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Constitutional Law - Eminent Domain - Value to Owner as Basis for Compensation

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this with §152(11) of the Railway Labor Act which would permit agreements compelling workers to join a union as a condition of continued employment.

It would seem that employers, who may not legally discriminate against union members, should also be prohibited from discriminating against non-union workers. The "right to organize" becomes in effect compulsion to organize under a union shop agreement. A right ceases to be a right, where it must be exercised in any event.

Perhaps the most powerful denouncement of the closed shop was made in a dissent by Mr. Justice Frankfurter who cited with approval a great exponent or organized labor, Mr. Justice Brandeis as saying, "But the American people should not, and will not accept unionism if it involves the closed shop. They will not consent to the exchange of the tyranny of the employer for the tyranny of the employee."[26]

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CONSTITUTIONAL LAW — EMINENT DOMAIN — VALUE TO OWNER AS BASIS FOR COMPENSATION — Plaintiff, the owner of a leasehold interest in property sought to be condemned by defendant, city housing authority, instituted proceedings to recover the market value of such interest. The defendant appealed from the trial court's charge to the jury that the Georgia constitution[1] did not require the use of the fair market value of the leasehold interest as the basis for determining just compensation; that the just and adequate compensation to which an owner is entitled is the value of property to him, not to a condemner, and that the measure of damages is not necessarily the market value of property, but may be the fair and reasonable value thereof. On appeal it was *held,* two justices dissenting, that the charge correctly stated the law as to the proper measure of compensation. *Housing Authority Of Savannah v. Savannah Iron & Wire Works,* 87 S.E.2d 671 (Ga. 1955).

It is universally held that property shall not be taken for a public purpose without the payment of "just compensation."[2] The Fifth Amendment to the Federal Constitution expressly imposes this limitation on the power of Congress, and the Fourteenth Amendment has been interpreted by the Supreme Court to impose a similar limitation on the power of all the states.[3] Most of the states have a "just compensation" clause in their own constitutions.[4] "Just compensation" means "the full and perfect equivalent in money of the property taken"[5] and that "the owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken".[6]

26. AFL v. American Sash and Door Co., 335 U.S. 538, 551 (1949) (dissent).

1. Ga. Const. Art 1 § 3 par. 1. "Private property can not be taken or damaged for public purposes without just and adequate compensation being first paid."

2. United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); Campbell v. Chase National Bank of New York, 5 F.Supp. 156, 171 (S.D.N.Y. 1933) (dictum).

3. McCoy v. Union Elevator Railroad Company, 247 U.S. 354 (1918); Chicago, Burlington, and Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897).

4. The interpretation of the constitutional provision in the instant case may well find reception throughout the country since a similar clause is contained in the constitution of all but two states, North Carolina and New Hampshire.See Staton v. Norfolk, 111 N.C. 278, 16 S.E. 181 (1892) where the court read this requirement into the North Carolina Constitution by implication under the due process clause.

5. United States v. Miller, 317 U.S. 369 (1943).

6. *Ibid.*

There seems to be uniform agreement that "market value," with or without some verbal qualification, is the proper measure of just compensation, at least in the usual run of cases.[7] "Fair market value" is frequently used, although there is no reason to suppose that the courts are consciously adopting a different standard when they make the addition of "fair" to "market value".[8] Occasionally some other variant, like "cash market value," is employed,[9] but it is doubtful whether there is any real difference between this last variant and the usual statement, since the courts often imply that the "market value" must be measured by such a price as might have been obtained by a sale for cash, rather than for any other consideration.[10] Regardless of the verbal qualification used, most courts have stated that market value or fair market value is the invariable basis of valuation in eminent domain where no consequential damages to property not taken are involved.[11] Fair market value has been described by most courts as being that price which can be obtained under fair conditions between a willing buyer and a willing seller, when neither is acting under necessity, compulsion, or peculiar and special circumstances.[12]

While market value is the general yardstick in a condemnation proceeding, or a suit for compensation in the nature of a condemnation proceeding, there may be circumstances in which market value and actual value are not the same. In these cases the courts attempt to determine the actual value of the land or interest even though reluctant to adopt a standard other than fair market value.[13]

Departure from the general rule as to measure of damages is based upon the theory that when property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough practical measure of value to the owner.[14] Courts departing from the general rule of market value indicate that there are instances when one might not be justly compensated for the taking of his property unless he was awarded an amount adequate to cover the replacement cost of the particular property takken, and conclude that a constitutional provision providing adequate and just compensation for private property

7. United States v. Commodities Trading Corporation, 339 U.S. 121, 123 (1950) (dictum); United States v. Toronto Navigation Co., 338 U.S. 396, 402 (1949) (dictum); United States v. Powelson, 319 U.S. 266, 275 (1943) (dictum); Reed v. Ohio Ry. Company, 126 Ill. 48, 53, 17 N.E. 807, 810 (1888) (dictum); In re Jeffries Homes Housing Project, 306 Mich. 638, 11 N.W.2d 272, 276 (1943) (dictum).

8. United States v. Commodities Trading Corporation, *supra* note 7.

9. Fort Worth & D.N. Ry. Company v. Sugg, 83 Tex. Civ. App. 776, 68 S.W.2d 570 (1934); Hetland v. Bilstad 140 Iowa 411, 118 N.W. 422 (1908).

10. State Highway Board v. Warthen, 54 Ga. App. 759, 189 S.E. 76 (1936); Conness v. Indiana I. & I. Railroad Company, 193 Ill. 464, 62 N.E. 221 (1901).

11. United States v. Certain lands, 47 F.Supp. 934, 937 (S.D.N.Y. 1942) (dictum); People v. Recciardi, 23 Cal.2d 390, 144 P.2d 799, 805 (1943) (dictum); Esch v. Chicago, M. & St. P. Ry. Company, 72 Wis. 229, 231, 39 N.W. 129, 131 (1888) (dictum).

12. Andrews v. Cox, 127 Conn. 455, 17 A.2d 507 (1941); Maher v. Commonwealth, 291 Mass. 343, 197 N.E. 78 (1935); Louisville & N.R. Company v. Cornelius, 232 Ky. 282, 22 S.W.2d 1033 (1929).

13. See United States v. Dixie Cement Corporation, 178 F.2d 195 (1949) (Where condemned land contained sand bank near to and used by a cement plant, the court permitted instruction that proximity of sand to cement plant resulted in a peculiar value to owner beyond general market value); Old South Association v. Boston, 212 Mass. 299, 99 N.E. 235 (1912) (Land condemned was tax exempt so long as in hands of petitioner, and court permitted recovery of a substantial sum in addition to market value because of the peculiar value to him.); Housing Authority of City of Augusta v. Holloway, 63 Ga. App. 485, 11 S.E.2d 418 (1940) (dissenting opinion).

14. United States v. Chandler-Dunbar Company, 229 U.S. 53 (1913).

taken for public use does not restrict the owner of the property to a recovery of the market value.[15]

In the instant case it will be observed that the court by applying the "value to owner" or "value for use to which the property is being devoted" rule, has departed from the standard employed by most jurisdictions.[16] Even so, irrespective of the measure of damages employed, the judiciary's primary concern is that the owner of condemned property be awarded its actual value. Consequently, while "market value" must be retained as the verbal rule of compensation in order to preclude the possibility of awards based solely upon sentiment and whim,[17] it is emminently just that courts in order to insure *full* compensation encourage the admission of evidence tending to show "special" value in appropriate cases.

ORALL B. JOHNSON

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EFFECT OF RACIALLY RESTRICTIVE DETERMINABLE FEE — A parcel of land was conveyed to plaintiff, a city park commission, upon the limitation, *inter alia*, that it be used as a park only by persons of the white race. In a declaratory judgment action brought by the commission for determination of the validity of the limitation. the court *held* that the limitation was valid. If Negros used the park, the determiable fee conveyed to the park commission would cease and terminate by its own limitation, and the estate would automatically revert to the grantor. The reversion would not operate by judicial enforcement and rights of Negros under the Fourteenth Amendment and federal civil rights laws would not be violated. *Charlotte Park and Recreation Commission v. Barringer*, 88 S.E.2d 114 (N. C. 1955).

The court reasoned that because of the automatic reversion there was no state action within the rule of *Shelley v. Kraemer*.[1] It therefore concluded that the discriminatory nature of the limitation would fall outside the ban of the Fourteenth Amendment and the federal civil rights laws on the theory that an individual is free to discriminate as long as his acts are unsupported by state action.[2]

The North Carolina Court's employment of the concept of automatic reversion to avoid the rule of *Shelley v. Kraemer* raises a greater problem than it solves. If the happening of the limitation occurs, the title is in the grantor and the possession in the grantee.[3] If the grantor wishes to retake possession, an action of ejectment is appropriate.[4] But if the grantor brings ejectment, a

15. Boom Company v. Patterson, 98 U.S. 403 (1917).

16. The instant case was tried only on whether the constitutional provision justified the charge to the jury as to the value to be placed on property condemned through eminent domain and not as to whether the fact situation justified the charge. The case would have been of much greater value had it also passed upon this point.

17. Housing Authority of City of Augusta v. Holloway, 63 Ga.App. 485, 11 S.E.2d 418 (1940) (dissenting opinion) (Court stated that if instructions were not based on market value the door would be opened to the wildest kind of speculation based upon the fancy and whim of juries).

1. 334 U.S. 1 (1948) Racial descriminations, such as the determinable fee in the instant case, are merely wrongful acts of individuals and can remain outside the ban of the Constitution only so long as they are unsupported by state authority.

2. Civil Rights Cases, 109 U.S. 3 (1883); See Hale, *Force and State*, 35 Col.L.Rev. 149, 181 (1935).

3. Tiffany, *Real Property*, §217 (3d ed.) (1939).

4. Toth v. Bigelow, 1 N.J. 379, 64 A.2d 108 (1949).