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CONDEMNATION PROCEEDINGS

The Federal Constitution provides that "Private property shall not be taken for public use without just compensation." Most of the state constitutions contain similar provisions. Incidentally, it might be stated that such provision is a limitation of the "Power of Eminent Domain." By "Power of Eminent Domain" is meant the right of the government to take or appropriate private property for public use. This power does not include the exercise of the power of taxation or the exercise of police power. The power may be exercised by the Federal government and the state government, or it may be delegated to a municipality, a board, a corporation or an individual.

Now while private property may be taken for a public use, it shall not be taken for any other use; that is, private property cannot be taken for a merely private use;¹ nor shall private property be taken for a use partly private; nor shall it be taken when the same is not necessary.²

All property is subject to the Power of Eminent Domain;³ but lands once taken for a public use cannot be taken for another public use without special legislative authority.⁴

Authority to condemn must be strictly construed.⁵ Condemnation proceedings are the legal machinery through which the Power of Eminent Domain is exercised; and statutory requirements in this exercise must be strictly observed. This rule relates to the acquisition of an easement as well as a fee.⁶

¹ Embury v. Conner, 3 N. Y. 511 (1850).

² Matter of Albany Street, 11 Wend. 148 (1834).

³ Eldridge v. Binghampton, 120 N. Y. 309 (1890).

⁴ Prospect Park, etc., R. Co. v. Williamson, 91 N. Y. 552 (1883).

⁵ Newell v. Wheeler, 48 N. Y. 486 (1872); Muller v. Brown, 56 N. Y. 383 (1874); Erie R. Co. v. Steward, 170 N. Y. 172 (1902).

⁶ Matter of Water Commissioners of Amsterdam, 96 N. Y. 351 (1884); Matter of City of Buffalo, 78 N. Y. 362 (1879).

In the exercise of the Power of Eminent Domain, proceedings are usually initiated by the passage of a resolution setting aside the property to be appropriated, and giving instruction to the attorney for the corporation, or board, etc., to take proceedings.

Notice is then given of the appropriation to all parties and persons interested in the property. This notice is perhaps the most important instrument in the proceeding because it not only tells the property owner of the proposed taking, but it complies with the constitutional requirement of notice. It also sets forth the forum and directs the parties or persons affected by the proceedings to file claims duly verified. Such claims shall set forth the real property of the claimant, the leases on the property, and shall give an inventory of the fixtures.

Important questions arise in the determination of title. It might be fairly said that all questions which arise on the closing of title in an ordinary sale of real estate crop up in the proof of title in a condemnation proceeding. If any leases are on the property, the value of them must be carved out of the fee; and if the rent is low, that is, less than the rental value, the value of such leases is apt to amount to a very substantial sum. The damage in such cases is the difference between the rent reserved in the lease and the rental value. When the total of such difference is determined, then the present worth or money value of the lease is found; this amount is the present worth of the lease. The lessee's right to an award may be defeated by the lease having provided therein a condemnation clause; that is, a clause making the lease terminate on the date of the vesting of title in the condemnation proceeding.

Another element that is liable to inject itself in determining the value of a lease is an option to purchase. This option is very valuable provided it is exercised pursuant to the agreement between the parties. If not exercised before con-

demnation, it has no value. Condemnation terminates the option and the lease.⁷

Another important question which arises in condemnation proceedings is that of "Trade Fixtures." In *Corpus Juris*⁸ "Trade Fixtures" are defined as follows:

"An article may be regarded as a trade fixture if annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises for the purpose of pecuniary profit. . . ."

These fixtures are unlike leases inasmuch as the value thereof does not come out of the fee. The award for fixtures is paid by the municipality. To determine the value of such fixtures, particularly if they are machinery, calls for the highest degree of technical knowledge. The *expert* must not alone know the machine, but he must also know the value thereof.

It must be borne in mind that condemnation is a compulsory sale;⁹ and when the property owner is compelled against his will or consent to part with his property, the price should be commensurate at least with its fair market value. Any other price would not comport with the constitutional guarantee of just compensation.

In a recent statute¹⁰ in New York it is provided:

". . . the corporation counsel shall present to the court a petition signed and verified by him setting forth the action taken by the department, board or officer with reference thereto, the authorization of the proceedings by a majority vote of all the members of the board of estimate and apportionment, *a statement of the amount or valuation at which each parcel of the real property to be acquired has been assessed for purposes of taxation on the city tax-rolls for each of the three years preceding the date of the petition*, the filing of said survey, map or plan, and a notice of the pendency of the proceeding." (Italicized part is the amendment to the law.)

The valuation or assessment for the purpose of taxation on the city tax-rolls is prepared by deputy tax commission-

⁷ *In re Water Front on Upper New York Bay*, 246 N. Y. 1 (1927).

⁸ "Fixtures," 26 C. J. 701.

⁹ *Buckhout v. City of New York*, 176 N. Y. 363 (1903).

¹⁰ Laws of 1932, c. 387.

ers; and it is a peculiar fact that, in the trial of these cases, the testimony of such deputy tax commissioners has never been accepted as evidence of value by the court. The reason for this is due to the fact that deputy tax commissioners are not in the real estate business, and for that reason are unable to qualify as real estate experts. And yet the statute provides that the assessments for purposes of taxation shall be presented without verification to the court. While the assessed values might be information for the court, still such figures having been prepared by city employees under city supervision, they are apt to unduly influence the court in rendering to the property owner just compensation.

The value of the property acquired is usually presented to the court in the form of estimates by real estate experts, who are compelled to give the value of the entire plot before the taking, then to give the value after the taking, the difference is the damage. This damage must also include any consequential injury which the property suffers by reason of the taking. The experts, in their values before the taking and after the taking, must consider the particular uses of the property because the claimant-property-owner is entitled to the value of his property at its highest utility.¹¹ They must also consider the use to which the part taken is to be put and the effect of such use on the part of the property remaining after the taking.¹² Of course if the entire property is taken, the question of consequential damage does not arise.

After hearing proof of value or damage, the court renders its opinion as to the amount of the award. This opinion takes

¹¹ *Miss. and Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1878).

¹² *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301 (1903); *Rasch v. Nassau Electric R. R. Co.*, 198 N. Y. 385, 389 (1910).

the form of a tentative decree. Notice of the filing of this tentative decree is published and the claimant-property-owner is given an opportunity to file objections thereto. Persons so objecting are given a hearing before the court in support of their objections. The court thereafter renders an opinion which becomes the final decree.

The foregoing article was prepared from the view point of the New York statute. No attempt has been made to cover other jurisdictions, although it can safely be said that the underlying principle involved in all jurisdictions is the same.

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