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Real Property -- Recordation of Federal Condemnation Judgments in the County of the Condemned Land

Herbert T. Mitchell Jr.

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against the state, and, if so, whether the state had waived its immunity. Upon finding that the suit was against the state and that the state had not waived its immunity, the court dismissed the suit. It was unnecessary to rule on the question of diversity or federal question jurisdiction. In cases where the Eleventh Amendment has been waived by the state, jurisdiction can never be based on diversity of citizenship, but jurisdiction may be exercised on grounds of a federal question provided the complaint properly alleges that the suit arises under the United States Constitution, a federal statute or treaty.

If the court of appeals in the *Loves* case was correct in holding there was liability on the part of certain individual parties because of their violation of plaintiff's constitutional rights, then it is submitted that the school district should have been dismissed as a party.³¹ In that event the Eleventh Amendment would be no obstruction to the district court's jurisdiction. However, so long as the school district remained a party, it would seem that the court would have no jurisdiction on any grounds.

LOWRY M. BETTS.

Real Property—Recordation of Federal Condemnation Judgments in the County of the Condemned Land

The recent federal case of *United States v. Norman Lumber Co.*¹ has presented to attorneys still another obstacle to overcome in the long road of searching titles. This was an action brought by the federal government to determine title to certain lands and to recover the value of timber removed therefrom. In federal condemnation proceedings² in 1936 certain lands in Montgomery County, North Carolina were condemned. One Bruton and his heirs, the owners of the property here in question, were made parties to those proceedings. The judgment was docketed and cross-indexed in the office of the clerk of the United States district court, and docketed, indexed and cross-indexed in the office of the Clerk of Superior Court of Montgomery County, North Carolina, but in the latter the names of the Bruton heirs did not appear. The judgment was not registered in the office of the Register of Deeds of Montgomery County, although the judgment by its terms required that this be done. In 1951 the Bruton heirs executed a timber deed to the Norman Lumber Company who then began to remove the timber from the property in suit.

³¹ See *McCartney v. West Virginia*, 156 F. 2d 739 (4th Cir. 1946).

¹ *United States v. Norman Lumber Co.*, 127 F. Supp. 518 (M. D. N. C. 1955), *aff'd*, 223 F. 2d 868 (4th Cir. 1955).

² *United States v.* 1053.2 acres of land in Montgomery County, North Carolina. [As cited in the District Court opinion, 127 F. Supp. 518 (M. D. N. C. 1955).]

Although there were other matters involved in the original action, the main question became: "Must a federal judgment of condemnation of land be indexed and cross indexed in the county where the land lies in order to give notice to a purchaser for value without notice of the proceeding?"³ The district court answered this query in the negative and its decision was affirmed by the court of appeals.

The main reasons employed by these courts were generally as follows: (1) There can be no question that the condemnation proceeding in rem gave title to the United States good against the world, as well as the Bruton heirs;⁴ (2) The North Carolina statutes as to recordation and cross indexing of judgments have no application to federal judgments of condemnation unless an act of Congress so provides, and no such provision can be found.⁵ (3) The act authorizing federal condemnation in 1936⁶ did provide for conformity with state practice "as near as may be," but this conformity has been held to relate only to court procedure and not to registration of muniments of title.⁷ The court supported this view by stating: "That docketing and cross indexing of the judgment of condemnation in accordance with state law for the protection of possible purchasers from the condemnee was not regarded as a part of the procedure provided for by the old condemnation statute is properly inferable from the fact that no provision therefore is contained in Rule 71A, 28 U. S. C., which took the place of the statutory procedure."⁸ (4) The Lien of Judgments Act⁹ does not apply to federal condemnation proceedings. "Congress recognized the distinction in that it passed on the same day two separate and distinct statutes with respect to these matters. . . . If it had been the intention that the provisions of the Lien of Judgments Act apply to proceedings under the Condemnation Act it would have been easy enough to so provide; and the fact that no such provision was made indicates that nothing of the sort was intended."¹⁰

³ *Norman Lumber Co. v. United States*, 223 F. 2d 868, 870 (4th Cir. 1955).

⁴ *Ibid.*

⁵ *Norman Lumber Co. v. United States*, 223 F. 2d 868, 871 (4th Cir. 1955).

⁶ 25 STAT. 357, 40 U. S. C. 258 (1888).

⁷ *Chappell v. United States*, 160 U. S. 499 (1896).

⁸ *Norman Lumber Co. v. United States*, 223 F. 2d 868, 871 (4th Cir. 1955).

⁹ 25 STAT. 357 (1888), 28 U. S. C. 1962 (1948). "Every judgment rendered by a District Court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State Court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State."

¹⁰ *Norman Lumber Co. v. United States*, 223 F. 2d 868, 872 (4th Cir. 1955).

The court concluded that although the resulting situation would work a severe hardship on attorneys, the question "whether docketing and cross indexing of federal judgments of condemnation with state court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far, Congress has not seen fit to take action with regard to the matter."¹¹

This is, on the whole, a well reasoned and well supported decision; however, there is one area of possible weakness, and that is the holding of the court of appeals that the Lien of Judgments Act does not apply to a federal condemnation proceeding. The court sought to draw an inference that Congress did not intend the Lien of Judgments Act to apply to federal condemnation proceedings from the fact that the two statutes were passed on the same day and placed in different chapters of the Statutes at Large. A closer examination of the passage of these two acts indicates that there is little support for such an inference. The bills were introduced at different times,¹² were sent to different committees,¹³ discussed and amended on different occasions,¹⁴ and in none of the committee or floor discussions on either bill is there any reference made one to the other to indicate an intent to exclude condemnation proceedings from the scope of the Lien of Judgments Act. The only point of similarity in the legislative history of these acts is that the final reading and voice vote on the bills took place on the same day.¹⁵ This history, of course, does not indicate conclusively that Congress intended the Lien of Judgments Act to apply to federal condemnation proceedings, but neither does it seem to exclude the possibility of inferring such an intent, as was suggested by the court in the present case. Indeed, a possible inference contra to the court of appeals' ruling may be found in the Committee Report presented to the House of Representatives which stated: "The only purpose of the proposed legislation [Lien of Judgments Act] is to place judgments of

¹¹ *Ibid.*

¹² The Condemnation authorization was introduced in the House of Representatives on January 30, 1888. 19 CONG. REC. 805 (1888). The Lien of Judgments Act was introduced by the Judiciary Committee as a substitute for other bills that had been pending in Congress for two sessions on March 7, 1888. *Id.* at 1829.

¹³ The Condemnation authorization was referred to the Committee on Public Buildings and Grounds. 19 CONG. REC. 805 (1888). The Lien of Judgments Act was referred to the Judiciary Committee. *Id.* at 1829.

¹⁴ The Condemnation authorization was amended and passed by the House of Representatives on February 21, 1888. 19 CONG. REC. 1387 (1888) and amended and passed by the Senate on July 17, 1888. *Id.* at 6401. The Lien of Judgments Act was debated and passed by the House of Representatives on March 22, 1888. 19 CONG. REC. 2359 (1888) and debated and passed by the Senate on July 9, 1888. *Id.* at 6014.

¹⁵ Both acts were examined and signed on July 21, 1888. 19 CONG. REC. 6654 (1888).

State and Federal Courts upon a perfect equality in each state, and that the same provisions of State Law which regulate the docketing, registration, or recording of the judgments of the State Courts shall be made applicable to the judgments of the United States Courts, when authorized by the laws of such State."¹⁶ Also, in all of the recorded debate and discussion, covering a period of twelve years, concerning the adoption of Rule 71A, which replaces the old statutory condemnation proceedings, there appears to be no mention of any activity beyond the actual court procedure.¹⁷ From this the court inferred that cross indexing and registration of the judgment was not intended by the Congress to be necessary. However, it would seem equally as proper to infer that Congress intended for the Lien of Judgments Act to apply to federal condemnation and felt no necessity to repeat the same instructions in this new rule.

The Supreme Court of the United States, on appeal, might reverse this decision by disagreeing with the circuit court as to the applicability of the Lien of Judgments Act to federal condemnation proceedings. It appears from the record of debate on this act, the House of Representative Reports and the adoption of Rule 71A with its silence on this matter, that the Supreme Court, by taking a reasonable view of these factors, might properly infer that Congress did intend for the Lien Act to apply to federal condemnation proceedings. However, in the event that the Supreme Court upholds the circuit court's ruling on this point, the decision must be affirmed; for as Judge Hayes said in the district court decision: "It is true it imposes a severe hardship on attorneys undertaking to examine titles, to have to inquire at the office of the clerk of the United States district court before he can be sure there is no condemnation judgment entered there which is not recorded and cross indexed in the county where the land lies, but this inconvenience cannot outweigh the public interest in safe-guarding and protecting the property of the United States in accordance with the laws of the United States."¹⁸

If the Supreme Court affirms this decision, the obvious solution to the resulting inequities which necessarily follow is that suggested by Chief Judge Parker in the circuit court's opinion, *i.e.*, a clear mandate from Congress requiring that federal condemnation proceedings be indexed and recorded in the county where the land lies. Such a mandate should be enacted at once. The rights of the federal government still would be adequately protected, the prospective purchaser for value

¹⁶ *Id.* at 2359.

¹⁷ See 11 F. R. D. 213 (1952), discussing the adoption of Rule 71A.

¹⁸ *United States v. Norman Lumber Co.*, 127 F. Supp. 518, 521 (M. D. N. C. 1955).

would have proper notice, and the attorneys' duties would be eased and clarified.

HERBERT T. MITCHELL, JR.

Real Property—Riparian Rights

Because *Y* irrigated his cabbages and collards with the contaminated water of Beaverdam Creek, the North Carolina Commissioner of Agriculture secured an injunction to prohibit the sale or disposition of the crop. *Y* thereupon sued the defendant municipal corporations for negligently permitting sewage to pollute the creek. The North Carolina court reversed the judgment for damages below and said that the motion for nonsuit should have been allowed.¹ In the course of the opinion the court stated that riparian rights were not established in *Y* because he had no allegation in his complaint that he or his lessor was a riparian proprietor, neither allegation nor proof that he or his lessor had acquired a right to use the waters of the creek by prescription or adverse use, nor proof that he or his lessor had authority and license from an alleged riparian owner to use the water. The court then raised two important questions by quaere: (1) What is the physical extent of riparian land?² (2) Can a riparian owner transfer his riparian rights to a non-riparian owner for use on non-riparian land? This note is concerned with the problems raised by these questions.³

In the common law riparian states⁴ that have considered the first question, two theories have developed concerning the physical extent of riparian land. One doctrine is the watershed rule⁵ which requires land

¹ *Young v. City of Asheville*, 241 N. C. 619, 86 S. E. 2d 408 (1955).

² Land to be riparian must have the stream flowing over it or along its borders. *Stratbucker v. Junge*, 153 Neb. 885, 46 N. W. 2d 486 (1951). The land must be in actual contact with the water and mere proximity without contact is insufficient. *Kingsley v. Jacobs*, 174 Ore. 514, 149 P. 2d 950 (1944).

³ Any treatment of the prior appropriation theory of water rights or of the attainment of water rights by prescription or adverse use is beyond the scope of this note. The doctrine of prior appropriation is that the one who first diverts and applies to a beneficial use the waters of a stream has a prior right thereto, to the extent of his appropriation. 56 AM. JUR., *Waters* § 291 (1947). Prescription or adverse use is the acquiring of ownership of a water right by adverse use. The use must be continuous, uninterrupted, adverse and exclusive under a claim of right for the prescriptive period. 56 AM. JUR., *Waters* § 326 (1947).

⁴ There are two separate and distinct systems of water rights in the United States. One is the riparian doctrine which developed under the English common law. The other is the prior appropriation doctrine which developed in the arid western states of the United States. Generally the common law riparian doctrine is that each riparian proprietor is entitled to have the water course flow by or through his land in its natural course and quality, subject only to reasonable use by himself and other riparian proprietors. The prior appropriation doctrine is the doctrine that the first person to apply the water of a stream to a beneficial use is entitled to the full flow of the stream, whether he is a riparian owner or not. Agnor, *Riparian Rights in the South Eastern States*, 5 S. C. L. Q. 141, 143, 147 (1952).

⁵ Research indicates that the following states have the watershed theory: