

Eminent Domain—Time as of Which Damages Are Assessed

The federal constitutional requirement that the owner of property taken in condemnation proceedings shall receive just compensation¹ has been interpreted to mean that it rests neither with the legislative branch of the government² nor the executive branch³ to say what compensation shall be paid or even what shall be the rule of compensation; that the ascertainment of just compensation is a judicial inquiry.⁴ On the other hand, it is a matter of legislative discretion as to which tribunal shall be eligible to determine the valuation.⁵

Where the property being condemned is fluctuating in value, the selection of the date for valuation may be important. Constitutional provisions for just compensation consistently have been held to require that the property taken be valued as of the time of taking.⁶ The great weight of authority excludes from the value at that time any increment due to the proposed improvement.⁷ The time of taking rule is flexible in that the whole course of the condemnation proceeding is considered a taking in a general sense, which makes it necessary to fix the time more specifically. The broad rule is somewhat focalized by the concept that the taking occurs at the time of the termination of the dominion of the owner and segregation of the property for public use.⁸ This test is also difficult of application in the light of the concept of ownership as an aggregate of rights, privileges, powers and immunities,⁹ as these may not all be taken from the owner at one time. For example, the taking may be said to begin at the time it becomes known that the property is to be condemned because the owner can no longer with reasonable certainty assure prospective buyers that he can convey effectively the future use in perpetuity. The process of taking may then continue through the loss of other

¹ U. S. CONST. AMEND. V; AMEND. XIV, § 1.

² *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

³ *United States v. New River Collieries*, 262 U.S. 341 (1923).

⁴ See notes 2 and 3 *supra*.

⁵ *United States v. Jones*, 109 U.S. 513 (1883); *Kohl v. United States*, 91 U.S. 367 (1875).

⁶ McCORMICK, DAMAGES 555 (1935).

⁷ See Note, 147 A.L.R. 66 (1943).

⁸ *Benedict v. City of New York*, 98 Fed. 789 (C.C.A. 2d 1899), *cert. denied*, 179 U.S. 685 (1900)

⁹ Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L. J. 721, 731 (1919).

components of ownership until the proceedings can no longer be abandoned by the condemnor, at which time it is complete.

Illustrative of the variation in the steps which have been held to constitute the taking for purposes of determining the time for ascertainment of value are the following: time of entry;¹⁰ time property was converted;¹¹ time land appropriated;¹² time of filing petition;¹³ time of trial;¹⁴ instant the property was taken or damaged;¹⁵ date of impaneling jury;¹⁶ date condemnor filed bond and made deposit;¹⁷ time of making award;¹⁸ time of payment of award.¹⁹

The federal constitution does not require payment before taking, although this is required by a number of state constitutions.²⁰ Where the taking for a public improvement is wrongful because of the failure of the condemnor to utilize proper proceedings, the owner may be allowed to recover the value of the property at the time of trial together with the loss of its use to the time of trial.²¹

Although definition of just compensation is a judicial function, the legislature may in effect determine the specific time as of which valuation shall be made by statutory designation of the time of termination of the dominion of the owner and segregation of the property for the public use.²² A minority of the American jurisdictions specify in general condemnation procedure statutes a particular step within the procedure as the time for ascertainment of compensation. These include: date of filing petition and order thereon;²³ date of summons or notice, with no compensation for improvements subsequent to date of service;²⁴ date of service of

¹⁰ *Yara Engineering Corp. v. City of Newark*, 136 N.J. Eq. 453, 42A 2d 632 (Ch. 1945).

¹¹ *In re Board of Water Supply of City of New York*, 277 N.Y. 452, 14 N.E. 2d 789 (1938).

¹² *State ex rel. State Highway Commission v. Blobeck Inv. Co.*, 233 Mo. App. 858, 110 S.W. 2d 860 (1937).

¹³ *Hocking Valley Ry. Co. v. Ornstein*, 18 Ohio L. Abs. 424 (P. Ct. 1935).

¹⁴ *Muskingum Watershed Conservancy District v. Kaufman*, 36 Ohio L. Abs. 480, 44 N.E. 2d 723 (App. 1940)

¹⁵ *Donaldson v. City of Bismarck*, 71 N.D. 592, 3 N.W. 2d 808 (1942).

¹⁶ *Chesapeake & Ohio Ry. Co. v. Ornstein*, 11 Ohio Op. 129 (App. 1947), *appeal dismissed*, 133 Ohio St. 385, 13 N.E. 2d 909 (1938)

¹⁷ *Aycock v. Houston Lighting & Power Co.*, 175 S.W. 2d 710 (Tex. Civ. App. 1943).

¹⁸ *Pardeeville Elec. Lt. Co. v. Pub. Serv. Comm.*, 238 Wis. 97, 297 N.W. 394 (1941).

¹⁹ *Danforth v. United States*, 308 U.S. 271 (1939).

²⁰ ROTTSCHAEFER, CONSTITUTIONAL LAW 722, 723 (1939)

²¹ *Morin v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 100, 14 N.W. 460 (1882); *Texas Western Ry. Co. v. Cave*, 80 Tex. 137, 15 S.W. 786 (1891).

²² *Benedict v. City of New York*, 98 Fed. 789 (C.C.A. 2d 1899), *cert. denied*, 179 U.S. 685 (1900).

²³ N. J. STAT. ANN. § 20:1-9 (1937).

²⁴ ALASKA COMP. LAWS § 1574 (1933); ARIZ. CODE ANN. § 27-916 (1939);

summons or notice to appear;²⁵ date of trial but no compensation for improvements subsequent to date of service of summons;²⁶ date of hearing;²⁷ date of adoption of the order establishing right of petitioner to take.²⁸ It has been ruled that statutes designating a time of valuation which is determined to be either prior to or subsequent to the time of taking are unconstitutional. In the case of *Opelousas G. & N E. Ry. Co. v. St. Landry Cotton Oil Co.*,²⁹ interpreting the Louisiana condemnation statute³⁰ which reads “. . . the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed . . .” the court held that the legislature must have meant as of the time of taking and not as of the time before the public improvement was proposed, on the ground that the latter would be unconstitutional as a taking without just compensation. In *Forster v Scott*³¹ the court held unconstitutional, as denying just compensation, a statute which provided that if condemnation proceedings followed the filing of maps of proposed routes of streets, the value of such land as might be taken should exclude the value of improvements made by the owner prior to the condemnation proceedings and subsequent to the filing of the map. In *Kittinger v. Rossman*³² a statute declaring that one thereafter building on land within the future lines of a street if extended shall not be entitled to damages for the improvement was held invalid as depriving the owner of use without compensation.

There are a number of factors which tend to prevent the development of a universal rule. In many instances the exact time chosen is of no practical importance and a series of such cases may build up a pattern of stare decisis.³³ The doctrine that a term of court is regarded in law as but a single day³⁴ may furnish a partial rationalization of the courts' attitude, in sum, that any date within the litigation is constitutionally unobjectionable. The process of

CAL. CODE CIV. PROC. ANN., pt. 3, tit. 7, § 1249 (1941), HAWAII REV. LAWS § 315 (1945); IDAHO CODE ANN. § 13-712 (1932); MONT. REV. CODES ANN. § 9945 (1935); N. M. STAT. ANN. § 25-909 (1941)

²⁵ NEV. COMP. LAWS ANN. § 9164 (1929), IND. ANN. STAT. § 3-1706 (Burns 1933), UTAH CODE ANN. § 104-61-12 (1943).

²⁶ N. D. REV. CODE § 32-1523 (1943).

²⁷ TEX. CIV. STAT., art. 3265 (1925).

²⁸ MASS. ANN. LAWS, c. 80A, § 12 (1933).

²⁹ 118 La. 290, 42 So. 940 (1907).

³⁰ LA. CIV. CODE ANN., art. 2633 (1945).

³¹ 136 N.Y. 577, 32 N.E. 976 (1893)

³² 12 Del. Ch. 276, 112 Atl. 388 (Ch. 1921)

³³ For an owner's constitutional rights to be infringed the rules applied in determining just compensation must have disregarded the owner's rights so greatly as to produce a clearly arbitrary result. *Roberts v. City of New York*, 295 U.S. 264 (1935).

³⁴ *People ex rel. Waber v. Wells*, 255 Ill. 450, 99 N.E. 606 (1912).

taking may spread over a period of time.³⁵ The court may set aside its usual rule to avoid an unusual hardship.³⁶ Aside from the difficulties of selecting the exact time to use, its importance in determination of the final result may be diminished by the uncertainty attending other steps of the process of evaluation. The exclusion of certain elements actually present and increasing value³⁷ and the exclusion of other elements actually present and decreasing value³⁸ may result in evaluating a group of rights that do not constitute an existing property. When the condemnation involves a unique property such as real estate there is no universal formula for determining "true market value." Thus it would appear that the problem of assessing value in condemnation proceedings may involve the assignment of an arbitrary amount for an imaginary property as of a fictitious date.

It is suggested that where the time of divestiture cannot be precisely determined, the better rule would embrace the following:

1. Value as of the date of filing petition. An earlier date would permit the condemnor to take advantage of the owner by avoiding compensation for increase of value during the interval, while a later date would put a greater problem of speculation on the condemnor and would give the owner opportunity to enhance the damages.
2. Exclude any increment or decrement due to the proposed improvement. Neither the public nor the owner should profit at the expense of the other.
3. Add actual damages for interference with possession prior to filing petition. There would be a tendency to avoid such injuries where the advantages to the condemnor are not at least equal to the injury suffered by the owner.
4. Add actual damages for improvements made by the owner in good faith between the date of the petition and service of summons. Unnecessary losses resulting from delay in notice to the owner would be minimized if the condemnor had a financial incentive to avoid them.
5. Award actual damages in the event of abandonment of proceedings subsequent to date of filing petition. In changing plans the condemnor would tend to weigh the advantages to the public against the injury to the owner, and losses which society would otherwise suffer from inadequate planning by the condemnor would be minimized.

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³⁵ See text, page 80.

³⁶ In a jurisdiction where the usual rule was date of impaneling jury, when the economic depression intervened between the date of filing petition and the time of impaneling jury, it was held that to avoid hardship the date of filing petition would be used as the date for determination of value. *Hocking Valley Ry. Co. v. Ornstein*, note 13 *supra*.

³⁷ See Note, 147 A.L.R. 66 (1943)

³⁸ *Graham v. Pittsburgh & Lake Erie Ry Co.*, 145 Pa. 504, 23 Atl. 239 (1891).