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Eminent Domain in Colorado

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EMINENT DOMAIN IN COLORADO

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"Whatever may have been the ancient right of condemnation, it has been restrained by constitutional limitations in the protection of individual rights. The power lies dormant in the state until the legislature speaks . . . . The right to condemn private property is therefore a creature of statute, pursuant to which it must clearly appear either by express grant or by necessary implication." [1]

Thus spoke the Supreme Court of the State of Colorado in its most recent utterance in the field of Eminent Domain.[2] This statement brings into sharp contrast the right of the state and its subdivisions to appropriate private property and the right of the individual to be unmolested in the enjoyment of his property until there has been a declaration of public necessity and a grant of power by the legislature. It is obvious, then, that unless the statutes clearly state (1) the *purposes* for which property may be condemned; (2) *whose property* may be condemned, and *by whom;* and (3) the *procedure* such condemnation should follow, unavoidable litigation will result and, in fact, is taking place concerning preliminary matters rather than the basic question of the compensation to be paid.

This article will concern itself with an analysis of the provision of our Constitution and statutes on eminent domain, their strength and weakness, and attempt to come to some conclusion as to possible changes or amendments.

We may start with a fundamental proposition often stated by our courts:

> Both our state constitution and statutes protect the individual in his vested rights and prohibit the taking thereof for public or private use without condemnation under proper proceedings and just compensation given therefor.[3] . . .

The provisions of our Constitution referred to which protect these individual rights are embodied in Article II, Sections 14 and 15:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.
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> Private property shall not be taken or damaged, for public or private use, without just compensation. Such

[1] Mack v. Town of Craig, 68 Colo. 337, 191 P. 101.

[2] Potashnick v. Public Service Co., Colo. Bar Assn. Advance Sheet, July 19, 1952.

[3] Stuart v. County Commissioners of Jefferson County, 25 Colo. App. 568, 575, 139 P. 577.

> compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

These sections merely confirm the common law limitation concerning who may take private property and emphasizes the fact that the use for which the property may be taken must be a *public use.* Although in the exceptional cases listed in Section 14 there is authority for taking of private property for *private* uses, the right is narrowly confined. In *Pine Martin Mining Co. v. Empire Zinc Co.,*[4] the Court stated:

> Although the words "private use" occur in our constitution and statutes, it is obvious that they do not mean a *strictly* private use, that is to say, one having no relation to the public interest. The fact that the constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi-public, or in a modified sense, affected with the public interest. . . .

Section 15 declares that property may not be taken or damaged without proper compensation. It also sets out the methods of determining the compensation, and provides that until this compensation has been paid into the court, the property shall not be needlessly disturbed. It also makes provision for a full judicial determination on whether the purpose for which property is proposed to be taken is a public use.

Though apparently expressed as clearly as possible, this constitutional provision has been involved in litigation in more than 50 cases reported by courts of review beginning with *Denver v. Bayer,*[5] and concluding with *Potaschnick v. Public Service Co.*[6] Even before this article appears in print, additional opinions may be handed down. Any word used in the constitutional provision may be a source of controversy. For example, whole treatises could be written on the meaning and implication of the words, *or damaged,* or upon the word, *public,* but such investigations are beyond the scope of this article.

The provision, however, does by limitation recognize the powers of the sovereign to condemn private property for public

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[4] 90 Colo. 529, 537, 11 P. 2d 221.
[5] 7 Colo. 13, 2 P. 6.
[6] Colorado Bar Assn. Advance Sheet, July 19, 1952.

use [7] and is the basis for every such taking in Colorado.

Despite the clear delimitations on the power of Eminent Domain set forth in the provisions just discussed, Article XV, Section 8 of the Constitution states:

> The right of eminent domain shall never be abridged nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.

Apparently the intent of this section is to prohibit forever a public body from alienating in any way its authority to condemn public utility corporations or their property.

Although this section has been quoted once [8] and cited twice [9] in Colorado decisions, it apparently has never been interpreted by our Supreme Court. It would seem to codify the common law doctrine that: "The power of eminent domain is inalienable and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it;" [10] and to make clear that corporate properties, including special franchises, may be taken just as individual property.

From the foregoing, it may be concluded that under the Constitution any property may be condemned for public use, but that, unless the legislature by statute outlines the extent of the power and who may exercise it and in what manner, this power will remain *dormant in the state.*

We shall now consider what statutory provisions have been enacted in Colorado and how well they answer the needs of the agency which takes and the owner of the property taken.

The statutory law of eminent domain legislation is compiled mainly in Chapter 61, 1935 Colo. Stat. Ann., under the heading, *Eminent Domain,* and Article 5, Chapter 163, 1935 Colo. Stat. Ann. entitled *Right of Eminent Domain* under the *Towns and Cities* chapter. This, unfortunately, does not mean that such legislation is not found in many other places in the statutes. On the contrary, it seems to be found everywhere. Authority to exercise the right of eminent domain by various state, city, quasi-public, or quasi-municipal corporations is found in Section 228, Chapter 41; Section 76, Chapter 57; Section 69, Chapter 73; Sections 3, 8, 39 and 70, Chapter 82; Section 96, Chapter 134; Sections 388, 444 and 478, Chapter 90; Section 189, Chapter 46; Sections 142 and 143, Chapter 138; Section 111, Chapter 143; Section 13, Chapter

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[7] Public Service Co. v. City of Loveland, 79 Colo. 217, 220.

[8] Public Service Co. v. City of Loveland, 79 Colo. 216, 245 P. 493.

[9] Denver Power Co. v. D. & R. G. W. R. R. Co., 30 Colo. 204, 69 P. 568; Fort Collins v. Public Serv. Co., 69 Colo. 554, 135 P. 1332.

[10] 8 Am. Jur. 636, Sec. 7.

138; all in 1935 Colo. Stat. Ann. and other places.

Apparently little or no study was made as to existing legislation when new statutes granting the right were passed. Conflicts thus may occur, as the following illustration will suggest:

Section 142, Chapter 138, states:

> The district, when necessary for the purposes of this article, shall have a dominant right of eminent domain over the right of eminent domain of railroad, telegraph, telephone, gas, water power and other companies and corporations, and over towns, cities and counties and other public corporations.

Section 70, Chapter 82, states:

> The purpose of condemnation for the rehabilitation of an area hereunder is hereby declared to be for a superior public use and property already devoted to one public use may be condemned for the purposes of this article. (S. L. '45, p. 622, Sec. 9, effective April 9, 1945.)

What happens when a *rehabilitation area* meets a *conservancy district?* Is this the irresistible force meeting the immovable object?

So, too, throughout our statutes, we have the same question, for the most part unanswered. How far does an agency whose use of land is public in nature have the authority to condemn the land of another public body already dedicated to one public use for another irreconcilable public use? The answer should be in the statutes, but, unfortunately, is not.

Article 5, Chapter 163, 1935 Colo. Stat. Ann., *Towns and Cities,* is a special purpose statute granting powers to cities of the first or second class for a restricted number of public uses, such as roads, parks or public improvements. Although it differs in many instances from the General Eminent Domain Act, there is a major point of possible distinction which should be discussed.

Under the general act, if no portion of a person's property is taken, he can receive no compensation for diminution in value of his property by reason of the proposed project, but a neighbor whose property is severed, may recover for the identical impairment to remainder which is denied in the first instance.

On the other hand, under the provisions of the Towns and Cities Act, Section 125, Chapter 163, damages are defined as follows:

> The fair and actual cash market value of all property proposed to be taken for the improvement without reference to the projected improvement, and
>
> The fair, direct, and actual damages caused on account of said improvement *to other property not taken for the improvement.*

and benefits are determined as follows:

> . . . by assessing against the owner or owners of *all real estate* which will be specially benefited by the proposed improvement the amounts of said benefit as special assessments.

It appears to the authors that the damages allowed and benefits assessed under the Towns and Cities Act are quite different from those referred to in the general statute, in that they contemplate all damages and all benefits to any property, whether or not there is a partial taking. The question of whether the general act is in accord with the Constitution does not appear to have been passed upon. It is of some advantage to the condemning agency to use the general act rather than the Towns and Cities Act. Under the latter, the extent of damage and benefit can be appraised only with difficulty, since it applies to property untouched but indirectly affected by a new improvement, be it park or parking lot. But, if the condemnation is invoked under the general act, the owner would not be chargeable for the benefits received nor compensable for detriment suffered where no part of his property is actually taken. Some revision of these inconsistent acts seems to be in order.

Although, as indicated, the provisions of Chapter 61 and Chapter 163 vary in many respects, our Supreme Court has failed in many instances to recognize this distinction. For instance, one of the mileposts in our interpretation of the General Eminent Domain Statute has been *Lavelle v. Julesburg*, 49 Colo. 290, decided in 1910. Yet, the case is cited as authority for *Wassenich v. Denver*, 67 Colo. 456, which came up under an amendment of 1911 to the Towns and Cities Act. The provisions of the two statutes on the point involved, far from being identical, appear to be contradictory. To illustrate further, *Wassenich v. Denver supra*, is cited as authority in numerous cases arising under the general act, although it purports to construe the widely different Towns and Cities Act.

To comment briefly upon the General Eminent Domain Act, we find first of all that it is not really one act with one procedure, but is a compilation of at least four separate acts conferring power in some cases on the same and in other cases on different condemning agencies through procedures that vary in substance as well as in detail.

Sections 1-20 of Chapter 61 comprise the basis of the Eminent Domain procedure in Colorado, being the procedure under which perhaps more than 90 per cent of all condemnation actions have been and are being brought. Historically, this is one of our oldest existing laws, going back at least to the General Laws of 1877, and codified in the 1935 Colo. Stat. Ann. with very little change or amendment, as will be discussed later.

Sections 21 to 25, Chapter 61, comprise the procedure for condemning land of the United States or the State of Colorado. The procedure therein set forth is quite different from the

other procedural portions of the general act (Sec. 1-20, Ch. 61) or the Towns and Cities Act (Ch. 163), thereby adding to the confusion. These sections are poorly drawn, without incorporation of definitions, leaving much to the judgment of the Court without guidance. Fortunately, the act has been used so little that the authors fail to find any reported case thereunder.

Sections 26-41, Chapter 61, were enacted by the legislature in 1907, as a bill: *Granting the exercise of the right of Eminent Domain to Tunnel Transportation Companies, Pipe Line Transmission Companies, Electric Power Transmission Companies and Aerial Tramway Companies.* The act itself merely confers upon these companies the power of Eminent Domain, but does not provide for the procedure. In Sec. 7 [11] of the act is found the following clauses:

> . . . and when the parties cannot agree upon . . . the amount of compensation . . . same shall be determined in manner *as now provided by law* for the exercise of the right of eminent domain. (Italics supplied.)

We ask, do the words *as now provided by law* mean the law of 1907 as it was without amendment, the law in 1908 at the time of the next revision of the statutes of Colorado, the law in 1921 at the time of the compilation of Colorado law, or does it mean the procedure under Sections 1-20, Chapter 61, 1935 Colo. Stat. Ann. as it exists *now* or may be changed hereafter?

The 1907 legislature, not quite satisfied with the confusion it had added to our law, authorized certain telegraph, telephone, electric light, power and pipe line companies to use the eminent domain act.[12] It gave such companies the right to acquire property *"as now provided by law for the exercise of the right of Eminent Domain and in the manner as set forth in this act."* Once again the pertinent question is, "when is now?"

To add to the confusion, the legislature included provisions in the second act of 1907 which were different from and contradictory to the general act (Sections 1-20). It included a special provision on immediate possession of property during pendency of action [13] which is different both in procedure and substance than the provision in the general act. [14]

The question of the constitutionality of this special provision has never been determined (although many cases have been tried under it in the past 45 years), and both its application and interpretation are still open to question. We mention one other incidental problem with respect to it. Sec. 39, Chap. 82, 1935 Colo. Stat. Ann., *Housing*, purports to confer upon a Housing Authority the right to use this special provision for condemnation. Can such right be given where the title of the original act limited its use to telephone, power, telegraph and like companies?

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[11] Now Sec. 32, Chap. 61, 1935 COLO. STAT. ANN.
[12] Now Sec. 42-49, Chap. 61, 1935 COLO. STAT. ANN.
[13] Now Sec. 47, Chap. 61, 1935 COLO. STAT. ANN.
[14] Now Sec. 6, Chap. 61, 1935 COLO. STAT. ANN.

Secs. 50 and 61, Chap. 61, 1935 Colo. Stat. Ann., passed in the 1901 session of the legislature, granted to telegraph, telephone, heat, light, and power companies selling electrical energy, certain rights of eminent domain. The statute refers back to Sections 1-20 for its procedure.

But, Sec. 52, Chap. 61, *supra,* passed by the legislature in the 1891 session already had granted certain rights of Eminent Domain, including the right of companies to construct telegraph lines and pipe lines.

Apparently there is some needless duplication, since even this brief examination reveals that you may condemn rights-of-way for telegraph lines under at least five different eminent domain provisions. In fact, it is even possible that if a city were condemning land for a pipe line, the owner would be awarded a different amount of compensation if the city chose to proceed under one statute (Chap. 163) than if the city chose to proceed under any of the other of its various authorities.

But that is not all, because if the city has a Home Rule Charter, under Article XX of the Constitution, it may proceed under the Eminent Domain provisions of the Charter and ignore all the other laws granting the same power. Charter provisions may vary to such an extent that we will not undertake to discuss them here, except to mention that Denver's Charter adopts the *general law* on the assessment of benefits and payment of damages and overrides other public uses (1927 Compilation, Section 80), with special provisions for boulevards, sewers, viaducts and fire and police stations.

Having clearly demonstrated that confusion exists in the statutory law of eminent domain, we would now like to analyze Secs. 1-20, Chap. 61, 1935 Colo. Stat. Ann., the procedural provisions under which, as we have indicated, the bulk of all such condemnation actions are brought.

Because this was a special procedural statute, it was not affected by our new Rules of Civil Proceedure. As a result, an attorney who has the good fortune to represent a petitioner or a respondent in such a case must learn a whole new set of rules which hark back to the days of our Code with its *not found* [15] returns, etc.

This procedure is so old that if a married woman owns property in her own right, her husband must be joined as a party with her.[16] We trust that the League of Women Voters has not heard of this.

A more patent defect in the procedure concerns the *immediate possession* provision of the statute [17] under which, if proper conditions are present, a condemning authority, after filing its petition, may obtain immediate possession of the premises being condemned during the pendency of the action. For many years this

[15] Sec. 4, Chap. 61, *supra.*
[16] Sec. 2, Chap. 61, *supra.*
[17] Sec. 6, Chap. 61, *supra.*

was considered an *ex parte* procedure. Then came the thunderbolt of *Swift v. Smith* [18] in which our Supreme Court said:

> An order for immediate possession does not necessarily involve title to the lands, but it does affect possession so that the imperative requirement of the statute "shall determine" would imply *some notice* to the one in actual possesion with some opportunity afforded him to testify.

Just what do these words *some notice* mean? Do they mean a telephone call; do they mean an actual personal service of a notice; do they mean that every person in possession, including the minor children, must be served; or do they mean that service on the head of the family or a posting of the premises is sufficient? The statute is so deficient in setting up the procedure for this immediate possession that it would require innumerable court cases to delineate what could be simply explained by legislative act. If the so-called procedural sections of the statute do not even set forth the simplest formulae of procedure essential to due process of law, we may as well be without them entirely.

Did you ever hear of a case in a court of record where the defendant does not have to answer the complaint or petition? In the condemnation procedure of our statute there is no provision for answer. Thus, the case may come to trial without any indication as to the issues to be raised. In spite of the fact that no answer is provided for, or necessary,[19] the act provides [20] that any party may demand a jury of freeholders, "before the time for the defendant *to appear and answer.*" This and many like instances of confusion pervade our present eminent domain law.

Another peculiarity of condemnation law is that at the trial the respondent has the burden of proof, and opens and closes his case to the jury.

During the past five years, the authors, acting either for the petitioner or for the respondents, have participated in over 300 condemnation actions. This participation has revealed to us the confusion which exists in our present acts and the desperate need for revision.

We hope that this article has either revealed this confusion to you or confused you sufficiently so that you, as members of the Bar, will participate in an attempt to draft and have passed a new Eminent Domain Act in Colorado which will clearly, concisely state who may condemn property; for what purpose property may be condemned; what property may be condemned and under what circumstances; and, how condemnation shall proceed. We submit it is time to rework and codify the law of eminent domain from start to finish.

We note that in this issue of *Dicta* there are two suggestions of possible procedural changes. One indicates the method used by the Federal Government in adopting a special Rule of Civil

[18] 119 Colo. 126.
[19] Whitehead v. Denver, 13 Colo. App. 134, 136; 56 P. 913.
[20] Sec. 7, Chap. 61, *supra.*

Procedure dealing with the subject, and the other is an even more simplified set of statutory or judicial rules suggested for Colorado. We urge you to examine these and other changes which will be suggested and lend your assistance in arriving at the best law, both procedural and substantive, for *the right to condemn private property is a creature of statute,* and such rights which deprive people of their property without their consent for the good of the public should be very clearly set forth.

FEDERAL PROCEDURE IN CONDEMNATION OF PROPERTY

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The key to procedure in the Federal Courts in the condemnation of property under the power of eminent domain is Rule 71A,[1] which became effective as an amendment to the Federal Rules of Civil Procedure August 1, 1951. This rule sets up a specialized procedure to meet the distinctive requirements of an eminent domain action, and integrates into the Federal Rules the procedure in such actions. Except as otherwise provided in that rule, the rules of civil procedure for the United States District Courts control.

The adoption of Rule 71A came in response to growing widespread dissatisfaction with the diverse procedures applied in condemnation suits in United States District Courts and the accompanying demand for some uniform procedure. The Advisory Committee on Rules, prior to its recommendation of the Rules of 1938, and again when it was considering the amendments of 1946, had given serious consideration to proposals to incorporate in the rules one covering condemnation proceedings.[2] The great number of condemnation suits filed by the United States during the war gave added impetus to the demand for uniformity and some degree of simplification in the rules. These procedural changes, it was argued, would make more effective both the exercise of the power of eminent domain and the constitutional right of the property owner to just compensation. Rule 71A brings condemnation proceedings under the Federal Rules of Civil Procedure; establishes, with one exception, the same procedure in the various United States District Courts; and, in an attempt to simplify the procedure, incorporates several departures from the procedure more commonly followed in the state courts and, prior to its adoption, in the federal courts.

The Rules of Civil Procedure, as adopted in 1938, were applicable in condemnation cases only on appeals. In pre-appellate procedure, a vast number of diversified procedures existed in the United States District Courts. In some of the acts authorizing the exercise of the power of eminent domain, Congress had prescribed, in varying

[1] United States Code, Title 28, Federal Rules of Civil Procedure.
[2] *Ibid.* Notes of Advisory Committee on Rules, following Rule 71A.