University of Miami Law Review

Volume 16 | Number 1 Article 6

10-1-1961

Lessee's Right to Jury Trial in Eminent Domain

Richard E. Reckson

LESSEE'S RIGHT TO JURY TRIAL IN EMINENT DOMAIN

I. INTRODUCTION

"[T]he statutes of this state relating to eminent domain proceedings have been enacted, modified, revised, repealed and re-enacted in so many particulars as to leave the law in a state of uncertainty and confusion."[1] It is the purpose of this comment to examine one specific area of the procedural law of eminent domain: the right of a lessee of condemned property to have his damages determined by the jury.

The Florida Constitution does not provide a clear procedural guide for the role of the jury in eminent domain proceedings. The constitutional directive that private property shall not be taken without due process of law,[2] nor taken from the owner without compensation determined by a jury of twelve men,[3] is subject to a wide range of interpretation. That the Florida cases have run the full scale has been due largely to the modification and revision of the eminent domain statutes.

II. FLORIDA STATUTORY PROVISIONS

Sections 73.11[4] and 73.12[5] of the Florida Statutes contain the form of verdict and form of judgment in eminent domain proceedings. The provisions of these two statutes regulate the procedural rights of the parties to a condemnation suit.

A. *Pre-1959 Provisions*

Prior to the 1959 amendment of section 73.12 of the statutes there was no definite statutory provision dealing with the right of a lessee of condemned property to have a jury determine his damages. Section 73.12[6] provided that the jury would fix the compensation to be awarded to each owner; and that the court would apportion the award among the owner and any mortgagees, judgment creditors and lien holders. The statute was silent as to the right of a lessee to have a jury determination of his interest.

The Supreme Court of Florida in *Natural Gas & Appliance Co. v.*

---

1. Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So.2d 687, 692 (Fla. App. 1959).

2. FLA. CONST. DECL. OF RIGHTS § 12: "nor shall private property be taken without just compensation."

3. FLA. CONST. art XVI, § 29: "No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

4. FLA. STAT. § 73.11 (1959).

5. FLA. STAT. § 73.12 (1959).

6. FLA. STAT. § 73.12 (1951): "The court upon appropriate petition shall determine the rights of any mortgages [*sic*], judgment creditors and lienholders in respect to the compensation awarded to each owner by the verdict."

Marion County,[7] a 1952 case, approved a jury verdict fixing the amount of a lessee's damages in a condemnation suit. The question before the court was the adequacy of the verdict. In affirming the jury's award the court stated:

> The question of special damages to the remainder of the property occupied by the appellant, as lessee, was fairly submitted to the jury under appropriate instructions from the Court. They rendered a verdict in which they fixed the amount of damages to the appellant for the land taken and special damages to the remainder.[8]

The opinion of the court did not reveal if the procedure of allowing the jury to determine the amount of the lessee's damages was challenged by the condemning authority. Nevertheless, the case by implication is authority for the statement that the lessee of real property is entitled to have a jury determine the amount of his damages as well as the damages suffered by the fee owner. The 1951 version of section 73.12 of the statutes[9] provided that each owner was entitled to have the jury determine his damages in eminent domain proceedings, and apparently the court considered a lessee to be an "owner" within the meaning of the statute. This case is the sole Florida Supreme Court decision dealing with the right of a lessee to have the jury fix his damages.

In *Shavers v. Duval County*,[10] decided two years after the *Natural Gas* case, the Florida Supreme Court held that a mortgagee was not an "owner" within the meaning of section 73.12 and thus was not entitled to recover attorney's fees in a condemnation suit. The court stated that the condemnation statutes are to be construed strictly; that under Florida law, a mortgagee is the owner of a chose in action which creates a lien upon the land, not the owner of an estate or proprietary interest.[11]

The right to have a jury determination of damages in eminent domain proceedings is further limited by the often expressed doctrine that an eminent domain action is not the proper proceeding to determine questions of title to the condemned property.[12] The sole function of the jury is to determine the value of the property being taken. The contest as to the recipient of the award should be determined in a supplemental hearing. *Porter v. Columbia County*[13] is illustrative. One J. H. Porter claimed to

---

7. 58 So.2d 701 (Fla. 1952).
8. *Id.* at 702.
9. See note 6 *supra*.
10. 73 So.2d 684 (Fla. 1954).
11. *Id.* at 687; see Waldock v. Iba, 114 Fla. 786, 150 So. 231, *rehearing granted* at 803 (1933), *aff'd on rehearing*, 153 So. 915 (1934); Evins v. Gainesville Nat'l Bank, 80 Fla. 84, 85 So. 659 (1920).
12. Cravero v. Florida State Turnpike Authority, 91 So.2d 312 (Fla. 1956); Porter v. Columbia County, 75 So.2d 699 (Fla. 1954); Shavers v. Duval County, 73 So.2d 684 (Fla. 1954).
13. 75 So.2d 699 (Fla. 1954).

be the fee simple owner of property condemned by the defendant, which had named Mary Porter as the sole owner. J. H. Porter requested that he be allowed to testify that he was the owner, and evidence was offered as to his interest in the property. An objection to this testimony was sustained and the ruling affirmed on appeal, the Florida Supreme Court stating:

> It is not the purpose of an eminent domain proceeding to try title to the property. . . . The purpose of the eminent domain proceeding is to determine the value of the property taken and damage to the remainder, irrespective of ownership. Such questions as interest in the property, ownership, liens on property, may be determined in the same action in a summary proceeding after the jury has ascertained and rendered a verdict as to the value of the property taken and damage to the remainder.[14]

As a general rule, the value of property taken under the eminent domain power is the fair market value of the property at the time of the taking.[15] If the fair market value is the basis for the award, the question of ownership is immaterial in awarding damages. In this regard, it is not necessary for the jury to determine who is the fee simple owner as that issue has no effect on the jury's determination of the damages to be awarded.

B. *The 1959 Amendment of Section 73.12*

In 1959 the Florida Legislature amended section 73.12 to provide that:

> The court upon appropriate petition shall determine the rights of any owners, lessees, mortgagees, judgment creditors and lien holders in respect to the compensation awarded to each owner by the verdict, and the method of apportionment among interested parties together with the disposition of any other matters arising from the taking.[16]

As a result of this amendment, the Florida district court of appeal held that a lessee of condemned property has no right to a jury determination of his damages.[17] As of the present time, the Florida Supreme Court has not passed on the question.

The leading decision on the construction of section 73.12 is *Rich v. Harper Neon Co.*[18] At the trial, the fee owner moved that the claim of the lessee be deferred until the jury had determined the damage due the

---

14. *Id.* at 700.

15. Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So.2d 687, 689 (Fla. App. 1959); JAHR, EMINENT DOMAIN, VALUATION AND PROCEDURE § 130 (1953).

16. FLA. STAT. § 73.12 (1959).

17. Parker v. Armstrong, 125 So.2d 138 (Fla. App. 1960); Rich v. Harper Neon Co., 124 So.2d 750 (Fla. App. 1960); Wingert v. Prince, 123 So.2d 277 (Fla. App. 1960).

18. *Supra* note 17.

owner. The trial court, denying the motion, held that the question of damages due the fee owner and the lessee should be submitted to the jury. The fee owner appealed from the denial of the motion. The order of the trial court was reversed on appeal. The appellate court held that under section 73.12 the lessee was not entitled to a jury determination of his damages. The court stated that the jury was to find a total award which the trial judge would apportion between the interested parties. The holding was based on the express terms of section 73.12 and on the *Porter*[19] and *Cravero*[20] cases, decided by the Florida Supreme Court, which had held that an eminent domain action is not a proper action in which to try questions of title.

The opinion in *Rich v. Harper Neon Co.* is more notable for its holding than for any discussion of the issues involved. The court made no attempt to analyze the cases relied on as authority. It is submitted that the case authority cited by the court is not relevant to the issue. The *Porter* and *Cravero* cases held only that an eminent domain proceeding is not the proper action to try questions of title. In the *Rich* case no conflict of title question was presented. The parties by admission stood in the relationship of landlord and tenant. The jury was not to determine if the lessee had a valid lease, but rather the damages to be awarded the lessee. The statement that the jury will not determine questions of title does not appear to be authority for the holding that the jury will not fix damages to be awarded a lessee. In the *Rich* case, the court also stated that "a circuit judge can more properly apportion the interest of various claimants to a certain tract of land than could a jury, under the circumstances."[21] This reasoning could support the total elimination of trial by jury. A judge, by way of his training, is better suited to determine any question, either law or fact, which is at issue in any case. The judge is better qualified to fix the total amount of the award, as well as to apportion the jury award among the interested parties. The presence of the jury in an eminent domain proceeding is not required because a jury possesses mystical qualifications not present in the judges of the State of Florida, but because the Constitution of the State of Florida grants a jury trial as a matter of right.[22]

It is this writer's view that the only valid ground for the holding in the *Rich* case is the express language of section 73.12 of the statute. There was no discussion in the opinion as to any conflict between section 73.12 and the Florida Constitution.

---

19. Porter v. Columbia County, 75 So.2d 699 (Fla. 1954); see text at note 13 *supra*.

20. Cravero v. Florida State Turnpike Authority, 91 So.2d 312 (Fla. 1956).

21. Rich v. Harper Neon Co., 124 So.2d 750, 752 (Fla. App. 1960).

22. FLA. CONST. art. XVI, § 29.

III. THE CONSTITUTIONALITY OF SECTION 73.12

The apportionment procedure provided for in section 73.12[23] has not been challenged in the Florida Supreme Court. The cases construing the statute have not discussed any constitutional issue. It is therefore emphasized that the subsequent discussion represents only the speculation of this author.

The Florida Constitution grants to each owner the right to have his damages in an eminent domain proceeding determined by a jury of twelve men.[24] The validity of the apportionment procedure of section 73.12 would appear to present a question of constitutional interpretation.

A. *Sister State Decisions*

As is to be expected, a conflict of authority exists as to the procedural method to be followed in the apportionment of damages among the interested parties in condemnation suits. Any attempt to state general rules must fail due to the diversity of constitutional and statutory provisions among the states.

The great weight of authority holds that the jury determines the total value of the condemned land, irrespective of the several interests in the land.[25] The compensation is for the taking of the land, not the several interests in the land:

> The value of property cannot be enhanced by any distribution of the title or estate. . . . Whatever advantage is secured to one interest must be taken from another, and the sum of all the parts cannot exceed the whole.[26]

The Florida rule is in accord with the majority position. Section 73.12 of the Florida Statutes[27] provides that compensation shall be determined as a whole, irrespective of the various interests in the land, and the case authority supports the validity of this procedure.[28]

B. *Apportionment by Judge or Jury*

A sharp conflict of authority exists on the question of how the jury award for the entire value of the condemned property shall be apportioned among the several interests in the land. Notwithstanding the variance of state constitutional and statutory provisions, there is an interpretative

---

23. See text at note 16 *supra*.
24. FLA. CONST. art. XVI, § 29.
25. 4 NICHOLS, LAW OF EMINENT DOMAIN §§ 12-36 (1951).
26. LEWIS, EMINENT DOMAIN § 483, at 634 (1888).
27. FLA. STAT. § 73.12 (1959).
28. Cravero v. Florida State Turnpike Authority, 91 So.2d 312 (Fla. 1956); Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So.2d 687 (Fla. App. 1959); Dratch v. Dade County, 105 So.2d 171 (Fla. App. 1958).

conflict among the states as to the right of a lessee to have a jury determination of *his* damages.

Two cases have been selected for discussion as illustrative of the prevalent positions: one holds that an *owner* is not entitled to have a jury determine his award; another holds that a lessee is entitled to a jury determination of his damages.

In *State, By and Through State Highway Comm'n v. Burke*,[29] the Oregon Supreme Court rejected an owner's argument that he was entitled to have the jury determine the extent of his interest in a condemnation award.[30] The court held that a condemnation proceeding is an action in rem, not the taking of a personal right, but a taking of the property. As such, individual owners have no constitutional right to a separate valuation of their interests in the land, even though they may answer and allege the value of the property and damage resulting from the condemnation. After a determination of a lump sum award by the jury, the fund is paid into court by the condemning authority and:

> [A]fter the state has paid into court the sum awarded by the jury, the condemnation proceedings, as such, are at an end, and judgment vesting title in the state follows. But this leaves in the court a fund in which the former lessor and lessees have interests which are the equivalent in money of the interests formerly held in the land . . . . [T]he determination of the relative interests in the fund may involve the most intricate and difficult problems, for the determination of which, juries are unsuited. The interposition of equity is required.[31]

The Court of Appeals of Kentucky, in *City of Ashland v. Price*,[32] came to a conclusion directly opposite to that of the Oregon court. The Kentucky court rejected the theory that the eminent domain action is one in rem, in which the personal rights of the landowners may be disregarded for the exercise of judicial "expertise" in apportioning a jury award. The court said:

> There is much authority for having the separate interests of a lessor and lessee disregarded in the trial of the condemnation proceeding. This is based on the conception that it is an action in rem and does not deal with persons. . . . But the interests of a lessor and lessee are obviously different in character. . . . Section

29. 200 Ore. 211, 265 P.2d 783 (1954).

30. ORE. CONST. art. I, § 18: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered . . . ."

31. State, By and Through State Highway Comm'n v. Burke, 200 Ore. 211, 258, 265 P.2d 783, 804 (1954). See also New Jersey Highway Authority v. J. & F. Holding Co., 40 N.J. Super. 309, 123 A.2d 25 (App. Div. 1956).

32. 318 S.W.2d 861 (Ky. 1958). See also Lambert v. Griffin, 257 Ill. 152, 100 N.E. 496 (1912).

> 13, a part of our Bill of Rights, declares that no "man's property [shall] be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." This deals with persons. . . . Thus our Constitution looks to compensation of persons. . . . Our Constitution, Section 242, plainly says that the damage for the property taken for public use shall be assessed by a jury . . . . Therefore, it would not be proper or right for the court independently of a jury to divide a single award where multiple claims rest upon different estates. We conclude therefore, that the compensation of the lessor and lessee, respectively, must be fixed by a jury.[33]

IV. CONCLUSION

The rationale of the Kentucky Court of Appeals appears to be more applicable to the construction of the Florida statute than does that of the Oregon court. There does not seem to be any indication in any Florida case that Florida regards an eminent domain action as a proceeding in rem. In *Shavers v. Duval County*,[34] the Florida Supreme Court, in construing the word "owner" as used in section 73.12, held that it did not include a mortgagee, who had only a lien on the land. Certainly a lessee, who has an estate for years, *is* an "owner" within this reasoning and should be granted the right to a jury determination of his damages.

The Florida Constitution does not provide for an in rem action in eminent domain proceedings. It grants to the owner of real property the right to a jury determination of damages, all questions of judicial expertise notwithstanding. The constitution grants to the individual *owner* the right that compensation determined by a jury shall be paid or secured *to him* before the property may be taken. Thus, the Florida Constitution provides for the compensation of *persons* as does the Kentucky Constitution.

It is submitted that the statutory apportionment procedure provided in section 73.12 of the Florida Statutes is violative of article XVI, section 29 of the Florida Constitution.[35] Regardless of the final determination of the constitutional question, the issue is one which should be discussed when the statute is construed. If the Florida appellate courts are to hold the statute constitutional, they should not do so by implication.

RICHARD E. RECKSON

---

33. City of Ashland v. Price, *supra* note 32, at 864.
34. 73 So.2d 684 (Fla. 1954).
35. See note 3 *supra*.