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Eminent Domain - Procedure - Relation of Judge and Jury in Michigan Condemnation Proceedings

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COMMENTS

EMINENT DOMAIN — PROCEDURE — RELATION OF JUDGE AND JURY IN MICHIGAN CONDEMNATION PROCEEDINGS — *The relationship of judge to jury in Michigan condemnation proceedings presents in many ways a merger of some of the problems and questions contained in the relationship of judge to jury in civil trials, and of court to tribunal in administrative law. Theorists as well as the practicing lawyer in Michigan and some other states[1] may well find in the development of the Michigan condemnation proceeding an interesting example of the growth of a procedure for adjudication, in a context of cross-fire between legislative ideas and judicial interpretation of a constitutional provision.

I. *The Problem*

The Constitution of 1850[2] was the first in Michigan to contain a provision which required, in condemnation cases, that the necessity for taking and the amount of compensation be determined by a "jury of twelve free-holders, residing in the vicinity of such property. . . ." This provision[3] reads as follows:

"When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by

* This comment was originally prepared as a report to the Michigan State Bar Committee on Condemnation Procedures by Mr. Jackson, under the supervision of Professor Paul G. Kauper of the University of Michigan Law School. The committee's permission to publish this report is gratefully acknowledged.—Ed.

1 Twenty states have provisions in their constitutions requiring some sort of jury procedure for some or all condemnation cases. The states, date of the constitution, and article and section of relevant provisions are as follows: Alabama (1901) §235; Arizona (1910) II:17; California (1879) I:14; Colorado (1876) II:15; Florida (1885) XVI:29; Illinois (1870) II:13; Iowa (1857) I:18; Kentucky (1891) §242; Missouri (1945) I:26; Montana (1889) III:15; New York (1938); I:7; North Dakota (1889) I:14; Ohio (1851) I:19, XIII:5; Oklahoma (1907) II:24; Pennsylvania (1874) XVI:8; South Carolina (1895) IX:20; South Dakota (1889) VI:13, XVII:18; Washington (1889) I:16; West Virginia (1872) III:9; Wisconsin (1848) XI:2. For a slightly out-of-date compendium of state constitutional provisions bearing on condemnation, see RANDOLPH, THE LAW OF EMINENT DOMAIN 401-416 (1894). See also 74 A.L.R. 569 (1931). Of the twenty state provisions cited above, eleven provide that the jury proceeding shall be "according to law," or "as prescribed by law," including Alabama, Arizona, California, Colorado, Florida, Illinois, Missouri, New York, Ohio, South Carolina, and Washington.

2 The first Michigan Constitution was adopted in 1835. One revision subsequent to 1850 was adopted in 1908.

3 MICH. CONST., Art. XVIII, §2 (1850). This section, in substantially unchanged form, is now Art. XIII, §2. Other provisions in the 1850 constitution relevant to condemnation are Art. XV, §9, providing for compensation before taking; Art XV, §15, providing for taking in cities and villages with a jury requirement; Art. XVIII, §14, providing for opening of private roads with a jury requirement.

the state, shall be ascertained by a jury of twelve free-holders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: *Provided,* The foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners."[4]

The major interpretative problem of this section is the meaning of "jury" in this context.[5] Although it may be thought that this term refers to a proceeding before a jury similar to that used in common law jury trials, the Michigan Supreme Court has stated on numerous occasions that, "These appraisals bear no resemblance to ordinary legal trials . . ."[6] and that it is "settled in this State that the jury contemplated by this section . . . is a special tribunal. . . ."[7]

In defining proceedings by this "special tribunal," the Michigan court has stipulated that these juries "are judges of the law and fact. . . ."[8] This has led the court to conclude that, "the presiding judge acts only in an advisory capacity and cannot give binding instructions . . ."[9] and, furthermore, the judge may refuse to give advisory instructions even when requested to do so.[10] A good example of the confusion that these principles can engender is contained in a 1939 case[11] where the judge and jury were faced with the question who should decide the constitutionality of the federal housing act!

It must be remembered that we are dealing with a constitutional provision which limits and controls the exercise of the sovereign power of eminent domain entrusted to the legislature.[12] In each condemnation there is a statute supplying the eminent domain authority, and this statute must be followed unless it

[4] The proviso was added in 1860. See 1 Mich. Stat. Ann. (1936) §190.

[5] No attempt will be made to consider proceedings under commissioners, although the Michigan court has indicated that commissioners have "the same powers and duties as a jury . . ." in condemnation cases. In re State Highway Commissioner, 249 Mich. 530 at 532, 229 N.W. 500 (1930). See also Port Huron & South-Western Ry. v. Voorheis, 50 Mich. 506, 15 N.W. 882 (1883); and Flint & Pere Marquette R. Co. v. Detroit & Bay City R. Co., 64 Mich. 350, 31 N.W. 281 (1887).

[6] Matter of Convers, 18 Mich. 459 at 468 (1869).

[7] McDuffee v. Fellows, 157 Mich. 664 at 668, 122 N.W. 276 (1909).

[8] Ibid.

[9] In re Acquisition of Land for Civic Center, 335 Mich. 582 at 591, 56 N.W. (2d) 387 (1953).

[10] Flint & Pere Marquette R. Co. v. Detroit & Bay City R. Co., 64 Mich. 350, 31 N.W. 281 (1887), and McDuffee v. Fellows, 157 Mich. 664, 122 N.W. 276 (1909).

[11] In re Brewster Street Housing Site, 291 Mich. 313 at 347, 289 N.W. 493 (1939).

[12] RANDOLPH, EMINENT DOMAIN 91 (1894).

is contrary to the constitution. In this comment attention will be focused on the characteristics of the "jury" (hereafter termed the "condemnation jury") proceeding required by the condemnation provision in the Michigan Constitution. These characteristics are of at least two types, those required as a matter of constitutional law, and those not required by the constitution but required by legislation or court interpretation of legislative and public policy. The frequent failure of the Michigan Supreme Court to distinguish sharply between these two types of characteristics has led to some of the confusion in the condemnation proceedings.

The purpose of this study is to give the reader a basic understanding of the nature of the Michigan condemnation jury, its origin (insofar as information on this exists) and its theory as developed by the Michigan Supreme Court. Such an understanding is interesting as a specific example of the development of a particular type of adjudicatory proceeding, not altogether unique,[13] but different from most. In any case no attempt has here been made to set out every characteristic of the Michigan condemnation jury proceedings, nor exhaustively to cite the cases bearing on this subject. Other works exist for this purpose.[14]

II. *The Dim Past*

Over a century of time has obscured the ideas and notions of law which may have influenced the Michigan judges in their early interpretations of the condemnation section. The decisions themselves are somewhat cryptic concerning these sources. Information on perhaps the most important source of interpretation, the intent of the framers, is almost non-existent, as will be indicated below. Consequently one finds himself groping among ideas and institutions which existed in the days just before and after 1850, in order to see if any of them might have a logical or psychological connection to the later interpretations being studied.

A. *Early Eminent Domain Proceedings*

Authorities seem to agree that at common law, prior to constitutions, it was "the practice in America and England to as-

[13] See note 1 supra.

[14] See, e.g., 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §§76-187 (1958); 5 MICHIGAN LAW AND PRACTICE ENCYCLOPEDIA, Condemnation §§91-120 (1956).

certain the compensation to be paid for property taken for public use by other agencies than a common law jury . . . ,"[15] one author describing the proceeding as "an inquisition on the part of the state for the ascertainment of a particular fact . . . [that] . . . may be conducted without the intervention of a jury. . . ."[16] Consequently, constitutional provisions, such as the Seventh Amendment, ensuring the right of trial by jury as it was known prior to the Federal Constitution did not require a jury in condemnation proceedings.[17] The 1835 Michigan constitutional provision that "The right of trial by jury shall remain inviolate"[18] likewise did not require a jury in condemnation proceedings.

Constitutions of some states, however, specifically required a jury in condemnation cases.[19] In such cases authorities seem also to agree that the "jury" mentioned is usually a common-law jury of twelve men.[20] An exception to this rule is stated by one author who notes that "if a special jury is the tribunal in vogue at the enactment of the constitution it may be presumed to be the jury intended. . . ."[21] This was evidently the approach taken by New York after a section was introduced into its constitution in 1846 which guaranteed compensation for condemnation for a private road to be "determined by a jury of freeholders. . . ."[22] The New York Court of Appeals in 1854 held that a majority of this jury could make the determination, since instances of statutory condemnation proceedings prior to 1846

> "are certainly sufficient to establish the position that at the time of the convention there was a known legislative usage in respect to this subject, according to which the term "jury" did not necessarily import a tribunal consisting of twelve men acting only upon a unanimous determination, but on the contrary was used to describe a body of jurors of different numbers and deciding by majorities or otherwise as the legislature in each instance directed. . . ."[23]

15 2 LEWIS, LAW OF EMINENT DOMAIN IN THE UNITED STATES, 2d ed., §509 (1909).

16 MILLS, EMINENT DOMAIN, 2d ed., §91 (1888).

17 Ibid.; and PROFFATT, TREATISE ON TRIAL BY JURY §104 (1877).

18 Art. I, §9.

19 RANDOLPH, EMINENT DOMAIN 289 (1894).

20 Ibid.; and 2 LEWIS, EMINENT DOMAIN IN THE UNITED STATES, 2d ed., §509 (1909).

21 RANDOLPH, EMINENT DOMAIN 290 (1894).

22 New York Constitution of 1846, Art. I, §7, which reads substantially the same as the present New York Constitution of 1938.

23 Cruger v. Hudson River R. Co., 12 N.Y. 190 at 199 (1854).

Condemnation procedures in Michigan prior to 1850 were found in the early Michigan statutes (special incorporation acts, acts concerning roads, acts incorporating towns and villages, etc.). Only one of these statutes provided that the necessity of the taking be determined by a jury,[24] the others providing that the damages be assessed by:

"five disinterested persons to meet on the land . . .;"[25]

"twelve respectable freeholders not interested in the land . . . ;"[26]

"three disinterested persons, freeholders . . . ;"[27]

"a jury of eighteen freeholders of said county . . . ;"[28]

"twelve freeholders in the county . . . each party . . . may strike off three . . . the remainder shall act as a jury of inquest of damage . . . ;"[29]

"a panel of twelve . . . the remaining six shall sit as a jury of inquest of damages . . . ;"[30]

"commissioners . . . ;"[31]

"six disinterested freeholders of the county in which the land lies . . . ."[32]

It seems clear from a perusal of these statutes that condemnation proceedings were considered to be completely within the control of the legislature, and generally were a special type of proceeding unrelated to normal civil trials.[33]

B. *Inquests*

The Michigan condemnation jury has been termed a "jury of inquest" by the Michigan Supreme Court,[34] so our groping for

24 3 Mich. Laws 214 at 217 (No. 115, 1839).
25 1 Terr. Laws of Mich. 75 at 77 (1805).
26 2 Terr. Laws of Mich. 93 at 94 (1817).
27 2 Terr. Laws of Mich. 593 at 594 (1827).
28 3 Terr. Laws of Mich. 1287 at 1289 (1834).
29 Mich. Laws (1836) 267 at 272.
30 Mich. Laws (1847) 5 at 12.
31 Mich. Laws (1847) 174 at 176.
32 Mich. Laws (1847) 114 at 116.
33 This was before the Fourteenth Amendment applied the due process requirements to the states. The Michigan Constitution of 1835 stated that "The property of no person shall be taken for public use, without just compensation therefor" (Art. I, §19), and there is indication in at least one early case that certain elemental standards of fairness and impartiality might be required of condemnation proceedings. See People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496 at 504 (1855) (condemnation prior to 1850). However, no Michigan cases have been found specifying required characteristics of condemnation proceedings prior to 1850.
34 Chicago & Michigan Lake Shore R. Co. v. Sanford, 23 Mich. 418 at 424 (1871).

sources must include a brief review of the meaning of a "jury of inquest" prior to 1850.

In a general sense an "inquest" can refer to any "body of men appointed by law to inquire into certain matters."[35] However, an inquest usually refers to a judicial inquiry, often with a jury,[36] such as a coroner's inquest. Two types of inquests in particular might have supplied analogies or precedents for terming a condemnation proceeding an inquest. One of these is the inquest of office, wherein a jury summoned by a sheriff or other proper officer inquired of matters relating to the crown upon evidence laid before them. This type of inquiry could be for the purpose of inquiring into matters that entitle "the king to the possession of lands or tenements, goods or chattels, . . ." and could be made "by a jury of no determinate number, either twelve, or less, or more. . . ."[37] Another type of inquest interesting to us is the "inquest of damages." When default was entered in a cause of action, and the damages were unliquidated, a "Writ of Inquiry" would be used to call a jury to determine the amount of the damages.[38] In an inquest for damages, the jury sat before and under the instruction of the sheriff, although if an important question of law were involved a judge might instruct the jury. The normal rules of evidence were not relaxed, and the jury's determination could be set aside like any other judicial proceeding.[39] However, one authority indicates that the jury's conclusion would not be set aside unless it was manifest that injustice had been done.[40]

C. *The Michigan Constitutional Convention of 1850*

Unfortunately neither the Journal[41] nor the report of the debates[42] of the 1850 constitutional convention in Michigan contain any discussion concerning section 2 of Article XVIII as finally adopted. This provision was introduced, referred to the committee on miscellaneous provisions,[43] and, when the article on miscellaneous provisions was reported to the convention, there was no

[35] BOUVIER'S LAW DICTIONARY (1914).

[36] Ibid.; and 43 C.J.S. 1208, Inquest (1945).

[37] KENNEDY, A TREATISE ON THE LAW AND PRACTICE OF JURIES 122 (1826).

[38] 13 CYCLOPEDIA OF LAW AND PROCEDURE 220-254 (1904).

[39] Id. at 225-227. See also 195 LAW TIMES 22 (1943).

[40] 13 STANDARD ENCYCLOPAEDIA OF PROCEDURE 421 (1916).

[41] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN (1850).

[42] REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN (1850).

[43] JOURNAL, note 41 supra, at 51.

debate on the particular section finally numbered (2).[44] There was, however, some debate on a provision in the same article (later eliminated from the article) which provided that when mill dams flowed land, "the actual value of the land flowed shall be determined by a jury of freeholders, . . ."[45] such value to be paid to the landowner. One member of the convention spoke opposing the motion to strike this mill dam provision, saying,

> "This provision was intended to protect the poor man in his rights. On but too many occasions were the poor men driven out of court when seeking for their rights, by reason of the costs arising from these suits. It only asked that these men should have their rights, but through a different channel from that now existing. It said that property should be assessed by a jury of twelve men — the same tribunal which had control over cases of a similar character. Gentlemen might say, let them go to the courts of justice. But then we had had experience in regard to that remedy. What did going to the courts of justice, to the court of last resort, amount to? To an utter rejection of claims for justice, so far as the poor clients were concerned."[46]

Whether this argument was also made for the provision on condemnation that was adopted by the convention is impossible to say from a reading of the debates. The evidence of the framers' intent when they established the condemnation jury is virtually non-existent, however, unless we consider such threads as this.

III. *Theories and Concepts of the Condemnation Jury Subsequent to 1850*

Two designations have frequently been applied to the condemnation jury by the Michigan Supreme Court. First, the court has termed the "jury" a "special tribunal," differing from a common law jury.[47] Second, the court has stated on a large number of occasions that the condemnation jury is "judge of law and fact."[48] The origin and development in the cases of these two rules

[44] REPORT, note 42 supra, at 822-855. No reports or documents of the Committee on Miscellaneous Provisions, if any exist, were found in the libraries at the University of Michigan, nor were any pertinent newspaper or other accounts of its deliberations found there. Time prevented search elsewhere in the state.

[45] REPORT, note 42 supra, at 823.

[46] Id. at 845-846.

[47] See note 7 supra.

[48] See notes 7 and 9 supra, and In re Huron-Clinton Metropolitan Authority, 306 Mich. 373 at 387-389, 10 N.W. (2d) 920 (1943).

is highly interesting, although the rules are so well established in precedent that it may seem fruitless to inquire into their correctness. Nevertheless, if either of these rules can be shown to rest on weak or doubtful grounds, then as a matter of constitutional law the Michigan Supreme Court may in the future be willing to limit precedent narrowly and not use one or both of these concepts to overrule the legislature when and if the latter prescribes a procedure that might not be considered strictly consistent with the implications of these concepts.

A. *The "Special Tribunal"*

If the new condemnation provision in the 1850 constitution was intended merely to codify and give constitutional protection to the general method of assessing damages in condemnation cases prior to 1850, there would seem to be no question but that condemnation proceedings would be by a special tribunal (not a common law jury) as governed by the particular statute in the case, within the explicit limits (twelve freeholders from the vicinity) set out by the constitution. On the other hand, if the 1850 constitution was intended to change the prior law in some way, then it might be that certain common law features of a jury trial could be demanded by right, even though not provided by legislation. The words in the provision itself read "as shall be prescribed by law . . . ," which could be interpreted to mean that the legislature can control the procedures within the explicit limits of the provision.

One early case, relying partly on another provision in the 1850 constitution,[49] suggested that the constitution intended to change the mode of laying out highways.[50] Other cases, however, have indicated a predilection on the part of the court to determine the nature of the constitutional condemnation jury by reference to the procedures prior to 1850, particularly those in the railroad laws. For instance, one case,[51] after mentioning proceedings under the old railway laws, states:

49 Art. X, §11, which provides: "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships under such restrictions and limitations as shall be prescribed by law."

50 "It manifestly was the intention of the constitutional convention of 1851 to surround the rights of individuals with additional guards, and to place them upon as sound a basis as was consistent with the rights and necessities of the public. . . ." People v. Kimball, 4 Mich. 95 at 97 (1856).

51 Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap, 47 Mich. 456 at 462, 11 N.W. 271 (1882).

"Our present system is better calculated than the old one, if fairly applied, to secure the rights of landowners. But the nature of the proceeding remains as before, a special proceeding by a temporary tribunal selected for the occasion, and not a judicial proceeding in the ordinary sense."

The first case involving the question whether the constitutional condemnation jury was to be the same as the jury in normal civil trials was an appeal in which the Michigan court set aside the proceeding because, inter alia, a peremptory challenge was allowed against one juror summoned for the case.[52] The court, noting that peremptory challenges were allowed only in criminal cases unless explicitly authorized by statute, held that a statute providing peremptory challenges in "civil cases" did not apply to the condemnation proceeding being reviewed.[53] The court did not hold, however, that the legislature could not prescribe a procedure for condemnation like that in common law civil trials. It merely held that the legislature did not so prescribe, and that the constitution did not require a normal common law civil procedure.

The next case to touch on this problem[54] held that a writ of certiorari was a proper way to review a condemnation proceeding, since the constitution required a jury, the statute required a venire and judgment, and no other provision was made for appeals. The court said, "We think the proceedings so far judicial in their nature as to be subject to revision . . .,"[55] but noted that it was disposing of the case "without deciding how far the Justice is connected with the inquest . . .,"[56] intimating that the proceeding was not necessarily similar to common law jury trials.

A third case, *Chicago & Michigan Lake Shore R. Co. v. Sanford*,[57] involved the issue of whether the condemnation jury must render its verdict by unanimous vote. The court held that despite inferences in the authorizing statute to the contrary,[58] it must be con-

[52] Matter of Convers, 18 Mich. 459 (1869).

[53] The court stated that the term "civil cases," ". . . does not apply to special proceedings not in the ordinary course of law, and which are regulated entirely by particular statute. . . . In the recent case of *Livermore* vs. *Hamilton*, in the New York Court of Appeals (reported in the New York Times of May 10) it was held . . . that it was error to allow a peremptory challenge in proceedings under the Landlord and Tenant law, as such proceedings were not properly civil actions. These appraisals bear no resemblance to ordinary legal trials." Id. at 468.

[54] People v. Brighton, 20 Mich. 57 (1870).

[55] Id. at 69.

[56] Id. at 71.

[57] 23 Mich. 418 (1871).

[58] Mich. Comp. Laws (1857) §1965.

strued so as to require a unanimous verdict in order to comply with the constitutional guarantee of a jury. The court took issue with the 1854 New York case[59] stating that a condemnation jury may act by majority. The Michigan court said, "If a jury does not mean a body acting substantially like a common-law jury it means nothing at all; and the provision is senseless."[60] The court went on to comment, however, that it was speaking of a "jury of inquest" such as those denominated by the old railroad charters, which it felt could "consist of more or less than twelve" but it doubted that "there ever was any . . . idea that a verdict of twelve or less would be valid that was not unanimous."

These three early cases seem to indicate a stand on the part of the Michigan court that, despite the clause "as shall be prescribed by law," a "jury of twelve free-holders" was to have a definite content beyond the explicit word, which would limit the legislature in its selection of proceedings for condemnation cases. On the other hand, the court seemed clearly to indicate that the condemnation jury is not necessarily to be like an ordinary common-law jury in all respects.

In the case of *Paul v. Detroit*[61] the same judge who wrote the *Sanford* opinion stated what he considered to be some of the characteristics of the tribunal, as follows:

> ". . . each case shall be determined by a separate tribunal summoned expressly for the purpose, who must be unanimous in their views before any land can be taken; who must act openly and before all concerned, in hearing and receiving testimony; who cannot listen to private persuasion, and where any attempt to influence them will subject the offender to severe and disgraceful punishment. All these safeguards are implied in the use of the term 'jury;' and no action, by laws, or by proceedings under them, can be maintained, if any of these securities are impaired or disregarded."

In light of this background, the case of *Wixom v. Bixby*,[62] decided in 1901, is extremely interesting. In that case one party to a condemnation proceeding sought to use the testimony of a juror in the proceeding to prove that the jury had illegally used a quotient method of arriving at the condemnation award. The question was whether such testimony could be admitted, and it

[59] See note 23 supra.
[60] 23 Mich. 418 at 424 (1871).
[61] 32 Mich. 108 at 114 (1875).
[62] 127 Mich. 479 at 484, 86 N.W. 1001 (1901).

was held that since such testimony would be inadmissible if the jury were a common-law jury, then such testimony would be inadmissible here also, if the condemnation jury were a common-law jury. The court concluded that the juror's testimony was inadmissible. The court quoted a contemporary authority[63] to the effect that if a constitution requires a jury without explanatory words, that jury means the tribunal established by the common law. The court then stated, ". . . our Constitution has expressly provided for a jury trial, without using explanatory words, in condemnation proceedings. Applying the rule as stated in Elliott, this means a common-law jury."

Of the three early cases discussed above, only *Paul v. Detroit* was cited in the *Wixom* opinion, but the words quoted from the *Paul* case above were used in the *Wixom* case to support the proposition that the 1850 constitution changed the prior law and established a jury in condemnation cases like that in common law cases. Later cases, however, seem to ignore *Wixom v. Bixby*.[64]

In summary, then, it must be concluded that despite *Wixom v. Bixby* and other inferences to the contrary, the Michigan Supreme Court takes the position that the "jury of twelve freeholders" guaranteed in condemnation cases by the constitution has certain characteristics of a common-law jury but is not identical to a common-law jury. Furthermore, these characteristics are guaranteed by the constitution, and consequently the legislature after 1850 no longer had as much freedom to define the procedure to be followed in condemnation cases.

B. *The Jury as "Judge of Law and Fact"*

The phrase "judge of law and fact" has influenced the Michigan court in its decisions on specific characteristics of the condemnation jury,[65] so it is interesting and important to trace the origin of the use of this phrase in connection with the condemnation jury.

[63] ELLIOTT, A TREATISE ON THE LAW OF ROADS AND STREETS, 2d ed., §196 (1900).

[64] E.g., in McDuffee v. Fellows, 157 Mich. 664, 122 N.W. 276 (1909), the court held that a probate judge properly could refuse to charge the jury in a condemnation case, stating at 665-666: ". . . in view of the decisions of this court interpreting the section in question, we think that it must be held as established that the tribunal contemplated by this section of the Constitution is a special tribunal, and that, while the tribunal when consisting of a jury has some of the incidents of a common-law jury, the requirement that such jury shall be instructed by the court is not one of those incidents. . . ." Wixom v. Bixby was not mentioned.

[65] See note 48 supra.

Perhaps the most important implications of the jury as "judge of law and fact" are the possibilities that such a definition prevents the judge from instructing the jury or ruling on law (or evidence) questions as they arise during the trial. The later cases on these questions will be discussed in the paragraphs below on specific characteristics, but the early cases must be viewed at this point for the light they shed on the development of the "judge of law and fact" rule.

The earliest cases after 1850 in condemnation proceedings seem to indicate that the judge could instruct the jury. In *Duffield v. Detroit*[66] the court, in refusing to review a condemnation proceeding because the record was not complete, noted without taking exception a statute specifically providing that the court should "instruct said jury as to their duties, and the law applicable to the case. . . ." Subsequently, the court, in restraining condemnation proceedings because of constitutional defects in the authorizing legislation, nevertheless indicated that the provision made for instruction by the court was correct, although perhaps it did not go far enough.[67]

Perhaps the starting point of the cases that later talk of the jury as "judge of law and fact" is the case of *Michigan Air Line Ry. v. Barnes*.[68] In this case the court affirmed a condemnation award, overruling two objections to rules by which the jury determined the amount of the award and objections to the evidence taken by the jury. The court's discussion did not mention constitutional limitations, but centered on the interpretation of the authorizing statute[69] which provided that the judge could attend the jury, to decide questions of law and administer oaths.

On the question of review of admission or exclusion of evidence in the court below, the reviewing court indicated that it would exercise considerable restraint because

> "The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under cir-

[66] 15 Mich. 474 at 485 (1867).

[67] Paul v. Detroit, 32 Mich. 108 (1875). At 117 the court stated: "The law does not presume the jury will be able to guide themselves, and when it requires the court, in connection with its instructions, to deliver a copy of the notice . . . it is to be presumed the jury in acting will pay special regard to the notice. . . ."

[68] 44 Mich. 222, 6 N.W. 651 (1880).

[69] Mich. Laws (1873) p. 496 at 516 (Act of May 1, 1873), which stated in part: "The said judge, or a circuit court commissioner to be designated by him, may attend such jury, to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings. . . ."

cumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. . . . The conclusion to which these and other considerations lead is that a very large discretion in admitting and rejecting testimony is left to the jury, or the attending officer, whenever there is one. . . ."[70]

The court did, however, review the jury's determination of the legal rules by which it determined the award amount, although the court affirmed the jury's view on these two matters.

The leading and first case stating the jury to be judge of law and fact in condemnation cases is *Toledo, Ann Arbor & Grand Trunk Ry. v. Dunlap*.[71] Although the court in this case reversed various orders of the lower court regarding a condemnation proceeding, it affirmed the jury's finding of necessity despite the fact that the circuit judge "attended the sittings of the jury, and admitted or excluded testimony, and charged the jury precisely as on a trial."[72] The court said:

"The judge formed no part of this special tribunal. The statute indeed allows the judge to "attend said jury, to decide questions of law and administer oaths to witnesses." §21, art. 2[73] . . . Whatever the language of this statute literally construed may mean, it is very clear that any such functions must at most be advisory. The jury will undoubtedly be regarded as accepting and doing what they permit to be done. But in all such cases the Constitution as well as the principles of the common law, makes them judges of law and fact. *Chamberlin* v. *Brown* 2 Doug. (Mich.) 120. Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders. . . ."[74]

In short, the court held that the jury is judge of law and fact by the constitution and therefore even if the judge purports to rule on law and evidence this will not be grounds for reversal because: "while an appellate court is bound . . . to set aside proceedings . . . based on false principles, it cannot properly deal with rulings as if they were excepted to on a common law trial . . ."[75] once

[70] Michigan Air Line Ry. v. Barnes, 44 Mich. 222 at 226, 6 N.W. 651 (1880).
[71] 47 Mich. 456, 11 N.W. 271 (1882).
[72] Id. at 466.
[73] See note 69 supra.
[74] 47 Mich. 456 at 466.
[75] Ibid.

again citing the *Chamberlin* case, as well as *Michigan Air Line Ry. v. Barnes.*

What led the court in this case to conclude the jury was to be judge of law and fact in condemnation cases, as a matter of constitutional law? Early in the opinion the court referred to the fact that certain condemnation proceedings under railroad laws were not regarded as judicial proceedings, even though subject to judicial review and supervision.[76] And, as noted above, the *Michigan Air Line* case was cited. But we have already learned that the *Michigan Air Line* case seems to stand only for the proposition that the statute involved there requires a non-technical proceeding with regard to rulings of law and evidence. In the *Toledo, Ann Arbor* case, however, the *Michigan Air Line* case seems to be cited for the proposition that the constitution requires such non-technical proceedings. This leads to the *Chamberlin* case, cited by the court in the *Toledo, Ann Arbor* opinion.

Chamberlin v. Brown[77] was decided in 1845, and concerned a proceeding under a Forcible Entry and Detainer statute[78] which required justices of the peace "to cause to come before them twelve discreet men, of lawful age, who shall be qualified to serve as jurors in the circuit court, at the same time and place appointed for the trial. . . ." The jury was to try the forcible entry or detainer, and return its verdict. The judge was to enter judgment according to the verdict. Certiorari was brought, on the grounds, inter alia, that one of the justices in the proceedings below had erred in charging the jury. The Supreme Court refused to consider this as error because the lower court was not a court of record, but one of "special and limited jurisdiction, not according to the course of the common law, but specially provided for and regulated by statute. . . . [I]n the latter case, the jury are the judges of the law and the facts; and the correctness of their verdict, must be tested by an examination of the merits of the case. . . ."[79] The Michigan Supreme Court indicated that, "It does not appear from the facts presented in this case, that the verdict is not consistent with the law or the merits of the case." The statute required that, "The supreme court, on hearing of such cause on certiorari shall proceed to determine the same according to the right and justice

[76] Id. at 462.
[77] 2 Doug. (Mich.) 120 (1845) (note decision).
[78] Mich. Rev. Stat. (1838) p. 490, c. 5, as amended.
[79] 2 Doug. (Mich.) 120 at 122 (1845).

of the case, on a review of the facts, as well as of the matters of law . . ."[80] and it seems possible that the court in this case was merely indicating that under this statute it could not review isolated errors of law such as an incorrect instruction to the jury, but must review the whole merits.[81]

But the *Toledo, Ann Arbor* case cites *Chamberlin v. Brown* for the proposition that the jury is judge of law and fact.[82]

The constitutional limitations placed on condemnation proceedings by the *Toledo, Ann Arbor* case seem all the more strange in view of the fact that a case just prior to it[83] upheld detailed instructions to a jury by a judge in a condemnation suit under a different statute.

At this point it is interesting to compare the statement made by the Michigan Supreme Court in an 1838 unreported decision.[84] Although this case was not reported until 1945 and therefore could hardly be considered to have been precedent for the nineteenth century cases, nevertheless it may indicate the existence of a general opinion regarding the law prior to 1850. In a case of certiorari to a justice of the peace on a contract action, the court said:

> "—The justice committed manifest error, in directing the jury, as to matters of fact, after the cause was submitted to them by the parties — In justice's Courts, the jury are judges of the law as well as of facts, and the justice had no authority, whatever, after the cause was submitted, to direct the jury how to find — we think it would be dangerous to tolerate such a practice — "

The *Toledo, Ann Arbor* case has been frequently cited for the proposition that the jury[85] or commissioners[86] are judges of law as well as fact in condemnation cases. But even if one admits that

80 Mich. Rev. Stat. (1838) p. 490, c. 5, as amended.

81 Two subsequent cases under the same statute cited Chamberlin for the proposition that the reviewing court must examine the facts as well as the law. See Latimer v. Woodward, 2 Doug. (Mich.) 368 (1846), and Caswell v. Ward, 2 Doug. (Mich.) 374 (1846).

82 In so doing the court may have been relying on an over-broad generalization contained in a headnote to the Chamberlin case, note 79 supra, which states: "It seems that the jury are the judges of both the law and the facts, in all courts of special and limited jurisdiction, derived from the statute, and whose proceedings are regulated by the statute, and are not according to the course of the common law."

83 Grand Rapids & Indiana R. Co. v. Heisel, 47 Mich. 393 at 400, 11 N.W. 212 (1882).

84 BLUME, UNREPORTED OPINIONS OF THE SUPREME COURT OF MICHIGAN 1836-1843, p. 17 (1945), reporting Burhans v. Reynolds, January 19, 1838. See p. 20.

85 See, e.g., Hart v. Lindley, 50 Mich. 20 at 21, 14 N.W. 682 (1883).

86 Port Huron & South-Western R. Co. v. Voorheis, 50 Mich. 506 at 510, 15 N.W. 882 (1883).

the condemnation jury is not strictly a common-law jury under the Michigan constitution, and further admits that there are certain characteristics of the jury nevertheless required by the constitution (beyond those explicitly stated), yet it does not necessarily follow that the constitution requires the jury to be judge of law and fact. It is certainly possible that the *Toledo, Ann Arbor* case was stretching a point in arguing from the *Michigan Air Line* case (which turned on a statute) and from analogy to cases before justices of the peace (as in the *Chamberlin* case) that the constitution required the jury to be judge of law and fact. The phrase "judge of law and fact" itself is highly ambiguous and can lead to a number of different specific characteristics in the condemnation jury. Some of these specific characteristics will be discussed next.

IV. *Characteristics of the Condemnation Jury*

Certain specific characteristics of the condemnation jury, as defined by the Michigan Supreme Court, indicate the outlines and the influence of the principles that the jury is a "special tribunal" and "judge of law and fact."

A. *Before Trial*

The procedures prior to the time of trial, such as initiation of the proceeding and the impaneling of the jury, have generally not been restricted by any constitutional requirements developed by the Michigan court, although subject of course to the explicit requirements that the jury must be of twelve[87] freeholders[88] from the vicinity.[89] Most problems in this stage of the proceedings are solved by reference to the authorizing statutes[90] or by analogy with other statutes.[91] Indeed, the court has stated that beyond "pro-

[87] Campau v. Detroit, 14 Mich. 276 (1866); Pearsall v. Board of Supervisors, 71 Mich. 438, 39 N.W. 578 (1888); but this requirement may be waived, Weber v. Detroit, 158 Mich. 149, 122 N.W. 570 (1909).

[88] This requirement may also be waived, Mansfield, Coldwater & Lake Michigan R. Co. v. Clark, 23 Mich. 519 (1871).

[89] As to the meaning of "vicinity," see 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §85 (1958), and Matter of Convers, 18 Mich. 459 (1869).

[90] See 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §§79-80 (1958). See, e.g., Peninsular Ry. Co. v. Howard, 20 Mich. 18 at 26 (1870), where the court held a jury illegally constituted because several members were interested, saying, "We are not called upon to express any opinion as to the power of the Legislature to authorize such stockholders to sit as jurors; as we are satisfied that they have not attempted it."

[91] Kundinger v. Saginaw, 59 Mich. 355 at 360-362, 26 N.W. 634 (1886), which stated that the question of personal notice or notice by publication was within the legislature's

ceedings in court to select a jury, and subsequent proceedings to determine whether the action of the jury should be sustained . . . ," the courts have no part in the condemnation matter,[92] leading possibly to the negative inference that the court does have a part, before and after the trial by jury, analogous to its part in other civil proceedings.

B. *Admission and Exclusion of Evidence*

The problem of admissibility of evidence before a condemnation jury poses two questions. First, can the judge attending the jury exclude evidence or is this part of the jury's function as "judge of law and fact?" Second, if a ruling as to admissibility of evidence is incorrect, whether made by the judge or the jury, can a higher court reverse for that reason?

Concerning the first question, the writer has found no case in Michigan where a condemnation proceeding was set aside merely because the judge attended the jury and ruled on the admission of evidence.[93] On the contrary, the Michigan court has refused to disturb a condemnation award where the judge did attend and rule on the evidence, over the objection of appealing counsel that the "presiding judge made himself a controlling and constraining member of the constitutional tribunal, and thus rendered the proceedings void."[94] Similarly, the court has affirmed condemnation proceedings at which a judge excluded evidence he felt was inadmissible.[95] But a judge need not be in attendance, it seems, where "the statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert. . . ."[96]

If rulings on evidence admissibility are considered a question of law or fact, it would seem that allowing a judge to rule on those questions is inconsistent with the jury's being "judge of law and

discretion, but since most legislation requires personal notice, the court feels that the jury trial in the instant case implies personal notice.

[92] Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap, 47 Mich. 456 at 462, 11 N.W. 271 (1882). See also In re Huron-Clinton Metropolitan Authority, 306 Mich. 373 at 389, 10 N.W. (2d) 920 (1943).

[93] See 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §107 et seq. (1958).

[94] Fort Street Union Depot Co. v. Backus, 103 Mich. 556 at 563, 61 N.W. 787 (1895). See also Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap, 47 Mich. 456, 11 N.W. 271 (1882).

[95] In re Widening of Fulton Street, 248 Mich. 13 (1929), reported under the name of City of Grand Rapids v. Barth at 226 N.W. 690 (1929); City of Kalamazoo v. Balkema, 252 Mich. 308, 233 N.W. 325 (1930).

[96] Note 70 supra.

fact." Possibly this inconsistency is resolved by saying that the judge's rulings "must at most be advisory . . ." as did one case.[97] Statutes sometimes say that the judge "may attend said jury, to decide questions of law and administer oaths . . ."[98] or that the jury "shall hear, in the presence and under direction of the court, evidence touching the matters. . . ."[99] These seem to indicate the opinion of the legislature that it can require strict adherence to a judge's rulings on evidence, despite court insistence that the judge act in an advisory capacity only.[100]

Regarding the second question, the *Michigan Air Line* case initiated the rule, under a statute,[101] that "a very large discretion in admitting and rejecting testimony is left to the jury, or the attending officer . . ." and that an award will not be disturbed on account of such rulings "unless it is fairly evident . . . that the ruling . . . was a cause of substantial injustice. . . ."[102] The Michigan court has on occasion reiterated the "substantial injustice" rule[103] and has been very reluctant to overturn a condemnation award on grounds of an incorrect ruling on evidence made at the trial level, because "in condemnation cases . . . strict rules as to the admissibility of testimony are not always enforced. . . ."[104] The court seems to feel that in condemnation cases the jury can rely partly on its own knowledge.[105]

Consequently, even though incompetent evidence has been presented to the jury, the Michigan Supreme Court has affirmed an award, stating, "It is not to be presumed that the incompetent evidence which was introduced regarding benefits influenced their judgment any more than the same evidence would if it had come to them when acting merely as citizens buying and selling the land. . . ."[106] On the other hand, the court has used, as grounds inter alia for reversing an award, the fact that hearsay and opinion evidence was improperly admitted,[107] despite the fact that the

[97] Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap, 47 Mich. 456 at 466, 11 N.W. 271 (1882).

[98] Mich. Stat. Ann. (1937) §§22.224, 22.329.

[99] Mich. Stat. Ann. (1937) §8.3.

[100] As in Toledo, Ann Arbor & Grand Trunk Ry. Co. v. Dunlap, 47 Mich. 456, 11 N.W. 271 (1882).

[101] See above, Part III-B.

[102] Michigan Air Line Ry. Co. v. Barnes, 44 Mich. 222 at 227, 6 N.W. 651 (1880).

[103] In re Parkside Housing Project, 290 Mich. 582, 287 N.W. 571 (1939).

[104] Detroit v. Fidelity Realty Co., 213 Mich. 448 at 454, 182 N.W. 140 (1921).

[105] In re Widening of Michigan Avenue, 299 Mich. 544 at 549, 300 N.W. 877 (1941).

[106] Detroit, Bay City & Western R. Co. v. First Nat. Bank of Yale, 196 Mich. 660 at 664, 163 N.W. 97 (1917).

[107] Grand Rapids v. Coit, 149 Mich. 668 at 674, 113 N.W. 362 (1907).

applicable statute stated that "the supreme court . . . may affirm, or for any substantial error reverse the judgment. . . ."[108] The supreme court has also reversed on grounds, inter alia, that valid evidence was improperly rejected, although it seemed to indicate that substantial injustice did result from the error.[109] Some statutes, like the one above, suggest a "substantial error" rule,[110] and one allows the trial court to set aside a verdict for "objections of law and for matters of substance, but not for objections as to matters of form. . . ."[111] These suggest that the legislature feels it has the power, at least, to dispense with technicalities of evidence in condemnation proceedings.

In summary, the Michigan court's reluctance to overturn a condemnation award on technical grounds of evidence seems consistent with the idea of the condemnation jury being a "special tribunal." But the fact that the court will sometimes overrule the proceedings on technical evidentiary grounds, and that it will allow judges to attend the juries and rule on evidence without mention of the rulings being "advisory" seems inconsistent with the idea of the condemnation jury being "judge of law and fact." In light of the conflicting opinions, and the fact that usually the court does not state precisely whether its decision is based on the constitution or merely on statutory interpretation, analogy, and public policy, it is doubtful whether any definitive conclusion can be reached concerning the questions (1) can the judge attending the jury making binding evidentiary rulings or (2) can the supreme court reverse for incorrect evidentiary rulings not causing substantial injustice? Since policies of saving expense and time and the idea that the freeholder juror has knowledge of his own in these cases — concepts analogous to modern administrative tribunals — combine to support the negative of the two above questions, it may be that statutes clearly requiring affirmative answers will never be passed. If so, the Michigan court may never be called on to render a decision as to the constitutional necessity of negative answers.

C. *Instructing the Jury*

Although early opinions suggested that a judge could instruct the jury in condemnation cases, the *Toledo, Ann Arbor* case in-

108 Act No. 124, Pub. Acts 1883, as amended. See Mich. Stat. Ann. (1937) §8.56.
109 Fort Street Union Depot Co. v. Backus, 92 Mich. 33 at 55, 52 N.W. 790 (1892).
110 See note 108 supra, and Mich. Stat. Ann. (1937) §8.25.
111 Mich. Stat. Ann. (1937) §9.1115.

dicated that if the judge did, his instructions would "at most be advisory . . ."[112] since the jury are to be "judges of law and fact." The question of what part a judge can play in instructing the condemnation jury in the principles of law has been the subject of some conflict in the cases, and it is difficult to know exactly what the position of the Michigan Supreme Court is on this question.

It seems clear that the trial judge may instruct the jury as to his views on the law,[113] but there are many statements in the cases to the effect that the judge acts "in an advisory capacity," that the jury "are not to be interfered with or dictated to by the judge,"[114] and that the judge "cannot give binding instructions."[115] That this rule is clearly considered to be a constitutional requirement is indicated by those cases which hold that a judge is correct in telling a jury his instructions are purely advisory even though the statute governing the proceedings requires the jury to "be instructed as to its duties and the law of the case by the judge of the court. . . ."[116]

Despite this stated rule, however, the writer has found no case which reverses a condemnation proceeding where the judge instructed the jury *correctly*, even though he did not tell them his remarks were purely advisory. On the contrary, there are many cases where the judge has charged the jury and the Michigan Supreme Court has upheld the proceeding without any notation that the judge indicated to the jury that his remarks were advisory.[117] Possibly this is because there was no prejudice resulting from the error if the instructions were correct.

Even if the judge's charge to the jury is incorrect, language used in at least one case indicates that the court will not overrule the proceeding unless "some ruling or instruction of the judge is clearly erroneous, and leads to the plain conclusion that

112 See Part III-B above.

113 Fort Street Union Depot Co. v. Backus, 103 Mich. 556 at 558, 61 N.W. 787 (1895). See 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §102 (1958).

114 In re Widening of Bagley Avenue, 248 Mich. 1 at 4, 226 N.W. 688 (1929).

115 In re Acquisition of Land for Civic Center, 335 Mich. 582 at 591, 56 N.W. (2d) 387 (1953). See also note 105 supra, and 8 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE, Eminent Domain §102 (1958).

116 In re Widening Harper Avenue, 237 Mich. 684 at 686, 213 N.W. 74 (1927).

117 Detroit & Toledo Shore Line R. Co. v. Hall, 133 Mich. 302, 94 N.W. 1066 (1903); Grand Rapids v. Luce, 92 Mich. 92, 52 N.W. 635 (1892); Allegan v. Vonasek, 261 Mich. 16, 245 N.W. 557 (1932); In re Petition of the City of Detroit for a Park Site, 227 Mich. 132, 198 N.W. 839 (1924).

the jury were thereby prejudiced against respondents."[118] This suggests that the "advisory only" rule of instructions may actually make it harder for a party to get a case reversed on the grounds that an incorrect rule of law was applied, since the instruction did not technically bind the jury. Most cases, however, do reverse on grounds, inter alia, of incorrect instructions[119] even when the judge states that he is merely giving the jury his opinion and advice.[120] Thus, as a practical matter, since courts will reverse for incorrect instructions even though they are merely advisory, it can be argued that the "advisory only" rule has no real influence on the proceeding where the judge does attend and give his opinions on the law. The jury in all probability will follow those instructions as carefully as it would in an ordinary common law civil trial.

Most cases indicate that the judge has no *duty* to advise the jury on the law in a condemnation case, at least where no statute requires them to do so.[121] However, one case states, "It is the duty of the court to interfere where matters foreign to the issue are rehearsed before the jury, prejudicial to the interests of a party. . . ."[122]

Where does this leave our "special tribunal" which is "judge of law and fact"? Regarding rulings on questions of law, at least, it seems that the judge can in any case advise the jury as to his opinion what the law is, as long as he tells them his remarks are merely advisory. In fact, it seems that the judge may omit telling them his remarks are only advisory if the judge is correct as to his opinion of law. If the judge is wrong in his opinion of law, then the higher court will usually reverse (unless it can be shown the opinion did not control or prejudice the jury) and it seems that reversal will result even if the judge told the jury his remarks were advisory. In essence, then, if the judge instructs, it seems that he can do so in about the same way as in ordinary common law trials. The primary difference of condemnation proceedings from ordinary common law proceedings with regard to instructions is the fact that the judge has no normal duty to instruct, unless some

[118] Fort Street Union Depot Co. v. Backus, 103 Mich. 556 at 558, 61 N.W. 787 (1895).

[119] In re Board of Education of City of Grand Rapids, 249 Mich. 550, 229 N.W. 470 (1930); Grand Rapids v. Coit, 149 Mich. 668, 113 N.W. 362 (1907).

[120] Allegan v. Vonasek, 261 Mich. 16, 245 N.W. 557 (1932).

[121] Flint & Pere Marquette R. Co. v. Detroit & Bay City R. Co., 64 Mich. 350, 31 N.W. 281 (1887); McDuffee v. Fellows, 157 Mich. 664, 122 N.W. 276 (1909).

[122] Fort Street Union Depot Co. v. Backus, 92 Mich. 33, 52 N.W. 790 (1892).

legislation requires him to do so. And even if legislation requires him to instruct, he may (or must) indicate to the jury that his statements are merely advisory.

Many statutes seem to contemplate instructions by the judge, stating that "The jury . . . shall be instructed as to their duties and the law of the case by the court . . ."[123] and that the judge "may attend said jury, to decide questions of law . . ."[124] but once again the court can interpret these to mean "advisory" instructions, thus avoiding the constitutional question of the legislature's power to prescribe binding instructions.

D. *Court Control and Review*

Although the jury is "judge of law and fact" in a condemnation proceeding, the Michigan court has intimated that before and after the trial in front of the jury, the judges have control.[125] If the rule of "jury as judge of law and fact" is to have any real meaning, however, it seems logical that the power of the judges before and after trial to control the jury and its verdict will not be as extensive as in a common law trial. The cases bear this out. There are two stages of the proceedings to examine here: (1) the control of the trial judge over the jury verdict and judgment, and (2) the review of the proceedings by an appellate court.

The basic power of the trial judge to control the jury's findings is the power not to confirm the award, or the power to set aside the proceeding and order a new trial. The *Fort Street Union Depot* case firmly establishes this power, although there was no serious challenge to his power before this case, and specifies the situations in which the court felt a judge was justified in setting aside an award, as follows:

> "1. If it is found by the court that there has been fraud or misconduct upon the part of the jury affecting the rights of the parties.
>
> 2. For gross errors or mistakes of the jury.
>
> 3. For the erroneous rejection or admission of testimony affecting the rights of the parties.
>
> 4. For errors of such extraordinary character or grossness as furnish a just inference of the existence of undue influence,

[123] Mich. Stat. Ann. (1937) §9.1115. See also §§5.1436, 5.1862, 8.19.

[124] Mich. Stat. Ann. (1937) §22.329. See also §22.224.

[125] See Part IV-A and note 92 supra.

partiality, bias, and prejudice, or unfaithfulness in the discharge of the duty imposed.

5. When it is apparent to the court that the damages awarded are either inadequate or excessive."[126]

Cases have held, however, that the judge cannot grant a motion to modify the verdict,[127] nor require consent to raise in the amount of the award on pain of ordering a new trial (additur),[128] nor require consent to a lower award on pain of the same penalty (remittitur).[129] Nor can the court dismiss the condemnation proceedings, at least where jurisdiction has been obtained and no statute authorizes dismissal.[130] Certainly these limitations are consistent with the notion that the jury is judge of law and fact. However, if the judge has the power to accomplish the same ends by ordering a new trial, it seems merely to be choosing the more expensive route to limit the judge's other controls.

Some statutory authorizations of condemnation proceedings seem to imply that the legislature intended, in some instances, to give judges in condemnation cases control over juries similar to common law cases, the statutes stating that the jury "shall be instructed . . . and shall retire under the charge of an officer and render their verdict in the same manner as on the trial of an ordinary civil case. . . ."[131] One statute even goes so far as to say, "The verdict of the jury may be set aside by the court and a new trial ordered for objections of law and for matters of substance, in the same manner and on the same ground as an ordinary civil action in courts of general jurisdiction. . . ."[132] It seems that the legislature does not have as much confidence in the jury as the courts do.

Appellate review of condemnation proceedings can be obtained

[126] Fort Street Union Depot Co. v. Backus, 92 Mich. 33 at 42, 52 N.W. 790 (1892).

[127] Grand Rapids, Grand Haven & Muskegon Ry. Co. v. Stevens, 143 Mich. 646, 107 N.W. 436 (1906).

[128] Grand Rapids v. Coit, 149 Mich. 668, 113 N.W. 362 (1907).

[129] In re Owen and Memorial Parks in City of Detroit, 244 Mich. 377, 221 N.W. 274 (1928).

[130] In re Huron-Clinton Metropolitan Authority, 306 Mich. 373, 10 N.W. (2d) 920 (1943).

[131] See Mich. Stat. Ann. (1937) §§5.1436, 5.1862, 8.19, 8.49. But see §5.2520 which states that "the decision of such jury shall be final and conclusive in the premises, unless an appeal . . . shall be taken. . . ."

[132] Mich. Stat. Ann. (1937) §9.1115.

by appeal,[133] by certiorari,[134] and, sometimes, even by mandamus.[135] The scope of appellate review in the case of review of evidentiary questions and in the case of review of a judge's instructions has already been mentioned. The Michigan Supreme Court has never hesitated to review and reverse when necessary because of an error of law relied on by the jury to determine either necessity[136] or the amount of the award.[137]

Concerning the amount of the award, the Michigan Supreme Court found no ground for disturbing an award where "the record shows that each award was between the maximum and minimum amounts as testified to by the various witnesses. . . ."[138] But the court has reversed when the award was inadequate[139] or too high[140] due to the application of a wrong rule of law. The court has stated that the jury has a great deal of discretion in determining the amount of the award,[141] and has indicated it will not set aside an award unless it is "grossly against the overwhelming weight of evidence. . . ."[142] Similar discretion is granted for a finding of necessity, and the court will not overturn one if "there was evidence to support the verdict. . . ."[143]

Conclusion

What is the Michigan condemnation jury proceeding? The Michigan Supreme Court has said that it is an "appraisal," but in another case it has stated that it is not a "mere appraisal."[144]

133 Chicago, Detroit & Canada Grand Trunk Junction R. Co. v. Simons, 200 Mich. 76, 166 N.W. 960 (1918); and see Mich. Stat. Ann. (1937) §8.24.

134 People v. Brighton, 20 Mich. 57 (1870); Dunlap v. Toledo, Ann Arbor & Grand Trunk Ry. Co., 46 Mich. 190, 9 N.W. 249 (1881).

135 Fort Street Union Depot Co. v. Backus, 92 Mich. 33, 52 N.W. 790 (1892).

136 Commissioners of Parks and Boulevards of the City of Detroit v. Moesta, 91 Mich. 149, 51 N.W. 903 (1892).

137 Ibid.; Toledo, Ann Arbor & North Michigan Ry. Co. v. Detroit, Lansing & Northern R. Co., 62 Mich. 564, 29 N.W. 500 (1886); In re Widening of Woodward Avenue, 265 Mich. 87, 251 N.W. 379 (1933); In re Widening of Woodward Ave., 304 Mich. 417, 8 N.W. (2d) 120 (1943).

138 In re Widening Harper Avenue, 237 Mich. 684 at 687, 213 N.W. 74 (1927).

139 Chicago, Detroit & Canada Grand Trunk Junction R. Co. v. Simons, 200 Mich. 76, 166 N.W. 960 (1918).

140 In re State Highway Commissioner, 249 Mich. 530, 229 N.W. 500 (1930). See also Ontonagon R. Co. v. Norton, 236 Mich. 187, 210 N.W. 480 (1926).

141 In re Widening of Michigan Avenue, 280 Mich. 539, 273 N.W. 798 (1937).

142 Village of Hamtramck v. Simons, 201 Mich. 458 at 468, 167 N.W. 973 (1918).

143 Saginaw, Tuscola & Huron R. Co. v. Bordner, 108 Mich. 236 at 239, 66 N.W. 62 (1896).

144 See Chicago & Michigan Lake Shore R. Co. v. Sanford, 23 Mich. 418 at 424 (1871).

The court has called it a "jury of inquest" or "inquisition," but contrary to the rule followed in some inquests has denied that the judge could give binding advice. The court has said that the condemnation jury is not a common-law jury, but in another case it has said that it was like a common-law jury. The court has termed it a "special tribunal," but has said that certain characteristics are implied by the term "jury." It must be concluded that the Michigan condemnation jury cannot be comprehensively defined by reference to any single analogy or category. It is a body which adjudicates the matter of necessity and the amount of award in certain condemnation cases, and has explicitly stated characteristics of "twelve free-holders, residing in the vicinity. . . ." It also has a number of characteristics required implicitly by the term "jury." In order to tell what implicit characteristics the condemnation jury has, a lawyer must examine the cases in detail.

One of the common phrases associated with the Michigan condemnation jury by the courts is "judge of law and fact," a designation seemingly drawn from analogy to statutory proceedings with a jury before a justice of the peace, and influenced by a Michigan case that turned on a statute. This phrase is ambiguous enough that by itself it has little meaning, and to determine its content one must still examine the cases to determine whether a particular characteristic is required in condemnation jury proceedings. When this is done, however, it is found that some characteristics attached to the condemnation jury do not necessarily appear consistent with the "judge of law and fact" idea. Nevertheless the phrase seems to have influenced a number of decisions. Although precedent has firmly established this phrase in the law of Michigan, its somewhat dubious origins suggest the possibility that the Michigan Supreme Court would hesitate to employ this ambiguous terminology as the basis for establishing any additional characteristics as constitutional requirements. It also remains to be seen what will occur when and if a case comes up for review in which the question is whether the jury must be "judge of law and fact" as a matter of constitutional law, in opposition to clear legislative intent to the contrary.

Many characteristics which the Michigan court applies to the condemnation jury can, on close scrutiny, be shown to stem from a statute or from analogy with other statutes or the common law. One possible reason why the Michigan court has imposed certain common-law-like characteristics on the condemnation jury

in circumstances where there is doubt whether the court means the requirement to rest on a constitutional basis or not is that when legislation involved is silent the court may nevertheless feel that certain characteristics are needed as a matter of fairness. It is easy then for the court to suggest that the characteristics are implied by the constitution in the term "jury," although if clear legislative intent to the contrary were involved the court might not make such characteristic a requirement.

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