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Food, Drug and Cosmetic Act—Statutory Construction—Coal-Tar Colors— Standard of Adulteration.—Flemming v. Florida Citrus Exchange.

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means of access, there was a taking. Some courts hold that when the grade of a road is changed with consequential damage to abutting property both in the form of decreased valuation and of difficulties of access, it constitutes a taking,⁶ while other courts have held to the contrary.⁷ These cases are not different in their application of the principle discussed above, but on the application of the facts to this principle and, therefore, difficult to reconcile.

In all cases there appears to be a balancing of the burden to the property holder against the benefit to the public. The benefit to the public outweighed the burden to the plaintiff in *Cities Service*. The result of this case is based on the judgment of the court as to the degree of interference and as to whether or not it was an interference sufficient to establish a taking. This degree of interference necessary to constitute a taking is not easily defined. The court considers the extent of the diminution of value of the property. "When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain . . ."⁸ "The rule seems to be deducible from the decisions of the courts . . . that if the owner of property, because of the permanent physical improvement itself, suffers damages . . . distinguished from mere inconvenience, he has a right to action . . ."⁹ "On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided"¹⁰ the determination of whether there is a taking is reached. The judgment of the court as to the degree of interference necessary to constitute a taking depends on the diminution of property value, permanency of the interference, the nature of the act itself and whether the act is beneficial to the public. Thus the judgment of the court in *Cities Service* was determined.

IRWIN N. ALBERTS

Food, Drug and Cosmetic Act—Statutory Construction—Coal-Tar Colors—Standard of Adulteration.—*Flemming v. Florida Citrus Exchange*.¹—A petition was brought to review an order of the Secretary of Health, Education and Welfare, which disallowed the use of coal-tar in the coloring of oranges. The United States Court of Appeals for the 5th Circuit set aside the order,² holding that, even though the coal-tar coloring (Red 32) was per se toxic, it did not adulterate the oranges as proscribed by the Food, Drug and Cosmetic Act of 1938,³ since the quantity of poison

⁶ *Boal v. Chicago*, 301 Ill. App. 536, 23 N.E.2d 237 (1939); *Tulsa v. Hindman*, 128 Okla. 169, 261 Pac. 910 (1927); *Cucurullo v. City of New Orleans*, 229 La. 463, 86 So.2d 103 (1956).

⁷ *State v. Snider*, 131 W. Va. 650, 49 S.E.2d 853 (1948); *Cantrell v. Pike County*, 255 S.W.2d 988 (Ky. 1953).

⁸ *Pennsylvania Coal Co. v. Mahon et al.*, supra note 2, at 413.

⁹ *Tulsa v. Hindman*, 128 Okla. 169, 171, 261 Pac. 910, 911 (1927).

¹⁰ *Rideout v. Knox*, 148 Mass. 368, 374, 19 N.E. 390, 393 (1889).

¹ 358 U.S. 153 (1958).

² *Florida Citrus Exchange v. Folsom*, 246 F.2d 850 (5th Cir. 1957).

³ Act June 25, 1938, c. 675, § 1, 52 Stat. 1040, 21 U.S.C. §§ 301-392.

CASE NOTES

was not such as would render the food article injurious to the health of the consumer. On appeal, the United States Supreme Court reversed, unanimously holding, per Brennan, J., that, although the "level of ingestion" of this particular red coal-tar involved in human consumption is harmless, proof that such color had poisonous properties allowed the Secretary of Health, Education and Welfare to remove the certification of Red 32 as "harmless and suitable for use" as an external coloring for oranges.

In the leading case of *United States v. Lexington Mill and Elev. Co.*⁴ (1914), the United States Supreme Court, in interpreting the original Food and Drugs Act of 1906,⁵ reviewed the condemnation of a "lot" of flour, to which had been added a poisonous ingredient in a quantity found to be so small that the health of the consumer could not thereby be injured. At the time the Food and Drugs Act provided that an article of food should be deemed to be adulterated if it "contain any added poisonous or other added deleterious ingredient which may render an article injurious to the health."⁶ It was contended in *Lexington* that it is the character, not the quantity, of the added substance which is to determine whether there has been an adulteration of the article under the statute. The Court held, however, that if the flour, with the additive, cannot injure the health of a consumer, it may not be condemned under the act, despite the fact that the additive is poisonous. This relative standard remained the law until the principal case.

The Food and Drugs Act of 1906 was repealed by the enactment of the Food, Drug and Cosmetics Act of 1938. For the first time, in the principal case, the Court was called upon to construe the adulteration provisions of the later act. The Court in reaching its decision held that the language of the provisions gave evidence of a legislative intent to depart from the traditional relative rule, by which a product was deemed adulterated only if the deleterious additive was found to be in such quantities as to make the product injurious to the health of the consumer. The Court disallowed any addition to food of any coal-tar colors not certified by the Secretary to be harmless after examination by him of the color substances alone.

The Supreme Court stressed the fact that the original Food and Drugs Act of 1906 did not deal with coal-tar colors specifically, but only with poisonous substances generally; but by the expressed and novel provisions [§ 402(c); § 406(b)] of the Act of 1938, Congress carefully distinguished the treatment to be given by the Secretary to toxic coal colors.

The Court stated that the new provision § 402(c) established a separate test: that food should be deemed adulterated if it contains a coal-tar color not certified by the Secretary in conformity with the standard enunciated in § 406(b), which provides for certification of "coal-tar colors that are harmless and suitable for use in food." From a literal reading of the above standard, the Court construed "harmless" in an absolute sense; absolute,

⁴ 232 U.S. 399 (1914).

⁵ Act June 30, 1906, c. 3915, § 1, 34 Stat. 768, 21 U.S.C. §§ 1-215.

⁶ Act June 30, 1906, c. 3915, § 7, 34 Stat. 769, 21 U.S.C. § 8.

in that the nature and properties of the added ingredient would be tested by reference to the particular ingredient alone, and not in its emperic context.

This absolute construction of "harmless" has the effect of establishing a standard in which the analysis will concentrate on the color per se, rather than an examination of the effect of the use of color on the article itself.

That a legal principle, which had reigned from the earliest days of the Food and Drugs Act, would be modified by Congress without the barest explanation, that the court would change the test of adulteration by a construction based on semantics and not on economic practicalities and the history of the orange economy, and that even tolerances of "harmful ingredients" would not be allowed because of § 402(c)'s flat prohibition against the use of non-certified colors, display once again the danger of being trapped in the mire of literal ideology, and not basing a decision on a traditional rule that stands on the facts of the matter.

EDWARD F. HARRINGTON

Labor Relations—Arbitration—Condition Precedent to an Action for Damages for Wrongful Discharge.—*Woodward Iron Co. v. Ware*.¹

A discharged employee brought an action at law for breach of his employment contract. He had not submitted his grievance to the union within five days, as provided by the collective bargaining agreement. He alleged that his discharge violated terms of the collective bargaining agreement which were incorporated into his employment contract. Judgment was rendered for the plaintiff. On appeal, affirmed; primary resort to grievance procedure is unnecessary where the employee elects to consider his discharge as final and he seeks damages rather than reinstatement.

Courts are divided on the question whether exhaustion of grievance machinery is a condition precedent to an action at law in discharge cases. At common law contracts to arbitrate were revocable.² Seemingly, courts which do not require exhaustion of grievance procedures are perpetuating this common law rule in the field of labor relations.³ Other courts have adopted the view that public policy favors the arbitration device and therefore, where the right to damages for wrongful discharge is dependent upon a collective bargaining agreement, contractual remedies must be exhausted before judicial remedies will be available.⁴ Under the latter view judicial relief is available, however, when the union is hostile to the claim of an

¹ 261 F.2d 138, 142 (5th Cir., 1958). The case had been removed from the Alabama courts on the basis of diversity of citizenship.

² Simpson, Specific Enforcement of Arbitration Contracts, 83 U. Pa. L. Rev. 160 (1934).

³ Lammond v. Aleo Manufacturing Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

⁴ Jorgenson v. Pennsylvania R.R. Co., 25 N.J. 541, 138 A.2d 24 (1958); Payne v. Pullman Co., 13 Ill. App. 2d 105, 141 N.E.2d 83 (1957); Williams v. Pacific Electric R.R. Co., 147 Cal. App. 2d 1, 304 P.2d 715 (App. Div. 2d D 1956).