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Eminent Domain--Right to Compensation of Covenants of Condemned Land

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X conveyed part of a tract of land to *Y*. An easement for ingress and egress was also given *Y* across land adjoining these premises. The deed contained a covenant that whenever the premises over which said easement was granted was improved for street purposes, *Y*, her heirs and assigns, agreed to pay their proportionate share of the expenses. *D* (city) obtained *Y's* property by eminent domain but *X* was not made a party to the appropriation proceeding against *Y*. Afterwards, *X* conveyed to *P* the part of tract remaining, over which the easement for ingress and egress was granted. After *P* made improvements on the premises over which the easement was granted, he sued *D* on the covenant to recover a money judgment for a part of the cost of the public street which he constructed. A demurrer to *P's* petition was sustained and judgment entered for *D*. *Held,* reversed, as *P's* predecessor in title, *X,* had an interest in the appropriated property and was not made a party in the appropriation proceeding, *X's* interest in the appropriated property was never taken. As the covenant ran with the land, *P* had a compensable interest in this adjoining land. *Hughes v. City of Cincinnati,* 195 N.E.2d 552 (Ohio 1964).

Both the federal and state constitutions protect private property owners from having their property taken by the government without just compensation. The fifth amendment of the federal constitution requires the payment of just compensation when private property is *taken* for public use. West Virginia's constitution provides an even broader protection for private landowners: "Private property shall not be *taken or damaged* for public use, without just compensation; . . . ." (Emphasis added) W. VA. CONST. art. III, § 9.

The principal case deals with the problem of what is an interest in land for which the condemning body must give just compensation. The general rule is that the term "owner," as used in statutes relating to condemnation proceedings, should be construed to include every person having any interest in the property to be taken. Annot., 2 A.L.R. 778, 785 (1919); 18 AM. JUR. *Eminent Domain* § 229 (1938). It does not matter whether the owner has a legal or equitable interest in the property condemned. *Swanson v. United States,* 156 F.2d 442 (9th Cir. 1946).

In some cases, it is not difficult to establish the identity of the compensable owners of property interests. Naturally, the owner

of a fee simple would receive all the condemnation proceeds. When a leasehold interest is involved, the tenant for years has an interest in the leased property and is entitled to a share of the compensation in the event that the lease itself does not include a provision in respect to the rights of the parties in the event of condemnation. *United States v. Petty Motor Co.,* 327 U.S. 372 (1946); *Gawzner v. Lebenbaum,* 180 F.2d 610 (9th Cir. 1950). The life tenant and remainderman or reversioner are entitled to compensation when the land is taken for public use. *Webster v. Pittsburg C. & T. R.,* 78 Ohio St. 87, 84 N.E. 592 (1908). It is a well established rule that when mortgaged land is condemned the mortgagee's rights against the land follow the award and the mortgagee may have the mortgage debt satisfied out of the condemnation proceeds in advance of other creditors of the mortgagor. *City of Chicago v. Sallinger,* 384 Ill. 515, 52 N.E.2d 184 (1944).

A lien is generally held not to be a compensable interest in the condemned land. *Williams v. Hutchinson & So. Ry.,* 62 Kan. 412, 63 Pac. 430 (1901). But the lien of a judgment creditor recorded prior to the condemnation proceedings may not be ignored and attaches to the condemnation proceeds. *Barnett v. O'Neal,* 270 Ala. 58, 116 So. 2d 375 (1959). Also, condemnation proceeds may be reduced by the amount of unpaid taxes and assessments. Annot., 79 A.L.R. 116, 121 (1932). A wife's inchoate right of dower is not a compensable interest in condemned property. *Shelton v. Shelton,* 225 S.C. 502, 83 S.E.2d 176 (1954). Neither is a bare option to purchase the condemned property compensable. *Phillips Petroleum Co. v. City of Omaha,* 171 Neb. 457, 106 N.W.2d 727 (1960).

More difficult is the problem of whether possibilities of reverter or rights of entry for condition broken are compensable interests in eminent domain proceedings. Whether such is a compensable interest depends on the likelihood of the termination of the possessory estate. If the occurrence of the event which would terminate a determinable fee or authorize a re-entry for breach of condition is not probable, the owner of the possessory estate is ordinarily entitled to all of the condemnation award as if he were the owner in fee simple. *Scovill v. McMahon,* 62 Conn. 378, 26 Atl. 479 (1892). If it appears that there is a good chance the possessory estate might terminate, the award should be divided among the parties in their proportionate shares. In *Chew v. Commonwealth,*

400 Pa. 307, 161 A.2d 621 (1960), a railroad had acquired a fee simple title subject to being defeated if the railroad ever abandoned this land as a right of way. Prior to condemnation of this land, the railroad had applied for permission to abandon land as a railroad. The court held that the abandonment was so probable and imminent as to make grantor's right of reverter a valuable property right which was subject to compensation.

The property interest in the principal case is analogous to a restrictive covenant. Restrictive covenants are to prevent subsequent owners from using the property in a certain manner while the covenant in the principal case called for affirmative action on the part of such owners. All restrictive covenants constitute at least an equitable easement or servitude. But the cases are in irreconciliable conflict in determining whether the right thus created is one of property for which compensation must be made when land subject to such right is taken by eminent domain. Annot., 122 A.L.R. 1464 (1939). Certain authorities take the position that building restrictions are a property right and where, through the exercise of the power of eminent domain there is a taking or damaging of such property rights, the owners of property for whose benefit the restrictions are imposed are entitled to compensation for the loss of the easements created by such restrictions. 2 NICHOLS, EMINENT DOMAIN § 5.73 (1963); 18 AM. JUR. *Eminent Domain* § 157 (1938). In *Board of Pub. Instruction v. Town of Bay Harbor Islands,* 81 So. 2d 637 (Fla. 1955), the court disagreed with the authorities as to what was the majority rule and held the better rule to be that restrictions on town lots do not give owners of all lots in the subdivision a property right for which compensation must be paid if such lots are taken for and devoted to public use in violation of the restrictions.

From an examination of cases, there appears to be an equal weight of authority on both sides. 53 MICH. L. REV. 451, 453 (1955). The federal courts have recently adopted the view that a restrictive covenant imposing a duty which runs with the land taken constitutes a compensable interest. *Adaman Mut. Water Co. v. United States,* 278 F.2d 842 (9th Cir. 1960); *United States v. Certain Land,* 220 F. Supp. 696 (S.D. Me. 1963). Compensation must be made where the taking of property under eminent domain violates building restrictions placed thereon for benefit of every other lot in the subdivision as each of the owners of the respective

lots regarded the restrictive agreement as something which added to the value of their land. *Burges v. City of St. Paul,* 241 Minn. 285, 64 N.W.2d 73 (1954); *City of Shelbyville v. Kilpatrick,* 204 Tenn. 484, 322 S.W.2d 203 (1959).

But other courts have held to the contrary. Restrictive covenants do not rise to the dignity of an estate in the land itself but are contractual rights not binding on the sovereign contemplating a public use of the particular property taken. *Friesen v. City of Glendale,* 209 Cal. 524, 288 Pac. 1080 (1930); *Anderson v. Lynch,* 188 Ga. 154, 3 S.E.2d 85 (1939). In *State v. City of Dunbar,* 142 W. Va. 332, 338, 95 S.E.2d 457, 461 (1956), the court said,

> ". . . those who enter into such covenants do so with the knowledge that the government has the absolute right to acquire lands for governmental purposes, and they can not be presumed to have intended an interference with such right."

Because of the unique fact situation in the principal case, the court had difficulty in determining whether the covenant was a compensable interest. Three dissenting judges held that the plaintiff did not have a compensable interest on the basis that the covenant was personal and did not run with the land. The Ohio court has held that owners of a restrictive covenant don't have a compensable interest. *Norfolk & W. Ry. v. Gale,* 119 Ohio St. 110, 162 N.E. 385 (1928); *Doan v. Cleveland Short Line Ry.,* 92 Ohio St. 461, 112 N.E. 505 (1915). Thus, the majority in the principal case seem to hold that this covenant created a greater interest in the land than a restrictive covenant.

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Equity—Clean Hands

Suit to replace a lost deed. In 1934 *A,* the sole stockholder and concededly alter ego of *P* corporation, conveyed property to *B,* his son, without consideration. *B* agreed to hold the property for *A's* benefit. The purpose of the conveyance was to conceal the property from *A's* creditors. In 1945 *A* filed a petition in bankruptcy in which he swore that he had no interest in real property. In 1950 *B* at *A's* request conveyed the property to *D* who was *A's* son-in-law. This conveyance was without consideration. *A* discharged *B's* earlier