201 VA 885

Record No. 5088

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Clerk, Supreme Court of Appeals
Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

ELOISE J. WHITE, ET AL.

v.

STATE HIGHWAY COMMISSIONER OF VIRGINIA

FROM THE CIRCUIT COURT OF PRINCESS ANNE COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5088

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of October, 1959.

ELOISE J. WHITE, ET AL., Appellants,

against

STATE HIGHWAY COMMISSIONER OF VIRGINIA, Appellee.

From the Circuit Court of Princess Anne County

Upon the petition of Eloise J. White and Ida N. Jacox an appeal is awarded them from a decree entered by the Circuit Court of Princess Anne County on the 19th day of May, 1959, in a certain chancery cause then therein depending wherein State Highway Commissioner of Virginia was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 14 } Princess Anne, Virginia
January 21, 1959.

W. P. McBain, Esquire
Attorney-at-Law
Board of Trade Building
Norfolk, Virginia

Richard B. Kellam, Esquire
Board of Trade Building
Norfolk, Virginia

Re: State Highway Commissioner *v.* White—Princess Anne County Law #5108.

Gentlemen:

The problem posed by the able briefs of opposing counsel in this case is not susceptible of easy solution. Where possession of property has been taken from someone who has turned out not to be the owner, in a currently instituted condemnation suit it cannot be catagorically stated that the rule of law is clear that the date of the original appropriation or date of the institution of condemnation must always govern.

There are cases holding that the date the physical possession was originally taken should be used and there are an equal number that the date of the institution of valid legal proceedings or the date of trial should prevail. It behooves us, therefore, to examine all these cases and determine to what extent a real conflict exists, and to what extent the decisions can be reconciled, since we have no Virginia decision reasonably close in point.

There are certainly many holdings that if wrongful possession is taken by any body authorized to exercise the power of eminent domain in advance of the institution of proper legal proceedings, the value to be determined is that as of the time of the institution of such proceedings or the trial of the case. In all of these cases the value at the later date was greater than at the time of the original entry. Some courts have based their decisions on constitutional provisions to the effect that no property shall be taken "until full compensation shall be paid to the owner" or "until full compensation shall first be made in money." These cases are not helpful to us as Virginia has no such provision in its constitution. Others

seem to proceed on the theory that a public service corporation which has been delegated the sovereign's power of eminent domain, is not in a position to complain of the consequences when it commits a tortions act of trepass instead of following the procedure provided by law.

page 15 } Conversely, in all the cases holding that the date of the original entry should determine, the property had diminished in value between the original appropriation and the institution of condemnation proceedings. Here again, those cases holding that the state cannot profit by its own tort, particularly when the loss in value has been occasioned by the state's action since it took possession, are based on elemental fairness but have no application to our present situation.

See the cases collected in 3 Nichols on Eminent Domain 27 for these conclusions.

The common denominator of these cases, when we eliminate those based upon particular constitutional phraseology, and those in which the state has by its own action diminished the value after taking wrongful possession, is that a property owner will not be required to accept less than "full compensation" for what is taken, and the basic question is when his property is "taken." If the time of physical "taking" in the particular case provides "full compensation," that will be followed over "taking" by the institution of legal proceedings; on the other hand "legal taking" has been held the proper time of valuation when the "tortions taking" would not provide full compensation.

It is also interesting to note that in none of the cases so far discussed was there any provision of law which would have allowed the property to be taken from the owner before legal proceedings had been completed, or at least reached a certain stage.

The State Highway Commission, as distinguished from others entitled to exercise the power of *eminent domain,* has been given the right to take possession of property prior to the institution of condemnation proceedings by Section 33-70 of the Code of Virginia. This was also the law at the time this road was constructed, but it is admitted that no payment was made by the Commissioner of the estimated fair value which is a prerequisite to entry under this section. A certificate that payment will be made is now permitted in lieu of the cash deposit. It is not pretended that the plaintiff has complied with this statute, and it is cited merely to show the trend of policy on the subject in Virginia, so far as this type of proceeding is concerned, and to further emphasize that the fundamental reasoning of many of the cited cases holding that

the date of "legal taking" must be used is based upon policy at variance with that of Virginia.

The United States is the only other government known to this Court to have a procedure whereby property can be taken in advance of condemnation proceedings, and a number of cases dealing with the proper date of valuation have come up in the Federal Courts, particularly under 40 U. S. C. A. Sec. 258(a), being the acquisition procedure for military purposes. The law was summarized in the comparatively recent case of 11,000 *Acres of Land, etc.* v. *United States,* 152 Fed. (2nd) 566, as: "We regard it as well settled that either where no declaration of taking is filed or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property should be determined as of the date, possession was acquired."

A rather new approach to the valuation date page 16 } problem appears in *Anderson* v. *United States*, 179 Fed. (2nd) 281. There a petition for condemnation was filed on January 30, 1946 under 33 U. S. C. A. Sec. 594, and on November 14, 1956, a declaration of taking for the same land was filed under 40 U. S. C. A. Sec. 258 (a). In the meantime the property increased in value several thousand dollars. The opinion states: "All agree that just compensation is to be measured by the fair market value at the time of taking * * * To allow the value of the land to be fixed long after the date when it has become known that the United States was in process of taking the same would tend to include any enhancement in market price occasioned by reason of the improvement * * *"

This decision is based upon an opinion by Mr. Justice Roberts of the Supreme Court of the United States in *United States* v. *Miller,* 317 U. S. 369, 147 A. L. R. 55 which holds: "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government at a later date determine the take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project in the beginning included the taking of certain tracts, but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement."

The appeal of this reasoning is particularly strong in the case at bar. Most of the increased value of 1958 over 1944 is based upon the fact that the Military Highway was constructed by the State. That the institution of the instant suit was necessary was occasioned by the negligent, as distinguished from the wilful act of the Highway Commission. The property owner was not even aware that his land has been taken until fourteen years after the event. The difference between the pending litigation and a matter that would have been settled years ago lies in the fact that the Highway Commission did not make the deposit required under Section 33-70. The defendant is entitled to no more than others for her land, similarly situated were entitled to receive at the time the road was constructed, and such, in my opinion, with accrued interest, constitutes "full compensation" in this case.

Very truly yours,

H. W. MacKENZIE, JR.

HWM/mmh

* * * * *

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* * * * *

INSTRUCTION NO. 1.

The Court instructs the Commissioners (1) that it is their duty to ascertain what will be just compensation for the property taken, and (2) assess damages, if any, to the adjacent property of the landowner beyond the peculiar benefits that will accrue, if any, to said adjacent property from the construction of the project.

Granted.

H. W. M.

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* * * * *

INSTRUCTION NO. 2.

The Court instructs the Commissioners that the landowner must be paid the fair market value for the land taken. If the market value of landowner's property has been increased by

the improvement or construction of the highway, such increase shall be offset against any damage to the residue of the property, if any. The property owner is entitled to receive the value of what he has been deprived of and nothing more, and if the market value of his remaining land will be increased more than it has been damaged by the proposed construction and improvement of the road, then the landowner has suffered no loss to the residue of his property.

Granted.

H. W. M.

page 20 }

* * * * * *

INSTRUCTION NO. 3.

The Court instructs the Commissioners that the measure of the owner's damage to the residue of his property, if any, is the difference between the market value of the property immediately before the taking and the market value immediately after the taking.

Granted.

H. W. M.

page 21 } INSTRUCTION NO. 4.

The Court instructs the Commissioners that you shall fix your award for the value of the land taken and the damage, if any, to the residue of the land of the defendants beyond the enhancement in value of the remaining land, if any, as of June 15th, 1943.

Granted.

H. W. M.

page 22 } INSTRUCTION B.

The Court instructs the Commissioners that the fair market value is the price which one under no compulsion is willing to take for property which he has for sale, and which another,

land; that no damage has accrued or will accrue to defendants or their property, or remaining property, from the construction, improvement, maintenance and operation of the highway and works of the commission, beyond the enhancement in value of the remaining land; that no damage to the property of any other person has arisen or will arise or occur by reason of the construction, reconstruction, alteration, repair and change of the highway, and the construction, improvement, maintenance and operation of the highway; that the property taken in fee is outlined in "RED" on the plat filed with the papers in this suit, all being more particularly described as follows:

page 28

BEING as shown on plans approved April 14, 1942, and lying on the Southwest (left) side of and adjacent to the survey centerline from the lands of the Commonwealth at approximate Station 614-75, and containing 0.067 acre, more or less, land.

For a more particular description of the land, or interest therein, taken, reference is made to photo copy of said Sheet 11, showing outlined in RED the land taken in fee simple, which photo copy is hereto attached.

And it further appearing that by Certificate No. C-166 recorded in the Clerk's Office of this Court on August 22, 1958, in Deed Book 551, at Page 581, in accordance with Sections 33-70 and 33-74 of the Code of Virginia, 1950, as amended, the State Highway Commissioner stated that $335.00 would be paid pursuant to order of this Court, and the Commissioner has this day paid said sum of $300.00, plus interest from June 15, 1943 in the amount of $283.56 making a total deposit of $583.56 to the Clerk of this Court, as full compensation and damages, together with the costs of these proceedings, it is ORDERED that the report of the Commissioners be and the same is confirmed, and title to the above described property and the rights condemned and easements having vested in the Commonwealth of Virginia, pursuant to filing of the aforesaid certificate, the same is hereby confirmed, and the State Highway Commissioner, and the agents, servants, or employees of the Commonwealth of Virginia and/or the State Highway Commissioner or Commission, and their successors and assigns, shall have the right to enter upon and use the said property and easement and rights condemned, and the rights, interest, and claims of defendants and any other interested person are transferred to the said funds so deposited.

And the Clerk of this Court is ORDERED to record and index the report of the Commissioners, together with this order, in the current Deed Book, in the name of Common-

under no compulsion, being desirous and able to buy is willing to pay for the property.

Granted.

H. W. M.

page 23 } INSTRUCTION A.

The Court instructs the Commissioners that they shall determine the fair market value of the defendants' property being condemned hereby as of August 22, 1958.

Refused.

H. W. M.

* * * * *

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* * * * *

DECREE.

This cause came on this day to be again heard, upon the papers formerly read, upon the report of K. L. Murden, W. M. Aygarn, Roger H. Sawyer, Walter Munden and George W. Gardner, Jr., appointed by the Court for the purpose of ascertaining a just compensation for the freehold, whereof above named defendants are tenants, sought to be condemned in these proceedings, and to award damages, if any, resulting to the adjacent or other property of the owners or to the parties in interest or to the property of any other person, if any, by reason of the improvement, operation, construction and repair of the highway by the State Highway Commissioner of Virginia, in Princess Anne County; duly returned and filed in open Court on March 12th, 1959, together with a certificate of the Deputy Clerk of this Court, who administered the oath to said Commissioners, which report was filed after a full and complete hearing of the evidence, in open Court, and a view of the land, the written exceptions filed to said report which are hereby overruled by the Court; and it appearing to the Court from said report that for the property so taken which is described in the petition, plats and papers filed in these proceedings, the sum of $300.00 will be a just compensation as of June 15, 1943 at which time the Highway Commissioner constructed the highway on the defendants'

wealth of Virginia and State Highway Commissioner as grantees and the name of defendants as grantors.

page 29 } And it appearing from the certificate of title of Richard B. Kellam, Counsel for the State Highway Commissioner of Virginia, that the record title to said property was vested in defendants at the time of filing said certificate, free of all encumbrances, the Clerk shall pay said funds to defendants and W. P. McBain, their Attorney.

And this suit is removed from the docket.

The defendants excepted to all of the above action of the Court and noted an intention to appeal.

Enter 5/19/59, 1959.

R. S. W.

• • • • •

page 30 } Counsel have stipulated that the following evidence was introduced at the hearing before the Commissioners and the following objections were made to the instructions.

The Highway Commission in 1942 started the construction of the Military Highway around the City of Norfolk and the road was completed in 1943. The Highway Commission took a General Warranty deed for lots 4 and 5, Block H, Oakwood, in Princess Anne County from the Will Cooke Corporation but this Corporation did not have title to these two lots. The record title to the above lots is in Caroline Jacox by deed which was duly recorded on the 2nd day of December, 1916, in Deed Book 432, page 201 in the Clerk's Office of the Circuit Court of Norfolk County, which deed was introduced as plaintiff's Exhibit #6. The defendants are the heirs of Caroline Jacox. Taxes were paid each year on the property by Caroline Jacox or her heirs.

The Highway Department did not examine the title but accepted the deed from the Will Cooke Corporation for all the property the Highway Department needed in Block H including a portion of the above lots to which the Corporation did not have title. It was the practice of the highway not to examine titles to purchases of less than $500.00.

The defendants had no notice that the Highway Department had taken any of their land and the defendants contracted to sell these two lots for $4,500.00 to E. C. Harrison on the 13th day of December, 1957. The contract covering this sale was offered in evidence by the defendants as Exhibit #1 but refused by the court to which action of the court the defendants duly excepted. Evidence was introduced that this sale

was made under no compulsion on the part of the defendants to sell and no compulsion on the part of the purchaser to buy.

The defendants learned for the first time that their property had been taken by the State Highway Department when the purchaser of these lots, having ordered Mr. S. W. Armistead, Civil Engineer, to survey them, reported that 3715 square feet of these two lots had been taken by the State Highway Department for the road and that the defendants had remaining only 2688 square feet of land. The purchaser refused to accept the property because his contract specified all the lots as shown on the plat and he could not put a building on what was left.

The defendants then took the matter up with the
page 31 } Highway Department and the error was discovered.

The Highway Department filed and recorded a certificate in lieu of payment to the Clerk of $335.00 on August 22, 1958 and this condemnation proceeding was started on September 10, 1958.

The defendants sold the remaining portion of their lots, that was not taken by the Highway Department, for $1,000.00 to Dorothy V. Lowe, evidenced by Defendants' Exhibit #2, which the court refused to admit to which action of the court the defendants excepted. The defendants testified that they tried to get more for this property but could not because it was too small for building purposes.

The defendants testified that at the request of Mrs. Lowe the property was deeded to Samuel C. DeLaura and wife on the 2nd of December, 1958, and the defendants were paid $1,000.00 evidenced by defendants' Exhibit #3 which the court refused to admit to which action of the court the defendants excepted.

The defendants testified that they lost $3,500.00 because the State had taken their land and that $3,500.00 represented a fair market value of the property, taken for the highway, on August 22, 1958, but the court refused to admit this evidence to which action of the court the defendants excepted.

The defendants took proper exceptions at the trial to all evidence which the court refused to permit to be introduced that pertained to the value of the land as of August 22, 1958 when certificate in lieu of payment to the Clerk was filed and to all evidence introduced by the plaintiff as to the value on June 15, 1943 when the Highway Department occupied the land.

The defendants objected to all the plaintiff's instructions on the ground that the value of the defendants' land taken for the highway must be determined as of August 22, 1958 when

the certificate in lieu of payment was filed and recorded, regardless of what factors contributed to this value. The defendants also excepted to the court's action in refusing the defendants' instruction "A" on the same grounds.

RICHARD B. KELLAM, p. q.
W. P. McBAIN, p. d.

Tendered and signed 5/19/59.

H. W. MacKENZIE, JR.
Circuit Judge.

Filed May 19, 1959.

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

* * * * *

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ASSIGNMENTS OF ERROR.

(1) The Court erred in holding that the value of the property condemned should be fixed as of June 15, 1943, when the plaintiff unlawfully took physical possession of said property.

(2) The Court erred in refusing to hold that the value of said property should be fixed as of August 22, 1958, when the plaintiff started lawfully to acquire the said property by filing certificate of deposit pursuant to sections 33-70:1 et seq. of the 1950 Code.

ELOISE J. WHITE
IDA N. JACOX
By W. P. McBAIN
Counsel.

Filed Jun 22, 1959.

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

THE COURT OF APPEALS
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RICHMOND, VIRGINIA