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terms within the operation of the Habitual Criminal Statute through the exercise of judicial discretion as outlined above, the function of that statute would be fairly carried out and its effectiveness enhanced.

Robert H. Connett

EMINENT DOMAIN: LIABILITY FOR ASSESSMENTS ACCRUING DURING PROCEEDINGS

Where property has been physically appropriated for public use by the state, is the owner of the legal title liable for taxes and special assessments that accrue against the land subsequent to such appropriation but prior to the passage of title to the condemner?

In the normal situation, the condemner does not enter upon the land until such time as compensation has been paid to the condemnee. In such cases, the general rule is that title to the condemned property does not vest in the condemner until the final judgment in the eminent domain proceedings is paid.¹ This rule protects the owner by preventing the taking of his property without just compensation.² It also protects the condemner because, until the time that the judgment is rendered, the condemning party may elect to abandon the proceedings and pay only the court costs and the condemnee's attorney fees.³ As the condemnee is still the legal owner until the termination of the proceedings, he is obliged to pay the property taxes and special assessments for local improvements that are levied upon his land.⁴ If he fails to pay, the assessing authority may take what is due from the award granted to the condemnee in the eminent domain proceedings.⁵

The rule is different, however, where the condemning party has entered upon the land under court order and deprived the condemnee of all beneficial use of the property.⁶ In this situation, the subsequent divestiture of title is merely a confirmation of the original physical taking,⁷ and all courts that have faced this problem have recognized the injustice of assessing the condemnee for benefits which he cannot enjoy.⁸ Relief is usually granted either on the theory that the transfer of ownership relates back to the commencement of the proceedings,⁹ or, as is done in New York, the sum of the taxes and assessments paid by the condemnee is added to the compensation subsequently awarded to him.¹⁰ Other courts, citing these cases as authority, reach the same result but give no independent reason for granting such relief to the condemnee.¹¹ Both of the principal theories for granting relief

¹ CAL. CODE CIV. PROC. § 1253.

² CALIF. CONST. art I, § 14.

³ CAL. CODE CIV. PROC. § 1255a.

⁴ 29 C.J.S., *Eminent Domain* § 200 (1941); 18 AM. JUR., *Eminent Domain* § 235 (1938).

⁵ CAL. CODE CIV. PROC. § 1252.1.

⁶ 29 C.J.S., *Eminent Domain* § 135 (1941); 18 AM. JUR., *Eminent Domain* § 278 (1938).

⁷ *People v. Joerger*, 12 Cal. App. 2d 665, 55 P.2d 1269, 1272 (1936).

⁸ 45 A.L.R.2d 518 (1956).

⁹ *Chicago Park District v. Downey Coal Company*, 1 Ill.2d 54, 111 N.E.2d 223 (1953); *City of Chicago v. McCausland*, 379 Ill. 602, 41 N.E.2d 745 (1942); *Sherwin v. Wigglesworth*, 129 Mass. 64 (1880); *Independent Consolidated School District No. 27 v. Waldron*, 241 Minn. 326, 63 N.W.2d 555 (1954); *Jasper Land and Improvement Company v. Kansas City*, 293 Mo. 674, 239 S.W. 864 (1922); *State v. Floyd*, 204 N.C. 291, 168 S.E. 222 (1933).

¹⁰ *In re Mayor*, 40 App. Div. 281, 58 N.Y.S. 58 (1899).

¹¹ *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P.2d 236 (1940); *Milmar Estate Inc. v. Borough of Fort Lee*, 36 N.J.S. 321, 116 A.2d 592 (1955).

are subject to criticism. The idea of relation back is nothing more than a legal fiction invented for the sake of convenience. It does not take into account the exact time when the owner was deprived of the beneficial use of his property which may be after the taxes become due. The weakness of the second theory lies in cases where the state is the condemning party, for to include payment of taxes and assessments in the compensation fund will subject the state to taxation indirectly where it cannot be directly taxed. In California, for instance, the property of the state is exempt from local taxation and assessment,¹² and to compel the state to pay the condemnee for taxes or assessments he has paid would have the same effect as levying a direct assessment on the state.

A case in point recently arose for the first time before the California Supreme Court in *People v. Peninsula Title Guaranty Co.*¹³ In that case the condemnees appealed from a court order directing the payment of \$612.20 to the city of San Mateo to satisfy a claimed assessment lien. The money was to come out of the fund awarded the condemnees for the condemnation of their property. The assessment lien was asserted after the state, pursuant to a court order, had taken possession of the property and started construction of a highway overpass. In its decision reversing the trial court, the Supreme Court of California did not rely on either of the two theories previously discussed, nor did it cite any of the cases which had. Instead, the court held that a taking which is of sufficient consequence is deemed to have the same effect of finality of transfer for tax and assessment purposes as has the passage of title.¹⁴ In seeking to establish what constitutes such a taking, the court said:

"Where it can be said that in addition to a mere taking of possession by the condemner there is also such a substantial change in the status of the land taken and the condemnee's relation to it as to constitute, in effect, a divestiture for all practical purposes of the former owners' interest, the strict rule should not apply."¹⁵

The strict rule that the court refers to is of course the rule that the condemnee, as legal owner, is liable for taxes and assessments until the proceedings in eminent domain are terminated. The test laid down by the court requires two things: a physical change in the land, and the exclusion of the condemnee. The real problem is deciding how much of a physical change is necessary in order to bring the exception to the strict rule into operation. In *People v. Peninsula Title Guaranty Co.* the taking consisted of requiring the condemnees to remove themselves from the property, the removal of buildings by the state, and the construction of a highway overpass on the condemnees' land. The court rejected the idea propounded by the city of San Mateo that the test of the taking must be that the land may not be restored to its original condition,¹⁶ and cited a case where entry on the land and the commencement of construction was held to be a sufficient taking.¹⁷ *People v. Peninsula Title Guaranty Co.* held that the city of San Mateo was not entitled to collect the assessment lien from the condemnee.

As the law in California now stands, if there appears to be a sufficient taking of the property the safest thing to do is to advise the condemnee not to pay taxes

¹² CAL. CONST. art XIII, § 1; 14 OPS. CAL. ATT'Y GEN. 46 (1949).

¹³ 47 Cal. 2d, 301 P.2d 1 (1956).

¹⁴ *Id.* at, 301 P.2d at 4.

¹⁵ *Id.* at, 301 P.2d at 3.

¹⁶ *Id.* at, 301 P.2d at 4.

¹⁷ *Id.* at, 301 P.2d at 3.

or assessments. Then, under the decision in *People v. Peninsula Title Guaranty Co.*, the court in the eminent domain proceedings will have to decide whether an award should be made to the assessing authority from the compensation fund. The risk that the condemner will abandon the proceedings and leave the condemnee to pay the taxes or assessments along with interest and penalties seems so slight that the gamble of waiting is probably well taken.

The solution offered by *People v. Peninsula Title Guaranty Co.*, however, would be inadequate in a situation where the condemner abandons the proceedings or where the condemnee pays the taxes or assessments in advance of the final award. The discussion that follows is an attempt to find a method of dealing fairly with the parties in these two situations.

In appraising this problem, one is apt to concentrate on the injustice being done to the condemnee and forget that there are two other interested parties, the condemner and the assessing authority, each with rights that should be protected. Although the concept that private property shall not be taken without just compensation should be assigned paramount consideration, we must neither lose sight of the assessing authority's right to assess property,¹⁸ nor overlook the condemner's privilege to abandon the proceedings and its possible immunity from taxation.

First, consider the effect of abandonment of the proceedings by the condemner. The condemnee is not only liable for the assessments, but also for penalties that have resulted from the delinquency. Under the California code provision for abandonment,¹⁹ he may recover only court costs and attorney's fees from the condemner. Where the abandonment has occurred after physical entry on the land, the condemner has been liable as a trespasser *ab initio*,²⁰ but there is no reason or authority for holding a trespasser liable for assessments or taxes, nor for penalties and interest. Add to this the fact that the condemner may be immune from taxation, and it is clear that no remedy lies here.

It seems unjust that the condemnee should be held liable for penalties. He may argue that he was relieved of all burdens during the taking and that, therefore, no penalties should be assessed against him during the period when the condemnation proceedings were in progress, and that the taxes or assessments did not become delinquent until then. The assessing authority may argue that it has a right to assess the property, that the condemnee could have paid the assessments and avoided the penalties but instead took a chance, and that there is no justification for penalizing the assessing authority for what goes on between the condemner and the condemnee.

The other situation occurs where the condemnee pays the taxes or assessments after there has been a substantial taking. Should he be permitted to recover from the assessing authority upon termination of the eminent domain proceedings?

The only statutory remedy available in California appears to be the following code section:

Within six months after the payment an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.²¹

¹⁸ CAL. JUR., *Taxation* § 23 (1926).

¹⁹ See note 3 *supra*.

²⁰ *Johnson v. Climax Molybdenum Co.*, 109 Colo. 1308, 124 P.2d 929 (1942); *Mitchell County v. Hudspeth*, 151 Ga. 767, 108 S.E. 305 (1921).

²¹ CAL. REV. AND TAX. CODE § 5138.