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jeopardy to which his actions have exposed him. Perhaps the cause of justice would have been better served by an adoption of the approach of the Fifth Circuit Court of Appeals to the same case. That court held: (1) since the victim was released unharmed the offense could not be punishable by death and the defendant could waive indictment, (2) that prosecution by information will be deemed a waiver of the Government's right to ask for the death penalty or for the jury to recommend it, and (3) that, whether waiver is allowed or whether the prosecution is to be by indictment, no evidence of harm can be introduced unless such harm is previously alleged so that the defendant will be made completely aware of the gravity of the charge he faces.

W. TRAVIS PORTER

Eminent Domain—Interest As an Element of Just Compensation

North Carolina recognizes the right of every property owner to receive just compensation for property taken from him under the power of eminent domain. When land is taken under this power, the owner is entitled to receive an amount equal to the value of the land on the date of the taking. If payment is made later than the date of the taking, then, when made it must include some additional sum as compensation for the delay, because the condemnee has had neither the legal right to possession or use of his property nor the use of the money owed him for the deprivation during this interval. Failure to compensate for the resulting loss would be unconstitutional. Interest on the principal sum from the date of the taking is used as a measuring stick for computing the condemnee's damages resulting from delay in payment. This right

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1 DeBruhl v. Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Johnston v. Rankin, 70 N.C. 550 (1874); see generally Comment, 35 N.C.L. Rev. 296 (1957).
6 "The concept of just compensation is comprehensive and includes all elements . . . . The owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.'" Jacobs v. United States, 290 U.S. 13 (1933).
to interest is not dependent on statutory provision or an express agreement between the parties, but is an integral part of the just compensation due the owner.\(^7\)

The federal courts and a great majority of the state courts allow this interest as a matter of strict constitutional right.\(^8\) It is usually considered either as payment for damages caused by detention of the compensation\(^9\) or as payment necessary to produce a full equivalent of the value of an award paid contemporaneously with the taking. There seems to be no valid distinction between the two, since both are based on the principle of remuneration for loss suffered during the interim.\(^10\)

North Carolina refuses to allow interest when the owner is permitted to remain in possession and reap benefit from use of the land during the interim period.\(^11\) Thus in *Yancey v. Highway Comm’n*\(^12\) where the petitioners were permitted to harvest crops from the land for two years after the date of the original appropriation, the court held that they were not entitled, as a matter of law, to have interest on the amount of compensation fixed by the jury. In *DeBruhl v. Highway Comm’n*,\(^13\) however, where the condemnee was completely deprived of possession and derived no benefit during the interim, the court held that he was entitled, as a matter of law, to have the jury award interest on the fair market value of the condemned property from the date of the taking. *Yancey* was not overruled; it was expressly distinguished on the ground that the owner in *Yancey* had derived benefit during the interim and consequently had suffered no compensable loss from the delay in payment.\(^14\) The *DeBruhl* decision was expressly followed in *Winston-Salem v. Wells*\(^15\) where interest was again allowed as a matter of law.

It can be argued that the petitioners in *Yancey* did not receive just compensation. Even if the owner is not completely deprived of possession at the time of condemnation his tenure is rendered precarious. All

\(^7\) Shoshone Tribe v. United States, 299 U.S. 476 (1937); Danforth v. United States, 102 F.2d 5 (8th Cir. 1939); see generally 29 C.J.S. Eminent Domain § 333(a) (1941); Mills, Eminent Domain § 175 (1879).


\(^10\) See Jahr, Eminent Domain § 176 (1953); Orgel, Valuation Under Eminent Domain § 5 (2d ed. 1953); 29 C.J.S. Eminent Domain § 176(a) (1941).

\(^11\) Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912). Right of way was condemned over property on which rental houses were located, but plaintiff had continued to rent the houses. The court held that the jury could have given interest as part of the damages if the circumstances had warranted, but since no decrease in rent was shown interest was not warranted.

\(^12\) 221 N.C. 185, 19 S.E.2d 489 (1942).


\(^14\) Id. at 684, 102 S.E.2d at 238.

NOTES AND COMMENTS

rights in this property can be exercised only under doubt and uncertainty as to their duration. It is submitted that it is not necessary for the court either to allow or disallow interest depending upon whether or not the owner has remained in possession and reaped benefit. It would seem to be a better rule for the court to allow interest, as a matter of law, in every case where payment is delayed. In cases where the landowner has received benefit from retained possession after the date of appropriation, the court could simply set off the value he has derived from such retention against the amount of interest allowed as a matter of law. This rule would facilitate uniformity in the court's decisions and would guarantee to the owner the just compensation to which he is entitled, while preventing any over-compensation to which the owner has no constitutional right. There is supporting authority for this method in both North Carolina\textsuperscript{16} and other jurisdictions.\textsuperscript{17}

Suppose that in a condemnation proceeding the court awards a judgment which includes compensation for delay in payment, \textit{i.e.}, interest, in addition to an amount equivalent to the value of the land at the date of the taking. If this judgment is not paid forthwith, is the condemnee entitled to interest on the judgment? Where the condemnor is not a governmental entity, North Carolina allows him to recover interest on the judgment by statute.\textsuperscript{18} However, where the condemnor is the state or an agency of the state the cases are not in agreement as to whether or not interest on the judgment should be allowed. A brief survey of the cases in this jurisdiction which have dealt with this issue will serve to indicate an apparent inconsistency in result when the condemnor is the state or a state agency.

\textit{City of Durham v. Davis}\textsuperscript{19} appears to have been the first case dealing with the issue of interest on a judgment rendered in condemnation proceedings against the state or a state agency. In this case the court awarded the condemnee interest from the rendition of the judgment. In so doing it cited no authorities and apparently took the view that interest on a judgment should be awarded as a matter of course. The court obviously was not impressed with the fact that the condemnor-city

\textsuperscript{16}Cf. Miller v. City of Asheville, 112 N.C. 759, 16 S.E. 762 (1893). In this case instruction to the jury, that it should allow interest on such sum as it might assess as damages from the time of the condemnation, but should take into consideration the use made of and benefit received by the plaintiffs from the land after such date against the damages, was held to be correct.


\textsuperscript{18}N.C. GEN. STAT. § 24-5 (1953). "[T]he amount of any judgment ... rendered or adjudged in any kind of action ... shall bear interest till paid."

\textsuperscript{19}171 N.C. 305, 88 S.E. 433 (1916).
was a governmental entity. Some twenty-six years later, however, in *Yancey v. Highway Comm'n* interest on a judgment against an agency of the state, previously rendered in the first *Yancey* case, heretofore discussed, was denied. The court in reaching this decision relied on the established principle that "the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid." The next case of importance was *Highway Comm'n v. Privett* which expressly recognized *Yancey second* as controlling and did not allow interest.

In the recent case of *Board of Educ. v. McMillan* the court, relying on *City of Durham v. Davis*, allowed interest on the judgment. The majority opinion did not mention *Yancey second* or *Privett* but again seemed to allow interest as a matter of course. Justice Parker in his concurring opinion, on the other hand, felt that the instant case had disemboweled the *Yancey second* decision without expressly referring to it. He advocated administering "the coup de grace to the Yancey decision by specifically overruling it." He stated that "the decision is wrong, and does violence to Article I, § 17, of the State Constitution, and to the 14th Amendment to the United States Constitution."

It is submitted that *McMillan* does, in fact, overrule *Yancey second* as the concurring opinion suggests. Even assuming that *Yancey second* and *Privett* can be distinguished from *Davis* and *McMillan* on the ground that the condemnors in the former cases were agencies of the state while in the latter the condemnors were municipal corporations,

Municipal corporations such as counties and incorporated cities and towns are instrumentalities of the state for the more convenient administration of local government. See *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Gaud v. Walker*, 214 S.C. 451, 53 S.E.2d 316 (1949).

The sovereignty in this interpretation is a carry-over from the common law idea that "the King can do no wrong" and as such is also the basis for the principle of sovereign immunity from suit, absent consent. See generally *Borchard, Theories of Governmental Responsibility in Tort*, 36 Yale L.J. 1 (1926).
Yancey second and Privett should fall on constitutional grounds. The 14th Amendment to the United States Constitution guarantees that a state cannot take private property for public use without awarding just compensation.\textsuperscript{29} North Carolina recognizes this right to just compensation as an integral part of the law of the land and declares that law of the land and due process are synonymous.\textsuperscript{30} Interest, as compensation for delay in payment, is an essential element of just compensation.\textsuperscript{31} It is contended that there is no substantial difference between delay in payment of the principal sum due the owner of condemned land and delay in payment of the judgment rendered on that sum, delay in either case being simply a description of the interval existing between the date of the taking and the date of payment. Consequently, interest on the judgment until final payment, compensating for this delay, is constitutionally guaranteed. The general rule that a state or state agency is not required to pay interest should, therefore, be held inapplicable to liabilities arising from the exercise of the power of eminent domain.\textsuperscript{32}

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Insurance—Insurer’s Liability for Death or Loss Resulting from Violation of Law

A felon flees the scene of a burglary with the police in hot pursuit. In the chase his wife’s car is wrecked and he is injured. Under the wife’s accident insurance policy covering the driver and containing no exception for injuries sustained in violation of law, may he recover his medical expenses? The Supreme Court of Michigan, in \textit{Davis v. Detroit Auto. Inter-Ins. Exch.},\textsuperscript{1} said that he could. Recovery was allowed in the absence of a provision in the policy excepting the risk and in the absence of proof that the policy had been obtained in contemplation of the commission of a felony. The court further stated that this construction would not encourage crime or be contrary to public policy.

A vigorous dissent argued that generally one may not recover when the crime involved is one of moral turpitude. Since the policy provided


\textsuperscript{31} Seaboard Air Line Ry. v. United States, 261 U.S. 299 (1923); see generally 1 ORGEL, \textit{op. cit. supra} note 10, § 6.


\textsuperscript{1} 356 Mich. 454, 96 N.W.2d 760 (1959).