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legitimately have been possible in the previous divorce action, had a different statute²⁴ been invoked or had the court felt obliged to consider the problem in the light of fairness and due process and opportunity to be heard. The state's interests lie largely on the side of prompt and effective safeguarding of the children's welfare,²⁵ which seems sufficiently related to the marriage relationship to justify treatment along with its adjudication, once the court has affirmatively determined the contacts and reasonableness issues. Such an approach would certainly then satisfy the state's interest in assuring the integrity of its domestic institutions, while providing for the cleanup of those litigious problems often arising out of marital estrangement.

The policy and trend in the law of jurisdiction has favored the expansion of the concept of personal jurisdiction to the limits of fairness and reason.²⁶ It is to be hoped that the dictum in *Fleek* does not indicate an intransigent attitude, which, by "labelling the action with the question-begging phrase 'in personam,'"²⁷ will always deny a forum to plaintiffs whose husbands are, for whatever reason, absent from the state.

ROBERT L. EPTING

Eminent Domain—An Expansion of the Definition of Taking

While it has been axiomatic since 1897 that state and municipal governments are bound by the due process clause of the fourteenth amendment to justly compensate for property taken for public use,¹ the conceptual problems involved in defining "taking" and "public use" have created uncertainty² and, in some cases, caused injustice.³ It is clear that the

²⁴ N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967) (departed debtor).

²⁵ *Estin v. Estin*, 334 U.S. 541, 546-47 (1948). See also *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922) (divorce can neither terminate a father's relationship to his children nor his continuing obligation to support them). North Carolina statutory law also reflects the state's interest in the issue of child support. See, e.g., N.C. GEN. STAT. § 14-325 (1953) (making nonsupport criminal); N.C. GEN. STAT. § 52A-6 (1953) (making nonsupport an extradictable offense).

²⁶ JAMES § 12.8, at 642-43.

²⁷ *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 423 (1957) (dissenting opinion of Frankfurter, J.).

¹ *Chicago, B. & O.R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897).

² See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37-42 (1964), tracing the conflicting views of Justices Harlan and Holmes on the question of what constitutes a "taking" and introducing the original conflict between the doctrinal and functional or utilitarian approaches to "taking." See also I J. LEWIS, *EMINENT DOMAIN* (2d ed. 1900). The author states: "[W]hen we come to seek

public policy demanding flexibility in land use precludes any purely formalistic definition of "public use."⁴ Thus, the term has outgrown the early restrictive requirement that the property sought be destined for actual "public employment." Rather, it has acquired an updated, policy-oriented "public benefit" aspect.⁵ Although there has been an ever-broadening and socially responsive definition of "public use," the concomitant has not been true of the concept of "taking."⁶ Certainly "taking" has changed from the antiquated view that government must assert an actual proprietary interest in the property before an owner may demand compensation.⁷ The modern view is that any substantial interference with private property that destroys or significantly lessens its value is a "taking," even though title in the owner remains undisturbed.⁸ But this seemingly broad definition has tended to be restricted and, on occasion, has failed to protect adequately private property from some of the aberrations of increased eminent domain power.⁹ However, there have been several recent decisions that indicate that a new and broader definition of "taking" may be developing to aid the property owner.¹⁰ In the most recent of these cases, *Sayre v. United States*,¹¹ the court approached "taking" with what appeared to be a doctrinal definition,¹² but which, upon closer scrutiny, proved utilitarian in application.

for the principles upon which the question of public use is to be determined, or to define the words, 'public use,' in the light of judicial decisions, we find ourselves utterly at sea." *Id.* at 410.

⁴ For a survey of the reasons which most courts give for making the owner of property absorb the depreciation in the value of his land created by a taking of adjacent land, see 2 P. NICHOLS, EMINENT DOMAIN § 6.441 [1] (3d rev. ed. 1963) [hereinafter cited as NICHOLS].

⁴ See Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A.J. 355, 356 (1966).

⁶ *Id.*; Comment, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 125; Note, *Real Property—Eminent Domain—The Public Use Requirement*, 46 N.C.L. REV. 663 (1968).

⁶ See 26 AM. JUR. 2D *Eminent Domain* § 158 (1966) (concluding that the meaning of "taking" is of decreasing importance).

⁷ See Sax, *supra* note 2, at 37-42.

⁸ *Eyherabide v. United States*, 345 F.2d 565, 567 (Ct. Cl. 1965); 2 NICHOLS § 6.3.

⁹ See Dolle, *Impending Condemnation and Stultification of Use*, 3 REAL PROP., PROB. & TRUST J. 106 (1968) [hereinafter cited as Dolle].

¹⁰ *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966); *City of Cleveland v. Carcione*, 116 Ohio App. 525, 190 N.E.2d 52 (1963).

¹¹ 282 F. Supp. 175 (N.D. Ohio 1967).

¹² The term "doctrinal" is used to indicate an approach to the law wherein concepts are created into which facts must fit to enable the rule of law to apply. This provides certainty, but it does not provide well for change in circumstances nor does it facilitate policy decisions. Conversely, "utilitarian" is used to indicate a functional approach that is dynamic but provides little certainty.

Sayre involved the use of eminent domain power in urban redevelopment, an area of governmental power that has been substantially augmented by the expansion of the "public use" doctrine.¹³ Pursuant to the Housing Act of 1949,¹⁴ the Cleveland, Ohio, City Planning Commission sought in January, 1961, to obtain federal funds under a grant and loan contract by adopting an urban renewal plan.¹⁵ After approval of the plan, the defendant City of Cleveland initiated the University-Euclid Urban Renewal Project I by sending notices to the residents and owners of the affected area of its intent to acquire their property.¹⁶ Subsequently, the city made "prominent and frequent public announcements and publication through all local media of public communication of its intention to appropriate the properties."¹⁷ Yet the city, thereafter, acquired only a small amount of the properties. At the same time, by following normal eminent domain procedure¹⁸ and denying any compensation for repairs to property, the city effectively denied area owners, one of whom was the plaintiff's bankrupt, Liberty Mortgage Company, the right to repair their swiftly deteriorating realty.¹⁹ On November 2, 1964, the Liberty Mortgage Company was declared bankrupt.²⁰ At that time the City of Cleveland had acquired not more than twelve of the scores of the company's properties within the project area.²¹

On these stipulated facts, the federal district court held as a matter of law that the city had abused its eminent domain power to an extent that amounted to a pro tanto "taking."²² In apparent ratification of the doctrinal method, the court marshalled facts from the complaint which fulfilled the required elements of conceptual taking—governmental intention to appropriate and governmental action amounting to appropriation.²³ However, the paucity of facts upon which the court relied, coupled

¹³ *Morris*, *supra* note 4, at 355-56.

¹⁴ 42 U.S.C. § 1441 (1964).

¹⁵ 282 F. Supp. at 178. See 42 U.S.C. § 1455(a) (1964), requiring the local government to approve an urban renewal plan for an area before any funds are made available.

¹⁶ 282 F. Supp. at 178. See 42 U.S.C. § 1455(d) (1964), providing that "no land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place and purpose of such hearing."

¹⁷ 282 F. Supp. at 179. See 42 U.S.C. § 1455(e) (1964).

¹⁸ See *Dolle*.

¹⁹ 282 F. Supp. at 179.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 192.

²³ *Id.* at 184, 185.

with the court's slight deviation from precise conceptualism, reveals the actual utilitarian approach of the opinion.

Quoting from *Biggs Realty Co. v. United States*,²⁴ the court in *Sayre* stated that "[t]o constitute a taking there must be an intent on the part of the [defendant] to take plaintiff's properties, or at least an intention to do an act the natural consequences of which was to take property."²⁵ In *Foster v. City of Detroit*,²⁶ upon which *Sayre* most heavily relied, finding intent had been easy, since that fact was established by the completion of the appropriation proceedings.²⁷ Thus, the court in *Foster* merely had to decide at what point in time the taking had occurred. However, in *Sayre* the eminent domain proceedings, though commenced in accordance with law, had never been concluded,²⁸ and this complicated the question of intent.²⁹ The court held that publication of notices to the effect that the city intended, at some future time, to procure plaintiff's properties was sufficient to establish an intention to do an act the natural consequences of which was to take property.³⁰ This then was the first crack in the doctrinal wall surrounding the concept of "taking." The "natural consequences" test for intent introduced an element of reasonable expectation into the concept of "taking," and like most tests of reasonableness, it allowed for balancing policy considerations. Could not the City of Cleveland reasonably expect that publication of the notices, followed by city inaction, would result in the gradual abandonment by tenants of the Liberty Mortgage Company's properties within the project area and subsequent vandalism of the vacated properties? The outcome in *Sayre* hinged upon the answer to that question. However, to analyze the concept of "taking," it is the formulation of that question that is crucial.

Even with the intent to appropriate established, the court in *Sayre* had to find some act by the city sufficient to implement that intent. Again the court relied upon the reasoning in *Foster*³¹ and concluded that Cleveland, by initiating steps to appropriate the bankrupt's properties without the proper planning for completing the appropriation, had abused its

²⁴ 353 F.2d 1013 (Ct. Cl. 1965).

²⁵ 282 F. Supp. at 185.

²⁶ *Foster v. City of Detroit*, 254 F. Supp. 655, 660 (E.D. Mich. 1966).

²⁷ 282 F. Supp. at 185. See Committee on New Developments in Real Estate Practice, *Inverse Condemnation*, 3 REAL PROP., PROB. & TRUST J. 173, 175 (1968).

²⁸ 282 F. Supp. at 185.

²⁹ See *Inverse Condemnation*, *supra* note 27, at 176.

³⁰ 282 F. Supp. at 185.

³¹ *Foster v. City of Detroit*, 254 F. Supp. 655, 664 (E.D. Mich. 1966).

power.³² However, the court stated that abuse of power alone was not enough to constitute an act of taking, where there had been no formal condemnation proceedings, unless that act of abuse "directly and proximately contributes to, hastens, and aggravates, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property."³³ The court required this element of causation to fulfill the concept of "taking."

The court rendered its decision that the required concepts of intention and action were fulfilled by the facts pleaded and that they constituted a taking for which there had to be just compensation. But what were the crucial facts? The City of Cleveland published the notices of intent to acquire and then did nothing, and as a result there occurred the rapid depreciation of bankrupt's properties. Upon these same crucial facts, the law prior to *Sayre* was well settled that "land is not damaged or taken in a constitutional sense by reason of preliminary proceedings looking to its appropriation for a public use."³⁴ Furthermore, one district court,³⁵ in a widely quoted opinion,³⁶ had expressly rejected the proposition that the *institution* of condemnation proceedings could lead to such an interference with private property rights as to constitute a taking:

The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation action itself constitutes a taking. The court finds no merit in it.³⁷

The court in *Sayre*, under the guise of conceptualism, has clearly promulgated a definition of "taking" that creates new law at least with reference to the conduct of eminent domain proceedings in urban redevelopment situations. This law stands as a warning to local governments that they must not abuse their power of eminent domain in substance or procedure, so as to injuriously affect private property.

The utilitarian effect of this expanded definition of taking is twofold. First, it will help correct the major fault current in the eminent domain

³² 282 F. Supp. at 192.

³³ *Id.* at 185.

³⁴ 26 AM. JUR. 2D *Eminent Domain* § 168 (1966). See also 2 NICHOLS § 6.13 [3]; Dolle 107.

³⁵ *Government of the Virgin Islands v. 50.05 Acres of Land*, 185 F. Supp. 495 (D.V.I. 1960).

³⁶ See, e.g., 2 NICHOLS § 6.13 [3] n.9; Dolle 107.

³⁷ 185 F. Supp. at 498.

power—procedural inadequacy.³⁸ Second, it will prevent what has been called “stultifying the use of property”³⁹ and thereby protect private property rights more fully.

The inadequacies current in eminent domain procedures seem to be a by-product of the expanded “public use” doctrine. That doctrine has increased local government’s power over land use while, simultaneously, federal funds have become increasingly available under the Housing Act of 1949. These developments have created an atmosphere that encourages increased use of eminent domain power, thereby effectuating society’s need for land development.⁴⁰ Although these tendencies have resulted in a greater volume of public land acquisition, the methods for handling this increase have been left largely to the ingenuity of the local governments, except for those general guidelines upon which the federal grants are conditioned.⁴¹ The strain on local procedures is most obvious in cases like *Sayre* and *Foster*, where property remains subject to condemnation for long periods of time.⁴² Hence the mandate of the court in *Sayre* seems designed to make local governments either increase the number of personnel handling their existing condemnation procedures to accommodate this increased volume or renovate these procedures so that each acquisition might be more efficiently accomplished. To implement this mandate, the court establishes a definition of “taking” that will permit each property owner to redress procedural abuse to his property by demanding compensation for unreasonable delay in appropriation that results in demonstrable loss.

The stultification of land caused by impending condemnation usually manifests itself in two forms.⁴³ Either the owner is unable to sell his property because of public knowledge that it may be condemned, or he is effectively prevented from developing it by governmental denial of compensation for repairs. Thus, fundamental rights to control property are divested by the initiation of eminent domain proceedings. And the longer those proceedings take, the greater is the owner’s deprivation. Consequently, the holding in *Sayre*, by demanding more expeditious condemnation procedures, also protects the owner’s right to use his property as he wishes.

Perhaps the expansion of the concept of “taking” in *Sayre* can best be attributed to an abstract need to strike a balance between the public

³⁸ See Comment, *Urban Renewal*, *supra* note 5, at 124.

³⁹ Dolle 106.

⁴⁰ Comment, *Urban Renewal*, *supra* note 5. See Morris, *supra* note 4.

⁴¹ See 42 U.S.C. § 1455 (1964).

⁴² 282 F. Supp. at 178-79 (four years); 254 F. Supp. at 660 (thirteen years).

⁴³ Dolle 106.

good and the individual's right to be free from injury. As the expansion of the "public use" doctrine has greatly augmented government's power to implement the former, *Sayre* seems to be a reaction to this power increase, thereby protecting the latter. However, by protecting the individual's rights, *Sayre* has not impaired the public's interest, for the streamlining of eminent domain procedures assures a quicker implementation of that interest while avoiding any accelerated deterioration of the property that is the subject of that interest.

KENNETH B. HIPPI

Federal Jurisdiction—The Delimitation of *Erie* and a Redefinition of "Laws"

In *Ivey Broadcasting Co. v. American Telephone & Telegraph*,¹ plaintiff brought an action in federal court to recover damages for negligence and breach of contract in the rendition of interstate telephone service. Diversity of citizenship not being present, both the complaint and a counterclaim for charges due for the same services were dismissed. The Court of Appeals for the Second Circuit reversed, holding that federal common law was applicable and that the district court had original jurisdiction under 28 U.S.C. § 1331.²

Reversing the normal order of analysis,³ the court first held that federal law was controlling. It found that the field of interstate communications had been preempted by the federal government, especially where the outcome of the case might adversely affect the federal policy of uniformity of rates.⁴ The court held that a congressional policy of uniformity of services could be implied from the congressional policy of uniformity of rates embodied in the Interstate Communications Act of

¹ 391 F.2d 486 (2d Cir. 1968), *rev'd* 234 F. Supp. 4 (N.D.N.Y. 1964).

² 28 U.S.C. § 1331(a) (1964) reads:

The district courts shall have original jurisdiction of all civil actions where in the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

³ Usually the courts treat the jurisdictional question first because there is a presumption that the court lacks jurisdiction until it is shown that it has jurisdiction over the subject matter. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 14 (1963).

⁴ See *Western Union Tel. Co. v. Speight*, 254 U.S. 17 (1920); *Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920); *Postal Tel.-Cable Co. v. Warren-Goodwin Lumber Co.*, 251 U.S. 27 (1919).