February 1971

**Mandamus--Eminent Domain**

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Property Law and Real Estate Commons

**Recommended Citation**

Available at: https://researchrepository.wvu.edu/wvlr/vol73/iss1/16

This Abstract is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

No cases were found discussing a state official’s duty to spend his entire allocations, but the decision appears to be in accord with the restrictions upon a writ of mandamus. Such a writ will lie to compel one to exercise any discretion he is permitted, but not to control the result of that exercise. Miller v. County Court of Tucker County, 34 W. Va. 285, 12 S.E. 702 (1890). Futhermore, mandamus is the correct procedure to require payment of an order approved by a public body; but it cannot be used to demand remuneration of the original obligation. Town of Elizabeth v. County Court of Wirt County, 128 W. Va. 34, 35 S.E.2d 601 (1945).

Mandamus—Eminent Domain

Pursuant to a highway improvement contract with the State Road Commission, a construction company was engaged in excavat- ing portions of a hillside for improvement to a state highway. During the work, an abandoned mine tunnel was opened. Several hours later, large volumes of water gushed from the tunnel, flooded a near- by town, and damaged realty belonging to petitioners. Petitioners brought a mandamus suit to compel the State Road Commissioner to institute an eminent domain proceeding to ascertain the damage. Held; Writs awarded. When highway construction or improvement results in property damage to non-residual, private property in the absence of an actual taking, the State Road Commissioner has a duty to institute eminent domain proceedings within a reason- able time to ascertain damages. Moreover, mandamus will lie to compel the observance of this duty. State ex rel. Phoenix Insurance Co. v. Ritchie, 175 S.E.2d 428 (W. Va. 1970). The court stated that W. VA. Const. art. III, § 9, which provides that property shall not be taken or damaged for public use without just compensation, is not limited to residual property. The clear legal right which a petitioner must show is not that he had been damaged, but that there is reasonable cause to believe that the issue of damages should be resolved by a judge and jury. Possible negligence of the State in causing the damage is not a bar to recovery in eminent domain proceedings.

Judge Berry’s dissent urged that the eminent domain proceeding applied only to residual property and did not extend to negligent
ABSTRACTS

damage, which was properly the subject of a separate action. The dissent of Judge Calhoun stated the constitution limited eminent domain compensation to land taken (or damaged) only for public use; and since the land was not damaged pursuant to the public use, recovery in eminent domain was barred. The dissent further stated liability in this case should have been based on negligence; and therefore, the Court of Claims was the proper avenue of recovery.

This case is in accord with the trend of West Virginia decisions which have awarded mandamus to compel eminent domain proceedings involving damage to non-residual property. The facts of this case were similar to those in State ex rel. Lynch v. State Road Commissioner, 151 W. Va. 858, 157 S.E.2d 329 (1967), which unanimously reached the same result.

Torts—Application of Last Chance Doctrine

Plaintiff was a passenger in an automobile driven by the defendant when it was involved in a collision with a second automobile. Plaintiff instituted an action for the recovery of damages for injuries sustained in the accident. The Circuit Court of Monongalia County directed a verdict in favor of the plaintiff on the question of liability. On appeal the defendant contended that, while she was negligent, the driver of the second automobile had the last clear chance to avoid the collision, and that the plaintiff's cause of action, if any, was against the other driver and not against the defendant. Held, affirmed. The defendant's assertion of the last clear chance doctrine was improper and no error was committed in directing the verdict for the plaintiff. Edwards v. Lynch, 175 S.E.2d 632 (W. Va. 1970).

It is generally recognized that the doctrine of last clear chance arises only when the plaintiff is guilty of contributory negligence. The doctrine cannot be invoked between defendants who were concurrently negligent except in Pennsylvania. See 65A C.J.S. Negligence § 136(1) at 124-25 (1966). The court in Edwards, citing Greene v. Charlotte Chemical Laboratories, Inc., 254 N.C. 680, 120 S.E.2d 82 (1961), stated that "[a] defendant may not rely upon the doctrine by asserting the negligence of a joint tortfeasor who has not been sued by the plaintiff." (emphasis added). This statement was apparently phrased to conform to the factual