

1940

## CONSTITUTIONAL LAW - EMINENT DOMAIN - VALUE AS FIXED BY AGREEMENT BETWEEN THE PARTIES - WHEN IS PROPERTY TAKEN FOR PURPOSE OF DETERMINING PAYMENT OF INTEREST?

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### Recommended Citation

John H. Pickering, *CONSTITUTIONAL LAW - EMINENT DOMAIN - VALUE AS FIXED BY AGREEMENT BETWEEN THE PARTIES - WHEN IS PROPERTY TAKEN FOR PURPOSE OF DETERMINING PAYMENT OF INTEREST?*, 38 MICH. L. REV. 1088 (1940).

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## RECENT DECISIONS

CONSTITUTIONAL LAW — EMINENT DOMAIN — VALUE AS FIXED BY AGREEMENT BETWEEN THE PARTIES — WHEN IS PROPERTY TAKEN FOR PURPOSE OF DETERMINING PAYMENT OF INTEREST? — Defendant's land, situated between the riverside and set-back levees of the proposed floodway extending along the western bank of the Mississippi from Bird's Point to New Madrid, Missouri, was inundated in the flood of 1937, at which time the floodway, with its system of fuse plugs (whereby the riverbank levee was to be lowered to allow flood waters to spend their destructive force by spreading over larger areas) was not yet in operation. Thereafter the United States, under authority conferred by the Flood Control Act of 1928,<sup>1</sup> instituted condemnation proceedings to secure flowage rights over defendant's land. Defendant claimed that the amount of compensation due had been set by an agreement entered into with the War Department in 1932<sup>2</sup> and that he should be allowed interest thereon from the date that his land was taken, which he alleged to be at the time that the Flood Control Act of 1928 was passed, or in the alternative, either the time that construction was begun on the set-back levee (October 21, 1929) or the time it was completed (October 31, 1932). *Held*, the amount of compensation to be paid was that agreed upon between defendant and the War Department, and interest was not allowable thereon as there had been no taking at any of the dates alleged by defendant. *Danforth v. United States*, 308 U. S. 271, 60 S. Ct. 231 (1939).

When the power of eminent domain is given to private corporations, an attempt to purchase from the owner is generally made a condition precedent to condemnation proceedings.<sup>3</sup> In contrast to this, it is said that a governmental agency is unable to purchase by agreement and is limited to the process of condemnation, absent statute, because of the public interest in having the amount of compensation determined in a judicial proceeding.<sup>4</sup> If a private corporation takes possession under an agreement to purchase, it cannot repudiate that agreement by subsequent condemnation proceedings.<sup>5</sup> An action for damages<sup>6</sup> or

<sup>1</sup> 45 Stat. L. 534, 33 U. S. C. (1934), §§ 702a-702m.

<sup>2</sup> Defendant accepted an offer contained in a letter from the secretary of war written in accordance with authority conferred by 45 Stat. L. 534, § 4, 33 U. S. C. (1934), § 702d: "When the owner of any land, easement or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price. . . ."

<sup>3</sup> RANDOLPH, EMINENT DOMAIN, § 124 (1894).

<sup>4</sup> "The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding." *Hanlon v. Supervisors of Westchester*, 57 Barb. (N. Y.) 383 at 394 (1870); *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 (1886); 2 LEWIS, EMINENT DOMAIN, 3d ed., § 463 (1909). There would seem to be no objection to the legislature's waiving this public interest in judicial proceedings.

<sup>5</sup> *Gray v. Burlington & M. R. R.*, 37 Iowa 119 (1873); RANDOLPH, EMINENT DOMAIN, § 118 (1894).

<sup>6</sup> *Morris v. Boston & Me. R. R.*, 2 Cush. (Mass.) 536 (1848); MILLS, EMINENT DOMAIN, 2d ed., § 113 (1888).

for specific performance is open to the party aggrieved by breach of the contract.<sup>7</sup> If a governmental agency is empowered by statute to purchase or condemn at its discretion, there would seem to be no valid reason for applying a rule differing from that applicable to a private company exercising the same power; in either case the agreement should be binding upon the parties. This is recognized by the holding in the principal case.<sup>8</sup> The formula for compensation in condemnation proceedings is simple: "just compensation" must be made under the requirements of the Fifth Amendment as applied to the federal government<sup>9</sup> and the same requirement is placed upon the states by the due process clause of the Fourteenth Amendment.<sup>10</sup> This constitutional requirement of just compensation is construed to require payment of interest from the time of taking until the payment of the award.<sup>11</sup> Though the rule is settled that interest should be allowed from the time of taking until the time of payment, the question remains, when is there a taking? Actual physical possession is universally recognized as a taking sufficient to start interest running upon the unpaid award.<sup>12</sup> Short of an actual change of possession courts have held that taking, for the purpose of determining interest, occurs at the commencement of suit,<sup>13</sup> at the time

<sup>7</sup> *Viele v. Troy & Boston R. R.*, 20 N. Y. 184 (1859); MILLS, EMINENT DOMAIN, 2d ed., § 113 (1888). The English rule is settled that when a private company, empowered to condemn, gives notice to treat and the parties thereafter agree upon a price, the resulting contract is specifically enforceable. See *Regent's Canal Co. v. Ware*, 23 Beav. 575, 53 Eng. Rep. 226 (1857); CRIPPS, COMPENSATION, 8th ed., 57-60 (1938).

<sup>8</sup> For another discussion of this part of the principal case, see 8 GEO. WASH. L. REV. 859 (1940).

<sup>9</sup> ". . . nor shall private property be taken for public use, without just compensation." U. S. Constitution, Amendment 5. See *United States v. Jones*, 109 U. S. 513, 3 S. Ct. 346 (1883); NICHOLS, EMINENT DOMAIN, § 259 (1909) [1 *ibid.*, 2d ed., § 204 (1917)].

<sup>10</sup> "Since the Fourteenth Amendment of the Federal Constitution is binding on every state, this requirement determines the *minimum* basis of compensation throughout the entire United States." ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 17-18 (1936). See *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct. 56 (1896); 2 LEWIS, EMINENT DOMAIN, 3d ed., § 811 (1909).

<sup>11</sup> *Jacobs v. United States*, 290 U. S. 13, 54 S. Ct. 26 (1933); *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 43 S. Ct. 354 (1923); *United States v. Rogers*, 255 U. S. 163, 41 S. Ct. 281 (1921); NICHOLS, EMINENT DOMAIN, § 285 (1909) [1 *ibid.*, 2d ed., § 216 (1917)]; 2 LEWIS, EMINENT DOMAIN, 3d ed., § 742 (1909); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 5, note 20 (1936); 96 A. L. R. 18 at 150 (1935). See McCormick, "The Measure of Compensation in Eminent Domain," 17 MINN. L. REV. 461 (1933). In England the law of vendor-purchaser governs the allowance of interest between the date of the award and the time of payment. See *Regent's Canal Co. v. Ware*, 23 Beav. 575, 53 Eng. Rep. 226 (1857); CRIPPS, COMPENSATION, 8th ed., 210-213 (1938).

<sup>12</sup> See *United States* cases cited in previous note; NICHOLS, EMINENT DOMAIN, § 286 (1909) [1 *ibid.*, 2d ed., § 216 (1917)].

<sup>13</sup> *Brown v. United States*, 263 U. S. 78, 44 S. Ct. 92 (1923). This case adopted the statutory rule of Idaho which had been followed by the lower federal courts under the conformity statute.

when the report of commissioners valuing the property is filed or confirmed,<sup>14</sup> at the time title passes,<sup>15</sup> at the time when the land owner is entitled to compensation and demands it.<sup>16</sup> Theoretically the ideal solution would be to have the passage of title, change of possession, and payment occur simultaneously, but as a practical matter this is impossible due to delay in legal proceedings.<sup>17</sup> So title may pass by decree, yet the owner may remain in possession pending appeal. In such a situation interest has been refused on the ground that the owner enjoys the benefits of possession, a rough equivalent to interest.<sup>18</sup> But this possession is a limited one of doubtful value in that the landowner is precluded from putting permanent improvements on the land or from selling it except subject to the condemnation proceedings. Moved by these considerations, other courts have allowed interest from the time that the suit was begun, the award was confirmed, or the title passed, deducting therefrom the value of the rents and profits.<sup>19</sup> Essential fairness would seem to demand that landowners receive interest before the actual change in possession; whether this should begin at the commencement of suit, the confirmation of the award, or the passage of title, is a question of policy to be determined by balancing the interests of the landowner against the interests of the public. The decision in the principal case seems acceptable; on none of the alleged dates was there a strict taking. An argument that the value of defendant's possession was reduced by the passage of the Flood Control Act, for which reduction he should be compensated, ignores the public interest involved.<sup>20</sup> The construction of the set-back levee did not add

<sup>14</sup> ". . . and we think that, generally, it is necessary, to allow interest from the date of the award, to give the owner just compensation." *Warren v. First Division of St. Paul & Pacific R. R.*, 21 Minn. 424 at 427 (1875). This view was adopted as the fair one in a federal case involving land in Minnesota. *United States v. Sargent*, (C. C. A. 8th, 1908) 162 F. 81. Cf. *Brown v. United States*, 263 U. S. 78, 44 S. Ct. 92 (1923). See also *United States v. Engeman*, (D. C. N. Y. 1891) 46 F. 898.

<sup>15</sup> *Fink v. City of Newark*, 40 N. J. L. 11 (1878).

<sup>16</sup> *Barnes v. City of New York*, 27 Hun (N. Y.) 236 (1882), decision probably influenced by desire to protect governmental agency from adverse claimants, each insisting upon the right to compensation.

<sup>17</sup> "The true rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court would be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest." *Parks v. Boston*, 15 Pick. (32 Mass.) 198 (1834).

<sup>18</sup> *Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361 (1892); *Bauman v. Ross*, 167 U. S. 548, 17 S. Ct. 966 (1897); *Hamersley v. City of New York*, 56 N. Y. 533 (1874). See 2 LEWIS, EMINENT DOMAIN, 3d ed., § 742 (1909).

<sup>19</sup> *Brown v. United States*, 263 U. S. 78, 44 S. Ct. 92 (1923); *United States v. Sargent*, (C. C. A. 8th, 1908) 162 F. 81; *Warren v. First Division of St. Paul & Pacific R. R.*, 21 Minn. 424 (1875); *Fink v. City of Newark*, 40 N. J. L. 11 (1878); 2 LEWIS, EMINENT DOMAIN, 3d ed., § 742 (1909); RANDOLPH, EMINENT DOMAIN, § 280 (1894).

<sup>20</sup> "The mere enactment of legislation which authorizes condemnation of property

materially to the burden upon defendant's land since the floodway was not yet in operation and the riverbank levee had not been lowered.

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cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail." Principal case, 308 U. S. at 286. Cf. *United States v. Sponenbarger*, 308 U. S. 256, 60 S. Ct. 225 (1939); *Bauman v. Ross*, 167 U. S. 548, 17 S. Ct. 966 (1897).