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CASE NOTES

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CRIMINAL LAW — Validity of a Criminal Conviction in Absence of Counsel. — Defendant was charged with burglary, and counsel for his defense was appointed by the Superior Court of Delaware. Several days thereafter the defendant informed the court of his decision to employ his own attorney, and directed the judge to dismiss the appointed counsel. Consequently, counsel was discharged, and the defendant was informed that no new appointment would be forthcoming except by request. No attorney was employed by the defendant however, and no request was made to the court for a subsequent appointment. The jury trial was conducted without an attorney for the defense. Care was exercised by the judge to insure the defendant a fair trial, and every effort was made to inform him of the nature of the proceedings. The jury returned a verdict of guilty and thereafter the court informed the defendant of his right to file motion for a new trial. On appeal, HELD: Affirmed. Where the defendant is given ample opportunity to avail himself of counsel but fails to do so, and the trial is not unfair, there is no reason to set aside the conviction. *Draper v. State,* 166 A. 2d 217 (Del. 1961).

Originally in England a person charged with treason or felony was not permitted the services of an attorney. However, parties in civil cases or those accused of misdemeanors were entitled to full assistance of counsel. The rule was abolished as to treason in 1688 but no right to counsel in a felony was allowed until 1836, when it was granted by an act of Parliament. *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158 (1932). The value of counsel in the promotion of justice was held in such high esteem in the newly created United States that the right to be represented was firmly embedded in its Constitution, and applied to federal cases. U. S. CONST. amend. VI. The United States Supreme Court held that denial of counsel in state courts, where a capital offense is involved, may be a violation of the fourteenth amendment's "due process clause." *Powell v. Alabama, supra; Adams v. Rager,* 172 F. 2d 693 (7th Cir. 1949). Consequently, all states have provided either by statute or constitution for appointment of counsel to indigent accused in capital cases, and a

majority of states have extended this appointment to lesser offenses; Alabama, Massachusetts, Mississippi, Pennsylvania, and South Carolina were not included in this group. 30 Miss. L.J. 319 (1959). Regardless of statutory provisions, the United States Supreme Court has required the state to appoint an attorney in cases where the circumstances of the proceedings were so complex that a fair trail for the defendant was impossible in absence of counsel. *Rice v. Olson,* 324 U. S. 786, 89 L. Ed. 1367 (1945). The failure of the court to protect the defendant's interest in absence of counsel has been ruled a violation of due process. *Gibbs v. Burk,* 337 U. S. 773, 93 L. Ed. 1686 (1949). The defendant may expressly or impliedly waive his right to counsel, *Bowman v. Alvis,* 88 Ohio App. 229, 96 N. E. 2d 605 (1950); *In re Bunson,* 152 Ohio St. 375, 89 N. E. 2d 651 (1949), and it has been held that if not claimed, this right is waived. *People v. Burnett,* 407 Ill. 269, 95 N. E. 2d 319 (1950); *People v. Reese,* 410 Ill. 11, 100 N. E. 2d 907 (1951). The trial court may offer counsel, and if declined by defendant, the trial may proceed without jeopardizing the validity of a subsequent conviction. *State v. Hamilton,* 163 La. 389, 111 So. 795 (1927). The defendant may decline a court-appointed counsel and obtain his own attorney, but this must be done seasonably. *People v. Zucker,* 2 Cal. 112, ___ P. 2d ____ (1960). Therefore, if he fails to secure counsel, and is subsequently convicted, this is no ground for reversal. *Watkins v. Commonwealth,* 174 Va. 518, 6 S. E. 2d 670 (1940); *Draper v. State, supra.*

In view of the development of the law concerning the right of the accused to be represented by counsel, it would seem that the Delaware court exercised sound legal judgment in finding that there was no error in the *Draper* case. The defendant was given the benefit of an appointed attorney, but apparently had no desire to avail himself of this right. His request that he be allowed to obtain his own lawyer was honored, but not seasonably exercised. Under these circumstances the court was not in error in proceeding with the trial. There are no facts to indicate unfair treatment of the defendant in absence of an attorney, and no evidence that during the trial defendant objected to the lack of counsel. The defendant's position is reflected in a statement borrowed from an old saw: "A horse led to water should not complain if he does not drink."

HARRY L. EDWARDS.

CONSTITUTIONAL LAW — Eminent Domain — Power to Condemn Private Property for Resale to Private Enterprise. — Pursuant to authorization by the Colorado Urban Renewal Act, the Denver Urban Renewal Authority proposed to acquire a substantial part of the properties within a project area by either purchase or condemnation, and thereafter, to sell a majority of the properties to private enterprises. Plaintiff, a property owner in the project area attempted to enjoin the Renewal Authority from proceeding with the project, attacking the act on the grounds that it violated the Colorado constitution. Plaintiff's preliminary motions were refused. On appeal, HELD: Affirmed. The Urban Renewal Act was not in violation of the state constitution, the taking being for public use. *Rabinoff v. District Court,* 358 P. 2d 879 (Colo. 1961).

It is a universally established rule that private property cannot be taken by eminent domain except for public use. *Berman v. Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954); *United States ex rel. TVA v. Welsh,* 327 U. S. 546, 90 L. Ed. 843 (1946). Originally, to constitute a public use there had to be more than a mere benefit from the contemplated improvement; the public had to be entitled to use or enjoy the property by right. *Gaylord v. Sanitary Dist.,* 204 Ill. 576, 68 N. E. 522 (1903); NICHOLS, EMINENT DOMAIN 430 (3d ed. 1950). Thus, the terms "public use," "public purpose," and "public benefit" were not considered synonymous. *Edens v. City of Columbia,* 228 S. C. 563, 91 S. E. 2d 280 (1956); *Bookhart v. Cent. Elec. Power Corp.,* 219 S. C. 414, 65 S. E. 2d 781 (1951). Yet, under early decisions, the acquiring of slum areas, accompanied by the erection of low-income housing developments, was held to be a public use. *Zurn v. Chicago,* 389 Ill. 114, 59 N. E. 2d 18 (1945); *New York Housing Authority v. Muller,* 270 N. Y. 333, 1 N. E. 2d 153 (1936). Residential slum clearance, as a distinct and separate act, has been held to be a public use in itself. *Papadinis v. City of Somerville,* 331 Mass. 627, 121 N. E. 2d 714 (1954); *Foeller v. Housing Authority,* 198 Ore. 205, 256 P. 2d 752 (1953). Some courts have said that the use of eminent domain under urban renewal statutes was strictly limited to slum areas. *Crommett v. City of Portland,* 150 Me. 217, 107 A. 2d 814 (1954); *Bristol Redev. & Housing Authority v. Denton,* 198 Va. 171, 93 S. E. 2d 288 (1956). However, others have decreed that prop-

erty may be taken by eminent domain for purposes other than slum clearance, provided that a compelling economic community need is being met. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369 (1896); *Oliver v. Clairton*, 374 Pa. 333, 98 A. 2d 47 (1953). Unimproved land and structures that are not substandard have been taken, in an area of slum, for public use; *Ghold Realty Co. v. Hartford*, 141 Conn. 135, 104 A. 2d 365 (1954), and public use has also been found to exist in the taking of so called vacant blighted areas—areas which, because of unpaid taxes, outdated zoning or inadequate community planning were standing idle. *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N. E. 2d 826 (1953). Since the acquisition of areas found to be detrimental to the public welfare was a proper public purpose, *Herzinger v. Mayor & City Council*, 203 Md. 49, 98 A. 2d 87 (1953), it follows that only the taking of the property, as distinguished from the subsequent use, need be in the public interest in order to constitute a public use. *People ex rel. Adamowski v. Chicago Land Clearance Comm'n*, 150 N. E. 2d 792 (Ill. 1958); *Schenck v. City of Pittsburg*, 364 Pa. 31, 70 A. 2d 612 (1950). Only one state, South Carolina, continues to subscribe to the narrow concept of public use and has refused to permit the acquisition of blighted areas if they were to be resold to private enterprises. *Edens v. City of Columbia, supra; Riley v. Charleston Union Station Co.*, 71 S. C. 454, 51 S. E. 2d 485 (1904).

The instant case agrees with the majority of the decisions in other jurisdictions and evidences the fact that absent private financial investments and the use of public powers of eminent domain that are contemplated by the urban redevelopment acts, slum and blight areas will not be cleared and returned to a socially useful role. The use of local police powers or private enterprise alone cannot effectively accomplish a program of blight clearance and redevelopment. Traditional notions of land use and development, as well as judicial precedent, support the concept of redevelopment by private enterprise of slum and blight areas that have been condemned and cleared by local public authorities. Remembering that this redevelopment is subject to rigid public control, it may be regarded as a proper instrument for the implementation of the public aims and uses envisaged in the urban redevelopment program. Since its one major purpose is the

elimination and rehabilitation of the blighted sections of municipalities, urban renewal certainly falls within any conception of public use, for nothing can be more beneficial to a community as a whole than slum clearance, public health, public safety, prevention of crime and juvenile delinquency. There is no apparent reason, therefore, why progress in the execution of this program should be impeded by adverse judgments as to its constitutionality, since the objectives of urban redevelopment are tailored exclusively for public use.

WILLIAM B. ENDICTOR.

TORTS — Survival Statute — Funeral Expenses Not Collectible. — The administrator of the decedent's estate brought an action under the Survival Statute to recover for conscious suffering, and medical and funeral expenses of the deceased. Defendant made a motion to strike the word "funeral" from the complaint. The trial judge granted the motion and the plaintiff objected and subsequently appealed. HELD: Affirmed. Funeral expenses were not recoverable under the Survival Statute. *Gowan v. Thomas,* 237 S. C. 223, 116 S. E. 2d 761 (1960).

The rule at common law that an action in tort dies with the deceased, *Baker v. Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (N. P. 1808), was changed in England by Lord Campbell's Act in 1846. *Fatal Accidents Act,* 1846, 9 & 10 Vict. c. 93. However, the English have not allowed recovery for funeral expenses under their act as there was no expressed provision in the act which would modify the common law. *Dalton v. South Eastern Ry.,* 4 C. B. (n. s.) 296, 140 Eng. Rep. 1098 (C. P. 1858); *Clark v. London Gen. Omnibus Co.,* (1906) 2 K. B. 648. One interesting view in America is that death is inevitable and the wrongdoer merely advances the time for payment of the funeral expenses and is not liable therefor. *Bradley v. Haw,* 187 Iowa 501, 174 N. W. 331 (1919); *Florida E. C. Ry. v. Hayes,* 67 Fla. 101, 64 So. 504 (1914). However, this view is not in accord with the greater weight of authority and is not the law in South Carolina. *Tollerson v. Atlantic Coast Line R. R.,* 188 S. C. 67, 198 S. E. 164 (1936); *Petrie v. Columbia & G. R. R.,* 29 S. C. 303, 7 S. E. 515 (1887). Statutes in the United States, patterned after Lord Campbell's

Act, vary widely; and South Carolina has both a Survival Act, CODE OF LAWS OF SOUTH CAROLINA, § 10-209 (1952) and a Wrongful Death Act, CODE OF LAWS OF SOUTH CAROLINA, § 10-1951 (1952). The two statutes provide for two entirely different causes of action and cannot be joined in the same suit. *Grainger v. Greenville S. & A. Ry.*, 101 S. C. 399, 85 S. E. 968 (1915); *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S. C. 27, 81 S. E. 189 (1913). However, there is authority to the effect that the two actions should be permitted to be joined in the same suit. *Brown v. Chicago & N. W. Ry.*, 102 Wis. 137, 78 N. W. 771 (1899). Under the Survival Act, the administrator sues in behalf of the estate of the deceased for damages done to the deceased before death; however, under the Wrongful Death Act the suit is brought for the direct benefit of the statutory beneficiaries for damages done to them by the wrongful death of the deceased. *In re Estate Mayo,* 60 S. C. 401, 38 S. E. 634 (1901); *St. Louis & S. F. R. R. v. Goode,* 42 Okla. 784, 142 Pac. 1185 (1914). The Survival Act permits survival of those actions that the deceased could have brought during his lifetime against the tortfeasor. *Claussen v. Brothers,* 148 S. C. 1, 145 S. E. 539 (1928); *Mahoning Valley Ry. Co. v. Van Alstine,* 77 Ohio 395, 83 N. E. 501 (1907). Naturally, the deceased cannot sue for his own funeral expenses before he dies. The Wrongful Death Act has been interpreted to include funeral expenses where they have been paid by the beneficiary. *Petrie v. Columbia & G. R. Co., supra; Tollerson v. Atlantic Coast Line R. R. Co., supra.* Under a similar statute it has been held that payment was not necessary as long as the beneficiary was obligated to pay. *Wyland v. Twin Falls Canal Co.,* 48 Idaho 789, 285 Pac. 676 (1930); *Thompson v. Cooper,* 192 Okla. 240, 135 P. 2d 52 (1943). In South Carolina, the estate is primarily liable for the funeral expenses of the deceased. *Waters v. Register,* 76 S. C. 132, 56 S. E. 849 (1907); *Mease v. Wagner,* 1 McCord 395 (1821); *In re Johnson's Estate,* 198 S. C. 526, 18 S. E. 2d 450 (1941). However, South Carolina provides for recovery by the statutory beneficiaries, *Petrie v. Columbia & G. R. R. Co., supra,* and leaves the estate without a cause of action by refusing to allow recovery of funeral expenses under the Survival Act. *Radobersky v. Imperial Volunteer Fire Dept.,* 368 Pa. 235, 81 A. 865 (1951); *Spillman v. Weimaster,* 275 Mich. 93, 265 N. W. 787 (1936).

Notwithstanding that the estate, and not the statutory beneficiaries, is primarily liable for the funeral expenses of the deceased, this decision has left the estate without a remedy against the tortfeasor for funeral expenses. The Court following a prior interpretation of the survival statute, said that the estate could collect only such damages as the deceased could have collected had he lived; however, the question of the collectibility of funeral expenses was not before the Court in the *Claussen* case and, although the interpretation was persuasive, it should not have been controlling in this case. Where the statutory beneficiaries have paid the funeral expenses, South Carolina has allowed them to recover said expenses, under the Wrongful Death Act, and no fault can be found with this proposition of law. However, it is conceivable that a deceased person may leave an estate and not leave any statutory beneficiaries under the Wrongful Death Act. Under such circumstances there is no way provided, under the present state of the law in South Carolina, for the funeral expenses to be collected from the tortfeasor. The Court wisely pointed out that the tortfeasor should not have to pay double funeral expenses (once under the Survival Act and once under the Wrongful Death Act). Therefore, if the statutory beneficiaries have paid or obligated themselves to pay, a recovery for funeral expenses from the tortfeasor by them should bar recovery for the same expenses by the estate. Conversely, if the estate were allowed to recover the funeral expenses, the statutory beneficiaries should be barred from a like recovery. The estate should be granted by the legislature the right to recover, thereby allowing the estate or the statutory beneficiaries (depending upon which is out of pocket for the funeral expenses) to recover the same from the tortfeasor. It is interesting to note that there is now pending a bill in the South Carolina legislature to allow recovery of funeral expenses under the Survival Statute. H. 1212, 94th Gen. Assembly 1st Sess. (1961). Said bill has been passed by the House and is now in the Senate Judiciary Committee.

JAMES O. DUNN.