

## Condemnation in Federal District Courts— Proposed Rule Compared to Current Practice in Ohio under Conformity Act

In May, 1948, the Advisory Committee on Rules for Civil Procedure submitted to the Supreme Court of the United States a "Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States."<sup>1</sup> Recently the Supreme Court returned the report to the Advisory Committee for further consideration.<sup>2</sup>

The need for a uniform procedure in federal condemnation of property is obvious after investigation. More specifically, an examination of the procedure followed in condemnation cases in the District Court of the United States for the Southern District of Ohio indicates that a uniform procedure would be most beneficial to the property owners and the United States. Congress has provided that in condemnation of realty for sites and other uses by the Department of Justice in the district courts of the United States, the "practice, pleadings, forms, and modes of procedure . . . shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state" within which such district court is held.<sup>3</sup> A study of state procedures completed in 1931 showed 269 different methods of judicial procedure in various classes of condemnation cases and 56 assorted methods of non-judicial procedure.<sup>4</sup> At the present time in Ohio a defendant landowner might find it very difficult to ascertain which of the many condemnation procedures provided in the Ohio General Code is being followed in the district court. If the defendant wished to challenge the procedure, he would find the Ohio General Code somewhat ambiguous.

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<sup>1</sup> The membership of the Advisory Committee on Rules for Civil Procedure is as follows:

William D. Mitchell, Chairman, George Wharton Pepper, Vice Chairman, Charles M. Clark, Reporter; Wilbur H. Cherry; Armistead M. Dobie; Robert G. Dodge; Samuel M. Driver; Clifton Hildebrand; Monte M. Lemann; Scott M. Loftin; Edmund M. Morgan, John Carlisle Pryor; Edson R. Sunderland.

<sup>2</sup> For a discussion of the proposed rule, see Clark, *The Proposed Condemnation Rule*, 10 OHIO ST. L. J. 1 (1949); also *The Committee Note to Rule 71A, Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States* (1948).

<sup>3</sup> 25 STAT. 357 (1888), 40 U.S.C. 258 (1946).

<sup>4</sup> First Report of Judicial Council of Michigan (1931), Section 46, pp. 55-56.

Section 13768 of the Ohio General Code attempts to designate the procedure to be followed by the United States in acquiring land in the State of Ohio. It provides:

Act prescribing the mode of assessment and collection of compensation to the owners of private property appropriated by and to the use of corporations, passed April 23, 1872, and all acts amendatory thereof are hereby made applicable, and said United States in appropriating such property, shall in all respects, be governed by the acts thereto and amendatory thereof as may be passed and be in force when such proceedings take place.

The Act<sup>5</sup> passed April 23, 1872, referred to in Section 13768 is now Section 11038 of Ohio General Code, which provides that "appropriation of private property by corporations must be according to the provisions of this Chapter," *i.e.*, Chapter 14. It would appear that, even though Section 13768 was passed in 1873 and the Conformity Act, *supra*, specifically referring to condemnation actions was not passed until 1888,<sup>6</sup> Ohio has nevertheless, by virtue of the General Conformity Act of 1872,<sup>7</sup> which was then controlling in condemnation cases, designated the procedure to be followed by the United States in condemnation of private property in Ohio.

In an early case, *United States v. Inlots*,<sup>8</sup> originating in the Southern District of Ohio, a federal court faced the problem of determining to what procedure it should conform. The court held that in accordance with the provisions of the Judiciary Act of 1872,<sup>9</sup> the procedure to be adopted was that designated in Section 13768 of the Ohio General Code. As the case was appealed on another issue, in affirming the decision the United States Supreme Court did not rule on the specific question of procedure under the Conformity Act. The problem was handled in substantially the same way by the Circuit Court for the Northern District of Illinois.<sup>10</sup>

It should be noted, however, that the part of the decision in the *Inlots* case, assuming the necessity of alleging that the petitioner has offered compensation and that it has been refused, has been overruled. It is no longer necessary to allege such fact in order to invoke the court's jurisdiction,<sup>11</sup> even though required in state

<sup>5</sup> 69 Ohio Laws 88 (1872)

<sup>6</sup> *Supra* note 4.

<sup>7</sup> 17 STAT. 197 (1872).

<sup>8</sup> 26 FED. CAS. 482, No. 15, 441 (S.D. Ohio 1873), see also *Chappell v. United States*, 160 U.S. 499 (1895)

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *United States v. Block 121*, 24 Fed. Cas. 1176, No. 14, 610 (N.D. Ill. 1872).

<sup>11</sup> *In re Condemnation for Improvement of River Rouge*, 266 Fed. 105, (E.D. Mich. 1920); *Via v. State Commission on Conservation and Development of State of Virginia*, 9 F. Supp. 556 (1935); *affirmed, per curiam*, 296 U.S. 549 (1935)

practice. In view of such changes in viewpoint, and in the light of its early date, there may be doubt about the other holdings of the *Inlots* case.

A somewhat similar situation has been recently considered by a federal court in *United States v. Alexander*.<sup>12</sup> Virginia provided in Sections 4360-4387 of the Virginia Code a general condemnation procedure and in Sections 4388a-4388v provided a special procedure, sometimes referred to as Federal Condemnation Act, to be followed by the United States in condemnation of private property. An action was brought in the district court following the special procedure designated in the Federal Condemnation Act. The court, in ruling on a motion to dismiss the action, followed *United States v. Chichester*,<sup>13</sup> holding that the United States should not follow the special procedure designated in Sections 4388a-4388v but should follow the general condemnation procedure provided in Sections 4360-4387. The court grounded its decision primarily on three points: first, the special procedure was to be followed by only one specific person, namely, the United States; second, the special procedure was less favorable to the landowner; and, third, the prior authority

Since Chapter 14 of the Ohio General Code is not limited to the United States but applies to all private corporations as well, and since Chapter 14 is apparently not less favorable to the landowner, the objections found in the Virginia Act are not present in the Ohio Act. Therefore, it would seem that following the *Inlots* case, *supra*, the procedure in Chapter 14 should be followed by the United States when condemning private property in Ohio. However, Section 11091, the last section of Chapter 14, contains these exceptions: "the provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities to appropriate private property for public uses or for roads or ditches." The Ohio General Assembly has implemented these exceptions by enacting specific procedures to be followed by the different departments and political sub-divisions of Ohio.<sup>14</sup>

In view of the exceptions in Section 11091, a problem of construction of the federal conformity statute arises. It might be argued that condemnations by state authorities are the "like causes" specified in the federal statute. If so, these specific state proceedings are the ones to be looked to for the "practice, pleadings, forms, and

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<sup>12</sup> 47 F. Supp. 900 (W.D. Va. 1942).

<sup>13</sup> 283 Fed. 650 (W.D. Va. 1922).

<sup>14</sup> Public works projects under public work superintendent, OHIO GEN. CODE, §§ 436-462 (1938); State Highway Department, §§ 1182-11 to 13, County Commissioners, §§ 2427-2-8; Park Commissioners, §§ 2976-7, Municipal Corporations, §§ 3677-3697; Sanitary Districts, §§ 6602-51-52; Township Trustees, § 3441; Conservancy Districts, §§ 6828-41.

modes of procedure" to be conformed to in federal courts. By virtue of Section 11091, it may not be the practice of Chapter 14 but of some one or more of the special procedures by various state authorities<sup>15</sup> that is to be followed.

A possible solution to the problem may be found in *United States v. 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, State of New York et al.*, wherein the court when presented with a diversity of state provisions permitted the United States to select from the specific procedures the more adaptable portions and thus develop a "hybrid" procedure.<sup>16</sup>

Perhaps this conclusion would be difficult to accept in the District Court for the Southern District of Ohio since the *Inlots* case would seem to be controlling. However, as will be indicated, an examination of case files in the District Court discloses that the current "practice, pleadings, forms, and modes of procedure" are of a "hybrid" nature. The general effect is one of substantial compliance with Chapter 14 of the Ohio General Code.

#### COMPARISON OF PROPOSED RULE WITH CURRENT PROCEDURE

Rule 71A(b) would permit the plaintiff to "join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use."

Ohio General Code Section 11043 appears to be substantially the same. The petition may include one or more parcels of property, rights, or interests in the county in which it is filed. This section has been interpreted to permit the plaintiff to proceed in one action against all the separate owners of property lying in the county.<sup>17</sup>

The current practice in the District Court is substantially in accordance with the proposed rule and Section 11043. The petitioner generally adds a prayer for the court's permission to join all defendants: "Petitioner claims it is not practical to follow the practice of the State of Ohio and seeks to join all the defendants in the same action."<sup>18</sup> If petitioner is following Ohio General Code Section 11043, the prayer seems an abundance of caution.

As proposed in Rule 71A(b), it would appear desirable to permit the plaintiff in one proceeding to condemn all the property

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<sup>15</sup> *Ibid.*

<sup>16</sup> *United States v. 243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, State of New York et al.*, 43 F. Supp. 805 (E.D. N.Y. 1942), *appeal dismissed*, 139 F. 2d 678 (C.C.A. 2nd 1942); *cert. denied sub. nom. Lambert, Ex'r. v. United States*, 317 U.S. 698 (1943).

<sup>17</sup> *Giesy v. Railroad*, 4 Ohio St. 308 (1854).

<sup>18</sup> *United States of America v. 64 Tracts of Land in Knox and Coshocton Counties, et al.*, Civil Action No. 554, District Court of the United States for Southern District of Ohio.

interests and rights necessary to carry out the project. In order to give adequate protection to all defendants, the court may, under Rule 42 (b), Federal Rules of Civil Procedure,<sup>19</sup> order a separate trial of any claim or of any separate issue.

### *Complaint*

The proposed Rule 71A(c) would require that the complaint contain:

1. "a short and plain statement of the authority for the taking;
2. "the use for which the property is to be taken;
3. "a description of the property sufficient for its identification;
4. "and as to each separate piece of property a designation of the defendants who have been joined as owners of some interest therein."

Ohio General Code Section 11042, "Petition for Appropriation," requires substantially the same contents as the proposed Rule 71A(c). The current practice of the District Court corresponds to the requirements established in Section 11042.

Rule 71A(c) (2) requires "all persons having or claiming an interest in the property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity in light of the type and nature of the property involved and also those whose names have been otherwise learned" to be joined as defendants in the action. All others may be made defendants by joining them as "Unknown Owners."

The current practice under the broad joinder of parties to the action in Section 11255 of Ohio General Code is quite similar to the joinder of parties as provided in the proposed rule. Placing the responsibility on the plaintiff to make a search of the records compatible with the common practice of the locality insures protection to all parties.<sup>20</sup>

The proposed rule would permit the plaintiff to add as defendants all necessary parties any time before trial. Ohio General Code Section 11049 permits such action and the practice is currently followed.

Rule 71A(c) (3) would require that the plaintiff furnish additional copies of the complaint upon request of the clerk or of a defendant. This provision would involve some slight expense and clerical work but, considering the nature of the action and the additional convenience and protection to the defendants, the provision is commendable.

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<sup>19</sup> 28 U.S.C. Sec. 723c (1946).

<sup>20</sup> Clark, *The Proposed Condemnation Rule*, 10 OHIO ST. L. J. at 7.

*Process*

In lieu of a summons, the proposed Rule 71A (d) provides that a notice be prepared by the plaintiff and delivered to the clerk for service by the United States Marshall. The delivery of the notice and its service would have the same effect as the delivery and service of the summons under Rule 4 (d), Federal Rules of Civil Procedure.<sup>21</sup>

The notice shall contain :

1. The name of the defendant to whom it is directed,
2. the title of the action,
3. a description of the defendant's property sufficient for its identification;
4. the interest to be taken;
5. statement "that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation."

Ohio General Code Section 11044 provides for service of the summons which need not contain as complete a description of the defendant's property as would be required by the proposed rule. A summons similar to that provided in Section 11044 is used in the District Court.

Although the form of notice as provided in the proposed rule would require more clerical work, it is nevertheless commendable. The proposed notice not only informs the defendant of the plaintiff's statement of his claim but it also advises the defendant of his rights regarding the filing of an answer.<sup>22</sup>

Under Rule 71A (d), the defendant is given 20 days after service of the notice in which to file his answer. Failure to answer has the legal effect as explained under "Answer," *infra*, in the discussion of paragraph (a) Rule 71A.

Section 11044 of Ohio General Code provides for answer not less than five days after service of the summons and not longer than 15 days after service. The current practice in the District Court is to permit an answer within 20 days after service of summons.

The territorial limits for personal service under Rule 4 (F), Federal Rules of Civil Procedure<sup>23</sup> are extended so as to permit personal service "upon a defendant who resides within the United States or its territories or insular possessions." Currently, personal service follows Rule 4 (F), Federal Rules of Civil Procedure<sup>24</sup>

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<sup>21</sup> *Supra* note 19.

<sup>22</sup> Clark, *supra* note 20.

<sup>23</sup> *Supra* note 19.

permitting personal service throughout the state in which the Federal District Court is situated.

Considering that the condemnation action does not seek to impose personal liability on the defendants and that the territorial provision will give more protection to the defendants, the extension would be desirable.

The procedure for service by publication proposed in Rule 71A(d)(3)(ii) is substantially in conformity with Ohio General Code Section 11045, except that the proposed rule would require publication "once a week for not less than *three* successive weeks" whereas Section 11045 requires publication for *four* consecutive weeks. The current practice in the District Court is publication for *six* consecutive weeks following Ohio General Code, Sections 11292 and 11295.

The current practice of publication for six weeks apparently causes no injury nor undue delay and may give "unknown defendants" more opportunity for notice of the pending action. *Quaere* as to the court's jurisdiction under strict conformity interpretation, if Section 11045 is applicable.<sup>25</sup>

#### *Answer*

The proposed rule provides for answer by the defendant within 20 days as discussed, *supra*. If defendant elects not to answer by raising objections or defenses, he thereby waives all defenses and objections to the taking of his property. However, at the trial of the issue of just compensation, the defendant may present evidence as to the amount of compensation and may share in the distribution of the award regardless of whether he has previously appeared or submitted an answer. Rule 71A(e) also provides that "no other pleading or motion asserting any additional defense or objection shall be allowed." This latter proviso undoubtedly prohibits the raising of any defenses except in the answer and prohibits the court from entertaining any preliminary motions.

The form and substance of the answer in current practice is in conformity with Ohio General Code, Sections 11314-11322. However, examination of condemnation actions in the District Court shows that the only issue raised in the answer is that of compensation.

Although there is a distinct tendency to protect private property rights, and justifiably so, nevertheless the condemnation is an *in rem* action and the issue is essentially one of compensation.

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<sup>24</sup> *Ibid.*

<sup>25</sup> Eminent domain statutes are strictly construed and must be strictly complied with to pass title to the sovereign. *United States v. 8,557.16 Acres of Land in Pendleton County*, 11 F Supp. 311 (N.D. W Va. 1935); *but see* *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1904).

Therefore, it is submitted that the proposed rule would not deprive the defendant of any rights. The procedure would eliminate unnecessary delay and expense involved in preliminary motions and answers by the defendant.

#### *Amendment of Pleadings*

The proposed Rule 71A (e) would permit the plaintiff to amend the complaint at any time before the trial of the issue without leave of the court. The plaintiff would also be required to furnish copies of the amendment upon request of any defendant and would be required to serve notice of the filing of the amendment on any of the parties affected.

Under the current practice and that designated by Section 11049 of Ohio General Code, the plaintiff must file a motion with the court to amend the petition.

It would seem to be an undue burden on the court to require trafficking in this type of a motion. Since the proposed rule requires notice to the defendant affected, thereby protecting his interests, this procedure should be acceptable.

#### *Trial*

Unless otherwise provided by an Act of Congress, any party may demand a trial by jury to determine the just compensation.<sup>26</sup> The proposed rule has specifically excepted trial by jury of the issue of just compensation when Congress has specifically constituted a tribunal to determine such issue. The current instances of such Congressional action are the acquisition of property by condemnation in the Tennessee Valley and District of Columbia.<sup>27</sup>

The adoption of paragraph (h), above, would indicate no substantial change in the current practice.

#### *Dismissal of Action*

The action may be dismissed either by the court, the plaintiff, or by stipulation of both parties by filing a notice of dismissal, providing the plaintiff has not acquired possession, title, or any lesser interest in the property. If the plaintiff has taken possession, title, or lesser interest, the court shall not dismiss the action but shall award just compensation for the property so taken.<sup>28</sup>

#### *Deposit and Distribution*

The proposed rule would require the plaintiff to make any deposit required by law and, although not required, the plaintiff could make such a deposit when permitted by statute.<sup>29</sup>

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<sup>26</sup> Proposed Rule 71A (h).

<sup>27</sup> Clark, *supra* note 20.

<sup>28</sup> Rule 71A (i).

<sup>29</sup> Rule 71A (j).

This provision permits the plaintiff to conform to any substantive law of the state wherein the action is brought and would not alter the current practice.

#### CONCLUSION

Considering the uncertainty as to what procedure should be followed under Ohio General Code and the findings of the Advisory Committee that multifarious procedures are followed throughout the United States, it appears unquestionable that a uniform procedure is desirable and long overdue.

Such a uniform procedure as proposed by Rule 71A would give adequate protection to the defendant while permitting speedy and efficient proceedings.

It might be suggested that the recommendations of the Advisory Committee concerning the adoption of a uniform Federal rule be carefully studied with the view of determining whether or not it would be advisable for the Ohio General Assembly to consider simplification and standardization of procedures for condemnation of property in Ohio.

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