

for the payment of interest and collection fees on delinquent taxes and that the county treasurer has no obligation for the collection thereof.

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CONDEMNATION PROCEEDINGS: Qualifications of commissioners.
COUNTIES: Board of Supervisors, members of
LEGISLATURE: Members of

Members of the state legislature or the county board of supervisors may not serve as members of condemnation boards, being unable to meet the requirement of disinterestedness in the outcome of the proceedings in which the condemnation board participates.

No. 4600

December 4, 1967.

Honorable James N. Callahan
State Representative
The Capitol
Lansing, Michigan

You have asked my opinion on the question whether a state legislator or a member of a county board of supervisors can accept appointment to a condemnation board.

Article XIII, Section 2 of the Michigan Constitution of 1908, provided in pertinent part as follows:

“When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: *Provided*, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.”

This section has been omitted from the Michigan Constitution of 1963, which, at Article X, Section 2, provides in part as follows:

“Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. . . .”

Certain statutes as enumerated hereinafter still constitute “provision by law” whereunder qualified individuals may serve as members of boards of commissioners in condemnation proceedings. These statutes are as follows:¹

¹ We omit discussion of statutes dealing with the condemnation powers of railroad corporations, depot corporations and power and supply companies as not within the scope of the opinion request.

C.L. 1948 § 213.3; M.S.A. 1958 Rev. Vol. § 8.3, a part of Act 236, P.A. 1911, as amended, being an act to authorize proceedings by the state to condemn private property for public use, provides for appointment by the court of 3 commissioners,

“. . . residents and freeholders within the county, not interested or of kin to any of the persons interested in the land to ascertain and determine the necessity of the proposed public use, . . .”

C.L. 1948 § 213.183; M.S.A. 1958 Rev. Vol. § 8.184, a part of Act 352, P.A. 1925, as amended, being an act to provide for the purchase and condemnation of private property for public highway purposes, provides in pertinent part as follows:

“. . . the court shall also, unless sufficient cause to the contrary be shown, appoint three [3] disinterested persons commissioners, herein called court commissioners, whose duty it shall be to appraise the damages to be paid as compensation for the taking of the property described in the petition, in respect to which an appearance is made, for highway purposes. Said commissioners shall not be residents of the township in which the property sought to be taken is situated. . . .”

It is noted that Act 295, P.A. 1966, an act to provide for the purchase and condemnation of property for public highway purposes by boards of county road commissioners and the state highway commission (M.S.A. Cur. Mat. § 8.261(1) *et seq.*) specifically provides at Section 31 that it does not directly or by implication repeal or amend any other condemnation act or part thereof.

I therefore conclude that the 1966 act, which deals with the same subject matter and which does not provide for the appointment of commissioners, does not repeal Act 352, P.A. 1925, as amended, either directly or by implication.

At 5 *Mich. Law and Practice Encyclopedia* “Condemnation,” Section 107, p. 551, is found the following comment:

“The commissioners must be disinterested persons, . . .”

In *Glass v. State Highway Commissioner*, 370 Mich. 482 (1963), it was held that an employee of the Highway Department had an interest in the outcome of a condemnation proceeding such as was sufficient on timely demand to call for his disqualification as commissioner.

Mr. Justice Black, writing for a unanimous court, noted at p. 485 that upon institution of the proceedings (to condemn land for state highway purposes) the landowners demanded that a special deputy highway commissioner disqualify himself as an interested person from hearing and determining the necessity of taking their property for highway purposes.

“. . . Such demand was planted, of course, upon the right to due process as guaranteed by like provisions of the Federal and State Constitutions. See Const. 1908, art. 2, § 16, and United States Constitution, Am. 4. The demand was overruled.

* * *

(p. 486)

“ . . . The reviewable question is posed by stipulation of the parties:

“Does due process require that an employee on the payroll of the State highway department disqualify himself from conducting and presiding at the hearing on necessity when such action is requested prior to the hearing by counsel for the land owners?”

“What was written in *Lookholder v. State Highway Commissioner*, 354 Mich. 28—at 32 and 33—has foreshadowed an affirmative answer. Mr. Hart was an interested ‘person’; interested to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, a part of which planning was the taking of appellants’ property. The case presents another instance of that which Alexander Hamilton had in mind when he wrote the quotation in *O’Donoghue v. United States*, 289 U.S. 516 at 531 (53 S. Ct. 740, 77 L. ed. 1356):

“In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”

“Upon such premise it is ruled that Mr. Hart’s refusal to disqualify himself operated to deprive appellants of the process that was due them. Decision is controlled by *Tumey v. Ohio*, 273 U.S. 510 (47 S. Ct. 437, 71 L. ed. 749, 50 A.L.R. 1243), and *In re Murchison*, 349 U.S. 133 (75 S. Ct. 623, 99 L. ed. 942), followed in *Lookholder, supra*. The supreme court said, in *Murchison* (at 136):

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that “every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. ed. 749, 758, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. ed. 11.”

“Such reasoning applies equally to Michigan’s assurance of due process. The right is no less forceful when a man’s property rather than his liberty is threatened. Our judgment, then, is that Mr. Hart had ‘an interest in the outcome’ of this proceeding. That was sufficient on timely demand to call for his disqualification as a presiding and deciding commissioner, and for the calling in of a circuit court commissioner under foregoing section 4a. Indeed section 4a provides a ready means for avoidance even of the ‘appearance’ of injustice. *Offutt* and *Murchison* make avoidance both judicially and constitutionally desirable.”

Upon the same reasoning it is clear that the presence in a condemnation proceedings in which the people of the state are interested in the acquisition of property being condemned of a representative of the people of the state would constitute a deprivation of due process, owing to the interest of the people's representative in the acquisition of the property sought to be condemned at the lowest possible cost to his constituents.

Similarly, the presence in such condemnation proceedings of a member of the county board of supervisors would taint the condemnation proceedings with respect to due process, since the county represented by the member of the county board of supervisors would have a direct or indirect interest in the acquisition by the public of the property sought to be condemned.

With respect to the legality of a state legislator accepting appointment as a member of a condemnation commission, the provisions of Article IV, Section 9 of the Michigan Constitution of 1963 would alone suffice to prohibit such appointment. It provides:

"No person elected to the legislature shall receive any civil appointment within this state from the governor, except notaries public, from the legislature, or from any other state authority, during the term for which he is elected."

With respect to the acceptance of such appointment by members of boards of county supervisors, the functions of condemnation commissioner, being subject to and part of court action under judicial control, would be incompatible, by reason of the fact that the supervisors determine whether and to what extent circuit and probate judges receive, from county funds, compensation in addition to that paid by the state. (Section 555 of Act 236, P.A. 1961 as last amended by Act 252, P.A. 1966; M.S.A. Cur. Mat. § 27A.555) (Section 4 of Chapter 1, Act 288, P.A. 1939 as last amended by Act 315, P.A. 1966; M.S.A. Cur. Mat. § 27.3178(4)).

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