Property Ownership Betrayed

By Dan Dennis Hartnett

A Case Commentary

In *Anderson v. Teco Pipeline Company*, 985 S.W.2d 559 (Tex. App.–San Antonio 1998, pet. filed March 2, 1999) a company posing as a public servant was allowed to condemn right of way for a pipeline it built across Guadalupe County. Instead of ordering the impostor to remove the pipe and compensate the landowners for their damages, costs and attorneys fees as the Texas Property Code requires, the court of appeals let the company keep the property because it is egulated.

The opinion simply ignores the facts, the controlling legal precedents and betrays fundamental notions of property ownership to create the power to condemn for all those who are subject to regulation.

Court-Ordered Nonsense

Wait a minute. Courts have no authority to change the law. How can a court change the fundamental rules of property ownership? *Anderson* is so absurd it could be the premise for a best-selling novel. It would be a satire, as wry as any penned by Kurt Vonnegut or George Orwell. In this tale, safaris of corporate lawyers and appeals court judges, armed with law licenses, would roam Texas trying to get on private ranches and game preserves.

Why might it be a best seller?[1] Because lawyer jokes are popular, especially ones suggesting murder as a solution to over-population? Because some lawyers and judges are thought to actually believe the words in their sophistic arguments and pointless ramblings in support of outcomes that defy common sense? Maybe, but more likely, because most of us simply do not believe lawyers and judges ever expect to live under the rules they try to make for others. Which of course, is why courts are not supposed to make law.

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Stop the Nonsense

It would be a vast improvement of Texas juris-prudence if the *Anderson* opinion were yanked out of the law reporters and replaced with the following appropriate words:

" ... the owner of one rood[2] of land may stand in the way of any private enterprise, however much the general utility may be thereby hindered and no human power in a free country, where the principles of Magna Charta[3] prevail in their full force, can compel him to budge one step."[4]

Before the *Anderson* decision, Texas law regarding the power of a private enterprise to use the property of others was very clear and settled. Reading the simple and direct language of the two controlling precedents not only supports the suggested improvement but also puts the enormity of the *Anderson* opinion's betrayal of fundamental principles in stark contrast.

"The right to condemn private property is only given to corporations ... formed to carry on ... business ... for public benefit. The Constitution itself protects private property from any taking except for the public use ... Any citizen whose property is sought to be taken in aid of a given enterprise is to have a hearing, in which the question whether or not the use to which the property is to be devoted is a public one may be fully considered; and, if it be found that such is not the character of the use, the statute does not authorize, and the Constitution forbids, the taking." Borden v. Trespalacios Rice and Irrigation Co. *98 Tex. 494, 86 S.W.11,14 (1905).*

"No hard and fast rule can be laid down for determining public use ... and each case is usually decided upon the basis of its own facts and the surrounding circumstances ... this Court has adopted a rather liberal view as to what is or is not a public use. On the other hand, we have refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain." Coastal States Gas Producing Co. v. J. E. Pate, *309 S.W.2d 828,833 (Tex. 1958).*

The Situation

Jack and Terrie Anderson have asked the Supreme Court of Texas to review and reverse the decision handed

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down on December 30, 1998 by the San Antonio Court of Appeals. The decision let stand a 1997 District Court order giving Teco Pipeline Company an easement for a gas line built in 1995 across the Anderson property. Because review by the Supreme Court is both discretionary and rare, it is extremely likely that *Anderson* will not be reversed and will stay on the books as a threat to every Texas citizen whose property is coveted by a private enterprise.

The Taking

Teco built the Guadalupe County pipeline so it could haul West Texas gas to the marketing hub in Katy, Texas. Teco took the Anderson property by claiming the power to condemn granted by the Texas Legislature in 1911 to public service corporations to assist them in supplying gas for domestic and industrial consumption.[5] Even if a landowner objects, Texas law allows those claiming the power to condemn to take possession during the administrative phase of the proceedings and complete their projects before they have proven their authority to do so in the judicial phase.

If it turns out that a condemnor such as Teco lacks the right to condemn pipeline right of way, a Texas court must order the installed pipeline removed and compensate the landowners for any damages, costs and attorneys fees sustained during the temporary possession.[6] Understandably, most courts are daunted by the waste involved in the removal of expensive projects and would much prefer adjudication before projects are built.[7] However, injunctions in Texas to delay such construction were outlawed in 1981.[8]

The Relevant Facts

As it turns out, Teco is not a public servant. Teco's investors got $380 million for selling Teco and its 30-mile pipeline, two months before it was supposed to prove it had been authorized to take the Anderson property. According to the pre-trial deposition testimony of Teco's top three executives: Teco had no good faith basis to believe that regulation as a "gas utility" conferred the power to condemn[9]; Teco had never before operated a "gas utility" pipeline or claimed the power to condemn; Teco did not supply gas for domestic and industrial consumption; and the pipeline project was a speculative venture which resulted in a net gain of over $300 million to Teco's investors.

The Trial

At trial, Teco had no evidence regarding its alleged authority to condemn[10] or its public use as required under the Texas Constitution Art. 1 §17.[11] Although Teco executives were subpoenaed to Seguin as witnesses by the Andersons, the trial judge refused to let the jury hear their testimony. A month after the conclusion of the jury trial, the judge signed a Final Judgment based on the verdict which awarded the Andersons damages of $13,980 with interest but did not award an easement or any other relief to Teco. Four months later, an Amended Final Judgment expressly granted all relief requested by Teco's petition. The trial judge never made any findings of facts, conclusions of law, docket entries or any other explanation for his signing the Amended Final Judgment.

The Decision

Andersons appealed the second judgment to the San Antonio Court of Appeals. The Court of Appeals had the

pre-trial testimony of the Teco executives showing that Teco is not a public servant but an impostor. However, the decision did not impose the sanctions warranted under the facts and mandated by the Property Code. Instead, the decision lets Teco's pipeline use the Anderson property because it files reports and pays fees to the Railroad Commission. That's right. The Court of Appeals declared that Teco had the power to condemn because it was regulated under a 1920 act targeting the monopoly practices of gas utilities.[12]

The opinion reasons from conflicting *obiter dictum*[13] or stray remarks found in two Courts of Appeals opinions involving corporations that had proved their claims to authority granted in the 1911 enactment.[14]

In reaching its practical result,[15] the opinion ignores controlling Texas Supreme Court precedent requiring factual inquiry by Texas courts into the fact of public use.[16] Incredibly, the opinion jettisons core legal values of real property ownership to create the power to condemn for those who are subject to regulation. ■

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Foot Notes

[1] The same basic idea involving marauding bands of licensed and regulated bartenders, barbers, plumbers, electricians, engineers, welders and concealed weapons carriers deluded into thinking they could simply pay to use the facilities at the country clubs, diner clubs and residences of lawyers and judges probably could not sustain more than one skit in a cable TV broadcast by "Roger And Me""producer Michael Moore.

[2] A British unit of land area equal to 1/4 acre.

[3] The great charter (or constitutional enactment) granted by King John of England to the barons at Runnymede, on June 15, 1215 and afterwards, with some alterations, confirmed in parliament by Henry III and Edward I. *Black's Law Dictionary*. "The famous clause promising that no free man shall be taken or imprisoned or disseised, or outlawed or exiled * * * without the judgment of his peers or by the law of the land, was a guarantee of security against arbitrary rule to all men, whether barons or simple free men." *The Encyclopedia Britannica* (14th Ed.) vol. 14, p. 632. In this country where written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, the provisions of Magna Carta were incorporated into the Federal and State Bills of Rights. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation. ***Hurtado v. California,*** 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.

[4] ***Smith v. Godart,*** 295 S.W.211, 212 (Tex. Civ. App –Texarkana, 1927, no hist), quoting a Judge Isaac F. Redfield referred to by the Vermont Supreme Court in the 1896 case of ***New England Trout & Salmon Club v. Mather***, 35 A. 323. Smith and Mather both declared unconstitutional legislation that seemed to authorize fishermen to cross privately owned property to access fishing areas.

[5] Seventy years ago, by confining itself to the words used in the statutes, the Supreme Court of Texas construed Article 1435 to authorize the formation of public service corporations in business to supply gas for domestic and industrial consumption and Article 1436 to grant the right of eminent domain necessary for operating such a corporation. ***Lone Star Gas Co. v. Municipal Gas Co.***117 Tex. 331, 3 S.W.2d 790, 792 (Tex.1928).

[6] ***Tejas Gas Corporation v. Herrin,*** 705 S.W.2d 177, 179 (Tex. App.–Texarkana, 1985, rev'd on other grounds 716 S.W.2d 45). Tex. Property Code §§ 21.044 and 21.062.

[7] ***Coastal Industrial Water Authority v. Houston Lighting & Power Company,*** 564 S.W.2d 389, 391 (Tex. Civ. App. –Houston [14th] 1978, writ ref'd n.r.e.).

[8] ***Harris County v. Gordon,*** 616 S.W.2d 167 (Tex.1981).

[9] A 1994 Railroad Commission letter to Teco's Vice President of Engineering responsible for securing building permits for the project states: "The Railroad Commission regulates gas utilities as defined in Tex. Rev. Civ. Stat. Ann. Arts. 1446e and 6050 et seq. (Vernon Supp. 1993). These articles do not grant the power of eminent domain and a company may be classified as a gas utility by the Commission without having the power of eminent domain. *Roadrunner Investments, Inc. v. Texas Utilities Fuel Company,* 578 S.W.2d 151 (Tex. Civ. App. –Fort Worth 1979, writ ref'd n.r.e.)." At his deposition the vice president testified that Teco's lawyers told him not to worry about the letter. At a pre-trial hearing, an engineer supervised by the Vice President testified that he was assigned the

task of getting another letter from the Railroad Commission for use in case condemnations were challenged. Although offered at the pre-trial hearing, the second letter stating that Teco was a "gas utility" was excluded from evidence by the trial judge.

[10] ***Fort Worth & D.N. Ry. Co. v. Johnson***, 125 Tex. 634, 84 S.W.2d 232, 234(1935) and ***Denton County v. Brammer***, 361 S.W.2d 198, 200 (Tex. 1962), place on condemnors, such as Teco, the burden of proving at trial all the essentials necessary to show a right to condemn. ***City of Houston v. Kunze***, 153 Tex. 42, 262 S.W.2d 947(1954) and ***Amason v. Natural Gas Pipeline Company***, 682 S.W.2d 240, 242 (Tex. 1985), require petitions in condemnation to be disregarded or dismissed where condemnors fail to meet their burden of proof.

[11] ***Borden v. Trespalacios Rice and Irrigation Co.*** 98 Tex. 494, 86 S.W.11(1905) ***Coastal States Gas Producing Co. v. J. E. Pate***, 309 S.W.2d 828,833 (Tex. 1958).

[12] ***Anderson*** at 565.

[13] Any judicial opinion on question not up for decision will not create binding precedent under stare decisis. ***Weiner v. Zwieb***, 141 S.W.771,773 (Tex. 1911); ***Lester v. First American Bank***, 866 S.W.2d 361 (Tex. Civ. App.–Waco 1993, denied).

[14] ***Roadrunner Investments, Inc. v. Texas Utilities Fuel Co.***, 578 S.W.2d 151 (Tex. Civ. App.-- Fort Worth 1979, writ ref'd n.r.e.), ***Loesch v. Oasis Pipe Line Co***., 665 S.W.2d 595 (Tex. App. -- Austin 1984, writ ref'd n.r.e.).

[15] Those who can pay to bulldoze their projects across Texas may be immune to judicial scrutiny by practical judges. "When I first became a judge, I knew there were certain people in town I wasn't supposed to touch. I knew if I were to remain a judge, this was so." Judge Daniel Haywood (Spencer Tracy) in *Judgment at Nuremberg*, United Artists release 1961.

[16] ***Borden v. Trespalacios Rice and Irrigation Co.*** 98 Tex. 494, 86 S.W.11,14 (1905).

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