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EVIDENTIARY EFFECT OF A TRIAL JUDGE'S VIEW
OF PROPERTY IN A CONDEMNATION PROCEEDING

Corrado v. Providence Redevelopment Agency
— R.I. —, 294 A.2d 387 (1972)

The Providence Redevelopment Agency appropriated petitioner's property pursuant to its powers of eminent domain.¹ Petitioner instituted an action to assess his damages.² At trial, the defendant agency's expert appraiser valued the property at \$10,400. Petitioner introduced no direct evidence as to value. The trial court, sitting without a jury, assessed damages at \$16,000, based on the location of the land, its income value, pictures of the land, and the court's "view"³ of the subject

1. R.I. GEN. LAWS ANN. § 45-32-5(d) (1971):

Each redevelopment agency shall constitute a public body, corporate and politic, exercising public and essential governmental functions, and shall have all the powers necessary and convenient to carry out and effectuate the purposes and provisions of chapters 31 to 33, inclusive, of this title, including the powers enumerated in this section in addition to others granted by said chapters.

. . . .
(d) . . . to acquire by the exercise of the power of eminent domain any real property or any estate or interest therein

2. *Id.* § 45-32-34:

Trial by court on damages.—Any owner of or persons entitled to any estate or interest in any part of the real property, and who cannot agree with said agency for the price of the real property, or estate or interest therein, so taken, may within three (3) months after notice of said taking, or, if he has no notice, may within one (1) year from the first publication of the copy of such resolution and declaration referred to in this chapter, apply by petition to the superior court in and for the county in which such real property lies, setting forth the taking of his real property or estate or interest therein, and praying for an assessment of damages.

Eminent domain power may be exercised only for a public use, *i.e.* a use by the government for a legitimate governmental purpose. *See generally* W. EBENSTEIN, *LAW OF PUBLIC HOUSING* 37-38 (1940). The fifth amendment of the United States Constitution requires that compensation be made to owners of property taken under power of eminent domain: ". . . nor shall private property be taken for public use without just compensation." This requirement has been applied to state eminent domain actions under the due process clause of the fourteenth amendment. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). "Just compensation" generally has been construed to mean the fair market value of the property taken. *Dugan v. Rank*, 372 U.S. 609 (1963); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). *See also* Note, *Eminent Domain: Ohio Evidentiary Aspects in Ascertaining Market Value*, 18 W. RES. L. REV. 1687, 1687-90 (1967).

3. Wigmore defined a "view" as the procedure in which the court goes to an

property.⁴ The agency appealed on the ground that no evidence in the record would support an award that exceeded the highest expert appraisal by \$5,600.⁵ On appeal, the Supreme Court of Rhode Island reversed and *held*: The trial court's divergence from the uncontradicted expert appraisal⁶ of the condemned land's value, based in whole or

object in its place and observes it. A view is used when the object cannot be produced in court or when it is inconvenient to remove the object from its setting. 4 J. WIGMORE, EVIDENCE § 1162 (J. Chadbourn rev. 1972) [hereinafter cited as WIGMORE].

4. *Corrado v. Providence Redevelopment Agency*, — R.I. —, —, 294 A.2d 387, 390 (1972).

5. A trial court's finding of value generally will not be disturbed on appeal unless it is shown either that the court adopted an erroneous theory of valuation or that the trial court's exclusion of competent evidence or admission of incompetent evidence impaired the rights of one of the parties. A. JAHR, LAW OF EMINENT DOMAIN VALUATION AND PROCEDURE 428 (1953); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 130 (2d ed. 1953) [hereinafter cited as ORGEL]. See also *Nugent v. City of East Providence*, 103 R.I. 518, 238 A.2d 758 (1968) (irrelevant evidence is ground for reversal only where it prejudicially influences the trial court in its determination of the issue in the case).

6. The American Law Institute defined an "expert witness" in the following manner:

A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know, or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience, or training, and that the witness has the requisite special knowledge, skill, experience or training.

ALI CODE OF EVIDENCE 123 (Proposed Final Draft, 1942). See also 2 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 197 (1954).

Most courts treat expert testimony as merely advisory and hence not controlling on the fact-finder. *United States v. 412.93 Acres of Land*, 455 F.2d 1242 (3d Cir. 1972); *Louisiana v. McPherson*, 259 So. 2d 33 (La. 1972); *In re Bruckner Expressway*, 37 App. Div. 2d 541, 322 N.Y.S.2d 468 (1971); *Schey Enterprises, Inc. v. State*, 52 Wis. 2d 361, 190 N.W.2d 149 (1971). This reluctance to treat the testimony as controlling arises out of a belief that to do so would usurp the jury's role. See *Ladd, Expert Testimony*, 5 VAND. L. REV. 414 (1952); *McCormick, Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 117 (1945); *Rosenthal, The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403, 417 (1935); Note, *Expert Testimony as an "Invasion of the Province of the Jury"*, 26 IOWA L. REV. 819 (1941); cf. *Jones v. City of Caldwell*, 20 Idaho 35, 116 P. 110 (1911); *Olena v. Standard Oil Co.*, 82 N.H. 408, 135 A. 27 (1926). If, however, the expert testimony is uncontradicted, it is generally held to be conclusive. See, e.g., *Stafos v. Missouri Pac. R.R.*, 367 F.2d 314, 317 (10th Cir. 1966); *Mantanoya v. Bratlie*, 33 Cal. 2d 120, 127, 199 P.2d 677, 681 (1948); *People v. Harvey*, 286 Ill. 593, 604, 122 N.E. 138, 143 (1919).

The Rhode Island courts have long recognized as a well-settled rule of law the proposition that the trier of fact must accept completely uncontradicted and unimpeached testimony as conclusive of the fact it was introduced to prove. *Gorman v. Hand Brewing Co.*, 28 R.I. 180, 66 A. 209 (1907). See also *Somerset Realty Co. v. Shapiro*, 51 R.I. 417, 155 A. 360 (1931); *Halliday v. Rhode Island Co.*, 42 R.I. 350, 107 A. 86

substantial part on a view of the property taken by the court, was prejudicial error.⁷

It is common in eminent domain proceedings for the jury to view the condemned premises.⁸ Authority on the evidentiary effect of the view, however, is conflicting. A majority of jurisdictions hold that a view constitutes at least some evidence of the fair market value of the particular property.⁹ Some jurisdictions recognize a view as independent evidence that may provide the basis for an award without regard to other evidence in the case.¹⁰ Other jurisdictions, including Rhode Island, hold that a view does not constitute evidence,¹¹ since impres-

(1919). This rule does not apply, however, if there is *any* evidence on the issue of value other than the expert appraisal.

Moreover, a trial judge in Rhode Island is permitted to impeach expert testimony based upon his observations of the witness' demeanor. *Johnson v. Providence Redevelopment Agency*, 96 R.I. 139, 189 A.2d 814 (1963). The expert's testimony also may be impeached if it is improbable or inherently contradictory. *See Jackowitz v. Deslauriers*, 91 R.I. 269, 274-75, 162 A.2d 528, 530 (1960); *Walsh-Kaiser Co. v. Della Morte*, 76 R.I. 325, 69 A.2d 689 (1949); *Gorman v. Hand Brewing Co.*, 28 R.I. 180, 66 A. 209 (1907). Thus, in *Corrado*, the court noted that the trial judge had impeached the testimony of the agency's expert appraiser. In allowing this impeachment, the court in effect said that if a trial judge prefers not to accept otherwise uncontradicted expert testimony on value, he may do so at will, the assumption on review being that the trial judge has impeached the testimony for one of the reasons mentioned above. *Corrado v. Providence Redevelopment Agency*, — R.I. —, —, 294 A.2d 387, 391 (1972). At least one author has suggested that the better reasoned rule would be that expert testimony in eminent domain-condemnation proceedings should not be controlling *per se* whether contradicted or not. *See* J. LAWSON, *THE LAW OF EXPERT AND OPINION EVIDENCE* 240 (1883). *See also* notes 17-20 *infra* and accompanying text. *But see* Note, *Valuation of Real Property—Role of the Expert Witness*, 44 WASH. L. REV. 687 (1969), for a discussion of the proposition that greater reliance should be placed on expert testimony in eminent domain proceedings. In effect, however, the rule in Rhode Island already is that expert testimony as to value is not necessarily controlling, because the trial judge apparently may impeach the testimony at will.

7. *Corrado v. Providence Redevelopment Agency*, — R.I. —, 294 A.2d 387 (1972).

8. For historical discussions of view, see 4 WIGMORE § 1163; *Yeary v. Holbrook*, 171 Va. 266, 198 S.E. 441 (1938).

9. *See, e.g.*, *Pierson v. Commonwealth*, 350 S.W.2d 487 (Ky. 1961); *Farrington v. Maine State Highway Comm'n*, 159 Me. 95, 188 A.2d 483 (1963); *Chaloupka v. State Dep't of Roads*, 176 Neb. 746, 127 N.W.2d 291 (1964); *Board of Comm'rs v. Gardner*, 57 N.M. 578, 260 P.2d 682 (1953).

10. *See, e.g.*, *United States v. 76,800 Acres of Land*, 46 F. Supp. 102 (S.D. Ga. 1942); *Whitman v. Housing Author.*, 272 Ala. 245, 130 So. 2d 362 (1961); *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 26 P.2d 308 (1933); *Louisville & N.R.R. v. White Villa Club*, 155 Ky. 452, 159 S.W. 983 (1913).

11. *See, e.g.*, *Board of Educ. v. 13 Acres of Land*, 50 Del. 387, 131 A.2d 180 (1957); *State v. Anderson*, 92 Mont. 313, 13 P.2d 228 (1932); *State v. Frazier*, 101 R.I. 156, 221 A.2d 468 (1966); *Reitzel v. Cary*, 66 R.I. 418, 19 A.2d 760 (1941).

sions of the trier of fact are not included in the record for appellate review.¹² These latter jurisdictions still permit a view, however, in order to aid the jury in understanding the testimony and in applying that testimony to the issue of value.¹³

Some commentators urge that a view should be controlling evidence in an eminent domain proceeding.¹⁴ However, they base this conclusion on an analysis of the land's physical characteristics only, disregarding other possible indices of the land's value.¹⁵ While a view may well be controlling as to whether a particular parcel of land is swampland or rolling hillside,¹⁶ it does not provide by itself the "quantitative data necessary for a pecuniary estimate of value."¹⁷ The better reasoned position, therefore, recognizes that a view is merely one form of "real evidence"¹⁸ that enables the trier of fact to see the land directly,

12. *Jeffersonville, M. & I.R.R. v. Brown*, 40 Ind. 545 (1872); *Schey Enterprises, Inc. v. State*, 52 Wis. 2d 361, 190 N.W.2d 149 (1971).

13. *State v. Frazier*, 101 R.I. 156, 221 A.2d 468 (1966); *D'Acchioli v. Cairo*, 87 R.I. 345, 141 A.2d 269 (1958); *Reitzel v. Carey*, 66 R.I. 418, 19 A.2d 760 (1941).

14. See 3 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE § 1412 (2d ed. J. Henderson 1926); 4 WIGMORE § 1168.

15. The analysis is based on a variation of a hypothetical fact situation in which the issue is whether a parcel of land is swampland or rolling hillside. All testimony indicates that the land is swampland, but the jury view reveals that the land is actually hillside. See note 23 *infra*. In similar cases the courts have held that "upon reason and authority, knowledge gained from a view of the premises is independent evidence." *Hatton v. Gregg*, 4 Cal. App. 537, 88 P. 592 (1906). See also *Parks v. Boston*, 32 Mass. (15 Pick.) 198, 209-10 (1834).

16. See note 15 *supra*.

17. ORGEL § 129.

In most cases where there has been both expert testimony and a view of the premises, damages have been assessed within the range of values presented by the expert testimony. See, e.g., *United States v. Seufert Bros. Co.*, 87 F. 35 (C.C. Ore. 1898); *Taylor v. State Highway Comm'n*, 182 Kan. 397, 320 P.2d 832 (1958); *Commonwealth Dep't of Highways v. Heath*, 354 S.W.2d 752 (Ky. 1962); *Portland v. Ruggero*, 231 Ore. 624, 373 P.2d 970 (1962); *Chesapeake & O.R.R. v. Johnson*, 137 W. Va. 19, 69 S.E. 2d 393 (1952). In verdicts, affirmed on appeal, that awarded damages outside the range of values presented in testimony, the courts generally have found some evidence other than the view on which the award might have been based. See, e.g., *Murray v. United States*, 130 F.2d 442 (D.C. Cir. 1942); *People ex rel. Dep't of Public Works v. Bond*, 231 Cal. App. 2d 435, 41 Cal. Rptr. 900 (1964); *Housing Author. v. Schroeder*, 113 Ga. App. 432, 148 S.E.2d 188, *rev'd on other grounds*, 222 Ga. 417, 151 S.E.2d 226 (1966). *But see Houston v. Highway Comm'r*, 152 Conn. 557, 558, 210 A.2d 176, 177 (1965); *Pierson v. Commonwealth*, 350 S.W.2d 487 (Ky. 1961); *Grand Rapids v. Perkins*, 78 Mich. 93, 43 N.W. 1037 (1889); *Wagner v. State, Dep't of Roads*, 176 Neb. 589, 126 N.W.2d 853 (1964); *Creasy v. Commonwealth*, 39 Pa. D. & C.2d 12 (C.P. Allegheny County 1965).

18. For a discussion of "real evidence," see 4 WIGMORE §§ 1150-51.

thereby avoiding the need to rely on the testimony of witnesses.¹⁹ Consequently, a view merely takes the place of a verbal description of the property and should not, therefore, serve as the *sole* basis for an award.

Courts that deny evidentiary status to a view fail to recognize that there is no practical way of limiting a jury's use of facts observed on a view to merely understanding and applying testimony.²⁰ In estimating just compensation, no amount of "judicial exhortation" will prevent a jury from giving greater weight to "the evidence of their senses than to the statements of witnesses."²¹

Furthermore, fair market value is an ambiguous legal standard which is not readily ascertainable by reliance on expert testimony alone.²² While objective in theory, the standard in practice results in as many different "fair market" values for a given parcel of land as there are appraisals of it, with condemnors minimizing, and condemnees exaggerating, the property's value.²³ Thus, since the issue of value is not

19. ORGEL § 129.

20. See notes 11-13 *supra* and accompanying text.

21. ORGEL § 129. See also 4 WIGMORE § 1168:

[I]t is wholly incorrect in principle to suppose that an autoptic inspection by the tribunal does not supply it with evidence; for, although that which is received is neither testimonial nor circumstantial evidence, nevertheless it is an even more direct and satisfactory source of proof, whether it be termed "evidence" or not. . . . The suggestion that, in a view or any other mode of inspection by the jury, they are merely "enabled better to comprehend the testimony," and do not consult an additional source of knowledge, is simply not correct in fact.

22. See Bigham, "Fair Market Value," "Just Compensation," and the Constitution: *A Critical View*, 24 VAND. L. REV. 63, 90 (1970).

23. Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 (1957).

A 1932 study of condemnation cases in New York City revealed that expert appraisals made for the condemnors and the condemnees varied, in the average case, by nearly one hundred percent. WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION at iv (1932), cited in Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 n.53 (1957). In cases where the condemnor offered more than one expert appraisal, those valuations varied by an average of thirty-two percent. Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73 n.55 (1957).

For striking examples of the variance to be found between expert estimates of value in particular takings, see *Oklahoma City v. Wilson*, 310 P.2d 369, 372 (Okla. 1957) (condemnor's appraiser—\$4,200; condemnee's appraiser—\$42,400); *Reeves v. City of Dallas*, 195 S.W.2d 575, 580 (Tex. Civ. App. 1946) (\$1,000 against \$100,000). See also *United States v. 37.15 Acres of Land*, 77 F. Supp. 798, 801 (S.D. Cal. 1948): "I cannot help but conclude that there is an excess minimization of values on the one side and over enthusiasm on the other—a phenomenon not untypical of condemnation cases."

so completely esoteric as to make a layman's opinion worthless, a view of the premises truly may be helpful in arriving at a just result. Indeed, under the present system, juries and judges often simply "split the difference" between the claims of the condemnor and condemnee,²⁴ thereby creating a potential for injustice to the condemnee if he fails to provide his own expert appraiser.²⁵

Given the ambiguous nature of the fair market value standard, the *Corrado* court arguably should have taken a more liberal position on condemnation awards. Although it would be improper for the trier of fact to base its award *solely* on a view of the property,²⁶ the trial court in *Corrado* had other evidence on which to base its verdict.²⁷

Moreover, the *Corrado* court's treatment of a view appears inconsistent with its position on the impeachment of witnesses. The court allowed the trial judge to impeach the testimony of the agency's expert appraiser based on the witness' manner and demeanor.²⁸ If, however, a view is not considered evidence because the court's impressions do not appear in the record, allowing impeachment based upon the trial judge's impressions of the witness,²⁹ which also do not appear in the record, contradicts that rationale.³⁰

By holding that a view is not evidence of any fact, and resting its reversal on the trial court's divergence from the expert appraisal, the Supreme Court of Rhode Island has promoted the unrealistic theory that value is objectively ascertainable.³¹ The court should have recognized

24. Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 87 (1957).

Condemnors are often willing to settle condemnation cases by allowing amounts far in excess of what they consider "market value." *Id.*

25. See generally Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63 (1970); Bryant, *Eminent Domain—Its Use and Misuse*, 39 U. CIN. L. REV. 259 (1970); Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

26. *People ex rel. Dep't of Public Roads v. Bond*, 231 Cal. App. 2d 435, 41 Cal. Rptr. 900 (1964) (all evidence must be considered in determining value; see note 23 *supra*. But see *Kiennan v. Chicago, S.F. & C.R.R.*, 123 Ill. 188 (1887).

27. See text accompanying notes 3 & 4 *supra*.

28. — R.I. at —, 294 A.2d at 387.

29. See note 6 *supra*.

30. This inconsistency is discussed in 4 WIGMORE § 1168. No rule exists whereby the admissibility of evidence is dependent upon whether the evidence can be incorporated into the record and brought up by the record. *Denver, T. & Ft. W.R.R. v. Pulaski Irrigating Ditch Co.*, 11 Colo. App. 41, 52 P. 224 (1898); *Hart v. State*, 15 Tex. App. 202 (1883).

31. One writer has characterized the determination of market value as follows:

value for what it is—a matter of opinion³² which may reasonably be based in part on a view of the property.

“The search for ‘fair market value’ is a snipe hunt carried on at midnight on a moonless landscape.” Bigham, *“Fair Market Value,” “Just Compensation,” and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 90 (1970).

32. *Parks v. Boston*, 32 Mass. (15 Pick.) 198 (1834) (Shaw, C.J.). See also 3 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE § 1413 (2d ed. J. Henderson 1926).