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Eminent Domain - Setting Aside Verdict and New Trial - Whether Remittitur May Be Utilized in a Statutory Eminent Domain Action

R. O. Young

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instant case is just, were the harshness of the ruling not somewhat mitigated by the fact that, as the court pointed out, a guilty defendant can now waive indictment, enter a plea of guilty, and begin serving his sentence as soon as he is arrested.¹²

The statute, commonly known as the "four term act," was enacted to implement the constitutional provision for a speedy trial by stating an arbitrary period during which any prisoner must be tried for his crime or be discharged. As in cases where a statute of limitations is applied, the guilt or innocence of the prisoner is not material to proper execution of the statute, as the statute was enacted to prevent the government from unduly harsh treatment of the prisoner and with the knowledge that the guilty as well as the innocent might benefit from its application. Even if it be conceded that no constitutional question is involved, the expiration of the four months period, without the prisoner's having been brought to trial, places him within the statute and entitles him to be discharged. Since his guilt or innocence is not material to the statutory right, it appears to follow that a plea of guilty should not waive the right even after the period has elapsed.

MISS J. FLEMING

EMINENT DOMAIN—SETTING ASIDE VERDICT AND NEW TRIAL—WHETHER REMITTITUR MAY BE UTILIZED IN A STATUTORY EMINENT DOMAIN ACTION—In the recent case of *Department of Public Works and Building v. Huff*,¹ the Supreme Court of Illinois considered a question of first impression in Illinois: whether a remittitur was proper in a statutory eminent domain proceeding? The defendants in the eminent domain action had been awarded damages by a jury. The plaintiff condemnor moved to vacate the judgment and for a new trial, urging that the verdicts were beyond the range of the evidence. The trial judge overruled the plaintiff's motions on condition that the defendants consent to a remittitur, which the defendants did. The plaintiff appealed directly to the Supreme Court of Illinois² on the ground that the remittitur was improper because there was no authority for the trial judge's action in either the statutes concerning eminent domain³ or in the Civil Practice Act.⁴ That tribunal

¹² Ill. Rev. Stat. 1959, Vol. 1, Ch. 38, § 702. See also, *People v. Bradley*, 7 Ill. (2d) 619, 131 N. E. (2d) 538 (1956).

¹ 15 Ill. (2d) 517, 155 N. E. (2d) 563 (1959).

² The opinion of the Supreme Court of Illinois did not give the ground of direct appeal from the trial court. However, the State of Illinois was interested as a party, through the Department of Public Works and Buildings, which would furnish a ground under Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 75(1) (b).

³ Ill. Rev. Stat. 1959, Vol. 1, Ch. 47, § 1, et seq.

⁴ Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 1, et seq.

affirmed the judgment of the trial court despite the fact that no specific authority for the remittitur was to be found.

In the early case of *Johnson v. Joliet & Chicago Railroad Co.*,⁵ the power of eminent domain was declared to be an inherent power of sovereignty, exercisable at the sovereign's will. Perhaps because of the broad sweep of that power, restraints upon its use have been present in the organic law of the jurisdiction from the first such law, the Ordinance of 1787.⁶ The condition most commonly imposed has been that just compensation be paid by the condemnor to the landowner. Following the Ordinance of 1787, provisions making just compensation mandatory were contained in Illinois' two earlier constitutions, those of 1818⁷ and of 1848;⁸ the provisions were identical in those two documents, and both required the consent of the individual landowners' own representatives in the General Assembly, as well as just compensation. Although such restrictions on eminent domain are in the form of a prohibition upon the taking of property for public use without just compensation, it was said in the case of *White v. People ex rel. City of Bloomington*⁹ that such prohibitions are references to the eminent domain power. Later cases have also held that such constitutional references are direct restraints upon the power.¹⁰

In addition to constitutional inhibitions upon the power of eminent domain, or perhaps in furtherance of them, the Supreme Court of Illinois has held, in the case of *South Park Commissioners v. Montgomery Ward & Co.*,¹¹ that, while the power of eminent domain exists independently of constitutions and statutes, the form of its exercise is to be prescribed by statute. There has been at least an apparent disagreement in the decisions of the court upon the exact nature of the power: in the case of *Zurn v. City of Chicago*¹² it was said that the General Assembly possesses the power of eminent domain, while in the case of *Chicago and Northwestern Ry. Co. v. Chicago Mechanics' Institute*,¹³ it was declared that

⁵ 23 Ill. 124 (1859). See also *Western Union Tel. Co. v. Louisville & M. R. Co.*, 270 Ill. 399, 110 N. E. 583, Ann. Cas. 1917 B, 670 (1915).

⁶ Section 14, Art. II. The Ordinance of 1787 may be found in Smith-Hurd, Ill. Ann. Stat., Const. Vol., p. 92.

⁷ Ill. Const. 1818, Art. VIII, § 11.

⁸ Ill. Const. 1848, Art. XIII, § 11.

⁹ 94 Ill. 604 (1880).

¹⁰ *Litchfield & Mad. Ry. Co. v. Alton & S. R. R.*, 305 Ill. 388, 137 N. E. 248 (1922); *Noorman v. Dept. of Public Works and Buildings*, 366 Ill. 216, 8 N. E. (2d) 637 (1937).

¹¹ 248 Ill. 299, 93 N. E. 910 (1911). See also *Sanitary Dist. of Chicago v. Manasse*, 380 Ill. 27, 42 N. E. (2d) 543 (1942), and *Dept. of Public Works and Buildings v. Kirkendall*, 415 Ill. 214, 112 N. E. (2d) 611 (1953).

¹² 339 Ill. 114, 59 N. E. (2d) 18 (1945).

¹³ 239 Ill. 197, 87 N. E. 933 (1909).

the legislature has control over the exercise of the power. The foregoing distinction is probably immaterial if those two cases are regarded alone, and is certainly so if the present constitutional and statutory restraints on the power to condemn property are taken into consideration. The section of the present Illinois Constitution establishing the power, lays it down that compensation shall be determined by a jury when not made by the State.¹⁴ By the section of the statute on eminent domain concerning the jury's oath in such cases, the jury are to be sworn to ascertain and report just compensation.¹⁵ Hence, whether the General Assembly holds the power, as said in the Zurn case, or only controls its use, as in the Mechanics' Institute case, it is certain that, first, the power is intended to be set out and regulated by statute, and second, that under any such statute, just compensation is to be determined by a jury.

It is probable that the belief of legislatures, courts, and drafters of organic laws that just compensation could be determined only by a jury led to such statements as, in the case of *Calumet River Railway Co. v. Moore*,¹⁶ that the determination of damages was the jury's special province and their findings would not be upset as long as they were within reason and free from corruption, passion and prejudice.¹⁷ Hence, despite a holding in the case of *Kiernan v. Chicago, Santa Fe and California Ry. Co.*¹⁸ that the jury can alter their own verdict in a land condemnation suit, the general rule has been that an erroneous verdict in an eminent domain proceeding must be cured by a new trial, that is, that just compensation may be determined or redetermined only by a jury, whether the verdict was excessively large or merely not within the range of evidence,¹⁹ as was argued in the present case. Some weight has been given to the fact that the jury had viewed the premises to assist them in deter-

¹⁴ Ill. Const. 1870, Art. II, § 13. In connection with the exception for compensation made by the State from determination by a jury, cf. Ill. Const. 1870 Art. IV, § 26, which prevents the State from ever being made a defendant in any court. If the State proper were the condemnor, the jury would assess damages against the State in a condemnation action, a result disharmonious with the purpose of Art. IV, § 26. However, compensation is not "made by the State" when it is paid by an agency or instrumentality of the State, in the same way that a suit against such an agent or instrumentality is not a suit in which the State is a defendant, *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327 (1904).

¹⁵ Ill. Rev. Stat. 1959, Vol. 1, Ch. 47, § 8.

¹⁶ 124 Ill. 329, 15 N. E. 764 (1888).

¹⁷ With regard to the fixity of the jury's verdict against everything but passion, prejudice or undue influence, see also *Sanitary Dist. of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723 (1893) and *Cook County v. North Shore Electric Co.*, 390 Ill. 147, 60 N. E. (2d) 855 (1945).

¹⁸ 123 Ill. 188, 14 N. E. 18 (1887).

¹⁹ *Atchison, T. & S. F. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41 (1889) (excessively large verdict); *City of Chicago v. Matteson*, 274 Ill. 308, 113 N. E. 595 (1916) (verdict not within the range of the evidence).

mining the quantum of damages,²⁰ but a new trial has been ordered after an unnecessarily generous verdict even where the jury did view the premises.²¹ In the instant case, a remittitur was used to adjust the jury's verdict despite this long background of new trials as the only cure for an excessive verdict in eminent domain.

The term remittitur, or fully, *remittitur damna*, refers to a remission, by the party who has received a judgment in damages, of some part of the judgment which is, or is thought by the court to be, excessive.²² The party remitting usually does so as an alternative to a new trial. Remittitur apparently arrived in Illinois practice quite early, although the earliest cases dealing with it are a trifle vague in regard to authority for sustaining its use. In the comparatively early case of *McCausland v. Wonderly*,²³ it was said to be settled practice, but no Illinois authority was cited to support the proposition. In the case of *Illinois Central Railroad Co. v. Blye*,²⁴ where it was held that remittitur was an allowable cure for an excessive verdict, there was also a statement that remittitur was settled practice, but without citations to authority. In the case of *Libby, McNeil & Libby v. Scherman*,²⁵ cited by the court in the instant case, it was said that remittitur was too well established to be then called into question, but no authority was furnished.²⁶ In the *McCausland* case, the arguments of counsel included a statement that a remittitur could be utilized in actions *ex contractu* but not in actions *ex delicto*, where unliquidated damages were to be fixed by a jury. The court there rejected the contention; but it is suggested that some of the unwillingness of courts to modify awards of damages in land condemnation cases may come from a reluctance to interfere in the jury's peculiar function of valuing unliquidated claims, and that the rule urged on the court in the *McCausland* case had had some efficacy earlier and strengthened the rule that a new trial was the only remedial measure for an excessive verdict in eminent domain proceedings. This view is assisted by a consideration of the career of additur in the courts of Illinois. In the case of *Carr v. Miner*,²⁷ an additur in a contract action was upheld where it served to give the

²⁰ *South Park Com'rs. v. Livingston*, 344 Ill. 368, 176 N. E. 546 (1931); *Dept. of Public Works and Buildings v. Bohne*, 415 Ill. 253, 113 N. E. (2d) 319 (1953).

²¹ *Atchison, T. & S. F. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41 (1889).

²² 39 Am. Jur., *New Trial*, § 210, p. 204; 76 C. J. S., *Remittitur*, p. 905.

²³ 56 Ill. 410 (1870).

²⁴ 43 Ill. App. 612 (1892).

²⁵ 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191 (1893).

²⁶ Cf. *Dimick v. Schiedt*, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), where the U. S. Supreme Court considered the common law backgrounds of both remittitur and additur.

²⁷ 42 Ill. 179 (1866).

plaintiff the ten percent interest provided in the contract, which was not usurious at that time, instead of the six percent the jury had awarded. In the case of *James v. Morey*,²⁸ an additur was allowed in an action for rent when the jury brought in a verdict much smaller than the amount due by the lease. Both the foregoing cases were distinguished in the case of *Yep Hong v. Williams*,²⁹ where the trial court had, by agreement, ordered an additur in an action for personal injuries incurred in an automobile accident; it was said that additur would not be allowed in an action for unliquidated damages, although it might be unobjectionable in an instance, as in the Carr and James cases, where the sum sought to be added was itself certain and it was clearly erroneous not to permit it.³⁰ All three cases fit within the rule unsuccessfully stated by counsel in the McCausland case, that the jury must fix the amount of unliquidated damages. But whatever its genesis, the rule admitted of no exceptions in eminent domain until the remittitur in the instant case was upheld.

Remittitur, as has been said, was known to the common law practice of Illinois. Neither the statute covering eminent domain³¹ nor the Civil Practice Act³² regulate remittitur in trial courts in any detail, but the latter specifies that, in all matters not regulated by statute or rule of court, the practice at common law and in equity shall continue.³³ It was upon this proviso that the court relied to reach the result in the instant case. The first section of the Civil Practice Act sets forth the scope of the Act, and excepts eminent domain, among other special actions, from its purview, but only to the extent that procedure in eminent domain is regulated by the statute upon that subject; in matters not regulated by the statute, the Civil Practice Act is to apply.³⁴ As was said, the law of eminent domain attempts no regulation of remittitur, which leaves the Civil Practice Act as the applicable law. But neither does the Civil

²⁸ 44 Ill. 352 (1867).

²⁹ 6 Ill. App. (2d) 456, 128 N. E. (2d) 655 (1955), noted in 34 CHICAGO-KENT LAW REVIEW 186 and discussed in 35 CHICAGO-KENT LAW REVIEW 45.

³⁰ Cf. *Dimick v. Schiedt*, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), wherein the U. S. Supreme Court concluded that since remittitur, but not additur, was known and practiced as the common law of England prior to the adoption of the U. S. Constitution, an additur in an action for damages for personal injuries in a federal court deprived the defendant of his right of trial by jury.

³¹ Ill. Rev. Stat. 1959, Vol. 1, Ch. 47, § 1, et seq.

³² Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 1 et seq. See particularly § 68.1(7), cited by the court, where it is provided that consent to a remittitur does not bar a party from arguing for the verdict on appeal; and § 92(1)(e), also cited by the court, which gives appellate courts power to enter a remittitur. Neither section refers to remittitur in the trial court except by implication.

³³ Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 1.

³⁴ See *Wintersteen v. National Cooperage Co.*, 361 Ill. 95, 197 N. E. 578 (1935), cited by the court in the instant case, which declares that the Civil Practice Act does not apply *only* where the specific statute regulates procedure.

Practice Act regulate remittitur specifically. Hence, as the Court construed the Civil Practice Act, remittitur was outside the scope of the act and therefore by the Act's own terms, was within the small area of practice still governed by the common law, whereunder a remittitur was permissible.

To reach this result, the court departed from a rule expressed in the case of *Department of Public Works and Buildings v. O'Brien*,³⁵ where it was said that proceedings under the statute of eminent domain are regulated entirely by the statute and not at all by the common law rules of pleading or practice. However, in the O'Brien case, the point at issue was whether the record in an eminent domain proceeding could be altered by a method similar to a writ of error *coram nobis*. As contrasted with the present case, the Court simply held, in the O'Brien case, that, since Section 72 of the Civil Practice Act³⁶ abolished *coram nobis* and substituted a motion procedure adapted to the same end, Section 72 governed the decision and *coram nobis*, a common law procedure, would not be allowed. The statement in that case, that the common law pleading or practice had no application to a statutory eminent domain proceeding, is a good deal broader than the point decided, and the conflict between that and the instant case is apparent rather than real.

The instant case throws into relief some larger questions concerning the respective roles of judge and jury in trials at law, principally whether there is really a clear line of separation between the jury as trier of fact and the judge as court and the trier of law. It has been said that the parties have a privilege to have contraverted questions of fact tried by a jury.³⁷ It was intimated in the early case of *Vincent and Bertrand v. Morrison*³⁸ that a verdict was defective in which the jury found evidence rather than facts; the attendant implication is that the jury's business is fact-finding exclusively. The court cannot coerce even one recalcitrant juror into acquiescence in the majority opinion without committing reversible error.³⁹ Further, where as in the case of *Kane v. Kinnare*,⁴⁰ the judge by his remarks during a witness' testimony, wrongly suggests a conclusion upon the evidence to the jury, reversal will follow; and remarks like the following may be elicited from the Appellate Court, as they were in that case: "One of the greatest difficulties of a *nisi prius*

³⁵ 402 Ill. 89, 83 N. E. (2d) 280 (1949).

³⁶ Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 72.

³⁷ *Morrison Hotel and Restaurant Co. v. Kirsner*, 245 Ill. 431, 92 N. E. 285 (1910).

³⁸ 1 Ill. 227 (1827).

³⁹ *Lively v. Sexton*, 35 Ill. App. 417 (1890).

⁴⁰ 69 Ill. App. 81 (1896).

judge is to keep his mouth shut. I had twenty-five years experience of it . . . Many judgments have been reversed in this state because the judge talked too much."⁴¹ The import of these cases is that the judge may in no instance interfere with the fact-finding function of the jury while it is in progress. In contrast to that, however, one may place some authorities to the effect that the judge has considerable freedom to amend, construe and modify the jury's verdict if its meaning is clear. In the case of *Law v. Sanitary District of Chicago*⁴² it was said that the verdict could be construed and amended by reference to the pleadings and proof where the intention of the jury was apparent, and it was there done. In view of the foregoing, it seems that the instant case did not work any profound change in the law, since it has for a long time been true that a jury's verdict is amenable to change by the court where change is reasonably and clearly indicated, as long as the court does not interfere in the jury's deliberations other than in the usual way, ie., by instructions. To this must be added the effect of the newer attitude of the courts toward the trial process. In the case of *Simmons v. Columbus Venetian Stevens Buildings, Inc.*⁴³ that attitude was thus expressed: ". . . courts should attempt to do substantial justice when all the facts are completely disclosed." Clearly, from such a principle, an appropriate impatience with the finer technicalities of jury trials will arise and lead to generally wholesome results such as that in the case under consideration.

If the customary conditions of remittitur are fulfilled, in that the defendant in an eminent domain proceeding consents to the reduction of the verdict, there is no good reason to keep alive the rule that only a jury can assess damages in eminent domain. In a time of large public works and vast land clearance schemes, such a rule adds nothing to the work of land condemnation except delay, and public policy clearly favors expeditiousness in such undertakings. The construction put upon the Civil Practice Act is entirely harmonious with its purposes and in accord with the needs of modern practice in eminent domain actions.

R. O. YOUNG

⁴¹ 69 Ill. App. 81, at 83.

⁴² 197 Ill. 523, 64 N. E. 536 (1902).

⁴³ 20 Ill. App. (2d) 1, 155 N. E. (2d) 372 (1959).