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Eminent Domain - Valuation - Denial of Compensation for Loss of Business Incurred by Condemnation Proceedings - Seferi v. Ives

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EMINENT DOMAIN—Valuation—Denial of Compensation for Loss of Business Incurred by Condemnation Proceedings. Seferi v. Ives, 155 Conn. 580, 236 A.2d 83 (1967).

Plaintiff Seferi owned a lot on which he operated a retail supermarket. The defendant highway commissioner acquired the land for highway purposes and awarded plaintiff the sum of $83,000 which plaintiff promptly refused. Plaintiff appealed the assessment and a state referee found that, taking into account $10,171 for moving expenses to another location in the area, the damages sustained by the plaintiff by reason of the taking were $139,000. The referee also found that the value of the business was $42,500 and the value of the fixtures that plaintiff would lose if unable to move his business was $16,364. He stated that if, as a matter of law, the values of the business and fixtures, as he found their separate values to be, were allowed as damages, then the $10,171 for moving expenses would not be required and the adjusted total would be $188,000. There was no location or site anywhere in the area in which they could erect a building into which they could move their business, including fixtures and equipment.

The trial court found that plaintiff was entitled to the $188,000 and upon appeal the Supreme Court of Connecticut reversed that decision and awarded plaintiff only $139,000 (value of the land plus the moving expenses). In doing so, the court commented that:

> [E]ven if the plaintiffs were correct in their claim in the referee's finding that 'there is no location or site anywhere in the area which the plaintiffs could acquire and upon which they could erect a building to which they could move their business' is the equivalent of a finding that the plaintiffs could not move their retail business to any location whatsoever,

they cannot recover for the loss and damage to their business.[1] In other words, the Supreme Court of Connecticut said that even if the plaintiff was put out of business because of the taking of the land, the general rule is that he may not be compensated for such loss. While this may be accepted as current law there appears to be cause for re-axamining the basic principles.

1. Seferi v. Ives, 155 Conn. 580, 236 A.2d 83, 86 (1967).

The law pertaining to such situations is settled.[2] The case most relied upon is *Mitchell v. United States.*[3] Although this is a relatively old case, it is almost invariably cited whenever a claim for loss of a business is being decided. In *Mitchell,* Congress had passed the Tucker Act to pay for damages and losses resulting from the procurement of land to increase facilities for testing ordinance materials. The landowner affected by such procurement of land had been using that land for the business of growing and canning corn of a special grade and quality. The corn could not be grown anywhere else and therefore the landowner was out of business. He received compensation for the land but not for the business that he actually lost by losing the land.

The court's reasoning in the *Mitchell* case exemplifies the reasoning of most state and federal courts handling similar situations:

> The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. (Citations omitted.) No recovery therefore can be had now as for a taking of the business. *There is no finding as a fact that the Government took the business, or that what it did was intended as a taking.* If the business was destroyed, the destruction was an unintended incident of the taking of the land. *There can be no recovery under the Tucker Act if the intention to take is lacking.*[4] (Emphasis added.)

The court also stated that for an owner to recover incidental damages, he "must show some statutory right conferred" by the state or the right guaranteed in the state or federal constitution.[5]

Thus, the problem of compensation for the loss of a business resolves itself into two questions: 1) Is such compensation provided for by the state or federal statutes and consti-

2. "Thus the general rule is that any loss occasioned to a business as a result of the condemnation of the land upon which it is conducted and which arises by reason of the necessity of removing such business to another location is not recoverable." 4 NICHOLS, EMINENT DOMAIN § 13.32(1), at 459 (4th ed. 1962); *see* also United States v. General Motors Corp., 323 U.S. 373 (1945); 27 AM. JUR.2d *Eminent Domain* § 285 (1966); comment, 67 YALE L.J. 61, 74 (1957).
3. Mitchell v. United States, 267 U.S. 341 (1925).
4. *Id.* at 345.
5. *Id.*

tutions, and 2) What is the definition of 'taking' and when does the state or federal government 'take'?

The fifth amendment of the Constitution of the United States provides: "nor shall private property be taken for public use, without just compensation." The courts interpret this to mean the taking and compensation for *property, i.e.,* land, and not compensation for consequential damages. The consequential or incidental damages can only be provided for by an act of Congress.[6] Accordingly, "injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation."[7]

The states' constitutions and statutes vary. They either follow the fifth amendment of the United States Constitution, or enumerate what damages will be compensated. The constitution of Connecticut, where the principal case arose, is typical of the former. It states that "the property of no person shall be taken for public use, without compensation therefore."[8] It can be easily seen from the holding of the *Seferi* case that this is interpreted the same way as is the United States Constitution. The Rhode Island statutes are an example of the latter, and are discussed in *Joslin Co. v. Providence* where the Supreme Court said that injury to business is only allowed by statute and the statute only *grants* a right.[9]

The present concern is with the state and federal constitutions of the first category, where it appears that in the absence of enumeraed damages, one is not afforded compensation. As already pointed out, under such constitutions, loss of one's business is not compensated.[10] The reasoning for this policy brings us to the second question: What is a taking?

In defining the term taking, the courts have gone along with the way the government likes to have it defined. The basic element in a taking is that "there must be a physical appropriation of the property and a dispossession of the owner, for public use."[11] "The sovereign ordinarily takes the

6. "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property. (Citations omitted.) Such losses may be compensated by legislative authority, not by force of the Constitution alone." United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).
7. Joslin Co. v. Providence, 262 U.S. 668, 675 (1922).
8. CONN. CONST. art. 1, § 11.
9. Joslin Co. v. Providence, *supra* note 7, at 675.
10. *See* notes 2, 6 and 7.
11. JAHR, EMINENT DOMAIN § 47 at 69 (1st ed. 1957).

fee.'"[12] It does not condemn one's business, "it condemns his property."[13] In other words, that which the government appropriates and uses, is that which the government "takes". Land is what the government needs so land is what it takes; whether it be for railroads in the 1800's or for highways, parks, or urban redevelopment in the 1960's. Since this has been the prime objective and use of condemnation proceedings, the courts allow compensation merely for the land taken by the government only lately admitting that the land might be worth more for its particular adaptability to certain uses and therefore giving the "market value" of the land.[14]

Since the state needs the land, it "takes" the land and if by chance there is a business being conducted upon that particular land and the state has no use for it, the state does not take the business but rather allows it to be removed. Examples of this are illustrated in *Seferi v. Ives,*[15] the principal case, where the government had no use for a retail market and therefore did not take it, and *Housing Authority of City of Bridgeport v. Lustig*[16] where the state did not take over a poultry business. The courts hold to the view that there can be no recovery if the intention to take is lacking.[17] Where there is an intent to take a business, *i.e.,* run it, then the owner is allowed compensation.[18]

Thus, a taking is very narrowly defined and such definition is in the favor of the taker or condemnor. He compensates for the land that he takes to use and the business that he takes to run. If, in effect, the landowner by moving from the land, is put out of business, he is not compensated for the loss of such business as evidenced in the *Seferi, Mitchell,* and *Sgarlot* cases.

12. United States v. General Motors Corp., *supra* note 2, at 379.
13. Sgarlot Estate v. Commonwealth, 398 Pa. 406, 158 A.2d 541, 543 (1960).
14. *Id.* at 543; Housing Authority of City of Bridgeport v. Lustig, 139 Conn. 73, 90 A.2d 169 (1952); "[I]t is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put." Seferi v. Ives, *supra* note 1, at 85.
15. Seferi v. Ives, *supra* note 1.
16. Housing Authority of City of Bridgeport v. Lustig, *supra* note 14.
17. Tempel v. United States, 248 U.S. 121 (1918).
18. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Here, the government took plaintiff's land, plant, and equpiment because it needed the facilities for a nearby base during World War II. They allowed him compensation for the use of said facilities and gave them back to him when they were no longer required.

Each time that a piece of property is condemned and the owner is forced to move and lose his business, the courts throw out the old standby principles. "A condemnation proceeding is a proceeding in rem; it is not the taking of rights in the ordinary sense, but is an appropriation of physical properties."[19] "There is no finding that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of taking the land."[20] The *Sgarlot* case came directly to the point: "The Commonwealth does not condemn an owner's business acumen or its results expressed in value. It condemns his property . . . ."[21]

Yet, other courts, while following the above principles have revealed their own feelings on the inequities of such rulings. They have stated that the consequences are harsh,[22] and that even though it is the law, it works hardships.[23] In the case of *City of Oakland v. Pacific Lumber & Mill Co.*,[24] where the state condemned land between landowner's mill and his access to the necessary water power and in effect put him out of the milling business, the court states an opinion that is quite in accord with this writer's opinion: "Indeed, this is but another way of phrasing the real contention of the appellant, . . . that the business is property and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefore. *We are not to be understood as saying that this should not be the law when we do say that it is not our law.*"[25] (Emphasis added.) Here there is evidence that the courts, while following the old, well setted rules, are at least cognizant of the very outstanding fact that when a landowner must move his business, and as a direct result of that moving loses that business, his business has in fact been taken and he should be compensated for it.

The need for an enlightened definition of "taking" is apparent and there are a few cases in Connecticut that seem

19. Reeves v. City of Dallas, 195 S.W.2d 575, 581 (Tex. Civ. App. 1946).
20. Mitchell v. United States, *supra* note 3, at 345.
21. Sgarlot Estate v. Commonwealth, *supra* note 13, at 543.
22. United States v. General Motors Corp., *supra* note 2, at 382.
23. City of Newark v. Cook, 99 N.J.E. 527, 133 A. 875, 879 (1926) .
24. City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 P. 705 (1915).
25. *Id.* at 707.

to be moving away from the established rule to include more compensation for incidental losses and this reveals how the court in the *Seferi* case stood still, where it could have taken a very important step toward the goal of just compensation.

In *Harvey Textile Co. v. Hill,*[26] the Highway Commissioner condemned land for a highway on which the owner had a factory. The court, claiming that it was not departing from the market value test, allowed a factory to recover its costs in relocating its industry holding that moving costs should be considered a part of the market value of the condemned property since an owner's willingness to sell would be influenced by his consideration of having to move his factory. Two years later there was a further departure from the prevailing rule in the case of *Housing Authority of the City of Bridgeport v. Lustig*[27] where the court held that a going business on a piece of property is an element to be considered in the determination of the fair market value of the land, if the land is enhanced by the use of it for business purposes (yet the business itself was not compensated for). It should be noted that both the principles of moving expenses compensation and enhanced value compensation were used in the *Seferi* case.[28]

As we are looking at such diversions from the established rules, we must consider the case of *Kimball Laundry Co. v. United States,*[29] where the Supreme Court in a 5-4 decision, compensated the owner for his loss of his trade routes while the military was using his business facilities. It is interesting to note that the trade routes were not "taken", yet were compensated.

This very fact in the *Kimball* case that the condemnor was ordered to pay the owner for the loss of his trade routes (which in the operation of a laundry is actually a key part of the business), combined with the trend in the *Harvey Textile* and *City of Bridgeport* cases broadening the market value rule to include some incidental losses, is an indication that the United States Supreme Court could decide the *Mitchell* and *Seferi* cases differently today. The above trend set by *Harvey*

26. Harvey Textile Co. v. Hill, 135 Conn. 686, 67 A.2d 851 (1949).
27. Housing Authority of City of Bridgeport v. Lustig, *supra* note 14.
28. Seferi v. Ives, *supra* note 1, at 84, 85.
29. Kimball Laundry Co. v. United States, *supra* note 18.

and *Bridgeport,* as evidenced by the steps of allowing moving expenses and then going concern considerations, has set the stage for the next natural, logical and justifiable step of compensating one for his actual loss of business caused by the condemnation.

The state and federal governments have some valid reasons for opposing such compensation. The damages are too speculative,[30] and to allow such damages would tend to greatly increase and make indefinite the costs of eminent domain, thereby discouraging public improvements.[31] Also, in many cases the condemnor would be purchasing something it will not receive. Yet, on the other hand we see that the business owner has no free choice to stay in that particular business or start another type of business, perhaps somewhere else. Stricter zoning laws, less land, and more occasions of such inability to relocate illustrate the point that there will be greater damages to businesses by eminent domain proceedings in the future and suggest strong reason for a relaxing of the strict rule of taking.

Of course, such a "relaxing" could go to extremes and public improvements would be hampered. But with today's ability to forecast damages, profits, moving expenses, etc., the courts should allow a businessman in the *Seferi* and *Mitchell* situations to prove his damages, and when it is proven that he has lost his business, he should be compensated. Accordingly, one man would not be required to bear more than his share of the expenses for his neighbor's gain, the burden would be placed over a larger number of people making the loss easier to bear, and the lawmaker's goal of just compensation would be one step closer.

In taking that step, the courts should recognize the necessity and legality of compensating businessmen in such situations. They should objectively rule on a case to case basis, allowing only the damages that are reasonable and certain with a goal of balancing the interests between the public and the businessman thereby arriving at an equitable result for *both* sides.

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30. Southern Amusement Co. v. United States, 265 F.2d 34 (5th Cir. 1959); Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925).
31. 1 ORGEL, VALUATION UNDER EMINENT DOMAINS 77, at 334 (2nd ed. 1953).