Constitutional Law -- Eminent Domain -- Tucker Act -- What Constitutes a "Taking" Under the Fifth Amendment

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Constitutional Law—Eminent Domain—Tucker Act—What Constitutes a "Taking" Under the Fifth Amendment.

The United States, acting under the authority of the Mississippi River Flood Control Act,[1] constructed dikes in the Mississippi River a short distance above and opposite the appellants' land, in order to improve the navigation of the stream. The dikes deflected the current of the river, washing away appellants' land, the elevation of which, prior to the flooding, was such that the waters of the river did not hinder or prevent its full and complete use as farming property. The appellants' claim that the property had been "taken" within the meaning of the Fifth Amendment to the Constitution of the United States was dismissed by the district court,[2] and on appeal to the circuit court of appeals the judgment was affirmed.[3] The court based its decision on three grounds: first, that the suit "sounded in tort", and, therefore, there could be no recovery due to the limitations of the Tucker Act;[4] second, that riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard; and third, that there was not an actual "taking" of private property for public use.

The Tucker Act precludes recovery against the United States in either the Court of Claims or, as was attempted in the case in question, in the district courts of the United States, for "injuries sounding in tort".[5] If the plaintiffs recover, it must be upon an implied contract,[6] for, as stated in *Tempel v. United States*,[7] ". . . the law cannot imply a promise by the Government to pay for a right over, or interest in, land which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of the plaintiff's is violated; but the cause of action, if

[1] Franklin v. United States, 16 F. Supp. 253 (W. D. Tenn. 1936).

[2] 42 STAT. 1505 (1923), 33 U. S. C. A. §702a (1928).

[3] Franklin v. United States, 101 F. (2d) 459 (C. C. A. 6th, 1939), *cert. granted*, — U. S. —, 59 Sup. Ct. 834, 83 L. ed. Adv. Ops. 812 (U. S. 1939).

[4] 24 STAT. 505 (1887), 28 U. S. C. A. §§250(1), 41(20) (1928).

[5] Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862 (1893); Hijo v. United States, 194 U. S. 315, 24 Sup. Ct. 727, 48 L. ed. 994 (1904) (holding that if the action is, in fact in tort, the statute (Tucker Act) cannot be avoided by framing the action in contract); Bigby v. United States, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. ed. 519 (1903); Sanguinetti v. United States, 264 U. S. 146, 44 Sup. Ct. 264, 68 L. ed. 608 (1924); Pendleton v. United States, 56 Ct. Cl. 222 (1921); Flynn v. United States, 65 Ct. Cl. 33 (1928).

[6] United States v. Russell, 13 Wall. 623, 20 L. ed. 474 (U. S. 1871); United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 316, 28 L. ed. 846 (1884); United States v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. ed. 442 (1888). In all of these cases the United States appropriated private property for public use. The important thing about these cases is that the officers who appropriated and used the property did not deny the plaintiffs' title.

[7] Tempel v. United States, 248 U. S. 121, 131, 39 Sup. Ct. 56, 59, 63 L. ed. 162, 165 (1918).

any, is one sounding in tort, for which the Tucker Act affords no remedy." When the Government claims title to the property, no contract arises;[8] but when it appropriates private property without asserting title, an implied contract to pay the owner the value of the land arises, although no formal proceedings are instituted for the condemnation of the property.[9] Nor is an express promise to pay necessary in order that the plaintiff may bring suit, as the promise to pay is imposed by the Fifth Amendment to the Constitution.[10]

In several instances, compensation has been denied riparian owners in suits against the United States on the theory that the riparian owner's right to have the stream come to him in its natural condition, as against the other individual riparian owners, is subject to the paramount power of the United States to improve navigation, and that the "consequential" injuries sustained as a result of the exercise of this power are non-compensable.[11] The courts invariably state, however, that if there has been an actual "taking" of the property, even in the exercise of the right to control navigation, compensation must be made to the riparian owner.[12]

[8] Langford v. United States, 101 U. S. 341, 25 L. ed. 1010 (1880); Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862 (1893); Bedford v. United States, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904); Henry v. United States, 38 Ct. Cl. 635 (1903); Peabody v. United States, 43 Ct. Cl. 5 (1907); Andrus v. United States, 59 Ct. Cl. 851 (1924); Cadwalader v. United States, 59 Ct. Cl. 533 (1924).

[9] United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. ed. 846 (1884) (taking property under legislative authority); Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. ed. 108 (1894); Philippine Sugar Estates Development Co. v. United States, 40 Ct. Cl. 33 (1904); Brooks v. United States, 39 Ct. Cl. 494 (1904). In the *Brooks* case the court extended the doctrine to all property, stating: "It is settled law that where an officer of the Government, having authority to act, takes or appropriates to public use property, admitting it to be private, an implied contract will arise to make compensation." *Id.* at 502.

[10] Jacobs v. United States, 290 U. S. 13, 54 Sup. Ct. 26, 78 L. ed. 142 (1933) (damage caused by backwater from dam); United States v. Chicago B. and Q. R. R., 82 F. (2d) 131 (C. C. A. 8th, 1936); Spoenbarger v. United States, 101 F. (2d) 506 (C. C. A. 8th, 1939).

[11] Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996 (1897); Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. ed. 126 (1900); Bedford v. United States, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. ed. 1063 (1913); Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. ed. 1083 (1913); Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. ed. 1363 (1913); Cubbins v. Mississippi River Comm., 241 U. S. 351, 36 Sup. Ct. 671, 61 L. ed. 1041 (1916).

[12] Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. ed. 557 (U. S. 1871); United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539 (1903); United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. ed. 756 (1917); Tompkins v. United States, 45 Ct. Cl. 66 (1910). Accord: Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463 (1893); see Scranton v. Wheeler, 179 U. S. 141, 153, 21 Sup. Ct. 48, 53, 45 L. ed. 126, 133 (1900), in which the court stated that "undoubtedly compensation must be made or secured to the owner when that which is to be done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Con-

The determination of whether there has been a compensable "taking", therefore, would seem to depend upon whether the damage resulting from the acts done by the Government is immediate and direct, or merely "consequential". There is great difficulty in making such a determination, because, apparently, there are two divergent lines of authority in the cases decided by the United States Supreme Court, and, in some particulars, the cases seem irreconcilable. The cases in which compensation was denied present situations where the lands of the plaintiffs were flooded by diversion of the current, in *Bedford v. United States*[13] and *Jackson v. United States,*[14] and where the plaintiff's boat landing was rendered virtually useless by reason of the construction of a dike and the lowering of the water level, in *Gibson v. United States.*[15] In the latter case, there was no flooding of the plaintiff's land, but a decrease in the value of the land due to a diversion *away from* rather than *over* the land; the court held that riparian ownership is subject to suffer the consequences of an improvement of navigation, and since the injuries sustained were "consequential" to the lawful and proper exercise of a governmental power, no compensation would be allowed. In the *Bedford* case, the Government constructed revetments along the bank of the Mississippi River six miles upstream from the plaintiff's land, and as a result of the construction of these revetments, the land of the plaintiff was flooded some time later. The Court denied compensation on the ground that this was a "consequential" injury, and that the purpose of the revetments was to prevent further erosion at the point of construction. In the *Jackson* case, the Court held that the Government is not liable to riparian owners for damages caused by overflow or for failure to construct additional levees along the Mississippi River for the protection from the levees built at other points. However, in this case, the appellants stated that there had been flooding of the lands in question before the construction of the levees. Too, the damage occurred over a period of twenty years, which would seem to indicate that it was "consequential" rather than direct. These cases appear to show that compensation will not be allowed when the injury to the land comes about as a result of the *diversion* of the stream for the purposes of improving navigation.

The cases in which compensation was awarded seem to show that if the injury is a result of the water being thrown *back* upon the land by the structure built in the aid of navigation, there is a "taking". In

stitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

[13] 192 U. S. 217, 24 Sup. Ct. 238, 48 L. ed. 414 (1904).

[14] 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. ed. 1363 (1913).

[15] 166 U. S. 269, 17 Sup. Ct. 578, 41 L. ed. 996 (1897).

Pumpelly v. Green Bay Company,[16] the lands of the plaintiff were overflowed because of a dam constructed downstream, and the court hold that the flooding of the land, which previously was free from flooding, was direct, and therefore constituted a "taking". This case established the rule that there could not be a total destruction of property without constituting a "taking", and that this would amount to an invasion of private right under the pretext of the public good.[17] In *United States v. Lynah*[18] it was held that there had been a "taking" of the land, a rice plantation, when an overflow caused by the construction of a dam turned the land into a useless bog. In the case of *United States v. Cress,*[19] locks and dams were built by the Government in the improvement of navigation, and the plaintiff's land was thereby subjected to *intermittent* floodings. Compensation was allowed here in proportion to the decrease in the value of the land, apparently indicating that there does not have to be a complete destruction to constitute a compensable "taking".

What, then, is the distinction? There seems to be only one possible ground on which the Court relied in denying compensation in the *Gibson, Bedford,* and *Jackson* cases, and that was that the Government could, in the exercise of the right to control navigation, change the course of the river, so long as no structure was built in the river which threw water back upon the lands of the plaintiff. However, it is difficult to see why an invasion caused by diversion of the river current should be considered less "direct" than one caused by the backing up of the water. The Court does not state a given rule or distinction, in any of the cases, which will hold up in the light of other cases on the point. The Court merely says that the injuries were "direct" and allow compensation, or that they were "consequential" and deny compensation. What actually constitutes a "taking" is apparently a matter of judicial discretion, incapable of exact definition.

[16] 13 Wall. 166, 20 L. ed. 557 (U. S. 1871).

[17] The Court adopted a very liberal attitude, stating, "It would be a very curious and unsatisfactory result, if in construing a provision of the constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors." *Id.* at 177, 20 L. ed. at 560.

[18] 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539 (1903).

[19] 243 U. S. 316, 37 Sup. Ct. 380, 61 L. ed. 746 (1917).

It would seem that the statement made by the Court in *Transportation Company v. Chicago*[20] to the effect that the right of the public in regard to navigation extends to the natural state of the stream, and that beyond that property cannot be taken without compensation being made to the owners, would seem more just and equitable than the rule that the Government may divert the course of the stream as much as desired —even over land that has never been flooded before, as in the principal case. As pointed out by the Circuit Court of Appeals for the Eighth Circuit,[21] in some instances there has been added to the word "taken" the words "or damaged". This suggestion, if followed, would allow the property owner to recover damages when the land was not actually appropriated for the public use, but seriously damaged for the public use.

Due to the diversity of reasoning advanced in the cases cited and commented on in this note, and due to the inconsistent and sometimes inequitable results reached, it is suggested that the federal courts might well adopt the test applied by some of the state courts in determining whether there is a "taking", e.g., if the property has been "damaged" for a public use this injury is compensable. This is provided for by statute in most cases.[22] However, it must be borne in mind that property is not "taken" when it is *destroyed* by the state to protect the public interest, under the police power.[23] The state takes property by eminent domain because it is useful to the public, and destroys it under the police power because it is harmful. "Appropriation can be necessary only where possession is of positive value to the public, and if so, there is really a case of eminent domain."[24] It would seem that the land in the instant case was put to a public use, and not destroyed because of its harmful nature.

Even if this test is not adopted, an exception should be made when it is inevitable that the plaintiff suffer complete destruction of the property as a result of the improvement of navigation, where there is no claim to the land by the Government, if his lands were free from flooding prior to the construction of the dike. One person should not be compelled to bear the brunt of the injuries, when the public as a whole is benefited.

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[20] 99 U. S. 635, 25 L. ed. 336 (U. S. 1897).
[21] United States v. Chicago B. and Q. R. R., 82 F. (2d) 131 (C. C. A. 8th, 1936).
[22] James Poultry Co. v. Nebraska City, 284 N. W. 273 (Neb. 1939); Harrison v. Louisiana Highway Comm., 186 So. 354 (La. 1939); Guaranty Savings and Loan Association v. City of Springfield, 113 S. W. (2d) 147 (Mo. App. 1938); note (1936) 13 VA. L. REV. 334.
[23] Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 981 (U. S. 1880).
[24] FREUND, POLICE POWER (1904) 547.