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## Eminent Domain--Condemnation Proceedings--Water and Watercourses--Condemnation by Power Corporation (People ex rel Horton v. Pendergast, 248 N.Y. 215 (1928))

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interest accruing during liquidation is allowed.<sup>6</sup> The fund in the present case is sufficient to pay the claims with interest. Since the United States branch of the company functioned like a domestic corporation, it seems but common justice that its creditors, whose claims are protected by statute, should receive interest on those claims, as they would if they had been dealing with a domestic corporation under the same circumstances. These creditors are the only claimants who are entitled to share in this distribution. All others must look to the domiciliary receiver. It is evident the Legislature intended to fully protect them. It is not full protection if they are deprived of the payment of interest, because elsewhere assets for the payment of debts are insufficient.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—WATER AND WATERCOURSES—CONDEMNATION BY POWER CORPORATION.—Relator and defendant own adjoining plots of land on the Salmon River in New York. Defendant's business, the manufacture and sale of electric power, has increased to such an extent that it is necessary for it to have an additional power site. For this purpose it sought to acquire relator's land in a proceeding under the Conservation Law.<sup>1</sup> The statute authorizes the condemnation by a public utility, owning a major part of the head and volume of the usable flow of power of a single undeveloped water power site, of property necessary for the full development and utilization of water power at such site. Prior to the institution of the proceeding, defendant obtained a certificate of necessity from the Public Service Commission and the latter's determination was sustained by the Appellate Division.<sup>2</sup> Relator attacks the decision upon the grounds that subdivision two<sup>3</sup> of the statute is the appropriate provision controlling the situation; that subdivision three upon which defendant relies does not govern, and even assuming that it does, the power to be developed is not for a public use. It further contends that the law is unconstitutional because it violates the equal protection clause of the 14th Amendment. *Held*, for the defendant. *People ex rel Horton v. Prendergast*, 248 N. Y. 215 (1928).

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<sup>6</sup> *People v. Merchants Trust Co.*, 187 N. Y. 293, 79 N. E. 1004 (1907); *Amer. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry. Co.*, 233 U. S. 261 (1914).

<sup>1</sup> Conservation Law, Cons. Laws (1911), Ch. 65, Sec. 624, Subdivision 3.

<sup>2</sup> 220 App. Div. 351, 222 N. Y. S. 29 (3rd Dept. 1927).

<sup>3</sup> Subdivision 2 provides that real property may be acquired under an exercise of the right of eminent domain, which is necessary to the full development of water power sites, where such sites on a stream or in a given locality cannot be developed separately as efficiently and economically, as under a plan for their development together; and where the owners transfer the same to a corporation organized for the production of power and the Commission determines that it can be better developed under such a plan than singly, etc.

Subdivision two is controlling when there are two or more sites; subdivision three, when there is but one. Both parties admit that the development of one plot would prevent development of the other, hence, though there are two parcels there is but one site, and subdivision three governs. The evidence supports the Commission's finding that defendant's interest constitutes the major part of the head and volume of the usable flow of water..

The State may delegate the power of eminent domain though it cannot permanently part with it. The only limitations on this rule are that the property must be for a public use, compensation must be paid therefor,<sup>4</sup> and due process of law must be observed. The production and distribution of electricity is a public use<sup>5</sup> and the State may appoint officers, bodies, or tribunals to determine the question of necessity.<sup>6</sup> The relator, moreover, was a party to the hearing before the Public Service Commission. As to equal protection, the State may withhold from all or delegate at will, its power of eminent domain.<sup>7</sup>

The question of the measure of damages to which the owners of the minor interests are entitled was not presented in this case. That point is being considered in a separate action.<sup>8</sup> A final determination of the statute's constitutionality is still to be had in an appeal, now pending, to the United States Supreme Court.

INSURANCE (LIFE)—WARRANTY—EVIDENCE.—Plaintiff seeks to recover the benefits payable under two life certificates issued by defendant association to one of its members, now deceased. The defense is a breach of warranty on the part of the assured, consisting of an alleged false statement in her application, that she had never consulted a doctor. The daughter of deceased called a physician on her own initiative when her mother complained of being troubled by a minor ailment. *Held*, that a negative answer to the question "Have you ever consulted a physician?" was not false as a matter of law. *Nowak v. Brotherhood of American Yeomen*, 249 N. Y. 78 (1928).

The doctor who attended deceased was called as a witness for the defendant and testified that she attended the assured at the request of the latter's daughter. When plaintiff's counsel asked the witness

<sup>4</sup> *Secombe v. R. R. Co.*, 90 U. S. 108 (1874).

<sup>5</sup> *Walker v. Shasta Power Co.*, 160 Fed. 856 (C. C. A. 9th Cir. 1908); *Matter of N. Lockport O. Power Co.*, 111 A. D. 686, 97 N. Y. S. 853 (1906); *Matter of City of Rochester v. Holden*, 224 N. Y. 386; 121 N. E. 102 (1918).

<sup>6</sup> *Supra*, note 5, 224 N. Y. 386, 390.

<sup>7</sup> *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668 (1923); *People v. Adirondack Rwy. Co.*, 160 N. Y. 225; 54 N. E. 689 (1899); 176 U. S. 335, 20 Sup. Ct. 460 (1900).

<sup>8</sup> *Niagara, Lockport & Ontario Power Company v. Horton, et al.* (Order of Supreme Court, Oswego County, dated Aug. 4, 1928, confirming report of Commissioners of Appraisal. Defendants have appealed to Appellate Division, Fourth Department).