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EMINENT DOMAIN-VALIDITY OF STATE STATUTE

EMINENT DOMAIN—VALIDITY OF STATE STATUTE—As upon certiorari, the New Mexico Supreme Court considered the question, whether it is "within legislative competence to declare a public use in the industry of coal mining, so as to permit taking private property in aid of it."[1] Plaintiff had obtained a judgment of condemnation, and defendant attacked it as offensive to the New Mexico constitutional provision:[2] "Private property shall not be taken or damaged for public use without just compensation." The opinion recognized the existence of an "orthodox" and a "liberal" doctrine of construing "public use." While the court found that, unlike Nevada's[3] or Utah's,[4] New Mexico's well-being was not dependent upon mining, that is, there was no compelling public benefit in coal mining, a test applied by the "liberal" doctrine, and while the court denied any intention to shut the door on the "liberal" view, it nonetheless saw "no easy or logical stopping place"[5] once the "orthodox" view was quit, and it *held* the condemnation statute, as far as it applied to coal mining, violative of the New Mexico Constitution. *Gallup American Coal Co. v. Gallup Southwestern Coal Co.*, (N. M. 1935) 47 P. (2d) 414.

It is elementary that the exercise of the sovereign power of eminent domain is in general restricted by organic law to a public use.[6] Although, in the first instance, the legislatures may determine what a public use is, and although the courts in varying degree give weight to the legislatures' determination, in the final analysis, the courts decide what a public use is.[7] As the New Mexico court in the principal case indicated, there are two lines of authority,[8] one of which, the so-called "orthodox" view, requires a use by the public or its agencies,[9] and the

[1] 47 P. (2d) 414.

[2] Art. 2, § 20.

[3] Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394 (1876).

[4] Nash v. Clark, 27 Utah 158, 75 P. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300 (1904).

[5] 47 P. (2d) 414 at 416.

[6] 1 LEWIS, EMINENT DOMAIN, 2d ed., § 163 (1900); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1109 (1927).

[7] 1 LEWIS, EMINENT DOMAIN, 2d ed., 158 (1900); 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 1141 (1927). Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 231, 78 P. 296, 297, 1 L. R. A. (N. S.) 976 (1904); Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394, 399 (1876); Sholl v. German Coal Co., 118 Ill. 427 at 431, 10 N. E. 199 at 201, 59 Am. Rep. 379 (1887); Kansas & Texas Coal Ry. v. Northwestern Coal & Min. Co., 161 Mo. 288, 313, 61 S. W. 684, 51 L. R. A. 936 at 944 (1900); 77 CENT. L. J. 111 at 112 (1913). As to the amount of weight different courts give the legislative determination, see 34 HARV. L. REV. 207 (1920). The United States Supreme Court binds itself to the decision of the state court upholding such a determination unless there are clearly no grounds to do so. Green v. Frazier, 253 U. S. 233 at 239, 40 S. Ct. 499 (1919).

[8] Nash v. Clark, 27 Utah 158, 162, 75 P. 371, 1 L. R. A. (N. S.) 208 (1904); 14 Ann. Cas. 903, note (1909); 1 L. R. A. (N. S.) 976 at 977, note (1906); LEWIS, EMINENT DOMAIN, 2d ed., § 164 (1900). And see generally 54 A. L. R. 7.

[9] 1 L. R. A. (N. S.) 977, note (1906); 20 L. R. A. 434, note (1893). For a borderline doctrine see Kansas & Texas Coal Ry. v. Northwestern Coal & Min. Co., 161 Mo. 288, 313, 61 S. W. 684, 51 L. R. A. 936 at 944 (1900). Under this view, it is not necessary that the whole or any particular part of the public exercise the use in

other, or so-called "liberal" view, holds that a use that will promote the public interest or tends to develop natural resources is sufficient.[10] Certain things are pretty generally recognized as public uses under either view,[11] but the courts have been by no means as one in their inclusion or exclusion of various public purposes enumerated by the legislatures.[12] There has been a marked failure of the courts, in the case of mining, to achieve any kind of agreement.[13] The particular object that condemnation was instituted for, tunnel, railroad spur, etc., appears to be immaterial in passing on the constitutionality of a condemnation statute, as different jurisdictions reach opposite results on identical or similar objects.[14] It is of much greater materiality that mining is a chief or considerable industry of the state granting eminent domain therefor,[15] but this rule is far from absolute, for courts in some states where mining is important do not find mining a public use as regards eminent domain,[16] whereas in other states where mining is relatively unimportant

question. All that is essential is that the public have a right to such use. Butte, A. & P. Ry. v. Montana Union Ry., 16 Mont. 504, 523, 41 P. 232, 31 L. R. A. 298 at 304 (1895). It must be remarked that these cases generally deal with railroad spurs and connections.

[10] Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527 at 531, 26 S. Ct. 301 (1906); Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676 (1905); Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394, 402 (1876); Miocene Ditch Co. v. Jacobsen, (C. C. A. 9th, 1906) 146 F. 680; Hand Gold Min. Co. v. Parker, 59 Ga. 419 (1877); Pine Martin Min. Co. v. Empire Zinc Co., 90 Colo. 529 at 535, 11 P. (2d) 221, 224 (1932). This last case quotes from Clark v. Nash, supra, and would seem to shift the policy of the Colorado court from the "use" doctrine of Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 P. 464 (1906), which itself would appear to deviate from the stricter rule of People ex rel. v. District Court, 11 Colo. 147, 17 P. 298 (1888).

[11] For example, various school and university purposes, 4 So. CAL. L. REV. 137 (1930); 16 ST. LOUIS L. REV. 176 (1931); highway purposes, Bell, "Public Purpose in Taxation and Eminent Domain, The Construction of Highways, Roads, and Bridges," 18 VA. L. REV. 50 (1931); railroads, 1 LEWIS, EMINENT DOMAIN, § 170 (1900).

[12] 36 YALE L. J. 1180 (1927); 14 VA. L. REV. 64 (1927).

[13] For a good history of the earlier cases, see 70 CENT. L. J. 167 (1910); for a complete discussion of the cases through 1928, see 54 A. L. R. 56.

[14] Mining tunnel: public use, Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 P. 464 (1906); not public use, Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 P. 277 (1914). Railroad connection: public use, Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394 (1876); not public use, Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379 (1887); Edgewood R. R. Co.'s Appeal, 79 Pa. 257 (1875).

[15] Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215 at 232, 78 P. 296 (1904); Clark v. Nash, 198 U. S. 361 at 367, 25 S. Ct. 676 (1905); 1 LINDLEY, MINES, 3rd ed., p. 612 (1914); Tanner v. Treasury Tunnel, Min. & Reduction Co., 35 Colo. 593 at 596, 83 P. 464 (1906). See also City of Albuquerque v. Garcia, 17 N. M. 445, 130 P. 118 (1913).

[16] Poland Coal Company's Case, 58 Pa. Super. 312 (1914); Edgewood R. R. Co.'s Appeal, 79 Pa. 257 (1875); Sutter County v. Nicols, 152 Cal. 688, 93 P. 872, 15 L. R. A. (N. S.) 616, 14 Ann. Cas. 900 (1908); Salt Co. v. Brown, 7 W. Va. 191 (1874); Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257,

the courts find otherwise.[17] Further, it is not likely that a court following the "liberal" view will hold that mining is not a public use, but it does not follow that a court adhering to the "orthodox" view is precluded from finding that mining is a public use.[18] With the authorities in this condition, one can only say that the importance of mining in the state's economy and whether the court accepts, or will accept, the increasingly popular "liberal" view are factors in determining whether mining will be declared a public use. With an increasing recognition of the state's right to intervene in behalf of the public welfare, this wider acceptance of the "liberal" view as to public use cannot be deprecated except insofar as in particular cases it allows one private individual or corporation to make economic warfare upon another at the expense of both the latter and the public, but the law quite generally provides against this type of behavior.[19] G. M. W.

144 P. 277 (1914); Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199 (1887). Notice that there is no East-West cleavage here.

[17] New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537 (1872); Hand Gold Min. Co. v. Parker, 59 Ga. 419 (1877).

[18] Butte, A. & P. R. R. v. Montana Union R. R., 16 Mont. 504, 41 P. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508 (1895); Kansas & Texas Coal R. R. v. Northwestern Coal & Min. Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936 (1900).

[19] Colvin, "Property Which Cannot be Reached by the Power of Eminent Domain for a Public Use or Purpose," 78 UNIV. PA. L. REV. 137 at 149-165 (1929).