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Date of Meeting: December 18-19, 1959

Date of Memo: December 8, 1959

Memorandum No. 7

Subject: Study 36 Condemnation - Evidentiary Problems

A number of the questions presented by the study on evidentiary problems are as yet undecided. In addition, certain problems are raised by action taken by the Commission at the November meeting.

1. At the November meeting, the Commission decided to exclude evidence of sales to an "agency with the power of condemnation." Does this mean "evidence of sales made to any person or agency that had the power to obtain such property by the power of eminent domain?"

Comments

Under existing California law everyone has the power of condemnation or eminent domain (Civ. C. §1001). The limitation on the exercise of the power is in terms of use (Code Civ. Proc. §1238). Hence, the term "agency with power of the condemnation" is not clear.

Moran v. Ross, 79 Cal.159 (1889) held that individuals (in that case a partnership) had the right to condemn a right of way for a railroad. Linggi v. Garovotti, 45 Cal.2d 20 (1955) held that a private individual could condemn a right of way for sewer purposes across neighboring residential property under Code of Civil Procedure section 1238 (8).

2. The last action taken by the Commission was to approve in principle the proposition that offers should be excluded as evidence of value, reserving the question of the admissibility of offers insofar as offers constitute admissions. The following questions need to be decided:

- (a). Should offers by the condemnee to sell to third parties be admitted as admissions (Study, pp. 73-77).
- (b) Should offers by the condemnee to sell to the condemnor be admitted as admissions (Study, pp. 71-72).
- (c). Should offers by the condemnor to the condemnee be admitted as admissions (Study, pp. 71-72).
- (d). Should offers by the condemnor to third parties in regard to comparable property be admitted. (Not specifically discussed. Problem is similar to that of sales to condemnor, Study, pp. 57-62).

Comments

Question (d), above, is included because it was discussed at the close of the last meeting. However, an offer by a condemnor to a third party for comparable property is not an admission for a condemnor is not taking a position in regard to the value of the third party's property. The value of such property is not an issue in the case. (Sacramento & San Joaquin Drainage District v. Jarvis, 51 AC 801, 806 (1959).)

Logically, an offer by a condemnor to buy comparable property is subject to the same objection and should be subject to the same rule that is applicable to sales to a condemnor if such sales are to be excluded. There is an appearance of fairness about the proposition that if offers by the condemnee are to be admitted as admissions then offers by the condemnor should be admitted as admissions. However, it must be kept in mind that the condemnor and the condemnee stand in essentially different positions. Before condemnation, the condemnee can deal with the whole world and is under no compulsion to sell;

hence, an offer made by the condemnee to sell, logically, may be some indication of the value of the property if introduced against him. On the other hand, the condemnor must buy the property from the condemnee only, and if he does not obtain it by sale, he must bear the expense of litigation in order to obtain it. Hence, any offer by a condemnor is in a sense an offer made to compromise litigation as it reflects the amount he must pay to avoid litigation. Similarly, an offer to sell by a condemnee to a condemnor is essentially an offer to compromise the threat of litigation. If sales to condemnors are to be excluded, offers to and by condemnors should also be excluded for they are merely negotiations preliminary to litigation.

These considerations do not apply to the offer of a condemnee to sell to third parties as litigation is usually not a factor in such an offer.

3. Options (Study, pp. 78-79)

(a). In regard to the subject property.

(1). Introduced on behalf of the condemnee.

(2). Introduced on behalf of condemnor as an admission.

(b). In regard to comparable property.

4. Sales Contracts (Study, pp. 79-80)

(a). In regard to the subject property.

(b). In regard to comparable property.

Comments

Although it seems to be the rule that contracts to sell are admissible to show value when they relate to the subject property (Redondo Beach School District v. Flodine 153 Cal.App.2d 437 (1957)),

Nichols indicates that the general rule is to exclude executory contracts when they relate to comparable property. (Nichols, Eminent Domain 307.) The authority for this statement, however, is somewhat dubious. Cases from four jurisdictions are cited to support the stated proposition. However, only the Massachusetts cases clearly hold that executory contracts in regard to comparable property are inadmissible.

In Suburban Land Co. v. Town of Arlington, 107 N.E. 432 (Massachusetts 1914), it was held that contracts of sale relating to comparable subdivision property were inadmissible because title to the property had not passed to the buyers. The contracts provided for installment payments by the buyers and for delivery of deeds upon full payment. Even though such contracts were partly executed they were held inadmissible.

5. Assessed Value (Study, pp. 81-85)

6. Should evidence be permitted to be introduced on cross examination if it is inadmissible on direct examination?

Comments

This question is not separately discussed in the study. However, it is mentioned in connection with Offers to Purchase (Study, pp. 72-73) and Assessed Valuations (Study, pp. 81-85). California courts have apparently let almost anything in on cross examination as indicated by the authorities cited in the study.

7. Should an expert be permitted to give hearsay testimony as to market value? If so, should such hearsay be received as an explanation of his opinion or as independent evidence of the value of the property?

Comments

All that was decided by the Commission at the November meeting was that evidence of market data should be received as independent evidence of the value of the property. To be decided at the present time is whether hearsay in regard to market data may be related by an expert and, if so, whether such hearsay is to be regarded as evidence or as merely an explanation of his opinion.

8. What effect, if any, on the admissibility of market data should the change in values caused by the condemnation be given? Should the statute specifically require that the judge find the condemnation did not affect the sales price as a condition of admissibility or should the proposed statutory language that sales are admissible if "made within a reasonable time" be left as the only criterion of admissibility?

Comments

A decision on this question was reserved when the Commission approved the principle that sales subsequent to the taking should be admitted.

9. Should the capitalization of income approach be permitted as an additional method of approving market value? (Study, pp. 96-107.) Should an expert be permitted to give hearsay testimony as to such income? Should such hearsay be received in explanation of opinion or as independent evidence of value?

10. Should the reproduction less depreciation approach be permitted as an additional method of proving market value? (Study, pp. 108-116.) Should an expert be permitted to give hearsay testimony in regard to such matters? Should such hearsay be received as explanation or as independent evidence of value?

11. Subject to the exclusionary rules already adopted, should all other evidence that a 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 admitted. (Study, pp. 33-44).

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

ADDENDUM TO MOVING COST STUDY

I

Since the time the Moving Cost Study was submitted to the Law Revision Commission on December 3, 1958, a number of events have occurred in other jurisdictions which bear considerable significance to the topic under study. Each of these happenings depicts an apparent trend by the courts and the legislatures toward the reimbursement of condemnees in eminent domain actions for their costs of moving. Hitherto, as indicated by the main study (pp. 2, 19, 26), the courts as well as the legislatures were extremely reticent in allowing for such costs. The events of the past year indicate that much of this reluctance is dissolving.

Soon after the Minnesota court in Korengold v. City of Minneapolis¹ reaffirmed its and the majority position that moving costs are not compensable, the Legislature of that state took "remedial" action. It enacted into law a provision that in the discretion of the court a homeowner may receive up to \$200 and the owner of business property up to \$500 for moving expenses. (The statute also permits as taxable costs two appraisal fees not to exceed \$150 each "after

a verdict has been rendered on the trial of an appeal."²
This latter provision, being outside the scope of this study, is not discussed further.)

The above statute (as it relates to moving costs) seems to have at least two questionable results. First, the award apparently can be given only at the discretion of the court. While this provision was inserted possibly to prevent "windfalls" (in those instances, for example, where the condemnee had planned to move and would have incurred moving costs regardless of the condemnation), the provision is unwisely worded. If only the court can grant moving expenses, condemnees who settle with the condemnor outside of court would be denied them. It seems desirable, if such costs are to be allowed, that they be allowed in all acquisitions, by judgment or by out-of-court settlement.

The second questionable result is the limitation in the amount, dollarwise, that a condemnee may receive. As the main study indicated, such a limitation may often be inequitable, particularly in cases where the property owner incurs heavy moving costs.

Nebraska, too, now grants moving costs, but without such limitations. The 1959 Legislature of that state enacted the following statute:³

"§5 -- Where any condemnor shall have taken or attempts to take property for public use, the damages for taking

such property shall be determined according to the laws of this state irrespective of whether the condemnor may be reimbursed for a part of such damage from the federal government and such damages shall include the reasonable cost of any necessary removal of personal property from the real estate being taken."

The only major question the above statute raises is what is meant by the term "reasonable." In all probability it will be interpreted to mean actual costs, to the extent they do not exceed what a reasonable man would incur. Yet, it seems that the determination of such costs may be difficult insofar as often the condemnee will not have expended such funds at the time of the trial, if litigation proves necessary. But, notwithstanding such a drawback, courts and administrators in the vast majority of cases should be able to ascertain a reasonable figure even before an actual expenditure. As indicated in the main text, however, it may be preferable to establish a percentage limitation as a safeguard to the allowance of moving costs.

Reform has not been limited to legislative action. Within the past year, the Florida Supreme Court, though recognizing that the strong weight of authority is to the contrary, specifically allowed for moving costs despite the absence of statutory authority.⁴ That court relied almost entirely upon the state constitutional guarantee of "just compensation." Moving costs (and inferentially all incidental losses), it

held, fall into the orbit of that constitutional dictate. The court further asserted that the market value standard cannot be used to bar the condemnee from receiving such compensation that is "just" even if not within the market formula:

"Although fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement."

II

Related to the above case and the case of Harvey Textile Co. v. Hill cited in the main text (p. 7) is the question as to whether the market value formula, correctly interpreted, actually includes moving cost expenses or whether such costs are not reflected in that standard. The Hill case and others discussed in the main text take the position that such expenditures should be included within the market value formula. That line of cases reasons that a "willing seller," confronted with moving expenses would demand (and by implication receive) such costs from the buyer.

The fallacy of the Hill reasoning, however, has been pointed out by a number of sources. Most recently the Oregon court,⁵ in an extensive discussion of the matter, pointed out how the Hill position fails to reflect the demands

of the buyer and his reluctance to assume such costs in the price he could pay for the property. Furthermore, as has been pointed out elsewhere, the concept of market value as arrived at in the market place does not reflect moving costs in those many instances where the seller does not incur any such costs, e.g., where he liquidates his business before selling, or sells his personal property as well as his land to the buyer.⁶ The Florida court, it would seem, by recognizing that moving costs to be given should be given directly, appears to be on sounder ground than the Hill rationale.

III

There may exist a possibility of conflict between the moving cost statute proposed in the main text and various federal statutes making provision for moving costs. For example, in urban renewal, the federal statute (cited on p. 24 et. seq.) makes provision for defraying the condemnee's moving expenses, or at least some part thereof, even though the market value for the property is paid to the condemnee by the local state or municipal agency.

It is quite possible, and perhaps even probable, that in those areas where there is a federal statute providing for the payment of moving expenses that, nonetheless, federal administrators will not grant such monies if the particular state or municipality has provisions for defraying

such expenditures. In other words, the state may pay costs that otherwise would be paid by the federal government.

To avoid this possibility, it is recommended that a proviso be inserted in the proposed statute (either the short or long form) to the effect that "No payment shall be made hereunder to the extent that such moving costs would be compensated for by any other governmental body or agency in the absence of this section." This additional provision will not put any reform in this area at a peculiar and unjustified disadvantage.

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FOOTNOTES

1. 95 N.W.2d 112 (1959).
2. Minnesota, New Laws, 1959, p.341, par (d). Cited in Kaltenbach, Just Compensation (May, 1959).
3. Nebraska 1959 Laws, p.733 (cited in Kaltenbach, supra, July 1959, p.4).
4. Jacksonville Express Authority v. Henry G. DuPree Co., 108 S.2d 289, 291 (Fla. 1958).
5. Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 420-21, 281 P.2d 707, 719-20 (1955). See also 1 Orgel §68, N.2.
6. Comment, Eminent Domain Valuations in an Age of Re-development: Incidental Losses, 67 Yale L.J. 61, 77-78 (1957).

In the case of sales by lessors, of course, removal costs are likely to be absent. Hence, only the deflating effect of the buyer's expenses would remain. Another reason advanced to show that the market value formula does not include remuneration for incidental expenses is that the market value of property is largely determined by the value set for vacant or about-to-be-vacant property; therefore, since the sellers of such property do not have to bear removal expenses, such costs are not reflected in market value. McCormick 541-42. At least in one case a third contention has been raised. In *St. Louis v. St. Louis, I.M. & S. Ry.*, 266 Mo. 694, 707, 182 S.W. 750, 753

(1916), the court found no need to compensate for removal expenses in eminent domain, since in voluntary sales "ordinarily" neither party considers the costs of removal in determining the price of the property.