Volume 57 | Issue 1 Article 9

March 1955

Right to Bill of Particulars in Eminent Domain Proceedings

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is ruled ineligible to take them. The statute provides that the proceeds should go to the persons who would have taken them if the beneficiary had been dead at the death of the insured.[24] The proceeds then are to revert to the estate of the insured and are to be taken by his next-of-kin. The heirs of the murderer are not entitled to the property unless they are also the persons who would have been heirs of the decedent if the murderer had predeceased him.[25] An assignee of the beneficiary likewise is barred from a recovery of the proceeds of the policy.[26]

The insurance company has been relieved of all liability under the policy in several situations. Where death of the insured at the hands of the beneficiary is an excepted risk in the policy, the provision has been held valid and sufficient to relieve the insurer of any duty of payment.[27] The West Virginia court has allowed the insurance company to retain the proceeds of the policy where the beneficiary was the sole heir and distributee of the insured's estate.[28] It has also denied the state the right to escheat the proceeds of the policy in such a case, holding that the state is a stranger to the insurance policy and has no equitable interest in the insurance money.[29] The estate of the insured was denied recovery where the beneficiary took out the policy and paid the premiums.[30]

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RIGHT TO BILL OF PARTICULARS IN EMINENT DOMAIN PROCEEDINGS.—The problem as to whether the general principles of pleading might be applied in eminent domain proceedings recently has been brought into focus by the many condemnation proceedings instituted by the West Virginia Turnpike Commission to secure the right of way for the turnpike currently under construction in southern West Virginia. This note concerns one phase of the above broad problem (as to whether the defendant can be required to submit a bill of particulars showing the exact nature of his claim for damages in his answer to the petition); but, in so particularizing the discussion, perhaps elucidation can be gained as to the overall question involved.

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[24] W. VA. CODE c. 42, art. 4, § 2 (Michie, 1949).
[25] 3 SCOTT, TRUSTS 2382 (1939).
[26] Johnson v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S.E. 865 (1919).
[27] McDade v. Mystic Workers, 196 Iowa 857, 195 N.W. 603 (1923).
[28] Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S.E. 743 (1928).
[29] State v. Phoenix Mutual Life Ins. Co., 114 W. Va. 109, 170 S.E. 909 (1933).
[30] Anderson v. Life Ins. Co. of Va., 152 N.C. 1, 67 S.E. 53 (1910).

There is no West Virginia case on the issue; however, by express statutory provision this state has conferred the right upon either party to move for a bill of particulars in "any action or motion."[1] Such language would seem to include eminent domain proceedings. The object of requiring a bill of particulars is to prevent surprise at the trial, to enable a litigant to make an intelligent preparation of his case.[2] The statute requires that there be no unreasonable delay on the part of the party in his application for a bill of particulars.[3] The granting of a bill of particulars is at the sound discretion of the trial court, and, therefore, there is no definite line or rule as to when one will be required, such depending upon the circumstances of each particular case.[4] Necessity must be shown; a statement of particulars will not be required, for example, where all the facts are already known,[5] and it seems that such necessity might arise in eminent domain proceedings as well as in any other type of action.

One court, pointing out that an eminent domain proceeding is neither an action at law nor a suit in equity, but a special statutory

[1] W. VA. REV. CODE (1931) c. 56, art. 4 § 19: "In any action or motion, if good cause therefor be shown or appear, the court or judge in vacation may order the plaintiff to file a more particular statement, in any respect, of the nature of his claim, or the facts expected to be proved at the trial, and may stay the action until a reasonable time after such order is complied with; and such statement must be made under the oath of the plaintiff, or some other credible person, to the effect that the affiant believes the same will be supported by evidence at the trial. But no such order shall be made if it appears that there has been unreasonable delay on the part of the defendant in applying therefor." *Id.* § 20: "In like manner, if good cause therefor appear, and there be no unreasonable delay on the part of the plaintiff in applying for such order, the court or judge in vacation may order the defendant to file a more particular statement, in any respect, of the nature of his defense, or the facts expected to be proved at the trial, which statement shall be under the oath of the defendant, or some other credible person, to the effect that the affiant believes the same will be supported by evidence at the trial."

[2] Metropolitan Life Ins. Co. v. Hayslett, 111 Va. 107, 68 S.E. 256 (1910); Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S.E. 835 (1906).

[3] Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S.E. 726 (1914); Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341, 98 S.E. 563 (1919). In the latter case the court overruled the plaintiff's motion for a bill of particulars. Although the defendant filed the appropriate plea in term time, February 12, 1918, plaintiff did not make his motion until June 12 of the same year, and, in overruling the plaintiff's motion, the court stated: "Diligence required immediate not delayed action in an endeavor to invoke the benefit of the statutory provisions and seems not to have been exercised by the plaintiff." See also Stone v. Safe Ins. Co., 109 W. Va. 739, 166 S.E. 106 (1930), where, on January 11, 1929, the case was continued on the motion of the defendant, and the defendant was given thirty days to file his plea. On May 11, the pleas were filed by formal order and joinder thereon. At the calling of the case for trial, later in the term, the defendant made his motion, and, in overruling the motion, the court stated that he should have requested the bill on May 11, or at least prior to the calling of the case for trial.

[4] Dale v. Atwell, 103 W. Va. 590, 138 S.E. 201 (1927); State v. Counts, 90 W. Va. 338, 110 S.E. 812 (1922).

[5] State v. Counts, 90 W. Va. 338, 110 S.E. 812 (1922).

proceeding, held that, in the absence of special statutory requirements as to procedure, the orthodox rules of pleading apply to condemnation proceedings, and that the sufficiency of the averments in the petition and answer may be raised by the usual methods of demurrer, motion to strike, etc., depending upon which is appropriate at the time.[6] There being no West Virginia code provision outlining special procedure as to eminent domain proceedings, it is at least arguable that the above is the law of West Virginia, that the general rules of pleading apply, and this would include, of course, the granting of the petitioner's motion for a bill of particulars under the proper circumstances. In support of this argument, it is noteworthy that the West Virginia court consistently has recognized the common law method of writ of error as the proper mode of review of eminent domain proceedings.[7] In this specific instance, our court has been applying the general common law rules of procedure, and it seems fair to assume that such rules are applicable at other stages of the proceeding.

One case stands out as holding that the defendant should not be required to file a bill of particulars in condemnation proceedings. In *Dallas, P. & S.E.R.R. v. Day*,[8] the court said: "The court did not err in refusing to require the defendant Day to particularize in writing the damage claimed by him before going into trial. The statute does not require written pleading in this character of proceeding, other than the application filed by the plaintiff as a basis for the condemnation. The law regulates what can and what cannot be considered as items of damages, and there is no necessity for any greater particularity." From the foregoing quoted portion

[6] Robertson v. Brooksville & I. Ry., 100 Fla. 195, 129 So. 582 (1930), which was a condemnation proceeding brought by the railroad to condemn an easement 100 feet wide through the plaintiff's property, wherein the court said: "While a proceeding of this character is not, strictly speaking, an ordinary law action, neither is it a suit in equity. It is a special statutory proceeding. But the statute pracitcally classifies it with actions at law by providing for appellate review on write of error, and, as we have implicated in a former case, except in so far as the statute may otherwise require, the general principles of pleading in actions at law might be appropriately assimilated thereto." Demeter Land Co. v. Florida Public Service Co., 99 Fla. 954, 128 So. 402 (1930), in which the court said: "As we see it, these allegations of the answer raise a question of law, which well might have been raised by a demurrer to the petition. . . The statute does not set out in detail the procedure that may be followed, and it says nothing about the right of the defendant in condemnation proceedings to demur, but when such statutes are silent as to how questions may be raised, the courts in which the proceedings are instituted may adopt the usual modes of determining such questions."

[7] See Strouds Creek & M.R.R v. Herold, 131 W. Va. 45, 45 S.E.2d 513 (1947); Welsh v. Norfolk & Western R.R., 104 W. Va. 660, 140 S.E. 839 (1927); Bluefield v. Gailey, 62 W. Va. 304, 57 S.E. 805 (1907); Baltimore & Ohio R.R. v. Pittsburg W. & K. R.R., 17 W. Va. 812 (1881).

[8] 3 Tex. Civ. App. 353, 22 S.W. 538 (1893).

of the opinion, the case appears easily distinguishable from those subsequently to be discussed, for the Texas statute required nothing in the way of written pleading except as to the plaintiff's application. In West Virginia written pleadings are required by statute in eminent domain proceedings,[9] thus making the situation materially different in this state, and the *Day* case apparently would have little weight here.

In *Kansas City, W. & N.W.R.R. v. Kennedy*,[10] the railroad brought condemnation proceedings to secure a right of way through the plaintiff in error's lands, and the latter appealed from the award of compensation to the district court. In the district court, the railroad company filed a motion to require the plaintiff in error to file a bill of particulars itemizing the elements of his damage resulting from the condemnation of his property, and, on appeal from the lower court's decision overruling the motion, the Kansas court held that the granting or disallowance of the motion for a bill of particulars was wholly discretionary in the trial court, concluding in this particular case that it had not been shown that the discretion had been abused by the trial court.[11] A bill of particulars was granted in *United States v. Certain Land in City of Poughkeepsie, N.Y.*,[12] wherein the court held that the federal rules do not apply in condemnation proceedings by the United States,

[9] W. VA. REV. CODE (1931) c. 54, art. 2. § 2: "The pleadings shall be in writing and shall be verified. The petition shall describe with reasonable certainty the property proposed to be taken, and it may embrace one or more parcels of land where the ownership is the same. If an estate less than a fee is proposed to be taken, the petition shall describe with reasonable certainty the particular estate less than the fee which it is proposed to take, the name of the owner or owners thereof, the manner and extent of their respective interests. If there are any liens or conflicting claims to such real estate, the petition shall state the nature and amount of such liens and claims and the names and places of residence of the persons who hold the same, so far as known to the petitioner. It shall also state the use to which the estate sought to be taken is intended to be appropriated."

[10] 49 Kan. 19, 30 Pac. 126 (1892).

[11] *Ibid.* The railroad company failed to show the requisite necessity for a bill of particulars; no evidence was presented in support of the motion, and nothing was offered to show that without the bill of particulars the company would in any way be hindered or surprised in the presentation of its defense.

[12] 71 F. Supp. 363 (D.C.N.Y. 1948), in which the court ordered the defendant "to serve within 10 days a bill of particulars showing the damages which it alleges it has suffered by reason of the taking and for which it asserts a claim, and the amount of each item so asserted. It will not be required to specify its loss on each machine, but will be required to specify, for instance, such items as (1) loss of rental value, if any, and the amount thereof, (2) whatever damage it claims to have suffered by reason of the deprivation of any portion of the leasehold, if any, and the amount thereof, (3) the total amount of its claim for damage, if any, for alterations, changes and rentals of other areas, specifying the nature and amount of each thereof, and (4) for other sundry expenses and damages, specifying the nature and amount of each." See also United States v. 243.22 Acres of Land, etc., 41 F. Supp. 469 (D.C.N.Y. 1941),

that the law of the state where the property is located governs the pleadings and procedure,[13] and that: "There is power in the court to direct service of a bill of particulars." The court further stated: "The petitioner does not assert that the defendant has suffered any damages; it merely concedes its obligation to pay 'just compensation', whatever that may consist of under the circumstances. Defendant is asserting damage and the burden of proving such is upon it. It should, therefore, specify the nature of the damage claimed by it in the amount of each item thereof. By this I do not contend that it should be required to set out its evidence but that it should at least specify the same facts that it would be required to do in a proof of any claim which it might file. Its pleading is most general and may contain items which are not recoverable under settled law in similar cases." This illustrates that the situation of necessity may often arise in eminent domain proceedings and that a bill of particulars should be, and was, granted in such case.

The precedents are few in number, but seem sufficiently strong to indicate the approach of the courts outside West Virginia to be that eminent domain proceedings, in the absence of any special statutes, are conducted and governed by the same rules of pleading which apply to other judicial proceedings. Only the *Day* case stands in opposition to this view, but a very weak opposition, the decision being based on and controlled by the Texas statute. Further, the West Virginia statute is broad in its scope, applying to "any action or motion", and this appears to be express authorization of the right to move for a bill of particulars in eminent domain proceedings. Where there is no unreasonable delay and necessity is shown, the trial court in its discretion should grant the petitioner's motion for a bill of particulars, thereby applying the general rules of procedure, and this probably will be held proper whenever the problem comes before the West Virginia court. At least, such would seem to be the more logical and reasonable result, and the argument is strengthened by our court's acceptance of the common law method of writ of error as the proper avenue of review.

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where a motion for a bill of particulars was denied, the court considering the particulars demanded as immaterial to the issues; but the court recognized the propriety of such under the proper circumstances of necessity.

[13] FED. R. CIV. P. 81 (A) (7), 28 U.S.C.A. following § 723c.