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LEGAL INSTITUTE PAPERS: CONDEMNATION LAW
PROCEDURES, PROBLEMS
PREFACE

Following are some of the papers on condemnation law presented at one of the Legal Institutes held as a part of the annual meeting of the State Bar Association. These institutes are of great benefit to those who are able to attend and participate in them, but, as stated in the speech of Mr. Rhyne, President of the American Bar Association, there is a need to disseminate the material gathered at such institutes to lawyers who are not able to attend the proceedings. The editors of the *Washington Law Review* take great pleasure in publishing these papers, as a service to the Washington State Bar Association.

TESTIMONY OF THE EXPERT APPRAISER IN
CONDEMNATION PROCEEDINGS

DONALD H. YATES*

The exercise of the right of eminent domain, necessary as it is in the public interest, poses a great many challenging problems, some amusing, some distressing. The system of getting at what is to be paid for the taking is probably only typical of a clumsy democracy stumbling along in its pursuit of justice without too much loss of efficiency.

The right of private ownership of real property is one of our greatest freedoms, probably the greatest. Pride of ownership is a deeply-rooted thing, and value is too often measured in the owner's mind by a kingly view of all he surveys.

Government is inherently paternal (modern government certainly) and with gracious dignity approaches its legal trespass with righteous determination to be fair but firm. Thus the battle is joined. Every servant of government, politician, engineer, lawyer and appraiser (and in just that order) is now simply to perform his duty. It is not a personal thing at all—just an official assignment to a job. Progress must go on.

But how personal is the awakening of the condemnee! Suddenly every tree or shrub that he planted, every nail or screw that he installed, each lease improvement he negotiated, takes on a new

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meaning. Something has happened to him, however, that he doesn't know about. He has been transformed by law into a different being. Like the newly-commissioned cadet out of West Point, by act of Congress being made a gentleman, this property owner has been declared "a willing seller." Yesterday he was completely unwilling to sell his property. Today, and without his having anything to say about it, he has been converted into a well-informed, willing, but not compelled seller. If that isn't a misnomer! He may not only be most unwilling, but he is most certainly compelled from his point of view.

Over the past twenty-five years my assignments in condemnation cases have been about half and half for a government or for owners. I should by now be objective toward each, I should think, but it seems to me I have become cynical toward each and particularly as to the procedure which must be followed.

AVAILABILITY OF GOOD EXPERT APPRAISERS

Let's trace a case from the beginning. The government is, of course, the moving party. The project has been planned, promoted, voted, engineered and finally ordered into being. The lawyers get busy and the taking becomes official. Appraisers are selected and the mysterious process of determining "how much" is begun. There aren't very many men whose services are both available and wanted. The requirements are quite exacting. The men wanted should be trained and experienced in the technical processes and in addition must be skilled in presenting their findings from the witness chair. In the entire state of Washington there are less than sixty men who hold membership in the Institute of Real Estate Appraisers. Of this number, only about twenty are available at all and often not when wanted, and all of those are not necessarily desired. Those non-members who are available and are well-qualified are still fewer in number. Thus, the available field may be well-combed by the condemning authority if the project is large.

The work of the appraisal completed, the owner is contacted and tender made. Human nature being what it is, he may well resist. Time drags and the trial date approaches. Belatedly the owner hunts up his lawyer or a lawyer. Now comes the rebuttal process. The lawyer goes on a hunt for qualified appraisers and competent witnesses. If I have appeared to stress too greatly the non-availability of qualified personnel for valuation testimony, let me here elaborate. Many of the best minds in the real estate busi-

ness simply will not serve. It may be a matter of policy of a firm avoiding ill will that often accompanies the work. Or, it may be personal distaste for cross-examination. It is not the most enjoyable experience in the world to be subjected to the kind of dynamic interrogation in which you men are so highly skilled.

Also, it must be admitted that a very good appraiser may not be a good witness and conversely an excellent witness may not be a good appraiser. I would hesitate to ask you gentlemen which of the two you would choose if you had to make a choice.

Appraisal witnesses are found and they must begin, by virtue of their acceptance of the assignment, fully informed of the situation, in disagreement with the government's appraisal. If one or more takes a good look and declines because he feels he cannot substantially disagree, others are found who can and will.

Meanwhile, time is running and the trial date is near. Where the government men have had weeks or months, the owner's appraisers may have days. If this suggests that the government appraisal is necessarily superior, let me point out what should be well known. Any appraisal is no more than an opinion, and it is entirely possible for an off-hand stab by an experienced, active real estate broker or salesman to be closer to actual fair market value than the most studious, careful, thorough analysis.

We studious analysts often overlook the real meaning of the legal definition of fair market value: the highest price that a well-informed, willing but not compelled buyer will agree upon with a well-informed, willing but not compelled seller for the purchase and sale of the property, within a reasonable time and for its highest and best use.

It is what people *do* do, not what they *should* do, that measures value. The public fixes the market. The appraiser should try to determine what they *will* do based upon what they, the public, *have been* doing. It is probably true that if the general public, dealing in real estate, were as studious as the professional real estate appraiser, it would act more conservatively. I have had provenly successful real estate buyers make a liar out of me too many times to retain much of my ego.

THE CONDEMNATION TRIAL

In any event the parties meet in court and the "experts" are quickly qualified. It has always been a mystery to me why lawyers

do not more often challenge the qualifications of their opposing witnesses. I have often thought from the witness stand, "If this lawyer knew as much about me as I know about myself, what he would do to me!"

Now comes the direct examination of the government witnesses. Simple, brief, and limited to the fact that the appraisal was made and at certain figures and that it was done with full consideration of all of the pertinent facts, it is designed to limit cross-examination as much as possible. Now the cross-examination begins and the battle lines tighten. It is no longer a genuine attempt to find just legal compensation, but a battle of wits, a game of strategy with perhaps high stakes. Rules of evidence that seem simple and clear are circumvented, and thoughts are implanted with the jury that no amount of admonishment to ignore or striking from the record can dissipate. It is like a football game with the witness carrying the ball and the counsel quarterbacking the show.

The series of downs ends, the ball goes over to the defense, and the process is repeated with variations. Following the football analogy we begin to see weaknesses that might be called fundamentals of the game. Lack of training or preparation is too often apparent, particularly of the defense. The cause goes back to the timing again. The owner has delayed consulting his lawyer too long, and maybe the lawyer has had trouble getting started. Reluctant appraisers have come into the case late, already busy with other matters, agreeing to serve largely through a sense of obligation. Under pressure of time, too much reliance has been placed upon gun-shot methods of appraisal.

The result is a good deal of bluffing and sparring to cover up. A battle of wits designed to confuse rather than clarify issues so often occurs. If the jury is impressed by the skill displayed or at least confused by it all, the verdict may be quite unrelated to a sound rationalization of the best evidence presented.

If the government's witnesses are wrong, and they may well be, the errors in their approach to value or their conclusions should be exposed by a competent and thorough analysis employing the accepted principles of appraising, which means hard work and tedious preparation. Written reports and full text analyses should always be required—not oral or sketchy outlines. Only by so doing can the appraiser prepare himself well. Again the football comparison. We have heard a lot recently about amateur players' rates

of pay. Could it be that this appraisal service is sought and had too cheaply? One usually gets what he pays for. I would urge upon lawyers that as an initial step in accepting condemnation defense, the client be well-informed of the importance of and proper cost of good and sufficient evidence of valuation. If the amount involved is not great enough to warrant such thorough preparation, as may often be, then certainly every effort should be made to settle out of court rather than to go to trial. If it must go to trial without good preparation, it seems to me that something is wrong with our system.

I would like to make a suggestion with respect to establishing your witness' qualifications. Often the witness is simply asked to state his qualifications to the jury. This puts the witness in the awkward position of boasting about himself. Or, if he is inclined to do just that, he doesn't look too good before a jury. We expert witnesses modestly prefer that you ask us leading questions about our training and experience.

A good deal of what I have said implies that I think the condemnor has the upper hand, the defense the laboring oar, that the government comes in better prepared, has the advantage of time, and normally should prevail. I do not mean to make such a generalization. I doubt that a run-down on the history of condemnation cases would prove that.

In fact, there is one advantage the property owner may have if he will avail himself of it. In large projects involving many takings, the government cannot concentrate too much on any one taking. Also, the government must be consistent as between parcels in the taking. The individual owner is not so burdened. He may elaborately "pour it on" for the establishment of proof of value of his one parcel, without concern as to consistency with any other property being taken.

ROLE OF A GOOD EXPERT EVALUATION WITNESS

I have taken the liberty of making suggestions to you lawyers as to your conduct of these proceedings in condemnation, and have attempted to point up some of the unfortunate matters that accompany the program. Let me now point out what I think a good expert valuation witness should do to assist you in your conduct of a case:

1. He should diligently work up his appraisal in complete professional written form after close inspection and careful

- assembly of all of the pertinent data he can get.
2. He should submit to, or even request, a rehearsal of examination and cross-examination as it may be simulated.
 3. He should attend the trial and listen to all of the testimony that precedes him and later hear what follows.
 4. He should not interfere with counsel during the trial but be available to him at recesses if counsel wishes his advice. His presence at the counsel table is undesirable. He should not appear to be an advocate of anything, only a witness.
 5. From the stand he should be so well prepared that he can be confidently responsive.
 6. He should not dodge or duck a difficult question nor evade an hypothetical question that appears prejudicial, if it can be answered.
 7. He should be always forthright and direct. He is there to tell the truth and state his opinions and should be as indifferent as possible to self-vindication.
 8. He must keep his temper no matter how abused.
 9. He must not engage in humor or facetious repartee no matter how much invited to do so.
 10. He must not be "cute" or "smartalecky," leaving all such measures to counsel.
 11. He should look at the questioner, not at his own lawyer, and should make his responses to the court and the jury.
 12. He should not be too quick with his replies, always giving time for objection. Still, he should not hesitate unduly.
 13. He should not worry about not having had time to give his full answer or its qualifications, knowing his own lawyer is alert and will come back for any needed enlargement or clarification.
 14. While a good appraisal witness should be informed on any question pertinent to the appraisal of the property, he should not be unwilling to say "I don't know" or "I failed to consider that," if it is true. The worst thing a witness can do is to pretend to knowledge he does not have.
 15. Frequently, questions of law arise before an appraiser as to what is compensable. He may have his own strong opinion about it based on previous experience and legal guidance. In his present assignment he must take his hypothesis from counsel directing the case and make his appraisal and give

his testimony accordingly. If the hypothesis be found wrong he must be prepared to modify his opinion of value to conform. It is not the witness' responsibility to know the law. It is his responsibility to seek legal direction from his counsel and to know when he needs it.

16. Finally, he should not undertake to prompt or help the attorney except when asked to do so. He should realize that the lawyer conducting the trial has the greatest burden and should not have his train of thought disturbed. If during recesses or after hours he sees that counsel is relaxed and wants to talk, he may volunteer things that he thinks have been overlooked. The one exception would be an obvious mistake of fact by an opposing witness that was important and that could only be known by an appraiser familiar with the property. This he should volunteer at the first opportunity, but he should be sure it is important.

One final admonishment: don't send a boy to do a man's work, either as a witness or a lawyer. Here again, if compensation isn't adequate for either lawyer or witness, the system is at fault and it would seem to me that the responsibility for proper education of clients and the public to that end is primarily that of you members of the bar. The real estate men have it too, but we are far behind you in professional standing or prestige.

The Appraisal Institute seeks to pattern itself after the Bar Association as to both professional capacity and ethics. The burden remains heavily upon you to improve the system of adjudication of value in litigation. We may be of help to you, but we look to you for leadership in this field.