Volume 59 | Issue 4 Article 15

June 1957

Restrictive Covenants--Right to Compensation in Eminent Domain Proceedings

R. M.
West Virginia University College of Law

preclude by contract the power of the court to allow adoption by foster parents, people who are in a position to know and love the child and for the child to know and love them, does not seem to square with the avowed policy of promoting the child's welfare.

If in the future this clause comes in issue in this state, it is hoped that the court will, with sound judgment, declare it to be void as against public policy.

G. W. H., Jr.

RESTRICTIVE COVENANTS—RIGHT TO COMPENSATION IN EMINENT DOMAIN PROCEEDING.—Relators alleged that their lot and all the other lots of a subdivision were subject to restrictive covenants binding the lot owners to use their lots exclusively for residential purposes. *D*, a municipal corporation, began a proceeding to condemn an adjoining lot. The adjoining lot owner conveyed the lot to *D* before the condemnation proceeding was completed. *D* constructed a toll bridge on the adjoining lot. Relators instituted a mandamus proceeding in a circuit court to compel *D* to prosecute an action in eminent domain to ascertain just compensation owing to them. A peremptory writ was awarded as prayed for. The Supreme Court of Appeals granted a writ of error. *Held*, that the restrictive covenants should not be so construed or applied as to require the government or one of its agencies, in the taking or acquiring of private property for a governmental use, to respond in damages either on the theory of a taking of a vested right or for breach of such a covenant. Reversed. *State ex rel. Wells v. City of Dunbar*, 95 S.E.2d 457 (W. Va. 1956).

It should be noted at the outset that the court expressly stated that "the holding does not determine the question as it relates to a public service corporation, that question not being here involved". *Id.* at 461. The decision therefore applies only to the government or a governmental agency, and not to public service corporations which have the power of eminent domain.

Private property shall not be taken for public use without just compensation. U.S. CONST. amend. V; W. VA. CONST. art. III, § 9. The basic question in the principal case (assuming that the building of a toll bridge would be a violation of the restrictive covenants) is whether relators, by virtue of the building restrictions, are entitled to compensation from *D*, a governmental body, which

acquired an adjoining lot, and built a toll bridge thereon. Although the court here answered the question in the negative, there is a sharp conflict of authority on this question. It has been stated that the view contrary to the principal case, which requires compensation to be paid, is the majority view. 2 NICHOLS, EMINENT DOMAIN § 5.73 (3d ed. Sackman & Van Brunt 1950). And it is said in 2 AMERICAN LAW OF PROPERTY § 9.40 (Casner ed. 1952), that this is the view of the "better reasoned authorities". In support of the view requiring compensation in such a situation are *Town of Stamford v. Vuono,* 108 Conn. 359, 143 Atl. 245 (1928); *Allen v. Detroit,* 167 Mich. 464, 133 N.W. 317 (1911); *Peters v. Buckner,* 288 Mo. 618, 232 S.W. 1024 (1921); *City of Raleigh v. Edwards,* 235 N.C. 671, 71 S.E.2d 396 (1952); RESTATEMENT, PROPERTY § 566 (1944). In support of the view denying compensation in such a situation are *Board of Pub. Instruction v. Town of Bay Harbor Islands,* 81 So. 2d 637 (Fla. 1955); *Anderson v. Lynch,* 188 Ga. 154, 3 S.E.2d 85 (1939); *City of Houston v. Wynne,* 279 S.W. 916 (Tex. Civ. App. 1926).

Obviously the courts which require compensation to be paid to the lot owners of a subdivision whose lots are subject to building restrictions, when a governmental body acquires one of the lots for governmental purposes, recognize the interest created by the restrictive covenants as a private property interest. The position of these authorities is well stated by the Michigan court: "Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; the validity of such restrictions not being affected by the character of the parties in interest." *Allen v. Detroit,* 167 Mich. 467, 473, 133 N.W. 317, 320 (1911).

The reasons most often advanced by the courts which deny compensation in the situation herein considered are: (1) that building restrictions are contrary to public policy and void insofar as they apply against a governmental use, and (2) that building restrictions are contractual in nature and do not create an interest in property. See 2 AMERICAN LAW OF PROPERTY § 9.40 (Casner ed. 1952). Most courts appear to use both lines of reasoning. See *Board of Pub. Instruction v. Town of Bay Harbor Islands, supra; Anderson v. Lynch, supra; City of Houston v. Wynne, supra.*

The reasoning of the court in the principal case, at page 461, is as follows, "No few citizens should be permitted to so contract as to destroy, or make prohibitive to the government, the right to acquire property for necessary governmental purposes .... [T]hose 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." Although not stating explicitly that the restrictive covenants were contrary to public policy and void as against the government, it seems that this was the underlying theory of the decision. The court did not discuss whether the relators had a property interest in the lots of the other owners in the subdivision, although the decision necessarily implies that they did not. While the West Virginia court has enforced the type of restrictive covenants herein discussed, it has not heretofore clearly determined the nature of the interest created. In *Withers v. Ward,* 86 W. Va. 558, 560, 104 S.E. 96, 97 (1920) (dictum), the court seems to consider the interest as a property interest. But in *Cole v. Seamonds,* 87 W. Va. 19, 24, 104 S.E. 747, 749 (1920), the court, while stating that the *Withers* case intimated that a property right was perhaps the real nature of the restrictive covenants, said, "It is unnecessary to discuss fully the exact nature of the right created in equity by these restrictive covenants." It appears then that the West Virginia court has enforced restrictive covenants without finding it necessary to definitely determine whether a property interest is created.

It would seem that the only real problem in this type of case is whether or not a property interest is created by these restrictive covenants. If the interest is a property interest, it is a constitutional mandate that just compensation be paid for the taking of private property for governmental use. U.S. CONST. amend. V; W. VA. CONST. art. III, § 9. Since this is so, the public policy arguments are of doubtful validity. If the local law treats restrictive covenants as creating a property interest, it is difficult to see how they would be contrary to public policy and void as against a governmental body in its exercise of the right of eminent domain, so that no compensation would be due to the property owners for whose benefit the restrictive covenants were made.

The principal case establishes the rule in West Virginia that owners of property subject to restrictive covenants are not entitled to compensation from the government or a governmental agency

which acquires other property subject to the restrictions, and then violates these restrictions. It leaves open the question as it relates to a public service corporation with the right of eminent domain. The reasoning of the court, seemingly based on public policy considerations, is not convincing. But since the court had not previously determined definitely whether a property interest was created by restrictive covenants, it can not be said that the decision is erroneous.

R. M.

STATUTES—INTERPRETATION—TERM "STOLEN" AS USED IN THE NATIONAL MOTOR VEHICLE THEFT ACT.—The appellee was informed for violation of the National Motor Vehicle Theft Act, making it a criminal offense for one to transport in interstate or foreign commerce a motor vehicle, knowing it to have been "stolen". 41 STAT. 324 (1919), 18 U.S.C. § 2312 (1946). The information charged the appellee with unlawful interstate transportation of an automobile, lawfully acquired in South Carolina, but converted (embezzled) before transportation. Does the term "stolen" as used in this federal act include not only common law larceny, but also embezzlement? *Held,* the word "stolen," as used in the National Motor Vehicle Theft Act, is not limited to a taking which amounts to common law larceny, but includes embezzlement and other felonious takings with the intent to deprive the owner of the rights and benefits of ownership. Reversed and remanded. (6-3 decision). *United States v. Turley,* 77 Sup. Ct. 397 (1957).

At the outset the Court was confronted with a distinct conflict of authority among the federal circuits on this question. The Fifth, Eighth, and Tenth Circuits favored the narrow construction which limited the term "stolen" to mean only common law larceny. *Murphy* v. *United States,* 206 F.2d 571 (5th Cir. 1953); *Ackerson v. United States,* 185 F.2d 485 (8th Cir. 1950); *Hite v. United States,* 168 F.2d 973 (10th Cir. 1948). But the Fourth, Sixth, and Ninth Circuits favored the broad construction which includes embezzlement and other felonious takings. *Boone v. United States,* 235 F.2d 939 (4th Cir. 1956); *Smith v. United States,* 233 F.2d 744 (9th Cir. 1956); *Bruce v. United States,* 218 F.2d 819 (6th Cir. 1954.)

As the *Hite* and *Ackerson* cases pointed out, if this statute is to be administered with any degree of practicability, it is desirable that