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CONSTITUTIONAL LAW - CONSTITUTIONALITY OF TIRE RATIONING

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CONSTITUTIONAL LAW — CONSTITUTIONALITY OF TIRE RATIONING — Plaintiff, Price Administrator, sought to enjoin [1] defendants from selling rubber tires and tubes to consumers without tire rationing certificates as required by the tire rationing regulations.[2] Defendants contended that the regulations were void under the Fifth Amendment as taking of property without due process of law and without just or any compensation. *Held*, judgment for plaintiff. The tire rationing regulations, a proper exercise of the war powers vested by Congress in the President or some duly constituted department, agency, or officer of the federal government, are not in contravention of the prohibition of the Fifth Amendment against the taking of private property for public use without

[1] See 51 YALE L. J. 1196 (1942); 42 COL. L. REV. 1170 (1942); 55 HARV. L. REV. 427 (1942).

[2] By Act of May 31, 1941 (55 Stat. L. 236) Congress amended the Act of June 28, 1940 (54 Stat. L. 676) by providing that "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. . . . The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe." Pursuant to the Act of June 28, 1940, and the amendment by Act of May 31, 1941, the President created the Office of Production Management [Executive Order 8629, 6 FED. REG. 191 (1941)] and within it the Office of Price Administration and Civilian Supply [Executive Order 8734, 6 FED. REG. 1917 (1941)] the latter becoming the Office of Price Administration [Executive Order 8875, 6 FED. REG. 4483 (1941)]. Subsequently the President created the War Production Board [Executive Order 9024, 7 FED. REG. 329 (1942)], which took over the powers of the Office of Production Management [Executive Order 9040, 7 FED. REG. 527 (1942)]. On January 24, 1942, the War Production Board granted to the Office of Price Administration authority to carry out the powers as to rationing materials conferred by Congress upon the President. Directive No. 1, 7 FED. REG. 562 (1942). The tire rationing regulations issued by the Office of Price Administration are found in 6 FED. REG. 6406, 6792, 6795 (1941) and 7 FED. REG. 72, 925, 1027, 1089 (1942).

due process of law or just compensation. *Henderson v. Bryan,* (D. C. Cal. 1942) 46 F. Supp. 682.[3]

Governmental action to effectuate economic mobilization for war may impinge upon property rights through (1) direct acquisition of private property by the government and (2) regulation with respect to what the owner may do with his property. Defendants' contention as to the unconstitutionality of tire rationing raises the question of the line of demarcation between a taking of private property compensable under the Fifth Amendment and property losses resulting from governmental regulation for which there is no constitutional requirement of compensation. "The line between expropriation and regulation is often very misty; but in the main, if the claimant can show no particular injury other than that suffered by other members of the public, and no physical appropriation by the government, a 'regulation' rather than 'a taking' is likely to be found. Hardship suffered by a restriction on the use of property has been held not to be a constitutional objection." [4] The challenged regulations do not involve direct appropriation of defendants' property by the government, nor injury to their property in a physical sense, nor denial to them of the right to dispose of their property;[5] but rather there is a limitation upon what they may do with their property which may result in some adverse effects upon the profit potentialities of their business. Defendants rely mainly upon the case of *United States v. Lynah,*[6] which held that when the governmental right of appropriation is exercised, the Fifth Amendment guarantees compensation and there is an implied promise on the part of the government to pay the value of the property.[7] The broad language of the *Lynah* case, it may be argued, lends some

[3] The validity of tire rationing is involved in Standard Oil Co. v. Angle, (C. C. A. 5th, 1942) 128 F. (2d) 728, and Henderson v. Smith-Douglass Co., (D. C. Va. 1942) 44 F. Supp. 681.

[4] Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 CORN. L. Q. 317, 476 at 516 (1942).

[5] For seventeen days tire dealers were not allowed to sell new tires and tubes, 6 FED. REG. 6406 (1941); but after the expiration of this period sales were allowed to those who had certificates from rationing boards. 6 FED. REG. 6792, 6795 (1941); 7 FED. REG. 72, 1027, 1089 (1942).

[6] 188 U. S. 445, 23 S. Ct. 349 (1903). Plaintiff brought an action to recover compensation for lands he alleged were flooded and rendered unfit for cultivation, by construction by the United States of dams in the Savannah River. Held, when the government appropriates property it does not claim as its own, it does so under an implied contract that it will pay the value of such property. To the same effect, United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 S. Ct. 306 (1884); Hollister v. Benedict & Burnham Mfg. Co., 113 U. S. 59, 5 S. Ct. 717 (1885).

[7] ". . . when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . All private property is held subject to the necessities of the government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation." United States v. Lynah, 188 U. S. 445 at 464-465, 23 S. Ct. 349 (1903).

support to defendants' contention that there is a taking of their property; but this language must be read in light of the particular fact situation there presented and of the view stated by the Supreme Court in numerous cases both before and after the *Lynah* decision that the provision of the Fifth Amendment prohibiting the taking of private property for public use without just compensation or due process of law applies only to direct injuries,[8] there being no liability for consequential damages. "But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense. . . . There are many laws and governmental operations which injuriously affect the value of or destroy property . . . but for which no remedy is afforded." [9] This limitation relieves the government of liability which might tend to impede the adoption of regulatory measures [10] and obviates the difficulty of determining compensation for injury which frequently is highly conjectural. The Court in the principal case finds that there is no taking [11] of defendants' property but only a regulation as to its disposition.[12] This position of the Court is analogous to that taken in several cases arising under the Lever [13] and War-Time Prohibition Acts [14] passed at the time of the last war.[15] Since defendants' injury, if any,

[8] "Closely allied . . . is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." Legal Tender Cases, 12 Wall. (79 U. S.) 457 at 551 (1871). See Norman v. Baltimore & Ohio R. R., 294 U. S. 240, 55 S. Ct. 407 (1935); Horstmann Co. v. United States, 257 U. S. 138, 42 S. Ct. 58 (1921); Union Bridge Co. v. United States, 204 U. S. 364, 27 S. Ct. 367 (1907); Bedford v. United States, 192 U. S. 217, 24 S. Ct. 238 (1904); Northern Transp. Co. v. Chicago, 99 U. S. 635 (1879); Twin Falls Canal Co. v. American Falls Reservoir District, (C. C. A. 9th, 1932) 59 F. (2d) 19, cert. denied, 287 U. S. 638, 53 S. Ct. 87 (1932).

[9] Omnia Commercial Co. v. United States, 261 U. S. 502 at 508-509, 43 S. Ct. 437 (1923).

[10] See Pine Hill Coal Co. v. United States, 259 U. S. 191 at 196, 42 S. Ct. 482 (1922).

[11] The Court argues that, even assuming there had been a taking, under the Fifth Amendment and the Lynah case the government has impliedly promised to pay for the property and defendants have their remedy. Principal case, 46 F. Supp. 682 at 685.

[12] See Standard Oil Co. v. Angle, (C. C. A. 5th, 1942) 128 F. (2d) 728 at 730.

[13] 40 Stat. L. 276 (1917).

[14] 40 Stat. L. 1046 (1918).

[15] Lever Act: Morrisdale Coal Co. v. United States, 259 U. S. 188, 42 S. Ct. 481 (1922); Pine Hill Coal Co. v. United States, 259 U. S. 191, 42 S. Ct. 482 (1922). War-Time Prohibition Act: Ruppert, Inc. v. Caffey, 251 U. S. 264, 40 S. Ct. 141 (1920); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 40 S. Ct. 106 (1919). The same result was reached in United States Bedding Co. v. United States, 266 U. S. 491, 45 S. Ct. 182 (1925); Campbell v. United States, 266 U. S. 368, 45 S. Ct. 115 (1924); Omnia Commercial Co. v. United States, 261 U. S. 502, 43 S. Ct. 437 (1923).

results from obedience to regulations [16] which apply generally to all tire dealers and are reasonably suited to accomplish the end sought, there would seem to be ample ground for holding that there is not a compensable taking. Whether governmental regulation direct and highly burdensome in its impact upon property rights would constitute a compensable taking remains to be decided, but the reliance by the court in the principal case upon the military necessity argument suggests that acts constituting a taking in peacetime may not be so regarded in time of war.[17] From recent cases [18] in which exercise of federal power has been grounded upon the military necessity argument there emerges the pattern of judicial reasoning likely to be followed with respect to the measures taken in the interests of effective military and economic mobilization—that while the exercise of the war powers is subject to applicable provisions of the Constitution, among which are the guarantees of the Fifth Amendment, the rights of the individual are not absolute and must be subject to such limitation as national security requires.[19]

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[16] ". . . no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands." Morrisdale Coal Co. v. United States, 259 U. S. 188 at 190, 42 S. Ct. 481 (1922).

[17] See Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 43 S. Ct. 135 (1922).

[18] Henderson v. Smith-Douglass Co., (D. C. Va. 1942) 44 F. Supp. 681; United States v. Hirabayasahi, (D. C. Wash. 1942) 46 F. Supp. 657; Ex parte Kanai, (D. C. Wis. 1942) 46 F. Supp. 286; Swift v. Hale Pontiac Sales (Mun. Ct., Syracuse, 1942) 34 N. Y. S. (2d) 888. Cf. United States v. Yasui, (D. C. Ore. 1942) 11 L. W. 2413.

[19] Principal case, 46 F. Supp. 682 at 688.