

Date of Meeting: November 27-28, 1959

Date of Memo: November 2, 1959

Memorandum No. 2

Subject: Study No. 36 - Condemnation

The study on Evidentiary Problems in Eminent Domain Cases was sent to you recently. The study discusses evidentiary problems which occur at the trial of eminent domain cases. Problems relating to pretrial procedures and discovery are not discussed. They will be the subjects of later studies.

A number of policy questions are presented by the "evidentiary problems" study. The author indicates his recommendations on these policy questions should be regarded as tentative pending the completion of the entire eminent domain study inasmuch as later studies may require minor adjustments. For convenience the questions which may be considered by the Commission, using the "evidentiary problems" study for background, are listed below.

The policy questions can be generally stated as follows: When should specific data (such as price of comparable property) be received -- on direct or cross examination, what data should be received, why should such data be received -- to support expert opinion or as independent proof of value, and how should such data be received -- by hearsay or by direct evidence. The specific policy questions appear below in the order in which they are discussed in the study.

The study assumes the validity of the rule enunciated in County of

Los Angeles v. Faus, 48 C.2d 672. In view of the fact that the decision of the court was a four-three decision and was made possible by the retirement of Justice Edmonds, it would be appropriate to consider the policy involved in its holding as a preliminary matter. The Faus case held that under C.C.P. Section 1872 (which provides that an expert may on direct examination give the reasons for his opinion) an expert may on direct examination give the sales prices involved in sales of comparable property. This reversed a long line of California cases holding that the price of comparable property could not be mentioned on direct, but could be asked about on cross-examination to impeach the expert's testimony. The policy underlying the majority decision is discussed at pages 45 through 52 of the study. The argument for the minority view appears at page 687 of the Faus decision:

Under the changed rule, the expert would not only be permitted, but would be practically required, to go into detailed facts upon direct examination concerning every sale which he had considered in forming his opinion. If he should fail to do so, he might find that the court would sustain objections later upon the ground that the questions should have been asked on direct and therefore would not constitute proper redirect examination. This would have the tendency to bring into the case on direct examination numerous collateral issues, thus necessarily making the direct examination of every expert unduly prolonged. It therefore appears that there is sound reason for sustaining the established rule.

Thus, the first policy question is that presented by the Faus case:

1. Should evidence of sales data relating to comparable property be introduced on direct examination, or should such data be revealed only on cross-examination to test the witness's credibility.

The next group of policy questions concerns the nature of the market data to be used to establish market value:

2. Should evidence concerning the following factors be permitted to be given to establish market value:
- a. Sales price of the identical property (discussed at pp. 52-53 of the Study).
  - b. Comparable rentals to establish value of leasehold (pp. 53-54).
  - c. Subsequent sales (pp. 54-57).
  - d. Sales to agency with power of condemnation (pp. 57-62).
  - e. Forced sales (pp. 63-65).
  - f. Offers (pp. 66-78).
    - (i) To purchase or sell between parties to the action (pp.71-72).
    - (ii) To purchase by third parties (pp. 72-73).
    - (iii) To sell by condemnee (pp. 73-77).
      - (aa) Introduced on behalf of condemnee (pp. 73-74).
      - (bb) Introduced on behalf of condemnor (pp. 74-77).
    - (iv) To buy or sell comparable property (pp. 77-78).
  - g. Options (pp. 78-79).
    - (i) On behalf of condemnee.
    - (ii) On behalf of condemnor.
    - (iii) In regard to comparable property.
  - h. Sales contracts (pp. 79-80).
    - (i) As to identical property.
    - (ii) As to comparable property.
  - i. Assessed valuation (pp. 81-85).

The next group of policy questions concerns the type of evidence which should be permitted to establish the market data and the purpose to be served in admitting such evidence.

3. Should an expert be permitted to testify as to the market data supporting his opinion even though his testimony in regard to such data is hearsay (pp. 85-94).

4. Should the evidence received as to market data be received as independent evidence of the value of the condemned property (pp. 85-95).

a. If the evidence is hearsay related by an expert witness.

b. If direct evidence in regard to such market data is introduced.

The final policy questions relate to matters which could be considered under No. 2, supra, as they present the problem of what should be considered in determining market value. However, the consultant has presented them as independent problems, so we do the same. It should be remembered, though, that the problems of the purpose of such evidence and the nature of the proof (questions 3 and 4) relate to these factors also.

5. Should the capitalization of income approach be permitted as an additional method of proving market value (pp. 96-107).

6. Should the reproduction less depreciation approach be permitted as an additional method of proving market value (pp. 108-116).

7. Should all other evidence that a reasonable, well-

informed prospective buyer or seller would take into consideration in deciding what price to pay or demand for the property to be condemned be permitted (pp. 33-44).

Respectfully submitted,

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