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CONSTITUTIONAL LAW-EMINENT DOMAIN-DESTRUCTION OF PRIVATE PROPERTY TO PREVENT ENEMY CAPTURE

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CONSTITUTIONAL LAW — EMINENT DOMAIN — DESTRUCTION OF PRIVATE PROPERTY TO PREVENT ENEMY CAPTURE — Respondent oil companies owned terminal facilities in Manila at the time of the Japanese attack on the Philippines. The terminals were destroyed by the United States Army as the Japanese entered the city. Although the Army had requisitioned oil from the terminals prior to their destruction, respondents were bound by the decision of the court of claims to the effect that prior to December 27, 1941, when respondents were notified that the terminals themselves were requisitioned for the purpose of destruction, there had been no taking within the meaning of the Fifth Amendment.[1] The court of claims allowed recovery on the theory that destruction of property for the common defense was a taking for public use and required just compensation.[2] On appeal the United States Supreme Court *held,* the Fifth Amendment does not require compensation for the destruction of private property in war time where the purpose is to hinder or impede the enemy. *United States v. Caltex (Philippines), Inc.,* (U.S. 1952) 73 S.Ct. 200.

It has long been recognized that accidental destruction of private property in battle by either friendly or enemy forces is not compensable.[3] The Fifth Amendment, however, is not suspended in war time,[4] and this claim was pressed on the theory that as a deliberate destruction for the ultimate public benefit it was outside of the old exception for property destroyed in battle. The majority of the court of claims relied on *Mitchell v. Harmony,*[5] *United States v. Russell,*[6]

[1] ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST., Amend. V.

[2] Caltex (Philippines), Inc. v. United States, (Ct. Cl. 1951) 100 F. Supp. 970.

[3] VATTEL, LAW OF NATIONS, Book III, c. 232 (1792); United States v. Pacific Railroad, 120 U.S. 227, 72 S.Ct. 490 (1887).

[4] Comparet v. United States, (10th Cir. 1947) 164 F. (2d) 452; Phelps v. United States, 274 U.S. 341, 47 S.Ct. 611 (1927); United States v. New River Collieries Co., 262 U.S. 341 at 343, 43 S.Ct. 565 (1923); cf. Juragua Iron Co. v. United States, 212 U.S. 297, 29 S.Ct. 385 (1909) (occupied enemy territory).

[5] 13 How. (54 U.S.) 115 (1852).

[6] 13 Wall. (80 U.S.) 623 (1871).

and two early cases in the court of claims.[7] In the *Mitchell* case the plaintiff's wagons and mules were impressed for use by the troops in the Mexican campaign and subsequently abandoned to the enemy,[8] while in the *Russell* case the suit was for the use of three steamers temporarily requisitioned by the Army because of military necessity.[9] In the principal case the majority of the Supreme Court distinguished the *Mitchell* and *Russell* cases on the ground that the property was impressed for subsequent *use* by the Army and not for the sole purpose of destruction.[10] They chose rather to follow the dictum of Justice Field in *United States v. Pacific Railroad*[11] to the effect that where the necessities of war justified destruction of property for the purpose of hindering, impeding, or crippling the enemy, the safety of the state overrides all considerations of private loss. This reasoning is particularly appropriate to the modern concept of "scorched earth" warfare by retreating troops. The Court declined to distinguish between such intentional destruction and "accidental" destruction of similar property behind enemy lines in that both are necessary incidents to the prosecution of the war. In addition the Court found support in the doctrine of absolute privilege arising out of public necessity. At common law, in times of great emergency, the sovereign could without liability destroy the property of a few to save the property and lives of the community.[12] In the broadest sense, public necessity cuts across the whole area of governmental impairment of private rights and is the foundation for non-compensable governmental regulation. The language of the Fifth Amendment is capable of such broad construction as to be of slight value in determining when compensation is required.[13] The

[7] Grant v. United States, 1 Ct. Cl. 41 (1863), where buildings and supplies of contractor furnishing supplies to the U.S. Army were destroyed by Union troops before they retreated from the Confederate Army, *held*, the Fifth Amendment required compensation whether the taking was for use or for destruction. In Wiggins v. United States, 3 Ct. Cl. 412 (1867), where a U.S. naval vessel sent to Greytown, Nicaragua to obtain redress for an insult to the American minister destroyed petitioner's gunpowder stored there, the court of claims followed the Grant case.

[8] Supra note 5. The following dictum by Chief Justice Taney, at 134, was the basis for the line of cases followed by the court of claims in the principal case: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser."

[9] Supra note 6. The Court followed Taney's dictum, supra note 8.

[10] The Supreme Court did not mention the Grant and Wiggins cases, supra note 7.

[11] Supra note 3, at 234.

[12] The considerations that a contrary rule may impose a staggering public debt and that fear of liability might make men hesitate when swift action is essential to the safety of the state are the underlying reasons for denying liability. See United States v. Pacific Railroad, supra note 3; Bowditch v. Boston, 101 U.S. 16 at 18-19 (1879); Respublica v. Sparhawk, 1 Dall. (Pa.) 357 at 363 (1788).

[13] See note 1 supra. In the broadest sense, any impairment of private property takes property rights from the owner. The narrowest definition of a taking would include only those cases where the government declared its action to constitute a taking. In the broadest sense, any impairment which benefits the public is a public use, while the narrowest defini-

basic considerations are those of due process of law.[14] The decision in the principal case is in effect that in cases of battle destruction or other great emergency, it is not unreasonable for the government to destroy this property without compensation because historically in such situations we have considered the necessity of the public more important than our ordinary interest in the protection of private property.[15] To say, however, that the compensability of property impairment is a matter of due process is not much more enlightening than to say that a taking for public use is compensable impairment while a regulation is not, except that it indicates that no precise definition of the terms "taking for public use" or "regulation" is possible. Nevertheless, at the risk of extreme oversimplification, a rough categorization of the types of cases that are compensable may be attempted. "Taking" and "public use" are each susceptible to a broad and a narrow definition.[16] If each is defined separately there is no accepted definition which will cover all cases. When the two are taken together, however, a combination of definitions will present a fairly accurate picture of where the Court stands on compensable impairment of property rights.[17] *First:* If there is actual user by the government or by the public as a result of governmental action, this meets the narrowest test of public use and the Court will find a taking from the fact that there is use.[18] *Second:* If there is an express declaration of the intention of the government to take possession and use of the property, the

tion would include only those cases where there is actual user of the property right taken, either by the government or by the public as a result of governmental action. See 1 BUFFALO L. REV. 147 (1951); 4 VAND. L. REV. 673 (1951).

[14] The concept of eminent domain originated with the natural law philosophers. It merged with concepts of "the law of the land" and has eventually come to be included in due process of law. This is apparent from the general recognition that Fourteenth Amendment due process includes the requirement of compensation for taking for public use even though the words, "taking" and "public use," are not to be found in the amendment. See Lenhoff, "Development of the Concept of Eminent Domain," 42 COL. L. REV. 596 (1942); Grant, "The 'Higher Law' Background of the Law of Eminent Domain," 6 WIS. L. REV. 67 (1931).

[15] It is to be noted that dissenting Justices Douglas and Black felt that this type of loss should be placed on the state and thus shared equally by all citizens. Due process is not static. As concepts of the role of the state in society change, due process slowly changes with them. For the present the non-compensability of this type of impairment seems settled, but there is no assurance that it will always be so. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 at 387, 47 S.Ct. 114 (1926).

[16] See note 13 supra.

[17] These combinations, although an indication of how the Court may be expected to decide, do not encompass the nice distinctions normally made in cases involving due process. The Court may consider the retroactive nature of the taking or the reciprocal benefit to the complainant, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922); the analogy to common law nuisance doctrine, Village of Euclid v. Ambler Realty Co., supra note 15, at 387-388; or the analogy to common law absolute privilege as in the principal case.

[18] United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062 (1946); cf. Pennsylvania Coal Co. v. Mahon, supra note 17.

Court will find a public use from the existence of public benefit.[19] *Third:* If there is only an impairment of a property right for the general public benefit and the purpose is other than the use of the right taken, the Court will declare it to be a regulation and not compensable.[20]

The principal case falls in the third category in that the purpose of the impairment was destruction rather than use. The Court did not consider the formal requisition an express declaration of a taking because its true purpose was merely that of an eviction order before the demolition and an excuse which the owners could present to the Japanese when they arrived.

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[19] Declaration of Taking Act, 46 STAT. L. 1421 (1931), 40 U.S.C. (1946) §258(a) to 258(e). See also United States v. Pewee Coal Co., 341 U.S. 114, 71 S.Ct. 670 (1951), in which the apparent purpose of the executive action was regulation rather than public use, but there was such an unequivocal expression of the intent to take possession of private property that the Court looked no further in deciding it to be compensable.

[20] Jenkins, "Recent Constitutional Developments on Eminent Domain," 4 VAND. L. REV. 673 at 673-674 (1951).