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Jury: Impairment of right: Provision for determination of necessity for taking private property held unconstitutional

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properly characterized the nature of the crime committed by the defendant, if guilty, is a matter upon which the judgment of men may well differ.

It appears that the holdings of the instant case and that of the *Meyers* case clash to some degree. It is true that the statement, "the only other way to handle this matter was to kill him," is sensational, but likewise is the statement about the crimes of the Huns. Such statement coupled with a direct accusation of the defendant, alleging defendant's guilt, would seem, under the rule of the *O'Neil* case, to be prejudicial error. It appears that the Supreme Court, in the instant case, is taking a precautionary measure to keep the zeal of the district attorney within bounds, and is seeking to impress upon the minds of those officers that the zeal for justice, rather than the zeal for conviction, should actuate their conduct throughout criminal prosecutions and particularly in their closing arguments to the jury.

LAWSON ADAMS

Jury—Impairment of right—Provision for determination of necessity for taking private property held unconstitutional.—A procedure which has been consistently followed in condemnation proceedings by the City of Milwaukee for eighty-seven years was given its death blow by the Wisconsin Supreme Court in granting a writ of prohibition in the case of *State ex rel. Allis v. Wiesner et al.*[1] The bone of contention was the determination of the question of necessity in the exercise by the municipality of the power of eminent domain. At common law this was, and in several states still is, considered a question for the legislature[2] and the usual method was by the appointment of a commission or similar inquisitorial body. Under the Village Charter[3] granted by the Territorial Legislature in 1838 the determination of necessity was left with the Village Board of Trustees. By the City Charter[4] granted by the Territorial Legislature in 1846 this question was left to the Common Council. Consequently it is not surprising to note that in the first draft of the Wisconsin Constitution in 1846 no mention was made of the determination of the question of necessity in condemnation proceedings. However, an amendment[5] was offered which was adopted and became section 2 of Article XI of the Wisconsin Constitution. It reads: "No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." During the argument upon the amendment no doubt was left as to the end desired. The whole object of it was to restrain municipal corporations from taking property at their discretion as they had done theretofore.

In attempted compliance with the Constitution the City Charter granted by the State Legislature in 1852 provided for the appointment

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[1] 187 Wis. 384, 204 N. W. 589.

[2] Eminent Domain, 20 C. J. 624, *State ex rel Baltzel v. Stewart* 74 Wis. 620 (629), 43 N. W. 947, 6 L.R.A. 394, *Wisconsin Water Co. v. Winans*, 85 Wis. 26 (39), 54 N. W. 1003, 39 Am.S.R. 813, 20 L.R.A. 662.

[3] Sec. 8, Act 56 Territorial Legislature passed Jan. 18, 1838.

[4] Act to Incorporate the City of Milwaukee, passed Jan 31, 1846.

[5] Journal of Constitutional Convention, 1848, p. 478.

of "twelve reputable freeholders, residents of the city, but not residents of the ward in which the premises may lie, nor interested in the result of such application", to view the premises and determine the necessity for their taking and make return to the common council. With certain addition to the powers of this "jury" the procedure has remained the same in the subsequent revisions of the City Charter in 1874, 1887, and 1911.

That the members of the Constitutional Convention were blessed with a happy foresight is illustrated by the case of *State v. Wiesner,* referred to above. Notice was given to the relator that application would be made to one of the circuit judges "for the selection of a jury to view the premises and to determine whether or not it is necessary to take said premises for the purposes specified", which the resolution of the common council declared to be for the purpose of an addition to Juneau Park. A panel of twenty-four freeholders was selected by the judge (it is worthy of note that the circuit judges of Milwaukee County have consistently held that they do not sit as a court in these proceedings) and each side allowed six strikes. Over the objection of the relator, twelve men were finally selected, and after receiving certain instructions from the judge which were not, as such, objected to because they were in strict accordance with the provisions of the City Charter, proceeded to view the premises. The "jury" were informed that they were then to conduct the inquiry of their own initiative, hearing such evidence as was offered by interested parties, and with power to subpoena whatever witnesses they might deem necessary, and that either of their number or the city attorney could administer the proper oath. They were further advised that it was unnecessary to reduce evidence to writing or to return the same with their report. The result was that the jury entrusted the notice of hearing to the City Attorney and arranged that said hearing be held in the office of the City Attorney. It was this "stacking of the cards" that the relator property-owner contended was against the letter and spirit of the Constitution, The relator contended that a verdict of a jury under Article XI, Section 2, must be a finding under the guidance of a court of competent jurisdiction, presided over by a judge qualified to instruct the jury in matters of law, and to pass upon the competency, relevancy and materiality of all testimony submitted, and that the jury must receive some instruction regarding the probative value of the testimony. Moreover, since no appeal was provided by law, without transcript of evidence a writ of certiorari would be ineffective.

The sole question considered by the court was whether this body, thus congregated, was a jury or a mere inquisitorial body. The consequent questions of what was a verdict of a jury, or whether a jury trial was intended by the Constitution were not decided, since it was held that this body was not a jury, and a writ of prohibition, forbidding them to act further in these proceedings, was granted.

In rendering this decision, Rosenberry, J. says,

> Having in mind the state of the law at the time of the adoption of the constitution, it is not conceivable that the framers of that document intended to use the term "jury" other than as applicable to a body of twelve men charged with the duty of finding certain facts under the direction of a court. Had the framers of the constitution intended to provide for a jury of inquest, one quite as well known at the common law as a petit jury, they would have used that term.

Two noteworthy contentions were advanced by the able counsel for the city in a futile attempt to maintain the position of their predecessors: (1) that the term "jury" was loosely used at the time of the adoption of the constitution, and (2) that the uniform interpretation given to a constitutional provision for a number of years must be followed. The first is sufficiently answered in the words of the court, quoted above. As to the second, the court held that this rule applied only where there was an ambiguity in the constitutional provision. Here the clause was clear and unambiguous and this rule had no application.

WILL C. GOBEL

Wills: Effect of a provision that testator should be deemed, in the event of death in common disaster of the testator and wife, to have predeceased his wife.—*In the Matter of the Will of Charles F. Fowles.*[1] The will of the testator provided that if he and his wife should die in a common disaster in such circumstances as to render it impossible to determine who died first it should be 'deemed' that he predeceased his wife and all provisions of the will were to be construed on that assumption. It was further stipulated that his wife was to receive part of the residuary estate in trust for life with the right to dispose of part of the share by her will. They both lost their lives in a disaster at sea, and there was no evidence showing which was the survivor. The court, however, permitted the testator's self-enunciated presumption to prevail and the provisions of the will were given effect as though it were indisputably established that he actually did predecease his wife. Admitting that there is no legal presumption that one survived or outlived the other[2] and the party alleging survivorship must prove it by some competent evidence,[3] the court sees no objection in carrying out the testator's instructions. Crane, J., in speaking of the above principles, voices the opinion of the court in these words:

> But this is no more than saying that the courts are limited in knowledge of events the same as individuals; that where no one knows who died first the courts likewise cannot determine. It is no positive rule of law; it is a lack of one; the expression is a mere declaration of a fundamental principle of our jurisprudence, —that the facts must be proved. The only facts that can be proved are the sinking and the death. Our law goes no further; it indulges in no fictions or presumptions. Fictions and presumptions are means to an end in the absence of proof. The necessity for the creation of a fact by the "ipse dixit" of the court has never been felt by us in cases like this.

By the civil law in cases of dispute about survivorship in the cases of common disasters, persons who by reason of age or sex or state of health were deemed best fitted in a struggle for their lives were presumed to be the survivors.[4] But this is not the rule of the common law, being objectionable because of its apparent lack of certainty.[5]

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[1] *222* N. Y. *222*; 118 N. E. 611.

[2] Jones, Evidence 3rd Ed. Sec. 64.

[3] Newell v. Nicholls, 75 N. Y. 78. *St. Johns v. Andrews Inst.* 191 N. Y. 254; 83 N. E. 891.

[4] 10 L. R. A. 550.: *Matter of Herman* 156 N. Y. 688, 171 App. Div. 26. Notes 51 L. R. A. 864: 41 Am. Dec. 522,: 104 Am. St. Rep. 210.

[5] *Middeke v. Baeder,* 198 Ill. 590, 64 N. E. 1002: 92 Am. St. Rep. 284: 59 L. R. A. 653.