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Eminent Domain: Corduroy Road to Ohio's Super Highways

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NOTES

Eminent Domain: Corduroy Road to Ohio's Super Highways

Is Ohio bogged down with an antiquated method of obtaining property?

Signs along Ohio's highway which read: "Begin Construction Area — Ohio Department of Highways" are daily increasing in number. The steady influx of industry with a correlative increase of population has necessitated an increase of highway facilities. Added impetus to this expansion program is being afforded by the Federal Aid for Highways program in which Ohio is participating.[1] Whether the pattern for long range highway development finds realization in the widening of an existing road or calls for the establishment of a completely new location, the acquisition of real property is generally required to provide a sufficient right-of-way. Such acquisitions may be completed by simple negotia-

[1] See American Bar Association, *Municipal Law Service Letter* p. 1 (October 1957). "The Federal-Aid Highway Act of 1956 made available for highway construction, in cooperation with the State Highway departments, the sum of 34 billion dollars to be expended in the next 13 years. Of that sum, it is expected that approximately 5 billion dollars will be needed for the purchase of right-of-way for highways alone. It has been estimated that approximately 15 billion dollars would be needed for highway right-of-way to bring all roads and streets up to tolerable standards of adequacy. Even though but a small percentage of the land acquired will have to be condemned, the number of condemnation cases will be greatly increased."

tion with the property owner, or through the assistance of judicial proceedings — either method has its attendant problems.

Discussion with jurists, attorneys, and real estate agents representing both the state and private owners has revealed the existence of two major interrelated problems: First, the public reaction to the new evaluation-negotiation procedure effective July 31, 1958, and second, what will be the court's ruling as to an apparent inconsistency regarding the "view of the premises" found in sections 5519.02 and 5519.03 of the Ohio Revised Code. The scope of this note will be a presentation of these two topics and a submission of proposals for future procedural legislation which emanate from the discussion.

The Eminent Domain Concept

The right of the sovereign to acquire property for public use upon making just compensation is known as the right of eminent domain. It is the superior right of property subsisting in a sovereignty, by which private property may be taken or its use controlled for the public benefit, without regard to the wishes of the owner.[2] This power of eminent domain — like the power of taxation and the police power — belongs to the state as a sovereign. These three powers have been referred to as the "state's power plant."[3] The existence of these powers is independent of the Constitution, but the Constitution, recognizing their existence, has limited and regulated their exercise by the state.[4] Within this constitutional boundary the right of eminent domain lies dormant in the state until legislative action calls it forth. The right may then be exercised by the state itself or may be delegated to a corporation or individual to whom has been delegated some public duty or function. In either event, the legislature prescribe such regulations as it deems necessary to protect the interests of the people. To assure this result, the power may only be exercised in strict compliance with the manner prescribed.[5] Although condemnation proceedings are judicial proceedings, within the

[2] OHIO REV. CODE c. 2709 (Definition).

[3] New York City Housing Authority v. Muller, 270 N.Y. 333, 341, 1 N.E.2d 153, 155 (1936).

[4] People *ex rel.* Burhans v. City of New York, 198 N.Y. 439, 446, 92 N.E. 18, 20 (1910) and Matter of City of New York, 190 N.Y. 350, 354, 83 N.E. 299, 300 (1907) "The legislature may require the donee of the right to do more than is demanded by the constitution, but it may not permit less to be done."; People v. Adirondack Ry. Co., 169 N.Y. 225, 237-38, 54 N.E. 689, 692 (1899), *aff'd*, 176 U.S. 335 (1900) "Within those boundaries the state, acting through the department which exercises the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interferred with by other departments of government."

[5] United States v. Westinghouse Electric & Mfg. Co., 339 U.S. 261 (1949)

scope of this statutorily controlled power[6] the Ohio Department of Highways determines its own policy, and thus the negotiation proceedings are administrative in actual practice. If the property owner is satisfied with the award determined by the department appraisal, the condemnor may have no need to resort to the courts. If the condemnee interposes objections as to what the department has regarded as a fair value of the property taken, the proceedings are thereafter entirely judicial in scope and character, and are *in rem*—binding on all persons having any interest in the property taken.[7]

It is obvious that these preliminary negotiations may have an important effect on the number of cases entering the courts for an ultimate determination of what is "just compensation."

NEGOTIATION WITH THE PROPERTY OWNER

Understanding the meaning of "just compensation" is an important prelude to a study of the department's negotiation procedure. "Just compensation" is an assurance guaranteed under the fifth amendment of the United States Constitution[8] as a restriction on the federal courts. Under the fourteenth amendment of the United States Constitution, the federal government guarantees that no state shall deprive an individual of his life, liberty or property without due process of law.[9] Practically every state in the Union contains an express constitutional prohibition against the taking of private property for public use without compensation.[10] Compensation implies remuneration, payment in money, indemnification for a loss, but to whom does the "just" refer — to the condemnor, the owner, or both? The courts refer to "just compensation" as a full indemnity[11] for the loss sustained by the owner of the property taken for the public use, or the full equivalent to place the owner in as good a condition pecuniarily as he would have been if the property had not been taken. Actually when the courts refer to "just compensation" they mean *fair market value,* which is generally defined as the price which a willing buyer and a willing seller, both of whom are free to act and are under

[6] §§ 5519.01-.05 (1957).

[7] Sowers v. Schaeffer, 152 Ohio St. 65, 87 N.E.2d 257 (1949).

[8] "No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without *just compensation.*" (Emphasis added).

[9] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573 (1898).

[10] North Carolina, which is the only state without such an express constitutional guarantee, recognized this fundamental right to just compensation as founded on natural justice in City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207 (1942).

[11] Kane v. Chicago, 392 Ill. 172, 64 N.E.2d 506 (1946); Matter of City of New York (Waterfront), 190 N.Y. 350, 83 N.E. 299 (1907).

no compulsion, would agree upon. Obviously the definition raises more questions than it answers,[12] and, like any rule, is easy to state but often difficult to apply. In *Grant v. Hyde Park*[13] the Ohio Supreme Court recognized that there can be two elements to be considered in valuation of the property. First, value of the property actually taken, and second, damage to the residue. Armed with the *fair market value* definition and the rule in the *Grant* case the Department of Highways must proceed with the negotiations.

There are infirmities in referring to "just compensation" as a full indemnity. In arriving at a value, money is considered an inflexible commodity; the actual change in value of the currency is not considered. The owner's expenses incurred in the litigation, his expert witness' fees, as well as compensation to his attorney are not part of the just compensation and must be borne by the ousted owner himself. Also, what a property will bring in a fair and open market is a mere matter of opinion until a sale has actually been consummated.

Until July 31, 1957, the policy of the Highway Department had been to have the required property appraised by one of their staff appraisers and then approach the property owner making an overture of purchase based on this figure. Possibly the negotiator for the state would make his first offer slightly lower than the appraised figure to allow for flexibility in bargaining. If the two parties could not reach an agreement on this figure, the property would be reappraised — this time by independent appraisers who might be local real estate men, but definitely individuals known to be well versed in property values in the area. On the basis of this new valuation which might be the same, larger, or smaller, the property owner would again be approached. If the new figure equalled, or was smaller, the owner would once again be asked to accept the first offer, and if again rejected, appropriation proceedings would be commenced. If the new appraisal was for a larger figure, the owner would be approached on this basis. This bargaining might reach a satisfactory conclusion by sale, or another stalemate. Possibly the owner's attorney might enter the scene, and, by pointing out facets of valuation that could be entered in evidence should a judicial interven-

[12] Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 390, 5 S.W 792, 794 (1887) "Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour s notice. To sell land at its market value sometimes requires effort and negotiation for some weeks or even some months."; Sargent v. Merrimac, 196 Mass. 171, 81 N.E. 970 (1907); Matter of Board of Water Supply, 277 N.Y. 452, 457, 14 N.E.2d 789, 792 (1938) "Fair market value means neither panic value, auction value, speculative value, nor value fixed by depressed or inflated prices. The mere absence of competitive buyers does not establish lack of a real market."

[13] 67 Ohio St. 166, 65 N.E. 891 (1902).

tion become necessary, sufficiently increase the state's offer to satisfy the owner's monetary desire. If not, appropriation proceedings would be commenced.

In a letter dated July 31, 1957, from Harold H. Waddel, Ohio's Chief of Right-of-Way, to All Division Engineers, a new procedure was outlined. With undertones which may be construed as aiding the Casper Milktoasts of Ohio; *i.e.,* establishing uniformity as to the number of appraisals prior to any negotiation, the policy was set forth requiring the Department of Highways to see that

> the appraisals upon which negotiations are based must be made by the same appraisers who will be witnesses if the property is appropriated and an appeal is taken , and all appraisals must be made in full and complete detail.

The methods used in two special situations will not be included because of the limited nature of their application. First, when the property cost will be less than $1,000 and there is little likelihood that the owners will contest, and, second, when large commercial or industrial properties adaptable only to a unique or special use are involved. Appraisals of the majority of parcels

> shall be made by no less than two independent appraisers in addition to the Staff appraiser. These appraisals shall be entirely independent of each other. If there is a major difference, additional independent appraisals shall be obtained until positive, consistent and logical opinions are available. All of the appraisals shall be reviewed by the Reviewing Appraiser and submitted by him to the Central Office with his comments and recommendations, for review and approval.
>
> In each case, the Reviewing Appraiser shall make a physical inspection of the property and obtain sufficient data so that at a later date, if required, he will be able to prepare an appraisal report to testify in court proceedings.

In the closing paragraph Mr. Waddel summarizes that the new procedure

> will require considerable extra work in connection with the appraisal of the properties to be acquired. However, it is believed that the overall acquisition program can be more effectively and efficiently accomplished if our initial groundwork is well laid.

The day of the "horse-trading" right-of-way purchaser is gone, and in his stead we must place the diplomat. In effect, the purchaser has become the seller—he must sell the property owner on the department's appraised value and impart as tactfully as possible that this is a final offer. This new method seems to impose a Herculean task of super-salesmanship on the Highway Department. A slight misunderstanding by the property owner as to the operation and reason for the new system can easily result in his feeling that the offer is arbitrary and certainly not "what his lawyer can get." How does this affect the legal profession? The "office" at-

torney, who under the former system, could generally negotiate an increase after the Department's single appraisal is going to be put on his mettle to find a valuation facet overlooked by the three independent appraisers to obtain even a nominal increase with which to appease his client. The finality with which this offer is made will make no substantial difference to the mental attitude of the "trial" attorney. In fact, his practice will most likely increase with the insurge to his office of his brother "office" attorney's clients. The corresponding increase to the already overcrowded court docket is an effect important to the entire profession.

These are some of the problems created by valuation procedures prior to the judicial appropriation. A study of the pertinent judicial procedure may disclose a method of curing the ills existing in both areas in "one fell swoop."

Appropriating the Property

Does the statutory provision in Ohio that a view of the premises by the jury shall be avaliable on motion of either party, in appropriation proceedings, prohibit the removal of any structure from the land prior this view? The Ohio courts have not yet been required to answer this question under the most recent legislative enactment, and there seems to be some doubt as to what decision they will reach.

Until the Ohio Court of Appeals decided *In re Appropriation for Highway Purposes,*[14] a reading of the chapter on Appropriation of Property in the Ohio Revised Code[15] prior to these amendments would have led one to believe that although a separate finding of value of the land and the structures thereon would be required,[16] still the Director of Highways had the immediate right of entry on the property after determining its value, making the appropriate entry in the journal of the Department of Highways,[17] and depositing the appraised sum with the court. The Ohio Court of Appeals, however, did not so construe these sections,

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[14] 90 Ohio App. 471, 107 N.E.2d 387 (1951).

[15] §§ 5519.01-.05 (1953)

[16] Ohio Rev. Code § 5519.03 (1953).

[17] Ohio Rev. Code § 5519.01 (1953) "If the director of highways is unable to purchase property he shall first enter on the journal of the department of highways a finding that it is necessary, for the public convenience and welfare, to appropriate such property as he deems needed for such purposes. Such finding shall contain , and *thereupon the director may take possession of and enter upon said property.* " (Emphasis added); Ohio Rev. Code § 5519.03 (1953) " [T]itle to said structure shall vest in the state with the right to enter upon the site of said structure and adjoining land upon which it is located for the purpose of removing the structure therefrom."

but held that because a *separate assessment* by the jury of the values of the land and buildings respectively was required, *i.e.*, trial and view of the premises by jury, "the vesting of title to such structures is stayed and the right of entry is prohibited" until such evaluation has been made by the jury.[18] Without doubt, the effect of this ruling could easily deter the completion of a proposed highway project since it is doubtful that any private contractor would begin work until the state had certified that the right-of-way was clear, and that his entry thereon would not subject him to personal liability from an unpaid and contesting property owner. To alleviate the probability of such delay, the Ohio legislature amended the pertinent sections[19] to grant the director power to take possession immediately upon depositing the appraised value in court, with the limitation that without the owner's or occupant's consent the director may not take possession of any structure prior to the expiration of sixty days from the service of notice.[20]

These amendments would seem to preclude any future statutory objection to removal or destruction prior to the view by the jury, but the operation of section 5519.02 of the Ohio Revised Code[21] pertaining to

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[18] *In re* Appropriation of Easement for Highway Purposes, 90 Ohio App. 471, 477, 107 N.E.2d 387, 390 (1951).

[19] OHIO REV. CODE § 5519.01 (1957). The immediate right to take possession and enter *property* was amended so that "property" was replaced by "buildings and structures thereon."; OHIO REV. CODE § 5519.03 (1957) was amended by adding: "The owner or occupant of such structure shall vacate the same within sixty days after service of notice as required under the provisions of section 5519.01 of the Revised Code, after which time the director may remove said structures. In the event such structures are removed before the jury has fixed the value of the same, the director, before such removal, shall cause an appraisal to be made by three persons, one to be appointed by the owner, one by the county auditor, and one by the director, and such appraisal may be used as evidence by the owner or director in the trial of said case but shall not be binding on said owner, director or the jury, and the expense of said appraisal shall be approved by the court and charged as costs in said case; shall cause pictures to be taken of all sides of said structure; and shall compile a complete description of said structure, which he shall preserve as evidence in said case to which the owner or occupants shall have access."

[20] See Duffy, *Condemnation of Structures*, 16 OHIO ST. L.J. 462 (1955), for a discussion of this and other problems which may arise in litigation involving these amendments.

[21] "Upon the motion of either party, the jury, under the care of an officer of the court and with such person as the court designates to show them the premises, shall examine the property taken and the property of the several appellants claimed to be damaged thereby. Such examination shall be before any testimony is submitted, except the plat and a survey of the property taken and the title papers of the appellant, if produced, which the jury may take with them. After making such examination, the jury shall return to the court at the time fixed therefor. After the jury has returned to the court the parties shall offer their evidence to the jury under the direction of the court in accordance with the rules af law and procedure governing cases in the court of common pleas."

view raises some further questions which the courts have not as yet answered. The language of this latter section, allowing a view upon the motion of either party, is mandatory in tenor, but the purpose of the view may aid in determining what interpretation the courts will allow. Is the view itself to have the efficacy of evidence, or is it merely to enable the jury to follow the evidence presented with greater ease? If the former, the court could readily hold the amendment to section 5519.03 of the Ohio Revised Code as ineffectual in accomplishing a ready means of possession for the highway department. If the latter, the Ohio courts might allow the effect of the amendment. Both conclusions have their followers.

The opinion of those courts that feel the view should be evidence is epitomized by the decision in *Washburn v. Milwaukee & L.W R. Co.*[22] where it was said:

> What they see they know absolutely.

This postulate has been held to include the situation where the jury must determine value — a matter of opinion as distinguished from a fact in existence.[23]

Those courts which feel that the view is solely to enable the jury to more clearly understand and apply the evidence adduce in support of their conclusion that it would be impossible to determine how much weight was due to the inspection as contrasted with the opposing evidence. This would result in the cause being determined, not upon the evidence given in open court, to be discussed by counsel and considered by the court in deciding a motion for new trial, but upon the opinion of jurors — silent witnesses in the case, burdened with testimony unknown to both parties in respect to which no opportunity for examination or correction of error, if any, could be afforded either party. These courts generally conclude that a jury must base their verdict on evidence delivered to them in open court, and that they may not take into con-

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[22] 59 Wis. 364, 368-69, 18 N.W 328, 330 (1884). The court limited the function of the jury somewhat by charging that they could not disregard the testimony presented in court, but in its opinion the court stated that "if a witness testified that a certain farm is hilly and rugged, when the view has disclosed to the jury, and every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned — no contrary evidence of witnesses on the stand is required to authorize the jury to find the fact as is, in disregarding the testimony given in court."

[23] 32 Mass. 198 (15 Pick. 1834). It is interesting to note that in his charge the judge said: " [I]f any one of them (jurors) knew any fact, from their own knowledge, which bore upon the case, he ought to disclose it and testify to it in court."; Kiernan v. Chicago, Santa Fe and California Ry. Co., 123 Ill. 188, 14 N.E. 18 (1887). In this case the jury was allowed to weigh the evidence presented against their opinion as to the value of the property.

sideration facts known to them personally, but outside of the evidence produced before them in court. If then, a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses.[24]

The Ohio Supreme Court was called upon to decide this question when it was argued that the bill of exceptions to a reviewing court would not contain a complete record if the "evidence" garnered by the view was absent therefrom and that therefore the court could not review the question of weight of the evidence. In holding that the bill of exceptions did present a complete record, the Ohio court decided that the impressions made on the minds of the jurors in an appropriation case by a view of the premises are not of themselves evidence in the cause.[25] The court reasoned that it is utterly improbable that the legislature could have established such elaborate details for a full trial, and in its stead have only a partial trial before the court of record and have the remainder away from the presence of the judge — perhaps a dozen miles in the country; that after setting forth details for preservation of a bill of exceptions, for review and error, the weight of the evidence given to support alleged facts is inaccessible.

But, is it possible for the jury, even on the most lucid instructions, to resolutely forget the impressions acquired during the view and their own knowledge of the value of land in that vicinity? To do otherwise has been held to be erroneous.[26] Does it not seem more realistic to allow the jurors to consider their impressions coupled with the other evidence presented under a charge that *all evidence* must be considered? Further, if the view is to be solely for the purpose of allowing the jury to better follow the evidence, certainly the judge, as in most other cases, should have been empowered with the privilege of permitting such a view when, in his discretion, it would be of benefit for this purpose. Such wording would also have precluded the quandary existing today as

[24] Wright v. Carpenter, 49 Cal. 607 (1875); Close v. Samm, 27 Iowa 503 (1869). In the course of the dissenting opinion Judge Wright said at 511. "If the only object of the statute was to enable the jury to better understand, and more intelligently to apply, testimony of the witnesses, then I confess that I do not see why, upon this basis alone, they might not, in determining the ultimate facts, 'include' or make use of, this 'personal examination.' If they are to use it to enable them 'to understand and apply the testimony,' then, it seems to me they are possessed of facts unknown to the parties; and whether the impresssions received and the applications of this testimony are true or false will no more be discovered than if they have actually 'burdened' themselves with *testimony.*"

[25] Zanesville, Marietta and Parkersburg R.R. v. Bolen, 76 Ohio St. 376, 81 N.E. 681 (1907).

[26] See 1 THOMPSON ON TRIALS § 895 (2d ed. 1912) for a more complete discussion of these views in relation to criminal and civil cases as well as appropriation proceedings.

to whether the Ohio Supreme Court will uphold the "sixty day rule."[27] The courts could, as before, construe the "mandatory" view requirement as effecting a stay of title until view by the jury, but it seems doubtful that the courts would so hold. The wording of the recent amendments to the highway appropriation procedure[28] show a clear intendment on the part of the legislature to allow the property — even when there are structures thereon — to be appropriated without delay, and rarely will the court go against the apparent intention of the legislature. Ohio's rulings on the purpose of the jury's view would not be a deterent factor in reaching such a result.

Is the Jury Appraisal Satisfactory?

Is there a better method than the two sides choosing their appraisers and trying to confuse the jury? The two thoughts as to value are generally antipodal with the property owner, having his price up in the clouds, feeling that the state is down in the basement. Those who feel that as a method the jury system is the best device for people with differences of opinion to have such differences settled are going to be required to champion some procedural and professional changes to quell the mounting dissatisfaction. Those who are opposed to the present system have raised the cry: "Taking Appropriation cases to the jury only adds to the already overcrowded docket." The delay in hearing appropriation cases is not, however, caused by an overcrowded docket, but rather is the result of professional dallying. The Ohio Revised Code[29] provides for the hearing to be set not more than twenty days after the court has determined that an appeal has been properly perfected. The hesitancy with which these cases are being tried can be attributed to either of two causes. First, the counsel hasn't assembled all the information required to try the case and passes, or, second, he is marshalling his evidence by the delay. An example of this last situation might occur when counsel feels that psychologically a more favorable case would be presented by precluding the jury's view and offering the three appraisals required by Section 5519.03 of the Ohio Revised Code. A speedier handling of the cases could be accomplished by the judges requesting the assignment commissioners to require counsel to hold the line and not allow so many passes. Other factors to be considered which might facilitate the procedure would be to dispense with the need for a special *venire*,[30] to add a circuit judge for the benefit of the metropolitan coun-

[27] Ohio Rev. Code § 5519.03 (1957).
[28] Ohio Rev. Code §§ 5519.01-.03 (1957).
[29] § 5519.02 (1957).
[30] Ohio Rev. Code § 5519.02 (1957).

ties engulfed in the docket backlog, and change the nature of appropriation cases to more closely approximate a normal proceeding for damages. The first step in this latter direction could be accomplished by the elimination of the lengthy and complicated oath given to the jury[31] — the import of which only confuses the average layman serving; the result of which could be accomplished by the charge.

Is the Jury System Mandatory?

Short of constitutional limitations the legislature is unfettered in enacting laws governing procedure to be followed in eminent domain actions. The organic law requires that no man be deprived of his property without "due process" of law.[32] Although the nebulous concept of due process has been variously circumscribed by court decisions, all courts agree that due process requires two major ingredients: somewhere during the proceedings there must be notice and an opportunity to be heard. When an owner's property is taken from him for public use by appropriation he is entitled, under the Constitution, to notice and an opportunity to be heard on the question of determining just compensation.[33] Unless the state constitution and statutes provide otherwise,[34] he has no constitutional right to be heard on the validity of the taking, which is a question of law for the court, or the necessity and expediency of public improvement, which is not a judicial question at all,[35] except in states in which it is specifically required.[36] The constitutional right of the owner to be protected against a taking without necessity are sufficiently guarded by his right to institute proceedings at law or in equity to save his property and have the taking set aside.[37] The land owner,

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[31] Ohio Rev. Code § 2709.16 (1953).

[32] U.S. Const. amends. V and XIV, § 1.

[33] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

[34] Union School Dist. v. Starr Commonwealth for Boys, 322 Mich. 165, 33 N.W.2d 807 (1948). The necessity for taking, as well as the value of the property, is determined by the jury.

[35] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

[36] Detroit v. Beecher, 75 Mich. 454, 42 N.W 986 (1889).

[37] Board of Water Comm'rs v. Johnson, 86 Conn. 151, 84 Atl. 727 (1912); Grafton v. St. Paul, Minneapolis and Manitoba Ry., 16 N.D. 313, 113 N.W 598 (1907); State *ex rel.* Baltzell v. Stewart, 74 Wis. 620, 43 N.W 947 (1889). These actions may test the validity of the grant of eminent domain to the body exercising the power and whether the property condemned is to be put to a public use. There is a distinction, however, between the necessity for using the power of eminent domain and testing the necessity for taking — the former is a political or legislative question, while the latter is always a judicial question. The method was further clarified in Wheeling & Lake Erie R.R. v. Toledo Ry. & Terminal Co., 72 Ohio St. 368, 74 N.E. 209 (1905), by the holding that when the court has jurisdiction to dismiss con-

being constitutionally entitled to be heard on the amount of compensation or damages, must be given such notice as will give him an opportunity to be present at the hearing and present such evidence as he may have as to value.[38] Without such notice the taking is invalid.[39] Such notice does not demand personal service — constructive notice by posting or publication being sufficient.[40]

As for the ingredient of being heard, the seventh amendment to the United States Constitution, which provides that in suits at common law the right of trial shall be preserved where the value in controversy shall exceed twenty dollars, relates only to trials in the federal courts. Also, no jury trial is required by the fourteenth amendment to the United States Constitution in appropriation proceedings.[41] All that is required is that the trial be conducted in some fair and just manner by an impartial tribunal. The nature and character of the tribunal, if providing these requirements, are left to the discretion of the legislature.[42]

Ohio requires a jury trial in appropriation proceedings.[43] This has not always been the case. Under the provisions of the Ohio Constitution of 1802 that "private property shall be held inviolate" it was held that damages could be determined by three or more commissioners, without intervention by the jury at any stage of the proceedings.[44] The Consti-

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demnation proceedings on the ground of abuse of discretion, there is an adequate remedy at law and an injunction will not be issured in a collateral proceeding.

[38] Morrison v. Indianapolis & Western Ry., 166 Ind. 511, 76 N.E. 961 (1906) *aff'd.* 77 N.E. 744 (1906); Branson v. Gee, 25 Ore. 462, 36 Pac. 527 (1894) The taking need not be preceded by notice so long as notice is given prior to the hearing to assess damages.

[39] United States v. Jones, 109 U.S. 513 (1883). *Compare* State v. Jones, 139 N.C. 613, 52 S.E. 240 (1905) (The court inferred the requirement of notice when the statute did not specifically provide therefor.) *with* Sterrit v. Young, 14 Wyo. 146, 82 Pac. 946 (1905) (The statute held invalid because a specific provision for notice was not included)

[40] Wuzzen v. San Francisco, 101 Cal. 15, 35 Pac. 353 (1894); Lancaster v. Augusta Water Dist., 108 Me. 137, 79 Atl. 463 (1911) There is a duty on the non-resident land owner to keep in touch with public affairs in the town where his real estate is situated.

[41] Bauman v. Ross, 167 U.S. 548 (1897); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897)

[42] United States v. Jones, 109 U.S. 513 (1883). See State v. Jones, 139 N.C. 613, 52 S.E. 240 (1905), where the court held an impartial tribunal is not secured if the sole power of selection rests with one party, however, a statute providing that each party shall choose an appraiser and that these two shall choose a third secures an impartial tribunal.

[43] OHIO CONST. art. I, § 19.

[44] Hickox v. Cleveland, 8 Ohio 543 (1838). It was held that compensation was not required to be first made, and that it might be taken for such use where provision for the assessment and payment is made whether the owner was actually paid or not, it being sufficient if provision be made by law for compensating him; also that bene-

tution makers of 1851 made a radical change in the procedure by requiring, in section 19 of the Bill of Rights, "Assessment of compensation by a jury."

Today, in other jurisdictions, eminent domain statutes frequently provide that valuation of property taken by appropriation proceedings be determined by referees or commissioners, instead of by a court and jury, or a court alone. The legislative acts prescribing such procedure must, of course, conform to the requirements of the state constitution. Excellent examples can be found in statutes enacted under the New York State Constitution.[45] The necessity for condemnation and damages are both assessed by a jury[46] when an application for a private road[47] has been made, but by a board of condemnation commissioners[48] when a town highway is involved.

The least onerous requirements are probably found in the Connecticut Constitution[49] under which the legislature enacted that "the determination of the amount of damages in any case brought by the state to condemn land or any interest therein shall be referred to a state referee."[50]

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fits conferred might be set off against the value of the property so taken. Compensation was determined by three commissioners who were sent out to view the premises. Under similar constitutional provisions the right of trial by jury is preserved inviolate only as to the classes of cases in which the right was enjoyed before the adoption of the Constitution. In all other cases the legislature may provide for a hearing or trial without a jury. Kirkland v. State, 72 Ark. 171, 78 S.W 770 (1904); Frost v. People, 193 Ill. 635, 61 N.E. 1054 (1901).

[45] Art. I, § 7(b) (1938) "When private property shall be taken for public use, the compensation made therefor, when such compensation not made by the state, shall be ascertained by a jury, or by the Supreme Court without a jury, but not by a referee other than an official referee, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

[46] N.Y. H'WAY LAW § 301.

[47] Drake v. Rogers, 3 Hill. 604 (N.Y. C.P. 1842). An order laying out a highway "for" a single person, who is the only one benefited thereby, is a private, and not a public, highway.

[48] N.Y. H'WAY LAW § 174: "Upon the presentation of such petition (calling for the town highway improvement), the county court must appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, and who shall not be related by consanguinity or affinity within the sixth degree to the applicant or to any person interested in the proceeding or to the owner of any lands to be taken or affected by the laying out, alteration or discontinuance of a highway as condemnation commissioners to determine the questions mentioned in the last section. They shall personally examine the highway described in the application, hear any reasons that may be offered for or against the laying out, altering or discontinuing of the highway, and assess all damages by reason thereof."

[49] Art. I, § 11. "The property of no person shall be taken for public use, without just compensation therefor."; art I, § 21. "The right of trial by jury shall remain inviolate."

[50] CONN. GEN. STAT. § 7178 (1949).

CONCLUSION

The program for developing state and interstate highway systems is picking up speed and there are "hotspots" resulting from legal friction. The best lubrication may be procedural reforms. A glance at the index of the Ohio Revised Code will reveal a dearth of statutory provisions pertaining to eminent domain proceedings which makes one wonder if the veritable mass of legislation in this area doesn't of itself breed confusion. Standardization of procedure with possible division as to methods for the public and private condemnor appears to be the ultimate in desirability.

The immediate "hotspot" as to what type tribunal shall determine damages accruing from appropriation and the corollary problem involving the role of the jury, have been spotlighted in Ohio by its highway program. With an increase in work-load, efficiency of procedure becomes mandatory. Mr. Waddel met this challenge by his directive calling for uniformity in negotiations. The legislature has aided efficiency by apparently successfully disposing of the impediment of delayed possession when buildings occupy the land by the "60 day rule," though it is questioned whether the legislature should not have removed all doubt.

Objectively, the view by the jury isn't too important and could effectively be replaced by evidentiary aids such as photographs and maps which, being constantly before the jury, would implement their following the evidence far more than a cursory inspection accomplished without leaving the bus when the snow prevents even a jaunt across the property being appropriated. The jury in trying the facts must arrive at a value for the damage to the property owner. Are they weighing the evidence to arrive at a figure based on the truthfulness of the witness or their opinion as to the value of the property? If the former, too much weight is being placed on the character of the witness rather than the character of his testimony, and, if the latter, it is submitted that valuation of property has become a highly complex and professional task — outside the ken of the layman.

As a substitute for the jury in assessing value it is proposed we adopt a system smacking of arbitration whereby the state appoints one man, the property owner one man, and these two choose a third; these three men arriving at a value based upon the expert testimony of architects, engineers, contractors, investors and realtors together with their own *special* knowledge of real estate values. By this method the Corduroy Road to Ohio's Superhighways could be traversed more smoothly, unimpeded by the vagaries of the jury wheel.

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