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# Eminent Domain -- Principles and Procedure -- Power to Condemn Dwelling-houses and Surrounding Premises for Highway Purposes

Lloyd S. Elkins Jr.

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an unemancipated minor child, living as a member of the family, may not maintain an action against its father for a negligent injury. There, the court felt that the interests of society in the preservation of the family as an economic and educational institution, and the interests of the other family members in these same benefits forbade such an intra-family lawsuit.<sup>20</sup> The reasons underlying this policy are lacking in the instant case. Indeed, a situation more violently dissimilar is difficult to picture! Here the family is already disrupted.<sup>30</sup> Here the action is not against a parent but against one, not only a stranger to the family relationship, but an intruder whose very act was the causal force in destroying the home.

Precedents in North Carolina decisions recognize principles which would have sustained allowing the cause of action in the instance case.<sup>31</sup> A minor child living in the family home has been allowed to sue its father's employer for an injury inflicted by the father's negligence. The policy protecting the father did not extend to insulate the employer from such an action.<sup>32</sup> A minor child has been allowed to sue its parent directly for support,<sup>33</sup> although the child could not maintain such an action at common law<sup>34</sup> and no statute creates such a cause of action in the child. In the light of these decisions the court's contention in the instant case that it is powerless to provide a remedy is not persuasive.

RICHARD E. WARDLOW.

### Eminent Domain—Principles and Procedure—Power to Condemn Dwelling-houses and Surrounding Premises for Highway Purposes

Eminent domain<sup>1</sup> is the power of the sovereign to take and use, alienate, or destroy for the benefit of the public any species of property whatsoever lying within its territorial jurisdiction.<sup>2</sup> It is, in effect, a funda-

<sup>20</sup> *Accord*, Villaret v. Villaret, 169 F. 2d 677 (D. C. Cir. 1948); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927). *Contra*: Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

<sup>30</sup> The policy preventing a minor child from suing its parent has been held inapplicable when the family unit was already disrupted. Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936).

<sup>31</sup> For a discussion of the legal bases of such a cause of action and analogous North Carolina decisions see Note, 28 N. C. L. REV. 113 (1949).

<sup>32</sup> Wright v. Wright, 229 N. C. 503, 50 S. E. 2d 540 (1948).

<sup>33</sup> Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936).

<sup>34</sup> Huke v. Huke, 44 Mo. App. 308 (1891); Mortimore v. Wright, 6 M. & W. 481, 151 Eng. Rep. 502 (1840); Shelton v. Springet, 11 C. B. 452, 138 Eng. Rep. 549 (1851).

<sup>1</sup> Grotius, an eminent publicist of the seventeenth century, originated the phrase. See Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460 (1912).

<sup>2</sup> Griffith v. Southern Ry., 191 N. C. 84, 131 S. E. 413 (1926); Clifton v. Duplin Highway Comm'n, 183 N. C. 211, 111 S. E. 176 (1922); Jeffress v. Greenville, 154 N. C. 490, 70 S. E. 919 (1911).

mental condition attached to the ownership of property. Every title is in this respect defeasible.<sup>3</sup> The power is an inherent attribute of sovereignty.<sup>4</sup>

The fundamental limitation upon the right of eminent domain is that property can be condemned only for a public purpose.<sup>5</sup> No such provision is to be found in the North Carolina Constitution, but the principle is treated as so fundamental that statutes in violation thereof are held unconstitutional and void.<sup>6</sup> To meet this requirement, the use intended must be ". . . by or for the government, the general public, or some portion thereof *as such*, and not . . . by or for particular individuals or for the benefit of particular estates."<sup>7</sup> Many jurisdictions hold it sufficient if the intended use directly promotes the public welfare,<sup>8</sup> but North Carolina adopts a stricter test, holding that the general public must have the right to use the property.<sup>9</sup> Originally, property could be taken only for essential purposes, but the rule has been relaxed, so that now property can be taken for such non-essential purposes as parks, playgrounds, public buildings,<sup>10</sup> scenic highways,<sup>11</sup> cartways,<sup>12</sup> etc.<sup>13</sup> The question of whether a proposed condemnation is for a public purpose is open to

<sup>3</sup> Legal writers, in theorizing, often treat the power as arising from an implied condition in the original grant from the sovereign to the individual. The sovereign is said to have reserved the right to retake the property, should the interests of the public so require. *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837); *MILLS, EMINENT DOMAIN* §1 (1879).

<sup>4</sup> Although the Constitution of North Carolina contains no reference to eminent domain, it was held in 1837 that the power of the state to condemn is "indispensable, and incontestible." *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837); *Jeffress v. Greenville*, 154 N. C. 490, 70 S. E. 919 (1911); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

<sup>5</sup> *Charlotte v. Heath*, 226 N. C. 750, 40 S. E. 2d 600 (1946); *Reed v. State Highway Comm'n*, 209 N. C. 648, 184 S. E. 513 (1936); *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928); *State v. Tyre Glen*, 52 N. C. 321 (1859).

<sup>6</sup> *Cozard v. Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905).

<sup>7</sup> *Charlotte v. Heath*, 226 N. C. 750, 40 S. E. 2d 600 (1946), quoting from *Ridge Co. v. County of Los Angeles*, 262 U. S. 700 (1922).

<sup>8</sup> Note, 15 N. C. L. REV. 361 (1937).

<sup>9</sup> *Cozard v. Hardwood Co.*, 139 N. C. 283, 51 S. E. 932 (1905) (condemnation for a private railroad unconstitutional, even though the proposed use would have developed natural resources, attracted wealth and population, etc.); *Cook v. Vickers*, 141 N. C. 101, 53 S. E. 740 (1906) (sustaining condemnation for cartway purposes, under N. C. GEN. STAT. §136-68 *et seq.* (1943), inasmuch as cartways are open to the use of the public, even though laid out on application of, paid for by, and primarily intended for the use of, private individuals). The requirement is that the general public have the right to use, not that it actually use. And the terms upon which the public may use are subject to legislative regulation.

<sup>10</sup> *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928).

<sup>11</sup> *Reed v. State Highway Comm'n*, 209 N. C. 648, 184 S. E. 513 (1936).

<sup>12</sup> *Parsons v. Wright*, 223 N. C. 520, 27 S. E. 2d 534 (1943); *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 615 (1938); *Cook v. Vickers*, 141 N. C. 101, 53 S. E. 740 (1906).

<sup>13</sup> N. C. GEN. STAT. §40-2 (1943), and annotations, list a multiplicity of public and quasi-public corporations delegated the power of eminent domain.

judicial review;<sup>14</sup> but once it has been determined that the purpose is public, the wisdom, expediency, and proper extent of condemnation are matters primarily within the political discretion of the legislature and the grantee of the power.<sup>15</sup>

Although no provision in the North Carolina Constitution requires that just compensation be given for property taken under the power of eminent domain,<sup>16</sup> it was held in 1859 that any legislative act which attempts to take private property without just compensation is "unconstitutional and void."<sup>17</sup> The principle has never since been questioned.<sup>18</sup> It may be noted that laws passed in the proper exercise of governmental police powers which merely restrict the use of property, such as zoning ordinances, do not, properly speaking, take property by means of eminent domain, and therefore do not require compensation.<sup>19</sup> But governmental immunity extends no further, and compensation must be given for any direct encroachment upon property rights, even though the acts are done by express legislative authority, and in the proper exercise of governmental functions.<sup>20</sup>

<sup>14</sup> *State Highway Comm'n v. Young*, 200 N. C. 603, 158 S. E. 91 (1931); *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928). A legislative declaration that the condemnation is for a public purpose has persuasive, but not conclusive, weight. *Reed v. State Highway Comm'n*, 209 N. C. 648, 184 S. E. 513 (1936).

<sup>16</sup> *Charlotte v. Heath*, 226 N. C. 750, 40 S. E. 2d 600 (1946); *Reed v. State Highway Comm'n*, 209 N. C. 648, 184 S. E. 513 (1936); *State Highway Comm'n v. Young*, 200 N. C. 603, 158 S. E. 91 (1931); *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928). But the court has indicated that if there is bad faith, or manifest abuse of discretion, it will take cognizance of these matters. *See Selma v. Nobles*, 183 N. C. 322, 325, 111 S. E. 543, 544 (1922); *Yadkin River Power Co. v. Wissler*, 160 N. C. 269, 274, 76 S. E. 267, 269 (1912).

<sup>16</sup> U. S. CONST. AMEND. XIV, §1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law," ratified in 1868, was in 1896 construed to prohibit states from condemning land without giving just compensation. *Chicago, B. & Q. Ry. v. Chicago*, 166 U. S. 226 (1896). The Fifth Amendment, ". . . nor shall private property be taken for public use without just compensation," ratified in 1791, binds only the Federal Government. *Staton v. Norfolk & C. R. R.*, 111 N. C. 278, 16 S. E. 181 (1892); *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837).

<sup>17</sup> *State v. Tyre Glen*, 52 N. C. 321 (1859). Early decisions sought to derive the necessity for compensation from N. C. CONST. Art. I, §17: "No person ought to be . . . deprived of . . . property but by the law of the land." *State v. Tyre Glen*, 52 N. C. 321 (1859); *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837). But later decisions proudly recognize that the principle is based solely on judicial fiat. *Parks v. Board of County Comm'rs*, 186 N. C. 490, 120 S. E. 5 (1923); *State v. Lyle*, 100 N. C. 497, 6 S. E. 379 (1888); *Johnston v. Rankin*, 70 N. C. 550 (1874).

<sup>18</sup> *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. 2d 107 (1950); *Lewis v. State Highway Comm'n*, 228 N. C. 618, 46 S. E. 2d 705 (1948); *Staton v. Norfolk & C. R. R.*, 111 N. C. 278, 16 S. E. 181 (1892); *Johnston v. Rankin*, 70 N. C. 550 (1874).

<sup>19</sup> *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. 2d 107 (1950); *In re Parker*, 214 N. C. 51, 197 S. E. 706 (1938). *Cf.* *State v. Tyre Glen*, 52 N. C. 321 (1859). *But see* N. C. GEN. STAT. §136-19 (1943), concerning scenic easements. (No cases.)

<sup>20</sup> *Clinard v. Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939) (pollution of stream by discharge from municipal sewage disposal plant); *Rhodes v. Durham*,

The measure of damages is the difference between the fair market value of the entire tract immediately before the taking, and the fair market value of the remainder of the tract immediately after the taking.<sup>21</sup> The legislature may provide that damages are to be reduced by special and general benefits,<sup>22</sup> or by special benefits alone, or that no benefits shall be offset.<sup>23</sup> At different times in our history, all three rules have obtained, and all have been sustained by our court as "just compensation."<sup>24</sup> Usually, only special benefits are offset.<sup>25</sup>

The North Carolina Constitution declares that no person ought to be deprived of property "but by the law of the land."<sup>26</sup> With respect to condemnation, the effect of the provision is to require that the owner be given reasonable notice, and a fair opportunity to be heard, when compensation is fixed.<sup>27</sup> It is not necessary that he be heard as to the necessity for, or proper extent of, condemnation, that question residing within the legislative discretion.<sup>28</sup> It may be noted that the owner has

165 N. C. 679, 81 S. E. 938 (1914) (pollution of air by noxious odors from municipal sewage disposal plant); *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510 (1913) (pollution of air by "foul stench" from municipal garbage and refuse dump).

<sup>21</sup> *Proctor v. State Highway Comm'n*, 230 N. C. 687, 55 S. E. 2d 479 (1949); *Nantahala Power & Light Co. v. Sloan*, 227 N. C. 151, 41 S. E. 2d 361 (1947); *Nantahala Power & Light Co. v. Carringer*, 220 N. C. 57, 16 S. E. 2d 453 (1941). In assessing compensation, the condemner is considered as having taken an interest in the remainder of the tract, to the extent of the depreciation in its market value. *Nantahala Power & Light Co. v. Rogers*, 207 N. C. 751, 175 S. E. 692 (1935); *Western Carolina Power Co. v. Hayes*, 193 N. C. 104, 136 S. E. 353 (1927); *cf. Clinard v. Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939).

<sup>22</sup> Special benefits are increases in property value "peculiar to the owner's land and not in common with other landowners in the vicinity." *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 871 (1930); *Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929); *Campbell v. Road Comm'rs*, 173 N. C. 500, 92 S. E. 323 (1917). Any increase in property value shared by others in the vicinity is a general, not a special, benefit. *Ward v. Waynesville*, 199 N. C. 273, 154 S. E. 322 (1930).

<sup>23</sup> *Miller v. Asheville*, 112 N. C. 759, 16 S. E. 762 (1893); *Elks v. Comm'rs*, 179 N. C. 241, 102 S. E. 414 (1920); *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850 (1917); *Southport, W. & D. R. R. v. Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903).

<sup>24</sup> *Elks v. Comm'rs*, 179 N. C. 241, 102 S. E. 414 (1920); *Southport, W. & D. R. R. v. Platt Land*, 133 N. C. 266, 45 S. E. 589 (1903); *Miller v. Asheville*, 112 N. C. 759, 16 S. E. 762 (1893).

<sup>25</sup> Under N. C. GEN. STAT. §40-18 (1943) only special benefits may be offset by those corporations authorized to condemn by N. C. GEN. STAT. §40-2 (1943). But the State Highway and Public Works Commission, under N. C. GEN. STAT. §136-19 (1943), may offset both general and special benefits. See *Elks v. Comm'rs*, 179 N. C. 241, 245, 102 S. E. 414, 416 (1920), for an interesting rationale of the distinction.

<sup>26</sup> N. C. CONST. Art. I, §17. This language traces its lineage to section 29 of the Magna Carta.

<sup>27</sup> *State Highway Comm'n v. Young*, 200 N. C. 603, 158 S. E. 91 (1931); *Yarborough v. North Carolina Park Comm'n*, 196 N. C. 284, 145 S. E. 563 (1928); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

<sup>28</sup> *State Highway Comm'n v. Young*, 200 N. C. 603, 158 S. E. 91 (1931); *Jennings v. State Highway Comm'n*, 183 N. C. 68, 110 S. E. 583 (1922); *Jeffress v. Greenville*, 154 N. C. 490, 70 S. E. 919 (1911); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

no constitutional right to a jury trial in condemnation proceedings, although N. C. GEN. STAT. §40-20 (1943) grants that privilege on appeal to the Superior Court.<sup>29</sup>

Extensive delegation of the power of eminent domain has frequently given rise to complex problems of statutory construction. In a recent case<sup>30</sup> the North Carolina Supreme Court questioned whether N. C. GEN. STAT. §40-10 (1943)<sup>31</sup> which exempts dwellings, gardens, etc., from condemnation by the corporations listed in N. C. GEN. STAT. §40-2 (1943), also exempts such property from condemnation for highway purposes by the State Highway and Public Works Commission (hereinafter referred to as the SH&PWC).<sup>32</sup>

"In the absence of constitutional or statutory restriction, the power of the State to appropriate private property to public use extends to every species of property within its territorial jurisdiction."<sup>33</sup> There are no constitutional restrictions in this state, and if any property is exempt from condemnation, it is only because some statute so provides.<sup>34</sup> But it is a familiar principle that inasmuch as statutes dele-

<sup>29</sup> N. C. CONST. Art. I, §19. A condemnation proceeding, in which the amount of damages is almost invariably the sole issue, "is not a controversy within the meaning of the Bill of Rights, nor such a trial by jury as that instrument declares shall be 'sacred and inviolable.'" *Raleigh & G. R. R. v. Davis*, 19 N. C. 451 (1837); *State v. Floyd*, 204 N. C. 291, 168 S. E. 222 (1933); *State v. Jones*, 139 N. C. 613, 52 S. E. 240 (1905).

<sup>30</sup> *Proctor v. State Highway Comm'r*, 230 N. C. 687, 694, 55 S. E. 2d 479, 484 (1949).

<sup>31</sup> "No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden, or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code."

<sup>32</sup> The *State Highway Commission* was created in 1915. Until 1921 it was a purely advisory body, with primary control of all highways still vested in the counties, towns, and other political subdivisions of the state. In 1921, to meet the requirements of federal aid appropriations, the key act for the present system of state highways was passed. This act created a statewide system of about 5,500 miles of highways. In 1927 the State Highway Commission was empowered to take over additional roads, not to exceed 20% of what it had already taken over. Soon after, Governor Gardner became convinced that the best course was to discontinue entirely state grants of aid to counties for roads, and instead to centralize control of all public highways in one agency, the State Highway Commission. In 1931 this was done, but the State Highway Commission was authorized to decline to take over certain highways, in its discretion. In 1933 the State Highway Commission was combined with the Public Works Commission and became the State Highway and Public Works Commission. N. C. P. L. 1915, c. 113; N. C. P. L. 1921, c. 2; N. C. P. L. 1927, c. 200; N. C. P. L. 1931, c. 145; N. C. P. L. 1933, c. 172; Pate, *Highway Administration in the South* (1935).

<sup>33</sup> *Parks v. Board of County Comm'rs*, 186 N. C. 490, 500, 120 S. E. 46, 51 (1923); *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922); *Clifton v. Duplin Highway Comm'n*, 183 N. C. 211, 111 S. E. 176 (1922).

<sup>34</sup> Where an act gives "broadly and without restriction the right to condemn private property for highway purposes, the right so given will include dwelling-houses, tree and yards . . . unless such power is excluded under general or other State laws applicable." *Parks v. Board of County Comm'rs*, 186 N. C. 490, 500, 120 S. E. 46, 51 (1923); *Clifton v. Duplin Highway Comm'n*, 183 N. C. 211, 111 S. E. 176 (1922); *Raleigh, C. & S. R. R. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 180, 82 S. E. 5, 10 (1914).

gating the power of eminent domain are "in derogation of the ordinary rights of private ownership" they are to be construed strictly against the delegatee.<sup>35</sup>

N. C. GEN. STAT. §136-19 (1943) delegates to the SH&PWC the power of condemnation for highway purposes<sup>36</sup> and provides that in exercising that power, "the ways, means, methods, and procedure of chapter 40, entitled 'Eminent Domain,' shall be used by it as near as the same is suitable for the purposes of this section." Does this provision indirectly restrict the power of the SH&PWC to condemn dwellings, gardens, etc., for highway purposes? Article I of Chapter 40 enumerates certain corporations and delegates to them the power of eminent domain, with certain special provisions in that regard, including the provision in question, that no such corporation shall condemn dwellings, gardens, etc., unless expressly authorized. Article II prescribes in detail the procedure to be followed in condemnation proceedings, and except for the prefatory provision in N. C. GEN. STAT. §40-11 (1943), is not concerned with the nature and extent of the power to condemn, but rather with the manner in which that power is to be exercised. Originally, the two Articles were codified in separate chapters,<sup>37</sup> but recent codifications have placed them in juxtaposition.<sup>38</sup> It is apparent that the two Articles are distinct, one delegating the power of eminent domain to certain corporations, and delineating the nature and extent of that power; and the other prescribing the special proceeding to be followed when that power is exercised.

As noted, N. C. GEN. STAT. 136-19, granting to the SH&PWC the *power*, makes reference to Chapter 40 only for the "ways, means, methods, and procedures." It, therefore, seems certain that the legislative intent was to provide that the SH&PWC should exercise its power of eminent domain in the manner prescribed in Article II of Chapter 40, but that an indirect limitation of the power itself was not contemplated. Neither Article I of Chapter 40, generally, nor N. C. GEN. STAT. §40-10 (1943), specifically, is concerned with "ways, means, methods, and procedure."

<sup>35</sup> Board of Education v. Forrest, 193 N. C. 519, 137 S. E. 431 (1927); Griffith v. Southern Ry., 191 N. C. 84, 131 S. E. 413 (1926); Carolina & N. R. R. v. Pennearden Lumber Co., 132 N. C. 644, 44 S. E. 348 (1903).

<sup>36</sup> N. C. GEN. STAT. §136-19 (1943) actually contains two distinct statutes, one passed in the initial act of 1921, dealing with the right to condemn for the state highway system; and the other passed in 1935, dealing with the right to condemn for the Blue Ridge Parkway. The two statutes are markedly dissimilar, and their codification into one section has wrought much confusion.

<sup>37</sup> The Code of 1883 placed what is now Article I in Chapter 38, Vol. I, entitled "Internal Improvements"; and placed what is now Article II in Chapter 49, Vol. I, entitled "Railroad and Telegraph Companies." The corporations delegated the power of eminent domain by Chapter 38 were to follow the procedure set out in Chapter 49.

<sup>38</sup> Rev. 1905, Chapter 61, Art. V; C. S. (1919), Chapter 33; N. C. GEN. STAT. (1943), Chapter 40.

Even if the exemption of dwellings, gardens, etc., were considered a way, means, method, or procedure, the same are to be applicable to the SH&PWC only insofar as "suitable for the purposes of this section." If the SH&PWC were forced to so locate its routes as to avoid every dwelling-house, garden, yard, kitchen, and burial ground encountered, the development of a state highway system would be seriously impeded. Such a result would hardly be compatible with the purposes of N. C. GEN. STAT. §136-19 (1943).

N. C. Sess. Laws 1947, c. 806, added a new subsection to N. C. GEN. STAT. §40-2 (1943) which, in effect, gives the SH&PWC the power to condemn land for facilities, a power not theretofore conferred upon it.<sup>39</sup> Inasmuch as the corporations listed in N. C. GEN. STAT. §40-2 (1943) are subject to the provisions of N. C. GEN. STAT. §40-10 (1943),<sup>40</sup> it would seem that in granting this additional power by amending N. C. GEN. STAT. §40-2 (1943), instead of by amending N. C. GEN. STAT. §136-19 (1943), the legislature intended to subject the power of condemnation for facilities purposes to the "dwelling house" limitation imposed in N. C. GEN. STAT. §40-10 (1943). But inasmuch as N. C. GEN. STAT. §136-19 (1943) grants the SH&PWC the power of eminent domain for highway purposes, and N. C. GEN. STAT. §40-2 (1943) grants only the additional power of eminent domain for facilities purposes, only that latter power should be limited by the provisions of N. C. GEN. STAT. §40-10 (1943). It is hardly probable that the legislature intended, by the 1947 amendment, to limit indirectly the broad powers of condemnation for highway purposes elsewhere conferred upon the SH&PWC.

LLOYD S. ELKINS, JR.

### Federal Income Taxation—Sale of Corporate Assets— Capital Gains Tax

When a corporation wishes to sell its assets the problem of capital gains taxable to the corporation arises. If there has been an appreciation in the value of the assets, as usually there has been, the selling corporation will be subject to a heavy capital gains tax on this appreciation, and, in addition, its stockholders will be subject to a capital gains tax on the proceeds of the sale when they are distributed, if the distribu-

<sup>39</sup> "The right of eminent domain may, under the provisions of this chapter, be exercised . . . by the bodies politic, corporation, or persons following. . . ."

<sup>39</sup> "9. The state highway and public works commission, for the purpose of acquiring such land or property as may be necessary for the erection of or addition to any building or buildings for the purpose of housing its offices, shops, garages, for storage of supplies, material or equipment, for housing, caring or providing for prisoners, or for any other purpose necessary in its work, including the administration of the state prison system."

<sup>40</sup> *Clifton v. Duplin Highway Comm'n*, 183 N. C. 211, 111 S. E. 176 (1922); *Raleigh, C. & S. R. R. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 180, 82 S. E. 5, 10 (1914).