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FEDERAL AND STATE CONDEMNATION PROCEEDINGS—PROCEDURE AND STATUTORY BACKGROUND

WILLIAM E. MILLER*

I. INTRODUCTION

The development of our modern and complex society has necessitated a widespread appropriation of private property for public use. The vital importance of present-day eminent domain is emphasized by the staggering proportions of recent and proposed takings in terms of the amount of land appropriated, its monetary value, and the number of individual citizens whose property is affected. In the Middle District of Tennessee alone—of course a small part of the national total—in excess of 700 tracts or parcels of land have been condemned during the past seven and one-half years for various projects, including the Old Hickory Dam and Reservoir, the Cheatham Dam and Reservoir, Tennessee Valley Authority projects, and a number of others. For these lands, the acquiring agencies deposited in court the approximate sum of $4,000,000 as the estimated value of the lands and interests condemned, not to mention the much greater amount of the final compensation awards. The Corps of Engineers is presently engaged in acquiring lands for the Barkley Dam and Reservoir Project on the Cumberland River, and it is indicated that approximately 1,450 tracts of land lying in the Middle District of Tennessee will be required for that project. Of course, it cannot be forecast with any degree of accuracy how many of these tracts will ultimately reach the court for trial because of defective titles, disputed ownership, or refusal of landowners to accept the price offered.

One writer has taken the view, which is no doubt shared by many, that land condemnation cases have assumed an importance to the public and to property owners which entitles them to preference over all other civil cases, in both trial and appellate courts.[1] Of significance to the legal profession is the fact that the so-called "land condemnation" case has now become commonplace. With the clarification of pertinent substantive law and the simplification of procedure, the general practitioner is no longer reluctant to enter this lucrative field, called by one of our distinguished visitors a number of years ago the "dark corner of the law,"[2] a corner which the practitioner has

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1. Wasserman, *Procedure in Eminent Domain,* 11 MERCER L. REV. 245, 272 (1960).

2. 2 ORGEL, VALUATION UNDER EMINENT DOMAIN § 248 (2d ed. 1953).

in times past chosen to leave to the specialist.

Since my experience as a trial judge in land condemnation cases has been exclusively in the federal court, this article is composed largely of observations on federal law and procedure, with some specific examples from my own experience in the federal court which are not only of local interest, but which also serve to illustrate the practical problems that arise in the trial and administration of this type of litigation.

II. CONSTITUTIONAL AND STATUTORY LAW

A. Nature and Source of Power

It should be helpful first to explore briefly the nature and source of the power of eminent domain.

The power itself is as old as political society. It is inherent in sovereignty, and does not depend for its existence upon specific constitutional recognition.[3] The power has always existed under the common law.[4] More than one hundred years ago the Supreme Court of Tennessee stated:

> It would, at this day, be worse than useless to enter into a discussion of the existence and extent of the right of eminent domain, and to prove that it is inherent in this and all other governments. That is now well settled, and admitted on all hands to exist in every state and country. No one now questions the right of the state to take private property for public use, against the consent of the owner.[5]

It has also been said that:

> This power is inherent in, and essential to, the existence of all government even in its most primitive forms. It was exercised by the Romans in the construction of roads, aqueducts, and similar public work. Until, however, the rights of the individual as against the state began to be recognized, it was not necessary to analyze the sovereign power, since every order which the government had the physical power to enforce was valid. At the approach of modern times, however, the rights of the individual began to be given more consideration, the existence of unlimited and despotic power in the sovereign began to be questioned, and the political philosophers of the time studied the recognized powers of government and named and classified them.[6]

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3. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

4. Kohl Inc. v. United States, 91 U.S. 367, 376 (1875).

5. Woodfolk v. Nashville & C. R.R., 32 Tenn. 421, 430 (1852).

6. 18 AM. JUR. *Eminent Domain* § 2 (1938).

B. Constitutional Provisions

Certain powers of government are, of course, "named and classified" in our federal and state constitutions. And while we frequently associate the power of eminent domain with the last two clauses of the fifth amendment[7] and the due process clause of the fourteenth amendment to the Constitution of the United States,[8] and article I, section 21 of the Constitution of Tennessee,[9] these constitutional provisions do not create the power; they merely assure that the power will not be exercised without due process of law and that payment of just compensation will be made when private property is taken for public use.

In short, the broad power of eminent domain may be exercised by the sovereign, subject only to the constitutional limitations: (1) that private property shall not be taken for public use without just compensation, and (2) that no person shall be deprived of his property without due process of law.

The due process clause is now seldom invoked, since it is well established that constitutional requirements are met when the taking for a public use is effected in accordance with statutes which provide for "just compensation" and procedures which afford "the owner a reasonable opportunity to be heard on the question of damages."[10] The principal constitutional question raised in condemnation proceedings today concerns the meaning of the term "public use," and even that question is becoming increasingly rare in view of the broad scope of the term as delineated by judicial decisions. There are two notable recent examples. In the case of *Berman v. Parker*[11] the Supreme Court of the United States upheld the constitutionality of the District of Columbia Redevelopment Plan. Under the plan, slums and blighted areas were to be acquired, cleared, and then sold or leased to private interests for redevelopment under restrictions designed to prevent the recurrence of slums or blight. A principal contention of the landowners was that the result would be "private use" by the redevelopers instead of "public use." In rejecting this contention the Supreme Court stated: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. . . . The public end may be as well or

7. "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

8. "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

9. "That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

10. See 18 AM. JUR. *Eminent Domain* § 4 (1938).

11. 348 U.S. 26 (1954).

better served through an agency of private enterprise than through a department of government—or so Congress might conclude."[12] Another case worthy of note is *United States ex rel. Tennessee Valley Authority v. Welch*,[13] in which the Supreme Court upheld the right of the Tennessee Valley Authority to condemn an area isolated by a reservoir, but not flooded, in lieu of providing a very expensive highway through mountainous terrain to give access to the severed area. The taking of the isolated area, said the Court, was "for a public purpose."

Legislative declarations are to be considered and must be given great weight, but whether a proposed taking is in fact for a public use, is, in the final analysis, a question for the courts.[14] The test, so far as the federal government is concerned, is whether the government has the constitutional power to create and develop the project for which the land is sought to be acquired. Thus, "If the Federal Government, under the Constitution, has the power to embark upon the project for which the land is sought, then the use is a public one."[15]

Any uncertainty as to this proposition was removed by the Supreme Court in the *Berman* case when it very pointedly said: "Once the object is within the authority of Congress the right to realize it through the exercise of eminent domain is clear."[16]

C. Statutory Authority

The exercise of the power of eminent domain belongs to the legislative branch of government. Hence, authority for any public acquisition must be found in appropriate legislation. The innumerable acts of the legislature extending to various departments of the state, to municipal corporations, to private corporations, and even to individuals, the authority to acquire private property for public use have resulted in much litigation in the state courts concerning the constitutionality and interpretation of the various acts. However, since the Act of August 1, 1888,[17] takings by the federal government have not been frequently challenged on the ground of lack of

12. 348 U.S. at 33-34.
13. 327 U.S. 546 (1946).
14. Cincinnati v. Vester, 281 U.S. 439, 446 (1930); Shoemaker v. United States, 147 U.S. 282 (1893); United States v. Certain Real Estate, 217 F.2d 920, 924 (6th Cir. 1954); United States *ex rel.* TVA v. Vogle, 28 F. Supp. 454 (W.D. Ky. 1939); City of Knoxville v. Heth, 186 Tenn. 321, 326 (1948); Southern Ry. v. City of Memphis, 126 Tenn. 267, 281 (1912); Memphis Freight Co. v. Mayor & Aldermen, 44 Tenn. 419, 430 (1867).
15. City of Oakland v. United States, 124 F.2d 959, 964 (9th Cir. 1942), *cert. denied*, 316 U.S. 679 (1942); Barnidge v. United States, 101 F.2d 295, 298 (8th Cir. 1939).
16. Berman v. Parker, 348 U.S. 26, 33 (1954).
17. 25 Stat. 357 (1888), 40 U.S.C. § 257 (1958).

statutory authority. That act empowers any government officer who is authorized to procure real estate for public use to "acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so."[18] Ordinarily, the acts of Congress merely authorize a project or program in broad terms, leaving it to the executive agency to determine what particular lands and interests therein are needed. The Act of 1888 established as a matter of statutory law that, except in those cases where Congress has specifically restricted or prohibited the right to condemn,[19] the power to purchase includes the power to condemn.[20]

D. Property To Be Acquired—Legislative and Administrative Determinations

It is now axiomatic that the legislature may determine the necessity of appropriating property for a particular improvement or public use, and that it may select the exact location of the improvement. In such case, the utility of the improvement, the suitableness of the location selected, and the consequent necessity of taking the particular lands selected, are exclusively for the legislature to determine and the courts have no power to substitute their own views for those of the representatives of the people.[21] However, legislative enactments ordinarily delegate to an executive agency or officer the authority to determine what property is required. In such cases, the question sometimes arises as to the finality of an administrative determination in this respect.

The scope of judicial review of eminent domain proceedings is no doubt extremely narrow. The Supreme Court of the United States has said in all-inclusive and unqualified language that "when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance."[22] The amount of land to be taken is a legislative and not a judicial question.[23] Neither the extent of the estate nor the nature of the interest taken is subject to judicial review.[24] That the legislative branch may delegate

18. The provision of the Act of Aug. 1, 1888, 40 U.S.C. § 258 (1940), requiring conformity to state practice and procedure, was superseded by rule 71A of the FED. R. CIV. P. and has been eliminated from the code. Rule 71A is discussed hereafter under the subject of "Procedure."

19. See, *e.g.*, 64 Stat. 83 (1950), 16 U.S.C. § 577(c) (1958).

20. See Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923).

21. See the numerous cases cited in 18 AM. JUR. *Eminent Domain* § 105 n.8 (1938).

22. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

23. United States v. Gettysburg Elec. Ry., 160 U.S. 668, 685 (1896); Sweet v. Rechel, 159 U.S. 380, 395 (1895); Shoemaker v. United States, 147 U.S. 282, 298 (1893).

24. United States v. South Dakota, 212 F.2d 14 (8th Cir. 1954); Simmonds v.

to executive agencies the authority to determine what particular lands and interests therein shall be acquired, though once questioned, is no longer open to doubt.[25] And in the event of such delegation, it is also the accepted rule that an administrative determination of what particular property is to be acquired is, in the absence of fraud or palpable abuse of discretion, final.[26]

In a number of cases in the Middle District of Tennessee, both before and since my appointment, takings have been challenged by owners who insisted that their property was not needed for the project and that the administrative officials had abused their discretion in including such properties within the takings. As a rule, these arguments have been vigorously advanced at some stage of the proceedings, but in most instances they have either been abandoned, or the court's rulings have been accepted as final. Two recent cases of local interest involving questions of statutory authority and abuse of discretion in which the administrative determination was upheld have reached the appellate courts from the middle district. These cases concerned the acquisition of the site for the present United States Courthouse in Nashville[27] and property for the capitol hill development in the same city.[28]

Little was left unsaid in the *Berman* case on this subject of judicial review of legislative and administrative determinations, as the following selected sentences from the unanimous opinion in that case will make clear:

> We do not sit to determine whether a particular housing project is or is not desirable. . . . In the present case, the Congress *and its authorized agencies* have made determinations that take into account a wide variety of values. It is not for us to reappraise them. . . . Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. . . . The means by which it will be attained is also for Congress to determine. *It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.* . . . The rights of these property owners

United States, 199 F.2d 305, 306-07 (9th Cir. 1952); United States v. New York, 160 F.2d 479, 480 (2d Cir. 1947), *cert. denied*, 331 U.S. 832 (1947); United States v. Kansas City, 159 F.2d 125, 129 (10th Cir. 1946); United States v. 6.74 Acres of Land, 148 F.2d 618, 620 (5th Cir. 1945); United States v. Meyer, 113 F.2d 387 (7th Cir. 1940), *cert. denied*, 311 U.S. 706 (1940).

25. See notes 19, 20 *supra*.

26. Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Sears v. City of Akron, 246 U.S. 242, 251 (1918); Barnidge v. United States, 101 F.2d 295, 299 (8th Cir. 1939); Department of Highways v. Stepp, 150 Tenn. 682, 687 (1924); Williamson County v. Franklin & Spring Hill Turnpike Co., 143 Tenn. 628, 647 (1920).

27. United States v. Certain Real Estate Lying on the South Side of Broad Street, 217 F.2d 920 (6th Cir. 1954).

28. Starr v. Nashville Housing Authority, 145 F. Supp. 498 (M.D. Tenn. 1956), *aff'd*, 354 U.S. 916 (1957).

> are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.[29]

The propositions which I have discussed up to this point are rather fundamental and are reaching the courts with increasing rarity. Yet it has been my observation, both in practice and from the bench, that they continue to perplex the attorney who is entering the field of eminent domain for the first time, with the result that much time and expense are wasted in litigation over principles that are no longer open to debate.

III. Procedure

A. Rule 71A

Rule 71A of the Federal Rules of Civil Procedure, which became effective on August 1, 1951, revolutionized condemnation practice in the federal courts by abolishing the requirement of conformity to state practices and procedures previously imposed by the Conformity Act[30] and substituting a uniform procedure in all cases except where Congress has established a special tribunal for the determination of the issue of just compensation. Due to the importance of this rule, we should consider it in some detail. Before the adoption of the rule federal condemnation practice was a hodgepodge of diverse state practices and procedures. It was stated in 1931 that there were 269 judicial procedures and 56 nonjudicial or administrative procedures governing condemnation proceedings throughout the United States. According to a study in 1949, it was thought that this number had not been reduced.[31] Transition to the new rule has been accomplished in the Middle District of Tennessee with very little confusion, and has been generally received as a constructive and workable improvement in procedure.

Subsection (c) provides for a short form of complaint and prescribes its contents.[32] A model form of complaint is appended to the rule.[33] Several innovations are introduced by subsection (d). Instead of the defendant being served initially by a summons,[34] he is served with a notice.[35] The notice must contain a brief description of the action

29. Berman v. Parker, 348 U.S. 26, 33-36 (1954). (Emphasis added.)
30. 25 Stat. 357 (1888).
31. First Report of Judicial Council of Michigan § 46, at 55-56 (1931); Clark, *The Proposed Condemnation Rule,* 10 Ohio St. L.J. 1 (1949). See also the notes of the advisory committee following rule 71A of the Fed. R. Civ. P.
32. *Cf.* Tenn. Code Ann. §§ 23-1404, -1530 (1956).
33. Form 29, App. of Forms, Fed. R. Civ. P.
34. Fed. R. Civ. P. 4(d) requires that a copy of the complaint be served upon a defendant along with the summons.
35. *Cf.* Tenn. Code Ann. §§ 23-1405, -1530 (1956).

sufficient to inform the defendant of what interest is being taken, the authority for the taking, the use for which the property is being taken, the steps which he may take to protect his interest, and the name of the plaintiff's attorney together with an address in the district within which the property is located where such attorney may be served. A model form of notice is also appended to the rule.[36] Delivery and service of the notice (but without copies of the complaint) are accomplished in the manner prescribed by the Federal Rules of Civil Procedure for a summons[37] and the effect is the same. Service by publication is required in the case of unknown owners or where the defendant's place of residence is unknown, and the procedure for publication specified in the rule is similar to that provided in the Tennessee Code.[38] Another innovation introduced by subsection (d) is that personal service may be made upon any defendant "who resides within the United States or its territories or insular possessions and whose residence is known," thus abrogating for condemnation cases the usual geographical restrictions upon service of process.

The only responsive pleading contemplated is an answer of the defendant. Under subsection (e), any objections to the taking must be stated by the answer, which must be filed within twenty days after service of the notice, or they are waived. But that is the *only* purpose for filing an answer. If a defendant has no objection or defense to the taking of his property, he may serve a simple notice of appearance designating the property in which he claims an interest, and he is thereafter entitled to receive notice of all proceedings affecting it. Even though he has not filed an answer or entered an appearance, a defendant may present evidence at the trial of the issue of just compensation, and he may share in the distribution of the award.[39] Liberal provisions are made for the amendment of pleadings without leave of the court.[40]

The provisions of subsection (h) which relate to the method of trial are probably the most important and controversial innovations. While the right to take is occasionally challenged, and the ownership of the various interests in the condemned property is sometimes in dispute, the great bulk of condemnation litigation involves only the issue of just compensation, or the value of the property condemned. The determination of that issue is the essence of condemnation procedure.

36. Form 28, App. of Forms, FED. R. CIV. P.
37. FED. R. CIV. P. 4(c), (d).
38. TENN. CODE ANN. § 21-214 (1956).
39. FED. R. CIV. P. 71A(e).
40. FED. R. CIV. P. 71A(f).

While 71A(h) is revolutionary and far-reaching, it contains only one paragraph comprising four sentences. Parenthetically, it should be noted here that the procedure under the Tennessee Valley Authority Act,[41] which I will discuss later, is left intact.

Subsection (h) begins:

> If the action involves the exercise of power of eminent domain under the law of the United States, any tribunal specially constituted by an act of Congress governing the case for trial of the issue of just compensation shall be the tribunal for the determination of that issue. . . .

In cases where there is no special tribunal or procedure provided for, the rule abrogates the former requirement of conformity to state law, and establishes a *qualified* right to a jury trial of the issue of just compensation.[42] Subsection (h), following the language quoted above, provides:

> [B]ut if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a [timely] demand therefor . . . unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

It then provides that if a commission is appointed its powers and proceedings shall be governed by certain provisions of rule 53 applicable to special masters. The subsection then concludes: "Trial of all issues shall otherwise be by the Court."

Subsection (h), like the rest of the rule, has created very few problems in our court. We have never had occasion to appoint commissioners under the rule but have always used the jury trial. Consequently, we have not as yet been seriously concerned with the controversial provision which permits the court, under certain circumstances, to submit the issue of just compensation to commissioners instead of to a jury.

I am advised that the Lands Division of the Department of Justice, which handles the bulk of the federal condemnation actions throughout the United States, favors the jury trial and strongly opposes the use of commissioners. It is convinced that a case is delayed instead of expedited by the appointment of commissioners. On the other hand, many district judges who have used the commission method disagree. I have in my files copies of letters from twenty-three dis-

41. 48 Stat. 70 (1933), 16 U.S.C. § 831(x) (1958).

42. There is no constitutional right to a jury trial in federal condemnation cases. Bauman v. Ross, 167 U.S. 548 (1897); United States v. Jones, 109 U.S. 513 (1883); Welch v. TVA, 108 F.2d 95, 99 (6th Cir. 1939).

trict judges who expressed their views during recent congressional consideration of appropriation acts. Twenty-two of those judges favor the use of commissioners in appropriate cases. The data contained in these letters and the conclusions stated therein are interesting. For instance, one judge, speaking of a single project in his district comprising 3,000 tracts, observed that "with a small percentage of settlements out of Court, a Judge spending all of his time trying these tracts to a jury would devote approximately ten years of his judicial life to the disposition of cases in just this one project. There would, by necessity, be a long delay in the disposition of these cases. Landowners would be required to wait several years at least before receiving all of their money which would be a great injustice." Another judge, citing the acquisition of property for a single project comprising 86,000 acres of land involving 10,000 separate ownerships, stated: "Literally, if the question of each of those was tried to a jury, it would have completely consumed the time of the four Judges of this District for a great many years." The consensus of the judges who have appointed commissioners under rule 71A(h) is that (1) the commission method is more expeditious and less expensive to all parties than jury trials, and (2) that commission awards are generally consistent, thus eliminating the wide disparity often found in jury verdicts.

One of the purposes in appointing commissioners is to afford the parties an early trial of the issue of just compensation in cases where, because of congested court dockets, the number of tracts involved in a project, or for other reasons, a jury trial cannot be had within a reasonable time. This purpose, of course, is not accomplished if the commissioners do not proceed with dispatch to conduct hearings and make their awards. Consequently, it behooves the court appointing commissioners to keep informed of their progress and to see that the proceedings are not delayed. We have had some experience with this problem in the past and on a few occasions have found it necessary to direct commissioners appointed in Tennessee Valley Authority proceedings to file their reports without delay. It is our present practice in TVA cases to enter a routine order at the time commissioners are appointed, fixing the time within which the award shall be filed. This practice has operated successfully to expedite the filing of reports, and as a result we have only two TVA cases on reference to commissioners at this time. Questions regarding the possible future use of commissioners under rule 71A(h) in our district must, of course, await developments. But I do feel that the practice of making indiscriminate, blanket references of all cases to commissioners is open to serious question under the rule. The conclusion that must be

reached is that a consideration by the court of the factors in each case is contemplated, and that trial by commissioners should be the exception rather than the rule.

The rule also governs actions in the federal courts involving the exercise of the power of eminent domain under state law, provided that "if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."[43] Under the law of Tennessee, the landowner has a right to a jury trial.[44]

Other provisions of the rule[45] relate to dismissals, deposits, and distribution of funds. They are short and clear and need no comment. Costs are not subject to rule 54(d).[46]

B. The Tennessee Valley Authority Act

Because of the vast operations of the Tennessee Valley Authority throughout this area, we should not overlook consideration of the Tennessee Valley Authority Act with respect to its eminent domain provisions. With some striking differences rule 71A(h) with reference to the appointment of commissioners is patterned somewhat after the Tennessee Valley Authority Act.[47]

Under that act there is no jury trial; the appointment of a three-man commission is required. Certain qualifications of the commissioners are prescribed and their compensation is fixed. Their powers and duties are defined. Exceptions to their award are heard by a three-judge court (unless the parties stipulate for a lesser number), and such court passes de novo upon the proceedings had before the commissioners. Usually, the hearing before the district court is upon the transcript of the proceedings had before the commissioners; however, the court may, in its discretion, permit the introduction of additional evidence. Upon such hearings, the district court fixes the amount of compensation without regard to the amount fixed by the commissioners. The provision that the district court "shall pass de novo upon proceedings had before the commissioners" has been the subject of some confusion. It has been argued in some cases that the use of the word "de novo" requires the district court to try the case anew, and upon such evidence as may be offered before it by the parties, and not upon the transcript of the evidence adduced at the hearing before the commissioners. However, it is now settled that

43. FED. R. CIV. P. 71A(k).
44. Shook & Fletcher Supply Co. v. City of Nashville, 338 S.W.2d 237 (Tenn. App. M.S. 1960); TENN. CODE ANN. § 23-1418 (1956).
45. FED. R. CIV. P. 71A(i), (j).
46. FED. R. CIV. P. 71A(l).
47. 48 Stat. 70 (1933), 16 U.S.C. § 831(x) (1958).

the words "de novo" simply require the court to fix the value of the property without regard to the award of the commissioners.

An appeal may be taken to the court of appeals within thirty days from the filing of the decision of the district court, and the court of appeals "shall . . . dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such court of appeals shall thereupon fix the value of the said property sought to be condemned."

A basic difference between the Tennessee Valley Authority Act and the rule 71A(h) is that the TVA Act requires the reviewing courts—both the district court and the court of appeals—to fix the compensation without regard to any previous awards; whereas, under rule 71A(h), and certain provisions of rule 53 relating to masters incorporated into the rule by reference, the court shall accept the commission's findings "nnless clearly erroneous."[48]

Procedural matters not covered by the Tennessee Valley Authority Act, such as service of process, form and title of proceedings, motions, orders and judgments, which were formerly governed by state law under the Conformity Act[49] (except on appeal, where the Federal Rules of Civil Procedure apply), are now governed by rule 71A and other pertinent federal rules. But the specific provisions of the Tennessee Valley Authority Act with reference to procedure were not superseded by the subsequent adoption of the rule. For instance, the Tennessee Valley Authority Act provides that exceptions to the award of the commissioners may be filed within twenty days from the date of the filing of the award in court; whereas, under rule 53(e) (II) exceptions to the report of the commissioners must be filed within ten days. Our court has held that in TVA cases the time within which exceptions to the award of the commissioners must be filed is governed by the Temiessee Valley Authority Act and not by rule 71A.[50]

Similarly, we have held that rules 71A and 53(e) cannot be invoked so as to require the TVA to pay for the transcript of the proceedings

48. FED. R. CIV. P. 71A(h):

> *"Trial.* . . . If a commission is appointed it shall have the powers of a master. . . . Its action and findings . . . shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53."

FED. R. CIV. P. 53(e):

> *"Report.* . . .
> (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings unless clearly erroneous. . . ."

49. See note 30 *supra.*

50. United States *ex rel.* TVA v. Cochran, Civil No. 1872, United States Dist. Ct., M.D. Tenn., Nov. 3, 1955.

had before the commissioners, and that such transcript must be furnished by the exceptor.[51]

C. The Declaration of Taking Act

Neither rule 71A nor the Tennessee Valley Authority Act affects the important Declaration of Taking Act of 1931.[52] While this act is substantive law, it has certain procedural aspects. Briefly, it provides that when the government institutes a condemnation action, or at any time before judgment, it may file a declaration of taking and deposit in the registry of the court a sum estimated by the acquiring authority to be just compensation for the land taken. The amount of the deposit is without prejudice to either party.[53] Upon the filing of the declaration of taking and the deposit of estimated compensation, title to the property vests in the United States, and all title and lien interests in the property attach to the fund. Thereafter, any deficiency as between the amount deposited and the amount ultimately determined to be the value of the property draws interest at the rate of six percent per annum; however, no interest is payable upon the amount of the deposit. On proper application, the court may make an immediate distribution of the deposit to the landowners, and may fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the condemnor. Withdrawals of the deposit are without prejudice. The purpose of the act is two-fold. First, it gives the government immediate possession and relieves it from paying interest upon the amount deposited from the date of the deposit to the date of judgment. Secondly, it gives the property owner immediate compensation for his property to the extent of its estimated value.[54] Such deposits are contemplated by rule 71A(j), which provides that the condemnor shall make such deposits as are required by law and may make a deposit when permitted by statute, and that in such cases the court and attorneys shall expedite the proceedings for the distribution of the deposit.

Although not required to do so, the Tennessee Valley Authority and other acquiring agencies are following generally the practice of filing declarations of taking simultaneously with petitions for condemnation. My observations have been that those agencies have cooperated with the courts and have assisted landowners in obtaining an immediate distribution of the deposit.

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51. United States *ex rel.* TVA v. An Easement, Civil No. 306, United States Dist. Ct., M.D. Tenn., Sept. 9, 1959.
52. 46 Stat. 1421 (1931), 40 U.S.C. § 258(a) (1958).
53. United States v. Miller, 317 U.S. 369, 381 (1943); Garrow v. United States, 131 F.2d 724, 726 (5th Cir. 1942), *cert. denied*, 318 U.S. 765 (1943).
54. United States v. Miller, 317 U.S. 369, 381 (1943).

On the subject of the declaration of taking, there are certain Tennessee statutes of interest. Tennessee Code Annotated section 23-1507 provides that on or after the filing of a petition for condemnation by a housing authority, such authority may file a declaration of taking. Provisions relative to vesting of title, surrender of possession, and determination and payment of compensation are contained in sections 23-1509 and 23-1510. These sections of the Tennessee Code are substantially the same as the Federal Declaration of Taking Act. One provision, however, is radically different: The federal act provides that upon application of parties in interest "the court may order that the money deposited . . . be paid forthwith for or on account of the just compensation to be awarded in said proceeding." The sections of the Tennessee Code referred to contain no such provision. On the contrary, section 23-1510 of Tennessee Code Annotated provides: "The money deposited into court by an authority shall be secured in such manner as may be directed by the court and *shall be disbursed by the court to the persons found to be entitled thereto by the final award of judgment of the court . . .*." (Emphasis added.) Taking note of this distinction, the Supreme Court of Tennessee has held that a deposit with a declaration of taking under these sections does not stop the running of interest on the amount of the deposit.[55]

The declaration of taking acts, both state and federal, provide for the deposit of a sum estimated by the acquiring authority to be just compensation, and further provide that the court shall fix the time when possession is to be surrendered. It has been suggested by some who have had much experience in the courts that certain amendments to the acts should be made. One suggested change is an amendment requiring that the amount of the deposit be based upon the opinion of an independent appraiser appointed by the court, rather than upon the opinion of the acquiring agency. The advocates of this change suggest that it would go far to encourage settlements and thus eliminate expensive litigation. They reason that public officials who are required to make unilateral determinations of the amounts to be deposited would be less than human if their decisions were not on occasion influenced by such considerations as the necessity for keeping costs within limited appropriations, an honest but mistaken belief that their duty is to obtain the property at a minimum cost to the government, and the belief that a small deposit will induce the landowner to compromise for what is, in fact, a reasonable price. And, of course, the landowner who is suspicious of the acquiring agency's policies, methods and motives would more readily settle for the amount of the deposit if he felt it were based upon the appraisal

55. Nashville Housing Authority v. Doyle, 197 Tenn. 555 (1955).

of a competent and distinterested expert appointed by the court rather than upon an appraisal made by a person selected and employed by the acquiring officials. Another suggestion is that the act be amended to provide that before the entry of any order affecting surrender of possession the landowner and parties in possession be given notice and an opportunity to be heard on such questions as (1) the right to take, and (2) the time within which and the terms upon which possession shall be surrendered to the condemnor. It is claimed that acquiring authorities sometimes misuse the authority delegated by the act by taking possession long before the property is needed. Conceding that these arguments have merit, the suggested changes would basically reform the declaration of taking act. One of its purposes as observed is to give the condemnor immediate possession. To this end, the act provides that the declaration of taking may be filed with the petition for condemnation. Obviously, that purpose of the act would be defeated by procedural delays in the appointment by the court of an appraiser, the actual appraisal and the delivery of the appraiser's report to the acquiring agency, and the notice and hearing on the question of surrender of possession of the property. These proceedings could often require many weeks, and even months. The suggested changes would require a full re-examination by Congress and the state legislature of the declaration of taking acts and the purposes for which they were enacted.

In numerous cases courts have stated categorically that administrative determinations of the estimated compensation to be deposited with a declaration of taking are final and not subject to judicial review.[56] Although such determinations are fundamentally legislative and not judicial in character, the broad principle that when Congress delegates this power to executive agencies and officials, their decision as to the amount of the deposit may not be reviewed by the courts, even for capriciousness or abuse, continues to be strenuously challenged. Recently it has been held in our court that a nominal deposit of one dollar, made by the condemnor at the time of filing of a declaration of taking against property admittedly worth many thousands of dollars, did not meet statutory requirements. The condemnor's application for an order of possession was denied, and the landowner's motion to vacate the declaration of taking was granted,[57] whereupon the condemnor filed amended declarations of taking and deposited additional funds aggregating in excess of $400,000.

56. See, *e.g., In re* United States, 257 F.2d 844 (5th Cir. 1958). *Contra,* United States v. 44.00 Acres of Land, 110 F. Supp. 168, 171 (W.D.N.Y. 1953).

57. United States v. Certain Land and Interests in Property Situate in Rutherford County, Civil No. 2453, United States Dist. Ct., M.D. Tenn., Nov. 7 and Nov. 30, 1957.

D. Remedies of Landowner When Property Is Taken Before Condemnation Proceedings Are Instituted

The Supreme Court of the United States has said:

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings. . . . Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C., Sections 1346(a)(2) and 1491, to recover just compensation.[58]

Thus, if the federal government, without instituting condemnation proceedings, physically occupies or damages property in the lawful pursuit of an authorized project or program, its action is a taking and not a trespass. And since the landowner in such case has an adequate remedy to obtain compensation under the Tucker Act,[59] an authorized taking cannot be prevented by injunction,[60] nor can damages be recovered against the government's officers or agents lawfully acting on its behalf.[61]

A distinction here is to be noted in the Tennessee statutes and decisions. Tennessee Code Annotated section 23-1423 provides that if land is taken and occupied for purposes of internal improvement without the institution of proceedings to condemn, "the owner of such land may petition for a jury of inquest . . . or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest." The Supreme Court of Tennessee has held that the above-quoted language "leaves no doubt as to the right of the owner to bring an action in the ordinary way, which can mean nothing else than an action of trespass or an action upon the facts of the case to recover the value of the land and the damages."[62]

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58. United States v. Dow, 357 U.S. 17, 21 (1958).

59. See, *e.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903); United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884).

60. Hurley v. Kincaid, 285 U.S. 95 (1932).

61. Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 21-23 (1940).

62. Duck River Valley N.G.R.R. v. Cochrane, 71 Tenn. 478, 480 (1879). See also East Tennessee & W.N.C.R.R. v. Gouge, 30 Tenn. App. 40, 203 S.W.2d 170 (E.S. 1947).

IV. MISCELLANY

A. Order of Proof—Opening and Closing of Argument

For many years the practice in the Middle District of Tennessee has been to require the condemnor first to introduce all of his evidence in chief and to open and close the argument, even when the right to condemn is conceded and the only issue is the amount of compensation. Questions concerning the order of proof and the right to open and close the argument arose in numerous cases growing out of the extensive land acquisition programs of the government for defense and other purposes at the beginning of World War II. The then district judge, in accordance with the state practice and procedure, and on the authority of *Alloway v. Nashville*,[63] *Lebanon and Nashville Turnpike Co. v. Creveling*,[64] and *Eastern Tennessee Power Co. v. Cleage*,[65] adopted that order of procedure. It has not been seriously challenged during my tenure until recently. Decisions of the Supreme Court of Tennessee handed down in 1943 and 1950 approved these procedures which were prescribed in the *Alloway, Lebanon and Nashville Turnpike Co.*, and *Eastern Tennessee Power Co.* cases.[66] However, in 1953, the Tennessee Legislature enacted what is now a part of Tennessee Code Annotated section 23-1418 (which deals with appeals from the findings of juries of view), which provides: "In all cases where the right to condemn is not contested and the sole question before the jury is that of damages the property owner shall be entitled to open and close the argument before the court and jury." This recent enactment of the Tennessee Legislature is cited in support of the view that we should change our trial procedure in the Middle District of Tennessee, in cases where the right to condemn is conceded and the only issue is the amount of compensation, so as to require the landowner, who has the burden of proof on the only issue involved, to go forward with his evidence in the first instance and to permit him to open and close the argument. Our court now has this matter under advisement.

B. Scope of Direct and Cross-Examination

I will not undertake a discussion of the scope of direct and cross-examination of expert witnesses; however, there is one point in this area that will be of particular interest to the trial attorney. The Court of Appeals for the Sixth Circuit has held that since the sole issue on

63. 88 Tenn. 510 (1890).
64. 159 Tenn. 147, 17 S.W.2d 22 (1928).
65. 5 Tenn. Civ. A. 417 (1914).
66. Town of Erin v. Brooks, 190 Tenn. 407, 411-12, 230 S.W.2d 397, 399 (1950); State v. Rascoe, 181 Tenn. 43, 55, 178 S.W.2d 392, 396 (1944).

direct examination is the value of the entire property before and after the taking, the witness may not testify as to separate values of lands, buildings, improvements, etc.[67] It has held, however, that on cross-examination counsel may test the weight and credibility of the testimony of such witness by inquiring as to how he arrived at his estimate and as to how much value he assigned to particular elements of damage making up the whole.[68]

C. Conflicts in Statutes and Decisions

A canvass of the state law has disclosed some interesting developments in the statutes and judicial decisions. The following are examples.

State v. Rascoe and *Town of Erin v. Brooks* have heretofore been noted.[69] In *State v. Rascoe,* the court, following the *Alloway* and *Creveling* cases held that the trial court did not commit error in requiring the state to introduce its proof first. However, in *Town of Erin v. Brooks,* the court, again citing *Alloway* and *Creveling,* held that after the right to take is established or conceded the burden of proving damages shifts to the owner, and hence the owner "must proceed on the question of value and is entitled to be followed by rebuttal evidence on behalf of the condemnor." These two cases are readily distinguishable upon the facts but the dicta prescribing the proper order of procedure in introducing evidence are in conflict. As we have heretofore noted, an act of the Legislature subsequently enacted gives the landowner the right to open and close the argument.[70]

In *Maury County v. Porter,*[71] the Supreme Court of Tennessee held that a provision in chapter 178 of the Tennessee Public Acts of 1951 that "no trial shall be had until twelve months have expired after the completion of said road, highway, freeway and/or parkway," violated section 17 of article I of the Tennessee Constitution. Holding that the doctrine of elision was not applicable and that the provisions of the act were not separable, the court struck down the entire act. Consequently, that act was not incorporated into Tennessee Code Annotated which became effective January 1, 1956. Notwithstanding this decision of the Tennessee Supreme Court, the legislature, by chapter 216, Tennessee Public Acts of 1959, enacted what is now a part of section 23-1532 of Tennessee Code Annotated, which provides

67. Fain v. United States *ex rel.* TVA, 145 F.2d 956 (6th Cir. 1944), and cases cited therein.
68. United States *ex rel.* TVA v. 12.3 Acres of Land, 229 F.2d 587 (6th Cir. 1956).
69. See note 66 *supra.*
70. TENN. CODE ANN. § 23-1418 (1956).
71. 195 Tenn. 116, 257 S.W.2d 16 (1953).

that "no trial shall be had until six (6) months have expired after the completion of said street, road, highway, freeway or parkway; provided, however, that if the same has not been completed within twenty-four (24) months from the filing of said condemnation petition, said case shall be tried." On May 4, 1960, the Supreme Court of Tennessee held this provision of the act to be violative of the Tennessee Constitution. However, the act contained a separability clause evidencing an intent on the part of the legislature that the valid portions remain in effect if some portions be declared unconstitutional. Consequently, only the unconstitutional provision was elided.[72]

These examples have been cited solely for the purpose of pointing up to the trial attorney the necessity of making a thorough examination of the latest statutes and judicial decisions.

D. Extent of Interest and Rights Acquired

The Tennessee Valley Authority apparently uses a uniform or "stock" description of the easement and rights sought to be acquired in practically all of its right-of-way cases. The rights condemned are broadly described as a permanent easement and right of way for the construction and maintenance of the line, and the right to remove "danger trees" located beyond the limits of the right-of-way, with a provision that the United States is to remain liable for physical damage to the land, crops, fruit trees, fences and roads, resulting directly from the operations of the construction and maintenance forces. Questions concerning the rights of the condemnor and the rights remaining in the landowner have presented themselves from time to time in TVA condemnation proceedings. These and other questions were raised in our court in *United States ex rel. Tennessee Valley Authority v. An Easement and Right of Way.*[73] In that case the landowner filed a motion seeking to require the Tennessee Valley Authority to file a more definite statement of the easement rights taken. It was held that the description was sufficient, and the motion was overruled. At the hearing of the motion both parties requested the Court to instruct the commissioners regarding certain legal questions in order to facilitate the presentation of testimony and to aid the commissioners in passing upon the evidence. Because of the frequency with which these questions recur, an order for publication was prepared setting out in some detail the rights acquired by the Tennessee Valley Authority under such an easement, the measure of damages, and the future rights and liabilities of the government

72. Catlett v. State, 336 S.W.2d 8 (Tenn. 1960).
73. 182 F. Supp. 899 (M.D. Tenn. 1960).

and the landowner. This order, which has been published in 182 *Federal Supplement,* at page 899, will be of interest to attorneys participating in TVA condemnation actions.

V. CONCLUSION

There are, of course, many areas in the field of eminent domain that offer interesting subjects for study. In this article I have drawn heavily upon my experiences as a trial judge and have attempted to touch upon problems that have most frequently arisen in the trial of several hundred land condemnation cases.

A continuous exchange of views will enable both the courts and attorneys to improve our judicial machinery, to the end that speedy justice may be afforded to every litigant—which, after all, is the goal we are seeking to attain.