the condemnor is recognized in Texas.[21] The eminent domain statutes in Texas, although confusing semantically,[22]

[17] The states included in this category are; Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wyoming.

[18] 330 S.W.2d 629 (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.), *appeal dismissed*, 364 U.S. 474, 81 S. Ct. 242, 5 L. Ed.2d 221 (1961). In overruling a denial of a building permit the court held that under our present constitution adequate compensation is recoverable for damage to property, as well as for a taking thereof, and the word "taking" includes any direct invasion of a property *right*.

[19] *Id.* at 632.

[20] City of Houston v. Biggers, 380 S.W.2d 700 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.), *cert. denied*, 380 U.S. 962, 85 S. Ct. 1105, 14 L. Ed.2d 153 (1965). The claimant's property was included in the area designated for condemnation which among other things, restricted any new improvements. The threat of condemnation lasted five years and allegedly made the property unsalable because of the threat of condemnation. In 1963 the city passed another ordinance which excluded the claimant's land from the condemnation area. In determining whether any compensation was due, the court ruled that the mere threat of condemnation will not constitute a taking for which compensation must be paid. *Id. See also* Danforth v. United States, 308 U.S. 271, 285, 60 S. Ct. 231, 236, 84 L. Ed. 249 (1930).

[21] State v. Carswell, 384 S.W.2d 407 (Tex. Civ. App.—Eastland 1964, no writ). For similar holding from another state *see* City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio Ct. App. 1963).

[22] Where the word "compensation" is used in the Texas Constitution, "damages" is the

require that damages to which a claimant is entitled be "the market value of the property in the market where it is located at the time of the hearing."[23] Although the decision in *Kirschke v. City of Houston* supports the contention that compensation will be due for a "de facto taking" under the word *damaged,*[24] the decision in *State v. Vaughan*[25] is diametrically opposed. The court ruled that the mere fact that tenants vacated rental property upon notice of impending condemnation under eminent domain proceedings did not entitle the property owner to "damages" because there had been neither a taking nor any character of physical invasion of the property.[26] Both decisions come from courts of equal jurisdiction, and although the *Kirschke* case is more in line with the current trend of decisions, it would be mere conjecture to state which decision will control.

The state of New York recognizes the doctrine of "de facto taking."[27] The court in the instant case begins by saying that "[t]his is a case of first impression which requires that we consider in detail the somewhat amorphous and apparently perplexing concept of *de facto* appropriation in the hope of *clearly defining and firmly establishing its perimeters.*"[28] The court proceeds to review the steps taken by the city of Buffalo to determine what steps, if any, might amount to a "de facto taking."[29] The court discusses the "motivation" of the claimant in moving his operations, and because the plant to which the claimant moved was 35 per cent larger than the condemned property, suggested that the fact of condemnation was "only one of three reasons motivating the

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word employed in the Eminent Domain Statutes governing compensation. TEX. REV. CIV. STAT. ANN. arts. 3264-3271 (1968). Reves v. City of Dallas, 195 S.W.2d 575, 584 (Tex. Civ. App.—Dallas, 1946, writ ref'd n.r.e.), attempts to clear up the problem by ruling that the words "compensation" and "damages" must be regarded as convertible terms.

23 TEX. REV. CIV. STAT. ANN. art. 3265(1) (1968).

24 330 S.W.2d 629, 632 (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.), *appeal dismissed,* 364 U.S. 474, 81 S. Ct. 242, 5 L. Ed.2d 221 (1961).

25 319 S.W.2d 349 (Tex. Civ. App.—Austin 1958, no writ). *See also* Naumann v. Urban Renewal Agency of Austin, 411 S.W.2d 804 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.), where the court held inadmissible evidence by condemnee relating to lost rent income.

26 *Id.* at 354.

27 City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 902 (N.Y. 1971).

28 *Id.* at 899. (*de facto,* Court's emphasis.) (*clearly . . . perimeters,* Emphasis added.)

29 *Id.* at 899, 900. The steps taken by the city of Buffalo as reviewed by the court in order of their occurrence were:

1. notice of public hearing, 1954.
2. notice of proposed appropriation, 1954.
3. beginning of frequent news releases by the City and Project officials, 1954.
4. direct communication from executive secretary of the project advising that the property would be taken between 1960 and 1962, 1957.
5. restated the last communication, 1957.
6. claimant was informed to vacate within 3 to 4 years, 1960.
7. estimate again changed to within 2 to 3 years, 1960.
8. notice to vacate in 18 to 24 months, 1961.
9. claimant was advised the "taking" would occur the following spring.
10. claimant was advised that final appropriation would be within 3 months, 1963. (final appropriation hearing 1967).

move, the other two being the inadequacy of existing facilities."[30] Even with the suggested mixed motivation on the part of the claimant, the court conceded that the claimant would not have had to vacate because of inadequacy of facilities for at least five years.

The court acknowledges that the constitutional provisions of just compensation for the taking of property may be violated without a physical taking. They, however, qualify this by holding that a "*de facto* taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use . . . ."[31] To illustrate this, the court draws a fine distinction between:

> [T]hose cases, which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true value at the time of the taking but as if it had not been subjected to the debilitating effect of the threat of condemnation (citations omitted) and those cases which go even further and declare the acts of the condemnor constitute a *de facto* taking. . . .[32]

Thus, a "de facto taking" cannot be considered the same as "condemnation blight" since the latter does not import a taking in the constitutional sense, but relates to the impact of certain acts upon the *value* of the property. To further support this distinction the court quotes from *Danforth v. United States*:[33]

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

The court further stipulates that "this is not to say that interferences short of physical invasion of the condemnee's property may not be sufficient to constitute a taking, . . ."[34] because a "de facto taking" does occur where there is some direct legal restraint on the use of the property.

In rejecting the contention that a "de facto taking" did occur, the court held that the claimant's property should *not* be evaluated on its diminished worth caused by the city's actions, "but on its value except for such '*affirmative value-depressing acts*' of the appropriating sovereign."[35]

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30 *Id.* at 900.
31 *Id.* at 902. (Court's emphasis.)
32 *Id.* at 902, 903. (Emphasis added.)
33 308 U.S. 271, 285, 60 S. Ct. 231, 236, 84 L. Ed. 240, 246 (1939).
34 City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 904 (N.Y. 1971).
35 *Id.* at 905. (Emphasis added.)

Since the *Clement* case is not supported by precedent, it must stand or fall on the logic of its opinion. No federal case, nor any state case found, supports the determination of *compensation* based on the distinction drawn in this case. The court asserts that the distinction between "de facto taking" and "condemnation blight" is not purely an academic one. It appears, though, that the conclusion reached by the court was more an *economic* application of a purely *academic* distinction. It is clear that the court was relying on Judge Fuller's statement, later reasserted by Judge Cardoza, that "[I]t is the duty of the state, in the conduct of the inquest by which compensation is ascertained to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it."[36] As the court points out, "both the award itself and the award as increased by the interest allowance are directly proportionate to the time of the taking and to hold that the taking was complete at an earlier date would, of necessity, require that interest run from that date; . . . ."[37] The interest involved in the present litigation amounted to $459,603.86 if a "de facto taking" was upheld. By allowing the claimant to recover on the theory of "condemnation blight" but overruling the lower court's finding of a "de facto taking," the court eliminated the accrual of interest.

Granted there is a distinction between "acts of appropriation" and "acts of diminution," whether academic or not, the question is now were the acts of the city of Buffalo merely "value depressing" or, by federal standards, did they amount to an "appropriation?" As illustrated earlier, the federal decisions hold that compensation is due when "value depressing acts" become sufficient to amount to a "de facto taking."[38] Compensation is not due for the "value depressing" effect of the designation of blight.[39] When compared to federal decisions, the acts by the condemnor in the instant case were at least sufficient to amount to a "de facto taking."

The court's definition of "de facto taking" comprises four specific actions by the condemnor: ". . . physical entry . . . , physical ouster . . . , a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property."[40] Does this definition clearly define and firmly establish the perimeters[41] of "de facto taking?" Although the claimant was forced to move by the protracted acts of the city, he was not "physically

[36] Searl v. School District No. 2 in Lake County, 133 U.S. 533, 562, 10 S. Ct. 374, 377, 33 L. Ed. 740, 746 (1890). *Cited in* New York, Ontario & Western R.R. Co. v. Livingston, 144 N.E. 589, 591 (N.Y. 1924).

[37] City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971).

[38] *See supra* notes 8, 11, 14 for acts constituting "calculated actions to depress" as compared to "mere value depressing" acts.

[39] Danforth v. United States, 308 U.S. 271, 60 S. Ct. 231, 84 L. Ed. 240 (1939).

[40] City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971).

[41] *Id.* at 899.