St. John's Law Review

Volume 11, April 1937, Number 2 Article 18

Eminent Domain--What Constitutes Public Use (Matter of Flushing Meadow Park (Sup. Ct. Queens, N.Y.L.J., October 19, 1936)

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his property is assessed he is estopped from denying the validity of the assessment for benefit. It is the general rule that when the assessment is void, the property owner is not estopped from denying its validity even though he has accepted the benefits of the improvement. Cases in New York are conflicting on this point, some cases holding that the doctrine of estoppel will apply even where the assessment is void,[20] and others adhering to the general rule.[21]

B. B.

EMINENT DOMAIN—WHAT CONSTITUTES PUBLIC USE.—The Commissioner of Parks, upon authorization of the Board of Estimate and Apportionment, instituted this action to condemn certain properties adjacent to the Flushing Meadow Park to be used temporarily as a parking space for the proposed New York World's Fair and to be used thereafter as a park and playground. The owners of this land oppose the action on the ground that it is a taking of private land for private rather than public use and furthermore that there is no need for this additional land. *Held,* application to vest title to the land in the city, granted. The legislature's determination that land is necessary for public use may not be questioned by the court. The court may question whether the use is public or private in nature. Temporarily setting aside a portion of a public park to be used as a parking space in connection with a fair and later to be used as a park and playground, is a public use. *Matter of Flushing Meadow Park* (Sup. Ct. Queens), New York Law Journal, October 19, 1936.

The city of New York has the power to condemn private property for a public purpose.[1] The determination of the legislature as to the necessity for such land is not reviewable by the court.[2] The

[19] Owners of property who were specially assessed for an authorized street improvement were estopped from raising the objection that the city had not condemned the land, had not made awards to the owners and had not acquired title to the land on which the improvement was made. The court held that the owners have and enjoy the improvement and cannot justly claim to be relieved from payment of the benefits assessed against such property. Boyton v. People, 159 Ill. 553, 42 N. E. 842 (1896); Holms v. Village *etc.,* 121 Ill. 128, 13 N. E. 540 (1887) (remedy would be to sue for the awards that would have resulted from a condemnation).

[20] People v. Many, 89 Hun 138, 35 N. Y. Supp. 78 (1895).

[21] *In re* Sharpe, 56 N. Y. 257 (1874).

[1] CHARTER OF THE CITY OF NEW YORK § 970 (L. 1901, c. 466, amd. by L. 1913, c. 329).

[2] Matter of Fowler, 53 N. Y. 60 (1873); Matter of Church Street, 49 Barb. 455 (N. Y. 1867); Harris v. Thompson, 9 Barb. 350 (N. Y. 1850); People v. Smith, 21 N. Y. 595 (1860); Matter of Cooper, 28 Hun 515 (N. Y. 1883); Matter of Peter Townsend, 39 N. Y. 171 (1868); Matter of Sacket Street, 74 N. Y. 95 (1878); Matter of Boston Road, 142 App. Div. 726,

court may impute only public motives to the legislature's acts of condemnation, thereby closing the door to an allegation that the land is not to be used for the purpose stated.[3] But the legislature's statement that the land is for public purposes is not conclusive.[4] Whether or not it is such a purpose is a question of law for the court.[5] Not only must the land be for a public purpose but for such public purpose only as to which the city has the power of condemnation.[6] As to what a public purpose is can not be exactly defined.[7] The purpose may be one of public benefit or of public use. The two terms are not synonymous.[8] The establishment of furnaces, mills, manufactures, churches, hotels, and other similar enterprises are matters of public concern and in the sense that they promote the public welfare they are public benefits.[9] "But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." [10] "There must be a right on the part of the public or some portion of it or some public or quasi-public agency on behalf of the public, to use the property after it is condemned," [11] in order that the power of eminent domain be exercisable.[12] The contemplated use of a portion of a park for parking purposes falls within this definition.[13]

Lands already acquired may later be used for purposes other than

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127 N. Y. Supp. 637 (1st Dept. 1911); Matter of the City of New York, Ely Ave., 217 N. Y. 45, 111 N. E. 266 (1916); Matter of Niagara Falls and W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[3] City of Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. 233 (1892); McCabe v. City of New York, 213 N. Y. 468, 107 N. E. 1049 (1915); Lahr v. Met. El. Ry. Co., 104 N. Y. 268, 10 N. E. 528 (1887); Matter of New Street, 215 N. Y. 109, 109 N. E. 104 (1915).

[4] Matter of Townsend, 39 N. Y. 171 (1868); Matter of Deansville Cemetery Ass'n, 66 N. Y. 569 (1876); Matter of Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506 (1891); Williams v. Hylan, 223 App. Div. 48, 227 N. Y. Supp. 392 (1st Dept. 1928); Williams v. Gattalin, 229 N. Y. 248, 128 N. E. 121 (1920).

[5] Queens Terminal Co. v. Schmuck, 147 App. Div. 502, 132 N. Y. Supp. 159 (2d Dept. 1911); *In re* Application Union Ferry Co., 98 N. Y. 139, 153 (1885).

[6] Erie R. R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118 (1902); Matter of S. I. Rapid Transit Co., 103 N. Y. 251, 257, 8 N. E. 548 (1886).

[7] Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 367 (1891); Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464 (1906); Matter of Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[8] Matter of Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[9] *Ibid.*

[10] *Ibid.*

[11] 54 A. L. R. 44; *Re* Deansville Cemetery Ass'n, 66 N. Y. 569 (1876); *Re* Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42 (1884); *Re* Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888); *Re* New York, 135 N. Y. 253, 31 N. E. 1043 (1892); *Re* Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506 (1891); Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246 (1891); Economic Power & Construction Co. v. Buffalo, 195 N. Y. 286, 88 N. E. 389 (1909).

[12] *Ibid.*

[13] Blank v. Browne, 217 App. Div. 624, 216 N. Y. Supp. 664 (2d Dept. 1926).

those intended at the time of condemnation.[14] Land may be condemned for future use.[15] Its use at any time must not constitute an alienation, nor an unlawful use of public property.[16] Its temporary use, until that future time, as a parking space is not an alienation of city property in violation of Section 71 of the Greater New York Charter.[17] The definition of public use must be kept elastic in order to keep pace with changing conditions;[18] "resort must be had to cases rather than definitions."[19] *Matter of Flushing Meadow Park* stands as an additional case construing what is a public use.

L. J.

EVIDENCE—PROSECUTION FOR RECEIVING, CONCEALING AND WITHHOLDING STOLEN PROPERTY UNDER SECTION 1308 OF THE PENAL LAW.—Defendant, a dealer in second-hand automobiles, was charged with violating the Penal Law [1] in having received, concealed

[14] Matter of Boston Road, 142 App. Div. 726, 127 N. Y. Supp. 637 (1st Dept. 1911).

[15] Matter of S. I. Rapid Transit Co., 103 N. Y. 251, 8 N. E. 548 (1886).

[16] Kahabka v. Schab, *et al.*, 205 App. Div. 368, 371, 199 N. Y. Supp. 551 (4th Dept. 1923), *aff'd*, 236 N. Y. 595, 142 N. E. 298 (1923); People *ex rel.* Hoffeller v. Buck, 193 App. Div. 262, 184 N. Y. Supp. 210 (4th Dept. 1920), *aff'd*, 230 N. Y. 608, 130 N. E. 913 (1920); Callanan v. Gillman, 107 N. Y. 360, 14 N. E. 264 (1887); Cohen v. Mayor, 113 N. Y. 532, 21 N. E. 700 (1889).

[17] Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. Supp. 967 (1st Dept. 1899). At page 41, the court said, "It is proper to furnish * * * opportunities * * * for rest for themselves and their animals as may be required." This Doctrine was later extended to include the advent of automobiles in Matter of McCoy v. Apgar, 241 N. Y. 71, 150 N. E. 546 (1925); Blank v. Browne, 217 App. Div. 624, 216 N. Y. Supp. 664 (2d Dept. 1926).

[18] 54 A. L. R. 7; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891); Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464 (1906). In answering the question as to what is a public use Judge Cooley says, "That can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility of making provision for them otherwise, it is alike proper, useful and needful for the public to provide." This Definition was cited with approval in Matter of Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[19] Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (1891).

[1] N. Y. PENAL LAW § 1308: "A person who buys or receives any property knowing the same to have been stolen * * * or who conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, * * * is guilty of a felony * * *. A person who being a dealer in or collector of any merchandise or property, * * * fails to make reasonable inquiry that the person selling or delivering any stolen or misappropriated property to him has the legal right to do so, shall be presumed to have bought or received such property knowing it to have been stolen or misappropriated." It is proved in this case that the defendant made no inquiries whatever as to the 'legal right to do so' of the person from whom he received the car. Under this section he was, therefore, presumed to have received the Buick, knowing it to have been stolen.