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Constitutional Law - Elements of Reasonable Notice in Emeninent Domain Proceedings

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CONSTITUTIONAL LAW

The Elements of Reasonable Notice in Eminent Domain Proceedings

In *Schroeder* v. *New York*[1] the question of what constitutes reasonable notice to a property owner in eminent domain proceedings was litigated. Pursuant to the New York City Water Supply Act,[2] notice of an intention to divert the Neversink River was given by publication in two newspapers in the county where the real estate was located and by posting on trees in the vicinity of the property.[3] According to the Act, all claims for damages were barred after three years.[4] Eight years later, appellant claimed in equity that she was given inadequate notice, since the newspapers used for the purpose of providing notice were not published in the largest communities of the county and there were other towns nearer the real estate in which notice could have been published. Secondly, none of the handbills were posted directly on her property. Furthermore, the handbills did not include her name, despite the fact it could have been easily ascertained from the deed books or tax rolls. There was no indication in the notices of the remedies she might have. The court held that the notice was inadequate and appellant was entitled to a hearing on the question of damages.

This decision raises serious questions concerning limitations on the power of eminent domain. "The power of eminent domain is an attribute of sovereignty and inheres in every independent state."[5] It is deemed to be a power essential to the proper functioning of the government of the state, which cannot be contracted away.[6] "It is not a personal privilege, it is a special authority, impressed with a public character, and to be

[1] 83 Sup. Ct. 279 (1962).

[2] Administrative Code of City of New York, Title K41.

[3] Administrative Code of City of New York, Title K41-8.0.

[4] Administrative Code of City of New York, Title K41-18.0.

[5] Georgia v. Chattanooga, 264 U.S. 472 (1924); Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390 (1912); Boom Company v. Patterson, 98 U.S. 403 (1878).

[6] United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 at p. 280 (1943).

utilized for a public end."[7] The state may occupy land without any notice to the property owner as long as the owner at some stage of the proceedings has an opportunity to be heard and to offer evidence of the value of the land taken.[8] This requirement is satisfied if the value of the land is fixed by persons who view the land, even if the property owner is not permitted to offer evidence, if the award is subject to judicial review on which a trial upon evidence may be had.[9] The power of eminent domain may be delegated to a municipality.[10]

It is clear no notice before the taking of the property is necessary,[11] since the power is originally a legislative and not a judicial function.[12] Due process does require that there be notice and an opportunity to be heard on the question of compensation.[13] Thus, the only issues in this case are whether there was a reasonable notice and opportunity to be heard.

It has been said that due process requirements are more exacting in the case of a resident owner, than in the case of a nonresident owner.[14] Constructive notice has been upheld against nonresident owners in a number of cases.[15] In the leading case on the point,[16] it was said:

[7] Georgia v. Chattanooga, 264 U.S. 472 (1924); Galveston Wharf Company v. Galveston, 260 U.S. 473 (1922); Pennsylvania Hospital v. Philadelphia 245 U.S. 20 (1917).

[8] Bailey v. Anderson, 326 U.S. 203 (1945); Georgia v. Chattanooga, *supra*, note 7; Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923); Bragg v. Weaver, 251 U.S. 57 (1919).

[9] Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).

[10] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Georgia v. Chattanooga, 264 U.S. 472 (1924); Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923); Bragg v. Weaver, 251 U.S. 57 (1919); Sears v. Akron, 246 U.S. 242, (1918).

[11] United States v. Twin City Power Co., 350 U.S. 222 (1956); Berman v. Parker, 348 U.S. 26 (1954); United States v. Cormack, 329 U.S. 230 (1946); Georgia v. Chattanooga, *supra*, note 10; Rindge Co. v. Los Angeles, 262 U.S. 700 (1923); Joslin Mfg. Co. v. Providence, *supra*, note 10; Bragg v. Weaver, *supra*, note 10; Sears v. Akron, *supra*, note 10.

[12] Walker v. Hutchinson City, 352 U.S. 112 (1956); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Bragg v. Weaver, 251 U.S. 57 (1919).

[13] North Laramie Land Co. v. Hoffman, *supra*, note 12; Bragg v. Weaver, *supra*, note 12; Backus v. Fort Street Union Depot Co., 169 U.S. 557 (1898); Pearson v. Yewdall, 95 U.S. 294 (1877).

[14] Annot., 1 L.Ed.2d 1635 (1957).

[15] Wick v. Chelan Electric Co., 280 U.S. 108 (1929); Huling v. Kaw Valley R. & Improv. Co., 130 U.S. 559 (1889).

[16] Huling v. Kaw Valley R. & Improv. Co., *supra*, note 15.

> The owner of real estate who is a nonresident of the State within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the State. Because he cannot be reached by some process of the courts of the State, which of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property . . .[17]

This emphasizes a point that has long been recognized.

> [The State] has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto . . . The well-being of every community requires that the title therein to real estate be secure . . . The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and, as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless it conflicts with some special inhibitions of the Constitution or against natural justice.[18]

Consequently, personal service upon a nonresident owner is not essential and it is difficult to see why a different rule should apply to a resident.[19] The owner of real estate usually arranges some means to learn of any attack on his property. If the State seizes his property, notice by publication or posting is just an additional means of informing the owner of the State's action.[20]

We must now look at the circumstances of the *Shroeder* case to see if they were sufficient to take it outside the general

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[17] Huling v. Kaw Valley R. & Improv. Co., *supra*, note 15, at 563.

[18] Ardnt v. Griggs, 134 U.S. 316, 320, 321 (1890). See also Clark v. Willard, 294 U.S. 211 (1935); Grannus v. Ordean, 234 U.S. 385 (1914); Dewey v. Des Moines, 173 U.S. 193 (1899).

[19] Georgia v. Chattanooga, 264 U.S. 472 (1924); Bragg v. Weaver, 251 U.S. 57 (1919).

[20] *Cf.*, Mullane v. Hanover Trust Co., 339 U.S. 306, 316 (dicta) (1950); Huling v. Kaw Valley R. & Improv. Co., 130 U.S. 559, 564 (1889).

rule. The right of eminent domain may to the extent and for the purposes designated by statute, be exercised by municipalities.[21] New York City was seeking the right to divert the waters of the Neversink River. A State can acquire the right to divert the waters of a stream by legislative grant.[22]

Appellant did not object to the statute, but she did object to the manner in which its provisions were carried out. However, it would seem that the objection was not timely, since it came eight years after the river had been diverted. The period of the statute of limitations was three years.[23] Courts of equity usually refuse relief where it appears that the complainant, before seeking the aid of equity, permitted the lapse of a period comparable to the one designated by the statute of limitations,[24] unless there is some extraordinary ground for granting relief.[25] "A court of equity . . . has always refused its aid to state demands, where the party has slept upon his rights, and acquiesced for a great length of time."[26] The party seeking relief must use reasonable diligence.[27]

It cannot be said that reasonable diligence was exerted in the instant case. As the New York Court of Appeals said, "[I]t is of considerable significance that the effect of the challenged diversion was clearly apparent long before the expiration of the three-year period within which the plaintiff was required to file her claim."[28] Obviously, appellant did not use reasonable diligence. Appellant claimed she was damaged because the velocity of the flow of the Neversink River was decreased. This so-called injury should certainly have been apparent within three years, yet appellant waited eight years to bring suit.[29]

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[21] Cases cited note 10, *supra*.

[22] Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923).

[23] Thorn Wire Hedge Co. v. Washburn, 159 U.S. 423 (1895); Curtner v. United States, 149 U.S. 662 (1893); Hammond v. Hopkins, 143 U.S. 224 (1892); 2 POMEROY EQUITY JURISPRUDENCE § 419(a) (5th ed. 1941).

[24] 2 POMEROY, § 419(a).

[25] Smith v. Clay, 3 Brow. Ch. 638, 29 Eng. Rep. 743 (1767).

[26] Walker v. Texas & Pac. Ry. Co., 245 U.S. 398 (1918); Moran v. Horsky, 178 U.S. 205 (1900); Baker v. Cummings, 169 U.S. 189 (1898).

[27] Schroeder v. New York City, 10 N.Y.2d 522, 527, 180 N.E.2d 568, 570 (1962); *Cf.*, Bellingham Bay & B.C. Ry. Co. v. New Whatcom, 172 U.S. 314 (1899).

[28] Nelson v. New York City, 352 U.S. 103 (1956).

[29] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); American Land Co. v. Zeiss, 219 U.S. 47 (1911).

The Supreme Court has often said that when it decides whether notice is reasonable, it will refer to the subject matter with which the notice deals.[30] It will view "with great respect the judgment of state courts upon what should be deemed public uses in any state." It would seem that the "great respect" paid in determining what is a public use, should also be appropriate in determining what is reasonable notice.

Appellant also sought relief on the ground that neither the newspaper publication, nor the posted notices indicated what action a property owner might take to recover damages, nor did they intimate any time limit upon the filing of a claim. The general rule is that all that is required is notice of the proceedings, and once a person has notice that such action is planned, he is bound to take cognizance of all further steps in the proceedings,[31] and it has been held that notice is sufficient if the publication is of such a character that it creates a presumption that the owner of property affected, if present and exercising ordinary care, will receive information as to what is proposed and when and where he may be heard.[32] It has already been demonstrated that reasonable notice was given and that the notice provided the necessary information, *i.e.*, what was proposed to be done or was done and when and where the hearing would be had.

In reaching its decision the court relied primarily on two cases. In *Mullane* v. *Hanover Trust Company*,[33] it was held that notice by publication was not adequate to inform known, nonresident beneficiaries of the settlement of accounts of common trust fund in which numerous small trusts funds had been invested. Clearly, there is a distinction between *Mullane* and the instant case. The *Mullane* case involved intangible personalty, in the instant case visible, tangible realty. It is possible the damage in *Mullane* could not be recognized, even if the highest degree of diligence were exercised; but, in the instant case, the damage was readily evident within the three years in which suit could be

[30] Rindge Co. v. Los Angeles, 262 U.S. 700, 705 (1923). See also, Hairston v. Danville & Western Railway, 208 U.S. 598 (1908); Fallbrook Irrigation District v. Bradley, 163 U.S. 112 (1896).

[31] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

[32] Bellingham Bay & B.C. Ry. Co. v. New Whatcom, 172 U.S. 314 (1899).

[33] 339 U.S. 306 (1950).

brought. Natural justice requires notice in the *Mullane* situation, but this is not true in the instant case.

The second case[34] which the court relied upon held that a statute requiring notice by publication when eminent domain proceedings were instituted against resident landowners violated the due process clause of the Fourteenth Amendment. This case can be distinguished on two grounds. The first is that the statute provided that publication was sufficient if notice were published *once* in the official city newspaper. Secondly, the landowner had only thirty days in which to appeal, or the decision became final. Due process was clearly denied since no presumption (because of the short statute of limitations) that a property owner used ordinary diligence could be raised under this statute. Furthermore, the period provided for appeal denied the property owner sufficient time to recognize the damage, if he were in the same position as appellant in the instant case.

The Supreme Court extended the requirements for reasonable notice far beyond any limits heretofore demanded by due process. Clearly the doctrine of laches should have applied, even if notice were unreasonable. The cases relied on by the Court are readily distinguishable and do not justify the decision that was reached. Nevertheless, one must accept the fact that the doctrine of constructive notice has been severely restricted and that undoubtedly it will soon be an ancient, legal relic.

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[34] Walker v. Hutchinson City, 353 U.S. 112 (1956).