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Article 21

Eminent Domain--Establishment of Bus Stops by City Held Not a Compensable Taking of Abutting Owner's Right of Access (Cities Serv. Oil Co. v. City of New York, 5 N.Y.2d 110 (1958))

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vacate judgments where the error complained of was one of law apparent on the record.[21]

In the present case the Court states that even though the defendant was ignorant of the indictment's insufficiency it does not follow that he did not intelligently waive his right to counsel. The Court reasoned that since the prosecution and the lower court failed to notice the defect in the indictment, it must remain wholly in the field of speculation as to whether assigned counsel would have done so.[22] Nevertheless, even if such a presumption could be made in the defendant's favor relief could not be granted in this proceeding since the error was one of law apparent on the record.

While at first glance the decision may seem harsh, other remedies are available to the defendant.[23] The writ of error coram nobis was intended to provide a means of relief where formerly none had existed, *i.e.*, to relieve against errors of fact unknown at the trial. It is applicable only where no other remedy is available.[24]

It is difficult, perhaps impossible, to prescribe the exact limits of coram nobis. However, in determining whether the remedy may be invoked, it is well to remember the history and purpose of the writ lest it become merely a substitute for appeal and other available remedies.

EMINENT DOMAIN—ESTABLISHMENT OF BUS STOPS BY CITY HELD NOT A COMPENSABLE TAKING OF ABUTTING OWNER'S RIGHT OF ACCESS.—Plaintiffs, gas station owners, sought to enjoin the City of New York from establishing bus stops, terminals, and turn-around points fronting on their driveways, and asked damages for this allegedly serious impairment of their easements of access. The Court

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the error appears on the face of the record. . . ." *Id.* at 202, 144 N.E.2d at 11, 165 N.Y.S.2d at 13.

[21] People v. Johnson, 10 Misc. 2d 103, 172 N.Y.S.2d 457 (Dutchess County Ct. 1958); People v. Waterman, 5 App. Div. 2d 717, 168 N.Y.S.2d 819 (3d Dep't 1957) (memorandum decision) (dictum); People v. Langford, 4 App. Div. 2d 919, 166 N.Y.S.2d 933 (3d Dep't 1957) (memorandum decision) (dictum).

[22] It would appear that the court presumes a defense counsel may very well be negligent. *But cf.* Berkey v. Third Ave. Ry., 244 N.Y. 84, 155 N.E. 88 (1926).

[23] Errors of law committed by a lower court are subject to attack by a motion for a new trial, an appeal or other statutory remedy for which coram nobis is not a substitute. See Taylor v. United States, 177 F.2d 194 (4th Cir. 1949); People v. Reid, 195 Cal. 249, 232 Pac. 457, 460 (1924).

[24] FRANK, CORAM NOBIS ¶ 3.02 (1953); Note, *Current Treatment of Coram Nobis in Federal and New York Courts,* 33 ST. JOHN'S L. REV. 98, 105 (1958).

held this to be a minor and intermittent interference, insufficient to constitute a compensable taking of property. *Cities Serv. Oil Co. v. City of New York,* 5 N.Y.2d 110, 154 N.E.2d 814, 180 N.Y.S.2d 769 (1958).

An abutting owner's easements of access to public streets have long been recognized in the courts of New York.[1] Where these rights are assumed, as in the present case, and the final question involves the degree of interference with the right of access,[2] the courts have used various standards in granting compensation.

Where the use of the street is not foreseeable, normal, ordinary, and consistent with the purpose of the street,[3] or where there is an obstruction of benefit to private parties only and not to the public,[4] the courts have granted compensation to abutting owners on the theory that such use breaches an implied contract between city and owner that the streets shall not be so used.[5] Mere authorization of the obstruction by the city, moreover, does not make the interference ordinary or reasonable.[6]

The New York courts have also used, in addition to consistency with "street use," theories of nuisance [7] and continuing trespass [8] in

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[1] Kane v. New York Elev. R.R., 125 N.Y. 164, 26 N.E. 278 (1891); Lahr v. Metropolitan Elev. Ry., 104 N.Y. 268, 10 N.E. 528 (1887); Story v. New York Elev. R.R., 90 N.Y. 122 (1882). These "elevated railroad" cases went far to protect the rights of abutting owners.

[2] "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Whether a regulation does go too far is a "question of degree—and therefore cannot be disposed of by general propositions. . . ." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, J.).

[3] Matter of Rapid Transit R.R. Comm'rs, 197 N.Y. 81, 90 N.E. 456 (1909); Kane v. New York Elev. R.R., *supra* note 1. Erection of a wall to support a double-deck highway is not a street use. Matter of City of New York (East River Drive), 298 N.Y. 843, 84 N.E.2d 148 (1949) (memorandum decision). Subways are not street uses, but municipal uses. "Business" enterprises by the city belong to the city as proprietor, not as sovereign, and normally are not street uses. Matter of Rapid Transit R.R. Comm'rs, *supra.*

[4] Bradley v. Degnon Constr. Co., 224 N.Y. 60, 120 N.E. 89 (1918); Rigney v. New York Cent. & H.R.R., 217 N.Y. 31, 111 N.E. 226 (1916).

[5] Kane v. New York Elev. R.R., *supra* note 1. New York courts express the abutter's rights in terms of contract and trust rather than title. Thus, title to the streets may be held in trust for public use, or under a contract with the abutting owner. Ackermann v. True, 175 N.Y. 353, 67 N.E. 629 (1903).

[6] The city has the obligation of compensation which cannot be done away with by authorization. Muhlker v. New York & Harlem R.R., 197 U.S. 544 (1905); Manhattan R.R. v. Mayor, 89 Hun 429, 35 N.Y. Supp. 505 (Sup. Ct. 1895).

[7] See, *e.g.*, Perlmutter v. Greene, 259 N.Y 327, 182 N.E. 5 (1932); Sammons v. City of Gloversville, 175 N.Y. 346, 67 N.E. 622 (1903).

[8] Vanton Corp. v. New York Rapid Transit Corp., 177 N.Y. 93, 13 N.E.2d 593 (1938); Pappenheim v. Metropolitan Elev. Ry., 128 N.Y. 436, 28 N.E. 518 (1891).

determining whether compensation shall be given to an owner. In some cases, any material obstruction, serious delay or unreasonable incumbrance has been held a taking.[9] But in the absence of these, other inconveniences or nuisances have been held to be *damnum absque injuria,* to be borne by the owner without compensation.[10]

The courts in many decisions have emphasized questions of policy. Some considerations here are public benefit and convenience,[11] public rights,[12] and necessity.[13] But while adhering to the concept of a proper balance between public welfare and the owner's rights, the courts have nevertheless granted compensation where the contemplated use is inconsistent with the scheme and purpose of the street and its use as a whole.[14]

Application of all the above theories is dependent on some test of the degree of the obstruction. The court weighs, for instance, the nature and type of the interference in itself in determining whether it is of such a nature as to be compensable.[15] Where the obstruction

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[9] See, *e.g.,* Kane v. New York Elev. R.R., 125 N.Y. 164, 26 N.E. 278 (1891); Story v. New York Elev. R.R., 90 N.Y. 122 (1882).

[10] Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd,* 206 U.S. 536 (1907).

[11] "Public benefit" must conform to the purpose of the street, Matter of Rapid Transit R.R. Comm'rs, 197 N.Y. 81, 90 N.E. 456 (1909), and be limited by the wisdom of the legislature, 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1129 (8th ed. 1927). *But see* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). "[The State] may not take private property without compensation *even for a public purpose and to advance the general welfare." Id.* at 231, 15 N.E.2d at 591. (Emphasis added.)

[12] *Compare* Deshong v. City of New York, 176 N.Y. 475, 483-84, 68 N.E. 880, 882 (1903) (the public right to the use of the streets is absolute and paramount to any other), *with* Matter of Rapid Transit R.R. Comm'rs, 197 N.Y. 81, 90 N.E. 456 (1909) (abutter, as member of public, cannot be injured to benefit others).

[13] "The interference must be not unreasonable . . . [and] must be kept within the limits of necessity." Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 230, 15 N.E.2d 587, 591 (1938). In Vernon Park Realty, Inc. v. City of Mt. Vernon, 282 App. Div. 890, 125 N.Y.S.2d 112 (2d Dep't 1953) (memorandum decision), an acute need for a public parking area could not prevail over plaintiff's rights. A taking in the guise of regulation cannot be done even for a public purpose. "The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1147 (8th ed. 1927).

[14] Bradley v. Degnon Constr. Co., 224 N.Y. 60, 120 N.E. 89 (1918); Matter of Rapid Transit R.R. Comm'rs, 197 N.Y. 81, 90 N.E. 456 (1909); cases cited note 1 *supra.*

[15] Caldwell & Ward Brass Co. v. State, 277 N.Y. 547, 13 N.E.2d 467 (1938) (permanent retaining wall); Thompson v. Orange & Rockland Elec. Co., 254 N.Y. 366, 173 N.E. 224 (1930) (power lines); Bradley v. Degnon Constr. Co., 224 N.Y. 60, 120 N.E. 89 (1918) (street railway); Waldorf-Astoria Hotel Co. v. City of New York, 212 N.Y. 97, 105 N.E. 803 (1914) (hack stands); Hawk & Wetherbee v. Gaynor, 211 N.Y. 598, 105 N.E. 1086 (1914) (memorandum decision) (hack stands).

is absolute and permanent or excessive and unreasonable,[16] the courts have recognized a taking of property to an appreciable degree [17] and have awarded compensation. In this area a constantly changing concept of reasonableness is used, based partly on the public policy considerations set forth above. Obstructions have been characterized in some cases as material, and compensation therefore awarded; similar obstructions in other cases have been dismissed as minor and intermittent.[18]

In *Waldorf-Astoria Hotel Co. v. City of New York*,[19] establishment of taxi stands in front of plaintiff's property was held reasonable under the above standards, because the presence of the cabs was intermittent and not permanent, and did not interfere with the plaintiff's right of access. The court, however, intimated that if the interference was unreasonable, compensation would have been granted. The court used the standard of reasonableness "founded upon some rational distinction having a real basis in the state of things to be dealt with." [20]

In the general area of eminent domain, equitable questions of unnecessary and substantial damage, special injury or hardship, diminution of property values, irreparability of harm, damages to business, and unreasonable delays and incumbrances have been weighed by the court.[21] In cases of obstruction to property, the courts have considered the type of property obstructed,[22] and the

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[16] "What is reasonable is in large part tested by what is ordinary usage and common experience . . . in these days when, as we all know, very exact rules are adopted to govern motor traffic in congested centers. . . ." Commissioners of Palisades Interstate Park v. Lent, 240 N.Y. 1, 8, 147 N.E. 228, 230 (1925). Intervals of from 5 to 30 minutes up to one hour of truck parking to unload merchandise have been held unreasonable. Western Auto Supply Co. v. Koming Tire Co., 48 N.Y.S.2d 256 (Sup. Ct. 1944).

[17] "The Courts have not hesitated to declare statutes invalid wherever regulation has gone so far that it is clearly unreasonable and must be 'recognized as taking' . . . ." Arverne Bay Constr. Co. v. Thatcher, *supra* note 13, at 232, 15 N.E.2d at 591. See also 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1119-20, 1120 n.2 (8th ed. 1927).

[18] *Compare* Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 537 (1907), *with* Matter of City of New York (East River Drive), 298 N.Y. 843, 84 N.E.2d 148 (1949) (memorandum decision). A similar distinction is made between temporary and permanent obstructions. Coffey v. State, 291 N.Y. 494, 53 N.E.2d 362 (1944).

[19] 212 N.Y. 97, 105 N.E. 803 (1914).

[20] *Id.* at 107, 105 N.E. at 806.

[21] Matter of Bd. of Water Supply, 277 N.Y. 452, 14 N.E.2d 789 (1938); Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1938); Matter of City of New York (W. 10th St.), 267 N.Y. 212, 196 N.E. 30 (1935); Eaton v. Sweeny, 257 N.Y. 176, 177 N.E. 412 (1931); Waldorf-Astoria Hotel Co. v. City of New York, 212 N.Y. 97, 105 N.E. 803 (1914); Sammons v. City of Gloversville, 175 N.Y. 346, 67 N.E. 622 (1903). Private enterprise is indirectly for the benefit of the city, and the city should not act to discourage it.

[22] See Waldorf-Astoria Hotel Co. v. City of New York, *supra* note 21.

extent of the impairment of access—its length in time and its location.[23] Final considerations include sanction by precedent, which the court will follow whenever practicable, and gross injustice,[24] which the court will prevent whenever possible.

In the principal case, plaintiff's rights of access were impaired by bus stops, bus terminals, and bus turn-arounds on all his frontage. The facts indicate that during rush hours and at red lights on both the abutting streets buses would normally tend to "double-up" at both stops and wait for various periods of time.[25] Although the Court found that the bus schedules and waiting periods did not constitute a major interference, the basis of the final decision was one of public policy. But policy considerations alone are purely arbitrary unless based on reasonable inferences from fact and connections with other theories, and the Court could have found on several of the above theories that the obstruction here justly warranted compensation.

Whether this was a reasonable and foreseeable use of the street might have been considered in the light of the establishment not only of bus stops, but bus terminals and turn-around points. Similarly, in considering whether public policy outweighs damage to the owner, there should be a reasonable balance of convenience and hardship. Although the Court found from the facts that this was a minor and intermittent interference, not permanent in nature, it must be noted that "minor" and "intermittent" interferences can sometimes be even more effective than "permanent" ones in destroying or seriously damaging an abutting owner's access.[26] While the Court may be reluctant to grant compensation in every area of eminent domain, the obvious hardships present in the instant case would suggest a more equitable definition of what constitutes "reasonable interference" in cases of this nature.

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[23] In Farrell v. Rose, 253 N.Y. 73, 170 N.E. 498 (1930), an obstruction barring plaintiff's access for 147 days longer than the date specified in a city contract was held reasonable.

[24] Kane v. New York Elev. R.R., 125 N.Y. 164, 26 N.E. 278 (1891). "The standard of what experience has proved to be convenient in the past, in order to afford free and ample ingress and egress . . . furnishes a ready test of what constitutes a reasonable exercise of power. . . ." Waldorf-Astoria Hotel Co. v. City of New York, 212 N.Y. 97, 107, 105 N.E. 803, 806 (1914).

[25] Cities Serv. Oil Co. v. City of New York, 5 N.Y.2d 110, 114, 154 N.E.2d 814, 815, 180 N.Y.S.2d 769, 771 (1958).

[26] Elevated railroad pillars, while permanent, would afford access between them to property below, Kane v. New York Elev. R.R., *supra* note 24, while the presence of standing buses, although not permanent, would be a continuing intermittent interference with *all* the owner's frontage. See Cities Serv. Oil Co. v. City of New York, *supra* note 25. The "elevated railroad" cases were not decided on the ground of permanence, but on "inconsistency with street use," together with hardship and the owner's rights. A similar test for surface interferences, rather than public policy alone, would seem to have been more reasonable in the present case.