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Constitutional Law -Eminent Domain - Private v. Public Use

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be foreseen.[15] However, the greater number of cases have failed to consider the question of duty and use the language of proximate cause. In any case, the ultimate question should be whether the negligent act and the injury which resulted are so related that liability should be imposed.[16] The prevailing view, of course, is that one is liable for any injury which results from his negligent act if the injury was the natural and probable result of the negligent act.[17]

It has been held that the proximate cause of the injury in cases similar to the instant case was not the theft but rather the unskillful handling of the vehicle by the thief.[18] The key in the automobile did no harm. Before any injury could result there had to be some illegal act of a third person, and generally one is not bound to anticipate that some person will disobey the law.[19] Even if the automobile owner could have foreseen that his act of leaving the keys in the automobile would induce a thief to steal the automobile, certainly one should not say that he was bound to foresee that the thief would be a careless driver. Such a statement would seem contrary to common experience; it would seem that car thieves, in order to avoid attention would drive with extreme care. There may be circumstances however, such as leaving an automobile unlocked with the key in the ignition in front of a school, where one might reasonably anticipate that some injury could result,[20] due to the possibility that the automobile may fall into the hands of an immature driver.

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CONSTITUTIONAL LAW — EMINENT DOMAIN — PRIVATE v. PUBLIC USE. — The City and County of San Francisco sought to condemn certain property for the purpose of leasing it for a term of not less than twenty-five years to a private citizen who was to construct and operate a parking garage thereon. The City Controller refused to certify to the availability of funds for this purpose, contending, *inter alia,* that the proposed use was not a public one. In a mandamus proceeding by the City the court *held,* that the application for the writ be denied. Since the City was to retain no control over the rates to be charged by the lessee, the proposed use was private rather than public. *City and County of San Francisco v. Ross,* 279 P.2d 529 (Cal.1955).

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15. Sinram v. Pennsylvania Ry. Co., 61 F.2d 767 (2d Cir. 1932); Palsgraf v. Long Island Ry. Co., *supra* note 12; Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Prosser on Torts, 186 n. 95 (1941).

16. Prosser on Torts §§31,45 (1941).

17. Kiste v. Red Cab Co., 122 Ind. App. 587, 106 N.E. 2d 395 (1952); Palsgraf v. Long Island Ry. Co., *supra* note 12. *Contra,* Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).

18. Wilson v. Harrington, *supra* note 2; 4 Blashfield, Cyclopedia of Automobile Law & Practice, §2534 n.26 (Perm. ed. 1946).

19. Leo v. Dunham, 41 Cal. 2d 712, 264 P.2d 1 (1953); Curtiss v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947), See Babbitt, *The Law Applied to Motor Vehicles* §553 (1946); Restatement, Torts, §447 (1934). "There is usually much less reason to anticipate acts which are malicious or criminal than those which are merely negligent. Under ordinary circumstances, it is not to be expected that anyone will intentionally . . . steal an automobile and run a man down with it." Prosser on Torts, §37 n.90 (1941).

20. Restatement, Torts §302 Illus. 7 (1934).

The power of eminent domain [1] has long been recognized as an inherent attribute of sovereignty.[2] Hence, constitutional provisions relative thereto are limitations upon, rather than grants of, such power.[3] North Dakota statutorily defines eminent domain as ". . . the right to take private property for public use." [4] The Code further provides that "Private property shall not be taken . . . without just compensation." [5] Case law reiterates this precept.[6]

Although implied rather than expressed in most state constitutions,[7] it is the universal rule that private property cannot, in the absence of the owner's consent, be taken for private use.[8] The law is devoid of similar uniformity as to what constitutes a public use. The older view that a public use means a use, or a right of use, by the public [9] is discredited by proponents of the more contemporary view that public use is synonymous with public benefit or advantage.[10] One authority, recognizing the hopeless irreconcilability of the decisions, correctly states that there neither is, nor can be, a concise definition of universal applicability.[11] In any event, a use is not private *per se* merely because the taking will result incidentally in a special benefit to particular private individuals.[12] However, in order for the power to be exercised, it must be clear that the use is *predominately* public. Even a merger of the public and private interests on a substantially equal basis will not permit the use of the power.[13]

The "liberal" trend of most courts is exemplified by the fact that in the vast majority of jurisdictions eminent domain proceedings may, in addition

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1. The power of eminent domain is to be distinguished from the police power. *See* Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 666 (Fla. 1952); See 1 Lewis, Eminent Domain §6 (3rd ed. 1909); 11 McQuillin, The Law of Municipal Corporations §32.04 (3rd ed. 1950); 1 Nichols, Eminent Domain §1.42(3) (3rd ed., Sackman & Van Brunt, 1950).

2. *See* State of Georgia v. City of Chatonooga, 264 U.S. 472, 480 (1923); Albert Hanson Lumber Co. v. United States 261 U.S. 581, 587 (1922); Boom Co. v. Patterson, 98 U.S. 403,406 (1378).

3. *See* Cincinnati v. Louisville etc. R.R. Co., 223 U.S. 390, 403 (1912); United States v. Jones, 109 U.S. 513, 518 (1883); United States v. 277.97 Acres of Land, 112 F.Supp. 159, 161 (S.D. Cal. 1953).

4. N. D. Rev. Code §32-1501 (1943).

5. *Ibid.*

6. U.S. v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); *see* Campbell v. Chase National Bank, 5 F.Supp. 156, 171 (S.D.N.Y. 1933).

7. The following constitutions are among those expressly prohibiting the taking of private property for a private use: Ala. Const. Art. I, §23; Ariz. Const. Art. I, §17; Colo. Const. Art. II, §14; Mo. Const. Art. I, §26; Okla. Const. Art II, §23; S. C. Const. Art. I §17; Wash. Const. Art. I, §16; Wy. Const. Art. I, §32. North Carolina alone has no constitutinoal provisions relative to eminent domain.

8. Missouri Pacific R.R. Co. v. Nebraska, 164 U.S. 403 (1896); Cole v. LaGrange, 113 U.S. 1 (1884).

9. Shasta Power Co. v. Walker, 149 Fed. 568 (C. C. N.D. Cal., 1906); Cleveland Ry. Co. v. Polecat Drainage District, 213 Ill. 83, 72 N.E. 685 (1904).

10. *See* Rindge Co. v. County of L.A., 262 U.S. 700, 707 (1923); Mt. Vernon-Woodbury etc. Co. v. Interstate Power Co., 240 U.S. 30, 32 (1916).

11. 2 Nichols, *op. cit. supra* note 1, §7.2(3). This would seem clear, since the effect of the contemporary majority of the decisions has been to make a definition of the nature of a use for the benefit of the public more a matter of degree than a legal absolute.

12. *See* Alabama Power Co. v. Gulf Power Co., 283 Fed. 606, 612 (C.C.M.D. Ala. 1922); *In re* Condemnation for Improvement of Rouge River, 266 Fed. 105, 114 (C.C. E.D. Mich. 1920); Sission v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454, 459 (1905) ". . . controlling effect cannot be given the fact . . . that the construction of a particular improvement will result incidentally in a benefit to private rights and interests. If the contrary were true, it it (sic) doubtful if there could be prosecuted any public work requiring an exercise of the power of eminent domain."

13. *See* Shizas v. City of Detroit, 333 Mich. 44, 52 N.W.2d 589, 594 (1952).

to takings for traditional purposes,[14] be constitutionally used to acquire land for such purposes as the effectuation of slum clearance, the promotion of low-rent housing,[15] and the providing of public parking facilities.[16] Illustrative of the extreme "public benefit" theory cases are those affirming condemnation of land which, though not a slum area, constituted a "social and economic" liability to a city because of unsound planning,[17] or mere vacacy.[18] These decisions have been subjected to criticism,[19] which has apparently gone unheeded.

It is essential to note that in condemning land for a public purpose, accomplishment of that public purpose is the primary consideration.[20] Consequently, subsequent sale or lease to private persons or corporations of property taken by eminent domain will in no way invalidate the taking unless made prior to the accomplishment of such public purpose.[21]

In all cases, although legislative declarations relative to a public use are considered prima facie correct, they are by no means conclusive, and the burden of ultimate determination of the matter falls upon the judiciary.[22]

In the instant case it will be observed that the purpose of the taking was not to replan, but to eliminate congestion by providing public parking at reasonable cost. This purpose, however, would have no assurance of fulfillment in veiw of the total absence of public regulation of rates to be charged for the privilege of parking. It is readily perceivable that a contrary decision could not be logically supported by utilization of any existing statutory or judicial interpretation of the term "public use".

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14. See, *e.g.*, 2 Nichols, *op. cit. supra* note 11, §7.511-7.5155, 7.5157-7.524. (For example, highways, dams, public buildings, railroad, and airports).

15. Keyes v. United States 119 F.2d 444 (D.C.Cir. 1941); Papadinis v. City of Somerville, 121 N.E.2d 714 (Mass. 1954); Ferch v. Housing Authority of Cass County, 59 N.W.2d 849 (N.D. 1953); *Contra*: Housing Authority of City of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953).

16. Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953); State *ex rel* Hawks v. City of Topeka, 176 Kan. 240, 270 P.2d 270 (1954); State v. Land Clearance for Redevelopment Authority of Kansas, 270 S.W.2d 44 (Mo. 1954).

17. See *e.g.*, Redevelopment Agency of San Francisco v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105 (1954), *certiorari denied*, 75 Sup. Ct. 214 (1955).

18. Seee.g., People *ex rel* Gutnecht v. City of Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953).

19, Schneider v. District of Columbia, 117 F.Supp. 705 (D.D.C. 1953). The court states, "That the Government may do whatever it deems to be for the good of the people is not a principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them, the powers of government are sharply limited . . . . It is said that the established meaning of eminent domain includes measures for the 'general welfare' and that new social doctrines have so enlarged the concept of public welfare as to include all measures designed for the public benefit . . . There is no more subtle means of transforming the basic concepts of our government, of shifting from the preeminence of individual rights to the preeminence of government wishes, than is afforded by redefinition of 'general welfare', as that term is used to define the Government's power of seizure. If it were to be determined that it includes whatever a commission, authorized by Congress and appointed by the President, determines to be in the interest of 'sound government', the ascendancy of government over the individual right of property will be complete." *Id.* at 716, 720.

20. The theory of the courts in the slum clearance and similar type cases is that condemnation promotes the elimination of a social evil, resulting in a consequent benefit to the public. Seee.g., Thomas v. Housing Redevelopment Authority, 234 Minn. 221, 48 N.W.2d 175 (1951).

21. Velishka v. City of Nashua, 106 A.2d 571 (N.H. 1954); David Jeffrey Co. v. City of Milwaukee, 66 N.W.2d 362 (Wis. 1954).

22. See City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930); Sears v. Akron, 246 U.S. 242, 251 (1918).

The policy reflected by the instant case in refusing to uphold a use clearly not public and in restricting an even greater expansion of the "public use" concept is encouraging to that ever diminishing minority which remains steadfast in its dedication to the proposition that individual rights are of far greater and more lasting worth than governmental aid. "The law of each age is ultimately what that age thinks should be the law." [23] That the courts, with certain notable exceptions, have made the most perspicacious choice in the field of eminent domain is open to question.

H. M. PIPPIN

CONTRACTS — PROMISSORY ESTOPPEL — CHARITABLE SUBSCRIPTIONS. — Plaintiff signed as guarantor several notes of a hospital building association, blank except for amount, so that it might make loans and secure building contracts. The association, relying on plaintiff's promise, had entered into the contracts when plaintiff became dissatisfied with the type of hospital being built, and demanded back the unused notes. The association refused to return them. In an action to enjoin negotiation of the notes judgment was entered for the defendants. On appeal it was *held,* that the judgment be affirmed. Plaintiff's promise of guaranty became binding when the charity, in reliance thereon, put itself into a position from which it could not extricate itself without substantial injury.[1] *Danby v. Osteopathic Hospital Association,* 104 A.2d 903 (Delaware 1954).

The early English and American cases regarded promises of money made to charitable organizations as nudum pactum since the very nature of the undertaking indicates a gift with no expectation of consideration.[2] Later decisions, however, have tended to enforce the promises whenever possible as a matter of policy.[3] Courts have sought refuge in a variety of theories in order that they might find consideration.[4] Some courts have found a consideration in the donee's "promise" to apply the subscriptions to the purposes of the institution.[5] Others hvae considered the promise as a unilateral offer which becomes binding as soon as the subscription has been accepted and liabilities incurred by the charity,[6] and a few courts have held that the promise of each subscriber is consideration for the promise of the

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23. *See* People *ex rel* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 450, 130 N.E. 601, 608 (1921).

1. The doctrine of promissory estoppel invoked by the court has been defined as. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts §90 (1933).

2. Phillips Limerick Academy v. Davis, 11 Mass. 113(1814); See 1 Williston on Contracts 403(Rev. ed. 1936).

3. *In re* Lord's Will, 175 Misc. 921, 25 N.Y.S.2d 747 (1941); More Game Birds in America Inc. v. Boettger, 125 N.J.L. 97, 14 A.2d 778(1940).

4. At least one early case held that a moral obligation was sufficient. Caul v. Gibson, 3 Pa. St. 416(1846).

5. Rogers v. Galloway Female College, 64 Ark. 627, 44 S.W. 454(1898); Rothenberger v. Glick, 22 Ind. App. 288, 52 N.E. 811 ,1899); Albert Lea College v. Brown, 88 Minn. 524, 93 N.W. 672(1903).

6, I & I Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532(1938); Kueka College v. Ray, 167 N.Y. 96, 60 N.E. 325(1901); *See In re* Lord's Will, 175 Mcsi. 921, 25 N.Y.S.2d 747,751 (1941).