North Dakota Law Review

Volume 38 | Number 3 Article 14

1962

Eminent Domain - Compensation - State Acquisition of Land Previously Devoted to a Public Use

Benny A. Graff

Some well recognized grounds for the writ involving due process are (1) denial of the right of counsel,[15] (2) insanity of the accused,[16] (3) perjured testimony within the knowledge of the prosecuting officer,[17] (4) plea of guilty induced by fraud or misrepresentation,[18] and (5) withholding of material testimony by the prosecuting officer.[19]

North Dakota has expressly abolished the writ of coram nobis in civil actions and has replaced it with a motion to set aside judgment.[20] Essentially a civil remedy, the motion has been recognized by North Dakota as a means of vacating a criminal conviction. Where so applied it has been said to be analogous to coram nobis.[21] The motion has been held to lie where the defendant was not properly advised to his right to counsel,[22] and where a plea of guilty was obtained by fraud, duress or coercion.[23]

It is submitted that each state should provide some adequate remedy whereby a post-trial procedure is available to test the legality of a conviction even though it appears proper on the surface. The instant case is an indication of the scope and flexibility of such a remedy. North Dakota's motion to set aside judgment, if liberally interpreted, should adequately provide a remedy to insure due process.

LARRY KRAFT

EMINENT DOMAIN—COMPENSATION—STATE ACQUISITION OF LAND PREVIOUSLY DEVOTED TO A PUBLIC USE—The State Road Commission filed an interlocutory appeal to determine whether they must compensate the defendant Board of Education for a public school condemned for freeway purposes. The Supreme Court of Utah *held,* two justices dissenting, that because the statutes of Utah did not differentiate between methods of taking public or

15. Hogan v. Court of General Sessions of New York County, 296 N.Y. 1, 68 N.E.2d 849, 852 (1946). See People v. Silverman, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).
16. People v. Hill, 9 App. Div. 2d 451, 195 N.Y.S.2d 295, 296 (1959); Lee v. State, 35 Ala. 38, 44 So. 2d 606 (1949).
17. Davis v. State, 200 Ind. 99, 161 N.E. 375, 381 (1928); People v. Steele, 65 N.Y.S.2d 214, 221 (1946).
18. People v. Docetti, 9 App. Div. 2d 740, 192 N.Y.S.2d 907, 908 (1959); People v. Farina, 2 App. Div. 2d 776, 154 N.Y.S.2d 501, 502 (1956).
19. People v. Anderson, 4 App. Div. 2d 886, 167 N.Y.S.2d 464 (1957); People v. Fisher, 9 App. Div. 2d 836, 192 N.Y.S.2d 741, 751 (1958).
20. See N.D. Rules Civ. Proc., Rule 60(b).
21. See Judge Burke's opinion in State v. Magrum, 76 N.D. 528, 530; 38 N.W.2d 358, 360 (1949).
22. State v. Magrum, 76 N.D. 528, 536; 38 N.W.2d 358, 366 (1949).
23. State v. Whiteman, 67 N.W.2d 599, 612 (N.D. 1954).

private property and since no provision excluded the payment, the right of the Board to compensation was identical to that of a private owner. The majority felt it would be inequitable to impose the entire cost of the right of way upon an individual school board. The dissent criticized the result on the grounds that the Board of Education as an agent of the state held the school in a governmental capacity and therefore no compensation was necessary. *State v. Salt Lake City Public Board of Education,* 368 P.2d 468 (Utah 1962).

When federal acquisition of municipal property previously devoted to a public use abridges a property right created by the state, just compensation is required.[1] Compensation for state condemnation of land devoted to a public use is normally based upon whether the property is held by the municipal corporation in its governmental capacity, or its proprietary capacity.[2] In the former, it is held by the municipality as an agency of the state, subject to control by the state.[3] Property so held may be reclaimed by the state without compensation.[4] Property held in a proprietary capacity by the municipality is for the sole benefit of its citizens and itself, and cannot be taken without payment.[5]

Often an activity which in one jurisdiction has been classified as governmental is accepted as proprietary in another.[6] Among those activities on which the courts have conflicted are the establishment and maintenance of public parks,[7] municipal airports,[8] public swimming pools,[9] and the repair of

1. Town of Bedford v. United States, 23 F.2d 453 (1st Cir. 1927).
2. Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942); Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N.E. 695 (1893); State Highway Commission v. City of Elizabeth, 102 N.J. Eq. 221, 140 Atl. 335 (1928).
3. State Highway Commission v. City of Elizabeth, 102 N.J.Eq. 221, 140 Atl. 335 (1928); City of Schenectady v. State of New York, 6 Misc. 2d 232, 162 N.Y.S.2d 262 (1957).
4. Burnes v. Metropolitan District Commission, 325 Mass. 731, 92 N.E.2d 381 (1950); Lowell v. City of Boston, 322 Mass. 709, 79 N.E.2d 713 (1948).
5. Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942); Village of Canajoharie v. State, 13 Misc. 2d 293, 177 N.Y.S.2d 799 (1958).
6. **Compare** Redell v. Moores, 63 Neb. 219, 88 N.W. 243 (1901) (where the fire department was held to be under the states control) **with** Davidson v. Hine, 151 Mich. 294, 115 N.W. 246 (1908) (where the fire department was held to be a function of the city as private property).
7. **Compare** State v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960) (proprietary) **with** City of Schenectady v. State of New York, 6 Misc. 2d 232, 162 N.Y.S.2d 262 (1957) (governmental).
8. **Compare** People v. Wood, 391 Ill. 237, 62 N.E.2d 809 (1945) (governmental) **with** Village of Blue Ash v. City of Cincinnati, 166 N.E.2d 788 (Ohio Com. Pl. 1960) (proprietary, but case later reversed on other grounds).
9. **Compare** Hannon v. City of Waterbury, 106 Conn. 13, 136 Atl. 876 (1927) (governmental as to tort liability) **with** Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926) (proprietary function when dealing with tort liability).

streets.[10] One state court has adjudged an activity to be governmental for one purpose and proprietary for another.[11]

The manner in which the municipality acquired the property is also an important factor in determining whether compensation must be paid.[12] In acquiring property, dedication of land by a private owner to the city to be used as a public park entitled the city to payment upon condemnation by the state.[13] However, where a city used bonds to finance a public park originally, the state was not obligated to pay since they then held in tenure of the state.[14]

It has been established that the state is served in a governmental manner by schools,[15] boards of education,[16] and school districts.[17] The courts have reached this conclusion on education by stating that (1) public schools are conducted for the benefit of the entire state and not just for the particular locale they serve,[18] (2) school districts are created to effectively carry out the state's education,[19] and (3) by creation school boards and districts are involuntary corporations organized for the public benefit with only limited powers.[20] However, a school district was awarded payment merely because its school code gave it the power to own land in fee, and the governmental-proprietary distinction was not brought into play.[21]

North Dakota has allowed a school district to acquire a fee simple title to a site for school purposes by the use of eminent domain proceedings.[22] No case directly involving the right of the state to condemn land devoted to a public use could be

---

10. **Compare** State **ex rel** Schlegal v. Munn, 216 Iowa 1232, 250 N.W. 471 (1933) (governmental) **with** Blue v. City of Union, 159 Ore. 5, 75 P.2d 977 (1938) (proprietary).

11. **Compare** Fay v. City of Trenton, 126 N.J.L. 52, 18 A.2d 66 (1941) **with** Perth Ambroy v. Barker, 74 N.J.L. 127, 65 Atl. 201 (1906) (public waterworks held to be governmental as to taxation, proprietary as to liability in tort action).

12. See, **e.g.,** Parr, **State Condemnation of Municipally Owned Property: The Governmental-Proprietary Distinction,** 11 Syracuse L. Rev. 27 (1959).

13. Winchester v. Cox, 129 Conn. 106, 26 A.2d 592 (1942); State Highway Commissioner v. Cooper, 24 N.J. 261, 131 A.2d 756 (1957).

14. City of Schenectady v. State of New York, 6 Misc. 2d 232, 162 N.Y.S. 2d 262 (1957).

15. Brown v. Board of Trustees, etc., 303 N.Y. 484, 104 N.E.2d 866 (1952); Consolidated School Dist. v. Wright, 128 Okla. 193, 261 Pac. 953 (1927).

16. Bingham v. Board of Education, 118 Utah 582, 223 P.2d 432 (1950).

17. School District v. Rivera, 30 Ariz. 1, 243 Pac. 609 (1926); Bank v. Brainerd School Dist., 49 Minn. 106, 51 N.W. 814 (1892).

18. Braun v. Victoria Independent School Dist., 114 S.W.2d 947, (Tex. Civ. App. 1938).

19. Florman v. School District, 6 Colo. App. 319, 40 Pac. 469 (1895).

20. School District v. Rivera, 30 Ariz. 1, 243 Pac. 609 (1926); Redfield v. School District, 48 Wash. 85, 92 Pac. 770 (1907).

21. School District of Borough of Speers v. Commonwealth, 383 Pa. 205, 117 A.2d 702 (1955).

22. Board of Education of City of Minot v. Park District, 70 N.W.2d 899 (N.D. 1955).

found, although the power is conferred to them.[23] It is submitted that by the wording of our statutes,[24] the holder to the fee in these public lands would be awarded compensation by the state without regard to whether the land is being used in a governmental or proprietary capacity by the owner.

BENNY A. GRAFF

INSURANCE—BINDING SLIPS OR MEMORANDA—THEIR EFFECTIVENESS AS TEMPORARY OR INTERIM INSURANCE—The defendant had issued a conditional receipt for premium deposit to an applicant for a life insurance policy.[1] On the back of this receipt was a clause providing that in the event of rejection of the application the deposit had to be returned to the applicant. The application was rejected by the insurance company. The insurance agent did not attempt to return the premium payment to the applicant until two days after her death, which occurred seventeen days after the initial deposit.

Plaintiff beneficiary brought an action to recover the full amount of the insurance. On appeal, the Supreme Court of Arkansas *held,* two justices dissenting, that the defendant was not liable since the policy clearly meant that there would be no protection until the deceased was accepted as insurable. The dissent claimed there was sufficient ambiguity in the policy to allow an interpretation of the policy as providing a period of interim insurance until rejection of the policy by returning the deposit to the applicant. *The Nat'l. Life and Acc. Ins. Co. v. Baker,* 354 S.W.2d 1 (Ark. 1962).

A conditional or binding receipt has been accepted as providing a present period of interim insurance until either ac-

23. N.D. Cent. Code § 32-15-04 (3) "Property appropriated to public use, but such property shall not be taken unless for a more necessary public use than that to which it has been appropriated already, . . ."

24. N.D. Cent. Code § 32-15-04 "The private property which may be taken under this chapter includes: (3) Property appropriated to public use . . ." and § 32-15-01, "Private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner."

1. "If . . . (2) the proposed insured is, on the date of said deposit and on the date of any required medical examination, insurable and acceptable in the opinion of the Company's authorized officers . . . then upon the death or bodily injury of the proposed insured prior to the date of issue and within thirty-one days of the date of said deposit, the Company will pay the benefit, if any, which would have been payable under the provisions of said policy had its date of issue been the date of said deposit." The Nat'l. Life and Acc. Ins. Co. v. Baker, 354 S.W.2d 1, 2 (Ark. 1962).