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Real Property - Condemnation of Non-Slum Area for Private Redevelopment - Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395 (1962)

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accomplish the fulfillment of the right. Where the loss which may result from the effort to legally enforce a right is substantially greater than the loss which results from compliance with a wrongful demand, the will is surely overridden. There is no freedom of choice; only a choice of evils. To deny recovery and thereby upheld the extortion is to deny an effective protection for the contractual rights, and to encourage the breach.[25]

By its decision in this case, the Ohio court not only went against the weight of authority by not recognizing the doctrine of business compulsion, but it also is encouraging breach of contract under similar circumstances.

[25] *Id.* at 472.

REAL PROPERTY—CONDEMNATION OF NON-SLUM AREA FOR PRIVATE REDEVELOPMENT

The plaintiffs, sixty-eight home owners, brought suit for a declaratory judgement that, a section[1] of the New York General Municipal Law, was unconstitutional on its face and as it applied to a proposed redevelopment project in an area in which the plaintiffs lived. The challenged section authorizes cities to condemn, for the purpose of reclamation and redevelopment, predominantly vacant areas which are economically dead with the result that their existence and condition impairs the sound growth of the community. The section states that if one or more of the noted conditions exist,[2] the planning commission, after public hearings, may designate the area as one requiring redevelopment and that the municipalities may use the power of eminent domain, if necessary, to clear, replan, and redevelop the vacant land. The question presented to the court was whether this statute, which allows the condemnation of an area which is substandard but does not contain tangible physical blight, is unconstitutional because it allows a private use of condemned land which is not an actual slum. In effect the statute allows the use of the power of eminent domain for private industrial purposes. The court held that an area in a city does not have to be a slum in order to make its redevelopment a pub-

[1] N.Y. GENERAL MUNICIPAL LAW ARTICLE 15, § 72n.

[2] Subdivision of the land into lots of such form, shape, or size as to be incapable of effective development; obsolete and poorly designed street patterns with inadequate access; unsuitable topographic or other physical conditions impeding the development of appropriate uses; obsolete utilities; buildings unfit for use of occupancy as a result of age, obsolescence, etc.; dangerous, unsanitary or improper uses and conditions adversely affecting public health, safety, or welfare; scattered improvements which, because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land. GENERAL MUNICIPAL LAW ARTICLE 15 § 72n subd. 1, pars. a and b.

lic use, nor is a public use negated by the fact that poorly developed vacant land is to be used for industrial purposes. *Cannata v. City of New York*, 11 N.Y. 2d 210, 182 N.E.2d 395 (1962).

The power of eminent domain, as we know it today, is believed to have been invented by Grotius in 1625, and was used to designate the power of a sovereign state to take, or to authorize the taking of, any property within its jurisdiction for public use. The exercise of the power of eminent domain is subject to limitations in the Constitution of the United States and of the constitutions of the several states. The power of the states is restricted in the 14th Amendment to the Constitution of the United States, which states: "no state shall deprive any person of life, libery, or property without due process of law." Article I of the New York Constitution forbids he taking of private property for public use without just compensation. A similar statement can be found in most other state constitutions. Some of the state constitutions do not specifically mention the fact that private land may not be taken for private use but simply state that land may not be taken without due process of law. The taking of land by a state for a private use is enough to be considered a deprivation of property without due process of law.[3]

Thus, one of the greatest and most complex problems ever to face the courts in the field of eminent domain has been the one of interpretation of the words "Public Use." It is generally agreed that the legislature has no power, in any case, to take the property of one person and hand it over to another without some reference to a "Public Use."[4] There is not a concrete definition of "Public Use" and its interpretation seems to vary with the circumstances and to be controlled by necessity. Two theories which seem to enjoy the most popularity are the "Public Use Theory," which limits the application of eminent domain powers to public ownership and employment, and the "Public Benefit or Public Advantage Theory," which only requires that the property taken be used for some public benefit without regard to ownership. One of the jurisdictions which adheres to the "Public Use" theory has said "there is a distinction between a public use and a benefit to the public."[5] The jurisdictions which give the term "Public Use" a liberal interpretation have stated that the term is synonymous with public benefit[6] and, if the municipal agency can prove

[3] Gilman v. Tucker, 128 N.Y. 190, 28 N.E. 1040 (1891).

[4] Richards v. Wolf, 82 Iowa 358, 47 N.W. 1044 (1891).

[5] Smith v. Cameron, 106 Ore. 1, 210 Pac. 716 (1922). Accord David Jeffrey Co. v. City of Milwaukee, 267 Wis. 559, 66 N.W. 2d 362 (1954). See generally, Cooley, CONSTITUTIONAL LIMITATIONS 760–764 (7th ed. 1903).

[6] State v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 270 S.W. 2d 44 (1954); *Contra*, Housing Authority of City of Atlanta v. Johnson, 209 Ga. 560, 74 S.E. 2d 891 (1953).

some public benefit or advantage, the constitutionality requirement has been met. The right to take private property for public use without the owner's consent lies dormant in a state until the legislature of that state passes a statute which defines the purpose, method, and agency to be used in the exercise of eminent domain appropriations.[7]

New York and Illinois are considered to be "Public Benefit" states, but it is interesting to note that New York was cautious in earlier years with its interpretations of "Public Use" and the requirements were strict. An example of this is the fact that the legislature of New York has never exercised the right of eminent domain in favor of "mills" of any kind.[8]

The use of eminent domain authority in the construction of public projects such as parks,[9] canals,[10] and highways[11] has always been recognized as a valid public use. There has even been an extension to the construction of parking lots where the parking situation was acute.[12] The real awakening of the power of eminent domain, however, came after World War II when the United States Congress passed the Housing Act of 1949.[13] This law made federal funds available to local government agencies for the rehabilitation and redevelopment of slum areas. The purpose of the act was to rid cities of their slums and to construct low-cost housing for public occupancy.

The advent of renewal projects brought to the courts a rash of suits seeking to have state enabling statutes declared unconstitutional. All but three of the many states which have passed such statutes have had their acts upheld upon judicial review.[14] A major contention of property owners, even in jurisdictions where the term is loosely interpreted, was that there was to be no "Public Use" of the land. The courts have answered this

[7] It is interesting to note that a telephone company, Doty v. American Telephone and Telegraph Co., 123 Tenn. 329, 130 S.W. 1053 (1910); a public service corporation, Minnesota Canal and Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907); and a railway, Thomson-Houston Elec. Co. v. Simon, 20 Ore. 60, 25 Pac. 147 (1890) have all been, at one time or another, agencies with the power of eminent domain.

[8] Hay v. Cohoes Company, 3 Barb. 43 (1848) (one of the earliest uses of the power of eminent domain was the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned).

[9] Yarborough v. Park Commission, 196 N.C. 284, 145 S.E. 563 (1928).

[10] Dalles Lumbering Co. v. Urquhart, 16 Ore. 67, 19 Pac. 78 (1888).

[11] Opinion of the Justices, 330 Mass. 713, 113 N.E. 2d 452 (1953).

[12] Amsterdam Parking Authority v. Trevett 174 N.Y.S. 2d 832 Supreme Ct., Special Term, Montgomery County (1958).

[13] STAT. 413 (1949); 42 U.S.C. §§ 1441, 1451-60 (1952).

[14] Edens v. City of Columbia, 228 S.C. 563, 91 S.F. 2d 280 (1956). Housing Authority v. Johnson, 209 Ga. 560, 74 S.E. 2d 891 (1953); Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952).

allegation by declaring the elimination of slums a public benefit in itself and, therefore, a "Public Use." The prevention and control of disease, crime and immorality is a public benefit.[15] Even jurisdictions which subscribe to a strict interpretation of "Public Use" have allowed redevelopment through condemnation, but they require strict public control throughout the entire redevelopment plan.[16]

Once the public use has been established, subsequent disposal of the property, as long as it does not negate the purpose of the taking, is immaterial.[17] An incidental benefit to private parties does not serve to defeat the enabling act."[18]

New York was one of the first states to recognize the elimination of slums as a "Public Use" when in *New York City Housing Authority v. Muller*[19] it was agreed that the replacement of unsanitary housing conditions with sanitary conditions was a "Public Use." This decision is especially significant when we notice that it was handed down in 1936, thirteen years before any federal housing aid was available. This decision was further substantiated in 1944 when in *Stuyvesant Housing Corp. v. Stuyvesant Town Corp.* the court said:

> having opened the door to a broad concept of Public Use, our courts have extended the doctrine of eminent domain from public housing to slum clearance and redevelopment of substandard and blighted areas, and to the providing of public parking facilities."[20]

The facts in the *Cannata*[21] case are unusual in that the area to be condemned consisted 75% vacant land, and a majority of the remainder contained dwellings and other commercial buildings which were not within the definition of slums–i.e.; structures which are substandard or unsanitary.[22] The main argument of the city of New York in the *Can-*

[15] Berman v. Parker, 348 U.S. 26 (1954); Crommett v. City of Portland, 150 Me. 217, 107 A. 2d 841 (1954); Herzinger v. Mayor and City Council of Baltimore, 203 Md. 49, 98 A. 2d 87 (1953); In re Slum Clearance in City of Detroit, 331 Mich. 714, 50 N.W. 2d2340 (1951).

[16] Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P. 2. 752 (1953).

[17] Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A. 2d 612 (1950); State v. Land Clearance for Redevelopment Auth. of K.C., 364 Mo. 974, 270 S.W. 2d 44 (1954); *Contra:* Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952).

[18] Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1943).

[19] 270 N.Y. 333, 1 N.E. 2d 153 (1936).

[20] Stuyvesant Housing Corp. v. Stuyvesant Town Corp., 51 N.Y.S. 2d 19, Supreme Ct., Special Term, New York County, (1944).

[21] Cannata v. City of New York, 11 N.Y. 2d 210, 182 N.E. 2d 395 (1962).

[22] It is interesting to note that the area being contested is to be used for industrial firms which have themselves been displaced by a housing development. Brief for Appellee, p. 22, Cannata v. City of New York, *id.*

nata[23] case was that the prevention of slums is as an important a public use as the elimination of slums and that the area in question, although then free from physical blight, would slowly deteriorate into a slum and would adversely affect the public health, safety, and general welfare.[24]

In the noted case, the New York Court of Appeals relied heavily upon an Illinois case, *Gutknecht v. City of Chicago*,[25] in which the Illinois Supreme Court upheld the constitutionality of the Urban Community Conservation Act of 1953.[26] This act had as its purpose the prevention of slums, and it authorized local conservation boards to take steps designed to prevent the spread of slum and blight to new areas. This was one of the first times a court stated that the prevention of slums was a sufficient public purpose to allow the use of eminent domain powers on an area which history shows will become slum in the future. The *Gutknecht*[27] case was reaffirmed in *Zisook v. Maryland Drexel Neighborhood Redevelopment Corp.*[28] when the Conservation Act was again challenged and again upheld. In 1956 the Massachusetts Supreme Court stated: "previously we reserved judgment with respect to blighted open area. We now express the opinion that the redevelopment of such an area is a public purpose."[29]

The decisions discussed in the previous paragraph were the basis for the decision of the New York Court of Appeals in the *Cannata*[30] case. The court said that the legislature's purpose in passing the challenged statute was the prevention of slums and that the prevention of slums is a sufficient public use as required by the Constitution. Once the public use is defined and agreed upon, the subsequent disposal of the land is immaterial.

We have seen, in a few short years, an expansion of the power of eminent domain from a dormant position in our lives to a most important one. We have authorized the use of eminent domain for housing projects, elimination of slums, and now, for the prevention of slums. The power has been used on areas of tangible blight, physical deterioration, and now, on open areas which are impairing or arresting the sound growth of a

[23] Cannata v. City of New York, 11 N.Y. 2d 210, 182 N.E. 2d 395 (1962).

[24] The area in question is a pocket of predominantly vacant, littered, small, excessively subdivided, unmaintained lots, many of which are two to ten feet below actual or mapped street levels, and are ungraded, unpaved and unlighted.

[25] 3 Ill. 2d 539, 121 N.E. 2d 791 (1954).

[26] ILL. REV. STAT. ch. 67½, §§ 91.8–91.16 (1953).

[27] Gutknecht v. Cityo f Chicago, 3 Ill. 2d 539, 121 N.E. 2d 791 (1954).

[28] 3 Ill. 2d 570, 121 N.E. 2d 804 (1954).

[29] Opinion of the Justices, 334 Mass. 760, 763, 135 N.E. 2d 665, 667 (1956).

[30] Cannata v. City of New York, 11 N.Y. 2d 210, 182 N.E. 2d 395 (1962).

community. Even though a recent case[31] stated that agricultural and residential lands which are economically sound could not be condemned by the Port Authority of Seattle for an industrial project, the overall trend seems to indicate that some day the "Public Use" requirement may be met by a showing of a greater benefit from the new use than was being received from the old.

[31] Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P. 2d 171 (1959).

TORTS–MINOR HELD TO ADULT STANDARD

A thirteen year old defendant, Paul Erickson, with his mother's permission, drove the family pickup truck to meet a friend, Lawrence Johnson. The boys were returning home in their own vehicles after a completed day of swimming. Erickson was following 100 to 150 yards behind the Johnson car at a speed of between 30 to 35 miles per hour along a dusty road. The plaintiff, Fannie Betzold, traveling in an opposite direction, was unable to see the road because of the dust raised by the oncoming Johnson car. Consequently, she stopped alongside a ditch on the right side of the road. The plaintiff testified that the defendant's truck, which was swaying to the right and to the left, went off the road into the ditch colliding head-on into the plaintiff's automobile. The jury found that the defendant was not guilty of negligence after the instruction that the defendant was to be measured by the degree of care "which an ordinarily prudent child of his age, experience, intelligence and capacity would have exercised . . . under the same or similar circumstances." The appellate court held that the instruction was "decisive of this case" and reversed the decision saying that under these or similar circumstances the only standard of care the defendant could be judged by is the standard of care required and expected of licensed drivers. *Betzold v. Erickson*, 35 Ill. App. 2d 203, 182 N.E. 2d 342 (1962).

Thus stands a somewhat unique problem. In what instances is an adult standard applicable to a minor who is charged with actionable negligence?[1]

There is no precedent for the *Betzold* decision in Illinois. However, in

[1] The most common situation involving a minor is when the question is whether or not he is guilty of contributory negligence. The great weight of authority shows that in these instances a child is only required to use the degree of care that an ordinarily prudent child of the same capacity would use in the same situation. Allen v. Colaw, 27 Ill. App. 2d 304, 169 N.E. 2d 670 (1960); Molnar v. Slattery Contracting Co., 8 N.Y. App. Div. 2d 95, 185 N.Y.S. 2d 449 (1959); Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97 (1928); Maskaliunas v. C&W I.I.R.R., 318 Ill. 142, 149 N.E. 23 (1925). It is unusual for a minor to be charged with actionable negligence as compared to the number of cases involving a minor's contributory negligence.