100/890

#63.70 12/17/75

Memorandum 76-6

Subject: Study 63.70 - Evidence (Eminent Domain and Inverse Condemnation)

BACKGROUND

The Commission, in connection with its study of Eminent Domain Law, previously reviewed the Evidence Code provisions relating to value, damages, and benefits in condemnation and inverse condemnation cases. At that time, the Commission did not wish to propose any significant substantive changes because it was felt that such changes were not integral to the Eminent Domain Law and their inclusion in the recommendation proposing the Eminent Domain Law might jeopardize the passage of the legislation reforming the substantive and necessary procedural provisions relating to eminent domain. A few changes in the Evidence Code provisions were tentatively approved, but these changes were eliminated from the final recommendation because the Commission concluded that a careful study of the Evidence Code provisions should be a separate project after the Eminent Domain Law itself had been enacted. In addition, the College of Fellows of the American Society of Appraisers had promised to present suggestions for reform of the Evidence Code provisions, and those suggestions had not yet been received.

The Eminent Domain Law having been enacted, the staff believes that now is an appropriate time to make a careful review of the Evidence Code provisions.

The staff has contacted the College of Fellows of the American Society of Appraisers, but apparently their study is not in progress.

We also to invite them to send one or more representatives to our January meeting when this memorandum is discussed. We also plan to invite our consultants on eminent domain to the January meeting.

ANALYSIS

This memorandum reviews the various Evidence Code provisions relating to valuation, indicating what action, if any, the Commission has previously taken. The discussion of each Evidence Code section presents first the text of the section and then any relevant observations. Comparable provisions of the Uniform Eminent Domain Act are also noted. The Uniform Act provisions are attached as Exhibit I (pink). The memorandum also notes any suggestions for change previously submitted to the Commission by the State Bar Committee on Condemnation (see Exhibit II--yellow), by respondents to the Commission's questionnaire on evidence in eminent domain, or by the Commission's consultant, Mr. Matteoni. Mr. Matteoni's analysis of the questionnaire responses and a Highway Research Board study of evidence is attached to this memorandum as is a copy of the Highway Research Board study. We present this background material so that the Commission's study of this matter will be a comprehensive one. If the Commission does not recommend a particular change in the Evidence Code provisions, it will ordinarily be safe to assume that the Commission has considered that suggested change and concluded that it would be an undesirable one. The memorandum outlines the policy issues raised. The background material attached will give you the background you need to become informed concerning evidence in eminent domain problems.

GENERAL COMMENT

The existing California Evidence Code provisions are the result of a long and stormy series of battles in the Legislature. A bill recommended by the Commission passed the Legislature in 1961 but was vetoed by the Governor. The Governor took the extraordinary action of personally holding a one-hour hearing on the bill before he decided to veto it. Again in 1963, a bill recommended by the Commission was passed but vetoed. Finally in 1965, legislation was enacted based on the Commission recommendation; the legislation was not recommended by the Commission. Senator Cobey worked out a compromise with the public agencies which permitted enactment of the legislation.

§ 810. Article applies only to condemnation proceedings

> 810. This article is intended to provide special rules of evidence applicable only to eminent domain and inverse condemnation proceedings.

Several commentators have suggested that the rules of evidence for valuation of property in eminent domain be applied to other proceedings to value property that use the same standard of fair market value. See, e.g., Whitaker, Real Property Valuation in California, 2 U.S.F. L. Rev. 47, 68 (1967); Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L.J. 143, 144 (1966). Such other proceedings might include real property and inheritance taxation, partition, insurance coverage, and others governed by case law. The staff has not researched the extent to which application of the eminent domain rules to these other areas would change the law and has not attempted to implement this suggestion. Such research would be a substantial undertaking.

§ 811. "Value of property"

811. As used in this article, "value of property" means the amount of "just compensation" to be ascertained under Section 19 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

The Commission made amendments to this section in 1975 to conform to the Eminent Domain Law. The Commission's Comment reads:

Comment. Section 811 is amended to conform to the numbering of the Eminent Domain Law.

Section 811 makes clear that this article as applied to eminent domain proceedings governs only evidence relating to the determination of property value and damages and benefits to the remainder. This article does not govern evidence relating to the determination of loss of goodwill. (Code Civ. Proc. § 1263.510). The evidence admissible to prove loss of goodwill is governed by the general provisions of the Evidence Code. Hence, nothing in this article should be deemed a limitation on the admissibility of evidence to prove loss of goodwill if such evidence is otherwise admissible.

§ 812. Concept of just compensation not affected

812. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 19 of Article I of the State Constitution or the terms "fair market value," "damage," or "benefit" as used in Articles 4 (commencing with Section 1263.310) and 5 (commencing with Section 1263.410) of Chapter 9 of Title 7 of Part 3 of the Code of Civil Procedure.

The Commission made amendments to this section in 1975 to conform to the Eminent Domain Law. The Uniform Act has a comparable provion, Section 1101(b).

§ 813. Value may be shown only by opinion testimony

813. (a) The value of property may be shown only by the opinions of:

(1) Witnesses qualified to express such opinions; and

(2) The owner of the property or property interest being valued.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

Evidence of value limited to opinion testimony. Subdivision (a) of Section 813 permits the value of property to be shown only by opinion testimony. Section 1103(a) of the Uniform Act does not so restrict the evidence. Professor Arvo Van Alstyne has written to the Commission:

> Section 1103(a), as approved at the national meeting in Hawaii, was significantly changed so that it does not now restrict evidence of value to opinion testimony, comparable to the policy reflected in California Evidence Code section 813(a). As finally approved, subsection (a) only restricts opinion evidence as to value of property to such testimony as is given by persons designated in subsection (a), thereby leaving to the general law of the adopting state the question whether additional evidence of value, other than opinion evidence, is admissible. This change in approach was extensively debated in the Hawaii meeting, and the change in policy was clear and positive. For example, the principal proponent of the change (Honorable Eugene Burdick of North Dakota) pointed out that under the law of North Dakota, direct evidence of comparable sales was often admitted through the testimony of the individuals who had bought and sold the comparable property; and he regarded this approach to valuation testimony as a desirable one which would be outlawed if the originally proposed version of section 1103 were adopted. By reason of the change, such evidence will still be admissible in North Dakota.

The reasons that California limits the evidence of value to opinion testimony are expressed in the Law Revision Commission's 1960 recommendation relating to evidence in eminent domain proceedings:

> The value of property has long been regarded as a matter to be established in judicial proceedings by expert opinion. If this rule were changed to permit the court or jury to make a determination of value upon the basis of comparable sales or other basic

> valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. In addition, the court or jury would be permitted to make a determination of value without the assistance of experts qualified to analyze and interpret the facts established by the testimony and to make an award far above or far below what any expert who testified considers the property is worth--even though the court or jury may know little or nothing of property values and may never have seen the property being condemned or the comparable property mentioned in the testimony. The Commission believes that the net result would be lengthened condemnation proceedings and awards which would often not realize the constitutional objective of just compensation. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified.

The primary consequence of requiring that value be based on opinion testimony is that the verdict award must generally be within the high and low valuation opinions offered. Redevelopment Agency v. Modell, 177 Cal. App.2d 321, 2 Cal. Rptr. 245 (1960); State v. Wherity, 275 Cal. App.2d 241, 79 Cal. Rptr. 591 (1969). However, it has been stated that a severence damage award may be higher than the total severance damage estimate of any single witness as long as it does not exceed "the highest valid arithmetical combination of factors selected from the testimony of all the witnesses." People v. Jarvis, 274 Cal. App.2d 217, 227, 79 Cal. Rptr. 175, 181 (1969). Similarly, the severance damage award may be lower than the range of testimony if the jury has based its verdict on factors presented by the witnesses. City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969).

In this connection, it should be noted that the State Bar Committee has complained that trial and appellate courts should not be permitted to use "contrived interpretations" of evidence to support a verdict outside the range of the opinion testimony. The staff assumes the State Bar would be strongly opposed to adoption of the Uniform Act approach.

Right of owner to testify. Section 813(a)(2) permits the owner of the property or property interest being valued to express an opinion as to value regardless of his qualifications. The State Bar Committee has suggested that this provision should define an owner to be "any person whose pleading or testimony discloses an interest, the taking or impairment of which will entitle said person to receive compensation in the action." One consequence of this suggestion is to permit persons having or claiming an interest in the property to testify not only to the value of that interest but also to testify to the value of the whole in cases where there is a lump-sum determination with subsequent apportionment.

In response to this suggestion, the Commission tentatively recommended that Section 813(a)(2) be amended to read:

> 813. (a) The value of property may be shown only by the opinions of:
>
> * * * * *
>
> (2) The owner of any right, title, or interest in the property ~~or property interest~~ being valued.
>
> * * * * *
>
> Comment. Section 813(a)(2) is amended to make clear that not only the fee owner of the property, but any person having a compensable interest in the property, may testify as to the value of the property or his interest therein. Cf. Code Civ. Proc. §§ 1235.170 ("property" defined) and 1263.010 (right to compensation).

When the Commission distributed its tentative recommendations relating to eminent domain for comment, it received only one communication directed to the owner testimony provision, from the County of San Diego: "Further, it is suggested that the rationale behind allowing the owner to testify be examined and set forth in the Evidence Code as

the conditions precedent for such owner to testify." This suggestion finds support in the Uniform Act provisions which permit an owner to testify "upon proper foundation." Professor Van Alstyne has written to the Commission:

> It should be noted that section 813(a) of the California Evidence Code only requires a showing of knowledgeability as to the character and use of the property if a corporate officer or employee has been designated to express an opinion of its value. No such requirement is expressly set out with respect to the owner of a right, title, or interest in the property being valued. (See tentative recommendation, page 296.) The Uniform Code, on the other hand, requires a "proper foundation" as a condition of admissibility of opinion evidence offered by any one of the witnesses who are designated as otherwise permissible for this purpose, including an owner of the property. The Uniform Code is, in this respect, more restrictive than the California Evidence Code.

The Comment to the Uniform Act provision states, however, that "an adequate foundation for an owner's testimony would ordinarily be provided by mere proof of his ownership; no special requirements of familiarity with the property of knowledge of its value are prescribed for an owner's testimony."

Right of corporate owner to testify. In California, where the owner of the property is a corporation, a corporate officer may not testify as an owner. See, e.g., City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969); Cucamonga County Water Dist. v. Southwest Water Co., 22 Cal. App.3d 245, 99 Cal. Rptr. 557 (1971). Other jurisdictions permit an officer of a corporation to testify if he has knowledge of the property apart from mere holding of office. See discussion in City of Pleasant Hill, supra, at 411-414.

The State Bar Committee has recommended that the statute make clear that an officer or majority shareholder of a corporation which owns the property is competent to express an opinion as to value if he "is first

shown to be knowledgeable of the character and use of the property or property interest being valued, as distinguished from the character, uses and values of properties generally in the area." It should be noted that the committee's recommendation would require a more precise form of qualification for the corporate officer or majority shareholder than would be required of an individual owner; however, such qualification is still less than that required of an expert.

In response to this recommendation, the Commission tentatively proposed to permit an officer or employee, but not a shareholder, to testify as to the value of property:

> 813. (a) The value of property may be shown only by the opinions of:
>
> * * * * *
>
> (3) An officer or employee designated by a corporation claiming any right, title, or interest in the property being valued if such person is knowledgeable as to the character and use of the property.
>
> * * * * *
>
> Comment. Paragraph (3) is added to Section 813(a) to make clear that, where a corporation owns property being valued, a designated officer or employee who is knowledgeable as to the character and use of the property may testify to his opinion of its value as an owner, notwithstanding any contrary implications in City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 82 Cal. Rptr. 1 (1969).

The preliminary portion of the Commission's recommendation stated that, "This will enable the small corporation to give adequate testimony as to the value of its property in cases where it might not be able to afford the cost of an expert."

The Uniform Act has a comparable provision:

> 1103(a) Upon proper foundation, opinion evidence as to the value of property may be given in evidence only by one or more of the following persons:
>
> * * * * *

(3) a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person.

There are three obvious differences between the Uniform Act and the Commission's tentatively recommended provision: (1) the Uniform Act applies to entities other than corporations (e.g., partnerships); (2) the Uniform Act permits shareholders to testify; and (3) the Uniform Act requires a "proper foundation" but does not indicate what that foundation is. Professor Van Alstyne has written to the Commission:

> The Uniform Code permits opinion testimony on valuation to be given by "a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person." While the inclusion of a shareholder as one who may be so designated is contrary to the views taken by the California Law Revision Commission in the past, the Uniform Code takes the view that shareholders should not automatically be disqualified. In each instance, under the Uniform Code, the opinion evidence is only admissible "upon proper foundation" as determined by the law of the enacting state, and that foundation ordinarily will require that the witness be shown to be knowledgeable as to the character and use of the property. If a proper foundation of this kind can be established with respect to a shareholder, as well as with respect to an officer or employee of a corporation, the Uniform Code admits the evidence.

When the Commission distributed its tentative recommendations relating to eminent domain for comment, it received only one communication directed to the corporate testimony provision, from the County of San Diego: "Because of the potential for abuse in permitting a representative of the corporate defendant who is not otherwise qualified as an expert to testify in an eminent domain proceeding, we recommend against adoption of any further provision allowing testimony by a lay witness."

Jury view. Section 813(b) refers to a view of the property for the limited purpose of enabling the trier of fact to understand and weigh

the testimony. Both the Commission's consultant, Mr. Matteoni, and the State Bar Committee have recommended codification of rules relating to jury views in eminent domain. Uniform Act Section 1102 also makes detailed provisions for jury views. The Commission determined to recommend to the Legislature enactment of general provisions relating to jury views, which was enacted as Cal. Stats. 1975, Ch. 301:

> Article 1.5 (commencing with Section 651) is added to Chapter 7 of Title 8 of Part 2 of the Code of Civil Procedure, to read:
>
> Article 1.5. View by Trier of Fact
>
> 651. (a) On its own motion or on the motion of a party, where the court finds that such a view would be proper and would aid the trier of fact in its determination of the case, the court may order a view of any of the following:
>
> (1) The property which is the subject of litigation.
>
> (2) The place where any relevant event occurred.
>
> (3) Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and which cannot with reasonable convenience be viewed in the courtroom.
>
> (b) On such occasion, the entire court, including the judge, jury, if any, court reporter, if any, and any necessary officers, shall proceed to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view. At the view, the court may permit testimony of witnesses. The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom.

§ 814. Matter upon which opinion must be based

> 814. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion.

The Commission made amendments to this section in 1975 to conform to the Eminent Domain Law. The Commission's Comment reads:

> Comment. Section 814 is amended to delete the listing of particular matters constituting fair market value that an expert may rely on in forming an opinion as to the value of property. This listing is unnecessary. See Code Civ. Proc. § 1263.320 (fair market value).
>
> It should be noted that the definition of fair market value contained in Section 1263.320(a) omits the phrase "in the open market" since there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. The fair market value of these properties is covered by Section 1263.320(b). Within the limits of this article, fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including, but not limited to, (1) the market data (or comparable sales approach), (2) the income (or capitalization) method, and (3) the cost analysis (or production less depreciation) formula. See the Comment to Section 1263.320.

As amended, Section 814 requires that an opinion be based on matter perceived by or personally known to the witness, whether or not admissible, that is of a type that may reasonably be relied on by an expert in forming an opinion. Section 1106 of the Uniform Act is a comparable provision that permits a valuation witness to use as a basis for an opinion "any nonconjectural matters ordinarily relied upon by experts in forming opinions as to the fair market value of property, whether or not they are admissible in evidence." Professor Van Alstyne has written to the Commission that there are three differences here worth noting:

> (1) The Uniform Code omits the California limitation that requires the matter on which the opinion is based to have been perceived by or personally known to the witness or made known to him at or before the hearing. Under the Uniform Code, it is assumed that the valuation opinion will necessarily be based upon information known to the witness; if the witness does not have knowledge of such information, that fact may readily be brought out upon cross-examination. Thus, the omission of this limitation in the Uniform Code is not regarded as reflecting any basic change in policy.

(2) The Uniform Code establishes as its test that the matters used as the basis for an opinion of value must be such matters as are "ordinarily relied upon by experts" in forming valuation opinions. The California Evidence Code, section 814, specifies that the matters must be "of a type that reasonably may be relied upon by an expert in forming an opinionn" as to property value. While the quoted phrases may appear superficially similar, the test in the Uniform Code is an objective one. That is, the permissibility of the use by the expert of the particular matter upon which he has relied in forming his opinion is not dependent upon whether such reliance is reasonable, but rather is based upon whether in fact experts ordinarily rely upon such information. The question of ordinary reliance is one of fact to be determined by testimony as to what actually is done by experts engaged in valuing property under similar circumstances in the market. The California test, which concentrates upon whether reliance is reasonable, is a more subjective one, and it would be difficult for a court to declare that such reliance is unreasonable if the expert who is upon the witness stand testifies that he regards such information as being a reliable basis for the formation of his opinion, regardless of whether other experts may disagree with his position as to its reliability and usefulness for that purpose. Thus, upon analysis, this difference of language does appear to reflect a different policy approach.

(3) The Uniform Code requires that the matters which a valuation witness may take into account as the basis for an opinion of value must be "non-conjectural" in nature. California Evidence Code section 814 does not include an additional test of this kind. The word "non-conjectural" was inserted into the Uniform Code in an effort to allow the court an extra measure of judicial control over the kinds of data that valuation witnesses would be permitted to use in support of their opinions, in light of the fact that the witnesses who are permitted to testify as to an opinion of value under section 1103 are frequently not truly experts.

§ 815. Sales of subject property

815. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.

The State Bar Committee has recommended that a prior sale of the subject property should be subjected to "the same standards of admissibility, proximity in time and transactional relevance as sales of comparable properties." Presumably this would require that the contract must have been made sufficiently near in time to the date of valuation and that the price realized may be fairly considered as shedding light on the value of the property. See Section 816.

Section 1107 of the Uniform Act is comparable to Section 815 but has the following differences noted by Professor Van Alstyne:

> (1) The Uniform Code does not require in express terms that the sale of the subject property have been "freely made." However, the Uniform Code does require that the sale be one that was made in "good faith," thereby precluding collusive or manipulative sales. The question as to whether the sale was truly a voluntary one, or was made under economic duress or some urgent necessity, is treated by the Uniform Code as a matter which goes to the weight and probative effect of the previous sale evidence, and is not regarded as a test of admissibility of that data.
>
> (2) The Uniform Code does not require that the sale had been made within "a reasonable time" of the date of valuation, as does California Evidence Code section 815. Again, the Uniform Code regards the question of the timing of the previous sale as a matter that goes to the weight of the evidence and its probative effect, rather than as a test of its admissibility. The basic thrust of the policy reflected in the Uniform Code is that the extent to which the previous sale of the subject property casts light upon its present value will depend upon a careful assessment of all of the circumstances of that transaction, including such questions as the degree to which the sale was freely entered into without duress or compulsion and the date upon which the sale was made.
>
> (3) The Uniform Code also omits the California provision declaring that the sale of the subject property may not be used where it includes only the property being taken and occurs after the filing of the lis pendens. Again, the Uniform Code omits a qualification of this kind in view of the basic policy that such qualifications go to the weight and persuasiveness of the data rather than to their admissibility.

§ 816. Comparable sales

> 816. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract

to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

The State Bar Committee recommended a policy of liberal admissibility of comparable sales. The committee was evenly split whether sales used by an appraiser should be presumed comparable subject to a showing by the opposing party that they are not. The committee did, however, adopt a motion favoring liberal admissibility on the theory that an error of exclusion is more likely to be prejudicial than an error of admission "because, in the case of admission, where there is an adequate opportunity for rebuttal the jury still has the power to exercise its discretion in determining the weight to be given to such sales."

In response to this suggestion, the Commission tentatively recommended the following addition to Section 816:

> (c) The provisions of this section shall be liberally construed to the end that an expert witness is permitted a wide discretion in his selection of comparable sales. Nothing in this section affects the right of the court in its discretion to limit the number of sales used by a witness.
>
> Comment. Subdivision (c) is added to Section 816 to incorporate a policy of liberal admissibility to sales on the theory that an error of exclusion is more likely to be prejudicial than an error of admission. This policy applies only to expert witnesses. It is not intended to limit the court's discretion in placing a reasonable limitation upon the number of sales that may be admissible for any appraisal purpose so as to avoid the cumulative effect of such testimony.
>
> It should be noted that existence of project enhancement or blight on comparable sales is one aspect of their relevance under this section. See Code Civ. Proc. § 1263.330 (changes in property value due to imminence of project).

The preliminary portion of the Commission's tentative recommendation on this point noted that:

> Where an expert witness relies on comparable sales as a basis for his opinion of value, the Commission recommends that he be permitted a wide discretion in his selection of the sales, for it is better to have all relevant evidence available to the trier of fact than to have insufficient evidence. Any errors of excess can be cured by motions to strike and proper instructions to the jury.

When this proposal was distributed for comment, the County of San Diego submitted the only response:

> Because of the latitude which the courts already have and which in practice results in the comparable sales provision of the Evidence Code being liberally construed, we recommend against any change. Your proposal assumes that this wider selection of comparable sales will lead to more relevant evidence. However, the present requirements as set forth in the Evidence Code as interpreted by case law have resulted in a plethora of sales with their adjustments causing confusion of the valuation issues in the minds of triers of fact.

Section 1108 of the Uniform Act is comparable to Section 816, but Professor Van Alstyne notes the following differences:

> (1) The Uniform Code omits the reference to the fact that the sale must have been "freely made." As with section 1107, this omission is a reflection of the policy position taken by the Uniform Law Commissioners that the question of voluntariness of the sale goes to the persuasiveness of the data rather than to its admissibility.
>
> (2) The Uniform Code omits any requirement, such as is found in California Evidence Code section 816, that in order to be comparable the property must be located "sufficiently near" the property being valued. The Uniform Code, in this connection, requires that the property be "sufficiently similar in the relevant market" to warrant a reasonable belief that it is comparable to the property being valued. What is "a relevant market" is regarded by the Uniform Code as a much more pertinent inquiry than the mere question of geographical proximity which is suggested by the phrase "sufficiently near." Competent property appraisers who advised the Special Committee that drafted the Uniform Code indicated that in some circumstances the relevant market for certain kinds of property may be a national market, while in other situations it may be a much more localized market. The Uniform Code has thus taken the position that geographical proximity, per se, is not a desirable limitation to be engrafted upon the use of comparable sales.

(3) The California approach to comparable sales appears to be susceptible of an interpretation that, in order to rely upon a particular sale, the court must be satisfied that the sale must have been "sufficiently near in time" and "sufficiently near" in geographic terms, as well as "sufficiently alike" in specified particulars "to make it clear" to the presiding judge that the property is in fact comparable. In other words, the California test in section 816 of the California Evidence Code appears to treat the various elements of the definition as going to the question of admissibility. The Uniform Code, on the other hand, uses a much more liberal approach with respect to comparable sales, making admissibility depend only upon whether the similarities are sufficient "to warrant a reasonable belief" that the property is in fact comparable to the property being valued. Since the valuation expert will ordinarily be prepared to testify that in his judgment it does warrant that "reasonable belief," the Uniform Code approach seems more liberal.

In light of the more liberal approach of the Uniform Code, the omission from the Code of the new proposed subsection (c) of section 816 of the California Evidence Code (see tentative recommendation, page 298), specifically mandating a liberal construction of the comparable sale section so that an expert witness would have wide discretion in his selection of comparable sales, is not an indication of any difference in basic policy as to the need for such a broad liberal interpretation.

§ 817. Leases of subject property

817. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation. A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at his opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

The Commission tentatively recommended a technical clarifying change in this section and tentatively added a Comment to help make clear that the section does not limit admissibility of evidence of leases based on income of a business in showing the loss of goodwill:

817. (a) When Subject to subdivision (b), when relevant . . . .

(b) A witness may take . . . .

Comment. Section 817 is amended to make clear that subdivision (b) is a limitation on subdivision (a). It should be noted that Section 817 applies only to the determination of the value of property and not to such matters as loss of goodwill. See Section 811 and Comment thereto and Code of Civil Procedure Section 1263.510 and Comment thereto.

The Uniform Act rule on considering leases of the subject property as a basis for an opinion as to value (Section 1109) is much more liberal than the California rule and is discussed below in connection with Section 818.

§ 818. Comparable leases

818. For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

Mr. Matteoni's commentary indicates that the law is not clear whether use of a gross rent multiplier in arriving at an opinion of value is a proper appraisal technique in eminent domain proceedings. The commentary does not indicate whether the law should be made clear and, if so, in which direction. The Commission has previously taken the position that, absent a showing that the present state of unclarity is causing problems, nothing should be done on this point.

Section 1109 of the Uniform Act permits use of the terms and circumstances of any lease made in good faith that included the subject property or comparable property. Professor Van Alstyne has pointed out:

California Evidence Code sections 817 and 818 limit the use of lease information relating to the subject property and to comparable leases in ways which are far more restrictive than the Uniform Code.

The basic difference in the approaches taken in the California sections and in the Uniform Code is apparently a fundamental difference of policy. The Uniform Code seeks to broaden the admissibility of all kinds of data which responsible valuation experts would take into account in advising propective buyers or sellers in actual market negotiations, leaving to the trier of fact the question of assessing the reliability, credibility, and persuasiveness of that data. The limitations introduced in the California Evidence Code appear to be predicated upon the view that it is desirable, in advance, to spell out limitations upon the usefulness of data of this type as a basis for value, either because it is generally regarded as not sufficiently probative, or because it may introduce undesirable complexities into the trial of the issue of valuation. The Uniform Code Commissioners took the view that a more liberal approach to the admissibility of evidence was a preferable policy position, since in their view such evidence was not likely to be used if it could readily be exposed on cross-examination to a charge of unreliability or unacceptability under prevailing professional standards for valuing property.

§ 819. Capitalization of income

819. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

While Section 819 restricts capitalization of income to the land and existing improvements thereon, Mr. Matteoni indicates that several persons who responded to the questionnaire desired that the law be changed to allow capitalization of income attributable to a highest and best improvement on the property. This suggestion has been previously discussed by the Commission on several occasions. The Minutes of the August 1961 meeting note that capitalization of the reasonable net rental value of the property (based on the assumption that the land is improved by improvements that would enhance the value of the property for its highest and best use) would be useful in cases where the land is unim-

proved or where existing improvements do not enhance the value of the property for its highest and best use. In these cases, a capitalization of the reasonable net rental value of the land as unimproved or as improved with its uneconomical improvement would not be as useful as a capitalization study that also took into consideration the capitalization of the reasonable net rental value attributable to the land if it were improved by improvements that would enhance the value of the land for its highest and best use.

The consultant at that meeting stated that this is most important if we are to keep up with the times. He made a statement which is summarized below:

> In a number of trials in which his firm has been engaged, this approach has been used and it will be used much more. For example, it is necessary to use this approach in a case where the existing structure is old or run down and the property is a perfect location for a motel. It is frequent to find a piece of property that is underimproved or that has an obsolete improvement. In these cases, a buyer and seller in the market place consider the use to which the property can be put. The buyer will determine that he wants the property because he assumes that if he puts up a motel on the property he will have so many units and, based on managerial and other costs, his investment will yield a certain amount. Subdivision land is often sold the same way: how many units can be put on the land and what income and costs will result?
>
> Most of the developments, at least in Southern California, use this kind of approach. Sometimes the approach is more refined, sometimes it is rather crude. But this approach does ascertain the amount that the property -- not in its present condition but as improved for its highest and best use -- will produce.
>
> It is true that this approach involves the capitalization of a hypothetical improvement but this is characteristic of a rapidly growing area. It is the way property is bought and sold. Admittedly, this approach would offer a jury the greatest chance for speculation. Nevertheless, it is not only a prime consideration but perhaps the prime consideration taken into account by buyers and sellers in the market. Purchasers buy property on what it will bring in -- based on its highest and best use. This anticipated income is computed using a capitalization approach. Use of this approach is a necessary corollary to the valuation of property on the basis of its highest and best use.

Some trial courts in California now permit the use of this approach. There are no appellate decisions in California. Most of the appellate decisions in other states do not permit this approach to be used.

The question may be asked: why not use comparable sales rather than capitalizing hypothetical improvements? The difficulty of using the comparable sales approach is that it is difficult to find really comparable sales of commercial property; property on one corner may be totally different from property in the same area on another corner. To find comparable sales it is necessary to go out on the periphery. Using sales that far from the subject property may make a substantial difference in the value of the property. We are not concerned with a case where there are 12 gas stations in a row and we are proposing to open the 13th. Instead, it may be the first gas station, the first motel or the first shopping center in the area.

It is not practical to limit the capitalization of hypothetical improvements approach to cases where there are no comparable sales. The difficulty is that one party will always come in with "comparable sales." For example, a sale of property across the street from the subject property will be presented as a comparable sale. But the area across the street may be one-half the area of the subject property and a motel could not be built on that property although a motel could be constructed on the subject property. Moreover, there may be one type of zoning on one half of the street and not on the other, or there may be a probability of rezoning or there may be a building existing on "comparable property" that may increase or decrease the value of the land. In the case of residential sales, comparable sales are something that can be discussed intelligently. But in the case of commercial property it is difficult and unrealistic to base valuations merely on sales of "comparable property."

A representative of the Highway Department at that meeting made a statement. The substance of his statement may be summarized as follows:

Capitalization is only one of the three approaches to value: (1) comparable sales, (2) reproduction and replacement and (3) capitalization. The capitalization approach is, at best, very uncertain and unreliable. Changing the capitalization rate by one point may make a difference of thousands of dollars in the capitalized value.

Capitalization of rental property having existing improvements is speculative enough, but when the appraiser is permitted to construct a castle in the air -- a structure not even built -- and consider all the things that go into getting a net rental in-

> come to capitalize, you are getting into the worst type of speculation in the world. It is well enough to state that this is considered in the market. But here we are considering the trial of a case before the jury. We are trying to come out with a fair compensation for the property owner and it is going to be too confusing and misleading to the jury to try to determine that compensation if this type of evidence is used. It is hard enough as it is when other evidence, such as comparable sales, is used. But when you speculate on nonexistent income from buildings not in existence, the jury will be confused, the trial will be lengthened, and the verdict is less likely to be a just verdict of compensation for the property owner and the condemning agency.
>
> Moreover, this is not useful evidence; it is not reliable and probative evidence as to the value of the property or the compensation -- it is the least reliable. There are so many other means of presenting and proving the fact of value without bringing in this incidental, speculative evidence that there is no justification for using evidence that is going to cause too much trouble for what you get out of it.
>
> Limiting the capitalization of nonexisting improvements to cases where there are no comparable sales would not be of much help -- you can never agree on what is comparable and what is not comparable. This type of provision would present the issue on whether these are comparable sales or not. Where there are several different contentions as to highest and best use, you may have comparable sales on one use but not on another. For example, there might be comparable sales if residential use is the highest and best use but none if commercial use is the highest and best use. A court could never determine whether or not there were comparable sales.

It was pointed out at that meeting that (1) the opinion of the expert is the thing upon which the verdict is based and the other evidence is merely in support of his opinion and, accordingly, is taken into account only in weighing the opinion of the expert who is giving an opinion based on this theory and (2) the other party is free to question the expert on cross-examination and see if he can shake him on what he thinks the building will cost, rate of occupancy and capitalization, and the like.

The Commission discussed at that meeting whether permitting the use of this approach would extend trials. But it was noted that this ap-

proach can be used only if a well-informed buyer and seller would consider it in determining whether to buy and sell the property in the market. It was agreed that, in some cases, this approach would result in longer trials. But this is because the problem of property valuation is complex, not because this approach is not a valid one.

While Evidence Code Section 819 limits capitalization to that based on existing improvements, Uniform Act Section 1110 permits capitalization based on the highest and best use of the property and thus, in effect, permits use of hypothetical improvements. Professor Van Alstyne has written:

> Again, this difference in approach represents the basic view of the Uniform Code Commissioners that the witnesses should be permitted to testify upon the basis of standards of judgment which are appropriate for use in the actual marketplace. If the use of hypothetical improvements under a judgment as to highest and best use is not a fairly reliable one, in the light of particular facts, its unreliability and lack of persuasiveness should be capable of being developed on cross-examination or rebuttal of the witness's testimony. In effect, the Uniform Code treats the issue of scope of capitalization data as one which goes to the weight of the testimony rather than to its admissibility.

Professor Van Alstyne has also pointed out one additional difference between California law and the Uniform Act:

> The Uniform Code also explicitly requires that capitalization of rental income be at "a fair and reasonable interest rate." This language, which does not appear in California Evidence Code section 819, is intended to provide the trial judge with more control over the capitalization formula and prevent the use of interest rates which are wholly unrealistic but which may, unless excluded, have a prejudicial effect upon the trier of fact.

§ 820. Reproduction cost

> 820. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

Mr. Matteoni recommends as a major area of codification "defining standards for admissibility of replacement cost approach" but offers no specific standards for codification. His major concern is that there are in California neither statutory nor judicial guidelines for admissibility of evidence as to a standard of functional equivalence or substantial similarity to the existing improvement for replacement purposes.

Section 1111 of the Uniform Act is comparable to existing California Evidence Code Section 820.

§ 821. Conditions in general vicinity of subject property

821. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

Section 1112 of the Uniform Act is comparable to existing California Evidence Code Section 821.

§ 822. Matter upon which opinion may not be based

822. Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain.

(b) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(c) The value of any property or property interest as assessed for taxation purposes, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(d) An opinion as to the value of any property or property interest other than that being valued.

(e) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(f) The capitalized value of the income or rental from any property or property interest other than that being valued.

General aspects. Section 822 makes certain items inadmissible as evidence and not a proper basis for an opinion as to value. If an opinion is based on an item listed in Section 822, it can be stricken under Section 803. Section 822 does not prohibit cross-examination of a witness on any of the matters listed for the limited purpose of determining whether a witness based his opinion in whole or in significant part on matter which is not a proper basis for such opinion. The State Bar Committee desired to have this explanation included in the Comment to the section, and the Commission tentatively recommended addition of the following Comment:

Comment. Section 822 does not prohibit cross-examination of a witness on any matter precluded from admission as evidence if such cross-examination is for the limited purpose of determining whether a witness based his opinion in whole or in part on matter that is not a proper basis for an opinion; such cross-examination may not, however, serve as a means of placing improper matters before the jury. Cf. Evid. Code §§ 721, 802, 803.

Subdivision (a). Purchases by public entities. Purchases by persons having the power of eminent domain are not admissible under the theory that they are not really open market transactions but are more in the nature of coerced compromises. The primary effect of this rule is to exclude evidence on the amount the condemnor paid for other properties in the vicinity.

Mr. Matteoni's analysis indicates some dissatisfaction with subdivision (a) and a desire to return to the law prior to its adoption, allowing evidence of sales to condemnors upon a showing of voluntariness and satisfaction with the price. The State Bar Committee, on the other hand, deemed the present rule "workable" and recommended that it be continued.

Section 1113(1) of the Uniform Act is comparable to Section 822(a) although Professor Van Alstyne notes the following distinction:

> Subsection 1 of the Uniform Code section 1113 is comparable to California Evidence Code section 822(a), except that the Uniform Code precludes use only of comparable sales made to a buyer vested with the power to condemn the property, whether the buyer is a public or private condemnor. The Uniform Code does not follow the view of the California Evidence Code that requires exclusion of sales of the subject property to a condemnor, taking the position (see the second paragraph of the comment, Uniform Code draft, page 11.13) that such sales will often cast some light upon present value.

Subdivision (b). Options, offers, listings. Subdivision (b) provides generally that offers to purchase are inadmissible except as an admission by a party. Section 1113(2) of the Uniform Act is comparable to Section 822(b). Mr. Matteoni's commentary indicates that a case can be made for limited admissibility of offers in certain other circumstances, e.g., where an offer is the best available evidence of market value because there is no recent market activity of similar properties in the vicinity of the subject property. Mr. Matteoni suggests that the policy of subdivision (b) be reconsidered.

To reconsider the policy excluding offers to sell or purchase property, several distinctions must be made. There are offers relating to the subject property and offers relating to comparable property. Of the offers relating to the subject property, some may arise out of the particular acquisition in litigation; others may have arisen between the owner and third persons prior to that time.

The statute as presently drafted permits admission of an offer or listing to sell by the present owner of the property to a third person.

Offers made during negotiations to acquire the property for public use are not admissible. See Evid. Code § 1152 (offer to compromise and the like). This is an exclusion that should be retained.

Offers to buy the subject property are not admissible even though bona fide and made by a purchaser ready, willing, and able to purchase. A case can be made for the admission of evidence of such an offer since the objection made to written offers generally--that the range of collateral inquiry would be too great--may not be valid insofar as bona fide offers to purchase the very property being valued are concerned. In determining the market value of property, a person of ordinary business judgment would certainly want to know about any offers that had been made for the property. Moreover, a reasonable buyer, knowing that a seller has declined a previous offer from a willing and able purchaser, would not believe that the seller would accept less than the previous offer. And it is difficult to persuade a property owner who has declined a well-secured offer because he thought it was not high enough that his property is not worth at least the amount of the offer. Nonetheless, the Governor's vetoes of the evidence in eminent domain bill rested primarily on the ground that the offers should not be made admissible.

To permit evidence of offers to purchase comparable property would go far beyond what could be justified.

Subdivision (c). Assessed value. Mr. Matteoni indicates a possible conflict between subdivision (c) and Revenue and Taxation Code Section 4986(2)(b). Evidently, this conflict is more theoretical than real, for Mr. Matteoni sees no problems. See also Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings L. J. 143, 157 (1966):

> Subsection (c) does not prohibit the witness from considering the "actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued." There should be no conflict between this provision and Revenue and Taxation Code section 4986(2)(b), which relates only to the mention of unpaid taxes. [Footnotes omitted.]

Section 1113(3) of the Uniform Act is comparable to Section 822(c).

Subdivision (d). Opinion as to value of other property. Mr. Matteoni raises the problem that, under a literal reading of Section 822(d)(opinion as to the value of other property is not admissible), an appraiser could not base his opinion in part upon "comparable" sales since, in order to testify as to why the sales are in fact comparable, the appraiser will have to show how he made adjustments to the sales. Mr. Matteoni resolves his own problem by indicating that the courts do not read Section 822(d) literally and allow reasonable testimony as to adjustments made in comparable sales. The Commission tentatively recommended the following statement in the Comment to this effect:

> It should be noted, however, that subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for his opinion. Cf. Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971).

Mr. Matteoni also indicates that, under Section 822(d), transactions involving the trade or exchange of property are not admissible. The State Bar Committee believed that they should not be admissible and recommended codification of language to that effect. The Commission tentatively recommended addition of a new subdivision (g) to Section 822:

> 822. Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:
>
> * * * * *

(g) A transaction involving the trade or exchange of any property including the property being valued.

Comment. Subdivision (g) is added to Section 822 to make clear that transactions involving a trade or exchange of property are not a proper basis for an opinion since use of such transactions requires valuation of property other than the property being valued. See subdivision (d). Cf. People v. Reardon, 4 Cal.3d 507, 483 P.2d 20, 93 Cal. Rptr. 852 (1971).

Section 1113(4), (5) of the Uniform Act is comparable to Section 822(d), (g).

Subdivision (e). Influence of noncompensable items. Section 1113(6) of the Uniform Act is comparable to Section 822(e).

Subdivision (f). Capitalized value of other property. The Uniform Act omitted a provision comparable to Section 822(f). Professor Van Alstyne comments that:

> The Uniform Code Commissioners deleted a proposed subsection embodying the California rule in the view that the rule is already assimilated within the prohibition of section 1113(4), forbidding consideration of an opinion as to the value of any property other than the property being valued.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

ARTICLE XI

EVIDENCE IN CONDEMNATION ACTIONS

Sec.

Section 1101. [Scope of Article]

(a) Actions under this Code are governed by the rules of evidence applicable in other civil actions and as supplemented by this Article.

(b) This Article does not create or diminish any right to compensation or damages, and does not affect the meaning of "just compensation" under the law of this State.

COMMENT

In condemnation actions, the principal issue to be tried relates to the amount of compensation to be awarded for the property taken. Since the "market value" approach to "just compensation" (see Section 1002) involves debatable judgmental factors, efforts to achieve comparability of testimony of valuation witnesses necessarily center upon the applicable rules of evidence. This Article establishes special rules of evidence adapted to the peculiar circumstances of condemnation, which are to be applied together with the general evidence law of the adopting state. The rules here set out, however, govern in the event of conflict. See Section 102(b).

Section 1102. [View of the Property Taken]

(a) Upon motion of a party or its own motion, the court may direct the jury to be placed in charge of an officer of the court

and taken personally to view the property sought to be taken. Upon like motion, if the case is tried before the court without a jury, the judge presiding at the trial may view the property. The court may prescribe additional terms and conditions consistent with this section.

(b) During a view of the property by the jury, the judge presiding at the trial shall be present and supervise the proceedings. The parties, their attorneys, engineers, and other representatives may be present during a view by the jury or judge.

(c) If a view is taken by a jury, only the judge presiding at the trial or a person designated by the court may make to the jury during the view a statement relating to the subject matter of the action.

(d) The physical characteristics of the property and of surrounding property, and any other matters observed during a view, may be considered by the trier of fact solely for the purpose of understanding and weighing the valuation evidence received at the trial, and do not constitute independent evidence on the issue of the amount of compensation.

COMMENT

Section 1102 authorizes, but does not require, the court to order a view of the premises either on its own motion or when any party requests. A view may properly be denied if the premises have changed in appearance or are no longer in substantially the same condition as when the action was commenced, so that the view might be of little or no assistance, or might even be misleading, on the issue of value. Additional factors that may influence the court's discretion in this regard are the availability of other reliable evidence (*e. g.*, maps, photographs, diagrams) and the cost of taking a view.

This section also prescribes basic procedural guidelines for the conduct of a view if one is ordered. The required presence of the presiding judge, and the limitation on persons who may make statements to the jury during the view, are intended to protect the impartiality of the proceedings outside of the courtroom.

The evidentiary consequences of a view are defined in Subsection (d), which adheres to what appears to be the majority approach among the several states. See Massey, Rules of Compensability and Valuation Evidence for Highway Land Acquisition 20–21 (Highway Research Board, Report No. 104, 1970). Under this rule, the view does not have independent evidentiary effect, but is intended only to assist the jury in understanding the valuation testimony. Thus, for example, an award that is outside the range of the valuation testimony of record could not be sustained on appeal merely on the conjecture that it was supported by observations made by the jury during a view

Section 1103. [Opinion Evidence Competent to Prove Value]

(a) Upon proper foundation, opinion evidence as to the value of property may be given in evidence only by one or more of the following persons:

(1) a witness qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of the property;

(2) an owner of the property; or

(3) a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person.

(b) This section does not preclude the admissibility of other evidence explaining and enabling the trier of fact to understand and weigh opinion testimony given under Subsection (a).

[(c) The court, for good cause, and in the interest of expediting the trial, may limit the number of witnesses permitted to give testimony for any party in the form of an opinion with respect to the issue of the amount of compensation.]

COMMENT

Under Section 1103, opinion evidence of property value may be given at the trial not only by qualified valuation experts, but also by persons who own a compensable interest in the property. A corporate owner, for example, is not limited to the employment of an expert witness, but may designate a stockholder, officer, or regular employee (*i. e.*, a person who has not been employed solely to give testimony in the case) to testify in its behalf. A proper foundation for the opinion testimony must first be offered, however; the elements of such a foundation and the qualifications of an expert are determined by the law of the adopting state. For example, an adequate foundation for an owner's testimony would ordinarily be provided by mere proof of his ownership; no special requirements of familiarity with the property or knowledge of its value are prescribed for an owner's testimony. Nothing in this section, however, limits evidence of value to opinion testimony under this section. Nor does this section affect the admissibility of proper rebuttal evidence.

This section does not prevent the appointment by the court of an impartial expert witness, if such appointment is authorized by the procedural law of the adopting state. Nor does this section preclude the court from giving effect to other rules of law in the adopting state that may require exclusion of the testimony of a witness. For example, an otherwise qualified expert valua-

tion witness may be ineligible to testify in some jurisdictions if it is shown that his fee is contingent upon the magnitude of the award.

This section and the subsequent sections in this Article relate only to opinion evidence on the issue of property value. Accordingly, the issue of the amount of any loss of good will, under Section 1016, is not governed by these special rules of evidence.

Subsection (b) is intended to remove any possible basis for a claim of inconsistency between this section and Sections 1104 to 1112.

Subsection (c) is bracketed as an optional provision for use in states where it is deemed useful to eliminate any doubt as to the authority of the trial court to limit the number of valuation witnesses in the exercise of sound judicial discretion.

Section 1104. [Supporting Evidence]

For the purpose of supporting an opinion as to the value of property, evidence may be received relating but not limited to the following factors:

(1) extent of loss of property and improvements;

(2) present use of the property, and the highest and best use for which it is reasonably suitable and available in the reasonably foreseeable future;

(3) extent of loss of a legal nonconforming use;

(4) extent of damage to crops; and

(5) existing zoning or other restrictions upon use, and the reasonable probability of a change in those restrictions.

COMMENT

Section 1104 provides a non-exclusive list of factors that may be the subject of admissible evidence for the purpose of supporting an opinion as to property value. See Section 1103(b). Evidence relating to the items listed, however, is subject to ordinary rules of admissibility under state law; thus, it may ordinarily be admitted, over objection, only if it is competent and neither speculative nor conjectural. Moreover, state law also determines whether supporting evidence under this section must be offered as part of the "foundation" required by Section 1103(a) or may be introduced after reception of the opinion which it seeks to support.

Under the basic approach to determining the amount of compensation (see Section 1002), this section provides a rule of evidence applicable to the question of the value of the property taken as well as to the issue of the value of the remainder in a partial taking case. See also, Section 1105.

Section 1105. [Evidence Relating to Remainder Value in Partial Taking]

(a) For the purpose of supporting an opinion as to the value of a remainder after a partial taking, evidence may be received relating but not limited to the following factors:

(1) extent of increase or decrease in the productivity and convenience of use of the remainder reasonably attributable to the taking;

(2) extent of improvement in or impairment of access to the public highways from the remainder upon completion of the project;

(3) extent of benefit or detriment caused by the project due to a change in the grade of a right of way abutting the remainder;

(4) extent of enhancement or loss of appearance, view, or light and air as a consequence of the project;

(5) extent of benefit or damage resulting from severance of land or improvements;

(6) extent of benefit or damage resulting from the distance or proximity of the remainder, or improvements on the remainder, to the project in view of its character and probable use, including any increase or decrease in noise, fumes, vibration or other environmental degradation; and

(7) cost of fencing not provided by the plaintiff and reasonably necessary to separate the land taken from the remainder.

(b) If there is a partial taking of property, evidence may be received as to the value of the part taken considered as part of the whole, based on its contribution to the value of the whole, or as to its value considered independent of the whole.

COMMENT

Section 1105(a) provides guidelines as to the admissibility of evidence in a partial taking situation for the purpose of supporting an opinion as to the market value of the remainder under the "before-and-after" phase of the basic rule for determining the amount of compensation. See Section 1002. The approach here adopted does not attempt to distinguish between "special" and "general" benefits or damages, and authorizes the reception of competent evidence relating to all compensable influences upon market value shown to be a consequence of the project. This section is consistent with the rule that the "after" value of the re-

mainder must be determined in light of the project as planned. See Section 1006. But see Section 1113(6) excluding evidence of losses caused by police power or other noncompensable factors.

Subsection (b) recognizes that all parts of an entire tract of property do not necessarily have equal value. The fair market value of property which, before the taking, was part of a larger parcel should thus be determined by considering both the value of the entire tract and the relationship of the part taken to the whole. Under some circumstances, the severed part may have a value for its highest and best use which is independent from that of the entire parcel. In other situations, the part taken may be so related to and may so contribute to the value of the entire property that its value for its highest and best use is dependent upon the value of the entire tract. Under Subsection (b), the parties are free to present competent evidence in support of their respective theories of independent or dependent value from a market perspective, so that the property owner may be compensation for the part taken at not less than the fair market value shown by the approach which the trier of fact deems most persuasive. See Section 1002(b) (compensation for partial taking cannot be less than value of part taken).

The terms "taking," "partial taking," and "remainder," as used in this section, are not specifically defined, but are intended to have the meaning ascribed to them under relevant state law. But see Section 1007 (defining "entire parcel").

Section 1106. [Matters upon Which Opinion Testimony May be Based]

As the basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider any nonconjectural matters ordinarily relied upon by experts in forming opinions as to the fair market value of property, whether or not they are admissible in evidence.

COMMENT

Section 1106 prescribes the general rule governing the basis for the valuation opinion of a witness qualified under Section 1103(a). Compare Sections 1104 and 1105 (collateral evidence in support of valuation opinion). The data upon which such an opinion is predicated need not be admissible in evidence, provided it is the kind of nonconjectural information upon which experts generally rely in determining property values. This section governs the opinion of any witness offered under Section 1103(a), whether or not the witness is an expert, and whether or not a relevant market exists for the property being valued. Information perceived by or made known to the witness, and veri-

fied through sources generally regarded as reliable (*e. g.*, records of sale transactions, published economic indicators, etc.) illustrate the kinds of data that are clearly permissible to establish a foundation for an opinion of value.

For more specific provisions describing what matters may be considered under the general rule of this section, see Sections 1107 through 1112. But see Section 1113 (inadmissible factors).

Section 1107. [Sales of Subject Property]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the price and other circumstances of any good faith sale or contract to sell all or part of the property sought to be taken, or all or part of any remainder that will be left after a partial taking of the property, whether the sale or contract was entered into before or after the valuation date.

COMMENT

Under Section 1107, an opinion as to value may be based, in part, upon the purchase price agreed to be paid to purchase all or part of the subject property, in a good faith transaction entered into before or after the valuation date in the condemnation action. See Section 1003 (defining "valuation date"). Previous sales, however, are not admissible as independent evidence of value; they may be considered only as a basis for the opinion of the witness as to value. This limitation is necessary to assure that the trier of fact will evaluate the sales price evidence with the informed assistance of a qualified witness and in light of the witness' analysis and interpretation of that data.

Previous sales data may be used as the basis of opinion testimony under this section only if the transaction was made in good faith. This requirement of "good faith" is believed to be a sufficient safeguard against efforts to manipulate the sales price. The weight to be given to the data, of course, will depend upon whether the particular transaction was fully voluntary, not too remote in time, and was made at a price and under circumstances which make it a useful criterion of market value on the valuation date. For example, if the prior sales price reflected project-caused enhancement or blight, or if physical and economic conditions substantially changed since the date of the sale, the agreed price might not be reasonably indicative of value for purposes of the condemnation action. In many states, factors of this kind (*e. g.*, remoteness, voluntariness, relevancy to value on valuation date) are treated as conditions to admissibility of the previous sales data; this section takes a more liberal position, deeming their elements as going to the weight

and persuasiveness of the data rather than to admissibility. See Massey, Rules of Compensability and Valuation Evidence for Highway Land Acquisition 31–34 (Highway Research Program Rept. No. 104, 1970).

Nothing in this section precludes the use of previous sales of the subject property as the basis of cross-examination of a valuation witness for the purpose of rebutting his opinion of value.

Section 1108. [Comparable Sales]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this section if it was made within a reasonable time before or after the valuation date and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

COMMENT

Section 1108 provides guidelines for the use of "comparable" sales evidence solely as the basis for an opinion as to value. The limited use of comparable sales authorized by this section is contrary to the majority view, under which such sales data are treated as independent evidence of value. See 5 Nichols, Law of Eminent Domain, § 21.3(1) (rev. 3d ed. 1971); Massey, *op. cit.*, 22–31. The position here taken is deemed preferable, since it avoids the danger that condemnation trials could be unduly prolonged by parades of witnesses called to testify as to the terms and conditions of comparable sales transactions. Moreover, the rule of this section provides assurance that the sales data will be interpreted with the aid of analysis and explanation by an informed valuation witness. Finally, since comparable sales may be used only as a basis for an opinion of value, greater attention can be given to their probative significance in relation to that opinion.

Under this section, a sale is "comparable" if it meets the stated specifications. Comparable sales, moreover, may include those made both before *and after* the commencement of the condemnation action, provided the other prescribed factors are satisfied. The initial determination of admissibility under this section is within the sound discretion of the trial judge; once admitted, the weight to be ascribed to a particular comparable sale is open to challenge by adverse parties. It is intended that this section should be liberally applied, since errors of admission are less likely to be prejudicial to the interest of justice than errors of exclusion.

However, this section must be read together with Section 1113(1) and (5), excluding comparable sales to condemnors, and exchanges of comparable properties.

Section 1109. [Leases]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the terms and circumstances of any lease made in good faith that included all or part of the property being valued or of comparable property whether the lease was made before or after the valuation date.

COMMENT

Section 1109 provides guidelines for the consideration, as the basis of a valuation opinion, of leases of the property being valued and of comparable property. The approach incorporated in this section parallels that used in Sections 1107 (sales of the subject property) and 1108 (sales of comparable property).

Section 1110. [Capitalization of Rental Income]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the actual or reasonable net rental income attributable to the property when used for its highest and best use, capitalized at a fair and reasonable interest rate.

COMMENT

Under Section 1110, a valuation witness may employ an income approach to valuation, subject to the general rules declared in Section 1106. For example, the witness may consider either the capitalized actual or *reasonable* net rental income from the property for its highest and best use, if the property is of a kind which is bought and sold on that basis in the relevant market. However, he may not calculate a capitalized value from the income or profits of a business conducted on the property, since this would introduce unduly speculative and uncertain elements depending upon managerial skills or other factors that are remote from the issue of property value.

This section does not preclude admission of evidence that a business being conducted on the property is in fact profitable, if under the circumstances prospective purchasers would consider this as a measure of its suitability for business purposes. See Section 1106. It does, however, authorize the court to deny use of an income valuation approach that assumes unrealistic or highly speculative capitalization rates.

Section 1111. [Reproduction or Replacement Cost]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the cost of reproducing or replacing existing improvements on the property sought to be taken which enhance its value for its highest and best use, less any depreciation resulting from physical deterioration or from functional or economic obsolescence.

COMMENT

Section 1111 authorizes use of reproduction or replacement cost data as one factor supporting opinion evidence as to the value of improved property. The cost of "reproduction" refers to the cost of duplication with the same or similar materials and appearance, and is not necessarily the same as the cost of "replacement" (*i. e.*, providing a substitute facility of equal functional utility).

Under this section, the evidence may be used only for the purpose of proving the market value of the land with the improvements on it, to the extent they enhance its value for its highest and best use, but not to prove the value of the improvements separate from the land. The section is not applicable, of course, if the improvements are detrimental to the use, and thus diminish the value, of the property for its highest and best use.

Section 1112. [Conditions in General Vicinity]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the nature, condition, and use of properties in the general vicinity of the property being valued.

COMMENT

Section 1112 should be read in conjunction with Section 1104(2) and (5) which permits reception of competent evidence as to the highest and best use of, and the reasonable probability of a change in existing zoning or other use restrictions on, the property being valued. Section 1112 makes it clear that similar evidence, relating to the uses of other properties in the vicinity, may be used as a basis for an opinion of value. Compare Calif. Evidence Code § 821 (1966).

Section 1113. [Matter upon Which Opinion May Not be Based]

Notwithstanding the provisions of Sections 1103 to 1112, the following factors are not admissible as a basis for an opinion as to the value of property:

(1) the price or other terms and circumstances of an acquisition of comparable property, where that property was or could have been acquired in that transaction under the power of eminent domain;

(2) the price at which property was optioned, offered, or listed for purchase, sale or lease;

(3) the assessed value of property for purposes of taxation;

(4) an opinion as to the value of property other than the property being valued;

(5) the terms and circumstances of a trade or exchange of property, and

(6) except as provided in Section 1104(5), the influence upon the value of the property being valued of an exercise of the police power or of other noncompensable damage.

COMMENT

Section 1113 provides a non-exclusive list of factors which are inadmissible as the basis for an opinion as to the value of property, either because the designated items are speculative and unreliable, or because their admission would be contrary to basic policies underlying the substantive law. This section does not preclude cross-examination of a valuation witness on matters that are inadmissible into evidence for the purpose of determining whether the witness' opinion was based upon matter which this section defines as not a proper basis for such an opinion.

Under paragraph (1), only acquisitions of comparable property by condemnors are excluded, consistent with the prevailing view that such transactions are not sufficiently voluntary, but tend to exhibit the characteristics of a forced sale or to involve elements of compromise that impair true comparability. Previous sales of the subject property to a condemnor, however, are not excluded; in most instances, these sales will presumably be to the present defendant in the instant condemnation action, and it is deemed unduly harsh to refuse to permit the defendant to show what it has in fact paid for the property in a recent acquisition, if the defendant deems that factor to be helpful. On the other hand, if the prior sale to the defendant condemnor is used by the plaintiff, the defendant is in an advantageous position to explain its

terms and circumstances in the most favorable light.

Under paragraph (2), options, offers, and listings which were not accepted are inadmissible to support a valuation opinion. This rule is consistent with the majority view in the United States, which regards such evidence as inherently unreliable, easily susceptible to abusive manipulation, and at best merely a representation of the opinion of one party to a hypothetical transaction that was never confirmed by the opinion of another. See Massey, *op. cit.*, pp. 34–37; 5 Nichols, Law of Eminent Domain § 21.4(1) (rev. 3d ed. 1971).

Paragraph (3) excludes assessed valuation, since local taxing officers' standards for determining assessed valuation for tax purposes are regarded as an unreliable basis of market value, since they are generally applied with an eye to equalization of tax loads rather than an ascertainment of market value, and are seldom determined in a consistent and systematic manner. See 5 Nichols, *op. cit.*, § 22.1.

While Paragraph (4) seeks to exclude the expansion of the trial into largely irrelevant and remote issues distant from that of the value of the subject property, it does not preclude admission of comparable sales data, nor prevent a valuation witness from testifying to adjustments made in such data in the course of forming his opinion.

Trades and exchanges of property are impermissible under paragraph (5) in view of the fact that these transactions are often motivated by factors quite independent from market value elements, including significant tax consequences arising from the terms and circumstances of the exchange. Moreover, to translate the circumstances of a trade or exchange into dollar terms for use in arriving at an opinion of market value, the witness would be required, in most instances, to formulate an opinion as to the value of the properties exchanged, contrary to paragraph (4). This process would introduce elements of a complicated nature that would be largely irrelevant to the issues in the condemnation trial, without significant improvement in the credibility of the valuation opinion regarding the subject property.

Paragraph (6) seeks to exclude from consideration any elements of loss of value that are legally noncompensable under the law of the adopting state. The principal elements made unacceptable by this paragraph are those caused by "an exercise of the police power." The Uniform Code is concerned primarily with procedural matters and closely related concerns, while the boundary line between police power and eminent domain is largely a matter of substantive decisional law in the several states. Moreover, existing differences in the law in this regard are, to some extent, a reflection of the fact that some, but not all, state constitutions require compensation for both "taking" and "damaging" of private property. Accordingly, the content of this exclusionary provision is left for judicial determination under

the applicable law of the adopting state. The introductory exception is intended to resolve any doubts as to the propriety of considering zoning changes under Section 1104(5) even though zoning is regarded as an exercise of police power.

EXTRACT OF MINUTES OF STATE BAR COMMITTEE, FEBRUARY 10, 1973

IV. EVIDENCIARY ISSUES

As a fourth order of business the Committee considered the following evidenciary issues.

It was moved, seconded and passed, that the Committee refrain from a direct criticism of the rules of compensability and valuation evidence for highway land acquisition set forth in the National Cooperative Highway Research Program Report 104 or of the comments of Norman Matteoni, dated March 24, 1972, relating to that report. The Committee determined that rather than criticize the views of others, it would express its own conceptual viewpoints, and would follow the sequence of of issues as they are mentioned in Mr. Matteoni's comments.

Witnesses - Experts

It was moved, seconded and passed, that the Committee finds that the existing procedure leaving the qualification of expert witnesses to the discretion of the trial court with the guidance of existing case law is workable.

Witnesses - Owners

It was moved, seconded and passed, (6-1) that the Committee recommend that Evidence Code Section 813(a)(2) permitting an owner to testify should be continued; however, the Committee recommends that said section should be amended, or another section adopted, to define such an owner to be any person whose pleading or testimony discloses an interest, the taking or impairment of which, will entitle said person to receive compensation in the action.

It was further moved, seconded and passed (7-2), that Evidence Code Section 813(a)(2) should be further modified by amendment or other section to include as an owner, an officer or majority shareholder of a corporation which is the owner of the property or property interest being acquired where said corporate officer or majority shareholder is first shown to be knowledgeable of the character and use of the property or property interest being valued, as distinguished from the character, uses and values of properties generally in the area.

The majority of the Committee feel that owner's qualifications should be clarified and liberalized because expert testimony is too expensive to permit defense of many small actions except through owner testimony. It was also observed that in many cases a tenant or even a purchase money deed of trust holder may find it necessary to present valuation testimony in the first phase of a case under C.C.P. §1246.1 in order to guarantee that the initial award will be substantial enough to provide compensation for their interest. The members of the Committee discussed cases from their own experience where landlords or trustors under purchase money deeds of trust have failed to defend the action with resulting prejudice to the tenants or beneficiaries interest.

The qualification of a corporate officer or majority shareholder is sought for substantially the same reasons with the belief that a corporation would rely upon such testimony only in smaller cases. It should

be noted that the Committee's recommendation would require a more precise form of qualification for the corporate officer or major shareholder than would be required of an individual owner; however, such qualification is still less than that required of an expert.

Witnesses - Zoning and Foundational Experts

It was moved, seconded and passed, that the Committee feels the present procedure permitting foundational expert testimony, not only of zoning experts, but also economists, engineers, geologists, etc., subject to the discretion of the Court, is a workable procedure.

Witnesses - Hearsay

It was moved, seconded and passed, that the Committee feels the present system of permitting a valuation witness to rely upon hearsay information, such as sales data and other published information affecting the market, and permitting the expert to testify to his reasons including the substance of such data gathered from hearsay sources, subject to the discretion of the trial court, is a workable procedure.

Witnesses - Court's Discretion

It was moved, seconded and passed, that the Committee finds the existing procedure of granting wide discretion to the trial court is workable.

Jury View

It was moved, seconded and passed, that the Committee finds the existing procedure permitting jury view at the discretion of the trial court is a workable procedure although it was noted that few courts observe all the formalities defined in C.C.P. §610.

It was further moved, seconded and passed, that the Committee recommend against the codification of the Maryland Rules respecting jury views.

It was moved, seconded and passed, that C.C.P. §610, or a similar section relating exclusively to condemnation cases, should be amended or adopted requiring that the trial judge must accompany and supervise the jury's view of the premises.

EXTRACT OF MINUTES OF STATE BAR COMMITTEE, JUNE 9, 1973

EVIDENTIARY ISSUES (cont.)

At its meeting of February 10, 1973, the Committee began a consideration of evidentiary issues in the same sequence as set forth in the comments of Norman E. Matteoni, consultant to the Law Revision Commission. The minutes of that prior meeting set forth the considerations of the State-Wide Committee through Chapter 3, "Jury View."

CHAPTER 4 - SALES EVIDENCE: GENERAL RULE

It was moved, seconded and passed that the general rule that sales are not direct evidence of value but are received, subject to rebuttal, only for purposes

of showing the relative weight and credibility to be given to the opinion of the witness who has relied upon them is a workable procedure and avoids confusion that would result were sales given independent relevance.

It was further moved, seconded and passed that sales and the jury view of the premises being valued, not being direct evidence of value, the trial and appellate courts should not be permitted to use contrived interpretations of such evidence to support a verdict outside the range of testimony as to any of the items of compensation defined by Code of Civil Procedure Section 1248.

CHAPTER 4 - SALES EVIDENCE: 1. COURT'S DISCRETION

It was moved and seconded, but said motion failed on a tie vote, that it should be presumed that all sales are admissible in evidence and, therefore, any sales that the appraiser has chosen to rely upon should not be excluded unless the trial court first finds that the offered sale is clearly lacking in significant elements of comparability to the property or property interest being valued.

However, it was moved, seconded and passed that the Committee favor the the policy of liberal admissibility of sales on the theory that an error of exclusion is more likely to be prejudicial than an error admission; because in the case of admission, where there is an adequate opportunity for rebuttal the jury still has the power to exercise its discretion in determining the weight to be given to such sales. This policy is not intended to limit the Court's discretion in placing a reasonable limitation upon the number of sales which may be admissible for any appraisal purpose.

The reasons for the different action on the two preceding motions expressed by the Committee during their discussion related to whether there should be a presumption of admissibility of a sale. As indicated by the vote on the first motion, the Committee was equally divided. One faction felt that there should be a presumption of admissibility which would be overcome by prejudice considerations, the burden of proof being upon the party opposing admissibility. The other faction felt that the burden of proof showing comparability must rest upon the party producing the sale; however, they did favor an underlying policy of liberality of admissibility in that the foundation to which that burden of proof would extend should not be so broad or so detailed as to make it economically impossible for the litigant's appraiser to rely upon the market data study.

It was moved, seconded and passed that the Evidence Code should be amended that a prior sale of the property will be subjected to the same standards of admissibility, proximity in time and transactional relevance as sales of comparable properties, and that in the event the Law Revision Commission takes any action respecting the recodification or revision of the rules of evidence in eminent domain that its comment reflect that a prior sale of the subject property should be subjected to said same standards.

CHAPTER 4 - SALES EVIDENCE: 2. PROJECT INFLUENCE

It was moved, seconded and passed that the value to be placed upon the property or property interest being valued should be the value it would have had on the date of value were there then no knowledge of the public project,

and that said principle is a standard of relevance for determining the relevance of a transaction offered under Evidence Code Sections 815 and 816,

CHAPTER 4 - SALES EVIDENCE
3. EXCLUDED EVIDENCE - GENERAL RULE

It was moved, seconded and passed that in the event the Law Revision Commission takes any action respecting the recodification or revision of the rules of evidence in eminent domain that its comment reflect that Evidence Code Section 822 does not prohibit cross-examination of a witness on any of the subject matters therein mentioned for the limited purpose of determining whether a witness based his opinion in whole or in significant part on matter which is not a proper basis for such opinion.

During the course of discussion it was observed that it must be possible to determine through cross-examination whether an opinion has been based upon improper considerations. If the opinion proves to be so tainted, it should be stricken under Evidence Code Section 803. However such cross-examination should not serve as a means of placing improper items before the jury since this probing should be done without mentioning specific facts or figures. In fact, to avoid prejudice, in certain cases it may be desirable that such inquiry be conducted in chambers.

CHAPTER 4 - SALES EVIDENCE: 3. EXCLUDED EVIDENCE

It was moved, seconded and passed that Evidence Code Section 822 be amended to specifically exclude trade or exchange transactions, or any opinion based upon them from evidence.

CHAPTER 4 - SALES EVIDENCE:
4. EXCLUDED EVIDENCE - CONDEMNOR'S PURCHASES

It was moved, seconded and passed that the present rule excluding condemnor's purchases from evidence is workable and should be continued.

CONSULTANT'S COMMENTS REGARDING BOTH NATIONAL COOPERATIVE RESEARCH PROGRAM REPORT 104, RULES OF COMPENSABILITY AND VALUATION EVIDENCE IN HIGHWAY ACQUISITION (1970), AND RESPONSE TO LAW REVISION COMMISSION'S QUESTIONNAIRE CONCERNING CONDEMNATION EVIDENTIARY ISSUES.

Prepared by Norman E. Matteoni
March 24, 1972

Introduction

As with most national studies, the 1970 National Cooperative Right of Way Research Program Report 104, entitled "Rules of Compensability and Valuation Evidence in Highway Acquisition", demonstrates ambition beyond its ability to execute. In its attempt to be all-encompassing, it broad brushes the pieces of the larger picture; and, in surveying the law of all jurisdictions, it is forced to rely upon some dated material. In the latter regard, although the study does extensively cite the California Evidence Code sections on eminent domain, most of the cases from California which receive mention are from the 1950's. It should also be noted that the study has reviewed only highway cases.

But concerning its purposes of pointing out state-to-state divergencies and making suggestions to standardize the rules of compensation (see p. 5), the study is worth review.

The study is divided into chapters concerning various evidentiary problem areas in eminent domain trials. This consultant does not attempt to restate the material presented. The study, in fact, does that for the reader in its own summaries of each chapter. Rather, the intention here is to comment or react to the points raised.

Additionally, this Commentary reflects some of the views of California practitioners who responded to the Law Revision Commission's recent questionnaire concerning suggested revisions to the Evidence Code eminent domain sections. In this regard and from the consultant's review of more recent California cases, the discussion below frequently goes beyond the remarks made in the study.

The issues are not always resolved; but it is hoped they are isolated to facilitate examination.

Comments re Chapter Two - Qualification of Witnesses

California law is mentioned throughout this chapter; and, while it concluded that Evid C §814, regarding the basis of a witnesses' opinion of value, shows advanced thinking (see p. 15), it is necessary to examine some of the sub-areas of qualification:

1. Qualified as an Expert

The study indicates Evid C §813(a)(1) simply states that value may be shown by "witnesses qualified to express such opinion"; it does not specify whether a witness must be qualified as an expert. The study asks whether only technical experts, that is, a specific class of persons, and owners should be permitted to testify in a condemnation trial. But, California case law declares that a witness need not demonstrate that he is an expert appraiser. To qualify a non-professional witness, it must be shown "'that he has some peculiar means in forming an intelligent and correct judgment as to the value of the property in question . . . beyond what is presumed to be possessed by men generally'". Spring Valley Water Works v. Drinkhouse (1891) 92 C 528, 534. See also San Diego Land & Town Co. v. Neale (1888) 78 C 63, 76. The study concludes that it is not desirable to define a certain class of persons who by reason of particular training or professional affiliation are sufficiently expert to testify without further qualification. This consultant agrees. At this time there exists no licensing system for appraisers and the variety of real estate situations which are presented in condemnation actions would require several appraisal classifications of competency (see p.15).

2. Property Owner

Evidence Code §813(a)(2) specifically declares a property owner competent to testify as to his opinion of the value of his own property without further qualification. Pennsylvania Stat. Ann. tit. 26, §1-704 goes a step further than California in permitting an officer of a corporate condemnee to testify on the question of value without the necessity of qualification. The reason for California's rule does not indicate cause to adopt the Pennsylvania position. "The rule was originally predicated on the theory that the owner who resided on and owned property for a period of years would be presumed to acquire sufficient knowledge of the property and of the value of the land in that neighborhood to be able to give an intelligent estimate as to the value of his own property." Pleasant Hill v. First Baptist Church (1969) 1 CA3d 384, 411. An officer of a corporation is not an owner of the property in the same sense that an individual is.

3. Probability of Change of Zoning Opinion

A witness qualified to express an opinion of market value is not necessarily qualified to express an opinion of the reasonable probability of a change in zoning. See People v. Arthofer (1966) 245 CA2d 454, 465; Los Angeles High School Dist. v. Swensen (1964) 226 CA2d 574, 582.

Conversely, testimony strictly concerning the highest and best use of the property, from a properly qualified witness, e.g., an economist, cannot be excluded because the witness offers no opinion of value for the property taken. People v. Wherity (1969) 275 CA2d 241. Evidence Code §813(a)(1), to the effect that

valuation of property may only be shown by the opinion of a witness qualified to express such an opinion, does not prevent supportive testimony of foundational experts who do not offer an opinion of value. Supra at 249.

Attorney Roger M. Sullivan of Los Angeles, in response to the Commission's questionnaire, urges that engineering and economic feasibility studies be made expressly admissible. The Wherity rule should offer sufficient authority for the admission of such testimony without a statutory rule. On the other hand, the conclusions by that appellate court should have been obvious at the trial court level. Nonetheless, Evid C §813(b) presently states the section is not intended to bar the admission of any other admissible evidence for the limited purpose of enabling the trier of fact to understand and weigh the opinions of the various witnesses. (Evidence Code §352 vests the trial judge with sufficient discretion to exclude such testimony where it is merely cummulative. Code of Civil Procedure §1267 also limits the number of appraisal expert witnesses.)

4. Hearsay

Evidence Code §§801 and 814 (the latter an express provision on eminent domain), set forth limitations on the bases of an expert witness' opinions of property's value. His opinion may be based on hearsay, if the hearsay "is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property", and would be considered by fully informed buyers and sellers in the market place. However, when hearsay is

completely unsupported and unreliable, the trial court has the inherent power to prevent its use. See People v. Alexander (1963) 212 CA2d 84. Case law demonstrates no difficulty in the present interpretation of these rules.

5. Discretion of the Court

The conclusion of the study that "wide discretion must continue to vest in the trial judge" (see p.15) is appropriate. The Evidence Code sections relating to condemnation trials should stand as general guideposts, allowing case law to adapt the rules to the particular factual situations presented.

Comments re Chapter Three - Jury View

A significant point of reference in considering this subject is whether the jury view constitutes independent evidence. In California it does not. Evidence Code §813(b) states that a view of the property being valued is "for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony" given by the witnesses.

This rule rests upon the theory: "Value must be based upon the purposes for which the property is suitable. While the view of the premises is evidence in a condemnation proceeding, it is merely corroborative of the quantitative oral testimony." People v. McCullough (1950) 100 CA2d 101, 105.

This is an exception to the general rule applicable in other types of cases that a judge or jury view is independent evidence on which a finding may be made and sustained. See Otey v. Carmel Sanitary Dist. (1933) 219 C 310, 312; and Donney v. Santa Fe Transp. Co. (1955) 134 CA2d 720, 725.

Prior to codification of the above eminent domain rule in 1965, California cases were in conflict on the point. People v. Bond (1964) 231 CA2d 435, flatly declared that a jury view was independent evidence; while Redevelopment Agency v. Modell (1960) 177 CA2d 321, 326, stated that "a jury cannot, solely on the basis of its view of the premises, render a verdict finding a value less than shown by the evidence."

A more recent case, Los Angeles v. Kossman (1969) 274 CA2d 116, decided after the enactment of the Evid. C §813(b), fails

to cite that section or mention any of the above cases in coming to the conclusion that when a trial court, with the consent of the parties, viewed the premises, what is then seen is itself evidence and may be used alone or with other evidence to support the findings. The authority given for this position is South Santa Clara etc. Dist. v. Johnson (1964) 231 CA2d 288,299, which is not a condemnation case and discusses in the portion of the opinion cited a general rule regarding findings of fact. The Kossman case did not intend, although it may sometimes be cited for the position, to conclude contrary to Evid C §813(b) that a view of the premises is independent evidence on the question of value. When the case is examined, it reveals that the question at issue on appeal was not the amount of damages per se but whether the trial court properly decided whether expense in moving equipment constituted mitigation of damages or improvement of the remaining property, in a part take condemnation action.

California is in line with the majority of states, which indicate that a view of the premises is discretionary with the court. The factors, enunciated at page 19 of the study, to guide the judge in the exercise in his discretion are helpful. But, since they should be self-evident, they are not recommended for codification. These factors are:

1. The degree of information to be gained by the view in relation to the inconvenience and time expended in taking the view;

2. Related to the above, whether the customary purpose for

allowing a view does exist in a particular case, and whether the amount of information that has been or could be adequately secured from maps, photographs, diagrams and so forth decreases the need for a view; and

3. The extent that the premises have changed in appearance and condition since the litigation was initiated.

California's rule for conducting a jury view is found at CCP §610 which states that the court may order the jury "to be conducted, in a body, under the charge of an officer, to the place which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trials."

The study makes the comment that this statute, as well as other States' procedures, are devised to safeguard the jury from outside influence during the view. But the statutes could go further to provide, for example, whether representatives of both parties may accompany the jury or whether the trial judge should accompany the jury. The Maryland Rules of Procedure, Rule U18, found at page 73 of the study, attempts to specifically provide for all contingencies regarding a view of the property involved in litigation:

1. That before the production of other evidence, the trier of fact shall view the property.

2. The parties, their attorneys, engineers and other representatives may be present.

3. Only one person who has been specified by the court shall speak for the parties at the view; these persons shall point out the property sought to be condemned and its boundaries and the physical features before and after the condemnation of the property.

4. The judge shall be present at the view and supervise the proceedings.

5. The view may be waived by the parties.

Codification of a similar set of rules for California condemnation cases would be beneficial. Another standard could be the practice of many California judges to place on the record, upon return from the view, a stipulated discription of precisely what was seen at the property.

Comments re Chapter Four - Admissibility of Evidence regarding Comparable Sales

Again, the underlying key question to this portion of the study is whether sales constitute independent evidence. Evidence Code §813(b) states that they are not; and the study itself, at page 31, quotes from the California Law Review Commission comments of 1961 to the effect that if the rule were changed to permit the trier of fact to make a determination of value upon the basis of comparable sales or other valuation data, the trial of an eminent domain case might be unduly prolonged and the determination could be made without the benefit of expert assistance by a court or jury who knows little or nothing of the property values.

Interestingly, Attorney Jess Jackson of Burlingame, in response to the Commission's questionnaire, states that there is too much emphasis on appraisal opinion. Facts, such as a sale in the market place, should have independent probative value.

There are several points worthy of mention under this subject heading, although the study does little more than raise some of the issues. California case law has developed an extensive system of rules regarding comparable sale evidence, most of which is not considered by the study.

1. Trial Court's Discretion

Evidence Code §816, adopting the rule of Los Angeles v. Faus (1957) 48 C2d 672, permits a witness, in determining the

value of property, to "take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property." The statute specifies various criteria which must be satisfied for the properties to be "comparable".

The trial judge has wide discretion in determining the admissibility of evidence of other sales. Los Angeles v. Faus (1957) 48 C2d 672, 678; Los Angeles v. Union Distributing Co. (1968) 260 CA2d 125. The court may exclude as well as admit evidence of allegedly comparable sales. Los Angeles City High School Dist. v. Swensen (1964) 226 CA2d 574, 583. The standard is whether such sales will "shed light" on the value of subject property. Merced Irr. Dist. v. Woolstenhulme (1971) 4 C3d 478, 500, 848. The trial judge makes only a prima facie finding that a sale is comparable. San Luis Obispo v. Bailey (1971) 4 C3d 518, 525. Once admitted, it is up to the jury to weigh the effect of evidence of comparable sales. People v. Donaldson (1965) 231 CA2d 739, 743.

Attorney Thomas Baggot of Los Angeles has recommended a legislative policy in favor of admissibility. "Jurors are just as capable as judges in assessing evidence of sales." Other responses to the Commission's Questionnaire, such as that of Attorney Justin McCarthy of Riverside, suggest that the question of admissibility of sales should always be determined by the judge in advance of the trial of compensation. This procedure would eliminate wrangling over comparability of

disputed sales before the jury and make judges more alert to their responsibility to determine all issues other than that of value.

2. Effect of Public Improvement on Comparability

A sale price of a purported "comparable sale" which reflects project enhancement (see discussion under Comments to Chapter 10) may be found to "shed light" on the value of the condemned parcel and may be admissible, where it also reflects recent increases in land values that are attributable to other factors. This is similar to the rule that requires excluding evidence of enhanced value to the parcel sought to be taken. Merced Irr. Dist. v. Woolstenhulme (1971) 4 C3d 518. See United States v. Miller (1943) 317 US 369. See also People v. Reardon (1971) 4 C3d 507; San Luis Obispo v. Bailey (1971) 4 C3d 518.

These cases do not speak of comparable sales reflecting project blight, and the rule may be different in that situation. Code of Civil Procedure §1243.1, enacted in 1971 to provide a cause of action in inverse where a condemnor does not bring its suit within six months of the resolution or ordinance of necessity, attempts to minimize the occurence of blight.

And, in the same year the legislature added Evid C §814.5: "Any increase or decrease in the value of property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of

the owner or occupant, shall be inadmissable in determining the value of the property." Effective July 1, 1972, that section is to be repealed and replaced by language in Govt C §7267.2, which provides: "Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant will be disregarded in determining the compensation for the property."

Both Evid C §814.5 and Govt C §7267.2 are portions of legislative packages which concern relocation assistance. The first is concerned with highway relocation assistance, and the second which replaces the first is more comprehensive, attempting to provide a program for relocation necessitated for all types of condemnation. They are based upon federal policy requirements. See Uniform Relocation Assistance and Land Policies Act of 1970 §303(3) (Pub. Law 91-646). In fact, Govt C §§7267 and 7274 (effective July 1, 1972) state that section 7267.2 is a guideline to a uniform policy of acquisition and creates no rights or liabilities. Neither Evid C §814.5 nor Govt C §7267.2 purport to alter the Woolstenhulme rule. It remains the task of the courts to develop the rules for admissibility of sales affected by a pending public project: whether a sale is so tainted and what degree of project

impact will preclude admissibility.

3. Evidence Code Section 822(d)

Some responses to the Commission's questionnaire, such as those of Deputy Attorney General Stewart Andrews and Attorney C. Douglas Alford of San Diego, criticize Evid C §822(d) which prohibits the admission of an opinion of value of any property or property interest other than that being valued. There are two types of sales that should be considered here: first, comparison of improved sales to an unimproved subject property; and, second, trades or exchange.

a. Nature of the Property and Improvements

The "comparable sale," to be admissible in evidence, must be sufficiently like the condemned parcel in character, size, situation, usability, and improvement. Evid C §816.

In valuing the condemned property, an appraiser may find parcels which are comparable in every way except that they are burdened with older improvements, such as an unoccupied, dilapidated house or barn. The appraiser may conclude that the particular improvements have little or no value and that the purchase price paid for the comparable piece of property is indicative of the true value of the land without the improvements. It may be difficult to admit this opinion and the comparable sale into evidence, however, in view of the prohibition against opinion of the value of any property or property interest other than that being valued. Evid C §822(d); Los Angeles v. Union Distrib. Co. (1968) 260 CA2d 125; see also

People v. Johnson (1962) 203 CA2d 712. On the other hand, the comparable sale being used to indicate land value should not be excluded by 822(d) where it can be shown that the parties to the transaction had given no value to the improvements, the improvements actually lessen the value of the land (e.g., the cost of demolishing old, unusable structures).

An appraiser valuing a fully improved parcel by comparison with other parcels not comparably improved may find himself in technical violation of Evid C §822(d), which prohibits appraisal of property other than that being condemned, if he attempts to allocate value between land and improvements. In People v. Donovan (1964) 231 CA2d 345, 350, and People v. University Hill Foundation (1961) 188 CA2d 327, 332, the courts permitted such allocation, but language in Sacramento & San Joaquin Drainage Dist. V. Jarvis (1959) 51 C2d 799, 804, seems more restrictive. It must be noted that all these cases predate the passage of Evid C §822(d). But, a recent case points out that a strict application of this section to the comparable sales approach would conflict with Evid C §816 which requires a valuation witness to weigh comparability. The witness must be allowed to testify regarding adjustments to be made in comparable sales. Merced Irr. Dist. V. Woolstenhulme (1971) 4 C3d 478, 502.

b. Trade or Exchange

A trade or exchange of property with no monetary value fixed for either property is not admissible. People v.

Reardon (1971) 4 C3d 507, 515. The introduction of such a transaction would violate Evid C §822(d) which precludes an appraiser from giving an opinion of the value of land other than that under condemnation. But, in Reardon, an exchange in lieu of a full payment in cash by one of the parties to the transaction was admissible. Further, an exchange involving the subject property is not in violation of Evid C §822(d) and thus would be properly received in evidence.

4. Sales to Condemnors

The responses to the Commission's questionnaire also indicated some dissatisfaction with Evid C §822(a) prohibiting the introduction of sales to condemnors. These responses suggest a return to the prior rule, exemplified in People v. Los Angeles (1963) 220 CA2d 345, 358-359, of allowing evidence of such a sale upon a showing voluntariness and satisfaction with the price.

Comments re Chapter Five - Admissibility of Evidence of Sales of Subject Property

California's rule of Evid C §815 permitting a witness to consider the sale or contract to sell the property presently under condemnation, is appropriate and not in need of revision.

Comments re Chapter Six - Admissibility of Evidence of Offers

Again, the comments of the California Law Revision Commission of 1961 are cited by the study, at page 37, for the case of excluding evidence of offers. Evidence Code §822(b) prohibits a witness from basing his opinion on offers or listings.

The study takes the position that there may be cases where an offer is the best available evidence of market value; such a situation exists when there is no recent market activity of similar properties in the vicinity of subject property. In that event, the study cautiously suggests that offers should be admissible to support the opinion of valuation where a proper foundation has been laid to support the offer's reliability. (See p.37.)

In view of this comment and responses of Attorneys Jerrold A. Fadem of Beverly Hills, Gary Rinehart of Martinez, John Thorne of San Jose and Richard Huxtable of Los Angeles to the Commission's recent questionnaire, the Law Revision Commission should recondiser its position taken in 1961.

Comments re Chapter Seven - Admissibility of Valuation Made for Non-Condemning Purposes

The Hon. Herbert S. Herlands of Santa Ana writes in response to the Commission's questionnaire that there is a conflict between Rev & T C §4986(2)(b), which provides that mention of the amount of taxes due on the condemned property shall be ground for a mistrial, and Evid C §822(c), which permits the use of taxes for the limited purpose of arriving at the reasonable net rental value of the subject property.

It would seem that Evid C §822(c) makes the distinction between tax assessed valuation and a property's tax bill as an express item in the income approach to value sufficiently clear. Perhaps the judge is suggesting that the Revenue and Taxation Code Section made the same explicit exception that the Evidence Code section does.

It should also be noted that an assessed valuation for tax purposes may constitute an admission against interest when the condemning agency make the assessment. See Gion v. Santa Cruz (1970) 2C3d 29. The study points out, at pages 39-40, that La Mesa v. Tweed & Gambrell Mill (1956) 146 CA2d 762, stands for the proposition that appraised value of the property under condemnation, as determined in a prior probate proceeding, is not admissible on direct examination. That case was decided before Faus permitted the use of comparable sales on direct examination; but there is nothing in the Evidence Code which permits such an independent valuation to be

received. However, a sale confirmed in probate court may be admissible. Redevelopment Agency v. Zwerman (1966) 240 CA2d 70.

Comments re Chapter Eight - Admissibility of Evidence of Income

1. Legal Tests of Income Approach

Before 1965, when CCP §1271.8, now Evid C §819, was enacted, California courts were reluctant to allow evidence before the jury on the income approach to valuation, Note, Valuation Evidence in California Condemnation Cases, 12 Stan L Rev 788, 791 (1960).

An appraisal witness is now specifically allowed to take into account as a basis for his opinion "the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon." (Emphasis added.) Evid C §819. However, he may not derive a capitalized value from the income or profits attributable to the business conducted thereon, nor can an appraiser use hypothetical improvements to derive a potential income from the property. See Carlson, Statutory Rules of Evidence for Eminent Domain Proceedings, 18 Hastings LJ 143, 151 (1966). See also People v. Johnson (1962) 203 CA2d 712, 716. Attorneys Jerrold Fadem and Richard Huxtable have both suggested that capitalization of income from a highest and best improvement on subject property should not be excluded. Richard Huxtable states: "Hypothetical capitalization should be permitted where the type of property is one that is actually bought and sold on such a basis in private business."

To determine the reasonable net rental value, a valuation

expert may consider any leases on the subject property (Evid C §817) and the terms and circumstances of leases of comparable property (Evid C §818). Evidence Code §817 allows him to take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the property. Evidence Code §818 discusses rent reserved and other terms of leases on comparable property but omits any reference to percentage leases. Both of these statutes merely enable the valuation witness to arrive at "the reasonable net rental value attributable to the property or property interest being valued," which may be used in the capitalization process provided for under Evid C §819. The expert witness cannot capitalize the value of the income or rental from any property or property interest other than that being valued. Evid C §822(f).

2. Gross Rent Multiplier

A "gross rent multiplier," the factor by which the gross rent is multiplied to indicate market value, is determined by extracting from comparable sales data the sales price and the gross rent earned per year, the latter of which is divided by the selling price for each comparable property. For example, a duplex and lot that sold for $30,000, producing an annual gross rental of $3,000, would indicate a gross rent multiplier of 10. In translating this into a gross capitalization rate, the appraiser must take the reciprocal of the multiple, thus producing a rate of 10%.

There is a division of opinion among California practitioners as to whether this appraisal technique is properly admissible evidence under Evid C §818, which indicates that the valuation witness may use only the rental derived from comparable properties to determine the reasonable net rental value attributable to the property under condemnation. The gross rent multiplier requires that the actual gross rent be used. The collateral factors involved in comparable rentals are far more complex than in comparable sales and add significantly to the problem. For instance, consideration must be given to whether the utilities are paid within the rental payment or are assumed by the lessee, who pays the taxes, insurance, maintenance costs, etc. 5 Nichols, The Law of Eminent Domain §19.21[1](rev. 3d ed, 1969). An alternative approach which may relieve some of these shortcomings is the "Net Income Multiplier."

While People v. Covich (1968) 260 CA2d 663, 666, cites with approval what is termed the "gross multiplier" approach under the income method of appraising property, the phrase appears as the equivalent of the building residual approach rather than the "gross rent multiplier."

Comments re Chapter Nine - Admissibility of Evidence of Costs of Reproduction

The statutory definition of the cost approach in Evid C §820 uses both the terms "replacing"and "reproducing." Although these terms have sometimes been used interchangeably by the courts (see, e.g., People v. Hayward Bldg. Materials Co. (1963) 213 CA2d 457, 460), they are not synonymous in an appraisal context. See American Institute of Real Estate Appraisers, The Appraisal of Real Estate 180 (5th ed, 1967). "Reproducing" is there used as meaning duplication of the improvement with one of identical or highly similar material. "Replacing," on the other hand, is used as meaning the substitution for the improvement of another one having the same functional utility.

The replacement approach is more appropriate for the valuation of old buildings that have suffered a great deal of functional obsolescence, or where the materials used in the old building are no longer economically available. On the other hand, the reproduction technique is particularly adaptable to newer buildings, as well as special, single purpose buildings. The reproduction technique has considerable appeal to both courts and juries, because it is easier to understand than the more abstract replacement approach. Implicit in the replacement theory is a standard of functional equivalence and substantial similarity to the existing improvement. The replacement approach has limited appeal to most litigants because, in order to demonstrate that the replacement structure

meets such a standard may require architectural evidence, the cost of which is often prohibitive. There are neither statutory nor judicial guidelines in California as to the admissibility of this type of evidence.

Comments re Chapter Ten - Admissibility of Evidence of the Effect of the Proposed Improvement

1. Enhancement

The study at page 48 provides a good example of increment in value received by 3 parcels because of the projected public improvement.

The example states that parcels A, B and C are in an area where a public project may be located; because of the impending project all the properties increase in value. Subsequently, the boundaries of the project are determined and only parcel A is to be taken. What the study attempts to explore is the enhancement situation recently discussed by the California Supreme Court in Merced Irr. Dist. V. Woolstenhulme (1971) 4 C3d 478.

The rule of Woolstenhulme is:

> During that period when it was not likely that his land would be condemned, the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, "project enhancement," for all practical purposes, ceases.
> 4 C3d at 497.

2. Blight

Atchinson T. & S. F. Ry. v. Southern Pac. Co. (1936) 13 CA2d 505, 518, first asked the question, "If the benefits may not be considered, why consider the detriment?" The rule

flowing from this case is that it is improper to attempt to show that the proposed improvement depressed the value of subject property. Community Redevelopment Agency v. Henderson (1967) 251 CA2d 336, 343; Oakland v. Partridge (1963) 214 CA2d 196, 203. But other opinions have not followed this rule. People v. Lillard (1963) 219 CA2d 368, 377; Buena Park School Dist. V. Metrim Corp. (1959) 176 CA2d 255, 258.

The landmark case of Merced Irr. Dist. v. Woolstenhulme (1971) 4 C3d 478, 483 n.1, has not resolved this dispute over blight. The court explicitly declared that it was not addressing itself to whether project blight is to be taken into consideration in computing just compensation. "[A]dditional complexities involved in the 'blight' situation" prompted the court to await a case presenting the matter directly. Implicit in this thinking is the view that rules different than those for project enhancement should be applied to project blight. Several commentators have also urged this distinction. See Anderson, Consequences of Anticipated Eminent Domain Proceedings--Is Loss of Value a Factor?, 5 Santa Clara Lawyer 35 (1964); Webber, The Lost Identity of Blight 45 Cal SBJ 492 (1970); and Comment, Recovery for Enhancement and Blight in California, 20 Hastings LJ 622, 645 (1969).

It seems probable, because of the slowness of the legislature to respond and the anticipation of the California Supreme Court, that case law will make the first attempt to establish rules regarding blight impact.

Nonetheless, legislation is in order to remove any adverse project impact from inclusion in the valuation process in eminent domain. Neither Evid C §814.5 nor CCP §1243.1 are sufficient to resolve the issues presented by project blight.

Comments re Chapter Eleven - Admissibility of Evidence of Sentimental Value

The study points out on page 51 that California's Evid C §814 defines value in accordance with the hypothetical willing buyer-willing seller concept. Sentimental value is not considered in the valuation of real property.

Comments re Chapter Twelve - Admissibility of Evidence Regarding Highest and Best Use

The Heilbron standard for just compensation requires examination of the highest and best use to which the property under condemnation can be put. Value is based upon the most advantageous and profitable use to which the property is adaptable, taking into consideration the present and reasonably foreseeable future, business conditions and wants of the surrounding community. See Los Angeles v. Hughes (1927) 202 C 731.

This entire area is governed by case law. Two subjects--feasibility studies and interim value--are commented upon here.

1. Feasibility Studies

Maps, diagrams or illustrations of proposed uses showing physical feasibility may be admissible under certain circumstances to show that a particular proposed use is probable, and thus represents the highest and best use. To make a feasibility study admissible, the prospect of the use which the study supports must be in dispute; it is never admissible simply as a measure of value itself or to enhance damages. People v. Chevalier (1959) 52 C2d 299, 309; People v. Alexander (1963) 212 CA2d 84, 93. Architectural and engineering studies may also be permitted. Los Angeles v. Cole (1946) 28 C2d 509, 519. On the other hand, evidence relating to specific schemes of development are generally rejected by the courts. The "frustration of a specific plan of development" is not a valid basis for a claim of the property's highest and best use. People v. Princess Park Estates, Inc. (1969) 270 CA2d

876, 884.

A more difficult question is the admissibility of economic feasibility studies. People v. Flintkote Co. (1968) 264 CA2d 97, 102, approved the introduction of an economic study to show the profitable adaptability of subject property to a particular type of mining operation. The opinion relied on the test enunciated in People v. Ocean Shore R. R. (1948) 32 C2d 406, 426: "where it is not shown that a suggested use would be profitable, or where it appears that the operations cannot be carried on except at a loss, the prospect of use for such a purpose is not a proper element of value." It is improper to put a hypothetical dollar value on land for a specific purpose, even though evidence regarding the adaptability of that land for that purpose may be proper. People v. Princess Park Estates, Inc., supra; San Bernardino Flood Control Dist. v. Sweet (1967) 255 CA2d 889; People v. Johnson (1962) 203 CA2d 712.

2. Interim Value

The study makes no comment regarding the question of interim value. It should be considered as a sub-area of the highest and best use concept.

Interim income is sometimes referred to as carrier value because it permits a developer to pay his holding costs (e.g., taxes, purchase-loan, interest) during the period of transition from present use to a higher use. See People v. Covich (1968) 260 CA2d 663, where interim value was approved as to the

acquisition of property improved with two old houses on showing of probability of rezoning for apartments or a motel complex. The condemnee's experts agreed that present zoning would permit high-rise apartment buildings or hotel-motel complexes as the highest and best use of the property. But because the neighborhood was in transition from the present use to other uses, they projected (considering such factors as financing, obtaining clients) that the present use would continue for an interim period of three years. The value of the raw land as of the projected termination date of the present use was adjusted into a present value (by discounting) and then added to the net income flowing from the present use, capitalized over the transitional period.

The interim value adds an increment of value to the property over and above an otherwise comparable parcel of land that is not capable of interim productivity. See Sando, Theories of Valuation for Interim Use, 32 Appraisal J 29, 31 (1964).

Comments re Chapter Thirteen - Admissibility of Photographs or Other Visual Aids

Appraisers often use exhibits called "sales maps" to illustrate their testimony regarding comparable sales. As information about the prices for which comparable properties have been sold is received in evidence, the pertinent date (usually date of sale and unit value) is written on the map. Trial courts sometimes regard these maps as cumulative evidence. Evid C §352. If they are admitted, they can assist the jury in recalling highlights of the testimony during deliberations.

A model, though constructed to scale, may be misleading because of its very small size. San Mateo v. Christen (1937) 22 CA2d 375. In Pleasant Hill v. First Baptist Church (1969) 1 CA2d 384, the use of a plan and model portraying the potential utilization of the subject property for church purposes was permitted.

In People v. Murata (1958) 161 CA2d 369, 377, refusal to admit photographs showing drainage problems caused by the construction of the project was held to be prejudicial error. Photographs are also admissible to show the conditions in the area surrounding the subject property. Montery v. Hansen (1963) 214 CA2d 794, 798.

Photographs may also serve as the basis for actual testimony. In People v. Donovan (1964) 231 CA2d 345, an expert witness, who had only seen pictures of improvements that had been removed before his employment, was permitted to state his opinion of value as to those improvements.

Comments re Chapter Fourteen - Other Issues Relating to Admissibility

The study here makes a quick review of miscellaneous issues, which include among others: revenue stamps (now authorized collectible by counties within the State under Rev & T C §§11901-11934) are often excluded as indications of value; building Code violations may have a bearing on market value [see La Mesa v. Tweed & Gambrell Mill (1956) 146 CA2d 762, regarding effect of a "liquidation of non-conforming use" zoning ordinance upon subject property]; appraisals not introduced in evidence; right-of-way agents statements as to value; and business records and other documents [see Santa Barbara v. Petras (1971) 21 CA2d 506, which allowed recovery for improvements made after service of summons but in compliance with a pre-existing contractural obligation in a lease].

None of the above or other points mentioned in the chapter were commented upon by those responding to the Commission's questionnaire. It would appear that case law provides adequate rules of admissibility for such evidence.

However, Attorney Richard Franck of Los Angeles in his response to the questionnaire complains that "the consequences of an appraiser relying upon inadmissible matters, or considering same in his reasons for his opinion," are most uncertain." Courts sometimes strike improper factors, but let stand an opinion based upon these factors. People v. Eggert

(1969) 2 CA3d 395.

The reason for such a result may be that reasons do not have independent probative value. But some responses to the questionnaire offer another reason: The courts do not have an adequate understanding of the rules of eminent domain evidence.

Conclusion

The above comments are designed to provide a review of areas of eminent domain evidentiary law which have been the subject of controversy.

The solution is not simply a matter of codifying more rules. In fact, Attorney Richard Desmond of Sacramento has suggested:

> The major deficiency is that for some reason they attempt to rewrite the Evidence Code for a particular species of cases. I feel that the general rules of evidence are adequate and that if applied in the same manner and with the same degree of liberality in a condemnation suit as in any other case, with the attempts to place technical restrictions upon the evidence, with reasonable limitations placed upon the Court to limit the scope of the inquiry, that you will find that condemnation suits would be far less complicated and tried much more rapidly. A Court recently had the pleasant experience of throwing out all of the technical rules and pretrial procedure in treating the case like a simple, ordinary, every-day lawsuit. It was tried swiftly, there were no delays, the jury was never excused and the result was just although I feel a little low. There is no reason to make an eminent domain suit complicated.

This consultant does not agree that general rules of evidence are sufficient to deal with the problems presented by a condemnation trial. The trial itself is almost exclusively a matter of expert testimony. And, although it may not be the "supercharged psychodrama" described in the dissent of Justice Friedman in State v. Wherity (1969) 275 CA2d 241, 252, it involves the admission of appraisal testimony which does not constitute precise scientific date and can be difficult to understand.

Many responses to the Commission's questionnaire either stated that the eminent domain rules of evidence found in the Code were satisfactory or offered no criticism of the rules.

The difficulty is in determining whether more rules should be enacted or the statutes should remain general, allowing case law to apply these rules to the numerous appraisal theories that are offered as opinion evidence in eminent domain trials.

This consultant favors general statutory condemnation evidentiary rules of the type presently on the books. Such a position, rather than minimizing judicial responsibility, places a greater burden on the trial judge. As stated in Sacramento Drainage Dist. V. Reed (1963) 215 CA2d 60, 69: "To say that only the witness' valuation opinion has probative value, that his reasons have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts." (Emphasis added.)

The major areas recommended for possible codification or amendment are: Admissibility of offers when there is no recent market activity in the area; defining standards for admissibility of replacement cost approach; specifying Evid C §822(d) does not prohibit adjustment of factors of comparability;

and establishing rules to remove the effect of project blight from condemnation valuation process.

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 104

RULES OF COMPENSABILITY AND VALUATION EVIDENCE FOR HIGHWAY LAND ACQUISITION

DEAN T. MASSEY
UNIVERSITY OF WISCONSIN
MADISON, WISCONSIN

RESEARCH SPONSORED BY THE AMERICAN ASSOCIATION
OF STATE HIGHWAY OFFICIALS IN COOPERATION
WITH THE FEDERAL HIGHWAY ADMINISTRATION

SUBJECT CLASSIFICATIONS:
LAND ACQUISITION
LEGAL STUDIES

HIGHWAY RESEARCH BOARD
DIVISION OF ENGINEERING NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING 1970

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition to these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Federal Highway Administration, United States Department of Transportation.

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authoritieson any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, nonprofit institution, is an insurance of objectvity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO. Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

NCHRP Report 104

Project 11-1 FY '65
ISBN 0-309-01892-7
L. C. Card No. 76-607813

Price: $4.40

Published reports of the

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

are available from:

Highway Research Board
National Academy of Sciences
2101 Constitution Avenue
Washington, D.C. 20418

(See last pages for list of published titles and prices)

FOREWORD

By Staff

Highway Research Board

This report will be of particular value to legal practitioners and a good desk book for appraisers. A variety of rules pertaining to evidence in condemnation proceedings is reviewed. The major emphasis is on the problem of proving the value of property taken or damaged. Various law cases are cited to support the rules of evidence presented together with the reasons the courts give as the bases for their decisions to admit or exclude various types of evidence. This report presents a composite picture of the state of the law of evidence in eminent domain proceedings for the country as a whole.

In the acquisition of land for highway rights-of-way, difficult problems of compensability and valuation continue to plague courts, highway administrators, and appraisers. Diversity of standards and rules between States and within States is a source of confusion, inefficiency, hardship, and expense. The rules relating to compensability and valuation are only partly sketched by legislation and administration interpretation; court decisions continue to play an important role, and case law frequently has produced diverse results in all of the States. Appraisal theory and practice frequently produce widely divergent results under these legal rules.

This report contains useful information relative to the present law of evidence in eminent domain proceedings. The divergencies which appear in the law from State to State are identified and analyzed. The cause and extent of diversity are determined and the connection between evidentiary law and the legal rules, and standards of compensability and valuation, is examined. The reasons the courts give as bases for their decisions to admit or exclude various types of evidence are set forth and described.

The researcher studied a sampling of reported highway condemnation cases involving evidentiary problems for 25 States covering a 16-year period. Cases of particular interest are cited to support the discussions about the specific rules of admissibility of various types of evidence.

Highway attorneys will find that this study of the law of valuation evidence is a practical aid in preparing for condemnation cases. The appraiser may find that the information presented in this report will be useful in his day-to-day appraisal operation for determining the factors that will be acceptable in court in preparing his estimate of the real estate value of condemned property.

CONTENTS

ACKNOWLEDGMENTS

The research reported herein consists of a portion of a larger study on "Rules of Compensability and Valuation in Highway Land Acquisition" (NCHRP Project 11-1) conducted at The University of Wisconsin with Richard U. Ratcliff, Professor of Urban Land Economics, Faculty of Commerce and Business Administration, University of British Columbia, as Principal Investigator. He was assisted in the project by G. Graham Waite, Professor of Law, Columbus School of Law, The Catholic University of America, and Dean T. Massey, Agricultural Economist, U.S. Department of Agriculture, and Collaborator in Law, The University of Wisconsin Law School.

Appreciation is expressed to all persons who participated in this study in one way or another. They include Messrs. W. Scott Van Alstyne and A. J. Feifarek, Attorneys at Law, Madison, Wis., for reviewing the manuscript. To gain an appreciation of real-life problems currently experienced in public acquisition of land, meetings were arranged with the following attorneys and right-of-way agents of state highway departments, practicing attorneys, and an independent appraiser: Roland Boyd, Attorney at Law, McKinney, Tex.; Joseph D. Buscher, Special Attorney General, Maryland; William R. Dillon, Attorney at Law, Chicago, Ill.; Hodge L. Dolle, Attorney at Law, Los Angeles, Calif.; Charles L. Goldberg, Attorney at Law, Milwaukee, Wis.; John P. Holloway, then Chief Highway Counsel and Assistant Attorney General, Colorado; Delbert W. Johnson, Assistant Attorney General, Washington; Leonard I. Lindas, Administrator, Legal and Right-of-Way, Nevada Highway Department; E. R. Lorens, Engineer of Right-of-Way, Minnesota Highway Department; Lester Mozier, then Chief Right-of-Way Agent, Maryland State Roads Commission; and Herman Wolther, independent appraiser, Chicago, Ill. Helpful suggestions were received throughout the study from Ross D. Netherton, then Counsel for Highway Research, Highway Research Board, Washington, D.C.

Special appreciation is expressed to Professor Orrin L. Helstad, The University of Wisconsin Law School, for acting as a consultant throughout the study and assisting in the preparation of this report.

RULES OF COMPENSABILITY AND VALUATION EVIDENCE FOR HIGHWAY LAND ACQUISITION

SUMMARY

This study of evidence had three main objectives: (1) to describe the present law of evidence in highway condemnation trials; (2) to identify and analyze the divergencies which appear in the law from state to state; and (3) to make suggestions for improving and standardizing the rules of evidence.

Two basic policy considerations underlie sound thinking about the law of evidence in condemnation trials:

1. Rules of evidence in jury trials have traditionally been fashioned by balancing relevancy against the auxiliary policy of expediency. The auxiliary probative policy would exclude evidence that tends to introduce an undue number of collateral issues, or takes an undue amount of time to present, or appears to be too untrustworthy, even though the evidence may be relevant in some degree. The conflict between the policies of relevancy and expediency explains some of the divergent rules that appear when the states are considered as a whole. Recommendations made in this report generally tend to favor relevancy over expediency, but certainly much discretion must be left to the trial court.

2. Fashioning the rules of evidence for condemnation trials requires a decision as to the proper delineation of the respective spheres of influence of the experts and the jury, so the crucial question becomes: How much trust do we want to place in the experts as compared with the jury? If we can assume that expert and reliable witnesses are available to prove value, then perhaps we can eliminate much "independent" evidence from consideration and to that extent reduce the number of evidentiary problems arising. It has been assumed in this study that we are dealing with jury trials rather than trial before some other tribunal.

Because proof of value in condemnation cases usually is accomplished through testimony of valuation witnesses, the competency of witnesses to testify to the value of the property was an issue in a substantial number of the cases reviewed. As a general rule the competency of a witness is a preliminary question for the trial court and is largely within the trial court's discretion. Nevertheless, some differences appear among the various states concerning the qualifications a witness must possess in order to be considered competent to express an opinion relative to value.

The shortage of well-trained appraisers and the general lack of standards of qualification in the appraisal field make it seem not desirable at present to attempt to define by legislative fiat who may testify to the value of property and who may not. Wide discretion must continue to vest in the trial judge. Nevertheless, some clarifications can be made, as illustrated by recent California and Pennsylvania legislation.

It is common practice for the jury to view the premises that are the subject of litigation. At least three aspects of the jury's view have been involved in litigation:

(1) the circumstances, if any, for the parties to have a right to a jury view of the property; (2) the proper procedure to be followed if a view is held; (3) the effect of such a view on the jury's discretion in making its value determinations.

Statutory provisions are fairly common with respect to the right to jury view. Most of them accept the common-law position that the right to jury view rests within the sound discretion of the trial court. This would seem to be the best position. Most statutes dealing with jury view regulate some aspects of the manner of conducting the view, but many could be more complete.

The evidential effect of a jury view differs from state to state, in that courts of some states consider that the view constitutes evidence, whereas courts of other states consider that the sole purpose of the view is to enable the jury to better understand the evidence presented at the trial. What effect to give to a jury view is basically a policy question—How much freedom should be accorded members of the jury to exercise their own common sense in arriving at a verdict, or should they be bound by the opinions of experts?—for the crucial test of the evidential effect of a jury view is: Will it support a verdict that is outside the range of the testimony presented at the trial?

Courts generally recognize that evidence of the prices paid for comparable parcels of land on recent voluntary sales is often the best available evidence of the market value of the subject parcel. Such evidence is therefore admitted on direct examination as well as on cross-examination, although at one time some courts limited the admission of such evidence to cross-examination because of the fear that too many collateral issues (e.g., comparability of parcel, voluntariness of sale) would be raised if the evidence were to be admitted on direct examination.

Another problem that arises, and one to which most courts do not appear to have given adequate attention, is whether the evidence of comparable sales is sought to be used as independent evidence of the market value of the subject parcel or whether it is sought to be used in support of the opinion of a valuation witness. If the opinion is being used only for the latter purpose, there should be less concern with questions of comparability, voluntariness, hearsay, and the like than if such evidence is being introduced as independent evidence and the jury is being given a free hand to arrive at its own conclusions of value.

Courts generally have maintained flexibility regarding such issues as the similarity of the comparable parcel and subject parcel, the proximity in time of the comparable sale to the date of valuation of the subject parcel, and the voluntariness of the sale of the comparable parcel. Only with regard to sales to persons possessing condemnation powers does there appear to have been a departure from this flexibility. The majority of courts do not permit such evidence to be admitted; a minority will admit the evidence if a proper foundation showing voluntariness has been laid. The flexibility shown by the minority would seem preferable to the rigid majority rule, particularly in situations with a dearth of other good comparables.

It appears to be the universal rule that the purchase price paid by the owner for the property in question is admissible on direct examination as evidence of market value, if the sale was bona fide, voluntary, and recent, and neither economic nor physical conditions have materially changed from the date of sale. Courts appear to have been very lenient in admitting prior sales prices. The distinction between independent evidence of value and evidence introduced merely to support a witness' opinion of value should be relevant to this as well as to other market data introduced in evidence.

Offers to sell and offers to buy are often useful indicators of a property's value, yet the great majority of courts exclude evidence of offers except as admis-

sions against interest. The reasons appear to be the ease of fabrication of such evidence and the extent of collateral inquiry that would be necessary to determine whether the offer is an accurate indication of market value.

Despite the arguments that can be made against permitting offering prices to be used as evidence, a rule that flatly prohibits admission of such evidence would seem undesirable. There may be cases where an offer is about the best available evidence of market value, and it would seem that the evidence should be admissible, at least to support the opinion of a valuation witness and particularly if a proper foundation supporting the offer's reliability is first laid.

As a general rule, valuations made for noncondemnation purposes, such as tax assessments, are excluded from evidence in condemnation trials. Statutes in some states permit limited use of such evidence, and some courts allow the evidence to be used as an admission against interest. In theory, if noncondemnation appraisals have been made by competent analysts, with the same definition of value as employed in the condemnation case and following valid and accepted methods, there is no reason for excluding the evidence. However, this seldom appears to be the case, and the reluctance to admit such evidence therefore seems warranted.

Confusion in the law relating to admissibility of evidence of income from the property being condemned appears to be due in part to the variety of purposes for offering such evidence. In some cases the evidence is introduced to support a valuation witness' opinion as to the market value of the property determined from the capitalization-of-income approach to valuation. In other cases, however, the objective appears to be to use the evidence as direct evidence for the jury to draw its own inferences of value from; or to show the suitability of the property for a particular use; or even to prove loss of income as an item of consequential damage, and claim compensation for it. Legislative action may be necessary to clarify the law in this area. Illustrations of possible clarifications are afforded by the new California law that, among other things, makes clear that the value of property may be proved only by opinion evidence.

The highway condemnation cases reviewed seem to state two different rules on admissibility of evidence of cost of reproduction: (1) in one group of states such evidence is not admissible if there is other evidence of market value in the case, unless it is the best evidence available under the circumstances; (2) in a second group of states, evidence of reproduction cost is admissible in all instances as one of the factors bearing on market value of the property. The courts, which have been wary of the Cost Approach, seem to have taken the better position. However, the Cost Approach may have utility in placing a value on special use properties not normally bought and sold in the market.

Advance public knowledge of a proposed project may have an effect by way of either enhancement or depreciation on the value of the property that subsequently may be taken for that project. Whether evidence of such enhancement or depreciation is admissible therefore becomes an issue in some cases, but the underlying issue is one of compensability or valuation. As a general rule, the owner should receive compensation based on the value of his property at the official appraisal date without diminution or increase by reason of the general knowledge of the improvement project.

Evidence of sentimental value or other special value to the owner, like evidence of the effect of advance public knowledge of condemnation, raises a basic question of compensability or valuation rather than evidence. Evidence of sentimental value is excluded because market value, not value to the owner, provides the proper basis for measuring just compensation.

As a general rule, property is valued according to its "highest and best use" or some similarly worded formula. Related evidential problems generally can be divided into four categories: (1) the effect of the present use of the property; (2) the owner's intended use of the property; (3) the effect of zoning; and (4) the suitability of the property for residential subdivision development. The general rule with regard to admissibility of evidence of highest and best use does not appear to be in dispute; rather, the difficulties arise in the application of the rule.

In order to warrant admission of testimony on the value of the property for purposes other than its present use, it must first be shown: that the property is adaptable to the other use; that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time; and that the market value of the land has been enhanced by the other use it is adaptable for.

In general, the courts' handling of problems relative to highest and best use appears to have been consistent with sound appraisal theory and practice, except that they may have been somewhat too restrictive in their handling of evidence that property presently used for agricultural purposes is suitable for residential subdivision development. Investors in real estate of this type start their calculations of present value with the expected future prices of lots to be marketed, and such evidence therefore should be relevant to a determination of present value and admissible in evidence if it is well supported by market analysis and used in connection with estimates of production costs and the risk and cost of waiting.

Properly verified maps, plats, and photographs that are relevant to the issue of determining just compensation on the date of valuation are admissible in eminent domain proceedings at the trial court's discretion. Photographs need not be taken on the date of valuation to be relevant to the issue of measuring just compensation. A photograph may be admitted as evidence of a condition, whereas maps and plats are admitted only to illustrate the witness' testimony relative to that condition.

CHAPTER ONE

INTRODUCTION AND RESEARCH APPROACH

Implementation of the federal plan for an Interstate System of controlled-access highways has greatly increased the impact of the power of eminent domain on landowners. With increased frequency of condemnation proceedings has come increased concern with the fairness of the proceedings to both landowners and the condemning authorities.[1] It has been commonly suspected that diversity among the states of legal standards and rules of compensability, valuation, and evidence has caused confusion, inefficiency, hardship, and expense in the process of public acquisition of land.

The research reported herein deals with the various rules pertaining to evidence in condemnation proceedings. More particularly, the report is concerned with problems associated with proving the value of the property taken or damaged, this being the principal issue in most condemnation trials. A large portion of the discussion therefore deals with problems of admissibility of evidence to prove value, but consideration is also given to problems pertaining to the competency or qualifications of opinion witnesses to testify and to problems pertaining to the rights to a jury view of the premises and its effect.

One objective of this report is to describe the present law of evidence applicable to highway eminent domain proceedings. A sampling of reported highway condemnation cases involving evidentiary problems decided in 25 states[2] during a 16-year period from 1946 through 1961 was

[1] *See* Widnall, *Needed: A Better Compensation Basis*, 17 VA. L. WEEKLY DICTA COMP. 77 (1966); Spies, *Police Power Regulation or Compensated Taking*, 17 VA. L. WEEKLY DICTA COMP. 89 (1966).

studied.[3] Cases of particular interest from other states were added to the sample. Authoritative legal treatises also were examined, in some instances, to provide depth and offer the reader a better understanding of specific rules of evidence. While the description of the law of evidence presented here is not intended to be a treatise on the law of evidence in condemnation proceedings, it is believed that a sufficient number of cases was examined for the report to present a composite picture of the state of the law of evidence in eminent domain proceedings for the U.S. as a whole. The picture was rounded out by inclusion of relevant statutory provisions. With the exception of legislation in California [4] and in Pennsylvania,[5] which spell out in some detail the type of evidence that may be introduced, there are relatively few statutory provisions dealing with evidence in eminent domain proceedings. The pertinent statutes are collected in the appendix of this report.

A second objective of the report is to identify and analyze the state-to-state divergencies that appear in the law of evidence. A critical analysis is made to determine the cause and extent of diversity and to pinpoint, if possible, the connections between evidentiary law and the legal rules and standards of compensability and valuation. The reasons the courts give as a basis for their decisions to admit or exclude various types of evidence are set forth and described. When appropriate, comments and criticisms are made with respect to such reasons.

The third objective is to make suggestions for improving and standardizing the rules of evidence while at the same time being cognizant of the fact that the rules of evidence are effected by the rules of compensability and the rules of valuation. It may also be pertinent at times to inquire whether the converse is true. For example, are there instances where some item of damage is held to be noncompensable because proof of damage or of value is considered too difficult? Or, are there instances where the rules of evidence prevent appraisers from giving relevant testimony, which by good appraisal standards should be given, to properly measure the value sought to be measured?

It should perhaps be noted that the rules of evidence described in this report are those applicable in full-scale jury trials. Many condemnation trials take place before administrative or quasi-judicial bodies, usually called commissioners or viewers, but the exclusionary rules we are concerned with in this report are not likely to be applied with the same strictness as in jury trials, if in fact they are applied at all. Thus, for example, the Wisconsin statutes admonish the condemnation commissioners to "admit all testimony having reasonable probative value" and to exclude only "immaterial, irrelevant and unduly repetitious testimony." [6] And the Pennsylvania statutes state that "the viewers may hear such testimony, receive such evidence and make such independent investigations as they deem appropriate, without being bound by formal rules of evidence." [7]

[3] These states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Rhode Island, Vermont, Virginia, Wisconsin, and Wyoming.

[3] The sampling of cases was drawn from the study of highway condemnation problems made by Professor Orrin L. Helstad of The University of Wisconsin Law School under Contract No. CPR 11-8002 between The University of Wisconsin and the Bureau of Public Roads, U. S. Dep't Commerce.

[4] CAL. EVIDENCE CODE §§ 810–822 (West 1966), in the Appendix of this report.

[5] PA. STAT. ANN. tit. 26, §§ 1–701 to –706 (Supp. 1967), in the Appendix of this report.

[6] WIS. STAT. § 32.08(6)(a) (1965), in the Appendix of this report.

[7] PA. STAT. ANN. tit. 26, § 1–701 (Supp. 1967), in the Appendix of this report.

CHAPTER TWO

QUALIFICATIONS OF WITNESSES GIVING OPINION EVIDENCE

The principal issue in most condemnation trials is proof of the value of the property taken and, in the case of a partial taking, proof of the extent of depreciation in the value of the remainder property. Proof of such values generally is accomplished through opinion testimony of persons who usually must possess certain qualifications of expertise, knowledge, or experience. Therefore, in each case it becomes necessary to determine whether the witnesses proffered by the parties are qualified to testify as to their opinion of the value of the properties involved.

Such issues arose with some frequency in the sample of cases studied, and are discussed in some detail in the following. The issues can be divided into two broad categories: (1) Whether certain persons (e.g., real estate salesmen, owners, valuation commissioners) possess the necessary training or experience to qualify them to testify as to their opinions of value, and, assuming the first hurdle is passed, (2) Whether the use of erroneous theories or the reliance on hearsay will disqualify them from testifying.

OPINIONS OF REAL ESTATE SALESMEN OR APPRAISERS

There seems to be less question about the qualifications of real estate salesmen or appraisers than of others. Nevertheless, problems have arisen.[8] In two Wisconsin cases the

landowners unsuccessfully challenged the competency of the condemnors' witnesses to testify, on the ground that they were biased.[9] Bias in one case was based on the fact that the two appraisers testifying for the county had previously done a great deal of presumably profitable appraisal work for it.[10] Noting that nothing appeared in the record that would destroy the witnesses' credibility as a matter of law, the court held their testimony had been properly admitted.[11] The verdict in the other case was held to be supported by credible and competent evidence even though the value testimony supporting such a verdict was given by an employee of the state.[12] Jurors are the judge of a witness' credibility and determine the weight to be given his testimony.[13] In the latter case the jury knew the condemnor's witness was a state employee and so could determine whether his position affected the testimony, and if so, the extent to which it did.[14]

A case in Maryland [15] and another in North Dakota [16] dealt directly with the qualifications of expert witnesses permitted to testify as to their opinion of value. Both states appear to follow the rule that only witnesses qualified as experts may express an opinion regarding the value of the subject property.[17] Not sustained in the North Dakota case was a contention that the trial judge erred in admitting the testimony of the State Highway Department's appraiser relative to the cost of building a new access road; the contention was made on the ground that the foundation did not establish sufficient qualifications of the witness to permit him to express an expert opinion.[18] The question of whether a witness is qualified to give expert testimony is largely within the discretion of the trial judge.[19] Under the facts of the case, the appellate court felt that the foundation had established sufficient expertise on the part of the witness to bring the trial court's ruling, which allowed him to testify to an opinion, well within the limits of the judge's discretion. In laying the foundation, the condemnor established that the witness had passed an examination given to candidates for a degree in engineering, that he was a member of the North Dakota Society of Professional Engineers, and that in his employment he had computed the cost of similar roads.[20]

In the Maryland case a real estate expert was held to have been properly permitted to testify as to the cost of excavating the earth necessary to make the remaining land available for use after the taking, even though the witness did not possess expert knowledge relative to the cost of land excavation.[21] According to the court, it was perfectly competent for him, as a real estate expert, to recognize what appeared to him to be a possible defect in the property and, after informing himself by inquiry as to the cost of remedying this condition, to make suitable allowance in computing the value of the property.[22] An expert may be one trained in assembling and evaluating information in allied fields but lacking the same firsthand knowledge that he possesses in his own specialty.[23] Therefore, according to the court, everything that the witness did here was well within his area of expertness.[24]

Contrast the foregoing case with another Maryland case where the trial court was held to have properly excluded the testimony of the landowner's witness regarding the value and extent of sand and gravel deposits on the property when such a witness had failed to qualify as an expert on sand and gravel deposits.[25] According to the appellate court, the witness, an expert real estate appraiser, was not qualified to testify as to the amount of sand and gravel deposits on the land taken because the landowner had been given the opportunity to qualify the witness as an expert on sand and gravel deposits, but had declined to do so, and the witness himself had testified that he had not made any test borings to ascertain personally the amount of sand and gravel deposits.[26] Other Maryland cases have held that witnesses giving opinion testimony must qualify as experts in land appraisal.[27] Consequently, an opinion witness not only must be an expert but also must possess expert knowledge about the particular property on which he is giving value testimony.[28]

The requirements relating to the knowledge of the local conditions in the community that a witness must possess as a prerequisite to qualifying as an expert are illustrated

[8] Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); Hot Spring County v. Prickett, 229 Ark. 941, 319 S.W.2d 213 (1959); State Roads Comm'n v. Novosel, 203 Md. 619, 102 A.2d 563 (1954); Lustine v. State Roads Comm'n, 221 Md. 322, 157 A.2d 456 (1960); Muzi v. Commonwealth, 335 Mass. 101, 138 N.E.2d 578 (1956); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956); Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329 (N.D. 1960); Smuda v. Milwaukee County, 3 Wis. 2d 473, 89 N.W.2d 186 (1958); Buch v. State Highway Comm'n, 15 Wis. 2d 140, 112 N.W.2d 129 (1961).

[9] Smuda v. Milwaukee County, 3 Wis. 2d 473, 475–76, 89 N.W.2d 186, 187 (1958); Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130–31 (1961).

[10] Smuda v. Milwaukee County, 3 Wis. 2d, 473, 475–76, 89 N.W.2d 186, 187 (1958).

[11] *Id.* at 476, 89 N.W.2d at 187. The court was not persuaded that the jury was not motivated by passion and prejudice.

[12] Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130–31 (1961).

[13] Smuda v. Milwaukee County, 3 Wis. 2d 473, 476, 89 N.W.2d 186, 187 (1958); Buch v. State Highway Comm'n, 142, 112 N.W.2d 130 (1961).

[14] Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130–131 (1961). The jury could also do the same for the testimony given by one of the landowner's principal value witnesses, who was a brother of the landowner's attorney.

[15] State Roads Comm'n v. Novosel, 203 Md. 619, 102 A.2d 563 (1954).

[16] Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329 (N.D. 1960).

[17] *See* State Roads Comm'n v. Novosel, 203 Md. 619, 626–27, 102 A.2d 563, 566 (1954); Turner v. State Roads Comm'n, 213 Md. 428, 433–34, 132 A.2d 455, 457–58 (1957); Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–60 (1960); City of Bismarck v. Casey, 77 N.D. 295, 298–299, 43 N.W.2d 372, 375 (1950); Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329, 330–31 (N.D. 1960).

[18] Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329, 330–31 (N.D. 1960). The cost of constructing a new road from the landowner's farm buildings to an interchange in order to provide him access to the interstate highway, for which a portion of his farm had been taken, was conceded to be an element of the landowner's damages.

[19] *Id. See also* City of Bismarck v. Casey, 77 N.D. 295, 299, 43 N.W.2d 372, 375 (1950).

[20] Boylan v. Board of County Comm'rs of Cass County, 105 N.W.2d 329, 331 (N.D. 1960).

[21] State Roads Comm'n v. Novosel, 203 Md. 626, 102 A.2d 566 (1954). The qualifications of the lessee's witness as a real estate expert was not challenged.

[22] *Id.*

[23] *Id.* at 626–27, 102 A.2d at 566.

[24] *Id.* at 627, 102 A.2d at 566. The condemnor could have properly challenged the figures given by the witness and offset them by opposing testimony.

[25] Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–460 (1960).

[26] *Id.*

[27] *See, e.g.*, State Roads Comm'n v. Novosel, 203 Md. 626–27, 102 A.2d 566 (1954); Turner v. State Roads Comm'n, 213 Md. 432–35, 132 A.2d 456–58 (1957).

[28] *See* Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–60 (1960).

in two Massachusetts cases.[29] In one case, which involved the condemnation of predominantly business and industrial land in Needham in connection with the construction of a limited-access highway in the Boston area,[30] the trial court was held to have erred in excluding the testimony of the landowner's two qualified real estate appraisers simply because they had not bought or sold property in the community during the previous two years.[31] Both of the landowner's expert witnesses, in addition to the condemnor's witness (who was permitted by the trial court to testify because he had recently bought and sold residential property in Needham), were, according to the appellate court, well qualified in general as appraisers of industrial, business, and residential property through years of experience in buying and selling real estate in and about the greater Boston area and in appraising for courts and for other purposes.[32] In view of the experts' general experience in the character of the land taken there were ". . . significant similarities in the important qualifications of the three witnesses and the differences are relatively unimportant." [33] Therefore, the fact that the landowner's witnesses had not taken part in any sales of residential property in the area was, under the circumstances, not a valid distinction between their qualifications and those of the condemnor's witness.[34] In the valuation of business property adjacent to a major highway, the supreme court noted that considerable experience with similar properties in other communities would be at least as relevant as experience with dissimilar properties in the local community.[35] The court further noted that local conditions no longer have the controlling significance that they had in the preautomobile era; thus, there are often more occasions for employing a qualified appraiser of wide experience than for relying only on persons who have local experience. However, in sustaining the landowner's contention, the court did recognize the rule that in determining the qualifications of an offered expert the trial judge has a wide discretion, which is seldom disturbed, but noted that the trial court's ruling in the present case deprived the landowner of the opportunity to have the assistance of a reasonably qualified appraiser in establishing relevant values. Any differences in the witnesses' qualifications went to the weight of their testimony.[36]

Similarly, in the other case, which involved the taking of a strip through a parcel of land used as a Girl Scout camp, the trial court was held to have erred in excluding testimony offered by the landowner's witness as to the value of the property and effect of the taking.[37] This witness was head of the real estate department of the National Bureau of Private Schools and had 30 years' experience surveying property suitable for camp and school purposes all over the country. Because the witness was not engaged in the field of buying and selling real estate in the State of Massachusetts, the trial court denied him the opportunity of giving his opinion as to whether a girls' camp could be maintained on the property after the taking.[38] The reason given for sustaining the landowner's challenge was that the witness was obviously a qualified expert in the general field of camp and school land uses and the questions asked were decidedly pertinent to the issue of the special value of this property, and the damage to it, for an important use of the property.[39] Recognizing that the trial judge is given considerable range of discretion with respect to such testimony, the court noted that ". . . here the effect of his consistent exclusion of evidence bearing on the specialized value of the property was to deny to the owner the power of proving the real value of that property, in a situation where the evidence of the value for the specialized purposes given by persons who have knowledge thereof derived from experience in that business, must be admitted from the necessity of the case." [40] Further, the supreme court noted that, once developed, properties adopted for such a specialized use are seldom sold and so will not have a very active market; thus, their market value may not be shown by sales of nearby comparable property. In such cases a wide geographical comparison will prove more beneficial than testimony by local experts on the value of the local residential and commercial properties.[41]

An opposite result was reached in an Arkansas case where the amount of the verdict for the taking of a strip of land from a parcel of residential property was based in part on the testimony of the landowner's witness, who was claimed by the condemnor not to be qualified to testify.[42] Finding that the landowner's witness was not qualified to express an opinion, the verdict was held not to be supported by substantial evidence.[43] The reason for disqualifying the witness, who had been in the real estate business since 1954, was that she had been in the area only six months and her experience as a realtor was in selling farms

[29] Muzi v. Commonwealth, 335 Mass. 101, 138 N.E.2d 578 (1956); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956).

[30] Muzi v. Commonwealth, 335 Mass. 101, 102, 138 N.E.2d 578, 578–79 (1956).

[31] *Id.* at 104–06, 138 N.E.2d at 579–81.

[32] *See id.* at 102–04, 138 N.E.2d at 579–80. One of the landowner's witnesses had appraised a substantial number of properties in Needham during the past two years, but testified that he had checked real estate sales and had become familiar with the real estate market in the area in order to handle the sale of properties listed with him near the property in question. On the other hand, the condemnor's witness, in addition to making many appraisals, had made purchases of residential property in the area.

[33] *Id.* at 104, 138 N.E.2d at 580.

[34] *Id.* at 105, 138 N.E.2d at 580.

[35] *Id.*

> In valuing property on main highways which is available for business and industrial purposes, experience with properties having such availability on the same or similar ways in other towns and cities, or however located, would be at least as significant as experience with local values. The value of a site zoned for industrial or business use will manifestly be related substantially to such factors as its location on or near a highway or near to other transportation facilities and reasonable accessibility to a metropolitan center and to residential communities where its employees may live. Local factors such as the tax rate of course are relevant, but experience with residential property alone does not appear likely to give a real estate appraiser notable advantage in relating such factors to the value of a business or industrial site (335 Mass. at 105, 138 N.E.2d at 580.)

[36] *Id.* at 105–06, 138 N.E.2d at 580.

[37] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 197, 138 N.E.2d 769, 775 (1956).

[38] *Id.* The trial court refused to permit the witness to answer questions as to whether it remained ". . . feasible to operate this camp as a resident camp . . . ," and whether a Girl Scout camp ". . . can be effectively operated within 250 feet of a toll highway, if the land on which this . . . camp is situated is at a lower level than the toll highway or whether, without the taking, the land would be suitable for a private resident camp."

[39] *Id.*

[40] *Id.* at 198, 138 N.E.2d at 775.

[41] *Id.* at 194–95, 138 N.E.2d at 773.

[42] Hot Spring County v. Prickett, 229 Ark. 941, 942–43, 319 S.W.2d 213, 213–14 (1959). The condemnor's expert witnesses estimated damages in amounts ranging from $900 to $1,500, while the landowner's witness estimated damages at $18,000, and the verdict was for $8,000.

[43] *Id.* at 943, 319 S.W.2d at 214.

rather than residential property, the best use for the type of property in question here.[44] A witness who had been in the real estate and insurance business for a number of years was held in an Alabama case to be qualified to testify.[45] In addition to having experience as a realtor in the county the property was located in and being familiar with the market value of land in the vicinity of the highway the parcel was being taken for, the witness had been over the property in question and other adjacent land for appraisal purposes.[46] Because a witness need not be an expert to express opinion testimony in Alabama,[47] the witness here was shown to be qualified by his familiarity with the property in question, rather than because he was in the real estate business.

OPINIONS OF OWNERS

Several of the recent highway condemnation cases involved the issue of whether the owner,[48] lessee,[49] or an officer of the corporate owner [50] of the property being taken is competent to testify as to its market value. Despite some differences of opinion that appear to exist among the jurisdictions relative to the owners' necessary qualifications, all of the recent highway condemnation cases in the sample studied recognized that owners are permitted to express opinions regarding the value of their property interests.[51] In fact, in most of the recent cases the owners were found, under the circumstances of the case, to be competent to testify.[52]

An Alabama case held that an owner solely by virtue of his ownership may testify as to the value of his property.[53] Cases in other jurisdictions have also held that the own of an interest in property is competent to testify regardi its market value without further qualification than the f of ownership.[54] Likewise, under California's statute a apparently without further qualification than the proof ownership, an owner may express an opinion as to the val of his property.[55] The reason for permitting an owner testify solely by virtue of his ownership has been said to that he is presumed to know the market value of his inter in the land.[56]

The application and reasoning behind this rule is illu trated in a Delaware case, where the competency of lessee, who was permitted to testify as to the value of l condemned leasehold solely on the basis of his ownershi was challenged by the condemnor on the grounds that possessed neither the special knowledge nor the qualific tions to express an opinion.[57] According to the court, owner of a leasehold interest, particularly in those situ tions where he conducts a business on the leased proper ordinarily should be permitted to express an opinion r garding the value of his leasehold. As a justification f permitting him to testify, the court noted that lessees business are generally cognizant of the fair market value their leaseholds and know when they are worth more less than the rental recited in the leases.[58] The lessee d rives such an awareness from being in constant touch wi existing conditions in the area relating to businesses simil to and competing with his own.[59] Since his relationship his leasehold in the operation of his business may be r garded as creating in and of itself a special knowledge r garding its value, it would be unusual for a lessee-operat of a business to be unaware of the value of his leasehold. Consequently, the trial court was held to have proper permitted the lessee to give opinion testimony relating t the value of the leasehold, and the verdict could be base solely on his testimony.[61] The special knowledge and f miliarity with the leasehold that the condemnor claime the witness did not possess was therefore acquired by virtu of his ownership, according to the court. However, th court did recognize that situations may arise where a lesse either as a bare owner or owner-operator, is so unfamili with the issue of value that the trial judge at his discretio may determine that the witness is incompetent to testify Such would not be the situation in this case, because th lessee did more than to testify that he was the owner an to then give his opinion of the lease's market value. Th lessee showed he was thoroughly familiar with the busines and testified as to the gross receipts, expenses, and improve ments made, and other factors and reasons tending to sho

---

[44] *Id.* She had been a real estate agent for approximately three years and had been in and out of the area in question during that period. During the six month period she had been in business in the area she had made only one sale, and that was of a farm. Her business was primarily dealing with farms and ranches and she had not bought or sold any residential property in the area. Her only knowledge of residential property values was from unaccepted offers to sell.

[45] Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959).

[46] *Id.*

[47] *See* State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959).

[48] Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); Hot Spring County v. Prickett, 229 Ark. 941, 319 S.W.2d 213 (1959); Porter v. Columbia County, 75 So. 2d 699 (Fla. 1954); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 162 N.E.2d 271 (1959).

[49] People v. Frahm, 114 Cal. App. 2d 61, 249 P.2d 588 (1952); State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591 (Del. 1960).

[50] Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 329 S.W.2d 173 (1959) (witness also majority stockholder); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956).

[51] Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959); Hot Spring County v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959); Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, at 270–71, 329 S.W.2d 173, 176 (1959); People v. Frahm, 114 Cal. App. 2d 61, 63, 249 P.2d 588, 589 (1952); State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 593–94 (Del. 1960); Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198–99, 138 N.E.2d 769, 775–76 (1956); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 668–70, 162 N.E.2d 271, 273–75 (1959).

[52] Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959). Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270–71, 329 S.W.2d 173, 176 (1959); People v. Frahm, 114 Cal. App. 2d. 61, 63, 249 P.2d 588, 589 (1952); State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 593–94 (Del. 1960); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198–99, 138 N.E.2d 769, 775–76 (1956). *See* Hot Spring County, Arkansas v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959); Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 669–70, 162 N.E.2d 271, 274–75 (1959). (In those instances the witnesses' testimony was held to be inadmissible because of the particular circumstances in the case.) *See also* Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 707 1960) (dictum).

[53] Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959). The landowner was permitted to testify as to the market value of th property on the sole basis that he was the owner of the property. Appar ently the owner did not have to prove he was familiar with the value o his property and that in the area.

[54] People v. Frahm, 114 Cal. App. 2d 61, 63, 249 P.2d 588, 589 (1952). State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 593–94 (1960)

[55] CAL. EVIDENCE CODE § 813(a)(2) (West 1966).

[56] *See* State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 593–94 (Del. 1960).

[57] *Id.* at 593.

[58] *Id.*

[59] *Id.* at 593–94.

[60] *Id.* at 594.

[61] *Id.* at 594–95.

why he thought the leasehold was worth more than the rental set forth in the lease.[62]

Similarly, in a California case where the condemnor claimed the sublessee operator of a restaurant was incompetent to testify because he was not sufficiently qualified as an expert on the valuation of leasehold interests,[63] the court held the sublessee, as an owner, was entitled to testify as to the market value of his property.[64] In addition, the many years of experience possessed by the sublessee in the restaurant business sufficiently qualified him to testify as an expert.[65]

Other jurisdictions appear to require that an owner of property [66] or an officer of a corporation owning the property [67] must have knowledge of the property apart from mere ownership or holding of office before he may testify and express an opinion regarding the value of such property being taken. Owners of land in Arkansas may testify regarding the market value of their property if their testimony shows that they are familiar with such matters.[68] Because the record did not show he had any experience in the real estate business and failed to give any indication as to how he arrived at his estimate of damages (that is, he gave no facts to sustain his conclusions), the landowner in an Arkansas case was held not to have been qualified to testify.[69] Consequently, since the verdict was based in fact on the landowner's testimony, the condemnor's contention was sustained that there was insufficient evidence to support such a verdict.[70] The supreme court in a later case from the same state held that testimony regarding value by the president and major stockholder of the company owning the subject property was sufficient evidence to support the verdict.[71] Nothing, according to the court, prevents an owner of property or an interested party to a lawsuit from giving testimony as to the value of his property.[72] Here the company's president was considered to be competent because he not only gave his opinion of value but stated that he was acquainted with property values in the neighborhood and testified as to the facts within his personal knowledge that he based his opinion of value on.[73] The circumstances of the owner's personal interest in the property go only to the weight of his testimony.[74]

As in Arkansas, an owner of real estate in Massachusetts who has an adequate knowledge of his property (that is, knowledge apart from his ownership) is qualified to express an opinion as to its value.[75] The determination of whether the witness has the knowledge about his property apart from his ownership necessary to enable him to express an opinion about its market value is within the sound judicial discretion of the trial judge,[76] and his discretion will not be reversed unless it is plainly erroneous.[77] The exclusion of the owner's testimony on market value was upheld in one case.[78] Here, however, the trial court's exclusion was interpreted as being based not on the landowner's inadequate knowledge of the property [79] but rather on the speculative nature of the landowner's opinion regarding unexecuted plans for the property's future development and use.[80] In a case involving the taking of part of a Girl Scout camp, the appellate court indicated that the trial judge may have abused his discretion in excluding the opinion testimony of the Girl Scout Council's president regarding the property's special value for a use that the witness had a very close knowledge of over a period of years.[81] Because for more than six years she worked actively with the camp and was in charge of overseeing the property and its repairs and remodeling, and because she took active part in investigating with various realtors sites for a new camp, her knowledge was considered to be beyond that of mere ownership.[82] The reasons the appellate court indicated that the testimony might well have been received appear to be the importance of the issue of the property's special value, the special problems of proof involved with such an issue, and the witness' knowledge of the property's special value.[83]

A Florida case held a witness may not testify and express an opinion as to value solely on the basis of claiming to be a joint owner of the subject property.[84] All of the proof appeared to indicate that he was not a joint owner of the property; so, according to the court, he had to meet the same qualifications as any other opinion witness, and this was not done. The record not only showed that he was not an appraiser or real estate expert, but failed to show any of the qualifications necessary for him to testify as a value witness.[85]

---

[62] *Id.* at 594.
[63] People v. Frahm, 114 Cal. App. 2d 61, 62, 249 P.2d 588, 589 (1952).
[64] *Id.* at 63, 249 P.2d at 589.
[65] *Id.*
[66] Hot Spring County v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959), Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270–71, 329 S.W.2d 173, 176 (1959); Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 669–70, 162 N.E.2d 271, 274–75 (1959). *See* Lazenby v. Arkansas State Highway Comm'n. 231 Ark. 601, 603–04, 331 S.W.2d 705, 707 (1960) (dictum).
[67] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198–99, 138 N.E.2d 769, 775–76 (1956).
[68] Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 707 (1960) (dictum).
[69] Hot Spring County v. Prickett, 229 Ark. 941, 942, 319 S.W. S.W.2d 213, 214 (1959).
[70] *Id.* The issue in the case was whether the testimony of a particular witness would sustain the verdict. Damages ranging in amounts from $900 to $1,500 were estimated by the condemnor's witness. The landowner estimated that he had been damaged in the amount of $25,000. As the verdict was $8,000, and the landowner was not qualified to testify, there was not substantial evidence to sustain the verdict.
[71] Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270–71, 329 S.W.2d 173, 176 (1959). Only the president of the company whose land was being taken testified to an amount that could sustain the verdict. Because this witness was competent to testify regarding value, the court concluded there was substantial evidence to sustain the verdict.
[72] *Id.*
[73] *Id.* at 270, 329 S.W.2d at 176.
[74] *Id.* at 271, 329 S.W.2d at 176.
[75] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198, 138 N.E.2d 769, 775–76 (1956); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 668–69, 162 N.E.2d 271, 274 (1959).
[76] *Id.*
[77] Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 669, 162 N.E.2d 271, 274 (1959).
[78] *Id.* at 669–70, 162 N.E.2d at 274–75.
[79] *Id.* at 669, 162 N.E.2d at 274. Here the landowner had been acquainted with the property all of his life. He had made plans and surveys for its development and had investigated the cost of repairing the dam and improving the property.
[80] *Id.* at 669–70, 162 N.E.2d at 274. Insufficient progress had been made to warrant the admission of evidence about the particular project to prove the status of a partly executed development contributing to market value.
[81] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198–99, 138 N.E.2d 769, 775–76. (1956). As the case was reversed on other grounds, the appellate court found it unnecessary to decide on the issue of whether the trial judge exceeded his discretion in excluding the testimony.
[82] *Id.* at 198, 138 N.E.2d at 775–76.
[83] *Id.* at 198–99, 138 N.E.2d at 775–76.
[84] Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954).
[85] *Id.* An explanation was not given relative to the necessary qualifications.

OPINIONS OF OTHER PERSONS CLAIMING SPECIAL KNOWLEDGE OF VALUE OF THE SUBJECT PROPERTY

Several cases dealt with the competency of persons claiming special knowledge to testify regarding the value of the subject property. At issue is whether these witnesses must qualify as experts, or if anyone who testifies that he has had the opportunity for forming an opinion and has done so may give his opinion of the value of the property taken. In a California case an issue was whether a sublessee operator of a restaurant and his accountant were sufficiently qualified as experts on valuation of leasehold interests to testify as to the value of the sublease, and whether such witnesses could base their testimony as to the value of the leasehold largely on income and profits.[86] Both were found to be qualified as expert witnesses, so their testimony with regard to the value of the leasehold interest was held to have been properly admitted. The sublessee and the public accountant who kept the sublessee's books had many years of experience in the restaurant business. In addition, the sublessee, by virtue of his ownership and without qualifying as an expert, was entitled to testify as to the market value of his sublease. The testimony objected to by the condemnor regarding the income and other facts connected with the actual operation of the business was, according to the appellate court, properly admitted as part of the foundation for the witnesses' opinion expressed as to the value of the lease.[87] By California statute any witness qualified to express an opinion relative to the value of property may do so; [88] this statute does not, however, specify whether or not a witness must be qualified as an expert to testify.

A couple of Arizona cases seem to indicate that a witness need not be qualified as a technical expert to give opinion testimony.[89] Laymen so qualified may be allowed in Arizona, at the trial court's discretion, to offer their opinions as experts.[90] According to the court, opinion evidence may be admitted from persons who are not strictly experts but who, from residing and doing business in the vicinity, have familiarized themselves with land value [91] and are more able to form an opinion on the subject at issue than citizens in general.[92] The question of the competency of such witnesses, experts or not, to testify as to the value of the land being taken is within the sound discretion of the trial court; [93] it will not be disturbed on appeal except for an abuse of such discretion,[94] and the weight to be given such testimony is for the jury.[95] However, the opinions of witnesses should not be admitted where it appears that their opportunity for knowledge concerning the land was slight or that their knowledge was too remote in point of time.[96]

Following these rules, the trial court in one case [97] was held not to have abused its discretion in admitting the opinion testimony by one of the landowner's witnesses relative to the value of the property taken.[98] The witness had lived and done accounting work in the area and had made some appraisals but was not an expert appraiser; [99] according to the supreme court, he appeared to have had a peculiar means of forming an intelligent judgment as to the value of the property in question, beyond that presumed to be possessed by men generally, even though he was not a technical expert.[100] In the other Arizona case, the trial court was held not to have abused its discretion in refusing to permit the landowner's witness to testify as to the fair market value of the property in question.[101] The witness did not reside or do business in the area in question or in the county, nor did he deal in buying or selling property. The witness made only one trip to the property in question and that was one week before the trial.[102]

An Illinois case, in which the valuation of a leasehold interest used for a trailer park was an issue, held the trial court erred in excluding the testimony of the lessee's opinion witnesses on the ground that they were not residents of the county or were not qualified as real estate experts.[103] All of the witnesses were familiar with the subject property and the terms of the lease, and some had experience in the trailer sales and park business.[104] The appellate court said, "With reference to the propriety of the court's striking the evaluations of the lessee's witnesses . . . it is established that in a condemnation proceedings the value of land is a question of fact to be proved the same as any other fact, and any person acquainted with it may testify as to its value. It is not necessary that a witness be an expert, or be engaged in the business of buying and selling the kind of property under investigation. 'Any person may testify in such cases who knows the property and its value for the uses and purposes to which it is being put.' " [105] As for the witness who lived in another city, her lack of special experience in the county where the subject property was located merely went to the weight of her testimony.[106]

In a later Illinois case, the landowner claimed the trial court erred in excluding testimony as to the fair market value of property that was a portion of a larger tract used partly for quarrying because, under the rule expressed previously, any witness who is familiar with the property is qualified to state an opinion as to the property's value and its highest and best use.[107] The witness' sole qualifications

[80] People v. Frahm, 114 Cal. App. 2d 61, 62–63, 249 P.2d 588, 589 (1952).
[87] *Id.* at 63, 249 P.2d at 589.
[88] CAL. EVIDENCE CODE § 813(a)(1) (West 1966).
[89] State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960); Parker v. State, 89 Ariz. 124, 127–28, 359 P.2d 63, 65 (1961).
[90] State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960) (dictum).
[91] *Id.*, Parker v. State 89 Ariz. 124, 127-28, 359 P.2d 63, 65 (1961).
[92] Parker v. State 89 Ariz. 124, 128, 359 P.2d 63, 65 (1961).
[93] State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960); Parker v. State, 89 Ariz. 124, 127–28, 359 P.2d 63, 65 (1961).
[94] Parker v. State 89 Ariz. 124, 127, 359 P.2d 63, 65 (1961).
[95] State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960).
[96] Parker v. State 89 Ariz. 124, 128, 359 P.2d 63, 65 (1961).
[97] State v. McDonald, 88 Ariz. 1, 11, 352 P.2d 343, 350 (1960). The condemnor claimed that the trial court had erred in permitting the witness to testify as to his opinion of value of the subject property because he was not qualified to give such an opinion.
[98] *Id.* at 12, 352 P.2d at 350.
[99] *Id.* at 11–12, 352 P.2d at 350. The witness was an accountant who had lived in the vicinity of the condemned property for about 20 years and had done accounting work for about 50 or 60 percent of the businesses along the highway in question; in addition, he was the chairman of the Board of Supervisors. Although he was not an expert appraiser, he had made appraisals for individuals, banks, and governmental agencies, and from this work he therefore knew the value of improvements, net and gross incomes from, and the values of similar businesses and properties along the highway.
[100] *Id.* at 12, 352 P.2d at 350.
[101] Parker v. State, 89 Ariz. 124, 128, 359 P.2d 63, 65 (1961).
[102] *Id.* The witness' experience consisted of 14 years of conducting a roadside business in another area.
[103] Dep't of Public Works and Buildings v. Bohn, 415 Ill. 253, 264–65, 113 N.E.2d 319, 325 (1953).
[104] *Id.* at 258–65, 113 N.E.2d at 322–25.
[105] *Id.* at 264, 113 N.E.2d at 325.
[106] *Id.* at 265, 113 N.E.2d at 325.

nsisted merely of his 30 years of experience as an owner and superintendent in the quarrying business and his familiarity with the subject property for the past eight years.[108] At no time did he describe the property, or state how he was familiar with it, or testify to such other matters as his knowledge of values of other properties in the vicinity or of the sales of similar property, and so establish a foundation for his opinion evidence.[109] In holding that the trial judge did not abuse his discretionary powers in excluding the testimony, the appellate court said that the *Bohne* rule could not be construed to mean that a witness is qualified to state his opinion without some preliminary showing as to the matter he bases his opinion on. The mere fact that the witness had been engaged in the quarry business for a long time did not place him, according to the court, in a position to state the value of the subject property without stating the reasons why he so valued it. Agreeing that the question of the competency of a witness is left largely to the discretion of the trial judge, the court said there is no presumption that a witness is competent to give a value opinion—his competency must be shown; that is, it must appear that he has some peculiar means, beyond that presumed to be possessed by men generally, of forming an intelligent and correct judgment as to the value of the property in question or the effect on it of a particular improvement. To be entitled to testify to the value of a thing whose nature is such as to have a current or market value, the witness must be acquainted with the value of other things of the same class that this thing belongs to. More must be required of a witness than the categorical statement that he is familiar with the property before he will be permitted to testify as to value, especially where there is an attempt to prove the land adaptable to a special use.[110]

A later Illinois case affirmed the rule defining the witnesses' necessary qualifications for giving opinions of value by stating, ". . . anyone who is acquainted with the property and has knowledge of value, either in the sale or ownership of property nearby, is competent to testify. The question of the degree of his experience is one of weight and not of competency."[111] Factors qualifying a witness to give an opinion of value may be, according to the court, professional appraisal experience, general and local knowledge as a real estate broker, inspection of the premises, and considerations of comparable sales and estimated net rentals.[112]

Several cases involved issues of whether and under what conditions a nonexpert,[113] such as a farmer living in the neighborhood of the subject property,[114] or the husband of the landowner,[115] is competent to testify as to the value of the property in question. In accordance with an Iowa case, nonexpert witnesses in that state are permitted to express opinion testimony relating to the value of the condemned property.[116] A farmer living in the area and another witness familiar with land values of farms in the neighborhood were held to be fully qualified to testify as to the value of the land being taken.[117] Proper foundation was considered to be laid for the opinion evidence by their testimony regarding their familiarity with the characteristics and values of comparable farm land in the neighborhood.[118]

Nonexpert witnesses are permitted in Arkansas to testify regarding the market value of the land if their testimony shows that they are familiar with the property in question and the market value of the land in the immediate vicinity.[119] Therefore, the competency issues in that state would generally involve the witnesses' familiarity with land values in the community. However, as a rule, the question as to who is competent to express an opinion on the value of land is largely within the discretion of the trial court.[120] The weight to be given the testimony of any one of the witnesses expressing opinion evidence is for the jury,[121] depending upon the witness' candor, intelligence, experience, and knowledge of values.[122] In one case, the trial court was held not to have abused its discretion in admitting the condemnor's witnesses' testimony as to their opinion of the value of the land involved after they testified they were familiar with the market value of lands in the particular area, of other property situated on the highway in question, and of the condemned premises.[123] The appellate court in another Arkansas case agreed with the landowner's contention that the trial court erred in directing the verdict when the effect of such a directed verdict was for the testimony of the landowner's husband to be ignored.[124] Even though he did not qualify as an expert witness in the matter of appraising land, the landowner's husband had a right to testify regarding the value of the land, provided his testimony showed he was familiar with such matters.[125] He was found to be a competent witness, according to the court, because his testimony did show him to be familiar with the market value of the land in the immediate vicinity.[126]

In Alabama witnesses need not be qualified as expert appraisers to express their opinion with reference to the

---

[107] County of Cook v. Holland, 3 Ill. 2d 36, 44, 119 N.E.2d 760, 764 (1954).

[108] *Id.* at 44–45, 119 N.E.2d at 764.

[109] *Id.* at 45–46, 119 N.E.2d at 765.

[110] *Id.* at 46–47, 119 N.E.2d at 765–66.

[111] Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 371, 131 N.E.2d 55, 57–58 (1955).

[112] *Id.* at 371, 131 N.E.2d at 58.

[113] State v. Johnson, 268 Ala. 11, 104 So. 2d 915 (1958); Blount County v. Campbell, 268 Ala. 548, 109 So. 2d 678 (1959); State v. Moore, 269 Ala. 20, 110 So. 2d 635 (1959); Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); Ball v. Independence County, 214 Ark. 694, 217 S.W.2d 913 (1949).

[114] Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 105 N.W.2d 660 (1960).

[115] Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960).

[116] Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 1356–57 105 N.W.2d 660, 663–64 (1960).

[117] *Id.* at 1357, 105 N.W.2d at 664.

[118] *Id.* at 1356–57, 105 N.W.2d at 663–64.

[119] Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 707 (1960).

[120] Ball v. Independence County, 214 Ark. 694, 698, 217 S.W.2d 913, 915 (1949). *See* Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 607, 331 S.W.2d 705, 709 (1960).

[121] Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 709. (1960).

[122] Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949).

[123] *Id.* at 697–98, 217 S.W.2d at 915.

[124] Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 603, 607, 331 S.W.2d 706–07, 709 (1960). The landowner's husband was the only witness testifying for the landowner with regard to the land's value. The trial court was of the opinion that no substantial testimony had been offered by the landowner upon which a verdict could be based in excess of the appraisals made by the condemnor. 231 Ark. at 602–03, 331, S.W.2d at 706.

[125] *Id.* at 603–604, 607, 331 S.W.2d at 706–07, 709.

[126] *Id.* at 606, 331 S.W.2d at 709. The husband based his opinion of value of the land in question on land values of property in the community.

value of the condemned property.[127] A witness is competent to testify as to his opinion of the property's value if he has had an opportunity to form a correct opinion and testifies in substance that he has done so. Where a witness testifies that he knows the property and its market value, he is qualified to state that value.[128] Those judicial decisions regarding the qualifications of value witnesses are supported by an Alabama statute.[129] The determination of the qualification or competency of a witness to testify as to value (that is, whether or not the witness has had an opportunity for forming a correct opinion) is a preliminary question to be passed on by the trial court and is largely within the sound discretion of that court.[130] This decision of the trial court relative to the witnesses' competency will not be disturbed on appeal, except in those cases where it is clearly shown that there has been an abuse of that discretion.[131] The weight and credibility to be attributed to the testimony of these witnesses permitted to testify by the trial court is a question for the jury.[132] To put it another way, the degree of opportunity that the witness may have had for forming an opinion goes to the weight of evidence and not to its admissibility.[133]

OPINIONS OF VALUATION COMMISSIONERS

A substantial number of states use a double-layered type of condemnation procedure that calls for an initial hearing or trial before condemnation commissioners (sometimes called viewers or appraisers) and a subsequent trial de novo before a jury if a party requests it. The issue then sometimes arises whether the condemnation commissioners may be called as witnesses in the jury trial to give their opinions of the value of the property. A Minnesota case [134] and one in Nebraska [135] provide illustrations of the problem.

The Nebraska case, which was an appeal of the original proceeding,[136] held that the witness' service as one of the appraisers in the original condemnation proceeding in the county court did not render his testimony as to damages incompetent in the district court. According to the supreme court, an appraiser in a condemnation proceeding may testify as any other witness when the proper foundation for his testimony has been laid; however, in no event may evidence of the appraisers' award be admitted as evidence.[137] The proper foundation is laid when a witness is shown to be familiar with the particular land in question.[138]

Under a Minnesota statute relating to appeals to the district court from an original award, a commissioner in a condemnation proceeding may be called by any party as a witness to testify as to the amount of the commissioners' award.[139] Prior to the enactment of the statute, in appeal to the district court from the commissioners' award in a condemnation proceeding, the court-appointed appraisers making the original award were held to be competent witnesses who might be called by either party to give opinion evidence on the question of value; however, the award of the commissioners was held to be inadmissible.[140] In *State, by Lord v. Pearson*,[141] the question was whether the statute limits an adverse party's right to cross-examine a condemnation commissioner when called as a witness; [142] that is, does the statute limit the testimony to the amount of the award, as contended by the landowner, or is such a witness subject to cross-examination as to the basis of the original award, as permitted by the trial court? [143] The appellate court held that under the permissive statute the commissioner could, within the sound discretion of the trial court, be cross-examined as to the reasons behind the award.[144] The right of cross-examination where there is adversity between the parties, as in condemnation proceedings, is inviolate.[145] If the legislature had intended to abrogate that right of cross-examination, it would have expressly done so.[146]

EFFECT OF WITNESS' TESTIMONY ON HIS QUALIFICATION

The witnesses' qualifications were challenged in a couple of the recent highway cases on the ground that their testimony was based on the wrong rules of valuation,[147] on elements of damages not recoverable under the law,[148] and on comparable sales where their familiarity was shown to be inadequate.[149] The trial court's discretion was held not to have been abused in permitting two witnesses to testify in the New Hampshire case,[150] even though the opinion of one witness was based in part on noncompensable items of damages [151] and the other's on the wrong method of valuation.[152] According to the appellate court, the basis of the

[127] State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959).

[128] State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959). In the latter case, a witness, who was a property owner in the county and had lived in the county for 20 years, was held to be properly and sufficiently qualified to testify. The witness had testified he was familiar with various sales and offers for sale of property in the county, knew the value of the land in and around the property in question, and was familiar with and knew the market value of the property in question.

[129] ALA. CODE tit. 7, § 367 (1940) (Recomp. 1958), in the Appendix of this report.

[130] State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959).

[131] State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); State v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959).

[132] State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959).

[133] Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959).

[134] State, by Lord v. Pearson, 260 Minn. 477, 110 N.W.2d 206 (1961).

[135] Twenty Club v. State, 167 Neb. 37, 91 N.W.2d 64 (1958).

[136] *Id.* at 41, 91 N.W.2d at 67.

[137] *Id.*

[138] *Id.* at 40, 91 N.W.2d at 66.

[139] MINN. STAT. ANN. § 117.20(8)(c) (1964), in the Appendix of this report. *See* State, by Lord v. Pearson, 260 Minn. 477, 482, 484, 110 N.W.2d 206, 210–12 (1961).

[140] State, by Lord v. Pearson, 260 Minn. 477, 481–82, 489, 110 N.W.2d 206, 210, 215 (1961).

[141] *Id.* at 477, 110 N.W.2d at 206.

[142] *Id.* at 481, 110 N.W.2d at 210.

[143] *Id.* at 479, 487, 110 N.W.2d at 209, 213.

[144] *Id.* at 490–91, 110 N.W.2d at 215–16.

[145] *Id.* at 488–89, 110 N.W.2d at 215.

[146] *Id.* at 490, 110 N.W.2d at 215.

[147] Edgecomb Steel of New England v. State, 100 N.H. 480, 491–92, 131 A.2d 70, 79–80 (1957).

[148] *Id.* at 492, 131 A.2d at 79–80.

[149] Turner v. State Roads Comm'n, 213 Md. 428, 431, 132 A.2d 455, 456 (1957).

[150] Edgecomb Steel of New England v. State, 100 N.H. 480, 131 A.2d 70 (1957). The condemnor claims that the witnesses were not qualified to testify; therefore, their testimony should have been excluded. However, the appellate court did find that the witnesses did have special and peculiar knowledge that would aid the jury.

[151] *Id.* at 492, 131 A.2d at 79–80.

[152] *Id.* at 492, 131 A.2d at 80. Some weaknesses in the method the witness used in arriving at his estimate of damages were disclosed during cross-examination. Such weaknesses did not, however, make his testimony inadmissible.

witnesses' opinions was properly ruled to be those matters affecting the weight of the testimony rather than its admissibility.[153] An examination of the first witness indicated he was sufficiently qualified by study and experience to testify as to the value of industrial property; [154] the second witness was a civil and construction engineer by training and had practical knowledge of the characteristics and selling prices of industrial properties in New England.[155]

In *Turner v. State Roads Commission*,[156] the trial court was held to have abused its discretion in excluding testimony of an expert witness simply because he did not remember the names and dates of all the comparable sales he claimed familiarity with.[157] The witness had resided in the county all of his life and was a licensed broker with twenty years of experience in the real estate business. His testimony showed his familiarity with the subject property and property values in the vicinity. Testimony was given relative to the sales of property found to be comparable, and for at least four of the comparable sales he claimed to be familiar with, the witness gave the year of the sale and sale price per acre.[158] Because preventing this witness from testifying meant that the landowner did not have the benefit of the testimony of an expert witness, the exclusion of his testimony was held to be prejudicial.[159] In deciding the issue, the court did recognize the rule that whether a witness is competent or sufficiently qualified as an expert to express an opinion relative to value is a matter left largely to the sound discretion and judgment of the trial court, and its ruling ordinarily will not be disturbed on appeal unless it is shown to have been based on an error of law or there is a clear showing of abuse. However, this discretion is not without limit and is always subject to review.[160]

A Massachusetts case held that the testimony of the condemnor's expert witness was admissible even though his opinion of value before and after the taking was based on unproved facts.[161] The landowner contended that the property was a farm and that its value as a farm had been severely impaired by the taking, whereas in forming his opinion on value, the witness had assumed the major use of the premises was for residential purposes and not for farming. Evidence had not been introduced as to the amount of income received from the farming operation on the property. In addition, the court stated that the case differed from an earlier one relied on by the landowner; in the earlier case the witness' testimony was based on hearsay evidence, but here it was based primarily on an examination and observation of the property involved. In this case the witness had come to his own conclusion as to the best use of the property.[162] Conceding that the admission or exclusion of opinion testimony is largely within the discretion of the trial court, the appellate court in another Massachusetts case held the trial court erred in excluding the witness' opinion testimony as to the property's value because he had made his appraisal of the property in August and November 1954, whereas the date of taking was September 1953.[163] The appellate court noted that other testimony in the case indicated that the physical condition of the property was the same in 1954 as in 1953. Acceptance of the witness' general qualifications meant that he had sufficient knowledge of the general facts to make his opinion of some worth, provided he was reasonably well informed about the location, appearance, and condition of the subject property at the time it was taken. An inspection of the property while it is in the same state as at the time of taking is a good way, said the court, of acquiring that necessary knowledge. The difference in the dates between the appraisal and the taking was without material significance because of the unchanged condition in the property.[164]

EXPERT WITNESS' OPINION TESTIMONY BASED ON HEARSAY

An issue arose in a few of the recent cases relative to how much an expert witness' opinion testimony could be based entirely or in part on hearsay. These cases seem to differ as to the extent that opinion evidence may be based on hearsay. For example, a Vermont case [165] involved with the taking of a part of a farm held that the trial court had not abused its discretion in accepting the testimony of three of the landowner's expert witnesses who had inspected only the portion of the farm where the buildings were located and had obtained their information relative to the remainder of the farm from the owner.[166] A witness must be familiar with the property itself, or must at least have examined it at or about the time of taking. However, a witness' familiarity with the property in question need not necessarily come only from a personal examination of the property—it may be supplemented by other information. The competency of a witness is a preliminary question for the trial court and its decision is conclusive, unless it appears from the evidence to have been erroneous or founded on an error in law. Also, the exact degree of familiarity is a question to be determined by the trial court in each case. Under these principles, the trial court was justified in find-

[153] *Id.*

[154] *Id.* at 491, 131 A.2d at 79.

[155] *Id.* at 492, 131 A.2d at 80.

[156] Turner v. State Roads Comm'n, 213 Md. 428, 132 A.2d 455 (1957). Here the landowner claimed the trial court erred in refusing to permit one of his expert witnesses to testify as to the value of the property in question because he failed to give any names or dates relative to comparable sales. 213 Md. at 431–32, 132 A.2d at 456–57.

[157] *Id.* at 432, 434–35, 132 A.2d at 458.

[158] *Id.* at 431–35, 132 A.2d at 456–58.

[159] *Id.* at 435, 132 A.2d at 458. The jury had the landowner's testimony before it, but the court said that the jury might not give as much weight to testimony of interested parties as to an expert witness' testimony.

[160] *Id.* at 432–34, 132 A.2d at 456–58. The admissibility of expert or opinion evidence is largely within the discretion of the trial court.

[161] Kinney v. Commonwealth, 332 Mass. 568, 569, 126 N.E.2d 365, 367 (1955). The landowner claimed the testimony of the witness should have been stricken, but the appellate court found no error had been committed in refusing to strike this witness' testimony.

[162] *Id.* at 570–71, 126 N.E.2d at 367–68.

[163] Ford v. City of Worcester, 335 Mass. 723, 724, 142 N.E.2d 327, 328 (1957). The witness' general qualifications to testify were admitted.

[164] *Id.*

[165] Farr v. State Highway Bd., 122 Vt. 156, 166 A.2d 187 (1960). The issue involved was whether the trial court properly admitted testimony from three of the landowner's expert witnesses. The condemnor claimed that these witnesses, because of their lack of familiarity with such property, were not sufficiently qualified to testify as experts and give their opinion with regard to the value of the subject property. 122 Vt. at 157–58, 166 A.2d at 187–88.

[166] *Id.* at 160–61, 166 A.2d at 189–90. All three of the witnesses had visited a portion of the farm prior to the trial, and all three had gotten from the landowner some of the information they based their opinion on. The information given by the landowner pertained primarily to the pasture land and woodlot, which were not too important here. 122 Vt. at 158–60, 166 A.2d at 188–89.

ing that the witnesses had a sufficient familiarity with the farm in question, concerning the things that mattered, to form an intelligent judgment as to value that was beyond that possessed by men in general.[167]

The extent to which the witness' opinion of value may be based on hearsay was an issue in two Massachusetts cases.[168] In one case,[169] the appellate court agreed with the condemnor's contention and held that the testimony of the landowner's witness regarding an estimate of the cost of completing installation of a refrigeration unit on the subject property should have been excluded.[170] The figures being testified to by the witness did not appear to be his own estimate of cost, but rather they were considered to be the landowner's estimate, which in turn was based on the cost figures obtained from the engineer or builder who made the estimate in the first place. Because it was hearsay, the witness could not give the opinion of another in that indirect manner. The engineer or builder who made the estimate should have been produced and qualified as a witness competent to give his own opinion if that was sought to be shown. Even if the witness had been giving his own estimate of cost, his testimony would not have been permitted because, although he had qualified as an expert in real estate, he was not an expert in engineering or in the construction of refrigeration plants.[171]

Testimony based on hearsay knowledge was held to be inadmissible in the other Massachusetts case.[172] One of the condemnor's witnesses, who did not appear to have any special experience in determining the value of camp property, was allowed by the trial court to give the price that a nearby unsimilar parcel of property had sold for at a time three years prior to the date of condemnation. The landowner objected because the witness had not participated in and had only hearsay knowledge of the transaction. Conceding that an expert witness may give the reasons for his opinion, even if he gained it from hearsay, the appellate court said this should be done in such terms that inadmissible hearsay is not introduced in a manner prejudicial to a party. Without producing a party to the sale who could be subjected to cross-examination, direct examination about the terms of the particular transaction should not have been admitted by the trial court over the landowner's objection.[173]

Hearsay was an issue in a Wyoming case involving the taking of about 158 acres of ranch land for a highway right-of-way.[174] Here, even though the landowner and seven of his witnesses, who were familiar with the property as a ranching unit, gave testimony ranging from $65,000 to $102,000 as the value of the land taken and damages caused by the highway, and the condemnation commissioners had returned an award totaling almost $39,000, the jury verdict amounted to only $15,000.[175] The verdict, apparently based on the testimony of the state's three witnesses, was held by the supreme court to be contrary to the weight of the evidence because those witnesses were not qualified to testify as to damages to the remainder. Because the record showed that they had not viewed the entire ranch or made a careful examination of such property, and consequently they had no specific knowledge of the ranch, none of the condemnor's witnesses was qualified to testify as to the damages caused by the highway to the ranch unit. In fact, one of the witnesses expressly stated that he was testifying only as to the value of the land taken.[176] While holding that the trial court erroneously admitted the condemnor's witnesses' testimony and that there was no evidence to support the verdict,[177] the appellate court did recognize that reviewing courts, lacking the advantage of observation at the trial, are reluctant to reverse the trial court.[178] However, if the trial court's findings or its judgment are unsupported by the evidence or are contrary to the great weight of evidence, the appellate court must reverse.[179]

SUMMARY AND CONCLUSIONS

As a general rule the competency of a witness to give opinion testimony regarding the value of the subject property is a preliminary question for the trial court and is largely within the court's sound discretion.[180] Ordinarily the trial court's ruling relative to the witness' competency will not be disturbed on appeal unless it appears from the evidence to have been based on an error of law or there is a clear showing of an abuse of that discretion.[181] The weight and credibility to be attributed to witness' opinion testimony is a question for determination by the jury[182]

---

[167] *Id.*

[168] Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 109 N.E.2d 148 (1952); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956).

[169] Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 109 N.E.2d 148 (1952). One of the buildings to be taken was in the process of being remodelled with a commercial refrigeration unit, but the remodelling process terminated when the landowner found out about the condemnation. 329 Mass. at 516–17, 109 N.E.2d at 149.

[170] *Id.* at 519–20, 109 N.E.2d at 151. The condemnor objected to the landowner's witness, who was the landowner's husband, giving evidence relative to the landowner's estimate of cost of completing the work.

[171] *Id.*

[172] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 199, 138 N.E.2d 769, 776 (1956).

[173] *Id.*

[174] Barber v. State Highway Comm'n, 80 Wyo. 340, 342 P.2d 723 (1959).

[175] *Id.* at 356, 342 P.2d at 727.

[176] *Id.* at 357–59, 342 P.2d at 728–29.

[177] *Id.*

[178] *Id.* at 355, 342 P.2d at 727.

[179] *Id.*

[180] *See* State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960); Parker v. State, 89 Ariz. 124, 127–28, 359 P.2d 63, 65 (1961); Ball v. Independence County, 214 Ark. 694, 698, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 607, 331 S.W.2d 705, 709 (1960); State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 594 (Del. 1960); Turner v. State Roads Comm'n, 213 Md. 428, 432–34, 132 A.2d 455, 456–58 (1957); Muzi v. Commonwealth, 335 Mass. 101, 106, 138 N.E.2d 578, 580 (1956); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198, 138 N.E.2d 769, 775 (1956); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 668–69, 162 N.E.2d 271, 273–74 (1959); City of Bismarck v. Casey, 77 N.D. 295, 299, 43 N.W.2d 372, 375 (1950); Boylan v. Bd. of County Comm'rs of Cass County, 105 N.W.2d 329, 331 (N.D. 1960); Farr v. State Highway Bd., 122 Vt. 156, 160, 166 A.2d 187, 190 (1960).

[181] *See* State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); State v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); Parker v. State, 89 Ariz. 124, 127, 359 P.2d 63, 65 (1961); Turner v. State Roads Comm'n, 213 Md. 428, 433–34, 132 A.2d 455, 457–58 (1957); Muzi v. Commonwealth, 335 Mass. 101, 106, 138 N.E.2d 578, 580 (1956); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 669, 162 N.E.2d 271, 274 (1959); Farr v. State Highway Bd, 122 Vt. 156, 160, 166 A.2d 187, 190 (1960); Barber v. State Highway Comm'n, 80 Wyo. 340, 355, 342 P.2d 723, 727 (1959).

[182] *See* State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959); State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960); Ball v. Independence

and is dependent on the witness' candor, intelligence, experience, and knowledge of values.[183] Jurisdictions differ as to the qualifications a witness must possess to be considered competent to express an opinion relative to value.

Notwithstanding the generally broad discretion vested in the trial court in every state, some differences of attitude, if not of fixed rules, appear. In some jurisdictions the witness need not necessarily be qualified as an expert to give opinion evidence with reference to the value of the condemned land. For example, a nonexpert witness is considered to be qualified to express an opinion in some jurisdictions if he has had an opportunity to form correct opinion as to the value of the condemned property and he testifies in substance that he has done so.[184] Generally, the witness' testimony must show that he is familiar with the property in question and the market value of comparable land in the immediate vicinity.[185] Other jurisdictions seem to require more from the witness than a mere statement that he is familiar with the property; that is, there must be some preliminary showing as to the matters on which the witness bases his opinion.[186] Under the rules established in Maryland [187] and Massachusetts,[188] indications are that the witness expressing opinion testimony must be qualified as an expert. Some jurisdictions permit owners of property to testify as to value solely by virtue of their ownership; [189] others require an owner to have knowledge of the property apart from his mere ownership before he may express an opinion regarding the value of such property taken.[190] Some inconsistencies also appear with regard to attitudes toward the hearsay rule and the effect of a witness' using erroneous valuation theories.

What changes, if any, should be made in the law relating to qualifications of witnesses presenting opinion evidence in condemnation trials? Viewing the matter from the standpoint of a land economist and an expert in real estate valuation, Ratcliff has this to say:

> In connection with the question of the admissibility of evidence, it is relevant to consider the qualifications of the expert witness. There is no more misleading witness than the incompetent appraiser who has a misconception of the nature of his objective and who is unfamiliar with methods of economic analysis and prediction. He is likely to employ the wrong methods and to present an inadequate analysis through ignorance of the principles of land economics. Unfortunately, it is presently difficult to discover any objective basis upon which competence can be judged. There is no licensing of appraisers based on educational qualifications, and membership in professional appraisal organizations is no assurance of competence or proper training for none of them requires adequate professional training for admission and with one exception, none requires educational attainment beyond a high school education. In many of the complex real estate situations which confront the appraiser, truly professional training in land economics and in analytical valuation methods is a necessity. Familiarity with the subject environment is not essential if the appraiser is trained in discovery and familiar with basic principles of value.
>
> It is quite possible that under some circumstances, a totally untrained person can present evidence of usefulness in the prediction of V_p. If it is a short-range prediction relating to an uncomplicated property in an area where there has been an active market for similar properties, there is required only a sufficient knowledge of recent transactions, a retentive memory, and a logical mind.[191]

It seems clear, therefore, that in the present state of the appraisal art it is not desirable to attempt to define by legislative fiat a specific class of persons who will be deemed sufficiently expert to testify at a condemnation trial without further qualification, nor does it seem desirable to state that certain persons are not qualified to testify. Wide discretion must continue to vest in the trial judge, but this fact perhaps does not preclude all attempts at clarifying the rules. The recent California and Pennsylvania statutes are instructive on this point. For example, the Pennsylvania statutes provide that a condemnee or an officer of a corporate condemnee may, without further qualifications, testify as to just compensation.[192] They further provide that a qualified valuation expert may state any or all facts and data he considered in arriving at his opinion, whether or not he has personal knowledge thereof.[193] Somewhat to the same effect is the California provision permitting a witness to express his opinion if it is based on matter perceived by or personally known to him or made known to him at or before the hearing, whether or not such matter ordinarily would be admissible in evidence, and if the matter is of a type that reasonably may be relied on by an expert in forming an opinion as to the value of property and which a willing purchaser and a willing seller would take into account in determining the sales price of the prop-

---

County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 706–07 (1960); Muzi v. Commonwealth, 335 Mass. 101, 106, 138 N.E.2d 578, 581 (1956); Smuda v. Milwaukee County, 3 Wis. 2d 473, 476, 89 N.W.2d 186, 187 (1958); Buch v. State Highway Comm'n, 15 Wis. 2d 140, 142, 112 N.W.2d 129, 130 (1961).

[183] Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949).

[184] *See* State v. Johnson, 268 Ala. 11, 13, 104 So. 2d 915, 917 (1958); Blount County v. Campbell, 268 Ala. 548, 554, 109 So. 2d 678, 683 (1959); State v. Moore, 269 Ala. 20, 24, 110 So. 2d 635, 638 (1959); Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959); Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603–04, 331 S.W.2d 705, 706–07 (1960); Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 1356–57, 105 N.W.2d 660, 663–64 (1960).

[185] Ball v. Independence County, 214 Ark. 694, 697, 217 S.W.2d 913, 915 (1949); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 603-04, 331 S.W.2d 705, 707 (1960); Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 1356–57, 105 N.W.2d 660, 663–64 (1960).

[186] *See* Dep't of Public Works and Bldgs. v. Bohne, 415 Ill. 253, 264–65, 113 N.E.2d 319, 325 (1953); County of Cook v. Holland, 3 Ill. 2d 36, 45–47, 119 N.E.2d 760, 765–66 (1954); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 371, 131 N.E.2d 55, 57–58 (1955).

[187] *See* State Roads Comm'n v. Novosel, 203 Md. 619, 626–27, 102 A.2d 563, 566 (1954); Turner v. State Roads Comm'n, 213 Md. 428, 432–35, 132 A.2d 455, 456–58 (1957); Lustine v. State Roads Comm'n, 221 Md. 322, 328–29, 157 A.2d 456, 459–60 (1960).

[188] *See* Muzi v. Commonwealth, 335 Mass. 101, 102–06, 138 N.E.2d 578, 579–81 (1956); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 194–99, 138 N.E.2d 769, 773–76 (1956).

[189] *See* Shelby County v. Baker, 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959); People v. Frahm, 114 Cal. App. 2d 61, 63, 249 P.2d 588–89 (1952); State *ex rel.* Smith v. 0.15 Acres of Land, 164 A.2d 591, 593–94 (Del. 1960).

[190] *See* Hot Spring County, Arkansas v. Prickett, 229 Ark. 941, 942, 319 S.W.2d 213, 214 (1959); Arkansas State Highway Comm'n v. Muswick Cigar and Beverage Co., 231 Ark. 265, 270–71, 329 S.W.2d 173, 176 (1959); Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 198–99, 138 N.E.2d 769, 775–76 (1956); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 669–70, 162 N.E.2d 271, 274 (1959).

[191] R. RATCLIFF, REAL ESTATE VALUATION AND HIGHWAY CONDEMNATION AWARDS, 65–66 (7 Wis. Commerce Report 6, 1966) [hereinafter cited as RATCLIFF].

[192] PA. STAT. ANN. tit. 26, § 1–704 (Supp. 1967), in the Appendix of this report.

[193] PA. STAT. ANN. tit. 26, § 1–705(1) (Supp. 1967), in the Appendix of this report.

erty.[194] The Pennsylvania statutes clarify a further point by stating that a valuation expert, if otherwise qualified, shall not be disqualified by reason of not having made sales of property or not having examined the condemned property prior to the condemnation, if he can show he has acquired knowledge of its condition at the time of the condemnation.[195] On the whole, however, neither the California statutes nor the Pennsylvania statutes make any substantial inroads on the trial court's discretion to determine the qualifications of valuation witnesses.

[194] CAL. EVIDENCE CODE § 814 (West 1966), in the Appendix of this report.

[195] PA. STAT. ANN. tit. 26, § 1-705(6) (Supp. 1967), in the Appendix of this report.

CHAPTER THREE

JURY VIEW OF THE PROPERTY BEING TAKEN

As a parcel of land subject to condemnation is immovable in character and so cannot be practically produced in court, the assessing tribunal in an eminent domain proceeding must go to the premises for a view. In this chapter consideration is given only to those views by the common law trial court juries or other assessing tribunals (such as commissions, boards, or trial judges in cases tried without juries) making final awards that are appealable by either party to the appellate court level. Eminent domain statutes in many states permit, as a preliminary procedure, the appointment of some type of board or commission to view the premises and ascertain damages, but, because the awards of such boards and commissions may be appealed for a jury trial, they are not regarded as final. In some states, however, the award ascertained by the commissioners becomes final upon the trial court's confirmation, and neither party has a right to appeal for a jury trial from that award.[196] As the commissioners in those states function more as a jury than as a board of viewers, views by them are, therefore, considered in this chapter as being by a jury.

Issues relating to jury view, which were found to have arisen quite frequently in the recent highway condemnation cases, involved both the right to view and the conduct and effect of such views. Among the questions litigated were: (1) Is a party to an eminent domain proceeding entitled, as a matter of right, to have the jury view the premises? (2) If a view is a matter within the trial court's discretion, under the circumstances of the case did the trial court abuse its discretion in permitting or refusing to permit a view of the premises by the jury? (3) What procedure should be used in requesting a view, and what methods should be used to safeguard the jury from outside influences while they are visiting the premises? (4) What evidentiary effect does the jury's view have?

Statutes dealing with one or more aspects of jury view have been enacted in many states. These may be applicable either to jury trials in general [197] or to eminent domain proceedings in particular.[198]

RIGHT TO JURY VIEW

Establishment of Right

A jury view of the premises taken or damaged in an eminent domain proceeding is discretionary with the trial court under the common law irrespective of any statutes conferring that express power.[199] In those jurisdictions (such as Georgia) following the common law rule, the trial judge may permit the jury to view the premises, with or without the parties' consent, whenever in his discretion such a view would aid the jury to better understanding of the evidence.[200]

Even though the judicial power to order a jury view exists independent of any statutory provision,[201] many of

[196] *See, e.g.*, DEL. CODE ANN. tit. 10, §§ 6108(b), (d), (g), (h) (1953); VA. CODE ANN. §§ 33-63.1, 33-64, 33-66 (Supp. 1966). In Delaware and Virginia the "jurors" are commissioners appointed by the trial court from a panel of disinterested citizens. After viewing the premises and hearing the testimony, such commissioners determine the amount to be awarded the landowner and file their written report with the trial court. When the trial court deems the report to be satisfactory, it is confirmed and becomes the final award. Neither party has a right to appeal for a jury trial from the decision confirming this report; however, it being the final award, either party may appeal to the supreme court. See also 9.6 Acres of Land v. State *ex. rel.* McConnell, 49 Del. 64, 66-68, 109 A.2d 396, 397-98 (1954); and Kornegay v. City of Richmond, 185 Va. 1013, 1024, [illegible]

[197] *See, e.g.*, ARK. STAT. ANN. § 27-1731 (Repl. 1962); CAL. CODE CIV. P. § 610 (West 1955); MINN. STAT. ANN. § 546.12 (1947); N.D. CENT CODE § 28-14-15 (1960); R.I. GEN. LAWS ANN. § 9-16-1 (1956); UTAH R. CIV. P. 47(j); WASH. REV. CODE ANN. § 4.44.270 (1962); WIS. STAT. § 270.20 (1965); WYO. STAT. ANN. § 1-125 (1957), in the Appendix of this report.

[198] *See, e.g.*, CAL. EVIDENCE CODE § 813(b) (West 1966); COLO. REV. STAT. ANN. § 50-1-10(1) (1963); DEL. CODE ANN. tit. 10, § 6108(d) (1953); FLA. STAT. § 73.071(5) (1967); ILL. REV. STAT. ch. 47, § 9 (1965) (Eminent Domain Act); ILL. REV. STAT. ch. 24, § 9-2-29 (1965) (Local Improvement Act); MD. R. P., R. U18; MASS. ANN. LAWS ch. 79, § 22 (Supp. 1965); S.D. CODE § 28.13A09 (Supp. 1960); VA. CODE ANN. § 25-46.21 (Repl. 1964) (general condemnation); VA. CODE ANN. § 33-64 (Supp. 1966) (highway condemnation). In the Appendix of this report.

[199] *See* State Highway Dep't v. Andrus, 212 Ga. 737, 95 S.E.2d 781, 781-82 (1956) (dictum); Barber v. State Highway Comm'n, 80 Wyo. 340, 352, 342 P.2d 723, 726 (1959) (dictum). *See also* 5 NICHOLS, LAW OF EMINENT DOMAIN § 18.3(2) (rev. 3d ed. 1962) [hereinafter cited as NICHOLS]; 4 WIGMORE, EVIDENCE § 1163 (3d ed. 1940) [hereinafter cited as WIGMORE].

[200] State Highway Dep't v. Andrus, 212 Ga. 737, 737-38, 95 S.E.2d 781, 781-82 (1956) (dictum). *See* State Highway Dep't v. Sinclair Refining Co., 103 Ga. App. 18, 22, 118 S.E.2d 293, 296 (1961) (dictum).

trial court.[225] Ordinarily the discretion exercised by the trial court in permitting or refusing to permit a jury view is not disturbed on appeal unless the record clearly shows an abuse under the particular circumstances of the case.[226]

In exercising its discretion to grant or refuse to grant a view, the particular circumstances in each case become important to the trial court. Consequently, a look at some of those circumstances may be helpful. Construction work had been in progress at the time of trial in a California case [227] where the refusal of the trial court to grant a request for a jury view was upheld.[228] According to the appellate court, the construction had caused such a vast difference in the property's appearance between the valuation and trial dates that a jury view, if granted, might have been improper and prejudicial to the landowner.[229] In an Arkansas case [230] the trial judge's discretion to refuse a jury view of the premises in question was upheld despite the fact that it was seemingly based on a negative response of the jury when queried as to whether they wanted to view the property.[231] In affirming the lower court, the appellate court acknowledged that, under the statute,[232] the power to allow a jury view rests in the judgment and discretion of the court and not in the jury.[233] However, the appellate court stressed that a view is not a matter of right, but rests in the sound discretion of the trial judge as to whether it is proper to enable the jury to obtain a clearer understanding of the issues or make correct application of the evidence.[234] An additional factor for upholding the trial court's discretion to refuse a jury view in those two cases was that maps, plats, photographs, and other descriptive items portraying the conditions of the properties at the time of valuation had been introduced in evidence and deemed sufficient by the trial court.[235]

In the cases where the trial court's discretion to permit jury views was upheld, the particular circumstances of the cases were important. Even though some changes had been made in the property's condition between the date of valuation and the date of trial, the trial court's discretion to permit a view was affirmed in a California case; [236] the reason was that the changes made in the property benefitted, rather than harmed, the landowner.[237] The trial court's discretion to permit the jury to view only a portion of the property in question was upheld in a Wyoming case,[238] even though the appellate court admitted that perhaps it would have been fairer to have shown the jury the entire ranch.[239] As the bases for its decision, the appellate court emphasized: that there was not any evidence to indicate the limited view was prejudicial to the landowner; in eminent domain proceedings,[240] the trial court is permitted a wide discretion in granting views of the premises; and the jurors were expressly instructed that the view was not to be considered as evidence, but was only for the purpose of permitting a better understanding of the evidence.[241] Similarly, a view was held to have been permissible in a Wisconsin case because the purpose of such a view was only to enable the jurors to better understand the evidence presented at the trial.[242]

In only one case was the trial judge held to have abused his discretion under the statute [243] in granting the condemnor's request for a jury view.[244] Stating that it is well settled in Rhode Island that the object of a view is to aid the jury to understand more clearly the evidence presented at the trial, the supreme court pointed out there was nothing peculiar about the property here that would have tended to indicate that a view might be required to enable the jury to fully understand and evaluate the testimony elicited at the trial.[245] Therefore, the customary purpose for which a view is ordinarily allowed was not shown by the condemnor to have existed in this case.[246] The effect of the view was to allow the jury to see the property at a substantial interval of time after it had been condemned by the state and at a time when conditions of the premises were materially different from those existing at the time of condemnation.[247] A new trial therefore was ordered.

---

[225] *Id.*, County of Los Angeles v. Pan American Dev. Corp., 146 Cal. App. 2d 15, 20, 303 P.2d 61, 65 (1956); People *ex rel.* Dep't of Public Works v. Logan, 198 Cal. App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961); Barber v. State Highway Comm'n, 80 Wyo. 340, 352–53, 342 P.2d 723, 726 (1959). See Ajootian v. Director of Public Works, 90 R.I. 96, 101, 155 A.2d 244, 246 (1959) (dictum). *See also* 5 NICHOLS, *supra* note 199, § 18.3(3).

[226] People *ex rel.* Dep't of Public Works v. Logan, 198 Cal. App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961). *See* 5 NICHOLS, *supra* note 199, § 18.3(3).

[227] People *ex rel.* Dep't of Public Works v. Logan 198 Cal. App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961). The condemnor contended that the denial of its motion for a jury view constituted an abuse of discretion; hence it was an error.

[228] *Id.* The appellate court emphasized the rule that a jury view is within the sound discretion of the trial court and that the decision made by the trial judge will not be reversed unless the record clearly shows an abuse of that discretion.

[229] *Id.* An indication was made that, had the trial court granted a jury view, its discretion would not have been upheld.

[230] Arkansas State Highway Comm'n v. Carder, 228 Ark. 8, 11, 305 S.W.2d 330, 332 (1957). The condemnor contended that the trial court abused its discretion in refusing a request for a jury view of the lands in question.

[231] *Id.* at 11–12, 305 S.W.2d at 332. The trial judge called for a show of hands on the part of the jury members to determine whether or not they felt a view of the premises was necessary. Getting a negative response, the trial judge exercised his discretion and refused the condemnor's request for a jury view.

[232] ARK. STAT. ANN. § 27-1731 (Repl. 1962).

[233] Arkansas State Highway Comm'n v. Carder, 228 Ark 8, 12, 305 S.W.2d 330, 332–33. On appeal the condemnor claimed that the trial judge failed to comply with the statute by allowing the jurors to determine whether they should view the lands.

[234] *Id.*

[235] *Id.*; People *ex rel.* Dep't of Public Works v. Logan, 198 Cal. App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961).

[236] County of Los Angeles v. Pan American Dev. Corp., 146 Cal. App. 2d 15, 20, 303 P.2d 61, 64–65 (1956). Here the landowner contended that the trial court erred in permitting the jury to view the premises, on the ground that the property was not in the same condition as at the time of the first trial.

[237] *Id.* The question as to whether the jury should be permitted to view the premises is a matter largely within the trial judge's discretion.

[238] Barber v. State Highway Comm'n, 80 Wyo. 340, 353, 342 P.2d 723, 726 (1959). Here the landowner claimed the trial court erred in granting the condemnor's motion to have the jury view only a part of the property in question. 80 Wyo. at 352, 342 P.2d at 726.

[239] *Id.* at 352–53, 342 P.2d at 726.

[240] *Id.* at 353, 342 P.2d at 726.

[241] *Id.* at 352, 343 P.2d at 726.

[242] Townsend v. State, 257 Wis. 329, 334, 43 N.W.2d 458, 460 (1950).

[243] R.I. GEN. LAWS ANN. § 9-16-1 (1956). Jury views are discretionary with the trial court after one has been requested by either party.

[244] Ajootian v. Director of Public Works, 90 R.I. 96, 103, 155 A.2d 244, 247 (1959).

[245] *Id.* at 101, 103, 155 A.2d at 246–47. Here the property taken consisted of an ordinary 2½-story building that did not have an intricate description.

[246] *Id.* Here the trial judge should have required sufficient information to be presented with regard to the merits of the view so that he could have intelligently exercised his discretion in deciding whether the view was reasonably necessary for the better understanding of the evidence for the expedition of the trial and for protecting the rights of all interested parties. The burden of satisfying the trial judge that the taking of the view at such time is reasonably necessary under all the circumstances is upon the requesting party, which was the condemnor in this case, and he failed to do so. 90 R.I. at 101-02, 155 A.2d at 246–47.

[247] *Id.* at 102, 155 A.2d at 247.

Rhode Island's statute simply provides that the court shall regulate the view.[269]

Reference is made in only a few states to the trial judge accompanying the jury on a view.[270] In Rhode Island the trial judge may accompany the jury at his own discretion;[271] in Maryland[272] and Virginia[273] it is mandatory that he accompany the commissioners or jurors if a motion to that effect is made by either party to the action. A recent Georgia highway condemnation case held the presence of the trial judge at the view was not necessary.[274]

An issue with respect to the conduct of a view was raised in a few of the recent highway condemnation cases;[275] it involved the propriety of permitting the parties or their representatives, witnesses, and other persons to accompany the jury on the visit to the premises for the purpose of answering questions concerning the location of property lines and showing the jurors vital points that had been developed by the evidence. In a Georgia case the condemnor's failure to object to the trial court's ruling prescribing the conditions for the jury view was held to have constituted a waiver of its right to have a representative or counsel present at the view.[276] Because the condemnor was not prejudiced, the trial court's ruling in an Alabama case to the effect that the landowner was entitled to accompany the jury on its inspection of the property was held not to be reversible under the particular circumstances, even if it was error.[277] Nothing in the record showed that the landowner actually accompanied the jury, and, if he did, no wrongful conduct on his part was shown.[278] Conceding that the authorization of the condemnor's engineer, who had testified on behalf of the city, to accompany the jury for the purposes of answering the jurors' questions concerning the property lines could be erroneous, the Alabama case again held the error was not reversible under the circumstances.[279] In this case the record was silent as to any misconduct caused by the engineer's presence that could have been prejudicial to the landowner, and the jury was instructed to the effect that testimony could not be taken during the view.[280]

[269] R.I. GEN. LAWS ANN. § 9–16–1 (1956), ". . . in all such cases the court shall regulate the proceedings at the view . . . ."

[270] *See*, e.g., MD. R. P., R. U18, § d; R.I. GEN. LAWS ANN. § 9–16–1 (1956); VA. CODE ANN. § 33–64 (Supp. 1966). *See also* MINN. STAT. ANN. § 546.12 (1947).

[271] R.I. GEN LAWS ANN. § 9–16–1 (1956).

[272] MD. R. P., R. U18, § d.

[273] VA. CODE ANN. § 33–64 (Supp. 1966).

[274] State Highway Dep't v. Peavy, 77 Ga. App. 308, 313, 48 S.E.2d 478, 482 (1948).

[275] State v. Johnson, 268 Ala. 11, 104 So. 2d 915 (1958); Wallace v. Phenix City, 268 Ala. 413, 108 So. 2d 173 (1958); State Highway Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478 (1948).

[276] State Highway Dep't v. Peavy, 77 Ga. App. 308, 313–14, 48 S.E.2d 478, 482 (1948). A distinction is made with criminal actions, where the defendant is entitled to be present at every stage of the trial. Here the trial court rules that no one interested in the litigation could accompany the jury on the view.

[277] State v. Johnson, 268 Ala. 11, 12, 104 So. 2d 915, 916–17. (1958). The supreme court would not concede that the ruling of the trial court to permit the landowner to accompany the jury was ever erroneous, but because of the particular circumstances of the case did not decide that issue.

[278] *Id.* The appellant has the burden not only to show error, but to show probable injury, which could not be done in this case.

[279] Wallace v. Phenix City, 268 Ala. 413, 415, 108 So. 2d 173, 175 (1958). Basically the appellant landowner failed in his burden to show not only an error, but probable injury. A reversible error, according to the court, would not even have been committed had the landowner properly objected to the trial court's ruling.

[280] *Id.*

EFFECT OF JURY VIEW

Decisions relating to the evidentiary effect of jury views superficially appear to represent the point of greatest disagreement among the various states, insofar as the law relating to jury view in condemnation proceedings is concerned. Thus, some courts will say that the jury's view of the property constitutes evidence; other courts will say that the view is not evidence but, rather, is a device to enable the jury to better understand the evidence presented at the trial. The apparent differences tend to disappear, however, if one takes the position that the crucial test of the evidentiary effect of a jury view is whether it will support a verdict that is outside the range of the valuation testimony given at the trial. Using this criterion, the states can be divided into two classes: (1) those where the courts hold that a view constitutes independent evidence that will support a verdict outside the range of the valuation testimony given at the trial, and (2) those where the courts hold that a verdict must be within the range of the valuation testimony, whether the view is denominated as independent evidence or merely as testimony to enable the jury to better understand the evidence.

Only one of the cases in the sample reviewed seems to fall squarely within the first rule; i.e., that a jury view will support a verdict that otherwise is outside the range of the valuation testimony. In an Alabama case[281] the valuation commissioners had awarded $11,650; the landowner appealed to circuit court for a jury trial and was there awarded $14,675. The condemnor appealed this verdict to the supreme court, contending that the verdict was outside the range of the evidence presented at the trial because the valuation commissioners had testified as to the correctness of their original award of $11,650, while the landowner did not offer any witnesses on the issue of the valuation of the property. The supreme court held that, because the jury viewed the premises, it was not bound by the evidence of value testified to by the witnesses.

Several cases have specifically held that the view is not to be considered as evidence but is for the purpose of providing the jury with a better understanding of the evidence presented at the trial.[282] Jurors may use their knowledge gained from a view of the premises to evaluate and weigh the evidence presented at the trial, but they are not at liberty to disregard such evidence.[283] Consequently, a jury's verdict must be within the range of testimony presented at the trial despite the view.[284] Verdicts that are not supported by evidence regularly produced in the course of the trial proceedings, but are based solely on the knowledge

[281] State v. Carter, 267 Ala. 347, 350, 101 So. 2d 550, 553 (1958).

[282] Meyers v. City of Daytona Beach, 158 Fla. 859, 860, 862, 30 So. 2d 354, 354–55 (1947); State Highway Dep't v. Andrus, 212 Ga. 737, 738–39, 95 S.E.2d 781, 782–83 (1956); Townsend v. State, 257 Wis. 329, 334, 43 N.W.2d 458, 460 (1950); Barber v. State Highway Comm'n, 80 Wyo. 340, 352–53, 342 P.2d 723, 726 (1959). *See also* Arkansas State Highway Comm'n v. Carder, 228 Ark. 8, 12, 305 S.W.2d 330, 332–33 (1957) (dictum); 9.6 Acres of Land v. State *ex rel.* McConnell, 49 Del. 64, 65–67, 109 A.2d 396, 397–98 (1954) (dictum); Ajootian v. Director of Public Works, 90 R.I. 96, 101, 155 A.2d 244, 246 (1959) (dictum).

[283] Meyers v. City of Daytona Beach, 158 Fla. 859, 862, 30 So. 2d 354, 355 (1947); State Highway Dep't v. Andrus, 212 Ga. 737, 738–39, 95 S.E.2d 781, 782–83 (1956).

[284] Meyers v. City of Daytona Beach, 158 Fla. 859, 862, 30 So. 2d 354, 355 (1947); State Highway Dep't v. Andrus, 212 Ga. 737, 739, 95 S.E.2d 781, 783 (1956).

gained from the view, will not be sustained by the appellate courts.[285]

Some courts have taken the position that the view constitutes real or independent evidence to be considered by the jury in arriving at its verdict.[286] However, the jury cannot disregard the other evidence as to value and render a verdict that is outside the range of testimony presented by the witnesses at the trial.[287] Verdicts that are based solely on the jury view and contrary to all the other evidence will not be sustained on appeal.[288] Consequently, as stated by the California court, a ". . . view . . . is merely corroborative of the quantitative oral testimony." [289] Similar rulings have been made in North Dakota.[290] The Minnesota court has used language to the effect that a jury that has viewed the premises is not bound by the testimony given by valuation witnesses, but in none of the cases examined was this rule applied to a situation where the verdict was outside the range of testimony given at the trial.[291]

Few statutes deal with the question of the evidentiary effect of a jury view. Statutes in California and Delaware support the position that a jury view is not evidence itself but is merely for the purpose of providing the jury with a better understanding of the evidence presented at the trial.[292] Under the Pennsylvania statutes, the view is evidentiary.[293]

SUMMARY AND CONCLUSIONS

A great deal of discretion is vested in the trial court with regard to all aspects of jury view, and rarely will an appellate court hold that the trial court has abused its discretion.

Statutory provisions are fairly common with respect to the question of the right to jury view. A jury view is mandatory under the statutes of at least one state and such views are a matter of right in a few other jurisdictions at the request of either party. Under most statutes, which in effect are declaratory of the common law, the right to a jury view rests in the sound discretion of the trial court.

Logically, the right to a jury view should be a matter of judicial discretion after a request has been made by either party, rather than a mandatory requirement. If a view is mandatory, one will have to be ordered regardless of its probative value or prejudicial effect. A mandatory view could place a hardship on one of the parties when the conditions of the premises have changed between the dates of valuation and trial. When views are discretionary, the trial judge can take the changes in condition into account before granting a view.

Most statutes dealing with jury view contain provisions regulating some aspects of the manner of conducting a jury view. Almost all of them specify that the jurors must be conducted to the premises under the supervision of a particular court officer and provide that the property must be shown by some person appointed for that purpose by the court. However, in only a few instances do the statutes specify whether the trial judge or other persons shall accompany the jury on its view. Several statutes prohibit the taking of testimony at the scene.

On the whole, the statutes dealing with the procedure on jury view appear to incorporate adequate safeguards to protect the jury from outside influences during the view. However, they could be more specific in pointing out whether representatives of both parties may accompany the jury on the view and whether the trial judge should accompany the jury. Perhaps also there is need for clarification as to the type of testimony that can be taken during the visit. Probably the testimony should be limited to pointing out certain features of the property that might help the jury to better understand the evidence introduced at the trial. For an example of a statute dealing with these matters, see the Maryland provisions reproduced in the Appendix.

The evidential effect of a jury view differs from state to state in that the courts of some states consider that the view constitutes evidence, whereas courts of other states consider that the sole purpose of the view is to enable the jury to better understand the evidence presented at the trial. Textbook writers appear to favor the position that the view constitutes evidence that may be considered along with other evidence presented at the trial, on the ground that the jury is not likely to be able to comprehend the niceties of a rule holding that a view is not evidence but is conducted merely for the purpose of enabling a better understanding of the evidence.[294] It may also be true that treating a jury view as independent evidence makes it somewhat easier for a court to justify upholding a verdict that does not accept the valuation figures of any particular witness but that nevertheless falls within the high and low figures testified to by the valuation witnesses. However, the crucial test is whether the view, even though denominated independent evidence, will support a verdict that is outside the range of testimony presented at the trial. Almost no court appears to have been willing to go this far, although dicta in various cases would lead one to think otherwise.

In the final analysis, the answer to the policy question of what evidentiary effect to give a jury view turns on the

---

[285] *Id.* *See* 9.6 Acres of Land v. State *ex rel.* McConnell, 49 Del. 64, 65–67, 109 A.2d 396, 397–98 (1957) (dictum). The issue was whether a verdict outside the range of testimony could be sustained when the jury had viewed the property, but the case was decided on other issues.

[286] People v. Al G. Smith Co., 86 Cal. App. 2d 308, 310, 194 P.2d 750, 752 (1948); People *ex rel.* Dep't of Public Works v. McCullough, 100 Cal. App. 2d 101, 105, 223 P.2d 37, 40 (1950); County of San Diego v. Bank of America Nat'l Trust & Saving Ass'n., 135 Cal. App. 2d 143, 149, 286 P.2d 880, 883–84 (1955); Bergeman v. State Roads Comm'n, 218 Md. 137, 142, 146 A.2d 48, 51 (1958); State, by Lord v. Shirk, 253 Minn. 291, 292–93, 91 N.W.2d 437, 438–39 (1958); State, by Lord v. Pearson, 260 Minn. 477, 486, 110 N.W.2d 206, 213 (1961); City of Bismarck v. Casey, 77 N.D. 295, 302, 43 N.W.2d 372, 377 (1950).

[287] People *ex rel.* Dep't of Public Works v. McCullough, 100 Cal. App. 2d 101, 105, 223 P.2d 37, 40 (1950); City of Chicago v. Callendar, 396 Ill. 271, 380, 71 N.E.2d 643, 648 (1947); County of Cook v. Holland, 3 Ill. 2d 36, 48–49, 119 N.E.2d 760, 766–67 (1954); Bergeman v. State Roads Comm'n, 218 Md. 137, 142, 146 A.2d 48, 51 (1958).

[288] *Id.*

[289] People *ex rel.* Dep't of Public Works v. McCullough, 100 Cal. App. 2d 101, 105, 223 P.2d 37, 40 (1950).

[290] City of Bismarck v. Casey, 77 N.D. 295, 302, 43 N.W.2d 372, 377 (1950); Little v. Burleigh County, 82 N.W.2d 603, 607 (N.D. 1957).

[291] State, by Lord v. Shirk, 253 Minn. 291, 292–94, 91 N.W.2d 437, 437–39 (1958); State, by Lord v. Pearson, 260 Minn. 477, 479–81, 486–87, 492–93, 110 N.W.2d 206, 209–10, 213, 216–17 (1961).

[292] CAL. EVIDENCE CODE § 813(b) (West 1966); DEL. CODE ANN. tit. 10, § 6108(d) (1953).

[293] PA. STAT. ANN. tit. 26, § 1–703(1) (Supp. 1967).

[294] 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 129 (2d ed. 1953) [hereinafter cited as ORGEL]; 5 NICHOLS, *supra* note 199, § 18.31(1).

decision of how much freedom to accord members of the jury in exercising their own common sense in arriving at a verdict, or how much to bind them by the opinions of experts. The same kind of question must be answered in determining whether sales prices should be admitted as independent evidence of value or whether they should merely be admitted in support of the opinions of value testified to by the valuation experts.

CHAPTER FOUR

ADMISSIBILITY OF EVIDENCE OF SALES OF SIMILAR PROPERTY

To estimate the value of property for condemnation purposes, appraisers generally use one or more of three different approaches—Market Data, Income, and Cost of Reproduction. This is in turn reflected in the law of evidence. Admissibility issues relating to the Market Data Approach are considered first. These include the problems of admissibility of comparable sales, which are discussed in this chapter. Other problems of admissibility under the Market Data Approach relate to sales of the subject property, offers to buy or sell, and valuations allegedly based on market value but made for noncondemnation purposes. These are discussed in Chapters Five, Six, and Seven, respectively. Admissibility issues pertaining to the Income Approach to valuation are discussed in Chapter Eight, followed by a discussion of evidential issues pertaining to the third approach in Chapter Nine. The remaining chapters of this report take up some miscellaneous evidential issues that have arisen in condemnation trials.

Evidence of sales of similar property is generally the best evidence of market value available in a given case. Recent voluntary sales of the exact parcel being condemned (discussed in the next chapter) may be even better evidence of its market value, but such sales may be nonexistent. (In any event, the question of the bearing of such sale on the market value of the property at the time of condemnation usually is subject to dispute.) For these reasons, one or both parties, in an effort to support the amount that it claims should be awarded the owner as just compensation, will almost invariably offer to prove the selling prices of similar properties in the neighborhood.[295] In the sense that the prices paid for neighboring lands may have some bearing on the present value of the parcel being taken for public use, nearly all courts, regardless of their admission policies, have agreed that such prices are relevant.[296] Variations appear to exist among the jurisdictions as to the purpose for admission of comparable sales and the methods for admitting such evidence at various stages of the trial.[297] The first task in this chapter is, therefore, to set forth and discuss the rules of admissibility adopted by the various states.

Most problems arising in the sample cases with regard to the admission of sales prices of similar properties did not involve their admissibility per se, but instead related to collateral issues. Despite the evidentiary rules applicable to a particular state, certain preliminary qualifications are prerequisite to admitting comparable purchase prices in evidence.[298] The three limitations on the admission of such evidence that most frequently cause problems concern: (1) the degree of similarity between the property that was the subject of the sale and the parcel that is being valued; (2) the proximity between the date of sale and the date of valuation; and (3) the nature of the sale, as determined by the circumstances it was made under.[299] Further complications are posed in the application of the admissibility rules, because the sufficiency of the foundation laid for these qualifying factors is likely to rest within the sound discretion of the trial judge,[300] and an insufficient foundation, such as lack of similarity between the properties, has been held by some jurisdictions to go to the weight of the expert's opinion and not to the admissibility of the comparable sale,[301] depending on the purpose for the admission of such evidence.

RULES OF ADMISSIBILITY

The admissibility rules relating to sales prices of comparable parcels of land are set forth in terms of admission objectives—that is, whether the prices are to be admitted as substantive evidence of value or in support of expert opinions—and the methods by which they are admitted, such as on direct examination or through cross-examination. In distinguishing the reasons for admitting comparable sales on direct testimony a federal court stated: ". . . evidence of the price for which similar property has been sold

[295] *See* 1 ORGEL, *supra* note 294, § 137.
[296] 1 ORGEL, *supra* note 294, §§ 137, 141.
[297] *See generally* 5 NICHOLS, *supra* note 199, §§ 21.3(1)–(3); 1 ORGEL, *supra* note 294, §§ 137, 141–45.
[298] 5 NICHOLS, *supra* note 199, § 21.31; 1 ORGEL, *supra* note 294, § 137.
[299] 1 ORGEL, *supra* note 294, § 137.
[300] 5 NICHOLS, *supra* note 199, § 21.3(1); 1 ORGEL, *supra* note 294, § 137.
[301] *See, e.g.*, County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 74, 153 N.E.2d 844, 848 (1958); Bergeman v. State Roads Comm'n, 218 Md. 137, 145, 146 A.2d 48, 53 (1948); Winepol v. State Roads Comm'n, 220 Md. 227, 231, 151 A.2d 723, 726 (1959); Taylor v. State Roads Comm'n, 224 Md. 92, 94–95, 167 A.2d 127, 128 (1961); Sear v. Kenosha County, 22 Wis. 2d 92, 100, 125 N.W.2d 375, 381 (1963).

in the vicinity may be admissible upon two separate theories and for two distinct purposes. First, such evidence may be admissible as substantive proof of the value of the condemned property, or secondly it may be admissible not as direct evidence of the value of the property under consideration, but in support of, and as background for, the opinion testified to by an expert as to the value of the property taken." [302] Seldom, however, was that distinction made in the sample cases, nor, for that matter, was it deemed important by many. For example, the appellate court in a Maryland case did not consider it vital to the question of admissibility that the available records ". . . do not make it clear as to whether this sale was being offered as primary evidence of the value of the property taken, or to support the witness' testify as to such value, or both, . . ." [303]

Under the majority view, also known as the "Massachusetts rule," the price paid at the voluntary sales of land similar to that taken at or about the time of the taking is admissible on direct examination as independent evidence of the market value of the parcel taken.[304] In most of the sample cases where other prices were offered on direct examination for what appeared to be substantive proof of the value of the condemned property, the courts either held in accordance with the general rule [305] or embraced it by indicating through dicta that the evidence would have been admitted had the sale met the factors qualifying it as a comparable.[306] Pennsylvania, under the guidance of a recently enacted statutory provision, follows the majority view.[307] Once it has been conceded that sales are admissible under that view, the evidence is admissible for all purposes and at all stages of the trial.[308]

Courts in a few states where the sample cases arose were a short time ago adhering to the minority view and excluding sales prices of comparable property offered on direct examination as independent evidence to prove the value of the parcel being taken.[309] On the other hand, nothing in these cases prohibited similar sales prices from constituting the source of witnesses' knowledge as to the value of the property in question.[310] However, under California's strict pre-1957 rule such witnesses could not, even to show the reasons for their expert opinions, testify on direct examination regarding the details and prices of the particular sales and transactions on which they based their testimony.[311] The basic reason given by the courts for excluding evidence of the price paid for similar property from being offered on the examination is, in chief, that such testimony would permit an excursion into collateral matters that would result in a confusion of issues and loss of time.[312] Some of the collateral issues that these courts seek to shut off are, according to Orgel: ". . . (1) the issue of similarity between the land involved in the sale sought to be adduced and the land in controversy; (2) the question whether the sale was sufficiently near to the date of valuation; and (3) whether the sale conforms to the substantive requirements of the market value standard, whether for example, it is a forced sale, or a "wash" sale or a family transaction." [313] The exclusion ". . . is based on a doctrine of auxiliary probative policy rather than on the belief that evidence of sales is irrelevant in determining market value." [314] Or, to put it another way, the minority view is a rule of administrative expediency based on a technical notion of what constitutes proper trial procedure.[315]

The minority view has never taken the position of completely excluding evidence of sales of similar property from the trial.[316] In the states where sample cases arose, courts holding similar sales prices to be inadmissible on direct examination (either as independent evidence of value or in support of expert opinions) usually have indicated that the

---

[302] United States v. Johnson, 285 F.2d 35, 40 (9th Cir. 1960). *See also* United States v. Certain Interests in Property, 186 F. Supp. 167, 168–70 (N.D. Cal. 1960); Bear v. Kenosha County, 22 Wis. 2d 92, 99–100, 125 N.W.2d 375, 380–81 (1963); Hurkman v. State, 24 Wis. 2d 634, 640–43, 130 N.W.2d 244, 247–48 (1964); 5 NICHOLS, *supra* note 199, § 21.3(2).

[303] Hance v. State Roads Comm'n, 221 Md. 164, 173, 156 A.2d 644, 649 (1959).

[304] 5 NICHOLS, *supra* note 199, § 21.3(1); 1 ORGEL, *supra* note 294, § 137.

[305] County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 73–74, 153 N.E.2d 844, 848 (1958); State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 213, 216, 219–20, 177 N.E.2d 655, 658, 660–61 (1961); Redfield v. Iowa State Hwy Comm'n, 251 Iowa 332, 338–42, 99 N.W.2d 413, 416–19 (1959); Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 1356–57, 105 N.W.2d 660, 663–64 (1960); Lustine v. State Roads Comm'n, 217 Md. 274, 280–81, 142 A.2d 566, 569 (1958); *in re* Application of the City of Lincoln, 161 Neb. 680, 685–86, 74 N.W.2d 470, 473 (1956).

[306] State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960); Popwell v. Shelby County, 272 Ala. 287, 292–93, 130 So. 2d 170, 174–75 (1960); State v. McDonald, 88 Ariz. 1, 8, 10–11, 352 P.2d 343, 347–50 (1960); City of Tampa v. Texas Co., 107 So. 2d 216, 227 (Fla. App. 1958); Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134–35 (1957); Fulton County v. Cox, 99 Ga. App. 743, 744–46, 109 S.E.2d 849, 851–52 (1959); Redfield v. Iowa State Highway Comm'n, 252 Iowa 1256, 1261–65, 110 N.W.2d 397, 400–03 (1961); Winepol v. State Roads Comm'n, 220 Md. 227, 231, 151 A.2d 723, 725–26 (1959); Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 358–60, 145 N.E.2d 681, 682–83 (1957); Brush Hill Development, Inc. v. Commonwealth, 338 Mass. 359, 366–67, 155 N.E.2d 170, 175 (1959); Barnes v. State Highway Comm'n, 250 N.C. 378, 394, 109 S.E.2d 219, 231 (1959); May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960).

[307] PA. STAT. ANN. tit. 26, § 1–705(2)(i) (Supp. 1967), in the Appendix of this report. *See* Berkeley v. City of Jeannette, 373 Pa. 376, 96 A.2d 118 (1953), which held that evidence of sales of similar property is not admissible on direct examination and is not evidence of market value; however, such evidence is admissible on cross-examination for the purpose of testing his good faith and credibility, if the witness relied on the sale for his evidence.

[308] 1 ORGEL § 137.

[309] *See* City of Los Angeles v. Cole, 28 Cal. 2d 509, 170 P.2d 928 (1946); Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947); People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953); Lehman v. Iowa State Highway Comm'n 251 Iowa 77, 99 N.W.2d 404 (1959); Rushart v. Dep't of Roads & Irrigation, 142 Neb. 301, 5 N.W.2d 884 (1942); Swanson v. Bd. of Equalization of Filmore County, 142 Neb. 506, 6 N.W.2d 777 (1942). *See also* 5 NICHOLS, *supra* note 199, § 21.3(1); 1 ORGEL, *supra* note 294, §§ 137, 141.

[310] City of Los Angeles v. Cole, 28 Cal. 2d 509, 518, 170 P.2d 928, 933 (1946); People v. La Macchia, 41 Cal. 2d 738, 748, 264 P.2d 15, 22 (1953); Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 86, 99 N.W.2d 404, 409 (1959).

[311] People v. La Macchia, 41 Cal. 2d 738, 744–48, 264 P.2d 15, 20–23 (1953) (dictum).

[312] City of Los Angeles v. Cole, 28 Cal. 2d 509, 522, 170 P.2d 928, 936 (1946) (dissent). *See* People v. La Macchia, 41 Cal. 2d 738, 746–47, 264 P.2d 15, 21 (1953); 1 ORGEL, *supra* note 294, §137.

[313] 1 ORGEL, *supra* note 294, § 137. *See* City of Los Angeles v. Cole, 28 Cal. 2d 509, 522, 170 P.2d 928, 936 (1946) (dissent). Similarly, Nichols states:

> It is argued in opposition to such evidence that it introduces a multitude of collateral issues. As no two pieces of land are ever exactly alike, the jury, instead of devoting its attention to the land in controversy, must compare it with the land price of which is in evidence. It must decide whether the lands were really similar, whether to believe the testimony offered in regard to its price, whether the price was affected by the necessities of the parties, and whether values have changed in the neighborhood since the sale was made. There is a danger of diverting the minds of the jury from the real issue by their consideration of these collateral points, of the waste of unnecessary time by the introduction of them in court, and a possibility of the jury being misled by testimony of the sale of land the resemblance of which to the land in issue is more specious than real [5 NICHOLS, *supra* note 199, § 21.3(1)].

[314] 1 ORGEL, *supra* note 294, § 137.

[315] *Id.*

[316] 1 ORGEL, *supra* note 294, §§ 137, 141; 5 NICHOLS, *supra* note 199, § 21.3(2).

prices paid for comparable properties are admissible on the cross-examination of an expert witness who has testified on direct examination as to value of the parcel in question —for the sole purpose of testing his knowledge of the market value of the land in the vicinity and the weight to be accorded his opinion as to such value.[317] Such evidence must, however, be strictly confined to the purpose it is admitted for and cannot be used as affirmative evidence of value.[318] For example, in an Iowa case, even though it was conceded that the testimony was elicited to test the witness' knowledge and their competence to testify as experts, the introduction on cross-examination of the sales prices of other properties in the vicinity was held inadmissible because the jury was not informed as to the limited purpose for which the evidence was received and might be considered.[319]

Positions regarding the admissibility of comparable sales on the examination in chief were changed in California [320] and Iowa [321] during the period of this study; Nebraska [322] did so in 1943. California's Supreme Court in *County of Los Angeles v. Faus* [323] overruled all previous cases that followed the minority view and said that henceforth, in condemnation proceedings, evidence of the prices paid for similar property in the vicinity, including the price paid by the condemnor, are to be admissible on both direct examination and cross-examination of a witness presenting testimony on the issue of the value of the condemnee's property. [324] The purpose for admission of sales prices on direct examination pursuant to the *Faus* case was confusing, but legislation has since clarified it. Under California law the value of property may be shown only by the opinions of certain witnesses.[325] An additional statute provides specifically that such evidence is not admitted on direct examination as substantive proof of market value, but only in support of the witness' opinion of that value.[326]

On the other hand, when Iowa [327] and Nebraska [328] abandoned their old rule, they adopted the majority view. An Iowa trial court was held to have committed prejudicial error in excluding evidence, in the form of certified copies of deeds and a contract,[329] of the sales prices of comparable properties; this evidence was offered on cross-examination of one of the condemnor's expert valuation witnesses for the purpose of testing his knowledge and credibility.[330] The same case held that evidence of sales of comparable properties is admissible as substantive proof of the value of property under condemnation where it is shown that the conditions are similar.[331] In a recent Nebraska case, where the sole admissibility issue regarding sales prices involved the particular rule to be followed, the trial court's adherence to the minority view was held to be erroneous[332] because of its refusal to permit the condemnor to lay a foundation for the admission of evidence of sales of similar property in the locality and to admit such evidence on direct examination where a proper foundation had been laid. Affirming the majority rule it had adopted in *Langdon v. Loup River Public Power District*,[333] the supreme court said that evidence of particular sales of other land is admissible on direct examination as independent proof on the question of value where a proper and sufficient foundation has been laid to make such testimony indicative of value.[334] A proper foundation must indicate that the prices paid represented the market or going value of the property sold, that the sales were made at or about the time of the taking by the condemnor, and that the land sold was substantially similar in location and quality to the subject property.[335]

DEGREE OF SIMILARITY

Certain requirements have to be observed before comparable sales are admitted in evidence. One such prerequisite to admission is that it must be demonstrated to the satisfaction of the court that the properties involved in those sales are sufficiently similar to the property in litigation to be of use in reflecting the market value of the latter.[336] The

[317] City of Los Angeles v. Cole, 28 Cal. 2d 509, 518, 170 P.2d 928, 933 (1946); People v. La Macchia, 41 Cal. 2d 738, 748, 264 P.2d 15, 22 (1953); Watkins v. Wabash Railroad Co., 137 Iowa 441, 113 N.W. 924 (1907); Maxwell v. Iowa State Highway Comm'n, 223 Iowa 159, 165, 271 N.W. 883, 886 (1937); Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 85–86, 99 N.W.2d 404, 408–09 (1959); Rushart v. Dep't of Roads and Irrigation, 142 Neb. 301, 306–07, 5 N.W.2d 884, 886 (1942); Swanson v. Bd. of Equalization of Filmore County, 142 Neb. 506, 515–16, 6 N.W.2d 777, 782 (1942). *See* 5 NICHOLS § 21.3(2); ORGEL §§ 141, 145.

[318] 5 NICHOLS § 21.3(2); Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 85–88, 99 N.W.2d 404, 408–10 (1959).

[319] Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 85–88, 99 N.W.2d 408–10 (1959).

[320] County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957).

[321] Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 99 N.W.2d 413 (1959).

[322] Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N.W.2d 201 (1943). *See in re* Application of the City of Lincoln, 161 Neb. 680, 74 N.W.2d 470 (1956).

[323] 48 Cal. 2d 672, 312 P.2d 680 (1957).

[324] *Id.* at 676–80, 312 P.2d at 682–85.

[325] CAL. EVIDENCE CODE § 813 (West 1966), in the Appendix of this report.

[326] CAL. EVIDENCE CODE § 815 (West 1966), in the Appendix of this report.

[327] Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413 (1959).

[328] Langdon v. Loup River Public Power District, 142 Neb. 859, 8 N.W.2d 201 (1943).

[329] Relative to the admissibility of the certified copies of the deeds and a contract, Iowa statutes make instruments in writing concerning real estate, where acknowledged or proved and certified as required, admissible evidence, and make an authenticated copy of duly recorded instruments competent evidence where the original was not within control of the party wishing to present it. IOWA CODE §§ 622.36 –.37 (1966).

[330] Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 334, 337, 99 N.W.2d 413, 415–16 (1959). "It has been the rule in this state that testimony of experts as to the sale prices of other similar properties in the vicinity may be received on cross-examination to test the knowledge and competency of such experts, the weight and value of their opinions." However, according to the supreme court, the trial judge should instruct the jury that evidence of the prices paid for other properties in the vicinity offered to test the knowledge and competency of witnesses as to valuation experts should not be considered as substantive proof of the value of the property in litigation. 251 Iowa at 337, 99 N.W.2d at 416.

[331] *Id.* at 334, 337–38, 340–42, 99 N.W.2d at 415, 417–49. The landowner contended the trial court erred in excluding testimony of his witness on direct examination regarding the price paid in a sale he used in forming his opinion of the value of the subject property.

[332] *In re* Application of the City of Lincoln, 161 Neb. 680, 686, 74 N.W.2d 470, 473 (1956). The trial court felt that similar sales could be offered on cross-examination, but must be excluded on direct examination. 161 Neb. at 685, 74 N.W.2d at 473.

[333] 142 Neb. 859, 865–67, 8 N.W.2d 201, 205–06 (1943).

[334] *In re* Application of the City of Lincoln, 161 Neb. 680, 685–86, 74 N.W.2d 470, 473 (1956).

[335] *Id.* at 685, 74 N.W.2d at 473.

[336] *See, e.g.*, State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960); Popwell v. Shelby County, 272 Ala. 287, 293, 130 So. 2d 170, 174–75 (1960); Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134 (1957); County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 74, 153 N.E.2d 844, 848 (1958); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 340–42, 99 N.W.2d 413, 417–19 (1959); State Roads Comm'n v. Wood, 207 Md. 369, 373, 114 A.2d 636, 638 (1955); State Roads Comm'n v. Smith, 224 Md. 537, 549, 168 A.2d 705, 711 (1961); Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 359–60, 145 N.E.2d 681, 682–83 (1957); Berry v. State, 103 N.H. 141, 145, 167 A.2d 437, 440 (1961). See also 5 NICHOLS, *supra* note 199, § 21.31.

party offering evidence of purchase prices of other tracts of land in the area has the burden of proving similarity between the parcel in question and the others.[337] Because no two parcels can be exactly alike, property similarly situated need not conform in every detail to the land subject to condemnation.[338] The generally accepted view relating to similarity was stated by the Illinois court when it said that "similar" does not mean "identical" but means having a resemblance, and properties may be similar even though each possesses various points of difference.[339] Thus, a general or arbitrary rule cannot be laid down regarding the degree of similarity that must exist to make such evidence admissible; it varies with the circumstances of each particular case.[340] Most courts take the position that comparability (that is, whether the properties are sufficiently similar to have some bearing on the value under consideration and to be of any aid to the jury) rests largely within the sound discretion of the trial court, and the discretion exercised by that court will not be disturbed unless abused.[341] Dissimilarities, particularly in those cases where comparable sales prices are offered in support of expert opinion, have been held to affect the weight of testimony rather than its competency.[342]

Even though the appellate courts appeared to take a liberal attitude on the admissibility of evidence of sales of other properties, problems relating to the degree of similarity between the alleged comparable and the subject parcel were raised frequently in the sample cases.[343] In an Illinois case evidence of the sales prices of two neighboring parcels was held to be competent because the supreme court found that ample testimony stressing similarities had been introduced to provide a reasonable basis for comparison between the properties sold and that being condemned.[344] Dissimilarities between the properties, which were disclosed to the jury during the cross-examination of the witnesses and the jurors' actual inspection of the property, affected the weight and value of the testimony and not its competency, according to the court.[345] By contrast the two properties in an Alabama case were not found to be sufficiently similar to permit introduction of the selling price of the alleged comparable as evidence of the condemned property's value.[346] Both properties had been used for gambling purposes and were located about the same distance from Birmingham; however, they were on different highways and the allegedly comparable parcel was divided into lots and was much larger in size, more valuably improved, and better suited for farming purposes than the subject property.[347] The trial judge in a Georgia case was held to have abused his discretion in admitting evidence of sales of other houses in the area when those houses were not in fact similar to the small homes being condemned, which were in very poor condition.[348] A cautious approach appears to have been taken in an Iowa case where the witnesses, who on direct examination had introduced evidence with regard to the amount a neighboring farm had sold for, testified in general terms as to the similarities and dissimilarities in the type of farming operation that existed between the subject property and the property claimed to be comparable.[349] Agreeing that the comparison of the similarities and dissimilarities of the two farms might have been described more fully, the supreme court held that the appellant condemnor was not prejudiced by the receipt of such testimony relating to sales prices ". . . particularly in view of the fact the case will go back for a new trial."[350]

The liberal approach referred to previously is particularly applicable to Maryland, where the court of appeals stated in *Lustine v. State Roads Commission*,[351] and substantially repeated in others,[352] that: "We are aware that there is considerable latitude in the exercise of discretion by the lower court in determining comparable sales. . . . It should be borne in mind, however, that real estate parcels have a degree of uniqueness which make comparability,

[337] State v. Boyd, 271 Ala. 584, 587, 126 So. 2d 225, 228 (1960). Contrary to the condemnor's contention, the trial court in this case had not erred in excluding evidence of the sales price of certain other tracts of land in the area, because, according to the supreme court, the condemnor had failed to meet its burden of proving similarity of the parcels.

[338] Forest Preserve Dist. v. Lehmann Estate, Inc., 388 Ill., 416, 428, 58 N.E.2d 538, 544 (1944); Lustine v. State Roads Comm'n, 217 Md. 274, 281, 142 A.2d 566, 569 (1958); 5 Nichols, *supra* note 199, § 21.31.

[339] Forest Preserve District v. Lehmann Estate, Inc., 388 Ill. 416, 428, 58 N.E.2d 538, 544 (1944); City of Chicago v. Vaccarro, 408 Ill. 587, 601, 97 N.E.2d 766, 773 (1951); County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 74, 153 N.E.2d 844, 848 (1958). *See also* Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 341, 99 N.W.2d 413, 418 (1959); 5 Nichols, *supra* note 199, § 21.31.

[340] City of Chicago v. Vaccarro, 408 Ill. 587, 600–01, 97 N.E.2d 766, 773 (1951); Berry v. State, 103 N.H. 141, 145, 167 A.2d 437, 440 (1961); 5 Nichols, *supra* note 199, § 21.31.

[341] Popwell v. Shelby County, 272 Ala. 287, 293, 103 So. 2d 170, 175 (1960); Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134 (1957); Forest Preserve Dist. v. Lehmann Estate, Inc., 388 Ill. 416, 428–29, 58 N.E.2d 538, 544 (1944); City of Chicago v. Vaccarro, 408 Ill. 587, 601, 97 N.E.2d 766, 733 (1951); County of Cook v. Colonial Oil Corp, 15 Ill. 2d 67, 74, 153 N.E.2d 844, 848 (1958); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 342, 99 N.W.2d 413, 419 (1959); State Roads Comm'n v. Wood, 207 Md. 369, 373–74, 114 A.2d 636, 638 (1955); Lustine v. State Roads Comm'n, 217 Md. 274, 280, 142 A.2d 566, 569 (1958); Bergeman v. State Roads Comm'n, 218 Md. 137, 145, 146 A.2d 48, 53 (1948); Winepol v. State Roads Comm'n, 220 Md. 227, 231, 151 A.2d 723, 726 (1959); State Roads Comm'n v. Smith, 224 Md. 537, 548, 168 A.2d 705, 711 (1961); Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 359, 145 N.E.2d 681, 682 (1957); Berry v. State, 103 N.H. 141, 145, 167 A.2d 437, 440 (1961); 5 Nichols, supra note 199, § 21.31.

[342] County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 153 N.E.2d 844 (1958); Bergeman v. State Roads Comm'n, 218 Md. 137, 146 A.2d 48 (1948); Winepol v. State Roads Comm'n, 220 Md. 227, 151 A.2d 723 (1959); Taylor v. State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961); Bear v. Kenosha County, 22 Wis. 2d 92, 125 N.W.2d 375 (1963).

[343] *See, e.g.*, State v. Boyd, 271 Ala. 584, 126 So. 2d 225 (1960); Shelby County, 272 Ala. 287, 130 So. 2d 170 (1960); Aycock v. Fulton County, 95 Ga. App. 541, 98 S.E.2d 133 (1957); County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 153 N.E.2d 844 (1958); Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 105 N.W.2d 660 (1960); State Roads Comm'n v. Wood, 207 Md. 369, 114 A.2d 636 (1955); Lustine v. State Roads Comm'n, 217 Md. 274, 142 A.2d 566 (1958); Bergeman v. State Roads Comm'n, 218 Md. 137, 146 A.2d 48 (1948); Winepol v. State Roads Comm'n, 220 Md. 227, 151 A.2d 723 (1959); State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961); State Roads Comm'n v. Smith, 224 Md. 537, 168 A.2d 705 (1961); Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 145 N.E.2d 681 (1957); Brush Hill Dev. Inc., v. Commonwealth, 338 Mass. 359, 155 N.E.2d 170 (1959); Berry v. State, 103 N.H. 141, 167 A.2d 437 (1961); Smuda v. Milwaukee County, 3 Wis. 2d 473, 89 N.W.2d 186 (1958).

[344] County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 73–74, 153 N.E.2d 844, 848 (1958).

[345] *Id.* at 74, 153 N.E.2d at 848.

[346] Popwell v. Shelby County, 272 Ala. 287, 292–93, 130 So. 2d 170, 174–75 (1960). The trial court was held to have erred in overruling the landowner's objections to certain evidence relating to comparable sales.

[347] *Id.* at 293, 130 So. 2d at 175.

[348] Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134–35 (1957).

[349] Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 1356–57, 105 N.W.2d 660, 663–64 (1960).

[350] *Id.* at 1357, 105 N.W.2d at 664.

[351] 217 Md. 274, 142 A.2d 566 (1958).

[352] Bergeman v. State Roads Comm'n, 218 Md. 137, 146 A.2d 48 (1948); Winepol v. State Roads Comm'n, 220 Md. 227, 151 A.2d 723 (1959); Taylor v. State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961).

one with the other, in a strict sense, practically impossible. We think it the better policy, where there are any reasonable elements of comparability, to admit testimony as to the sales, and leave the weight of comparison for the consideration of the jury, along with such distinguishing features as may be brought out on cross-examination or otherwise." [353]

A few examples follow of how Maryland's very liberal attitude has been interpreted by their courts in light of the fact situations expressed in the cases:

The *Lustine* case involved the taking of a 10.30-acre tract of land from a 53.36-acre parcel that did not have frontage on a public road and that the owner had leased under an arrangement whereby the lessee was to remove sand and gravel deposits and then grade the property so that it would be suitable for subdivision purposes.[354] An unsuccessful attempt was made at the lower court level by one of the landowner's expert witnesses to establish as comparable properties: one 42-acre parcel located about one-half mile from the subject property and formerly used as a gravel pit but developed for subdivision purposes after the material's removal and before it was sold; and an adjacent 17-acre tract of "raw land" served by a dead-end road and also developed as a subdivision prior to its sale. The court of appeals on review concluded that the trial court's exclusion of testimony regarding the sales prices of those properties on the ground that they were not comparable was, as contended by the landowner, unduly restrictive and so in error.[355]

Prior to the *Lustine* case, the Maryland court had considered whether platted land could be considered comparable to unplatted land that concededly was suitable for platting.[356] The condemnor in the *Wood* case contended that the trial court erred in permitting the landowner's witnesses to introduce evidence of the sales prices of two subdivision lots from nearby tracts of land at a time when the subject property had not yet been platted. As grounds for its claim of error, the condemnor asserted that authorities have generally held that sales of platted lots cannot be used as evidence to determine the value of unplatted lots, even though both parcels are located in the same vicinity.[357] The court of appeals believed this assertion was stating the rule too narrowly. It is universally recognized, said the court, that comparisons with sales of similar lands may be made, and that the adaptability of condemned land to development purposes may be considered. Continuing, the court said that the vice in comparing subdivided land lies in the fact that the comparison is between wholesale and retail price, for the price of platted lots includes the expense of subdividing and promotional and sales costs of moving the individual lots.[358] The court indicated that this vice can be eliminated by laying a proper basis for comparison between the lot sales introduced by the witnesses and the acreage condemned, and, even if that had not been done here, the admission of such evidence in this case was not considered to be an error because of other considerations precluding the condemnor from complaining.[359]

A Maryland case decided after *Lustine* involved the issue of whether a parcel of land in a residential zone at the time of the sale, but rezoned commercial almost immediately afterwards, could be considered sufficiently comparable to the subject property, which was located in a commercial zone, to enable the condemnor's witness to base his estimate of the condemned land's value on such a sale.[360] The court of appeals concluded that an error had not been committed because the rezoning occurred so soon after the sale that the parties to it must have taken the immediate prospect of rezoning into consideration in fixing the sale price. Conceding that it is generally true that property in a residential zone is less valuable than in a commercial zone, which could make them not truly comparable, the court, to bolster its decision, stated that there was precedent in Maryland for holding in some situations that the probability of rezoning within a reasonable time may be taken into account.[361] Even though all concerned with the condemnation proceedings were unaware of the type of zoning applicable to three recently sold neighboring lots, in a later case such lots were similarly held to be comparable with the unzoned condemned parcel of land.[362] On the other hand, the court of appeals held the trial court in the *Winepol* case had not, as claimed by the landowner, abused its discretion in determining that an alleged comparable parcel of land was not sufficiently similar to the property taken by condemnation to admit testimony regarding its sale price.[363] These properties were not comparable because the parcel alleged to be similar was in a shopping district of a much higher grade than where the landowner's store was located, and because the other parcel's frontages on two commercial streets gave it an extraordinary and almost unique value. With these facts, said the court, and even under the liberal approach of the earlier cases as to the general desirability of admitting evidence of nearby sales, to leave its weight to the trier of fact would not compel a finding that the trial court abused its discretion in refusing to admit the evidence of the earlier sale.[364]

As in Maryland, Massachusetts courts follow the rule that much is left to the trial judge's discretion as to whether

[353] Lustine v. State Roads Comm'n, 217 Md. 274, 280–81, 142 A.2d 566, 569 (1958). *See also* Taylor v. State Roads Comm'n, 224 Md. 92, 94–95, 167 A.2d 127, 128 (1961).

[354] Lustine v. State Roads Comm'n, 217 Md. 274, 277, 142 A.2d 566, 567 (1958).

[355] *Id.* at 280, 142 A.2d at 569.

[356] State Roads Comm'n v. Wood, 207 Md. 369, 114 A.2d 636 (1955).

[357] *Id.* at 373, 114 A.2d at 638. The condemnor did concede that in determining the fair market value of the land, consideration may be given to any utility the land is adapted to and is immediately available for, that evidence of sales of comparable land is admissible in condemnation actions, and that a wide discretion rests in the trial court as to what is properly comparable.

[358] *Id.*

[359] *Id.* at 374, 114 A.2d at 638. Here the condemnor had opened the door to the inquiry as to the basis of a distinction between interior and exterior land. There was also no effort made to have the jury fix the value of the land condemned in terms of its retail value as lots, but rather only to arrive at a proper valuation per acre. The witnesses had already testified as to the sales of undeveloped land and so no harm could be done by their statements that subdivided lots sold at the same figure.

[360] Bergeman v. State Roads Comm'n, 218 Md. 137, 144–45, 146 A.2d 48, 52–53 (1948).

[361] *Id.* at 145, 146 A.2d at 53. Also assisting the court of appeals in reaching its decision was the rule that the trial court has wide discretion in determining what sales are reasonably comparable and the weight of the comparison is for the jury's consideration.

[362] Taylor v. State Roads Comm'n, 224 Md. 92, 95–97, 167 A.2d 127, 128–29 (1961).

[363] Winepol v. State Roads Comm'n, 220 Md. 227, 231, 151 A.2d 723, 725–26 (1959).

[364] *Id.*

the similarity between neighboring land and the subject property is sufficient to render competent the testimony regarding the sales prices. However, that discretion of the trial judge is not unlimited, and when shown to be erroneous it will be reversed.[365] In one Massachusetts case the properties alleged to be comparable were located in a residential zone, while part of the condemnee's property was located in a business zone.[366] The supreme judicial court concluded that the trial judge had acted within its discretion in excluding evidence of the sales of properties alleged to be comparable, on the grounds that the different use zones where the properties were located precluded them from being sufficiently similar.[367] However, the appellate court did note that if the trial judge had concluded that despite this difference the dissimilarity between the properties was not such as to confuse or mislead the jury and had admitted the evidence, the court also would have hesitated to disturb the ruling.[368] The parcel alleged to be comparable in the second Massachusetts case was located about four miles from the subject property and, although both properties were being developed for residential purposes, the subdivision plans for the subject property had not been approved for the other property and that property had a somewhat better access to public ways than the condemnee's.[369] Noting that the differences between the two parcels did not seem very great and that substantial similarities appeared between them, the appellate court said that the trial judge, in his discretion and in view of the scarcity of this type of property in the area, might well have admitted the experts' testimony with regard to the sales price. However, in view of the distance between the properties, his exclusion of such evidence was not held by the supreme judicial court to be an abuse of discretion.[370]

PROXIMITY IN TIME

A sale of neighboring land, no matter how similar to the land taken, is not admissible unless the sale was so near in point of time as to furnish a test of present value.[371] The exact limits regarding nearness or remoteness in point of time is difficult, if not impossible, to prescribe by an arbitrary rule but must to a large extent depend on the location and character of the property and the circumstances of the sale.[372] Therefore, as with the question of similarity between the properties, the question of whether the sale was sufficiently near to the date of valuation is left to the discretion of the trial court.[373] The party offering proof of other sales has the burden of showing that such sales were not so remote in time as not to represent the present value of the property.[374] Basically, the courts tend to show the same liberality with regard to the time element as to physical similarity.

Whether sales of comparable parcels were sufficiently proximate in time to the date of the condemned properties' valuation was an issue expressly raised in two Maryland cases.[375] The Maryland court of appeals refused in each case to set a specific time beyond which the sale would be considered too remote for admission; proximity in time and its relationship to the circumstances were thereby permitted to become largely a matter within the trial courts' discretion.[376] The landowner in *Bergeman v. State Roads Commission*[377] claimed that testimony as to a comparable sale made seven years before the trial should have been excluded on the grounds that it was too remote in time. Stating that even if it is assumed, without having to be decided, that sales made more than five years before the date of trial are generally too remote to be reasonably comparable or to have any evidentiary value, the court of appeals concluded that the admission of such testimony in the instant case did not constitute a prejudicial error, because a full explanation of the circumstances of sale was placed before the jury and, under Maryland law, it is up to the jury to give the proper weight to the evidence.[378]

A short time later the Maryland court was faced squarely with the issue of whether a five-year limitation should be imposed on the admissibility of comparable sales.[379] Solely because of the lack of proximity in time, the landowner in this case claimed that the trial court erred in admitting the purchase price given for comparable property when the sale had taken place five years, one and one-half months prior to the institution of the condemnation proceedings.[380] Conceding that under appropriate circumstances the purchase price of a sale made five years before the taking is proper and admissible evidence insofar as proximity in time is concerned, the landowner wanted the court to impose a hard and fast rule providing that five years, under any and all circumstances, is the maximum time limit for

[365] Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 359, 145 N.E.2d 681, 682 (1957).

[366] *Id.* at 358–60, 145 N.E.2d at 681–82.

[367] *Id.* at 359–60, 145 N.E.2d at 682–83. Another reason with regard to one of the sales for supporting the trial judge was that the property was purchased from an estate that had to sell it at that particular time. Such could be considered a compulsory sale.

[368] *Id.* at 359, 145 N.E.2d at 682.

[369] Brush Hill Dev. Inc. v. Commonwealth, 338 Mass. 359, 567, 155 N.E.2d 170, 175 (1959).

[370] *Id.*

[371] State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960); Popwell v. Shelby County, 272 Ala. 287, 292, 130 So. 2d 170, 174 (1960) (dictum); Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134 (1957) (dictum); Fulton County v. Cox, 99 Ga. App. 743, 744–45, 109 S.E.2d 849, 851 (1959) (dictum); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 341, 99 N.W.2d 413, 418 (1959) (dictum); Bergeman v. State Roads Comm'n, 218 Md. 137, 146–47, 146 A.2d 48, 53–54 (1948); Hance v. State Roads Comm'n, 221 Md. 164, 173–76, 156 A.2d 644, 649–50 (1959); Taylor v. State Roads Comm'n, 224 Md. 92, 94–95, 167 A.2d 127, 128 (1961); Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 359, 145 N.E.2d 681, 682 (1957) (dictum); *In re* Application of City of Lincoln, 161 Neb. 680, 685, 74 N.W.2d 470, 473 (1956) (dictum); Barnes v. State Highway Comm'n, 250 N.C. 378, 394, 109 S.E.2d 219, 231 (1959) (dictum); May, State Highway Comm'r v. Dewey, 201 Va. 621, 633, 112 S.E.2d 838, 847–48 (1960); 5 NICHOLS § 21.31 (2).

[372] Fulton County v. Cox, 99 Ga. App. 743, 744–45, 109 S.E.2d 849, 851 (1959) (dictum); Taylor v. State Roads Comm'n, 224 Md. 92, 95, 167 A.2d 127, 128 (1961); 5 NICHOLS § 21.31(2).

[373] Popwell v. Shelby County, 272 Ala. 287, 293, 130 So. 2d 170, 175 (1960) (dictum); Aycock v. Fulton County, 95 Ga. App. 541, 543, 98 S.E.2d 133, 134 (1957) (dictum); Fulton County v. Cox, 99 Ga. App. 743, 745, 109 S.E.2d 849, 852 (1959) (dictum); Taylor v. State Roads Comm'n, 224 Md. 92, 94–95, 167 A.2d 127, 128 (1961); 5 NICHOLS § 21.31(2).

[374] State v. Boyd, 271 Ala. 584, 587, 126 So. 2d 225 (1960).

[375] Bergeman v. State Roads Comm'n, 218 Md. 137, 146–47, 146 A.2d 48, 53–54 (1948); Taylor v. State Roads Comm'n, 224 Md. 92, 94–95, 167 A.2d 127, 128(1961).

[376] *Id.*

[377] 218 Md. 137, 146 A.2d 48 (1958).

[378] Bergeman v. State Roads Comm'n, 218 Md. 137, 146–47, 146 A.2d 48, 53–54 (1948). One judge in a dissenting opinion argued that remoteness in time is a matter of admissibility rather than weight. 218 Md. at 149–50, 146 A.2d at 54–55.

[379] Taylor v. State Roads Comm'n, 224 Md. 92, 167 A.2d 127 (1961).

[380] *Id.* at 94, 167 A.2d at 128.

sales to be admissible.[381] Holding that the trial court did not abuse its discretion in admitting evidence relative to this sale, the court of appeals refused to follow the landowner's suggestion relative to the five-year limitation. More latitude should be allowed, said the court, when the movement of real estate in the neighborhood has been slow and it is impossible to secure evidence of sales in the vicinity really close to the time of taking. As this particular sale was the only one of small-farm acreage testified to by any of the experts, the court felt that it could reasonably be inferred that sales of such property had not been numerous in the locality.[382] With this interpretation the court of appeals approved the broad rule expressed in the *Lustine* case.[383]

A couple of cases dealt with the question whether evidence of sales of similar properties that took place after the date of condemnation rather than before the taking is admissible.[384] The landowner in a Maryland case claimed the trial court erred in excluding evidence of a comparable sale made six weeks after the date of condemnation when the exclusion of such evidence by the trial court was based solely on the ground that the sale was made subsequent to the taking.[385] Agreeing with the landowner's contentions, the court of appeals held that sales taking place at a time subsequent to the condemnation are admissible as comparable sales if the sales prices sought to be introduced in evidence have not been influenced (i.e., either materially enhanced or decreased) by the project or by improvement occasioning the taking of the condemned property and if the other tests of a comparable sale have been met.[386] In noting that this rule represents the great weight of authority, the appellate court stated it saw no reasons why it should not be followed in Maryland, despite the language in an earlier case[387] that tended to indicate that evidence of comparable sales should be limited to those made before the taking.[388] Consequently, evidence of the comparable sale should have been admitted here; however, the court was unable to see how the exclusion of this one sale was prejudicial to the landowner.[389]

Contrast this with the result reached in a Virginia case.[390] Virginia has a rule providing that comparable sales are admissible in evidence only when such sales are made under comparable conditions in point of time and circumstances.[391] Contending they were not comparable sales, the condemnor in *May, State Highway Commissioner v. Dewey*[392] claimed the trial court had erred in permitting the landowner to introduce evidence regarding sales of commercial properties taking place in the vicinity two years after the highway improvement project had been completed and after traffic had materially increased on the improved highway.[393] Agreeing with the condemnor that the sales were not made under conditions that were comparable in time and circumstances, the supreme court held the admission of such evidence constituted a prejudicial error.[394] Sales after the taking and after the project had been completed and conditions had materially changed did not, according to the court, reflect a fair market value of the property when taken.[395] Yet, said the court, the erroneous admission of such evidence in this case probably gave the jurors the impression that the subsequent sales were comparable in value to that of the owner's land at the time of the taking.[396]

TRANSACTIONS WITH CONDEMNORS

Another prerequisite to the admissibility of comparable sales in evidence, and the one that appears to provoke the greatest amount of disagreement among the various jurisdictions, requires that the nature of those similar sales be sufficiently voluntary to be indicative of the condemned property's present market value.[397] Questions of whether sales are sufficiently voluntary to be admitted as comparables usually arise when one of the parties seeks to introduce evidence of the prices paid for neighboring land by persons with the power of condemnation.[398] Transactions with condemning authorities have been said to closely resemble

[381] *Id.* The basis of the landowner's contention is his claim that the court of appeals had previously indicated in dictum its approval of a five-year limitation in Pumphrey v. State Roads Comm'n, 175 Md. 498, 509, 2 A.2d 668, 673 (1938), and Bergeman v. State Roads Comm'n, 218 Md. 137, 146–47, 146 A.2d 48, 52–53 (1948).

[382] *Id.* at 95, 167 A.2d at 128.

[383] Lustine v. State Roads Comm'n, 217 Md. 274, 280–81, 142 A.2d 566, 569 (1958).

[384] Hance v. State Roads Comm'n, 221 Md. 164, 156 A.2d 644 (1959); May, State Highway Comm'r v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960).

[385] Hance v. State Roads Comm'n, 221 Md. 164, 173, 156 A.2d 644, 649 (1959). It was not clear whether the comparable sale was offered as primary evidence of value of the property taken or to support the witness' opinion as to such value or both. No evidence was offered by the landowner to show that the sale was a voluntary one, that the property was comparable to that taken, that it was in the same locality, or that the property involved in the sale had neither benefitted, nor been damaged by, the project occasioning the taking. However, because the only reason for rejecting the evidence was that the sale had been made after the taking, the court of appeals said that it could assume the landowner's witness could properly offer evidence relative to the other prerequisites for admissible comparable sales. 221 Md. at 173–74, 156 A.2d at 649.

[386] *Id.* at 175–76, 156 A.2d at 650.

[387] Mayor & City Council of Baltimore v. Smith & Schwartz Brick Co., 80 Md. 458, 31 A. 423 (1895).

[388] Hance v. State Roads Comm'n, 221 Md. 164, 175, 156 A.2d 644, 650 (1959). *See* 1 ORGEL § 139, which states: "Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemner. They usually admit the latter type of evidence, sometimes qualifying their ruling by stating that the sale adduced must not be too remote in time or that there must be no drastic change in market conditions."

[389] *Id.* at 176, 156 A.2d at 650.

[390] May, State Highway Comm'r v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960).

[391] *Id.* at 633, 112 S.E.2d at 847–48 (dictum). *See also* Seaboard Air Line Ry. v. Chambin, 108 Va. 42, 60 S.E. 727 (1908); Virginia and Elec. Power Co. v. Pickett, 197 Va. 269, 89 S.E.2d 76 (1955).

[392] 201 Va. 621, 112 S.E.2d 838 (1960).

[393] May, State Highway Comm'r v. Dewey, 201 Va. 621, 623, 633, 112 S.E.2d 838, 847 (1960).

[394] *Id.* at 633–34, 112 S.E.2d at 848.

[395] *Id.* at 633, 112 S.E.2d at 848.

[396] *Id.* at 633–34, 112 S.E.2d at 848.

[397] *See, e.g.*, State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960); Popwell v. Shelby County, 272 Ala. 287, 292, 130 So. 2d 170, 174 (1960) (dictum); State v. McDonald, 88 Ariz. 1, 8, 352 P.2d 343, 347–48 (1960); Arkansas State Highway Comm'n v. Kennedy, 234 Ark. 89, 91–92, 350 S.W.2d 526, 528 (1961); People *ex rel.* Dep't of Public Works v. Univ. Hill Farm Foundation, 188 Cal. App. 2d 327, 331–32, 10 Cal. Rptr. 437, 439–40 (1961); City of Tampa v. Texas Co., 107 So. 2d 216, 227 (Fla. App. 1958); Fulton County v. Cox, 99 Ga. App. 743, 745, 109 S.E.2d 849, 852 (1959) (dictum); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 341, 99 N.W.2d 413, 418 (1959) (dictum); *in re* Application of the City of Lincoln, 161 Neb. 680, 685, 74 N.W. 2d 470, 473 (1956) (dictum); Barnes v. State Highway Comm'n, 250 N.C. 378, 394, 109 S.E.2d 219, 231 (1959); May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960); 5 NICHOLS, § 21.3(1).

[398] *See, e.g.*, State v. Boyd, 271 Ala. 584, 126 So. 2d 225 (1960); State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); Arkansas State Highway Comm'n v. Kennedy, 234 Ark. 89, 350 S.W.2d 526 (1961); People *ex rel.* Dep't of Public Works v. Univ. Hill Farm Foundation, 188 Cal. App. 2d 327, 10 Cal. Rptr. 437 (1961); City of Tampa v. Texas Co., 107 So.2d

forced sales, in that neither is voluntary enough to reflect just compensation under the market value concept.[399] Courts following the traditional rule therefore hold that evidence regarding the prices paid for similar parcels of land subject to condemnation by the proposed condemnor, or another potential condemnor, is inadmissible on both direct and cross-examination as bearing either on the value of the property presently being taken or in support of witnesses presenting opinions as to the value of such property.[400]

Courts have reasoned that prices of land sold to persons with condemnation powers are not fair criteria of market value because each sale is in all likelihood something of a compromise. Condemnors might be willing to give more than a parcel is worth, and the owner of the land might be willing to take less than it is worth (that is, less than its market value) and thus compromise rather than be subjected to a lawsuit. Another reason for excluding such testimony is the courts' concern that evidence showing what condemning authorities have paid for other lands in the neighborhood would probably be given too much weight by the jurors in determining the amount to be awarded the landowner as just compensation. Hence, to be admissible as comparables under the traditional rule, sales must have been made in the ordinary course of business.[401] An Alabama case held the party offering proof of other sales must show that those transactions did not involve property subject to condemnation, and his failure to do so results in the exclusion of such evidence.[402]

Even though both states follow the traditional rule, opposite results were reached in an Arkansas case [403] and a North Carolina case [404] relative to the admission on cross-examination of the price a condemning party paid for comparable property. The Highway Commission in the Arkansas case claimed the trial court erred in refusing to strike testimony elicited by it during the cross-examination of one of the landowner's witnesses. He testified that he had checked into the appraisals made by the Highway Department relative to other parcels in the area acquired by the condemnor, and that this information was part of his knowledge that entered into his formulation of the valuation figure he gave for the subject property. Ordinarily, the court said, it would have been a reversible error to permit a party to introduce evidence as to the price of land acquired by a purchaser with condemnation powers, because such prices are apt to be in the nature of a compromise rather than to be indicative of true market value. The trial court's refusal to strike the testimony, however, did not constitute an error in this case, since no prices were given during the cross-examination, the witness was a well-qualified real estate expert who correctly gave detailed testimony as to the values before and after the taking, his estimate of value was the lowest made by any of the landowner's witnesses, and, finally, the traditional rule, said the supreme court, is a prohibition against the introduction of certain testimony and not a prohibition against the knowledge a witness may possess.[405]

In *Barnes v. State Highway Commission*,[406] the North Carolina case, the landowner claimed the trial court erred in not permitting a condemnor's witness to be cross-examined relative to the appraisal he made for the former owners of a 13.2-acre parcel of land previously sold to the condemnor for $300,000. Such questions on cross-examination, said the landowner, were for the purpose of impeaching the witness' testimony rather than of showing the purchase price of the 13.2-acre tract of land.[407] However, an error was not found to have been committed by the trial court in excluding the question on cross-examination.[408] Agreeing that the right of cross-examination is an important one, the supreme court said it must be used for legitimate purposes. An expert witness may be questioned on cross-examination with respect to the sales prices of nearby property to impeach his testimony or test his knowledge of values, but not for the purpose of fixing value.[409] The supreme court based its decision on previous rulings that provided that it is improper to cross-examine as to the prices paid by a condemnor for other tracts for the same project because such prices are likely to be in the nature of a compromise.[410] Other opportunities were available to the landowner to impeach the witness' testimony, but these were not taken advantage of by the landowner. Therefore, it appeared to the supreme court that the landowner was only interested in improperly getting before the jury the fact that the condemnor had paid $300,000 for the particular parcel.[411]

California courts have held evidence of sales to con-

---

216 (Fla. App. 1958); Garden Parks, Inc., v. Fulton County, 88 Ga. App. 97, 76 S.E.2d 31 (1953); State Highway Dep't v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 131 N.E.2d 55 (1955); Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); Templeton v. State Highway Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961); May, State Highway Comm'r v. Dewey, 201 Va. 621, 112 S.E.2d 838 1960).

[399] *See* State v. Boyd, 271 Ala. 584, 586, 126 So. 2d 225, 227 (1960); City of Tampa v. Texas Co., 107 So. 2d 216, 227 (Fla. App. 1958); 5 NICHOLS, *supra* note 199, §§ 21.32, 21.33.

[400] State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960); State v. McDonald, 88 Ariz. 1, 8, 352 P.2d 343, 347 (1960); Arkansas State Highway Comm'n v. Kennedy, 234 Ark. 89, 91–93, 350 S.W.2d 526, 528–29 (1961) (dictum); People *ex rel.* Dep't of Public Works v. Univ. Hill Farm Foundation, 188 Cal. App. 2d 327, 332, 10 Cal. Rptr. 437, 440 (1961) (dictum); City of Tampa v. Texas Co., 107 So. 2d 216, 227 (Fla. App. 1958); Garden Parks, Inc., v. Fulton County, 88 Ga. App. 97, 76 S.E.2d 31, 32 (1953); State Highway Dep't v. Irvin, 100 Ga. App. 624, 625, 112 S.E.2d 216, 217 (1959); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 373, 131 N.E.2d 55, 58–59 (1955); Barnes v. State Highway Comm'n, 250 N.C. 378, 395, 109 S.E.2d 219, 233 (1959); May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960) (dictum); 5 NICHOLS, *supra* note 199, § 21.23.

[401] Arkansas State Highway Comm'n v. Kennedy, 234 Ark. 89, 91–92, 350 S.W.2d 526, 528 (1961) (dictum); Barnes v. State Highway Comm'n, 250 N.C. 378, 395, 109 S.E.2d 219, 233 (1959) (dictum); May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960) (dictum); 5 NICHOLS § 21.33.

[402] State v. Boyd, 271 Ala. 584, 586–87, 126 So. 2d 225, 227–28 (1960).

[403] Arkansas State Highway Comm'n v. Kennedy, 234 Ark. 89, 350 S.W.2d 526 (1961).

[404] Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

[405] Arkansas State Highway Commission v. Kennedy, 234 Ark. 89, 90–93, 350 S.W.2d 526, 527–29 (1961).

[406] 250 N.C. 378, 109 S.E.2d 219 (1959).

[407] Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219, 231 (1959).

[408] *Id.* at 396, 109 S.E.2d at 233.

[409] *Id.* at 394, 109 S.E.2d at 232. This is especially true if the witness used such sales as a basis for his appraisal of the property taken, or if he had actually appraised the property sold.

[410] *Id.* at 395, 109 S.E.2d at 233.

[411] *Id.* at 396, 109 S.E.2d at 233. *See* Templeton v. State Highway Comm'n, 254 N.C. 337, 340–41, 118 S.E.2d 918, 921–22 (1961), which held the trial court erred in refusing to let the condemnor cross-examine the landowner's witnesses for the purpose of testing their knowledge and basis of value. Such witnesses already had testified on direct examination that they were familiar with the subject property and market values of land in the area and had considered the value of other property in the area in evaluating the subject property.

demnors admissible both on direct examination and on the cross-examination of a witness who is presenting testimony on the issue of the value of the condemnee's property. Such sales, however, had to have been sufficiently voluntary in nature to be a reasonable indication of value.[412] In one case the appellate court said that proper foundation was laid for the admission of the evidence because of the landowner's testimony expressing satisfaction with the price paid for his real estate. The weight to be given the sales price is a factual question for the jury to determine.[413] These court decisions have now been changed by a statute providing that the amount paid for land by persons with condemnation powers is inadmissible as evidence and is not a proper basis for an opinion as to the value of property.[414]

A few other courts have indicated a willingness to break with the traditional rule if the party offering the evidence could show that the sale was not in the nature of a compromise, but was voluntary and without compulsion; that is, the transaction was not influenced by any fear of litigation.[415] The Arizona court said that it failed to see why evidence of a sale should be inadmissible simply because the purchaser has power to condemn. Such sales, according to the supreme court, would be admitted subject to the trial court's sound discretion as to its probative value and subject to the laying of a proper foundation for its admission. In the instant case, however, the admission of the sales price was held to be erroneous due to the lack of foundation, in that the party offering such evidence failed to show that the sale was voluntary, that the owner was willing to sell the property but was not compelled to do so, and that the buyer was willing to buy but was under no necessity to buy. A party offering such evidence has the burden of establishing as a preliminary fact that the purchase concerned in the offering of this evidence was made without compulsion, coercion, or compromise.[416] Agreeing with the dictum in the Arizona case, the admission of the price paid by the condemnor for a parcel of land was held to be erroneous by the Virginia Supreme Court, for the same reasons given by Arizona's court.[417]

SUMMARY AND CONCLUSIONS

Courts today generally recognize that evidence of the prices paid for comparable parcels of land in recent voluntary sales is often the best available evidence of the market value of the subject parcel. Such evidence therefore is admitted on direct examination as well as on cross-examination, although at one time some courts limited the admission of such evidence to cross-examination because of the fear that too many collateral issues (e.g., comparability of parcel, voluntariness of sale) would be raised if the evidence were admitted on direct examination.

Another problem that arises, and one to which most courts do not appear to have given adequate attention, is whether the evidence of comparable sales is sought to be used as independent evidence of the market value of the subject parcel, or whether it is sought to be used merely to support the opinion of a valuation witness. The issue is presented most sharply when the jury returns a verdict outside the range of the opinions of value testified to by the appraisal witnesses. A recent Wisconsin case, *Hurkman v. State*,[418] affords a good illustration. In this case the lowest "after" value testified to by a witness was $105,000, whereas the jury found an after value of $85,500. The supreme court said that this finding was permissible because some of the comparable sales introduced in evidence had been introduced as independent evidence of the market value of the subject parcel and not merely in support of the opinion of a witness.[419]

The effect of this "independent evidence—support or opinion evidence" distinction on the jury's freedom to fix its verdict is not the only important consequence of the distinction. It is suggested that counsel might well pay more attention to the purpose for which evidence of comparable sales is being introduced, for if such evidence is being introduced merely in support of the opinion of a qualified witness, there should be less concern with questions of comparability, voluntariness, hearsay, and the like than if such evidence is being introduced as independent evidence to give the jury a free hand to arrive at its own conclusions of value. In general, a qualified valuation witness ought to be permitted to testify as to whatever formed the basis for his opinion, and, if he has relied on unreliable hearsay or on parcels not truly comparable or on sales lacking in voluntariness, let opposing counsel make his attack on cross-examination. Of course, this general statement may need some qualification. A trial judge certainly should be allowed to prohibit unduly repetitious evidence, and conceivably there are witnesses who would rely on evidence so unreliable that it ought not be admitted even to support the witness' opinion. California's recent statutory formulation would permit a witness to testify to only the type of evidence ". . . that reasonably may be relied upon by an expert in forming an opinion as to the value of property and which a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property. . . ." [420] The same statute makes clear, however, that evidence may be admitted to support the opinion of a qualified witness even though it would otherwise be inadmissible—hearsay, for example.

One of the key phrases in this discussion and the conclusions to be reached may be the term "qualified witness." If the expertise of those permitted to testify to the opinions of the value of the subject parcel is low, the

[412] County of Los Angeles v. Faus, 48 Cal. 2d 672, 676–80, 312 P.2d 680, 682–85 (1957); People *ex rel.* Dep't of Public Works v. Univ. Hill Farm Foundation, 188 Cal. App. 2d 327, 331–33, 10 Cal. Rptr. 437, 439–40 (1961).

[413] People *ex rel.* Dep't of Public Works v. Univ. Hill Farm Foundation, 188 Cal. App. 2d 327, 332, 10 Cal. Rptr. 437, 440 (1961).

[414] CAL. EVIDENCE CODE § 822(a) (West 1966) in the Appendix of this report.

[415] State v. McDonald, 88 Ariz. 1, 8, 352 P.2d 343, 347–48 (1960); May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960); 5 NICHOLS § 21.33.

[416] State v. McDonald, 88 Ariz. 1, 8, 352 P.2d 343, 347–48 (1960).

[417] May, State Highway Comm'r v. Dewey, 201 Va. 621, 634, 112 S.E.2d 838, 848 (1960).

[418] 24 Wis. 2d 634, 130 N.W.2d 244 (1964).

[419] *Id.* at 640–42, 130 N.W.2d at 247–48.

[420] CAL. EVIDENCE CODE § 814 (West 1966) in the Appendix of this report.

tinction noted previously between independent evidence and opinion evidence tends to break down. One's conclusions on whether valuation evidence should be limited entirely to the opinions of valuation witnesses would probably depend to a large extent on one's estimation of the qualifications of those permitted to present opinion evidence at condemnation trials. Thus, the Wisconsin court in *Hurkman v. State* commented:

> We take notice from the records of innumerable land condemnation cases that opinions of ostensibly equally qualified experts as to values often vary to a substantial and irreconcilable degree. Considering the opinions of the experts alone, in these cases, can leave the jury with little rational basis for its ultimate findings. In these instances proper evidence of comparable sales [as independent evidence of value] can be of substantial aid to the jury in the performance of its obligation to find the true value.[421]

On the other hand, the California Law Revision Commission, in affirming California's rule limiting valuation evidence to opinion evidence, concluded:

> The value of property has long been regarded as a matter to be established in judicial proceedings by expert opinion. If this rule were changed to permit the court or jury to make a determination of value upon the basis of comparable sales or other basic valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. In addition, the court or jury would be permitted to make a determination of value without the assistance of experts qualified to analyze and interpret the facts established by the testimony and to make an award far above or far below what any expert who testified considers the property is worth—even though the court or jury may know little or nothing of property values and may never have seen the property being condemned or the comparable property mentioned in the testimony. The Commission believes that the net result would be lengthened condemnation proceedings and awards which would often not realize the constitutional objective of just compensation. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified.[422]

As indicated in the discussion of the sample cases, courts generally have maintained flexibility with regard to such issues as the similarity of the comparable parcel and the subject parcel, the proximity in time of the comparable sale to the date of valuation of the subject parcel, and the voluntariness of the sale of the comparable parcel. The general rule, often repeated, is that much must be left to the discretion of the trial court. Only with regard to sales to persons possessing condemnation powers does there appear to have been a departure from this flexibility. The majority of courts do not permit such evidence to be admitted, although a minority will admit the evidence of such sales if a proper foundation showing voluntariness has been laid. The flexibility shown by the minority would seem preferable to the rigid majority rule, particularly in situations where there is a dearth of other good comparables. Courts should also keep in mind the distinction previously noted between comparable sales introduced as independent evidence of value and comparable sales relied on by a witness to support his opinion. Greater flexibility should be permissible to the latter situation.

[421] 24 Wis. 2d at 641–42, 130 N.W.2d at 247–48.

[422] CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*, A-1, at A-6 (1961) [hereinafter cited at 3 CAL. LAW REV. COMM'N].

CHAPTER FIVE

ADMISSIBILITY OF EVIDENCE OF SALES OF THE SUBJECT PROPERTY

When a parcel of land is taken by eminent domain, the price paid by the owner for such land when he acquired it is important evidence in determining its present value.[423] The admissibility of the purchase price per se in evidence did not seem to be an issue in most of the recent highway condemnation cases studied. Rather, almost all of the issues related to the relevance of such evidence to present value under the circumstances of the particular case. Those relevancy issues generally arose with regard to remoteness in time of the sale, changes in physical and economic conditions since the sale, and the nature of the sale itself. Basically, the recent cases illustrate the amount of discretion available to the trial court in determining the admissibility of such evidence.

ADMISSIBILITY

Most of the recent highway condemnation cases studied seemed to agree that the purchase price of the subject property is admissible in condemnation proceedings as evidence of market value, provided that the prior sale was bona fide, voluntary in nature, and not too remote in point of time, and that neither economic nor physical conditions had materially changed since the date of the sale.[424] Even though admissible, such a price was held in one case not to

[423] Parker v. State, 89 Ariz. 124, 126, 359 P.2d 63, 64 (1961) (dictum). *See* 5 NICHOLS, *supra* note 199, § 21.2.

[424] State v. McDonald, 88 Ariz. 1, 5–7, 352 P.2d 343, 346 (1960). Parker v. State, 89 Ariz. 124, 126–27, 359 P.2d 63, 64 (1961); Epstein v. City & County of Denver, 133 Colo. 104, 108, 293 P.2d 308, 310 (1956);

be conclusive or controlling in the determination of market value, but rather to be a factor that the jury might consider, along with all other supporting evidence, in reaching a verdict.[425] Purchase prices [426] in the recent cases were admitted on direct examination when introduced by either the landowner [427] or the condemnor [428] as independent evidence of present market value, or on cross-examination of the landowner to contradict or rebut his contention that the property is now worth a much larger sum.[429]

The admission of purchase price as evidence of market value is not automatic under the previously expressed general rule. To be admitted, purchase price must have a bearing or relationship to the market value at the time of condemnation.[430] If the sale was involuntary or not in good faith or remote in time, or if the physical and economic conditions have greatly changed since such sale, the purchase price would lack probative value with regard to the present market value of the property.[431] The determination of these qualifying factors [432] in relation to whether the price paid would be a useful criterion of present value [433] or would afford an indication of that value at the time of the property's taking [434] is a matter largely within the trial judge's discretion.[435] His decision on the admissibility of such evidence is ordinarily not reversible,[436] unless it constitutes an error of law.[437] Once the sale price has been introduced in evidence, it is subject to explanation by the owner of the circumstances of the sale, and the owner has full opportunity to show why such a sale has a limited bearing on the present value.[438]

Consequently, in those jurisdictions where the purchase price is admissible as independent evidence of market value, the time and circumstances of the sale and the economic and physical changes since that sale become important. The admission of sales prices as evidence is, therefore, dependent on the facts of each particular case and how the trial judge interprets those facts in relation to the qualifying factors. In an Iowa case, a deed dated December 13, 1965, conveying to the condemnee the subject property he purchased in February 1956 and bearing revenue stamps indicating the consideration paid,[439] was held not to be too remote in time to be admitted as independent evidence of value in a condemnation action taking place in November 1957.[440] The price paid for the property in question four years previously was held to be admissible in a Colorado case, even though certain public improvements in the vicinity, which very likely enhanced the value of the property in the area, had been completed since the time of the prior sale. Because all of these projects or improvements, which were thought to have enhanced property values, were in the process of being made at the time of the prior sale, the character of the land actually had not changed in the interim. In addition, it was common knowledge to all the citizens in the city at the time of the previous sale that the public improvements would be completed in the near future.[441]

The purchase prices paid for the properties in question at times four,[442] six,[443] and ten years [444] prior to the date of condemnation were admitted in the Massachusetts cases. Even though real estate values had increased substantially within the period, evidence of the purchase price paid by the landowner four years previously was held to be properly admitted. According to the court, the conditions during that period were doubtlessly within the memories of the

---

Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 343–44, 99 N.W.2d 413, 420 (1959); Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953); Ford v. City of Worcester, 335 Mass. 723, 725, 142 N.E.2d 327, 329 (1957); and Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 123–24 (1958).

[425] Epstein v. City & County of Denver, 133 Colo. 104, 108–09, 293 P.2d 308, 310 (1956). *See* 5 NICHOLS, *supra* note 199, 1, § 21.2. *See also* Little v. Burleigh County, 82 N.W.2d 603, 606–07, 609 (N.D. 1957). A question was not raised in this case as to the admissibility of a 1950 purchase price of $399, or $30 per acre, for 13.38 acres of land, from which a 1.144-acre strip was taken in October 1952 for a highway right-of-way. However, the supreme court, reviewing the case as a trial de novo on the issue of damages because the landowner contended the award of the trial court was inadequate, held that the assessment of the trial court, $200 for the value of the strip taken and $150 as severance damages to the remainder of the 13.38-acre parcel, making a total of $350, was sustained by the evidence. Such evidence included the 1950 purchase price of the whole property and an expert witness of the county who expressed an opinion that the market value was not more than $25 per acre.

[426] *See* Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 343, 99 N.W.2d 413, 420 (1959) (deed was introduced as evidence of the amount of the purchase price); State v. McDonald, 88 Ariz. 1, 6, 352 P.2d 343, 346 (1960) (sales contract was introduced as evidence of the amount of purchase price).

[427] State v. McDonald, 88 Ariz. 1, 6, 352 P.2d 343, 346 (1960). *See* Redfie'd v. Iowa State Highway Comm'n, 251 Iowa 322, 343, 99 N.W.2d 413, 420 (1959). The condemnee offered the deed of conveyance, not as independent evidence of market value, but to be considered by the jury only in connection with and having a bearing upon the value of the opinions of the various witnesses. However, the supreme court held, on appeal, that the purchase price was admissible as independent evidence of market value.

[428] Epstein v. City & County of Denver, 133 Colo. 104, 107, 293 P.2d 308, 309 (1956); Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953).

[429] Ford v. City of Worcester, 335 Mass. 723, 724, 142 N.E.2d 327, 328 (1957).

[430] Parker v. State, 89 Ariz. 124, 126, 359 P.2d 63, 64 (1961); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 344, 99 N.W.2d 413, 420 (1959).

[431] Parker v. State, 89 Ariz. 124, 126–27, 359 P.2d 63, 64 (1961).

[432] Epstein v. City & County of Denver, 133 Colo. 104, 108, 293 P.2d 308, 310 (1956).

[433] Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 124 (1958).

[434] Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953).

[435] Epstein v. City & County of Denver, 133 Colo. 104, 108, 293 P.2d 308, 310 (1956); Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953); Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 124 (1958).

[436] Epstein v. City & County of Denver, 133 Colo. 104, 108, 293 P.2d 308, 310 (1956); Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 124 (1958).

[437] Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 124 (1958).

[438] Ford v. City of Worcester, 335 Mass. 723, 725, 142 N.E.2d 327, 329 (1957); Mintz v. City of Worcester, 337 Mass. 756, 757, 153 N.E.2d 122, 124 (1958).

[439] Redfield v. Iowa State Highway Commission, 251 Iowa 332, 343, 99 N.W.2d 413, 420 (1959). The deed did not directly indicate the purchase price, but it had revenue stamps in the amount of $66 attached and cancelled, indicating a consideration of $60,000. Those revenue stamps on the deed were held by the court to be as reliable an indication of the consideration as if the recited amount of the purchase price was on it. Because revenue stamps are attached to the deed pursuant to federal statute and the violation of it is a crime, they indicate with reasonable certainty the consideration paid.

[440] *Id.* at 343–44, 99 N.W.2d at 420. After introducing the deed in evidence, the condemnee requested the trial judge to instruct the jury that such evidence should not be considered as bearing independently upon the value of the land taken, but should be considered by the jury only in connection with and having a bearing upon the value of the opinions of various witnesses. However, on appeal, the supreme court, in deciding on the issue of the admissibility of prior sales of the subject property for the first time, held that the trial court properly refused the instruction to the jury and admitted the deed as evidence of value.

[441] Epstein v. City & County of Denver, 133 Colo. 104, 107–12, 293 P.2d 308, 309–12 (1956). Another reason for its admission was that the landowner first brought the purchase price to the attention of the trial court through a deposition taken preliminary to the trial; and so he was in no position at the trial to urge error in the admission of the evidence.

[442] Lembo v. Town of Framingham, 330 Mass. 461, 115 N.E.2d 370 (1953).

[443] Mintz v. City of Worcester, 337 Mass. 756, 153 N.E.2d 122 (1958).

[444] Ford v. City of Worcester, 335 Mass. 723, 142 N.E.2d 327 (1957).

jurors, and they could make due allowances for them.[445] Evidence of a sale six years earlier from a corporation to the condemnees owning all the stock in the corporation, was admitted even though the sale was a bookkeeping transaction to secure tax advantages for the condemnees.[446] The issue in the other case did not directly involve the admission of the price paid for the property ten years earlier, but rather the trial court's exclusion of evidence offered by the landowner relative to the circumstances of the prior sale.[447] Error was held to have been committed in excluding evidence of the circumstances of the sale;[448] however, the error was not prejudicial in view of the fact that prices had risen so much between 1943 and 1953 that the 1943 sale price scarcely had any significance insofar as 1953 values were concerned.[449]

In an Arizona case, evidence of the price paid for one of the parcels in question, under a 1954 contract of sale between the former owner and his son, both of whom were the condemnees, was held to be admissible, even though the price specified in the contract included in one lump sum the 200 acres of land with its improvements and the stock of goods, together with the "business and all of the good will thereof."[450] Admitting that injury to a business is not compensable in an eminent domain taking, the admission of such evidence was not an error, according to the court, when the trial judge had properly instructed the jury in the definition of fair market value, and that injury to a business is not property within the meaning of the eminent domain statute. In addition, the court stressed the fact that this sale was the only one that had taken place in the area for many years.[451] Admission of evidence of a prior sale price in a later Arizona case was an error because the conditions and values of the properties in the vicinity had changed so materially in the two-year interval between the date of the prior sale and the taking that the purchase price had no probative value.[452] However, inasmuch as there was ample other evidence relative to the value of the property to sustain the verdict, the error was held not to be reversible.[453]

California's recently enacted Evidence Code contains a provision regulating the admissibility of evidence of sales of the subject property.[454] Under the statute,

> . . . when relevant to the determination of the value of the property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued . . . if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation . . . [However,] where the sale or contract to sell and purchase includes only the property or property interest being taken . . . [the] sale or contract . . . may not be taken into account if it occurs after the filing of the *lis pendens* [in the condemnation action].

Another section of the Evidence Code makes clear that such evidence may be introduced only in support of the opinion testimony of valuation witnesses and not as independent evidence of value.[455]

SUMMARY AND CONCLUSIONS

By holding the purchase price paid by the owner for the property in question to be admissible on direct examination as evidence of market value, recent highway condemnation cases followed the universal rule. Under that rule the purchase price of identical property is admissible, provided the sale was bona fide, voluntary, and recent, and provided that neither economic nor physical conditions have materially changed from the date of the sale. The reason for admitting such prices is that they are important evidence in determining present value. However, the price paid must have probative value with regard to the determination of market value at the time of condemnation. The determination of the evidence's probative value is discretionary with the trial court.

An analysis of the recent cases does not seem to reveal any type of rule with regard to a limit to the time of the sale. Those recent cases appeared to be very lenient with

---

[445] Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953). Error was not committed in admitting in evidence the fact that the property had a $1,000 mortgage on it at the time of the prior purchase. The amount of any mortgage was immaterial, since the jury was to value the property without regard to any encumbrances. Therefore, the admission of this immaterial evidence could not have injuriously affected the rights of the landowner.

[446] Mintz v. City of Worcester, 337 Mass. 756, 756–57, 153 N.E.2d 122, 123–24 (1958). The sale being in evidence, the landowners had full opportunity to rebut the evidence by showing why it had a limited bearing on present value. In addition, the landowner failed to make a motion to strike the evidence.

[447] Ford v. City of Worcester, 335 Mass. 723, 725, 142 N.E.2d 327, 328–29 (1957). The purchase price was brought out on cross-examination, and the landowner attempted to prove on re-direct that the price was reduced because the sellers were about to enter military service and so were anxious to sell.

[448] *Id.* As long as the condemnor had made the 1943 sale relevant under the considerable latitude allowed on cross-examination, it was open to the landowner to show the circumstances of the sale. The fact that the sellers were about to enter military service was a circumstance of the sale, as any pressure on the sellers is relevant even if it does not establish compulsion.

[449] *Id.* Witnesses for the condemnor testified that the divergence between the 1943 price and 1956 values was from 300 to 400 percent.

[450] State v. McDonald, 88 Ariz. 1, 6, 352 P.2d 343, 346 (1960). The State objected to the admission of the contract of sale because the price of the realty, improvements, and going business were lumped together, and, at the time of the sale, separate values were not given for the component parts of the property.

[451] *Id.* at 6–7, 352 P.2d at 346. The supreme court did admit that the contract standing alone with its lump sum price tag would have been prejudicial, but under the circumstances it was not misleading to the jury. One of the circumstances that assisted in clarifying the contract was that the trial court permitted wide latitude in the direct and cross-examination of witnesses to establish the "date of sale" value of the various items of personalty that the jury could use to readily determine the contract price of the realty.

[452] Parker v. State, 89 Ariz. 124, 126–27, 359 P.2d 63, 64 (1961). When the condemnees acquired their properties, there was no highway constructed adjacent to it and no definite plans were in existence to build one. Shortly after the acquisition, the state purchased easement rights from the landowners to construct a highway and in return granted them access rights from their properties to the highway. The easements greatly enhanced the value of the property in relation to what they had originally paid for it. Consequently, the landowners contend that because of the changed conditions by the time of the condemnation action, the cost no longer had any bearing or relationship to the true value of the rights being deprived. The condemnation action arose here because the state needed more land and had to take the access rights previously given.

[453] *Id.* The court also stressed the fact that the case was tried without a jury. Under such circumstances the court assumed the trial court would ignore the incompetent evidence.

[454] CAL. EVIDENCE CODE § 815 (West 1966), in the Appendix of this report.

[455] CAL. EVIDENCE CODE § 813 (West 1966), in the Appendix of this report.

regard to admitting prior sales prices, particularly in view of the physical and economic changes that had taken place between the sale and condemnation dates. Two reasons appear to exist for this leniency: one reason is that the landowner has an opportunity to explain the circumstances of the sale; the other appears to be that the jury can take into consideration common knowledge relative to economic and physical changes.

Much of the discussion in Chapter Four about the distinction between independent evidence of value and evidence introduced merely to support a witness' opinion of value is relevant here.

CHAPTER SIX

ADMISSIBILITY OF EVIDENCE OF OFFERS TO BUY AND SELL

In his monograph, *Real Estate Valuation and Highway Condemnation Awards,* Ratcliff says that offers to sell and offers to buy are useful indicators of value if the offers are bona fide, current, and in such form that acceptance will create a binding contract.[456] This probably explains the persistent efforts to introduce such evidence despite the general disfavor it has met in the courts. In the sample of cases studied, issues relating to the admissibility in evidence of offers to buy and offers to sell pertained to both the property subject to condemnation and comparable lands. Some issues involved the admissibility of offers made by the condemner to purchase either the subject property or similar property. Most of the issues, however, involved the admissibility of offers made by third persons to purchase the subject property. An offer by the owner to sell was only rarely involved.

OFFERS TO BUY OR SELL THE SUBJECT PROPERTY

Offers Made by Third Persons

Under the majority view evidence of unaccepted offers made by third persons to purchase the property in question is inadmissible on direct examination to prove the market value of real property.[457] Reasons given for excluding such offers include their inherent unreliability in establishing market value,[458] the difficulty in establishing their good faith,[459] and their representation at best as the opinion of one rather than of two parties.[460]

Illinois has taken a more liberal view relative to the admissibility in condemnation proceedings of offers to purchase the subject property. In the absence of evidence of actual sales of similar property in the vicinity, recent bona fide offers to purchase the subject property for cash by persons able to buy are admissible under the minority rule as some evidence of the property's market value.[461] The reason for their admission is that offers to purchase under these conditions are some evidence of what the subject property would sell for on the market.[462] However, the minority rule does not include offers to purchase received after the filing of the condemnation petition.[463] Under that rule, an admissible offer must have been made in good faith, and the offeror must have been not only a man of good judgment but one acquainted with the value of real estate in the vicinity and having the financial means to pay for the property. In addition, the offer must be for cash and not for credit or in exchange, and must be made with reference to the market value of the property and not to supply a particular need or fancy.[464] The bona fide character of an offer is a preliminary question to be decided by the trial court [465] and its admission in a particular case is discretionary with that court, whose decision will not be disturbed unless it is manifestly against the weight of evidence.[466] The burden of establishing a sufficient foundation

---

[456] RATCLIFF, *supra* note 191, at 64.

[457] State v. McDonald, 88 Ariz. 1, 9–10, 352 P.2d 343, 348–49 (1960) (dictum); Ruth v. Dep't of Highways, 145 Colo. 546, 549–50, 359 P.2d 1033, 1035 (1961) (dictum); Southwell v. State Highway Dep't, 104 Ga. App. 479, 479–80, 122 S.E.2d 131, 132–33 (1961) (dictum); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 44 (1958) (dictum); L'Etoile v. Director of Public Works, 89 R.I. 394, 402, 153 A.2d 173, 177 (1959) (dictum); 5 NICHOLS, *supra* note 199, § 21.4(1).

[458] Ruth v. Dep't of Highways, 145 Colo. 546, 549, 359 P.2d 1033, 1035 (1961) (dictum). Offers to purchase are speculative on the question of value. *See* 5 NICHOLS, *supra* note 199, § 21.4(1).

[459] State v. McDonald, 88 Ariz. 1, 9, 352 P.2d 343, 348 (1960) (dictum); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 44–45 (1958) (dictum); 5 NICHOLS, *supra* note 199, § 21.4(1).

[460] State v. McDonald, 88 Ariz. 1, 9, 352 P.2d 343, 348 (1960) (dictum); 5 NICHOLS, *supra* note 199, § 21.4(1).

[461] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 356, 360 (1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 44 (1958). *See also* State v. McDonald, 88 Ariz. 1, 10, 352 P.2d 343, 348–49 (1960) (dictum); Ruth v. Dep't of Highways, 145 Colo. 546, 550, 359 P.2d 1033, 1035 (1961) (dictum); L'Etoile v. Director of Public Works, 89 R.I. 394, 402, 153 A.2d 173, 177 (1959) (dictum); 5 NICHOLS, *supra* note 199, § 21.4(1).

[462] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 356, 360 (1952).

[463] Dep't of Public Works and Bldgs. v. Finks, 10 Ill. 2d 15, 19, 139 N.E.2d 267, 269 (1956). The trial court was held to have properly excluded evidence of an offer to purchase the condemned property where the offer was received subsequent to the filing of the condemnation petition. Such offers are inadmissible even under the minority view. *See* 5 NICHOLS, *supra* note 199, § 21.4(1).

[464] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 45 (1958).

[465] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 356, 360 (1952). *See also* City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 45 (1958). Private offers may be multiplied to any extent for the purpose of the cause, and it would be difficult to prove that they were made in bad faith.

[466] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 356, 360 (1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 45 (1958).

by showing that the offer was bona fide, for cash, and made by a person able to comply with its terms, if accepted, is upon the party seeking to have the offer admitted in evidence.[467] In two recent Illinois cases, because the offers to purchase did not comply with the carefully circumscribed conditions necessary under the minority rule, they were held to have been properly excluded by the trial court.[468] In one case evidence was not presented to show that the prospective purchaser could pay cash;[469] in the other the offer was not for cash, as required by the rule, but for partly cash and the balance payable in monthly terms.[470]

Cases in Arizona,[471] Colorado,[472] and Rhode Island [473] dealt with the issue of the admissibility in evidence of offers to purchase the property in question. All three cases followed the majority view by agreeing that evidence of offers to purchase the property in question were inadmissible on direct examination under the facts of the particular cases.[474] However, from an analysis of the reasons for the decision in each case it is difficult to determine what rule those jurisdictions should adopt under other circumstances. Through dicta all three courts acknowledged the existence of a minority rule providing that, under limited circumstances and upon laying the proper foundation, recent bona fide offers to purchase are admissible on direct examination as some evidence of market value.[475]

Testimony was held in a Rhode Island case to be properly excluded as evidence of value when it was given on direct examination by one of the landowners that substantial offers to purchase the property in question were made by responsible persons prior to the taking. Admitting that the exclusion of such offers was in accordance with the prevailing view, the particular reason for the exclusion in this case was that the landowner's testimony regarding such offers made to him would have been at best only hearsay evidence, thereby making them inadmissible. Consequently, the court reached the decision without having to pass on the question of whether such offers would have been admissible under other circumstances.[476] After reviewing both the majority and minority views relative to the admissibility of offers, the Arizona court held that, under the particular circumstances of the case, a witness for the landowner was erroneously permitted to testify that prior to the condemnation action he had offered to purchase one of the properties in question for $75,000, but that the offer had been rejected because the property had already been sold to the landowner's son. Here the particular circumstance warranting the rejection was the witness' testimony on cross-examination to the effect that he did not have the amount of money he had offered the landowner.[477] Such an offer did not meet the requirements set out for the minority view [478] because it was neither a bona fide nor cash offer.[479] The issue in the Colorado case involved the admissibility in evidence of negotiations for the purchase of the property in question. These negotiations had never progressed to the point of a sale or even a firm offer to purchase before they were discontinued on the initiation of the condemnation proceedings. Such evidence was held to be inadmissible on the ground that it was not relevant to establishing the property's value. In view of the preponderance of authority holding that evidence of actual offers to purchase are inadmissible and in view of the scarcity of authority for even the limited admissibility in evidence of offers to purchase, evidence of mere negotiations to purchase would, according to the court, lack probative value.[480]

Offers Made by Condemnor

Offers made by the condemnors to purchase the properties in question prior to the condemnation proceedings were held to be inadmissible by both the Illinois [481] and Rhode Island [482] courts, either as evidence of market value [483] or as an admission by the condemnor of the value of the property.[484] One reason for excluding such evidence is that

---

[467] *Id.*

[468] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 365, 360 (1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438–39, 143 N.E.2d 40, 45 (1958).

[469] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 190–91, 103 N.E.2d 356, 360 (1952). A real estate broker, testifying as a witness for the landowner, gave testimony relative to an offer, which was made by a person from another state and rejected by the landowner, to purchase a part of the land to be taken in the condemnation proceeding. Further testimony showed that the prospective purchaser paid a small amount as earnest money, but the purchaser did not see all of the cash nor did he know whether the offerer was able to pay it. In the absence of evidence showing the qualification or ability of the prospective purchaser to comply with the offer if it had been accepted, the exclusion of the offer was not an abuse of the trial court's discretion.

[470] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 437–39, 143 N.E.2d 40, 44–45 (1958). Under the terms of the offer to purchase, the landowner would receive one-half in cash and the balance in 36 equal monthly installments with interest at the rate of five percent per annum. Such an offer was properly excluded because it was not for cash as required by the rule, but for partly cash and the balance payable in monthly terms.

[471] State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960).

[472] Ruth v. Dep't of Highways, 145 Colo. 546, 359 P.2d 1033 (1961).

[473] L'Etoile v. Director of Public Works, 89 R.I. 394, 153 A.2d 173 (1959).

[474] State v. McDonald, 88 Ariz. 1, 9–10, 352 P.2d 343, 348–49 (1960); Ruth v. Dep't of Highways, 145 Colo. 546, 549–50, 359 P.2d 1033, 1035 (1961); L'Etoile v. Director of Public Works, 89 R.I. 394, 402, 53 A.2d 173, 177 (1959).

[475] *Id. See also* Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.E.2d 356, 360 (1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 44–45 (1958).

[476] L'Etoile v. Director of Public Works, 89 R.I. 394, 402, 153 A.2d 173, 177 (1959). Whether or not such evidence should be taken to have probative value was not an issue before the court. Therefore, the question still exists of whether such offers would have been admitted in evidence if they had been presented by a competent witness.

[477] State v. McDonald, 88 Ariz. 1, 9–10, 352 P.2d 343, 348–49 (1960).

[478] *See* Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 191, 103 N.W.2d 356, 360 (1952); City of Chicago v. Harrison-Halsted Building Corp., 11 Ill. 2d 431, 438, 143 N.E.2d 40, 44–45 (1958). These cases set out the conditions of the minority view.

[479] State v. McDonald, 88 Ariz. 1, 10, 352 P.2d 343, 348 (1960). However, an analysis of the case indicated that an offer by a third person to purchase the property in question might be admissible in Arizona under the carefully circumscribed conditions outlined in the minority view.

[480] Ruth v. Dep't of Highways, 145 Colo. 546, 550, 359 P.2d 1033, 1035 (1961). Negotiations would be inadmissible under either view. If offers are inadmissible, except under certain conditions, surely negotiations would be inadmissible. However, the court failed to decide if it would hold admissible recent bona fide cash offers to purchase.

[481] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 434–35, 143 N.E.2d 40, 42–43 (1958). The landowner claimed that the condemnor's offer to purchase the property prior to the suit is relevant as a type of probative evidence on the question of value. In addition, the landowner claimed, because it came from a party to the suit, it is relevant and admissible on the grounds that it constituted an admission by the condemnor of the property's value. However, the court held that the proffered evidence of the condemnor's offer to purchase was properly excluded.

[482] L'Etoile v. Director of Public Works, 89 R.I. 394, 400, 403–04, 153 A.2d 173, 177–78 (1959). A letter received by the landowner in which the condemnor offered $28,100 for the property about to be taken was held to be properly excluded.

[483] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 434–35, 143 N.W.2d 40, 43 (1958); L'Etoile v. Director of Public Works, 89 R.I. 394, 403–04, 153 A.2d 173, 178 (1959). *See* 5 NICHOLS, *supra* note 199, § 21.4(1).

[484] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 434–35, 143 N.E.2d 40, 43 (1958).

an offer of settlement is made without prejudice.[485] In Illinois another reason is that there, under statute, a condemnor must make an attempt to agree with the owner on compensation before instituting condemnation proceedings.[486] Consequently, an offer to purchase by the taker is mandatory as a condition precedent to filing the petition.[487] At any rate, since its exclusion was not prejudicial to the landowners, the question of whether the lower court in the Rhode Island case erred in excluding the offer to purchase was immaterial. The jury verdict was in excess of the offer; and even if the offer had been admitted, it could have gone only to the weight of testimony given by the condemnor's expert witness.[488]

Offers Made by Owner: Options

None of the cases in the sample reviewed dealt with the admissibility of offers by the owner to sell the subject property, but such evidence is generally held to be inadmissible.[489] One case involved the admissibility of evidence of an option agreement entered into by the United States government and a neighboring landowner. Such an option is, of course, basically an offer to sell at a certain price, usually within a specified time. The court said that options are inadmissible because they involve too many contingencies to be relevant or material in determining the issue of market value of real estate.[490] The option is a mere offer that binds the optionee to nothing and that he may or may not decide to accept within the specified time.[491]

OFFERS TO BUY OR SELL SIMILAR PROPERTIES

Offers Made by Third Persons

Evidence of offers made by third persons to purchase comparable lands is inadmissible on the question of the value of property under consideration for condemnation.[492] One reason for excluding such evidence is that those offers are not a measure of the market value of the similar property.[493] If isolated unaccepted offers to purchase the property in question are inadmissible to prove its value, the Georgia court reasoned that isolated unaccepted offers to purchase comparable properties should accordingly be considered as incompetent evidence of the condemned property's value.[494] Hence, that court refused to extend the rule, which provides that evidence of actual recent sales of similar properties in the vicinity be admitted as a determinant of the value of the condemned property, to include as competent evidence[495] unaccepted offers to purchase similar properties. However, even if the offer had been accepted and the property sold in the Georgia case, the testimony would still have been inadmissible because a proper foundation had not been laid for its admission. Evidence had not been introduced to show the similarities between the two properties or that the transaction was near in point of time to the taking of the condemned property.[496]

Offers Made by Condemnor

Evidence of the amount offered or allowed by the condemnor to other property owners for comparable property is inadmissible and its admission would generally constitute a reversible error.[497] Even though the trial court in *Blount County v. McPherson*[498] erred in admitting the amount offered by the condemnor for neighboring land, the admission was not a reversible error because the witness' testimony in that regard was inconclusive and not responsive.[499]

Offers Made by Owner

Offers made by owners to sell comparable lands are inadmissible as evidence of market value of the property taken by condemnation.[500] One reason for their rejection as a determinant of just compensation is that an offer to sell comparable property is not even considered to be a measure of the market value of that similar property. Such evidence is incompetent to prove the market value of the comparable property because the asking price is only the opinion of one person who is not bound by his statement and too unreliable to be accepted as a correct test of value.[501] Even though the landowner in a Vermont case was erroneously permitted to testify as to the asking price for similar property, the error was held not to be prejudicial or reversible.[502] The offer was so lacking in probative value that the appellate court was ". . . unable to conceive how the jury could have made any use of it at all, to say nothing of an improper use."[503]

---

[485] L'Etoile v. Director of Public Works, 89 R. I. 394, 404, 153 A.2d 173, 178 (1959).

[486] ILL. REV. STAT. ch. 47, § 2 (1965). "Where the right to take private property for public use, . . . the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested . . . ."

[487] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 434, 143 N.E.2d 40, 43 (1958).

[488] L'Etoile v. Director of Public Works, 89 R.I. 394, 404, 153 A.2d 173, 178 (1959). Such weight would have been slight when it is remembered that the offer must have taken into consideration such elements as time and cost of litigation and the amount of interest that must have run from the time of taking.

[489] *See* 5 NICHOLS, *supra* note 199, § 21.4(2). An offer by the owner, made at or about the time of the taking, to sell the land for a lesser price than he now contends it is worth is competent evidence against him.

[490] State v. McDonald, 88 Ariz. 1, 7–8, 352 P.2d 343, 347 (1960).

[491] Hankey v. Employer's Cas. Co., 176 S.W.2d 357, 362 (Tex. Civ. App. 1943). *See* 5 NICHOLS, *supra* note 199, § 21.5 for a discussion of options.

[492] State v. Farabee, 268 Ala. 437, 440, 108 So. 2d 148, 150–51 (1959); Southwell v. State Highway Dep't, 104 Ga. App. 479, 479–80, 122 S.E.2d 131, 132–33 (1961). *See also* State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961) (dictum); 5 NICHOLS, *supra* note 199 § 21.4(3).

[493] State v. Farabee, 268 Ala. 437, 440, 108 So. 2d 148, 150 (1959). *See also* State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961) (dictum).

[494] Southwell v. State Highway Dep't, 104 Ga. App. 479, 479–80, 122 S.E.2d 131, 132–33 (1961). The offer would have no probative value. In addition, under the circumstances of this case, the testimony of the witness was heatsay.

[495] *Id.* at 479, 122 S.E.2d at 132.

[496] *Id.* at 480, 122 S.E.2d at 133.

[497] Blount County v. McPherson, 268 Ala. 133, 136, 105 So. 2d 117, 119 (1958).

[498] 268 Ala. 133, 105 So. 2d 117 (1958).

[499] *Id.* at 136, 105 So. 2d at 120. The error was committed while cross-examining one of the condemnor's witnesses who had appraised both the condemnee's land and that of a neighbor's. He was asked the amount of his appraisal of the neighbor's property.

[500] Penna v. State Highway Bd., 122 Vt. 290, 294, 170 A.2d 630, 633 (1961). *See also* State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961) (dictum); 5 NICHOLS, *supra* note 199 § 21.4(3).

[501] State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 213, 177 N.E.2d 655, 658 (1961) (dictum).

[502] Penna v. State Highway Bd., 122 Vt. 290, 294–95, 170 A.2d 630, 633 (1961).

[503] *Id.* at 294, 170 A.2d at 634.

SUMMARY AND CONCLUSIONS

Offers to buy or sell property made to or by the condemnee or owners of comparable property are generally inadmissible on direct examination as evidence of the market value of the subject property. The same rule is applicable to offers made by or to the condemnor regardless of whether the property in question or comparable property was involved. Under a minority rule, such as in Illinois, recent bona fide offers by third persons to purchase the subject property for cash are admissible as some evidence of market value. Offers to sell may in some instances be used to contradict an owner's present contention that the property is worth more money. The same rules applying to the admissibility of offers are applicable to options.

The case for excluding evidence of offers was well stated by the California Law Revision Commission:

> (b) Offers between the parties to buy or sell the property to be taken or damaged should . . . be excluded from consideration. Pretrial settlement of condemnation cases would be greatly hindered if the parties were not assured that their offers during negotiations are not evidence against them. Such offers should be excluded under the general policy of excluding evidence of an offer to compromise impending litigation.
>
> (c) Offers or options to buy or sell the property to be taken or damaged or any other property by or to third persons should not be considered on the question of value except to the extent that offers by the owner of the property subject to condemnation constitute admissions.
>
> Oral offers are often glibly made and refused in mere passing conversation. Because of the Statute of Frauds such an offer cannot be turned into a binding contract by its acceptance. The offerer risks nothing, therefore, by making such an offer and there is little incentive for him to make a careful appraisal of the property before speaking. Thus, an oral offer will often cast little light upon the question of the value of the property. Another objection to permitting oral offers to be considered is that they are easy to fabricate.
>
> An offer in writing in such form that it could be turned into a binding contract by its acceptance is better evidence of value than an oral offer. But written offers should not be considered because of the range of the collateral inquiry which would have to be made to determine whether they were an accurate indication of market value. Such an offer should not be considered if the offerer desired the property for some personal reasons unrelated to its market value, or if, being an offer to buy or sell at a future time secured by an option, it reflected a speculative estimate rather than present value, or if the offerer lacked the necessary resources to complete the transaction should his offer be accepted, or if it was subject to contingencies. Not only would the range of collateral inquiry that would be necessary to determine the validity of a written offer as a true indication of value be great, but it would frequently be very difficult to make the inquiry because the offerer would not be before the court and subject to cross-examination.
>
> In view of these considerations and the fact that the value of such evidence is slight, the Commission has concluded that offers should be excluded entirely from consideration as basis for determining market value except that an offer to sell which constitutes an admission should be admissible for the reasons that admissions are admissible generally.[504]

In accordance with this policy, the recently enacted California Evidence Code prohibits the use of offering prices as evidence of value, except as admissions against interest and then only in support of the opinion of a qualified witness as to the subject property's value.[505]

Despite the arguments that can be made against permitting offering prices to be used as evidence, the author has some doubts about the desirability of a rule that flatly prohibits admission of such evidence. There may be cases where an offer is about the best available evidence of market value. In such cases, should not the evidence be admissible at least to support the opinion of a valuation witness, particularly if a proper foundation supporting the offer's reliability has been first laid? A rule based on the minority view would seem preferable to a flat prohibition.

[504] 3 CAL. LAW REV. COMM'N, *supra* note 422, A-1, A-7 to A-8.

CHAPTER SEVEN

ADMISSIBILITY OF EVIDENCE OF VALUATIONS MADE FOR NONCONDEMNATION PURPOSES

One of the parties to a condemnation proceeding sometimes will seek to introduce evidence of valuation of the subject property made for noncondemnation purposes, particularly when such valuation is supposed to be made on a market value basis. Valuation made for tax purposes was the most common noncondemnation valuation involved in the recent highway condemnation cases reviewed in this study, but other types of valuations occasionally were involved.

ASSESSED VALUATION FOR TAXATION

Evidence Held Inadmissible

It has been said that the overwhelming weight of authority supports the rule that valuations made for taxation purposes are inadmissible on direct examination as an indication of the condemned property's market value.[506] Several reasons have been given for this rule. The basic one is that tax valuations rarely represent market value and therefore would not be a fair criterion of such value in condemnation proceedings.[507] Valuations for tax purposes are aimed at equalizing the community tax load rather than at ascertaining exactly what the property would sell for on the open market. Moreover, tax assessments are seldom done with the same degree of detail and study that is required in condemnation proceedings. Also, in many instances the time span between the latest tax assessment and the date of taking is too long to be of any useful value in condemnation proceedings. Finally, tax assessments are not subject to any of the restrictions of the hearsay rule, nor are they, being an ex parte statement of the assessor, subject to cross examination.[508]

Only a few cases in the sample of highway condemnation cases reviewed could be said to deal with admissibility of evidence of valuations made for tax purposes, but most of them supported the majority rule discussed earlier.[509] One of them, however, pointed out that a tax assessor may qualify as a valuation witness; he merely is prohibited from testifying as to the value shown on the assessment rolls.[510]

Evidence Held Admissible as an Admission Against Interest

The rule excluding assessed valuations as evidence has been relaxed in those states that permit the landowner or his agents to participate in assessing the property for tax purposes. Alabama has held that where a landowner testifies as to the value of the land to be taken, the tax assessment sheets prepared by him or his agent are admissible on cross-examination, not for the purpose of showing the value of the land but as an admission against interest and to test his credibility, judgment of value, and memory.[511] The purpose for offering the tax assessment sheets in evidence must be made clear at the time of their introduction.[512] When the subject property is owned by more than one person or by a corporation, the identity of the person participating in fixing the assessed value could become an important point.

One of the issues in a Maryland case involved the admissibility of evidence relating to the corporate condemnee's effort prior to the initiation of the condemnation proceedings to have the amount of its tax assessment reduced. Because the probative value of the proffered evidence was so slight, its exclusion by the lower court was held not to be an error.[513] Another reason given for affirming the lower court's ruling was that the assessment pertained to the tract as a whole, and there was nothing in the record to indicate what value, if any,[514] was placed by the condemnee on the tract directly involved in the condemnation proceeding.[515] This case seems to decide the issue only on the facts presented; consequently, one does not know how the court would react to such evidence under other situations. The evidential issues raised in the two Alabama cases[516] differ from those raised in this case. In those two cases, the issue involved the introduction of tax assessments that the landowner participated in preparing, while in the Maryland case the problem related to the admissibility of attempts by the landowner to obtain a reduction in the amount of its tax assessment.

Evidence Held Admissible as Evidence of Value

A Vermont case has indicated that appraisals made of the property for tax purposes are admissible as evidence of value in direct examination in eminent domain proceedings.[517] The issue in *Colson v. State Highway Board*[518] arose, however, because the trial court refused to permit the condemnor to cross-examine the landowner relative to

[506] CAL. EVIDENCE CODE § 822(b) (West 1966), in the Appendix of this report.

[507] 3 CAL. LAW REV. COMM'N, *supra* note 422, A-48; 5 NICHOLS, *supra* note 199, § 22.1.

[508] City of Chicago v. Harrison-Halstead Bldg. Corp., 11 Ill. 2d 431, 439, 143 N.E.2d 40, 45 (1957); 3 CAL. LAW REV. COMM'N, *supra* note 422, A-48–A-49; 5 NICHOLS, *supra* note 199, § 22.1.

[509] 3 CAL. LAW REV. COMM'N, *supra* note 422, A-48–A-49; 5 NICHOLS, *supra* note 199, § 22.1.

[510] Roundtree Farm Co. v. Morgan County, 249 Ala. 472, 475, 31 So. 2d 346, 349 (1947); Etowah County v. Clubview Heights Co., 267 Ala. 355, 357, 102 A.2d 9, 10–11 (1958); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 439, 143 N.E.2d 40, 45 (1957). The Illinois case held it was not an error to exclude from the jury the valuation of the condemned property made by the tax assessor for the purpose of taxation. Here the landowner offered the assessor as a witness for the purpose of proving on direct examination the assessed value of the property as shown on the assessment roles. Notice that the objection was to the statement of value as shown on the assessment rolls and not to the assessor as a witness.

[511] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 439, 143 N.E.2d 40, 45 (1957).

[512] Roundtree Farm Co. v. Morgan County, 249 Ala. 472, 475, 31 So.2d 346, 349 (1947); Etowah County v. Clubview Heights Co., 267 Ala. 355, 357, 102 So. 2d 9, 10–11 (1958) (dictum). Tax assessment sheets prepared by the landowner or his agent are inadmissible on direct examination to prove the value of the property. *See* 5 NICHOLS, *supra* note 199, § 21.1.

[513] Etowah County v. Clubview Heights Co., 267 Ala. 355, 357, 102 A.2d 9, 11 (1958). Upheld was the trial court's refusal to permit the introduction of a tax assessment sheet prepared by the president of the condemnee corporation, or under his supervision, when offered by the condemnor during the cross-examination of the president. The reason is that it was not entirely clear for just what purpose the tax assessment sheet was offered in evidence.

[514] Congressional School of Aeronautics, Inc., v. State Roads Comm'n 218 Md. 236, 254, 146 A.2d 558, 568 (1958). The reasons for offering the evidence were not given. That is, was it offered as evidence of value or as an admission against interest?

[515] *Id.* The opinion does not clarify what the court means by the value placed on the tract by the condemnee. Does that refer to the value placed on the property by the owner during tax assessment? Or, does it refer to a value placed on the land by the owner during an appeal of tax assessments?

[516] *Id.* One of the reasons for holding this evidence inadmissible was that the assessment pertained to the whole tract and not to just the tract taken. The tract of land taken was zoned as residential, while the remainder was zoned either commercial or light industrial. That strip taken was zoned residential to preserve it for future highway widening. In valuing the property, the State's witnesses made a distinction between the land values dependent on the land use zone, while such a distinction was not made by the landowner's witnesses. Possibly the condemnee desired to illustrate, through introducing evidence of the landowner's attempt to obtain a reduction in the amount of property tax assessment, that the landowner also felt there was distinction between land values in the various zoned areas.

[517] Roundtree Farm Co. v. Morgan County, 249 Ala. 472, 31 So. 2d 346 (1947); Etowah County v. Clubview Heights Co., 267 Ala. 355, 102 A.2d 9 (1958).

[518] Colson v. State Highway Bd., 122 Vt. 392, 397, 173 A.2d 849, 852 (1961) (dictum). Vermont has held in previous cases that when the value of the property is a material issue, the grand list (assessment roll) being a public document, is pertinent to this issue of value. *See* Ripley v. Spaulding, 116 Vt. 531, 532, 80 A.2d 375–76 (1951); Viens v. Lancke, 120 Vt. 443, 446, 144 A.2d 711, 713 (1958). *See also* 5 NICHOLS, *supra* note 199, § 22.1.

[519] 122 Vt. 392, 173 A.2d 849 (1961).

an appeal from the lister's (assessor's) tax appraisal of the subject property that he had pending. Presumably, the purpose of the condemnor's attempt to cross-examine was to show that the landowner considered the tax appraisal of the land in question to be in excess of its fair market value. While the landowner was still a witness, evidence of the grand list (assessment roll) pertaining to the premises for the year 1959 was introduced on his own behalf. For that reason the restriction placed by the trial court on the condemnor's cross-examination of the landowner was held on appeal to be an error.[519] The landowner, as an adverse party, was subject to cross-examination by the state under the rules applicable to such trial procedure.[520] However, because the valuation placed on the property by the witnesses and the amount of the verdict were each substantially less than the full value of such property computed from the grand list, the error was held to be harmless.[521]

Statutory Provisions

By California's statute, assessed values for taxation purposes are inadmissible as evidence in condemnation proceedings and are not to be considered in such proceedings as a proper basis for an opinion as to the value of property.[522] This statute follows the majority rule. Actually, California followed the majority rule in theory prior to the enactment of that statute; tax assessments had always been inadmissible on direct examination as original evidence of market value. However, those assessment values could be brought out while cross-examining experts who had testified as to market value, for the purpose of testing the value of such witnesses' opinions.[523] The same procedure was used for appraisals made for probate proceedings.[524] With this type of procedure, the policies of the majority rule were probably not effectuated in practice, because such a procedure was probably no more than a roundabout way of introducing testimony.[525] However, with the adoption of legislation providing that tax assessments shall not serve as a basis for an opinion as to the value of the property,[526] the majority rule can now be followed in practice.

On the other hand, both Arkansas [527] and Massachusetts [528] have adopted legislation permitting assessed values for tax purposes to be admitted as evidence. Under the Massachusetts statute evidence of the assessed value of a parcel may be introduced as bearing on its fair market value, provided the assessment pertains to the parcel taken or damaged and the assessments for all three years immediately preceding the taking or injury are introduced in evidence. The appellate court refused in *Wenton v. Commonwealth* [529] to extend the admission of assessed value to comparable parcels. Its reasoning was that the use of the assessed value as evidence of the subject property's value is solely dependent on the statute. Therefore, the court would permit evidence of such assessments only to the extent provided for in the statute.[530]

Arkansas' statute provides that courts and juries in valuing land taken by the state in condemnation for highway rights-of-way shall take into consideration the fact that land in Arkansas is required to be assessed at 50 percent of its true value. One of the recent highway cases held that under this statute evidence of assessed valuation of the land in question is admissible to assist in ascertaining market value. However, evidence admitted under the statute is not the controlling factor in arriving at the value of the condemned property. Assessed valuation is to be considered by the jury only with all the other evidence used in ascertaining the value of the land to be taken.[531]

However, in *Union County v. Richardson* [532] prejudicial error was held not to have been committed by the lower court's refusal to permit the condemnor to cross-examine the landowner relative to the amount of tax assessment on the land in question.[533] The reasons given for affirming the trial court's decision were: (a) the condemnor's own witness, the tax assessor, testified that the assessed valuation of the land in the particular county had practically no relationship to actual value; (b) the trial court instructed the jury that the law requires land to be assessed at 50 percent of its true value, a fact that should be considered along with other evidence in fixing the amount of damages; (c) after the trial court allowed proof of value through the assessor's testimony, the condemnor never sought to recall the landowner for further cross-examination; and (d) it was never shown that the landowner knew the amount of the assessment.[534]

OTHER VALUATIONS

A California case held that an appraisal of the condemnee's property made for a prior probate proceeding was inadmissible on direct examination.[535] However, the court

---

[519] *Id.* at 397, 173 A.2d at 853. The introduction of the grand list on direct examination of the landowner as evidence of market value was not objected to by the condemnor.

[520] *Id.* at 397-98, 173 A.2d at 853. Even though the landowner is a competent witness to testify as to the value of his own land, the landowner here was not questioned as to the value of his property. Such testimony was not necessary here as a prerequisite to the cross-examination of him because of the grand list's admission. *See* VT. STAT. ANN. tit. 12, § 1641a (Supp 1967) (relating to cross-examination of witnesses); VT. STAT. ANN. tit. 12, § 1604 (1959) (relating to testimony of owner relative to the value of his own property).

[521] *Id.* at 398, 173 A.2d at 853.

[522] CAL. EVIDENCE CODE § 822(c) (West 1966), in the Appendix of this report. However, the statute does not prohibit the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

[523] Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 310, 92 P. 849, 852 (1907). *See* 3 CAL. LAW REV. COMM'N *supra* note 422, A-48 to A-49.

[524] Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 311, 92 P. 849, 852 (1907); City of Los Angeles v. Deacon, 119 Cal. App. 491, 493-94, 7 P.2d 378, 378-79 (1932); City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 778, 304 P.2d 803, 813 (1956).

[525] *See* 3 CAL. LAW REV. COMM'N *supra* note 422, A-48, A-50.

[526] CAL. EVIDENCE CODE § 822(c) (West 1966), in the Appendix of this report.

[527] ARK. STAT. ANN. § 76-521 (Repl. 1957), in the Appendix of this report.

[528] MASS. ANN. LAWS ch. 79, § 35 (1964), in the Appendix of this report.

[529] 335 Mass. 78, 138 N.E.2d 609 (1956).

[530] *Id.* at 81, 138 N.E.2d at 611. The trial court had improperly admitted the testimony of a landowner's witness relative to a comparable parcel's tax assessment as evidence of such property's value.

[531] Omohundro v. Saline County, 226 Ark. 253, 255, 289 S.W.2d 185, 186 (1956). In Arkansas State Highway Comm'n v. Snowden, 233 Ark. 565, 345 S.W.2d 917 (1961), the court stated that the amount the landowner assessed the land for indicates to some degree its actual value and so it is proper to consider it in ascertaining market value.

[532] 225 Ark. 997, 287 S.W.2d 1 (1956).

[533] *Id.* at 1000-02, 287 S.W.2d at 3-4. After the trial court's refusal to permit the cross-examination, the condemnor was permitted to call the tax assessor, who testified relative to the tax assessment on the property in question. On cross-examination the assessor stated that there was not a criterion for valuing property in the county, that the assessment is the value put on the property by the owners themselves, and that there is very little relationship between the market value and the assessed value in some instances.

[534] *Id.* at 1002, 287 S.W.2d at 4.

did indicate that such evidence may be admitted at the trial court's discretion during the cross-examination of an expert witness who has testified on direct examination as to the property's value; such an admission is for the purpose of testing the value of the witness' opinion. The scope of cross-examination being discretionary with the trial judge, he may, however, determine that, under the circumstances of the particular case, the time when the appraisal was made is so remote that any lack of knowledge concerning it is irrelevant.[536]

In an Illinois case, a consolidated balance sheet of the corporate landowner was held to have been erroneously admitted as an admission against interest. The balance sheet had been prepared by the corporate landowner for submission to the Securities and Exchange Commission in connection with a proposed merger between the condemnee and two other corporations, and it was used in the trial to show that the value of the property submitted to the Commission by the landowner varied from the values fixed by its witnesses at the present condemnation action. The basis for the inadmissibility of the balance sheet was that it was not relevant to the issue of fair cash market value, and the admission of the evidence was also held to be of such a prejudicial nature as to warrant a reversal.[537]

The reason for holding, in this particular case, that the balance sheet was not relevant to the issue of fair cash market value was based on the nature and method of preparing the balance sheet. It was based in part on an appraisal made more than 17 years prior to the date of the sheet, or 18 years prior to the date of filing the petition in this condemnation action. Value of the property acquired prior to March 1, 1937, was based on an appraisal made at that time, and property subsequently acquired was valued at cost less depreciation or depletion; this resulted in a balance sheet that combined appraisal and book value. Because the balance sheet was based partly on book value it reflected neither the inflationary trend between 1937 and 1954 nor the increase in the corporation's value by virtue of its location and more favorable zoning restrictions. Consequently, the balance sheet did not indicate fair cash market value, nor did it purport to do so; in fact, it was shown on the face of the balance sheet that it did not purport to represent fair cash market value.[538]

SUMMARY AND CONCLUSIONS

As a general rule assessments made for noncondemnation purposes are inadmissible as evidence of the property's value in a condemnation proceeding. The basic reason that has been given is that such an appraisal, which has been made for another purpose, is not competent evidence of the property's value in a condemnation proceeding. Another reason is that the introduction of such evidence would violate the hearsay rule.[539] In some states that permit landowners to participate in fixing the assessed value of their property, such evidence may be introduced on the cross-examination of the landowner as an admission against interest and to test his credibility, judgment of value, and memory, but not for the purpose of showing market value.[540] A few states have adopted statutes permitting the introduction of assessed value as an element to be considered by the jury in ascertaining just compensation.[541] In those jurisdictions the assessed values must be in strict conformance with the statutory provision.

If noncondemnation appraisals have been made by competent analysts, with the same definition of value as employed in the condemnation case and following valid and accepted methods, according to Ratcliff there is no reason for excluding the evidence.[542] This would be particularly true if the evidence is used only in support of an expert witness' opinion of value, rather than as independent evidence of value, so that the hearsay objection is eliminated or at least minimized. However, the rub seems to be that the appraisals, and particularly those made for tax purposes, seldom are made with the necessary care and under approved appraisal methods. The general reluctance of courts to accept evidence of tax valuations therefore seems well advised. But since the care with which such appraisals are made may vary from state to state, it does not seem desirable to suggest a universally applicable rule. The best policy would seem to be for the courts or legislature of each state to determine the relevance and reliability of such evidence in the particular state and to formulate the evidentiary rules for that state accordingly.

---

[536] City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 778, 304 P.2d 803, 813 (1956).

[539] *Id.* (dictum).

[537] Cook County v. Vulcan Materials Co., 16 Ill. 2d 385, 389, 390, 393, 158 N.E.2d 12, 14–16 (1959). Whether an erroneous admission of evidence is prejudicial depends upon the use made of the testimony or exhibits and its probable effect on the jury's verdict. The reason for holding that a prejudicial error was committed in the instant case was that the condemnor's arguments and its extensive cross-examination of the landowner's witnesses about the balance sheet tended to convey to the jury that either the balance sheet or the landowner's witnesses' valuations were false.

[538] *Id.* at 389, 392, 158 N.E.2d at 14–16.

[539] 3 CAL. LAW REV. COMM'N, *supra* note 422, A-48 to A-49; 5 NICHOLS, *supra* note 199, § 22.1.

[540] 5 NICHOLS, *supra* note 199, § 22.1.

[541] *See* 5 NICHOLS, *supra* note 199, § 22.1(1) for a discussion of the various statutory provisions.

[542] *See* RATCLIFF, *supra* note 191, at 65.

CHAPTER EIGHT

ADMISSIBILITY OF EVIDENCE OF INCOME

A leading text writer in the field of eminent domain wrote some years ago that the admission and treatment of income as evidence of value is "perhaps the most puzzling aspect of the law of evidence in the entire realm of judicial valuation." [543] The sample of cases studied here seems to bear out that statement.

It is true that one of the generally accepted three approaches to appraising real property today is to capitalize a potential stream of income at a certain rate.[544] Therefore, it would seem that the issues might have been limited largely to such questions as: (1) whether the particular property was one for which the Income Approach to valuation could properly be used; (2) whether the proper capitalization rate was used; or (3) whether the potential income stream capitalized by the valuation witness was reasonable. Instead, the cases seem to deal to a large degree with such issues as whether particular leases are admissible or whether past or current rentals may be introduced in evidence. Apparently, in many cases evidence of the income potential of a property was sought to be used as some sort of direct evidence the jury might use to draw its own inferences as to value, rather than to support the opinion of an expert. It is not surprising, therefore, that litigation as to the use of this type of evidence should have arisen with some frequency. The problem is complicated by the distinction that courts generally have attempted to draw between rental income and business profits. Further complications arise because sometimes the evidence of income or loss of income is sought for some purpose not directly related to proof of the fair market value of the property in question. Thus, there are cases wherein evidence of income allegedly was introduced or sought to be introduced merely to show that the property was suitable for a particular use, and other cases wherein evidence of loss of income was sought to be introduced to show loss of profits, for which compensation was claimed, as a consequential damage.

EVIDENCE OF INCOME AS PROOF OF MARKET VALUE

Actual Versus Potential Income

Theoretically, it is what income the property will produce in the future, not what it has produced in the past, that has a bearing on its market value. But, as one court said, the income that the property is currently producing or has produced in the past bears on the question of what it will produce in the future. Therefore, through a process of deduction, existing rental income is relevant to the property's market value.[545] Some problems arise, however, with regard to the use of rents actually obtained in the past.

One such problem is illustrated by a couple of Iowa cases holding that the capitalization of net rents may not be used as the sole factor in determining market value.[546] As was pointed out in one, the landowner can, by spending an inadequate amount for repairs and upkeep, show a high net rental income, which when capitalized will yield a market value that is excessive.[547] There the supreme court stated: "It is possible, of course, by cannibalizing a property by taking all possible rental income out and putting nothing back, to make it pay a highly disproportionate income for a time." [548]

Evidence of rental income must cover a period reasonably close to the time of the taking to be admissible.[549] Due to pressures from the condemnor and knowledge that condemnation proceedings were imminent, the subject property in a Maryland case had been vacant for two years before the date of taking. Under these circumstances it was held that the rentals received for the last two years the property was occupied were admissible in evidence. The reason for such an admission was that owners of condemned property may show the contribution made to market value by the uses for which the property is available at the time of taking. Except for the knowledge relative to the construction of the highway in this case, the subject property would have been available for rent.[550]

The possibility of fraud or collusion is a problem sometimes raised with regard to the admissibility of leases (contract rent). Thus, it has been said that, to be admissible, leases must have been negotiated and executed in good faith prior to the commencement of the condemnation proceedings. Such leases may not have been entered into as a result of collusion between the landlord and tenant for the purpose of increasing the award.[551] A 25-year lease entered into only 26 days before the condemnation proceeding and 20 days prior to the Highway Commission's resolution determining that public interest and necessity required the taking of the particular parcel, was held to have been executed in good faith.[552] An Illinois case involved a long-term lease with an oil company that had been negotiated and executed by the landowner a short time prior to filing the petition in condemnation. Such a lease was held to be admissible because evidence had been introduced showing

[543] 1 ORGEL, *supra* note 294, at 646.

[544] For a discussion see RATCLIFF, *supra* note 191, at 25–26, 29–32.

[545] Winepol v. State Roads Comm'n, 220 Md. 227, 230, 151 A.2d 723, 725 (1959).

[546] Kaperonis v. Iowa State Highway Comm'n, 251 Iowa 39, 41–42, 99 N.W.2d 284, 286 (1959); Kaperonis v. Iowa State Highway Comm'n, 251 Iowa 415, 416–17, 100 N.W.2d 901, 903 (1960).

[547] Kaperonis v. State Highway Comm'n, 251 Iowa 415, 416–17, 100 N.W.2d 901, 903 (1960).

[548] *Id.* at 417, 100 N.W.2d at 903.

[549] Winepol v. State Roads Comm'n, 220 Md. 227, 229–31, 151 A.2d 723, 724–25 (1959). Rental income to be admissible must relate to the time of taking.

[550] *Id.* at 229–30, 151 A.2d at 724–25.

[551] People *ex rel.* Dep't of Public Works v. Dunn, 46 Cal. 2d 639, 642, 297 P.2d 964, 966 (1956); Dep't of Public Works and Bldgs. v. Kirkendall, 415 Ill. 214, 216, 223, 112 N.E.2d 611, 615 (1953).

[552] People *ex rel.* Dep't of Public Works v. Dunn, 46 Cal. 2d 639, 642, 297 P.2d 964, 966 (1956). Here the condemnor claimed the lease was entered into for the purpose of increasing the amount of the award.

that the property in question was considered, purchased, leased, cleared, and planned for a gas station, truck stop, and restaurant—all in good faith prior to the commencement of the proceeding.[553]

In a Georgia case, evidence of the agreed rental income was held to be admissible on direct examination as the basis of a witness' opinion of value,[554] even though an agreement had not been reached on all terms of the lease. However, testimony showed that the amount of the rental had been settled and such agreed rental was the fair rental value of the property. The court used the admissibility of unaccepted offers to purchase and sell as its foundation to admit the evidence in this case. Testimony relating to offers is not admissible, said the court, as direct evidence of market value. However, where a nonexpert testifies as to the facts he bases his opinion of market value on, then such opinion evidence is admissible, even though he bases his opinion partly on offers.[555]

Testimony on potential rents is perhaps more restricted than testimony on actual or contract rents. Thus, the Massachusetts court held in one case that potential rental value of an existing structure subject to condemnation is admissible in evidence when such testimony is given by an expert witness qualified to express an opinion relative to the potential rental value of the property. However, a landowner, by virtue of his ownership alone, is not qualified to express such an opinion.[556]

Income From Comparable Lands

Evidence of rental income from comparable properties was held to be inadmissible to prove property value in a Massachusetts case.[557] A distinction was made between the competency of evidence relating to actual sales of similar property and the rental values of such properties. The supreme judicial court felt the rental value of similar property, as distinguished from evidence of recent actual sales of comparable property, was not sufficiently relevant to warrant the extension of the field of controversy and the fact-finding that the admission of such evidence would entail.[558]

The Rental Income-Businss Income Distinction

The general rule was stated by one court as follows:

> It is settled that evidence of profits derived from a business conducted on the land is too speculative, uncertain and remote to be considered as a basis for ascertaining market value. . . . On the other hand, it is the general rule that income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property. . . . [559]

Another reason given for rejecting such evidence is that the owner is entitled only to the value of the property taken and to damages to the remainder, if any. Therefore, damages cannot be allowed for injuries to the business.[560]

Despite the apparent clarity of the rule, the distinction between rents and profits has not always been easy to draw. Issues arise regarding the distinguishing of business income from rental income and the admissibility of leases, particularly where the rental income is based on a percentage of profits or gross sales. Rental income received under a lease was excluded in an Arkansas case because the landowner was the operator of the leased service station during a substantial part of the lease period, and the income therefore was said to be part of the profits.[561] In another case evidence of the actual rents received under a lease was admitted as tending to prove the value of the property taken even though the amount of the rent was based on a percentage of gross sales; however, testimony relating to this percentage figure was held to be inadmissible.[562] The term "income stream" used to describe the rental received under a three-year sand and gravel mining lease caused confusion between rents and profits in a Maryland case.[563] Erroneously believing that the term referred to business profits, the trial court was held to have improperly refused to permit one of the landowner's witnesses to testify that in arriving at a value for the land in question he considered the "income stream" of $1,500 per acre under the lease. In holding that the income was actually rent, the appellate court, however, conceded that the choice of words, if taken out of context, unfortunately did indicate business profits.[564]

California's new Evidence Code makes clear that

> A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portions of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at his opinion as to the reasonable net rental value attributable to the property.[565]

In addition to the statutory exception just noted and,

---

[553] Dep't of Public Works and Bldgs. v. Kirkendall, 415 Ill. 214, 216–17, 223, 112 N.E.2d 611, 612, 615 (1953).

[554] Sutton v. State Highway Dep't, 103 Ga. App. 29, 32–33 118 S.E.2d 285, 287 (1961).

[555] *Id.*

[556] Lembo v. Town of Framingham, 330 Mass. 461, 462–63, 115 N.E.2d 370, 371 (1953). The issue on appeal in this case was whether the trial judge erred in excluding the landowner's testimony relating to the potential rental value of the whole building taken. At the time of the taking only a portion of the building was rented, while the landowner operated a grocery store in the remaining portion. The supreme judicial court, stating that ordinarily rental value of real estate may be received in evidence as affording some indication of fair market value, concluded that the exclusion of the landowner's testimony was not prejudicial error. The landowner was not shown to have had any experience in hiring or letting stores, so the trial judge was not required to find him qualified to express an opinion as to the rental value of the building. Ownership alone did not require the judge to admit his opinion as to its rental value, even if in his discretion he might have admitted it. In addition, experts for the landowner were permitted to testify as to potential rental value.

[557] Wenton v. Commonwealth, 335 Mass. 78, 82–83, 138 N.E.2d 609, 612–13 (1956). The trial court rejected testimony of a landowner's witness that she owned a neighboring parcel of land and that she had leased it to an oil company for a certain amount of rent.

[558] *Id.* However, the fact that the owner of neighboring land had obtained a permit for the sale of gasoline and leased the land to an oil company was admissible within the trial judge's discretion to show the possible use of the condemnee's land, for example, as a basis for the propositions that the area was a good one for gasoline stations or that it might be more difficult to get another license, or to set up a competitive station.

[559] People *ex rel.* Dep't of Public Works v. Dunn, 46 Cal. 2d 639, 641, 297 P.2d 964, 966 (1956).

[560] Ryan v. Davis, State Highway Comm'r, 201 Va. 79, 82–83, 109 S.E.2d 409, 413 (1959). *See also* State Roads Comm'n v. Novosel, 203 Md. 619, 623, 102 A.2d 563, 565 (1954).

[561] Hot Springs County v. Bowman, 229 Ark. 790, 793, 318 S.W.2d 603, 604–05 (1958).

[562] May, State Highway Comm'r v. Dewey, 201 Va. 621, 630, 112 S.E.2d 838, 846–47 (1960).

[563] Lustine v. State Roads Comm'n, 217 Md. 274, 277, 280, 142 A.2d 566, 567–68 (1958).

[564] *Id.* at 279–80, 142 A.2d at 568. The appellate court added that even if this "income stream" had been business profits, it still would have been admissible as a factor to be considered in making a valuation of the property. As an exception to the rule relating to the admission of business profits in evidence, income in the form of profits derived from mining is admissible.

[565] CAL. EVIDENCE CODE § 817 (West 1966), in the Appendix of this report.

even without statutory provision, the willingness of some courts to admit evidence of rents based on gross sales, other courts have recognized another exception to the general rule that evidence of business income, as distinguished from rental income, may not be introduced as evidence of market value. It has been said that profits or losses arising from a business conducted on the land taken may be admitted as evidence of market value if such profits or losses are attributable to the intrinsic nature of the property,[566] or if the property is designed for or applied to such special use that its market value cannot be ascertained in any other manner.[567] Some courts consider that profits from the use of land devoted to agricultural purposes are in exception to the rule that profits may not be admitted as evidence of market value.[568]

EVIDENCE OF INCOME AS ILLUSTRATION OF SUITABILITY FOR USE

The rental income-business income distinction has been blurred somewhat by the cases that permit the introduction of evidence of business income to show the suitability of the land for a particular use. Testimony relating to the number of gallons of gasoline sold and to the annual volume of business conducted by the landowners on the condemned premises was held to be admissible in an Indiana case to show that the property appropriated was suitable for business purposes.[569] In a Virginia case, indications were made that, to show how the property was being used,[570] evidence was admissible showing there was a going business on the land before the taking and the type of business. According to a Maryland case, consideration may be given to its productive capacity in determining the value of the land; the productivity of a parcel of land has an important bearing on its value. Prospective purchasers would consider whether or not the business conducted on the premises has proved to be profitable, and this would be a measure of the desirability of the business' location. Consequently, an error was not committed in permitting the landowner's expert witness to take into account in valuing the land the profitable nature of the business conducted on it. To do this, a witness may inquire into the question of business profits, but he is not permitted to give the figures in testimony. The exact weight to be accorded this evidence is for the jury to determine.[571]

In *Shelby County v. Baker*,[572] a landowner's witness was permitted to introduce evidence to the effect that the profits of a similarly situated business had been reduced 40 percent by the construction of a similar highway. The purpose of such evidence was not to prove the loss of speculative profit, but merely to show that the new highway would be a detriment rather than, as the condemnor contended, an enhancement to the value of the property.[573] Part of a parking lot in a shopping center leased by a supermarket was taken in a Minnesota case.[574] Evidence showing that the gross sales of the leased supermarket had been steadily increasing was held to be admissible, even though no attempt was made to show whether the increase resulted in greater or lesser net income to the lessee. The purpose of admitting the evidence was to show that the lease was becoming more valuable as the district developed and the market potential increased. These factors would have a bearing on the value of the lease.[575]

EVIDENCE OF LOSS OF INCOME AS AN ITEM OF CONSEQUENTIAL DAMAGE

In many instances the dirt, dust, noise, machinery, temporary obstruction of accesses, and traffic detours during the period of construction cause temporary financial losses to businesses adjoining the highway improvement area. However, those recent highway condemnation cases where the issue was raised held that evidence of temporary business losses sustained by the landowner in the course of construction of the highway project was inadmissible.[576] One of the reasons for excluding such evidence was that in the absence of a statute making it compensable, damages arising from temporary losses of business during the construction period are not compensable.[577] Another reason was that the measure of damages to the remainder land in cases of partial taking is the difference between the fair market value of the premises immediately prior to the taking and the fair market value of the premises immediately after the taking.[578]

A somewhat different issue relative to the admissibility of temporary business losses was involved in an Illinois case.[579] There, the court said, where only a portion of a

---

[566] Ryan v. Davis, State Highway Comm'r, 201 Va. 79, 82, 109 S.E.2d 409, 413 (1959) (dictum).

[567] Dep't of Public Works and Bldgs. v. Lambert, 411 Ill. 183, 194, 103 N.E.2d 356, 362 (1952) (dictum).

[568] Arkansas State Highway Comm'n v. Addy, 229 Ark. 768, 769–70, 318 S.W.2d 595, 595 (1958) (dictum); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 1006–07, 90 N.W.2d 161, 169 (1958) (dictum).

[569] State v. Stabb, 226 Ind. 319, 321, 79 N.E.2d 392, 394–95 (1948).

[570] Ryan v. Davis, State Highway Comm'r, 201 Va. 79, 82, 109 S.E.2d 409, 413 (1959) (dictum).

[571] State Roads Comm'n v. Novosel, 203 Md. 619, 624, 102 A.2d 563, 565 (1954).

[572] 269 Ala. 111, 110 So. 2d 896 (1959). Here, a part of the condemnee's land, which was suitable before the institution of the proceedings for service station purposes, was being condemned for the construction of a four-lane highway.

[573] *Id.* at 125, 110 So. 2d 909–10. It was not an error to permit the landowner's witness, the owner of a service station on a four-lane highway in another area, to testify that his volume of sales had decreased by 40% after the construction of such a highway. In addition, the condemnor failed to make proper objections to the introduction of such evidence.

[574] State, by Lord v. La Barre, 255 Minn. 309, 96 N.W.2d 642 (1959).

[575] *Id.* at 316–17, 96 N.W.2d at 647.

[576] Dep't of Public Works and Bldgs. v. Maddox, 11 Ill. 2d 489, 493–94, 173 N.E.2d 448, 450 (1961). The landowner contended that they were entitled to have the jury consider alleged loss of business during the construction in determining consequential damages. They offered to prove that the machinery and dust caused by the construction forced them to close their restaurant and decreased the business of the filling station. However, the evidence was held to be properly excluded.

Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 1007, 90 N.W.2d 161, 169 (1958). Traffic detours and the uncompleted side strips along the curbs prevented the landowner from operating his cafe during the period of construction in that case. The appellate court held the jury was properly instructed to the effect that in making allowances to the landowner it should not consider loss of revenue from that cause.

Ryan v. Davis, State Highway Comm'r, 201 Va. 79, 83, 109 S.E.2d 409, 413 (1959). Here the condemnees complained about one of the jury instructions and that evidence relating to damages the restaurant business sustained while the highway was being constructed was excluded. The instruction, which told the jury, ". . . to disregard any evidence of annoyance, inconvenience, or loss of business caused by dirt, noise, or temporary obstruction of access caused by the actual carrying on of the construction work," was held on appeal to be proper.

[577] Dep't of Public Works and Bldgs. v. Maddox, 11 Ill. 2d 489, 493–94, 173 N.E.2d 448, 450 (1961).

[578] *Id.* at 493, 173 N.E.2d at 450; Ryan v. Davis, State Highway Comm'r, 201 Va. 79, 83, 109 S.E.2d 409, 413 (1959).

[579] City of Chicago v. Callender, 396 Ill. 371, 71 N.E.2d 643 (1947).

building is taken, the jury in assessing damages should either consider the remaining part of the building to be worthless and allow the whole value of the building, or consider what could be done with the remaining portion of the building and the cost of putting it in condition for use. Evidence of business losses or profits during reconstruction, as an element of the cost of rehabilitating the remaining property to minimize severance damages, was held to be admissible to assist the jury in deciding whether the property may be rehabilitated in order to salvage a part of the value of the property not taken.[580]

Of course, evidence of the loss of business profits is admissible in those states where statutes specifically make such losses compensable or where the courts construe the statutes to provide for such compensation. Thus, the Indiana court at one time construed general language in an Indiana statute[581] to mean that loss of profits was compensable and that testimony of the annual volume of business conducted by the landowner on the condemned premises and the damages suffered by reason of loss of their business profits was admissible.[582] A later decision reversed this interpretation of the Indiana statute.[583]

SUMMARY AND CONCLUSIONS

Confusion abounds in the law relating to admissibility of evidence of income from the property being condemned. This appears to be due at least in part to the variety of purposes for offering such evidence. In some cases the evidence is introduced to support the opinion of a valuation witness as to the property's market value based on capitalization in the Income Approach to valuation. In other cases, however, the objective in introducing or seeking to introduce the evidence appears to be to use it as direct evidence from which the jury may draw its own inferences of value. In still other cases the evidence is sought to be used for some purpose not as directly related to proof of market value—for example, to show the suitability of the property for a particular use. And in a few cases the landowner has sought to introduce the evidence to prove loss of income as an item of consequential damage for which he is claiming compensation.

Legislative action may be necessary to clarify the law in this area. Illustrations of possible clarifications are afforded by the new California Evidence Code. In the first place, this law makes clear that the value of property may be shown only by opinion evidence.[584] As noted previously in Chapter Four, plausible arguments can be made both for and against a rule that permits such market data as comparable sales to be introduced as independent evidence of the subject property's market value. There would seem to be much less reason, however, for permitting evidence of income to be introduced as independent evidence of the subject property's value. Although it may be questioned whether many valuation witnesses are qualified to use the Income Approach to valuation or whether this approach should be used at all, surely the average juror is not qualified to draw inferences of market value from evidence of income. A rule that would bar such evidence except when used to support an expert's opinion therefore would seem a desirable policy and at the same time would eliminate many of the evidential issues that have been raised in the cases. Of course, the suggested rule should not bar use of evidence of a lease of or of income from the subject property to show that the property is adapted to a particular use if that becomes an issue in a case, but care ought to be taken not to let this become a means of circumventing the rule excluding evidence of income as independent evidence of market value.

Even if a legislature decides to allow evidence of income to be used only in support of the opinion of a qualified valuation witness, there still remain problems as to when and under what circumstances a valuation witness may testify as to his use of income information in arriving at his opinion. Here, again, the California legislation illustrates possible clarifications:

1. The California statutes make clear that the capitalization (income) approach may be used only when "relevant to the determination of the value" of the property involved in the condemnation proceeding.[585] If appraisers and judges would accept Ratcliff's conclusion[586] there would be few occasions for using the Income Approach because it seldom has any bearing on the most probable selling price of the property.

2. Assuming, however, that this is a situation where the Income Approach is relevant, the California statutes make some further clarifications. They make clear that it is "reasonable net rental value" attributable to the land and existing improvements thereon that is to be capitalized, not the rent reserved in a lease nor the profits attributable to a business conducted on the property.[587] However, the witness may take into account the rents reserved in the lease in arriving at his estimate of "reasonable net rental value," and this is true even if the reserved rent is fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.[588] Furthermore, he may take into account in arriving at his estimate of "reasonable net rental value," the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.[589]

This does not necessarily suggest that the California rules are perfect in every respect. For example, if buyers and sellers are accustomed to using a "gross income multiplier" in arriving at the selling price of certain types of properties,[590] rather than "reasonable net rental value,"

---

[580] *Id.* at 379, 71 N.E.2d at 648.
[581] IND. ANN. STAT. § 3-1706 (Burns 1968 Repl.).
[582] State v. Stabb, 226 Ind. 319, 323-25, 79 N.E.2d 392, 394-95 (1948).
[583] Elson v. City of Indianapolis, 246 Ind. 337, 204 N.E.2d 857, 862 (1965).
[584] CAL. EVIDENCE CODE § 813 (West 1966), in the Appendix of this report.
[585] CAL. EVIDENCE CODE § 819 (West 1966), in the Appendix of this report.
[586] RATCLIFF, *supra* note 191, at 29-31.
[587] CAL. EVIDENCE CODE § 819 (West 1966), in the Appendix of this report.
[588] CAL. EVIDENCE CODE § 817 (West 1966), in the Appendix of this report.
[589] CAL. EVIDENCE CODE § 818 (West 1966), in the Appendix of this report.
[590] *See* RATCLIFF, *supra* note 191, at 30.

then that is what the valuation witnesses also should be looking for. Nevertheless, the California statutes represent a commendable attempt at clarifying a difficult area of evidentiary law in condemnation proceedings.

CHAPTER NINE

ADMISSIBILITY OF EVIDENCE OF COST OF REPRODUCTION

A third commonly used method of appraising real property is the Cost Approach.[591] In brief, the cost of reproducing the existing improvements on the land, less depreciation, is added to the value of the land appraised as if it were vacant. This total is supposed to represent the value of the land with the existing structures on it.

Evidential issues pertaining to the Cost Approach arose in several of the highway condemnation cases examined. The terms "replacement," "reconstruction" and "reproduction" seemed to be used interchangeably by the courts, so no attempt is made to draw any distinctions among them in the ensuing discussion.

ORIGINAL COST OF IMPROVEMENTS

The evidential issue occasionally involved the admissibility of evidence relating to the owner's original cost and cost of repairs rather than to the cost of reproduction less depreciation. Such evidence was held to be inadmissible.[592] In eminent domain proceedings, the measure of damages is the fair market value of the property at the time of taking; according to the Rhode Island court, evidence of original cost of improvements and costs of maintenance and repair is immaterial and irrelevant to the value of the property at the time of condemnation.[593] Basically, as stated by the Arkansas court, the amount expended by the landowner in making improvements on his property is not the test of value.[594] A landowner may, however, testify as to the nature and extent of the improvements made to the property so long as he does not testify as to their cost.[595]

In those instances where there is not a readily ascertainable market value for the property in its particular use, such as an airport, the evidence of the original cost of the property and the amount spent improving it are admissible under an exception to the general rule.[596] Such evidence is not admitted as a substitute for market value, but as an aid to the jury to assist it in determining the market value.[597] The reasoning behind the exception is that the fair market value should be based on the highest and most valuable use to which the property could be reasonably devoted at the time of condemnation or in the reasonable future. Consequently, where there is no readily ascertainable market value for the property at its highest and best use, a substitute method must be found to determine just compensation.[598]

COST OF REPRODUCTION

The recent highway condemnation cases under study appeared to differ as to the admissibility of evidence relating to reproduction cost less depreciation. Some jurisdictions appear to have taken the position that reproduction or replacement costs are admissible only in the absence of other evidence of market value in the case.[599] Vermont has indicated that the admissibility of such testimony under those conditions is additionally predicated upon the fact that the building whose reconstruction costs are offered in evidence has been injured or destroyed by the taking of the land it was located on.[600] Consequently, the admissibility of such evidence in those jurisdictions is dependent on the particular facts in each case. Courts have justified admit-

[591] For a discussion of Cost Approach, see RATCLIFF, *supra* note 191, at 25–29.

[592] L'Etoile v. Director of Public Works 89 R.I. 394, 397, 401, 153 A.2d 173, 175, 177 (1959). *See* Arkansas State Highway Comm'n v. Richards, 229 Ark. 783, 785, 318 S.W.2d 605, 606 (1958) (dictum).

[593] L'Etoile v. Director of Public Works, 89 R.I. 394, 401, 153 A.2d 173, 177 (1959).

[594] Arkansas State Highway Comm'n v. Richards, 229 Ark. 783, 785, 318 S.W.2d 605, 606 (1958).

[595] L'Etoile v. Director of Public Works, 89 R.I. 394, 397, 153 A.2d 173, 175 (1959).

[596] Arkansas State Highway Comm'n v. Richards, 229 Ark. 783, 785, 318 S.W.2d 605, 606 (1958). *See* L'Etoile v. Director of Public Works, 89 R.I. 394, 397, 401, 153 A.2d 173, 175, 177 (1959) (dictum). The Rhode Island court does recognize the existence of the exception to the general rule. In that case the landowner had purchased the property 30 years prior to the taking and had spent a substantial amount of money making repairs and converting the building into an apartment house. However, the landowner was precluded from testifying as to the original cost and the amount spent for improvements under the exception to the general rule because of the fact that evidence relating to comparable sales had already been introduced. *See* Hall v. City of Providence, 45 R.I. 167, 168–69 (1923), where the court admitted the costs of improvements under an exception because of the lack of comparable sales.

[597] Arkansas State Highway Comm'n v. Richards, 229 Ark. 783, 785, 318 S.W.2d 605, 606 (1958).

[598] *Id.* at 784–87, 318 S.W.2d at 605–07. Here the landowner purchased the 65-acre tract in question and spent substantial amounts of money improving it as an airport. The lands were being used as an airport at the time of condemnation and such use was the most valuable purpose for the lands. In order to establish that the most valuable use the land could be devoted to was an airport, the landowner attempted to show the amount of money he had invested in the land and other improvements. Such evidence was held to be admissible on the grounds that the land did not have a market value for this use.

[599] Ragland v. Bibb County, 262 Ala. 108, 111–12, 77 So. 2d 360, 362 (1955); Assembly of God Church of Pawtucket v. Vallone, 89 R.I. 1, 10–12, 150 A.2d 11, 15, 16 (1959); Rome v. State Highway Bd., 121 Vt. 253, 255–56, 154 A.2d 604, 606 (1959); Stringer v. Bd. of County Comm'rs of Big Horn County, 347 P.2d 197, 202 (Wyo. 1959).

[600] Rome v. State Highway Bd., 121 Vt. 253, 256, 154 A.2d 604, 606 (1959).

ting reproduction or replacement costs as evidence of market value under these circumstances because it is the only method available for determining just compensation.[601]

An error was held not to have been committed in excluding evidence relating to reconstruction or replacement costs in the Alabama,[602] Vermont,[603] and Wyoming [604] cases because other evidence of market value was present. Also, in the Vermont case, the house in question was not taken, injured, or destroyed by the condemnor.[605] Additional reasons for excluding the evidence in the Wyoming case were that the oil well was constructed in such a manner that its tubing could not be removed, and the manner of its construction interfered with, but did not entirely prevent, the well's use. Therefore, because the well was incapable of normal production, the replacement costs would have been so entirely unrelated to market value that such evidence would have tended to confuse rather than enlighten the jury.[606] In a Rhode Island case, evidence of reproduction and replacement costs minus depreciation was held to be properly admitted to assist the trial judge in determining the amount of damages in just compensation to the landowners for the value of the church taken. Here there was no evidence relating to the sales of similar property; the only evidence available was the depreciated cost of the buildings taken and the value of the land exclusive of the buildings.[607] The court said, ". . . where the property taken is of a peculiar character or has a special use for which it is adapted, such as here, if it is highly improved with additions suitable to that use it generally has no active market and therefore it is impossible to prove the fair market value by evidence of comparable sales." [608]

Other jurisdictions have taken the position that the admissibility of evidence of reproduction or replacement costs less depreciation is not dependent on the availability of other evidence to determine market value.[609] In those jurisdictions, the issues in the cases generally involved depreciation and the "unit rule" of valuing property. For example, the trial court in a Georgia case was held to have erred in admitting evidence as to the replacement costs of the condemned houses without taking depreciation into consideration.[610]

In Illinois replacement or reproduction costs of the building less depreciation were held admissible in evidence as one element or factor that a witness may take into consideration for the purpose of arriving at his estimate of the market value of the property.[611] Consequently, a trial court may not rule that reconstruction or replacement cost is not a legal method of valuation and that a witness cannot take such costs into consideration.[612] However, evidence of such costs is not admissible for the purpose of showing the value of the buildings, separate and apart from the land itself.[613] Testimony tending to show the reproduction cost of the buildings separately from the land itself was held to be properly excluded in two Illinois cases.[614] Buildings are not valued separately, because just compensation is defined as the market value of the land together with all the improvements on it, considered as a whole, and not what the buildings cost originally nor what their cost would be at the time of condemnation.[615] The separate value of the buildings may be considered only insofar as it affects the value of the land.[616] In addition, under those circumstances where reproduction costs may be introduced, depreciation is a vital element that must be taken into consideration.[617]

---

[601] Assembly of God Church of Pawtucket v. Vallone, 89 R.I. 1, 9-11, 150 A.2d 11, 15-16 (1959).

[602] Ragland v. Bibb County, 262 Ala. 108, 111–12, 77 So. 2d 360, 362 (1955). Here a lumber yard, planing mill, and sawmill had been constructed on two parcels of land. The condemnor had taken portions from these and the condemnee attempted to give testimony relating to the cost of constructing a similar planing mill on other land. The appellate court indicated that the cost of reconstruction is admissible as evidence of market value when there is no reasonable market value for the land, but held that the lower court correctly rejected such evidence there because of other testimony by the landowner's witnesses indicating that the tracts had a reasonable market value before and after the taking. Such witnesses even gave an opinion as to the amount.

[603] Rome v. State Highway Bd., 121 Vt. 253, 255–56, 154 A.2d 604, 605–06 (1959). Here the landowner offered testimony, through the actual builder of the house, on the reproduction cost of building the same house at the time of the trial. Such evidence was offered by the landowner on the question of the fair market value of his property before the taking. On reviewing previous decisions, the court concluded that there is no uniform rule on the admissibility of evidence of reconstruction costs of a building as evidence of fair market value, but he indicated the better reasoned cases held that such evidence may be admissible in the discretion of the trial judge, if there is not adequate evidence of sales of property of comparable value in the same general locality. There were sales of comparable property in the vicinity to use in basing a value opinion.

[604] Stringer v. Bd. of County Comm'rs of Big Horn County, 347 P.2d 197, 201 (Wyo. 1959). Evidence of the cost of replacing an oil well was properly excluded because the property in question had a market value determinable by the usual test of what it was worth before and after the taking.

[605] Rome v. State Highway Bd., 121 Vt. 253, 256, 154 A.2d 604, 606 (1959). The admission of such testimony relative to the cost of reproduction is predicated on the fact that the building, on which the evidence is offered, has been injured or destroyed by the taking of the land it is located on. Here there was no taking by the condemnor of the land on which the building was located, nor was the house destroyed or injured by the taking for which recovery is sought. Consequently, the admission of evidence on reconstruction costs was properly excluded.

[606] Stringer v. Bd. of County Comm'rs of Big Horn County, 347 P.2d 197, 202 (Wyo. 1959).

[607] Assembly of God Church of Pawtucket v. Vallone, 89 R.I. 1, 11–12, 150 A.2d 11, 16 (1959). The court did recognize the rule that where there are buildings on the land taken, the market value is the value of the land and buildings as a unit, but states an exception must be made to that rule when evidence of comparable sales is lacking.

[608] *Id.* at 10, 150 A.2d at 15.

[609] State Highway Dep't v. Murray, 102 Ga. App. 210, 115 S.E.2d 711 (1960); City of Chicago v. Callender, 396 Ill. 371, 71 N.E.2d 643 (1947); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 131 N.E.2d 55 (1955); County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 153 N.E.2d 844 (1958); State, by Lord v. Red Wing Laundry and Dry Cleaning Co., 253 Minn. 570, 93 N.W.2d 206 (1958).

[610] State Highway Dep't v. Murray, 102 Ga. App. 210, 213–15, 115 S.E.2d 711, 713–15 (1960). In view of the fact that the houses ranged in age from two years to twenty years, replacement costs alone were not a sufficient criteria of value. Because of these circumstances, other factors, such as depreciation, should not have been taken into consideration in determining the property's value. The court, however, did indicate that if the houses had been new, reproduction costs alone might have been the best measure of damages.

[611] City of Chicago v. Callender, 396 Ill. 371, 381, 71 N.E.2d 643, 648–49 (1947); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 373, 131 N.E.2d 55, 59 (1955); County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 73, 153 N.E.2d 844, 847–48 (1958).

[612] County of Cook v. Colonial Oil Corp., 15 Ill. 2d 67, 72–73, 153 N.E.2d 844, 847–48 (1958) (dictum). Here the lower court made such an erroneous ruling. The landowner was precluded from asking one of its witnesses if he took the replacement cost of the building into consideration. However, the ruling was held not to be a prejudicial error, because the record disclosed that the witness in question did not take the replacement cost of the building into consideration. The building in question, according to this witness, covered the entire lot, and it would have been impossible to reconstruct a building like it at the time of the condemnation proceeding. In addition, the record disclosed that one of the landowner's later opinion witnesses was permitted to testify as to economic factors and reproduction costs.

[613] City of Chicago v. Callender, 396 Ill. 371, 381, 71 N.E.2d 643, 648–49 (1947); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 373–74, 131 N.E.2d 55, 59 (1955).

[614] City of Chicago v. Callender, 396 Ill. 371, 381, 71 N.E.2d 643, 648–49 (1947); Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 373–74, 131 N.E.2d 55, 59 (1955).

[615] *Id.*

[616] City of Chicago v. Callender, 396 Ill. 371, 381, 71 N.E. 2d 643, 649 (1947).

[617] Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 374, 131 N.E.2d 55, 59 (1955). Reproduction costs were held to be properly excluded here because no proof was offered as to reasonable depreciation.

A Minnesota case held that evidence of reproduction cost less depreciation is admissible as an aid to the jury in arriving at the market value of the land and improvements as a whole.[618] The reasoning for so holding was that in a previous case the court had held any evidence legitimately bearing upon the question of market value of the property is admissible,[619] and, according to the court in the instant case, reproduction cost less depreciation, as defined, does legitimately bear on the market value of the property.[620] Depreciation has been defined to include physical "wear and tear" and economic and functional obsolescence. Evidence of reproduction cost less depreciation is an element to be considered separately in computing the value of the property as a whole. However, because such evidence is admissible only as an element or circumstance to be considered along with all other circumstances in arriving at the value of the whole property, its admission does not detract from the "unit rule" of valuing property as a whole.[621]

Under a statute recently adopted in California, when it is relevant to the determination of the value of the property a witness may take into account, as a basis for his opinion, the value of the property being valued, as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements on it, if the improvements enhance the value of the property for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.[622] This statute does not seem to be as liberal as the rule adopted by the Illinois and Minnesota courts, for, under the statute, improvements must enhance the value of the property for its highest and best use. On the other hand, the absence of other evidence to determine market value is not a prerequisite to the admission of reproduction or replacement costs under it. A California court could, however, interpret "when relevant to the determination of the value of property" [623] to mean "when the property does not have a market value due to the lack of comparable sales."

SUMMARY AND CONCLUSIONS

The recent highway condemnation cases seem to state two different rules as to admissibility of evidence of cost of reproduction:

1. In one group of states such evidence is not admissible if there is other evidence of market value in the case. Even in these states, however, such evidence is admissible if it is the best evidence available, as in the case of special-purpose properties that do not have any ready market.

2. In a second group of states evidence of reproduction cost is admissible in all instances as one of the factors bearing on market value of the property. The courts generally make clear, however, that the evidence is admissible only to prove the value of the land with the improvements on it and not to prove the value of the improvements separate from the land. Depreciation must of course also be taken into consideration.

Evidence of original cost plus cost of repair and maintenance is generally excluded on the ground that it has no relationship to market value. Exceptions are occasionally made where the property is of a special type whose market value would be impossible or extremely difficult to determine.

The courts, which have been extremely wary of the Cost Approach, appear to have taken the better position. As Ratcliffe has pointed out, the Cost Approach rarely has any predictive usefulness in determining market value.[624] It may, however, have utility in placing a value on special-use properties not normally bought and sold in the market. In such a case, it should be frankly recognized that a special value rather than market value is being sought. A statutory recognition of such a situation is exemplified by the Maryland statute that permits replacement costs to be taken into consideration in valuing churches.[625]

---

[618] State, by Lord v. Red Wing Laundry and Dry Cleaning Co., 253 Minn. 570, 573–75, 93 N.W.2d 206, 208. (1958). After considering several authorities, the court was of the opinion that the most practical rule should be that evidence of reproduction cost less depreciation is admissible in all condemnation cases as a factor reasonably bearing on the market value of the property.

[619] King v. Minneapolis Union Ry. Co., 32 Minn. 224, 20 N.W. 135 (1884).

[620] State, by Lord v. Red Wing Laundry and Dry Cleaning Co., 253 Minn. 570, 574, 93 N.W.2d 206, 209 (1958). Economic obsolescence would include factors that might cause a reduction or increase in the value of property as a result of external or environmental influences; functional obsolescence would include internal factors involving the inadequacies of a structure that have been developed due to technological improvements.

[621] *Id.*

[622] CAL. EVIDENCE CODE § 820 (West 1966), in the Appendix of this report.

[623] *Id.*

[624] RATCLIFF, *supra* note 191, at 27–29.

[625] MD. ANN. CODE art. 33A, § 5(d) (Repl. 1967), in the Appendix of this report.

CHAPTER TEN

ADMISSIBILITY OF EVIDENCE OF EFFECT OF THE PROPOSED IMPROVEMENT ON THE VALUE OF THE PROPERTY TAKEN

RATIONALE

Advance public knowledge of a proposed project may have an effect on the value of the property that subsequently may be taken for that project, either by way of enhancement or by way of depreciation. Whether evidence of such enhancement or depreciation is admissible in a condemnation trial therefore becomes an issue at times. Only a few of the cases in the sample reviewed dealt with this issue. It should become clear that the issue is basically one of compensability or valuation rather than evidence, even though it sometimes arises as an evidential issue.

The compensability and valuation issues involved here are complex; a rationale will first be suggested, and the few recent cases that were reviewed will be examined for their fit into that rationale. For this purpose the rationale developed by Orgel in his treatise on *Valuation Under the Law of Eminent Domain*[626] will be heavily relied on.

It is first of all necessary to distinguish between two types of values created by the condemnor. In the first type, a parcel of land may have much greater value to the condemnor than its value on the open market in the absence of the public project. For example, a parcel may be worth $10,000 as farm land, but a highway agency might be willing, if necessary, to pay $1 million for the parcel because it would cost the agency more to select an alternate route for the highway in the particular area. One of the main reasons for giving a public agency condemnation powers is to avoid the necessity of paying such holdup prices. In other words, this "value to the taker" is rejected as a measure of compensation. However, a second type of taker-created value also may be involved. The land in the area of the proposed highway may gain value because it will be suitable for a commercial use after the highway has been built, whereas prior to that time it is suitable merely for agricultural uses. Or, in some circumstances the proposed project might have a depressing effect on the value of land in the area of the project, and it is enhancement or depreciation of this type that is of primary concern here. But, the former type of value created by the taker is relevant to the discussion of the latter type because it suggests that a distinction might logically be drawn between effects on value that occur before a parcel has been definitely designated for taking and after it has been so designated. An example will make this clearer.

Suppose that parcels *A*, *B*, and *C* are in an area where a public project supposedly will be located. One of the parcels will be needed for the project, so buyers are now willing to pay $12,000 for each of these parcels, whereas previously they would have sold for only $10,000. At a later date, the boundaries of the project are definitely established, and it is determined that parcel *A* is the parcel that will be taken and that parcels *B* and *C* will not. Parcels *B* and *C* still will sell for $12,000, but parcel *A* now can be sold for $15,000 because buyers are willing to speculate that the condemnor will pay at least that much and probably more for it or, in any event, that the jury will return a verdict of at least that much if the case goes to condemnation. It can be seen that the $3,000 increment in value of parcel *A* is the result of speculation as to what the award or verdict will be (assuming a total taking), and that this is closely related to the "value to the taker" concept first discussed previously, and therefore should be rejected as an item to be considered in measuring compensation. The $2,000 increment in value received by all three parcels, however, falls within the second category of taker-created value discussed previously. It is assumed that the $2,000 increment was due to the fact that property not taken generally will become more valuable because of the location of the project in the area.

However, it does not necessarily follow that the owner of parcel *A* should receive payment for this $2,000 enhancement in value. The law generally does not favor windfalls, and this increment is basically a windfall resulting from the location of the public project in the area. It can also be argued that a condemnor should not be required to pay for value that it has created. These same policies lie behind the generally accepted rule that benefits must be set in partial-taking cases. On the other hand, it can be argued that if the owner of parcel *A* is to be treated equitably as compared with the owners of parcels *B* and *C* (which were not taken), he should be compensated for this increment in value. Finally, it can logically be argued that the converse situation, depreciation in value, ought to be treated consistently with enhancements. If the owner is not permitted to gain from enhancements resulting from advance public knowledge of the project, he also should be protected from loss resulting from such knowledge unless there are strong independent policy considerations for denying him compensation.

FITTING THE SAMPLE HIGHWAY CONDEMNATION CASES INTO THE RATIONALE

Enhancement of Value

Although the issue under consideration would seem to be an important one, it was not litigated extensively at the appellate level. Only about half a dozen cases are in-

[626] See particularly 1 ORGEL, *supra* note 294, chs. 6, 8.

volved, but they illustrate most of the problems that are likely to arise.

The first type of enhancement (value to the taker) became a minor issue in an Arkansas case.[627] The case involved the condemnation of a parcel of land containing deposits of sand and gravel. The sand and gravel was to be used on the project a part of the land was being taken for. The court recognized the principle that "a condemnor should not be required to pay an enhanced price which its demand alone has created," but concluded that the case did not come within that rule. The court pointed out that the value of the deposits on the land taken were not attributable solely to the present construction project.[628]

One of the most complete statements with regard to enhancements resulting from advance public knowledge of the project was found in a Colorado case,[629] which also demonstrates the relevance of the date of valuation. In this case the trial court had excluded evidence of enhancements from the public project. The landowner contended on appeal that this was error because the Colorado legislature recently had passed a statute fixing the date of valuation as of the date of trial or the date of the condemnor's taking possession of the property, whichever comes first. To this argument the Colorado court replied:

> [T]o say that value is to be fixed at the time of trial does not mean, as defendants contend, that the court must give consideration to enhancement resulting from construction or proposed construction of public improvements on the property subject to condemnation. To do so would allow speculative considerations to determine value and provide a windfall for the property owner. The courts will not sanction such considerations. . . .
>
> There are, of course, exceptional situations where the courts will admit evidence of enhancement resulting from the acquisition. They include cases where the location of the proposed project is indefinite or where there is a supplemental taking. See 4 Nichols on *Eminent Domain*, pp. 122-130. However, there is nothing in the record to bring this case within any of the recognized exceptions to the rule.[630]

Under the same reasoning the court concluded that a change in zoning that resulted from the public project should not be taken into account in valuing the property.

As the Colorado court noted, it is generally recognized that the rule excluding evidence of enhancements from the public project applies only to enhancements resulting from the particular project the land is taken for. Although the rule is clear, it sometimes may be difficult to tell where one project ends and another begins. This was the problem in a Texas case [631] where the court found that a subsequent taking of additional property to enlarge the original project was in fact a separate project. Therefore, enhancement in the value of the property resulting from the first project could be taken into account in valuing the property for purposes of the subsequent taking.

The problem of admissibility of evidence of enhancements may arise because the sales price of comparable parcels, used to prove the value of the subject parcels, may have been enhanced by advance public knowledge of the public project. This problem was discussed in two Iowa cases.[632] Although the issue was not squarely presented because the court found no proof of enhancement, the court nevertheless noted that the issue is more crucial where comparables are introduced as direct evidence of value rather than merely as corroboration of the opinion of a valuation witness.[633] Iowa also has a constitutional provision stating that a jury in determining just compensation "shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." [634] In view of this provision the Iowa court indicated a willingness to consider changing the previous Iowa rule that had permitted evidence of enhancements from the public project to be admitted.[635]

Depreciation of Value

Advance public knowledge of a proposed project also may have a depressing effect on land values. In a Maryland case,[636] error was held to have been committed by the trial court in permitting a witness for the state to take into account the "cloud of condemnation" in giving his opinion of the value of the land being condemned. This would seem to be consistent with the principle that if the condemnee is not permitted to gain from the effects of advance public knowledge of the project, he also should be protected from losses resulting from such knowledge. In fact, the Maryland court noted that, "[T]his court has held that evidence of value based upon the effect of the taking involved in a pending condemnation suit is inadmissible . . . We think that the rule is applicable to considerations which might tend to depress values as to those which might tend to increase them and that it should also extend to the effects of the prospect of the taking." [637]

In a Massachusetts case [638] the landowner claimed compensation for damages to his land allegedly caused by the "cloud of condemnation" that resulted when the condemnor placed stakes on the land to indicate the parcel to be taken but later removed the stakes and decided not to take the land. The Massachusetts court refused to permit recovery, saying that the stakes were at most a temporary, inchoate injury that did not give rise to recovery on eminent domain principles. A Massachusetts statute that permitted recovery of damages where the injury is special and peculiar was of no help to the landowner because the court concluded that the claimed injury was too indefinite, conjectural, and general to come within the ambit of the statute.[639] This case seems to typify the atti-

---

[627] Arkansas State Highway Comm'n v. Cochran, 230 Ark. 881, 327 S.W.2d 733 (1959).
[628] *Id.* at 883–84, 327 S.W.2d at 735.
[629] Williams v. City & County of Denver, 147 Colo. 195, 363 P.2d 171 (1961).
[630] *Id.* at 199–200, 363 P.2d at 173–74.
[631] State v. Willey, 351 S.W.2d 907 (Tex. Civ. App. 1961).
[632] Iowa Dev. Co. v. Iowa State Highway Comm'n, 252 Iowa 978, 108 N.W.2d 487 (1961); Redfield v. Iowa State Highway Comm'n, 252 Iowa 1256, 110 N.W.2d 397 (1961).
[633] Iowa Dev. Co. v. Iowa State Highway Comm'n, 252 Iowa 978, 989, 108 N.W.2d at 487, 494 (1961); Redfield v. Iowa State Highway Comm'n, 252 Iowa 1256, 1258–60, 110 N.W.2d 397, 399–400 (1961).
[634] Redfield v. Iowa State Highway Comm'n, 252 Iowa 1256, 1258–60, 110 N.W.2d 397, 399–400 (1961).
[635] *Id.* at 1260–61, 110 N.W.2d at 397, 400 (1961).
[636] Congressional School of Aeronautics, Inc., v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958).
[637] *Id.* at 249–50, 146 A.2d at 565.
[638] Onorato Bros., Inc. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957).
[639] *Id.* at 58–59, 142 N.E.2d at 392–393.

tude of courts in cases where the landowner is claiming compensation for damages caused by the "cloud of condemnation" because the condemnor has changed its mind or there has been a long delay between the announcement of the project and the start of condemnation proceedings.

SUMMARY AND CONCLUSIONS

The problems discussed in this chapter, although arising as evidential issues in condemnation trials, are basically questions of compensability or valuation. Greater justice might result if the appraiser would attempt to arrive at a value under a hypothetical situation that removes from his consideration the actual anticipatory value effects of the expectation of taking. Appraisers are able, within the usually expected limits of reliability, to make a prediction of the most probable selling price of the property under a set of conditions that include the hypothetical situation of a market not affected by the rumors of the coming improvement project. Thus, it would be a logical and workable rule of compensability that the owner should receive compensation based on the value of his property at the official appraisal date without diminution or increase by reason of the general knowledge of the improvement project.[640]

[640] For an extended discussion see RATCLIFF, *supra* note 191, at 52–53.

CHAPTER ELEVEN

ADMISSIBILITY OF EVIDENCE OF REPUTATION OR SENTIMENTAL VALUE

The preceding chapter noted that value to the taker generally is rejected as a measure of compensation. This chapter deals with a related question—the question of special value to the owner. Again, the issue is basically one of valuation or compensability, even though it sometimes arises in the form of a question whether evidence of sentimental value is admissible.

Sentimental value is that special or peculiar value to him that an owner attaches to his land over and above market value.[641] Reputation of the condemned property itself has been defined in an Alabama case as, "at best . . . a matter of sentiment."[642] Issues relative to the admissibility of sentimental value would probably be most often raised when a landowner attempted to offer evidence indicating his property has a special or peculiar value to him. An example of this is where a landowner attempts to show a sentimental attachment to his property because it has been a family homestead. However, the rule with regard to the admissibility of such evidence in eminent domain proceedings seems to be sufficiently certain so that the issue was the subject of litigation in only two of the recent highway condemnation cases studied.[643]

INADMISSIBLE EVIDENCE OF REPUTATION AND SENTIMENTAL VALUE

In those two recent highway cases where the issue was raised, evidence of reputation of the property subject to condemnation[644] and sentimental value[645] was held to be inadmissible. For example, in *City of Chicago v. Harrison-Halsted Building Corporation*,[646] the trial court's refusal to give the landowner's requested instructions that would have permitted the jury to consider special value that the owner might attach to his property, but which would not have been reflected in fair cash market value, was held to be proper.[647] The reason given for excluding the evidence was that a landowner is entitled to the fair cash market value of the property at its highest and best use,[648] including any special capabilities the property might have, but consideration is not given to the values or necessities peculiar to the owner or condemnor in determining fair cash market value.[649]

Because reputation of the condemned property itself is a matter of sentiment and all elements of sentiment are

[641] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 440, 143 N.E.2d 40, 46 (1957).

[642] Popwell v. Shelby County, 272 Ala. 287, 292, 130 So. 2d 170 (1961).

[643] Popwell v. Shelby County, 272 Ala. 287, 130 So. 2d 170 (1961); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[644] Popwell v. Shelby County, 272 Ala. 287, 292, 130 So. 2d 170, 174 (1961). The reputation dealt with in this case was the reputation of the condemned property itself and not that of the neighborhood where the property was located. 272 Ala. at 291, 130 So. 2d at 173.

[645] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 440–41, 143 N.E.2d 40, 46 (1957).

[646] 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[647] *Id.* at 440–41, 143 N.E.2d at 46.

[648] *Id.* at 433–34, 143 N.E.2d at 42. The property involved here consisted of an old six-story brick building in poor condition and located near the downtown area of Chicago. Its highest and best use was the landowners' use for it—warehousing of dry materials.

[649] *Id.* at 440–41, 143 N.E.2d at 46. A distinction has been made between any special value the property itself has because of claimed special capabilities and a special value peculiar to the owner. An issue was not raised here with regard to the property's capabilities, as all witnesses agreed that its present use was its highest and best use. The Court here distinguished the present decision from others permitting admission of evidence of special values attributable to the property's special capabilities.

excluded, the trial court in *Popwell v. Shelby County* [650] was held to have committed a prejudicial error in permitting the admission of evidence to the effect that the condemnee's property bore a reputation of having been used in the past for gambling purposes.[651] Neither the buyer nor the seller is influenced by sentimental attachments to the property under the willing seller-willing buyer concept of determining market value.[652] Another reason for the exclusion of sentiment or reputation is because of the nebulous and uncertain effect of such evidence. Difficulty would arise in assigning, with any degree of accuracy, the dollar amount the value would be increased by sentiment or reduced by unfavorable reputation.[653]

COMMENTARY

An analysis of these two recent cases illustrates the close association between sentimental value and the rules of valuation. The basic question relative to the admission of sentiment seems to be: by which standard is just compensation determined—market value, or value to the owner? Sentiment is an element in the determination of value under the value-to-the-owner standard, but not, as held in the two recent highway cases, under the market value standard.[654] The general rule is that, so long as the property has an ascertainable market, the measure of just compensation is in accordance with the market value standard,[655] and evidence of sentimental value is inadmissible.[656] To admit evidence of sentiment as a factor in the determination of just compensation under the market value standard would, in effect, make the measure of damages conform with the value-to-the-owner doctrine.[657]

None of the states appears to have any statutory provisions relating directly to the admission of sentimental value in evidence. However, under California's evidence statute [658] value is defined in accordance with the willing purchaser-willing seller concept; Pennsylvania's evidence statute states, "A qualified valuation expert may testify on direct or cross-examination, in detail as to the valuation of the property on a comparable market value, reproduction cost or capitalization basis . . . ." [659] "Fair market value" is defined by both the Maryland [660] and Pennsylvania [661] statutes in accordance with the willing buyer-willing seller concept. Statutes such as these, which indicate the measure of just compensation is in accordance with the market value standard and then define market value by the willing buyer-willing seller concept, are as effective as statutes that prohibit the introduction of sentiment in evidence.

SUMMARY AND CONCLUSIONS

Sentimental value is inadmissible in evidence as an element bearing on value in the determination of just compensation. The principal reason is that just compensation is based on market value, rather than on value to the taker or value to the owner and, in the market value concept, evidence of sentimental attachment is irrelevant. Another reason sometimes given for excluding this evidence is that its effect on value would be too difficult to prove, even if it is assumed to be relevant.

---

[650] 272 Ala. 287, 130 So. 2d 170 (1961). The issue was whether or not evidence of reputation of the property itself was admissible as a proper element bearing on such property's market value. 272 Ala. at 291–92, 130 So. 2d at 173–74.

[651] *Id.* at 291–92, 130 So. 2d at 173–74. Over the landowner's objection, the condemnor was permitted by the trial court to introduce in evidence a court injunction restraining the landowner from using the property for an illegal purpose—gambling. Issues involved on appeal here differed from those involving market value based on profit or rent received from the illegal use of the property. Had the admissibility of such profits or rents been the issue, the court indicated it would have followed cases from other jurisdictions and held that present value based on past illegal use may not be considered in making an award of just compensation, although the property had been put to an illegal use and although such use did change the market value.

[652] *Id.* As long as sentiment may not increase the price under the willing buyer-willing seller concept, the court reasoned that sentiment may not reduce the price. Sentimental considerations causing a seller to demand and a buyer to pay a higher price are of the same character, but to an opposite effect, as the reputation of the condemnee's property. Basically, as long as sentimental value that an owner attaches to his property is not taken into account in determining its value, reputation, that is likely to lower the value of the property should also not be taken into account in valuing the property.

[653] *Id.* at 292, 130 So. 2d at 174. Imaginary or speculative values should not be used as a basis for awarding damages. 272 Ala. at 291, 130 So. 2d at 173.

[654] *Id.* at 292, 130 So. 2d at 174; City of Chicago v. Harrison-Halsted Bldg. Corp. 11 Ill. 2d 431, 440–41, 143 N.E.2d 40, 46 (1957).

[655] 4 NICHOLS, *supra* note 199, § 12.1.

[656] 4 NICHOLS, *supra* note 199, §§ 12.2(2), 12.22(2).

[657] *See* 3 CAL. LAW REV. COMM'N *supra* note 422, at A-17 which states, "Value to the owner is a subjective standard; it enables the condemnee to present a myriad of factors that may or may not in fact exist to enlarge his award. It opens the door to sham and fabrication. It has no limits, it has no control. By itself, it seriously weakens the concept of 'just compensation'—'just' to the condemnor as well as to the condemnee."

[658] CAL. EVIDENCE CODE § 814 (West 1966), in the Appendix of this report.

[659] PA. STAT. ANN. tit. 26, § 1–705(2) (Supp. 1967), in the Appendix of this report.

[660] MD. ANN. CODE art. 33 A. § 6 (Repl. 1967), in the Appendix of this report.

[661] PA. STAT. ANN. Tit. 26, § 1–603 (Supp. 1967), in the Appendix of this report.

CHAPTER TWELVE

ADMISSIBILITY OF EVIDENCE OF HIGHEST AND BEST USE FOR PROPERTY

The measure of compensation for a parcel of land taken for public use under eminent domain is the fair market value of that land.[662] Courts define fair market value as the amount of money that a purchaser willing but not obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all uses the land was adapted to and might in reason be applied.[663] Therefore, as a general rule, property is usually valued according to its "highest and best use" or some similarly worded formula. That is even a legislative requirement in a few states.[664] Similarly, a statutory provision in Vermont provides that damages resulting from the taking shall be based on the property's value for its "most reasonable use";[665] on the other hand, a Georgia statute states that the value of land taken is not to be restricted to its agricultural or productive qualities.[666] In estimating Georgia land values inquiries may be made as to all other legitimate purposes to which the property could be appropriated.[667]

Continuing urban expansion and changing land-use patterns and land values have caused the "highest and best use" concept to be a frequent source of litigation. This chapter is directed towards an analysis of those problems connected with the kind of evidence that may be introduced to prove the subject property's adaptability for a specific use, many times for a use other than its present use. Admissibility issues raised in the sample cases with regard to "highest and best use" usually involved questions relating to the admission of evidence to show: (1) the property's higher value for some other use; (2) the owner's intended use of the property; (3) adaptability of the property to a use currently prohibited by zoning; and (4) suitability of the property for use as a residential subdivision development.

HIGHER VALUE OF PROPERTY FOR SOME OTHER USE

Courts presented with the question in the few sample cases dealing with the subject were in agreement that the present use of the condemned property does not preclude the introduction of evidence to show that such property has a higher value for some other use.[668] Thus, an Alabama case held it was not an error to permit an inquiry into the adaptability of a parcel of farm land for use as a housing project or filling station or other business place.[669] Quoting with approval from *Alabama Power Company v. Henson*,[670] the court said:

> It is relevant to inquire into the several elements of value, such as the uses to which the property is adapted, although not presently so used, if it appears such prospective use affects the present market value of the property. Whatever an intelligent buyer would esteem as an element of value at the time of taking may be considered.[671]

Along this same line, the Illinois Supreme Court held an error had been committed by excluding the landowner's offered evidence to show that the property was susceptible of other than railroad uses without impairing its use for railroad purposes.[672] Provided that it can be done without impairing the use of the property for railroad purposes, railroads are authorized under legislation to improve, develop, convey, and lease any of their property owned in fee.[673] In view of that statutory provision, said the supreme court, the compensation to be paid to a railroad for the taking of an easement over its property must take account of the use to which that property could be put without impairing the use of the rest of the property for railroad purposes.[674]

The condemnor in a Wisconsin case claimed that because the landowner did not intend to change his use of the property at any time in the near future and the condemnation did not interfere with the operation of his present business establishment and dwelling, the present use of the property made by the owner was its most advantageous use.[675] However, the appraisers for the landowner were permitted to value the property on the basis of the use it

[662] 4 NICHOLS, *supra* note 199, § 12.2.

[663] *Id.* at 12.2(1).

[664] MD. ANN. CODE art. 33A, § 6 (Repl. 1967), in the Appendix of this report; ME. REV. STAT. ANN. tit. 23, § 154 (1964); PA. STAT. ANN. tit. 26, § 1-603(2) (Supp. 1967), in the Appendix of this report.

[665] VT. STAT. ANN. tit. 19, § 221(2) (1959).

[666] GA. CODE ANN. §§ 36-505 (1962).

[667] *Id.*

[668] Blount County v. McPherson, 268 Ala. 133, 137, 105 So. 2d 117, 120-21 (1958); City of Chicago v. Sexton, 408 Ill. 351, 356-57, 97 N.E.2d 287, 289-90 (1951); Utech v. City of Milwaukee, 9 Wis. 2d 352, 356-58, 101 N.W.2d 57, 61-62 (1960).

[669] Blount County v. McPherson, 268 Ala. 133, 137, 105 So. 2d 117, 120-21 (1958). The court uses Thornton v. City of Birmingham, 250 Ala. 651, 35 So. 2d 545 (1948), which held evidence as to the adaptability of condemned property for a subdivision to be a proper element for consideration of the jury in assessing damages, as a basis for its decision.

[670] 237 Ala. 561, 566, 187 So. 718, 721 (1939).

[671] Blount County v. McPherson, 268 Ala. 133, 137, 105 So. 2d 117, 121 (1958). *See also* Mississippi and Rum River Boom Co. v. Patterson, 98 U.S. 403, 408 (1878), which stated: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."

[672] City of Chicago v. Sexton, 408 Ill. 351, 356-57, 97 N.E.2d 287, 289-90 (1951). The trial court had relied on City of Chicago v. Lord, 276 Ill. 571, 588, 115 N.E. 397, 403 (1917), which held that the property of a railroad company used in the conduct and operation of that railroad is devoted to a public use and whether or not it is capable of another use, its value to the railroad company is its use for railroad purposes. 408 Ill. at 355-56, 97 N.E.2d at 289.

[673] ILL. REV. STAT. ch. 114, § 174a (1965). City of Chicago v. Sexton, 408 Ill. 351, 356, 97 N.E.2d 287, 289 (1951).

[674] City of Chicago v. Sexton, 408 Ill. 351, 356-57, 97 N.E.2d 287, 290 (1951).

[675] Utech v. City of Milwaukee, 9 Wis. 2d 352, 356-57, 101 N.W.2d 57, 61 (1960).

might best be adapted to (some type of business development), even though the present use of the property (millwork factory and residence) was not disturbed by the partial taking and there was no testimony on the part of the owner that he intended to develop the property for business purposes.[676] The fact that the owner had not seen fit to use his property for business development was, according to the supreme court, evidence to be considered on the issue of the most advantageous use, but it was not conclusive.[677] As a basis for its decision, the court said there was testimony indicating that the trend in that part of the city was towards development of property for commercial purposes, and so the trial court was justified, particularly in view of the fact that the property in question was zoned for business uses, in its finding that the property's future business use constituted its highest and best use.[678]

A trial court's refusal, on the other hand, to permit an inquiry into the adaptability of a particular property for other uses does not necessarily constitute a reversible error.[679] In an Alabama case, a small strip was taken from a parcel of land on which a sawmill and planing mill were located, and the trial court refused to permit one of the landowner's witnesses to answer a question as to whether the property had a value for any purpose other than its present use.[680] Such a refusal was held not to be an error, and even if it was, it was not, according to the supreme court, a reversible one, because only a small portion of the parcel was being taken and the structures on it were not touched, testimony had already been given as to the tract's before and after market value, and the jury had an opportunity to view the premises.[681]

INTENDED USE OF PROPERTY BY OWNER

Closely related to the effect of the present use of the property is the question concerning the admissibility of evidence of the owner's intended use of the property. Courts in the sample cases did not appear to have a specific answer to this question. The admission of the owner's intended use seemed to be dependent on the trial court's judgment as to the value of such evidence in establishing market value. This value is in turn weighed against the number and complexity of the collateral issues that the evidence was likely to introduce into the case.

Under the general rule, as expressed by the California court, the use intended by the owner is immaterial; it is market value, and not value to the owner, that is to be determined.[682] For example, the court in one case said:

> The criterion is not the value of the use of the property to the owner. . . . The value is determined by taking into account the highest possible use to which the land is or may be reasonably put, and what a purchaser would be willing to pay for it in view of such highest possible use.[683]

In another, the court stated:

> All reasonable uses must be considered. . . . Evidence of the value of the highest and most valuable use is admissible, not as a specific measure of value, but as a factor in fixing market value.[684]

Evidence of a proposed plan by the owner to use the property for motel purposes was held to be admissible in that case for the purpose of showing adaptability of the land for that use, but inadmissible for showing the enhanced loss to the owner because the taking of part of his land precluded him from carrying out his particular planned improvement.[685] "In other words," said the court, "it is not value in use, either actual or prospective, to the owner that is involved, but value in exchange—market value—that is the test."[686] However, a later case, in which the condemnor's witnesses had introduced evidence that the best use of the property would be for an office building, held that it was proper for the landowner's witness to testify that the owner had plans drawn up both for an office building and for a garage, that it had been estimated that the garage would yield a better return than the office building, and that the type of building testified to by the condemnor's witnesses would be economically unfeasible and unprofitable.[687] The landowner, according to the court, has the burden of proving value and severance damages and of showing the highest and best use of his property, and so the testimony was admissible to rebut the evidence offered by the state and thus show that an office building on the property would be economically unwise.[688]

Iowa's Supreme Court does not appear to have been consistent in its view on the question of the effect of the owner's intended use of the property. A restrictive view seems to have been followed in a 1959 case where the court implied that it would limit the highest and best use rule to uses shown to be within the owner's contemplated plans.[689] The trial court's refusal in that case to instruct the jury, as requested by the landowner, that the property must be valued according to the highest and most valuable use that it could reasonably be put to as shown by the evidence offered at trial, was affirmed on appeal.[690] Juries, said the court, should not be required to explore all of the possibilities to determine the highest and most valuable use for a property. Too much speculation and conjecture would be involved in making that determination. Another reason for affirming the lower court's refusal to instruct the jury was because of the feeling that usually, ". . . it is doubtful if the condemnee would contemplate changing from his present use of the premises to the most valuable use which could reasonably be found."[691] It was noted, however, that if the owner had contemplated converting his farm land into city lots, and it was found to be suitable for that

[676] *Id.* at 357–58, 101 N.W.2d at 61–62.
[677] *Id.* at 357, 101 N.W.2d at 61.
[678] *Id.* at 358, 101 N.W.2d at 62.
[679] Ragland v. Bibb County, 262 Ala. 108, 111, 77 So. 2d 360, 361–62 (1955).
[680] *Id.* at 110–11, 77 So. 2d at 361–62. The reason for the question was to show that the land was not suitable for any other purpose than for a sawmill and planing mill.
[681] *Id.* at 111, 77 So. 2d at 362.
[682] People v. Vinson, 99 Cal. App. 2d 100, 221 P.2d 161 (1950); County of Los Angeles v. Bean, 176 Cal. App. 2d 521, 1 Cal. Rptr. 464 (1959).
[683] People v. Vinson, 99 Cal. App. 2d 100, 102–03, 221 P.2d at 162–63.
[684] City of Daly City v. Smith, 110 Cal. App. 2d 524, 531, 243 P.2d 46, 51–52 (1952).
[685] *Id.* at 532, 243 P.2d at 51.
[686] *Id.*
[687] People v. Loop, 127 Cal. App. 2d 786, 801, 274 P.2d 885, 896 (1954).
[688] *Id.* at 801–02, 274 P.2d at 896.
[689] Hammer v. Iowa State Highway Comm'n, 250 Iowa 1228, 1230, 98 N.W.2d 746, 748 (1959).
[690] *Id.* at 1229–30, 98 N.W.2d at 747–48.
[691] *Id.* at 1230, 98 N.W.2d at 748.

purpose, such a fact should be taken into consideration by the jury in determining the fair market value.[692] A later case, on the other hand, indicates the acceptance of a more liberal view.[693] Evidence of a plat showing lead and spur railroad tracts that could be built and used for industrial purposes, the use the landowner claimed the land was adapted for, and testimony as to the adaptability of the tract for industrial use, were held to be properly admitted in that case. Even though the tractage had not been built, nor had the land ever been actually used for industrial purposes, the evidence, said the court, was not too speculative.[694] Quoting with approval from *Ranck v. City of Cedar Rapids*,[695] the court's decision was based on the proposition that:

> . . . the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and of any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use.[696]

A few sample cases appear to illustrate the relationship between the admissibility of evidence of the owner's intended use of the property and the extent that those planned uses for the property have progressed toward reality.[697] Drawings of plans prepared by the landowner ten years before the commencement of the condemnation proceeding and a topographic map prepared for him by a civil engineer, both of which showed the improvements the owner planned to build on the property, were offered and admitted in evidence by the trial court without the condemnor's objection, in an Illinois case.[698] A landscape architect's plat that elaborated considerably on the owner's original drawings was, on the other hand, excluded by the trial court, and the landowner claimed on appeal that this was erroneous. This plat, which showed in detail the owner's plans for the use of the property, was prepared after the commencement of the suit and completed about ten days before the trial. Whether evidence of plans of structures the owner contemplated erecting on the land may be admitted depends, according to the supreme court, entirely on the purpose for which they are offered and they are limited to this by the trial court. If they are offered merely in illustration of one of the uses to which the property is adapted, and if the use of the evidence is clearly and expressly limited by the trial court to that object, they are admissible at such court's discretion; but if the object of the admission is to enhance the damages by showing that such a structure would be a profitable investment, they are clearly held to be incompetent. However, the supreme court felt that even if their admission does not constitute a prejudicial error, the introduction of such evidence should not be encouraged because there is generally a danger of its being misunderstood by the jury.[699] Disagreeing with the landowner's contention, the appellate court held the trial judge in this case had not abused his discretion in rejecting the plat.[700] Similarly, the supreme court in a Rhode Island case held that an error had not been committed in excluding evidence to the effect that the owner intended to alter the premises by converting certain apartments located on the subject property into additional doctors' offices.[701] Such evidence, said the court, would be pure speculation. The estimated cost of such alterations and the increased rentals presumed to result therefrom, together with the question of available tenants, would not have furnished the jury with factual information bearing on the question of fair market value.[702]

Part of a parcel of land that at one time had been flooded by a now breached dam located on the tract was condemned in *Southwick v. Massachusetts Turnpike Authority*.[703] The breach in the old dam could be repaired at a cost of $4,000, according to one of the owner's witnesses. One of the issues on appeal involved the trial court's exclusion of the landowner's testimony to the effect that he had plans to repair the dam and to either sell the land to a fish and game club or to develop a camp site on it. The condemnor's cross-examination of the owner disclosed that, except for making one or two surveys of the area involved and checking on a similar development in another area, he had done very little toward executing his plans for the development of the property. The dam could not have been repaired after the taking because the resulting pond would have extended onto that part of the land condemned for the highway improvement.[704] Agreeing with the trial judge, the supreme judicial court held that insufficient progress had been made on the owner's plans for developing the property to warrant admission of evidence relative to the cost and other details of the particular project the landowner had in mind.[705] However, the court did note that the presence on the land of the brook and the dam, which might have been repaired at a cost of only $4,000 prior to the taking, might well be of interest to a prospective purchaser. The possibility of restoring the large pond was sufficiently substantial to be entitled to consideration in appraising the market value of the land at the time of the taking. It was, said the court, a factor increasing the property's marketability. If the landowner reasonably thought that a purchaser would pay more for the property because of the possibility of restoring the pond at low cost and because of the adaptability of it for camp sites, that, the court further noted, was a question of judgment he was entitled to use in formulating his opinion of the value of the property. In short, he was entitled to bring out the relevant facts. Therefore, the landowner, who knew

[692] *Id.*
[693] Iowa Dev. Co. v. Iowa State Highway Comm'n, 252 Iowa 978, 108 N.W.2d 487 (1961).
[694] *Id.* at 988, 108 N.W.2d at 493. Some preliminary work, however, had been done on the railroad tract.
[695] 134 Iowa 563, 565–66, 111 N.W. 1027, 1028 (1907).
[696] Iowa Dev. Co. v. Iowa State Highway Comm'n, 252 Iowa 978, 988, 108 N.W.2d 487, 493 (1961).
[697] Department of Public Works and Buildings v. Lambert, 411 Ill. 183, 103 N.E.2d 356 (1952); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 162 N.E.2d 271 (1959); State, by Lord v. La Barre, 255 Minn. 309, 96 N.W.2d 642 (1959); L'Etoile v. Director of Public Works, 89 R.I. 394, 153 A.2d 173 (1959).
[698] Department of Public Works and Buildings v. Lambert, 411 Ill. 183, 191–93, 103 N.E.2d 356, 361 (1952). No actual construction had been commenced at the time the condemnation suit was filed.
[699] *Id.* at 192, 103 N.E.2d at 361.
[700] *Id.* at 193, 103 N.E.2d at 361.
[701] L'Etoile v. Director of Public Works 89 R.I. 394, 401–02, 153 A.2d 173, 177 (1959).
[702] *Id.*
[703] 339 Mass. 666, 162 N.E.2d 271 (1959).
[704] *Id.* at 667–69, 162 N.E.2d at 273–74.
[705] *Id.* at 669–71, 162 N.E.2d at 274–75.

enough about his property to express an opinion about its market value and the reasons for his opinion, should have been able to testify about the weight he gave to the potential use of his property in connection with the restored pond.[706] If the reasons for his opinion, said the court, ". . . could be shown on cross examination (a) to be unconvincing, or (b) to result in an over-estimate of the value of the property or of the feasibility of restoring the pond, or (c) to be based on faulty analysis or inadequate investigation, these matters go only to the weight of the testimony," and would not affect its admissibility.[707]

Quoting from *King v. Minneapolis Union Railway Company*,[708] the Minnesota court said:

> We think it may be stated as elementary that a person is entitled to the fair value of his property for any use to which it is adapted . . . whether that use be the one to which it is presently applied, or some other to which it is adapted. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately bears upon the question of the marketable value of the property. . . . The owner has a right to its value for the use for which it would bring the most in the market.[709]

At issue in the instant case was the condemnor's contention that the trial court erred in receiving in evidence expert testimony as to valuations that admittedly were based on improvements to the premises then in contemplation but not actually completed at the time of trial. In giving testimony as to valuations based on the contemplated improvements, the witness deducted the cost of completing the shopping center from the valuation arrived at. Work was in progress at the time of condemnation. Plans for the completion of the project had been submitted and accepted by the owner and some contracts had been awarded for the construction involved. It was possible to determine with a degree of accuracy what the cost of completion would be. Such evidence, said the supreme court, was properly admitted on the grounds that the completion cost of the project could be determined and was deducted from the expert's estimate of the valuation of the shopping center as a completed and going concern.[710]

ADAPTABILITY OF PROPERTY TO USE CURRENTLY PROHIBITED BY ZONING

A frequent source of litigation involved the question of how reasonably probable a prospective use must be before evidence is admissible to show the value of the property for that use. Problems of this nature generally arose in those situations where the prospective use of the property is restricted by a zoning ordinance, or where the owner contemplated subdividing his land into residential lots. Instances regarding the extent to which evidence may be introduced to show the property's adaptability to a use currently prohibited by zoning are discussed in this subsection, and the question of the admissibility of evidence that the property is suitable for subdivision development is discussed in the following one.

Existing valid zoning ordinances may prescribe or limit those uses that may be considered in proving market value.[711] The general rule expressed in the sample cases appears to be that evidence of the property's market value for a particular use currently prohibited by zoning may be admitted only if rezoning is sufficiently probable for such a change to have an effect on the present market value of the property as of the date of taking.[712] With regard to the effect of a zoning ordinance specifying a minimum setback requirement, the Minnesota court stated: "Evidence of value for uses prohibited by an ordinance may be introduced and considered only where there is evidence showing a reasonable probability that the ordinance will be changed in the near future."[713]

The court in a California case stated the rule as follows:

> Where the land is not presently available for a particular use by reason of a zoning ordinance or other restrictions imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value.[714]

In a later California case, the landowner claimed the jury was entitled to consider the possibility or probability of prospective zoning changes that might permit use of her lot for other than single-family residential purposes; here the court went even further when it said:

> Where there is a reasonable probability that zoning restrictions will be altered in the near future, the jury should consider not only those uses currently permitted, but also other uses to which the property could be devoted in the event of such a change.[715] . . . The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were he contemplating a purchase of the property . . . and it is manifest that plausible and probable changes in the character of the neighborhood and in zoning restrictions in an area constitute such factors.[716]

---

[706] *Id.* at 670–71, 162 N.E.2d at 274–75.

[707] *Id.* at 670–71, 162 N.E.2d at 275. The trial court was not justified in excluding the landowner's testimony and reasons entirely; portions of the testimony which were too related to a particular project of development (rather than to the effect upon market value of the general possibility of such a development) could have been excluded in less wholesale fashion.

[708] 32 Minn. 224, 225, 20 N.W. 135, 136 (1884).

[709] State, by Lord v. La Barre, 225 Minn. 309, 316, 96 N.W.2d 642, 647 (1959).

[710] *Id.*

[711] State, by Lord v. Pahl, 254 Minn. 349, 356, 95 N.W.2d 85, 90 (1959).

[712] State *ex rel.* Morrison v. McMinn, 88 Ariz. 261, 262–65, 355 P.2d 900, 902–04 (1960); People *ex rel.* Dep't of Public Works v. Dunn, 46 Cal. 2d 639, 642, 297 P.2d 964, 966 (1956); People *ex rel.* Dep't of Public Works v. Donovan, 15 Cal. Rptr. 19 (1961), *rev'd*, 57 Cal. 2d 346, 352–54, 369 P.2d 1, 4–5 (1962); State Roads Comm'n v. Warriner, 211 Md. 480, 483–93, 128 A.2d 248, 250–55 (1957); State, by Lord v. Pahl, 254 Minn. 349, 356, 95 N.W.2d 85, 90 (1959).

The validity of a zoning ordinance, however, cannot be collaterally attacked in a condemnation proceeding. Robinson v. Commonwealth, 335 Mass. 630, 631–32, 141 N.E.2d 727, 727–28 (1957).

[713] State, by Lord v. Pahl, 254 Minn. 349, 356, 95 N.W.2d 85, 90 (1959). The record in the case, however, did not disclose any evidence that would have indicated a reasonable probability that the setback requirement would be changed.

Similarly, an Arizona case held that the commercial value of property zoned for residential purposes could not be considered in determining the present market value of the property unless evidence was introduced indicating a probable change from residential to commercial zoning in the near future. No such evidence was introduced here. State *ex rel.* Morrison v. McMinn, 88 Ariz. 261, 262–65, 355 P.2d 900, 902–04 (1960).

[714] People *ex rel.* Dep't of Public Works v. Dunn, 46 Cal. 2d 639, 642, 297 P.2d 964, 966 (1956). Testimony was given here that a change of zoning was reasonably or highly probable.

[715] People *ex rel.* Dep't of Public Works v. Donovan, 15 Cal. Rptr. 19 (1961), *rev'd*, 57 Cal. 2d 346, 352, 369 P.2d 1, 4 (1962).

[716] *Id.*

Landowners are not required to show that the zoning authorities were contemplating changes in the zoning restrictions. The reasonable probability of a zoning change, noted the court, may be shown by a variety of factors, including neighborhood changes and general changes in land use.[717]

The principal question in a Maryland case, and one which had not been previously passed on by the state's court of appeals, involved whether it was erroneous, as claimed by the condemnor, to permit introduction of evidence of the probability of a change in zoning of the subject property from residential to light industry and to allow the landowner's witnesses to testify to market value on the basis of a probable change in zoning.[718] Noting that both text writers and numerous cases in other jurisdictions recognize the rule that ". . . evidence of a reasonable probability of a change in zoning classification within a reasonable time may properly be admitted and its influence upon market value at the time of the taking may be taken into account," [719] the court of appeals, disagreeing with the condemnor's contention, stated that it saw no reason for not adopting the above rule in Maryland.[720] Therefore, testimony to show a substantial possibility or probability of a reclassification should be admitted in evidence.[721] "If the evidence offered proved to be insufficient to establish a reasonable probability of rezoning within a reasonable time after the date of taking, it would," said the court, "have been entirely in order for the trial court to have instructed the jury as to the insufficiency of such evidence and to have stated that no element or enhancement of market value could be based upon the mere possibility that at some time in the future a reclassification might occur." [722] That, however, was not the situation here. The showing as to the growth of population in the area, the market expansion of its commercial area outwards and toward the subject property, the demand for property for industrial use in the area on such land already having industrial zoning in effect, the adaptability of the subject property to industrial use, the opening of part of an expressway in the vicinity, the opinions of expert witnesses to the effect that the highest and best use of the subject property is for light industrial use, were sufficient to meet the test of at least a reasonable probability of reclassification within a reasonable time.[723]

SUITABILITY OF PROPERTY FOR SUBDIVISION DEVELOPMENT

Closely associated with the evidentiary problems concerning the owner's plans for using his property is the question involving the admissibility of evidence that the property, which is presently being used for agricultural or nonurban purposes, is suitable for use as a residential subdivision development. As with proof of the owner's intended use of the land, the cases studied did not appear to set forth definite rules with regard to the extent that evidence of the landowner's proposal to subdivide his land may be admitted to prove the value of the subject property for that purpose. Trial courts seem to have a considerable amount of discretion in deciding whether the probative value of the evidence outweighs the detrimental effects that could result from the raising of time-consuming and misleading collateral issues. The sample cases did, however, indicate some of the factors the trial courts take into consideration to assist them in exercising their discretion as to the admissibility of such evidence on an individual basis. Two of the most important factors disclosed by those cases include the imminence of the subdivision development and the purpose one of the parties had in offering the evidence.

Cases in Alabama [724] and Arkansas [725] illustrate the influence those factors of imminence of development and purpose of introduction have on the court's exercise of its discretion to admit proposed subdivision plans in evidence. In the first Alabama case the land a parcel was being taken from for highway purposes was undeveloped and no lots had been laid out.[726] A rough map offered by the landowner, which showed a possible subdivision of the subject property into residential lots, was held to be properly admitted in evidence for the purpose of showing the best use of the property relative to determining its present market value. However, such evidence would not be admissible, said the court, for the purpose of establishing value based on the speculative profits from the sale of the proposed lots. Basically, then, under the rule expressed in this case, a proposed subdivision plat can be admitted to show the use to which the land could be put, but no valuation of any kind, such as putting a price tag on the lots,[727] can be placed on the map.

The condemnor in the second Alabama case, *State v. Goodwin*,[728] claimed the trial court erred in accepting in evidence the landowner's subdivision plats showing that the 33-acre tract in question had been divided into 63 lots before the taking and 39 lots after, resulting in the loss of 24 lots.[729] An argument was made by the condemnor that

---

[717] *Id.* at 353, 369 P.2d at 4. Because of changes in character that the neighborhood had undergone, the landowner theorized that she could reasonably expect that her property would be upgraded in zoning and use. Sufficient evidence was present, said the court, to support her theory.

[718] State Roads Comm'n v. Warriner, 211 Md. 480, 483–84, 128 A.2d 248, 250 (1957).

[719] *Id.* at 484, 128 A.2d at 250.

[720] *Id.* at 485, 128 A.2d at 250.

[721] *Id.* at 486, 128 A.2d at 251.

[722] *Id.* at 486, 128 A.2d at 251–52.

[723] *Id.* at 486–87, 128 A.2d at 252. With regard to the landowner's expert witnesses basing their opinions of value on the probability of a change in the zoning ordinance, the court of appeals noted that the jury did not accept their testimony entirely at face value. 211 Md. at 487–88, 128 A.2d at 252.

[724] Etowah County v. Clubview Heights Co., 267 Ala. 355, 102 So. 2d 9 (1958); State v. Goodwin, 272 Ala. 618, 133 So. 2d 375 (1961).

[725] Arkansas State Highway Comm'n v. O. & B. Inc., 227 Ark. 739, 301 S.W.2d 5 (1957); Arkansas State Highway Comm'n v. Watkins, 229 Ark. 27, 313 S.W.2d 86 (1958).

[726] Etowah County v. Clubview Heights Co., 267 Ala. 355, 357, 102 So. 2d 9, 10 (1958).

[727] *Id.* at 356–57, 102 So. 2d at 10. The court bases its decision on Thornton v. City of Birmingham, 250 Ala. 651, 655, 35 So. 2d 545, 547 (1948), which states: "Evidence of value of the property for any use to which it is reasonably adapted is, as already stated, admissible but the proof must be so limited and the testimony restricted to its value for such purposes. Of probative tendency on this issue is the offer of a proposed plan or a possible scheme of development, and the trial court so held, but it was not permissible to incorporate in such a plan the speculative price of the individual lots."

[728] State v. Goodwin, 272 Ala. 618, 133 So. 2d 375 (1961).

[729] *Id.* at 620–21, 133 So. 2d at 377–78. All of the lots had been fully laid off on the ground and all engineering work had been completed. A plat of one section had been given final approval by the Planning Commission of the City of Montgomery, while the plat of the other section had been given only preliminary approval. The lots in neither of the sections had been developed.

the proper unit for valuation purposes was the entire tract of 33 acres and any evidence that the tract was divided into lots created an improper unit for valuation.[730] Agreeing that the entire tract was the proper unit for valuation,[731] the supreme court held that evidence as to the actual value of the lots was properly admitted, first, because of the highest and best use factor,[732] and second, because the tract was part of a going subdivision proven to be successful,[733] and the plans for subdividing the tract into lots had already been approved by the local authorities.[734] Compensation, said the court, is based on the use the property is adapted or reasonably adapted to, and it was conceded here that the highest and best use of the property in question was for residential subdivision purposes.[735] With regard to the second reason for admitting such evidence, the court said: "When property has reached the stage of development as has this subdivision, no competent appraiser could disregard the value of the lots, and an appraised value based solely upon acreage would not only be unrealistic, but unfair to the landowner." [736] Another reason for the admission of such evidence was because all lot values were set by the witnesses after they had excluded the speculative values and the anticipated profits.[737] In distinguishing the present case from an earlier one, which held it was a reversible error to permit proof of the values of separate lots by the front foot, the supreme court said there was no attempt in the instant case to prove the value of individual lots.[738]

In one of the Arkansas cases a strip of land was taken for highway purposes from a tract that had been divided into residential lots.[739] The strip taken, however, was not subdivided, but instead had been reserved by the subdivider for highway purposes. Many of the lots were already sold at the time of the condemnation trial.[740] With regard to the strip taken, the landowner sought to prove its value for residential lot purposes by offering testimony showing how the parcel might have been divided into such lots had the strip not been reserved for the highway project, and the net value of each lot after deduction of improvement costs. Contrary to the condemnor's contention, the supreme court held the testimony to have been properly admitted to establish market value, and as a basis for such admission said, "The established rule in this state in cases like this is that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market." [741] The tract involved here was a going subdivision and surrounded by well-developed residential sections of a fast growing area, and its best and most logical use was for residential lot development; therefore, this was not a case, as were the situations in those cited by the condemnor to support its argument, where the land's use for subdivision purposes was merely speculative and too remote to influence present market value.[742]

Part of a tract of land that was suitable for subdividing into lots, but which had not been so subdivided, was taken in the second Arkansas case.[743] In his attempt to prove the value of his land taken, the landowner sought to introduce in evidence a plat showing possible subdivision of the area into residential lots and the probable value of the lots.[744] The supreme court agreed with the condemnor's contention that the admission of such evidence by the trial court constituted a reversible error.[745] Landowners have the right to introduce competent testimony to establish and explain the suitability of the land for its highest and best use; evidence was admitted without dispute here to show that the subject property's most valuable use was for residential purposes.[746] What the supreme court is holding here, then, is that it is improper to show the number and value of lots in those situations where the land actually has not been subdivided and it may be some time before the subdivision takes place.[747] Evidence relating to the number and value of lots in a nonexistent subdivision ". . . partakes too much of the character of speculation to serve as a basis of valuation at the date . . . of the present suit." [748] "It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided that is to be valued." [749]

SUMMARY AND CONCLUSIONS

The term "highest and best use" as applied to eminent domain situations is concerned both with valuation concepts and with the rules of evidence. Buyers of land normally will give thought to its most profitable use and will bid up its price to what they can afford to pay under this most profitable development plan. The "highest and best use" concept, therefore, is a legitimate element in determining market value (most probable selling price), and both appraisers and courts freely accept the validity of the general concept.[750]

It is noted in this chapter that evidential problems generally can be divided into four categories: (1) the effect of the present use of the property; (2) the owner's intended use of the property; (3) the effect of zoning; and (4) the suitability of the property for subdivision development. With regard to the first category, it is clear that the present use of the property does not prevent introduction

[730] *Id.* at 622, 133 So. 2d at 378.
[731] *Id.*
[732] *Id.* at 622, 133 So. 2d at 378–79.
[733] *Id.* at 622, 133 So. 2d at 379.
[734] *Id.* at 621, 133 So. 2d at 377–78. *See also* 272 Ala. at 623, 133 So. 2d at 379.
[735] *Id.* at 622, 133 So. 2d at 378.
[736] *Id.* at 622, 133 So. 2d at 379. *See also* 272 Ala. at 623, 133 So. 2d at 379.
[737] *Id.* at 623, 133 So. 2d at 379. *See also* 272 Ala. at 623–24, 133 So. 2d at 379–80.
[738] *Id.* at 623, 133 So. 2d at 379.
[739] Arkansas State Highway Comm'n v. O. & B., Inc., 227 Ark. 739, 740–41, 301 S.W.2d 5, 6 (1957).
[740] *Id.*
[741] *Id.* at 744–45, 301 S.W.2d at 8. The condemnor conceded that the potential use of land for subdivision purposes may be considered in establishing market value but claimed it was erroneous to show the number and value of lots into which a certain tract could be divided.
[742] *Id.* at 745, 301 S.W.2d at 8.
[743] Arkansas State Highway Comm'n v. Watkins, 229 Ark. 27, 313 S.W.2d 86 (1958).
[744] *Id.* at 29–31, 313 S.W.2d at 87–88.
[745] *Id.* at 29, 31, 34, 313 S.W.2d at 87–88, 90.
[746] *Id.* at 29, 313 S.W.2d at 87. *See also* 229 Ark. at 31–34, 313 S.W.2d at 88–90.
[747] *Id.* at 31–34, 313 S.W.2d at 88–90.
[748] *Id.* at 32, 313 S.W.2d at 89.
[749] *Id.* at 33, 313 S.W.2d at 89.
[750] *See generally* RATCLIFF, *supra* note 191 at 53–57.

of evidence of its suitability for some other use. This is consistent with sound appraisal theory.[751] With regard to the second category, the courts again seem to have followed sound appraisal theory. The admission of evidence of the owner's intended use seems to depend on the trial court's judgment as to the probative value of such evidence in establishing market value, weighed against the number and complexity of the collateral issues that the evidence is likely to introduce into the case. As the courts sometimes point out, it is market value, not value to the owner, that is to be determined, and the owner's intended use may or may not be relevant to the determination of market value.

Most of the evidential issues have arisen in the last two categories noted. As a general rule, evidence of a property's adaptability to a use currently prohibited by zoning may be admitted only if rezoning is sufficiently probable for it to have an effect on the present market value of the property as of the date of taking. The general rule is therefore quite clear, but difficult underlying factual issues are presented. Admissibility of evidence that the property presently used for agricultural purposes is suitable for use as a residential subdivision development appears to be dependent on the imminence of development and the purpose of introducing such evidence. Courts in the cases studied here admitted plats of proposed subdivisions for the purpose of showing that the highest and best use of the property is for residential development but not to establish market value by reference to the selling price of the lots. Only where the subdivisions were developed did the courts in the sample case admit in evidence the value of the residential lots. Ratcliff has suggested that the courts have been somewhat too restrictive on this point. Investors in real estate of this type clearly start their calculations of present value with the expected future prices of lots to be marketed, and such evidence therefore should be relevant to a determination of present value. Consequently, courts should not exclude this type of testimony if it is well supported by market analysis and used in connection with estimates of production costs and the risk and cost of waiting.[752]

The California Evidence Code touches on the subject of highest and best use when it states that an expert witness may base his opinion of value on all those ". . . uses and purposes for which the property is reasonably adaptable and available . . ." that a willing buyer and willing seller would take into consideration in determining the property's price.[753] The Code further states: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties."[754] The admissibility of evidence of the property's highest and best use is similarly dealt with in the Pennsylvania statutes.[755] These seem to be largely restatements of the general common law rule, which is stated as follows in Nichols:

> To warrant admission of testimony as to the value for purposes other than that to which the land is being put, or to which its use is limited by ordinance at the time of the taking, the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, (3) that the market value of the land has been enhanced by the other use for which it is adaptable.[756]

Perhaps the California and Pennsylvania statutory rules represent as definite a statutory formulation as is feasible in this particular area. A considerable amount of discretion must remain with the trial courts, and improvements, where needed, probably can be brought about through the educational process.

---

[751] *Id.* at 54–55.

[752] *Id.* at 56.

[753] CAL. EVIDENCE CODE § 814 (West 1966), in the Appendix of this report.

[754] CAL. EVIDENCE CODE § 821 (West 1966), in the Appendix of this report.

[755] *See* PA. STAT. ANN. tit 26, §§ 1-703(2), 1-705(3) (Supp. 1967), in the Appendix of this report.

[756] 4 NICHOLS, *supra* note 199, § 12.314.

CHAPTER THIRTEEN

ADMISSIBILITY OF PHOTOGRAPHS OR OTHER VISUAL AIDS

Issues relating to the admissibility of photographs, maps, plats, charts, models, and other demonstrative evidence for the purposes of showing the location or condition of the property subject to condemnation were raised in a few of the recent highway condemnation cases. Most of these problems, which related to the visual aids' accuracy and their relevancy to an issue in the case, involve photographs as contrasted with maps, plats, charts, and so forth. The admissibility of such evidence as subdivision plats and maps to illustrate the adaptability of a particular parcel of land for a specific use is not analyzed in this chapter.

PHOTOGRAPHS

Verification

Parties offering photographs [757] must show by extrinsic evidence that such pictures are a true and accurate representation of the property they purport to portray. Such verification may be established by any witness who is familiar with the scene portrayed and is competent to speak from personal observation.[758] When a witness who had indicated a personal knowledge of the pictured building identified a photograph as a protrayal of that building, such identification was held in one case to be a sufficient verification of the exhibit's correctness by a qualified and competent witness.[759] In another case, a registered professional engineer employed by the condemning city identified certain aerial photographs [760] as representing the property in question, the neighborhood surrounding it, and the relative position of the improvements.[761] His testimony that stated a familiarity with the property in question and that the photographs accurately and correctly portrayed such property and its conditions was held to be an adequate certification to support the exhibits' admission in evidence.[762] The sufficiency of the certification of a photograph seems to be discretionary with the trial judge.[763]

Relevancy and Materiality

The relevancy of a photograph pertains to the relevancy of the fact or subject matter pictured and not to the propriety of evidencing a relevant fact by a photograph. If the fact to be shown by the photograph is itself irrelevant, and so inadmissible, the fact cannot be made relevant and proved by a photograph.[764] Generally, photographs are considered to be relevant to the issues in the case and so admitted in evidence if they assist the jury in understanding the case or aid a witness in explaining his testimony.[765] As with verification, the determination of relevancy and materiality of a photograph is left largely to the sound discretion of the trial judge, and his ruling in that regard will not ordinarily be disturbed unless it can be shown he abused that discretion.[766]

Admissible photographs in eminent domain proceedings must be relevant and material to the issue of determining just compensation on the date of valuation for those compensable rights taken or damaged by the condemnor. Relevancy problems in the recent highway condemnation cases generally arose because the photographs were taken either before or after such date of valuation. Consequently, they were subject to allegations that they did not represent the true condition of the property at that time; therefore, they could not be relevant or material to the issue of determining just compensation. In making its decision the court, in each sample case, had to determine if the photograph represented a compensable right taken or damaged, and if so, to decide if the photograph had a bearing on that right's value. Of course, photographs that are entirely irrelevant and immaterial to that issue [767] or are of such a nature as to divert the minds of the jurors to irrelevant or improper considerations are excluded from evidence.[768] For example, a photograph of a parcel of land located in a business zone across the street from the condemned property, which was not in such a zone, was held to be properly excluded on the ground that such a photograph was not relevant to the issue of ascertaining the subject property's value.[769] The reasoning behind the decision was that the two properties were not comparable.[770] In the second case, photographs showing the injurious conditions of the property on the date the condemnor took possession (approximately two and one-half months after the date for assessing damages) were held to be inadmissible because of their irrelevancy to the issue of determining just compensation.[771] The basis of the decision in this case was that compensation to the condemnor for damages done to the property between the valuation date and the date of possession was not an issue for determination, and so the admission of the photographs might have misled the jurors into believing the date of possession to be the one for valuation.[772]

The decisions in some of those recent highway cases indicated, however, that photographs do not have to be

---

[757] *See* Commonwealth Dep't of Highway v. Williams, 317 S.W.2d 484 (Ky. 1958), where it was held that colored photographs are admissible under the same conditions as black and white pictures.

Without citing any cases as a basis for his assumption, Scott indicates that when photos are relevant and properly verified, there should be no question as to their admissibility, because by showing the actual colors of a subject they are even a more faithful type of reproduction than black and white photographs. The courts, therefore, will not, Scott feels, reject the most reliable type of photographic pictures. [SCOTT, PHOTOGRAPHIC EVIDENCE § 627 (1942).]

[758] State *ex rel.* State Highway Comm'n v. Cone, 338 S.W.2d 22, 26–27 (Mo. 1960). *See also* Frankfurt v. City of Dallas, 229 S.W.2d 722, 723, 726 (Tex. Civ. App. 1957).

[759] State *ex rel.* State Highway Comm'n v. Cone, 338 S.W.2d 22, 27 (Mo. 1960). When shown a particular photograph, the witness said, "This is the New York Life Building." By such a statement, the appellate court held, he in effect said, "This photograph truly represents the portrayed part of the New York Life Building as I have seen it." 338 S.W.2d at 27.

[760] SCOTT, PHOTOGRAPHIC EVIDENCE § 628 (1942). Aerial pictures should be admissible under the same rules governing all photographs. Therefore, they must be relevant to some issue in the case and verified as a correct representation of the property they purport to portray. *See, e.g.*, Moore v. McConnell, 105 Ga. App. 758, 759, 125 S.E.2d 675, 676 (1962) (holding an aerial photograph was improperly admitted as evidence because it was not properly verified or authenticated by some other evidence); Buchanan v. Hurdle, 209 Miss. 722, 725, 48 So. 2d 354, 355 (1950) (properly excluded, as the accuracy and correctness of the photographs were not properly and sufficiently shown).

[761] Frankfurt v. City of Dallas, 229 S.W.2d 722, 723, 726 (Tex. Civ. App. 1957).

[762] *Id.*

[763] *See* State *ex rel.* State Highway Comm'n v. Cone, 338 S.W.2d 22, 27 (Mo. 1960) (holding that the trial court did not abuse its discretion in admitting the photographs).

[764] *Id.*

[765] Hance v. State Roads Commission of Maryland, 221 Md. 164, 172, 152 A.2d 644, 648 (1959) (dictum).

[766] *Id.* at 172–73, 156 A.2d at 648; State *ex rel.* State Highway Comm'n v. Cone, 338 S.W.2d 22, 27 (Mo. 1960); Colson v. State Highway Bd., 122 Vt. 392,397, 173 A.2d 849, 853 (1961). *See* Corens v. State of Maryland, 185 Md. 561, 570, 45 A.2d 340, 346 (1946), which stated: "Whether a photograph is of any practical value in a particular case is a preliminary question for the trial court, and the court's exercise of discretion in determining the question is not open to review unless plainly arbitrary."

[767] *See, e.g.*, L'Etoile v. Director of Public Works, 89 R.I. 394, 153 A.2d 173 (1959).

[768] State *ex rel.* State Highway Comm'n v. Cone, 338 S.W.2d 22, 27 (Mo. 1960). *See, e.g.*, New Jersey Highway Authority v. Wood, 39 N.J. Super. 575, 121 A.2d 742 (1956).

[769] L'Etoile v. Director of Public Works, 89 R.I. 394, 402–403, 153 A.2d 173, 178 (1959).

[770] *Id.* Property located in an area zoned for business commonly has a greater value because of that reason, and so the admission of the photograph for consideration by the jury would have been prejudicial to the condemnor.

[771] New Jersey Highway Authority v. Wood, 39 N.J. Super. 575, 580–82, 121 A.2d 742, 744–45 (1956). Here the photographs were held to have been erroneously admitted by the trial court. The issue in the case was to determine the property's value as of the commencement date of the condemnation action, and because the pictures did not represent the premises' condition at that time, they were not relevant to that issue.

[772] New Jersey Highway Authority v. Wood, 39 N.J. Super. 575, 580–82, 121 A.2d 742, 744–45 (1956). Photographs made of the property on

taken at the time of valuation to be relevant to the issue of determining just compensation.[773] Some illustrations of these situations may be helpful for an understanding of the problems relating to relevancy. Photographs taken of the property nine months before the date of condemnation were held to be relevant to the issue of the case and so admissible even though improvements had been made on the property between the dates of photographing and valuation.[774] Such pictures became relevant through the accompanying testimony of witnesses and other evidence that indicated what improvements had been made on the property since the date of photographing and what condition the property was in at the time of valuation.[775] Prejudicial error was held not to have been committed in admitting photographs made in the wintertime of the subject property condemned the previous August, because the jury could not be misled by the testimony of the condemnor's witness that the photographs were a fair representation of the property's condition at the time of condemnation.[776]

In a case of partial taking, where the measure of damages is the difference between the fair market value of the property before and after the taking, photographs made depicting the change in the condition of such property after the date of valuation have been held to be admissible. The reason is that such photographs have a bearing on the property's value after the date of taking and so are relevant to the issue of measuring damages.[777] In addition, the photographs afford an opportunity for a comparison of the property before and after the taking.[778] Where the issue in the case was to determine just compensation for the loss of the landowner's access rights, photographs made at a time when the conditions of the property had been substantially changed from the date of taking were held to be admissible to show the nature and extent of damages to the remainder of the property by reason of the fact that the access rights had been taken away.[779] Photographs in a Missouri case showing a temporary use easement during the period of time the condemnor was constructing a highway on the permanent easement were held to be relevant and material to the question of such work easement's fair market value. There, the condemnor had condemned a strip of land for a work easement and the value of that easement was a jury question; therefore, the photographs, which showed the condition and use made of the strip during the construction period, could assist the jury in ascertaining compensation.[780]

OTHER VISUAL AIDS

Only two of the recent highway condemnation cases involved the admissibility of maps and plats.[781] A copy of a verified plat[782] representing several blocks of the city (including the property in question) was admitted, not as independent evidence, but for the sole purpose of showing the location of the subject property in reference to the streets.[783] The map in question in the other case was prepared under the direction of the resident engineer for the State Highway Department, who identified it as a correct representation of the field notes made by the regular surveyors.[784] The map was held to be admissible, not as evidence in itself of the property's condition, but only to illustrate the testimony of the witness testifying in relation to such conditions, even though it was not made by the person making the surveys it was based on.[785] In another type of case, the trial court was held not to have erred in preventing one of the condemnor's witnesses from using a sheet of paper with figures on it to illustrate his testimony with regard to market value.[786]

---

the date of possession would tend to give the jury the impression that such a date was the date of valuation. Those photographs, which were offered by the condemnor and showed the property in worse condition at the time of possession than at the time of valuation, would have been prejudicial to the landowner because of their possibility of reducing the amount of compensation.

[773] Hance v. State Roads Comm'n, 221 Md. 164, 156 A.2d 644 (1959); Carney v. Mississippi State Highway Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958); State *ex rel.* State Highway Comm'n v. Volz Concrete Materials Co., 330 S.W.2d 870 (Mo. 1960); Ajootian v. Director of Public Works, 90 R.I. 96, 155 A.2d 244 (1958); State v. Meyers, 292 S.W.2d 933 (Tex. Civ. App. 1956); Colson v. State Highway Bd., 122 Vt. 392, 173 A.2d 849 (1961).

[774] Hance v. State Roads Comm'n, 221 Md. 164, 172–73, 156 A.2d 644, 648–49 (1959).

[775] *Id.* at 172, 156 A.2d at 648. The photographs were not admitted as a true representation of the condition of the property as it existed on the date of valuation, but as a true representation of the conditions as they existed when the pictures were actually taken.

[776] Ajootian v. Director of Public Works, 90 R.I. 96, 100–01, 155 A.2d 244, 246 (1958). Independently of the condemnor's witness' opinion, the jurors could reach the same or a different conclusion that the photographs were a fair representation of the property's condition at the time of condemnation.

[777] Carney v. Mississippi State Highway Dep't, 233 Miss. 598, 610, 103 So. 2d 413, 417 (1958) (holding all photographs having any bearing on the value or condition of the property before and after the taking are admissible); Colson v. State Highway Bd., 122 Vt. 392, 397, 173 A.2d 849, 852–53 (1961).

[778] Colson v. State Highway Bd., 122 Vt. 392, 397, 173 A.2d 849, 852-53 (1961). The photographs in question showed the property during the construction period when many of the trees had been cut down.

[779] State v. Meyers, 292 S.W.2d 933, 938 (Tex. Civ. App. 1956). To prohibit photographic evidence competent to show the loss of such valuable compensable property rights would deprive the landowners of their property without due process of law.

[780] State *ex rel.* State Highway Comm'n v. Volz Concrete Materials Co., 330 S.W.2d 870, 878–79 Mo. (1960). The grounds for challenging the admission of such photographs were that they did not show the conditions of the property either before or after the construction of the highway, the photographer was unable to distinguish the line between the temporary use easement and the permanent right-of-way, and they were prejudicial against the condemnor by showing that the road in front of the landowner's property was torn up during construction, which was not a compensable item. However, the photographs were introduced relative to the issue of determining compensation for the taking of a temporary easement, and not for the purpose of ascertaining damages for condemning the permanent right-of-way under the before and after rule, or of determining the compensability of the landowner for tearing up the road in the front of his property.

[781] McGovern v. Bd. of County Comm'rs of Adams County, 115 Colo. 347, 173 P.2d 880 (1946); Aycock v. Fulton County, 95 Ga. App. 541, 98 S.E.2d 133 (1957).

[782] Aycock v. Fulton County, 95 Ga. App. 541, 542, 98 S.E.2d 133, 134 (1957). The witness testified that from his own knowledge the plat correctly corresponded with the streets as they actually existed.

[783] *Id.* at 542–43, 98 S.E.2d at 134. The decision here is based on Durden v. Kerby, 201 Ga. 780, 41 S.E. 131 (1947), which states that as a general practice, plats and diagrams are admitted, ". . . for whatever they may be worth; not as original, independent evidence, but on the theory that they are nothing more than verified pictorial representations of matters about which the witness has properly testified, and as being a desirable expediency by which to illustrate witness's testimony as to location of the land there represented." 201 Ga. at 782, 41 S.E.2d at 132.

[784] McGovern v. Bd. of County Comm'rs of Adams County, 115 Colo. 347, 349, 173 P.2d 880, 881 (1946). The map merely showed the location and shape of the area, but not the acreage, from which the sand had been removed.

[785] *Id.* at 349–50, 173 P.2d at 881. This was permissible particularly in view of the fact that it was not contended that the map was inaccurate. Here the map was shown to be reasonably accurate and correct, which is all that is required in such cases. The admission of such exhibits is in the sound discretion of the trial court.

[786] Shelby County v. Baker, 269 Ala. 111, 122, 110 So. 2d 869, 906 (1959). The court found this type of evidence to be somewhat analogous to the use of a blackboard for the purpose of illustrating testimony. The use of such demonstrative materials is within the sound discretion of the trial court.

SUMMARY AND CONCLUSIONS

Maps, plats, and photographs must be verified through testimony of the witnesses introducing them as an accurate and true representation of the property as it exists at a time relevant to the issue of measuring just compensation. However, as indicated by the sample cases, such verification need not be made by the photographer or maker of the map or plat. One held a map could be verified by a person under whose direction the map was prepared, even though the map was actually prepared by a person other than those making the surveys it was based on. All that seems necessary for a verification is that the witness have sufficient knowledge of the scene represented by the pictures to testify from personal knowledge.

A difference seems to exist between the degree of accuracy required for photographs and maps or plats. Where a map or plat is not admitted as independent evidence in itself of the property's location or condition, but only for the purpose of illustrating a witness' testimony relative to such location or condition, that map or plat need only be reasonably accurate and correct. At any rate, the sufficiency of the verification logically is discretionary with the trial court.

The fact represented by an admissible photograph must be relevant to the issue of measuring just compensation on the date of valuation. However, an analysis of the recent highway condemnation cases indicates that a photograph need not be taken on the date of valuation nor even represent the condition of the property on that date to be relevant. All that seems to be necessary is that the photograph represent an issue that is relevant to the measure of just compensation. For example, a photograph taken prior to the date of valuation may be relevant if other evidence indicating the changes made in the property's condition accompanies the introduction of such photographs. The test relative to the admissibility of a photograph taken after the date of valuation seems to be whether it represents the condition of a compensable right taken or damaged or assists in the determination of the after value in partial taking cases. Logically, the relevancy of photographs and other visual aids is discretionary with the trial court.

When a photograph is admitted it does not become evidence of value, but it is admissible as independent evidence of the conditions of the property affecting its value, and, as such, photographs differ from maps and plats, in that maps and plats seem to be admitted only for the purpose of illustrating testimony and not as independent evidence. For example, a map or plat is not admitted as evidence of the property's condition, but only to illustrate the witness' testimony relative to that condition. This could appear to be a fantasy. How can a trial judge effectively tell a jury that a map that has been introduced is not to be considered as evidence but only as illustrative testimony?

In summary, properly verified maps, plats and photographs that are relevant to the issue of determining just compensation on the date of valuation are admissible in eminent domain proceedings at the trial court's discretion. Photographs need not be taken on the date of valuation to be relevant to the issue of measuring just compensation. A photograph may be admitted as evidence of a condition, whereas maps and plats are admitted only to illustrate the witness' testimony relative to that condition.

CHAPTER FOURTEEN

OTHER ISSUES RELATING TO ADMISSIBILITY OF EVIDENCE

Many cases in the sample reviewed dealt with miscellaneous evidential issues not analyzed in the preceding chapters. Some of these are closely related to problems concerned with compensability and valuation. Others relate to general principles of evidence not peculiar to condemnation proceedings. However, such principles may be as important in condemnation trials as in other trials.

FEDERAL GOVERNMENT CONTRIBUTION TOWARD COST OF PROJECT

Evidence relating to the portion of the cost of the highway project to be paid by the Federal Government was an issue in two cases.[787] A Wyoming case held that the trial court properly excluded testimony tending to show that the Federal Government rather than the State of Wyoming was paying for the land.[788] According to the court, such evidence is wholly immaterial to the issue of determining the land's market value in condemnation proceedings.[789] The Wyoming Supreme Court further noted: "Apparently the idea underlying the request was that juries regard Federal projects as pork barrels which may be tapped without pain to the conscience or injury to the residents of the State. Our experience is that the citizens who serve on juries are fully cognizant of the harm to State taxpayers which results from

[787] Blount County v. McPherson, 270 Ala. 78, 79-80, 116 So. 2d 746, 748 (1959); Barber v. State Highway Comm'n, 80 Wyo. 340, 352, 342 P.2d 723, 725–26 (1959).

[788] Barber v. State Highway Comm'n, 80 Wyo. 340, 352, 342 P.2d 723, 725–26 (1959).

[789] *Id.* at 352, 342 P.2d at 725.

unwarranted Federal spending." [790] Evidence relating to the portion of the cost of the highway project to be paid by the Federal Government was admitted by the trial court during the cross-examination of one of the condemnor's witnesses in an Alabama case.[791] The objection was held to be too general to support the condemnor's assignment of error; hence, the appellate court refused to decide the issue.[792]

REVENUE STAMPS ON DEEDS

Pursuant to a federal statute,[793] revenue stamps must be attached to all deeds conveying real property. The amount of the conveyance tax, which is regulated by the statute, is dependent on the value of the property conveyed. A violation of the statute is a crime.[794]

The issue in a couple of cases involved, either directly or indirectly, whether the sales price could be proved by means of the revenue stamps attached to the deeds.[795] A deed, which previously conveyed the premises taken in this eminent domain proceeding and whose purchase price was indicated by revenue stamps attached and cancelled, was held to be admissible in an Iowa case as evidence of the property's market value at the time of condemnation.[796] Relative to the stamps on the deed indicating the prior purchase price for the property, the court said, ". . . revenue stamps are as reliably indicative of the consideration as a recited amount would be." [797] Because revenue stamps are attached to a deed pursuant to a federal statute and the violation of that statute is a crime, such stamps, noted the court, ". . . may be said to indicate with reasonable certainty the consideration paid." [798]

Whether revenue stamps attached to a deed may be used to prove the purchase price of the property is dependent, according to a New Hampshire case, on whether the witness considered the properties in forming his opinion as to the value of the property in question.[799] During the cross-examination of one of the condemnor's witnesses, whose opinion of the fair market value of the property in question was based on the sales price of comparable parcels, the landowner was permitted by the trial court to introduce in evidence deeds of certain tracts of land not taken into consideration by the witness, and to prove the sales price of them by means of the revenue stamps attached to those deeds. The landowner claimed that she was entitled to present evidence of the sales for the purpose of testing the extent of the witness' knowledge and the basis of his conclusions; and that, in order to determine the price paid for these conveyances (if such evidence was considered to be of sufficient probative value to warrant its admission), reference could be made to the revenue stamps. On the other hand, contentions were made on appeal by the condemnor that proof of the consideration paid for those certain parcels of land by evidence of the amount of revenue stamps on the deeds was hearsay, so its admission constituted a prejudicial error.[800]

If the deeds, noted the court, had conveyed property that the witness used as comparables in forming his opinion of the value of the premises in question, or if he had given his opinion of the value of those properties, then evidence of the amount of revenue stamps on the deeds could have been introduced to test the basis of the conclusions of the witness and the weight to be given them. The presence of revenue stamps on a deed creates a presumption that consideration was given in an amount represented by the stamps.[801] Here, however, the deeds that the witness did not consider in forming his opinion (nor did he testify as to their values) were offered to demonstrate that considerations paid for the various parcels of land conveyed, as denoted by the revenue stamps, were not in line with the damages the witness testified the plaintiff had suffered. Since this was an improper manner of proving the amount of consideration paid for those conveyances, the admission of the evidence was held to have constituted a prejudicial error.[802] As the actual selling price of comparable property could not be shown by hearsay evidence,[803] the sales price should have been proved by the testimony of a person having personal knowledge of it.[804]

A Colorado statute provides that a witness testifying as to the value of the property may state the considerations involved in any recorded transfer of property examined and utilized by him in arriving at his opinion, provided that he has personally examined the record and communicated directly with and verified the amount of such consideration with either the buyer or seller. The testimony is admissible as evidence of the consideration and is subject to rebuttal and objections as to its relevancy and materiality.[805]

MORTGAGES ON THE SUBJECT PROPERTY

The admissibility of evidence of a mortgage on the subject property was an issue in two Massachusetts cases.[806] In one case, where the condemnor was permitted to show that the landowner paid only $4,000 for the real estate four years prior to the condemnation, the landowner objected to the admission in evidence of the fact that the property had a $1,100 mortgage on it when he purchased it.[807] However, the court pointed out on appeal that the amount of any mortgage was immaterial because the jury was required to value the property without regard to the existence of encumbrances.[808] In counteracting the landowner's claim that

[790] *Id.* at 352, 342 P.2d at 725–26.
[791] Blount County v. McPherson, 270 Ala. 78, 79, 116 So. 2d 746, 748 (1959).
[792] *Id.* at 79–80, 116 So. 2d at 748.
[793] 26 U.S.C. § 4361 (Supp. II, 1965–66).
[794] *See* Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 343, 99 N.W.2d 413, 420 (1959); Berry v. State, 103 N.H. 141, 145, 167 A.2d 437, 440 (1961).
[795] Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 343, 99 N.W.2d 413, 420 (1959) (indirectly); Berry v. State, 103 N.H. 141, 145, 167 A.2d 437, 440 (1961) (directly).
[796] Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 343–44, 99 N.W.2d 413, 420 (1959).
[797] *Id.* at 343, 99 N.W.2d at 420.
[798] *Id.*
[799] Berry v. State, 103 N.H. 141, 145–46, 167 A.2d 437, 440–41 (1961).
[800] *Id.* at 145, 167 A.2d at 440–41.
[801] *Id.* at 146, 167 A.2d at 441 (dictum).
[802] *Id.*
[803] *Id.* at 145, 167 A.2d at 440.
[804] *Id.* at 146, 167 A.2d at 441.
[805] COLO. REV. STAT. ANN. § 50–1–22 (1963), in the Appendix of this report.
[806] *See* Lembo v. Town of Framingham, 330 Mass. 461, 115 N.E.2d 370 (1953); Onorato Brothers, Inc. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957).
[807] Lembo v. Town of Framingham, 330 Mass. 461, 463, 115 N.E.2d 370, 371 (1953).
[808] *Id.* at 463–64, 115 N.E.2d at 371.

the size of the mortgage might cast some doubt on his testimony that the property was worth $40,000, the appellate court noted that it ". . . cannot be supposed that the jury would think that the existence of a mortgage for $1,100 would furnish any basis for determining the value of the property." [809] Therefore, the admission of this immaterial evidence was held not to have injuriously affected the substantial rights of the landowner.[810]

A complaint was made by the landowner in the second case that the amount remaining due on a mortgage covering the lots taken had even been excluded.[811] Conceding that there may be particular cases where proof of the amount of a mortgage may have a real tendency to establish at least the minimum value of the mortgaged property, the appellate court in this case refused to decide whether evidence of mortgage value is always to be excluded in eminent domain proceedings.[812] In any event, the present case was not shown to be one for the admission of such testimony. Here the landowner failed to make an offer of proof as to: (1) how much of the amount due on the mortgage represented money originally lent and how much, if any, was arrears of interest; (2) how much of the security for the mortgage loan was furnished by the lot, of which only a small portion was taken; and (3) the change, or absence of change, in values of the mortgaged property between the date the mortgage was given as a purchase money mortgage and the date of condemnation.[813] The evidence was held to be properly excluded, because in the absence of proof on these three points the amount remaining due on the mortgage had little, if any, probative value in establishing the value of the land actually taken and the extent of the injury caused by the condemnation.[814]

BUILDING CODE VIOLATIONS

The admissibility of evidence relating to violations of the Building Code was an issue in a Maryland land condemnation case; the authorities had ruled that an apartment building located on the land did not comply with such Building Code.[815] Admitted in evidence were the Building Code of Baltimore County and three letters from the Building Engineer for Baltimore County (whose duties involved the enforcement of the Building Code) to the landowner, dated January 24, 1952, September 9, 1955, and September 23, 1955, respectively, in each of which the building was described as not being safe or fit for human habitation. The appellate court held them to have been properly admitted in evidence in the condemnation action, even though the date of taking was March 4, 1959.[816] Those letters were admitted by the trial court on the theory that they were written in the regular course of business and so admissible under Maryland's statutes.[817]

As for the reasoning behind its holding that the trial court did not err in admitting those letters in evidence, the appellate court said that, because the entire parcel of land owned by the condemnee was condemned, the issue for the jury was to determine the fair market value of the land taken, at the time of taking, as enhanced by the building upon it. The owners were not entitled to any separate compensation for the building unless it increased the market value of the land taken. As bearing upon the market value of the land, it was competent, according to the appellate court, for the landowner to show the advantageous factors relative to the land and building. Thus, it was also proper for the condemnor to show, as a means of showing its market value, that the building was not considered to be fit for human occupancy. The appellate court conceded that ordinarily, in order to establish the value of the property as of the date of taking, the condemnor would not show its condition seven years before that date, but stated that any evidence of value as of the date of taking, which is competent under the general rules of evidence and which is material and relevant to the question of value, may be admitted. Here, not only did the condemnor offer evidence showing the condition of the building in 1952, but he offered evidence to show the building's condition continuously thereafter down to and including the time of taking.[818] As for the Building Code, it was held to be admissible in evidence to show the source and extent of the authority of the Building Engineer to write the letters stating the building was unfit for human habitation and to corroborate the fact that the letters were written in the regular course of business.[819]

Under an Illinois statute evidence as to any unsafe, unsanitary, substandard, or other illegal condition, use, or occupancy of the property, the effect of those conditions on income from the property, and the reasonable cost of causing the property to be placed in a legal condition, use, or occupancy is admissible as bearing on the value of the property, and such evidence is admissible in spite of the fact that official action has not been taken to require the correction or abatement of the illegal condition, use, or occupancy.[820]

PRELIMINARY CONDEMNATION AWARDS AND DEPOSITS

A few states have statutory provisions specifying whether the amount of the deposit at the time of the declaration of taking [821] or the preliminary condemnation awards [822] may be introduced in evidence at subsequent jury trials of just compensation issues and whether valuation commissioners may be called as witnesses at such trials.[823] Both Arizona's [824] and Florida's [825] statutes provide that neither the

[809] *Id.* at 464, 115 N.E.2d at 371.
[810] *Id.*
[811] Onorato Bros., Inc., v. Massachusetts Turnpike Authority, 336 Mass. 56, 59, 142 N.E.2d 389, 393 (1957).
[812] *Id.*
[813] *Id.* at 59–60, 142 N.W.2d at 393.
[814] *Id.* at 60, 142 N.E.2d at 393.
[815] Hance v. State Roads Comm'n, 221 Md. 164, 156 A.2d 644 (1959).
[816] *Id.* at 169–70, 156 A.2d at 646–47.
[817] *Id.* at 169, 156 A.2d at 647. *See* MD. ANN. CODE art. 35, § 9 (Repl. 1965), which provides that any writing or record made in the regular course of business is admissible in evidence.
[818] *Id.* at 170–71, 156 A.2d at 647.
[819] *Id.* at 171–72, 156 A.2d at 647–48.
[820] ILL. REV. STAT. ch. 47, § 9.5 (1965), in the Appendix of this report.
[821] *See, e.g.*, ARIZ. REV. STAT. ANN., § 12–1116 H (Supp. 1967), in the Appendix of this report; Fla. Stat. § 74.081 (1967), in the Appendix of this report.
[822] *See e.g.*, WIS. STAT. §§ 32.05(10)(a) and 32.08(6)(a) (1965), in the Appendix of this report.
[823] *See, e.g.*, MINN. STAT. ANN. § 117.20(8)(c) (1964), in the Appendix of this report.
[824] ARIZ. REV. STAT. ANN., § 12–1116 H (Supp. 1967).
[825] FLA. STAT. § 74.081 (1967).

declaration of taking nor the amount of the deposit shall be admissible in evidence. Under a previous Florida statutory provision, the declaration of taking, the amount of the deposit, and the report of the appraisers appointed by the court were inadmissible, and could not be exhibited to any jury empaneled for the purpose of assessing the value of any land in condemnation.[826] However, the same statute provided that the appraisers appointed by the court were competent witnesses in the cause when such a cause was submitted to the jury for the purpose of fixing an award.[827] By Wisconsin statute neither the amount of the jurisdictional offers (the basic award) nor the award of the condemnation commissioners shall be disclosed to the jury during the trial.[828] An additional statute provides that the amount of a prior jurisdictional offer or award shall not be disclosed to the condemnation commissioners in proceedings before them.[829] Under an interpretation of a Minnesota statute, a commissioner in a condemnation proceeding may be called by either party as a witness to testify as to the amount of the commissioners' award.[830]

The trial court in an Arkansas case was held not to have committed a prejudicial error, as contended by the condemnor, in permitting to be revealed to the jury, on the cross-examination of one of the State Highway Commission's witnesses, the amount deposited with the clerk by the Commission as its estimate of just compensation at the time of the declaration of taking.[831] To test the credibility of a witness for purposes of impeachment, the appellate court said that such a witness may be cross-examined to show prior inconsistent statements.[832]

One of the appellate judges in a dissenting opinion to that case felt that the evidence of the amount deposited by the condemnor with its declaration of taking was inadmissible. He pointed out that the requirement of the deposit apparently has a two-fold purpose: first, to vest the condemnor with title and give him the right to immediate entrance upon terms fixed by the court, and second, to avoid the payment of interest on the amount deposited. Such a deposit actually is in the nature of an offer of compromise. Generally, offers made to or by the condemnor during the pendency of the condemnation proceeding are incompetent as evidence because they represent mere attempts at compromise and are not a true indication of market value.[833]

A Maryland case held that evidence of the award of the Board of Property Review (valuation commissioners) is inadmissible on a subsequent trial of the issue of just compensation.[834] The case primarily involved the construction of an ambiguous statute.[835] In a Wyoming case evidence of the award made by the valuation commissioners was held to be properly admitted on cross-examination of one of the commissioners when he testified as a witness at the trial.[836] The appellate court agreed that the amounts previously placed on the property by the valuation commissioners, who had an obligation to valuate the property, are not proper evidence to be introduced at the trial.[837] Here, however, the inconsistent statements of the witness are in issue, rather than the former action of the commissioners, and such inconsistent statements, if material, may be the subject of cross-examination or impeachment. Consequently, according to the appellate court such evidence was not admitted as substantive or independent testimonial evidence of value, but, admitted on cross-examination for the purpose of impeaching the witness' testimony.[838]

APPRAISALS NOT INTRODUCED IN EVIDENCE

The trial court in a Colorado case was held to have properly excluded evidence designed to show that the condemnor had made two appraisals of the property that were not offered in evidence.[839] According to the appellate court, juries are obligated to determine the value of the subject property on the basis of the evidence before them and cannot indulge in surmises or speculations concerning what might or might not have been the result of an appraisal by some person not produced as a witness.[840]

RIGHT-OF-WAY AGENT'S STATEMENTS AS TO VALUE

That portion of one of the landowner's testimony relating to observations of and conversations with an alleged agent of the condemnor during the course of settlement negotiations was held to have been properly excluded by the trial court in a North Carolina case on the ground that such statements made by the agent were hearsay, and hearsay statements, unless admitted within an exception to the hearsay rule, are inadmissible.[841] Even though neither the purpose for which the excluded testimony was offered nor the asserted basis of its admissibility was stated in the record, it was apparent, according to the court, that the landowners wished to place before the jury statements allegedly made by the alleged agent to the landowners during the course of the negotiations, that "they have damaged you $15,000," and "if he was going to sue, he would sue for $15,000."[842] Such extra-judicial declarations, the court said, are not competent to prove the agency of the declarant, but, even conceding that the declarant was the condemnor's agent, there was no showing that the alleged statements were within the scope of the declarant's authority, and the burden of so showing was on the landowners.[843]

---

[826] FLA. STAT. § 74.09 (1963).
[827] FLA. STAT. § 74.09 (1963).
[828] WIS. STAT. § 32.05(10)(a)(1965).
[829] WIS. STAT. § 32.08(6)(a)(1965).
[830] MINN. STAT. ANN. § 117.20(8)(c) (1964). *See* State, by Lord v. Pearson, 260 Minn. 477, 110 N.W.2d 206 (1961).
[831] Arkansas State Highway Comm'n v. Blakeley, 231 Ark. 273, 273–74, 329 S.W.2d 158, 159 (1959). The amount deposited was $500 and the verdict was $1,000. Under the provision of the statutes, the landowner withdrew the deposit. *See* ARK. STAT. ANN. §§ 76–534, *et seq.* (Repl. 1957).
[832] *Id.* at 274, 329 S.W.2d at 159.
[833] *Id.* at 275–76, 329 S.W.2d at 160–61.
[834] Congressional School of Aeronautics, Inc. v. State Roads Commission, 218 Md. 236, 250–54, 146 A.2d 558, 566–68 (1958). The trial court correctly excluded such evidence.
[835] MD. ANN. CODE art. 89B, § 18 (Repl. 1964).
[836] Barber v. State Highway Comm'n, 80 Wyo. 340, 353–54, 342 P.2d 723, 726 (1959).
[837] *Id.* at 353, 342 P.2d at 726 (dictum).
[838] *Id.*
[839] Epstein v. City & County of Denver, 133 Colo. 104, 113–14, 293 P.2d 308, 313 (1956).
[840] *Id.* at 114, 293 P.2d at 313.
[841] Williams v. State Highway Comm'n, 252 N.C. 514, 516–17, 114 S.E.2d 340, 341–42 (1960).
[842] *Id.* at 516, 114 S.E.2d at 341.
[843] *Id.* at 516–17, 114 S.E.2d at 341–42.

BUSINESS RECORDS AND OTHER DOCUMENTS

A California case held that certain documents offered by the landowner were properly excluded because they were irrelevant or were hearsay.[844] One of the documents was a letter from the landowner, to a bank, dated 16 months after the taking of the property, pertaining to the escrow established with the bank for the sale of the condemnee's remaining property to a third person. The admission of the letter in evidence was urged by the landowner to prove that he, in making the sale to the third person, reserved the right to compensation from the condemnor. However, because all of the parties through their testimony indicated an awareness of the reservation and neither evidence nor contentions to the contrary were presented, the letters were considered to be irrelevant.[845] The other document, a letter from the bank to a realtor indicating the average of price estimates made by several brokers with respect to the property involved, was held to be inadmissible because it was hearsay.[846]

In a Maryland condemnation proceeding the land being taken had been leased to a corporation for the purpose of mining sand and gravel from the property; the appellate court held that an error had been committed in excluding from evidence the records of the lessee corporation as to its mining operations.[847] Such books of the lessee were kept in the regular course of business and under the supervision of the corporation's president. The reason for the error in the exclusion was that the books were needed by the president as a source of evidence to enable him to testify as to the value and amount of sand and gravel extracted from the property.[848]

"COST TO CURE"

A couple of Massachusetts cases illustrate the extent that evidence of "cost to cure" may be admitted to show damages to the remaining land as a result of the taking of part of the land.[849] One case involved the taking of a strip of land a filling station was located on.[850] In that case the trial court was held not to have erred in refusing to permit the jury to consider the landowner's evidence that the condemnation was making it necessary to move the filling station back on the property at a cost of $1,100 in order to use both sides of the pump.[851] The landowners are entitled to recover the difference in the market value of their land before and after the taking according to the court,[852] and any expense arising from adapting the remaining land to the conditions in which it was left by a taking may be considered, not as a particular item of damage, but as tending to show the difference between the market value of the parcel of land before and after the taking.[853] However, evidence of expense is admissible, said the court, only when it is made to appear as a reasonable and economical method of dealing with the land in making changes thereon that are reasonably necessitated by the taking.[854] There was not any evidence in this case to indicate that the taking had reduced the rental value of the land or that the highway authorities intended to restrict the business by forbidding the refueling of automobiles on the highway side of the pumps.[855]

In the other case, the taking of a portion of a residential lot left a very steep bank, as a result of erosion, sub-soil exposure, and the lack of vegetation; the landowner's witness, who was qualified as a civil engineer and a landscape contractor, was held to have been erroneously prohibited from giving his opinion as to what would be reasonably necessary to restore the property to its approximate appearance before the taking.[856] Basically, the landowner attempted to introduce in evidence that, to correct the condition left by the taking, it would be necessary to do a considerable amount of landscaping and to construct a retaining wall on the property, all at a cost of approximately $4,000. If the evidence had been admitted, said the appellate court, the jury could have disregarded it, or they could have accepted the whole or any part of it in determining whether it was an economical method to make such a repair in adapting the premises to the new condition created by the taking. The evidence, therefore, was competent as bearing upon the diminution in value caused by the taking and as corroborative of other testimony on that issue.[857]

PROPOSED USE OF THE PROPERTY TAKEN

The proposed use of the property taken clearly has an effect on the value of the remainder in a partial taking, and admission of evidence of such use seldom appears to pose a problem. However, its admissibility may be questioned in certain borderline situations, such as where the proposed use is speculative or the evidence is otherwise misleading. The following cases illustrate situations with issues arising from them.

A New Hampshire case held that evidence of how the use of the new highway by members of the public who were attending school functions affected the landowner's remaining property was admissible as an aid to the jury in determining the value of the residue after the taking.[858] Here the jury was properly instructed that it might consider factors influencing what a fair market value would be and that

[844] County of San Diego v. Bank of America Nat'l Trust & Savings Ass'n, 135 Cal. App. 2d 143, 149–51, 286 P.2d 880, 884–85 (1955).
[845] *Id.* at 150, 286 P.2d at 884.
[846] *Id.* at 150–51, 286 P.2d at 884–85.
[847] Lustine v. State Roads Comm'n, 217 Md. 274, 280, 142 A.2d 566, 568–69 (1958).
[848] *Id.* The president of the corporation was unable, without consulting the records, to state on cross-examination the amount of sand and gravel that had been taken from the property. The records were sought to be introduced for the purpose of giving the president an opportunity to answer the question.
[849] Valentino v. Commonwealth, 329 Mass. 367, 108 N.E.2d 556 (1952) (held to be inadmissible); Kennedy v. Commonwealth, 336 Mass. 181, 143 N.E.2d 203 (1957) (held to be admissible).
[850] Valentino v. Commonwealth, 329 Mass. 367, 108 N.E.2d 556, 557 (1952).
[851] *Id.* at 368, 370, 108 N.E.2d at 557.
[852] *Id.* at 368, 108 N.E.2d at 557.
[853] *Id.* at 369–70, 108 N.E.2d at 558.
[854] *Id.* at 370, 108 N.E.2d at 558.
[855] *Id.* at 369–70, 108 N.E.2d at 558.
[856] Kennedy v. Commonwealth, 336 Mass. 181, 182–83, 143 N.E.2d 203, 203–04 (1957). The reason for the trial court's rejection of the testimony was that even if the property was left in a mess, the jury, having taken a view of the property, would presumably have taken this into account; there was not a retaining wall on the property before the taking; there was no place for a landscape architect in a land damage case; and this was the usual case where the damages were the difference in value before and after the taking.
[857] *Id.* at 183, 143 N.E.2d at 204.
[858] Stratton v. Town of Jaffrey, 102 N.H. 514, 516–17, 162 A.2d 163, 166 (1960).

the landowner was not entitled to damages for any inconveniences or annoyances he may suffer, especially those due to the presence of a high school in the area.[859]

Evidence pertaining to the effect on the value of the remaining land caused by the construction of a limited-access highway was held to be admissible in one Alabama case.[860] In another Alabama case, evidence was held to have been properly admitted that was introduced by the condemnor's witnesses relative to the Court of County Commissioners' adopting a resolution to the effect that the county was going to blacktop the service road being constructed through the landowner's property in connection with a limited-access highway.[861] The minutes of the Commissioners showing that such action was taken were also held to be admissible. According to the appellate court, evidence that the road would be blacktopped was admissible to show what type of road would serve the property when the project was ultimately completed. The reason for its admission was that the minutes showed that the resolution was passed prior to the filing of the original condemnation petition. A question also arose relative to the admissibility of the evidence introduced by the condemnor relative to the whole matter of the county's participation in the project by adopting a resolution to blacktop the road. Because the appellant landowner first introduced the matter during the cross-examination of one of the condemnor's witnesses, the condemnor was entitled to pursue it further. The court said that assuming, without deciding that the county's participation in the project was irrelevant, the rule is that it is not an error to receive irrelevant evidence to rebut or explain evidence of like kind offered or brought out by the complaining party.[862]

In a third Alabama case the condemnor's plans were more remote. The supreme court held that the trial court did not err in excluding testimony to the effect that the State Highway Department's future plans for the development of the particular highway the land was presently being taken for were to ultimately increase it to four lanes throughout the county and make it a part of the interstate system.[863] The condemnor erroneously claimed the testimony was admissible because it was confined to the present plans of the Highway Department. According to the Department, the proposed construction, being an improvement, would result in some enhancement to the subject property. Plans, specifications, or stipulations of the condemnor as to the nature of the improvements to be constructed on or about the premises sought to be condemned, or the use to be made of such premises, are admissible in evidence to enable the jury to fix with more precision the damages of the owner of the premises. However, the court said that this rule could not be extended to warrant the admission of the condemnor's plans pertaining to work that is remote, either because of its proximity to the subject tract or to the time in the future when further construction is anticipated, as was the situation found to exist in this case. If the rule was extended, the condemnor could introduce evidence in mitigation of the damages a condemnee was entitled to by showing plans and surveys of work, the completion of which might be speculative or contingent. Therefore, the evidence was properly excluded in this case, according to the court, on the grounds that it was too remote in time and place with respect to the work that was presently being done.[864]

MISCELLANEOUS EVIDENTIAL ISSUES

Problems of cumulation of evidence, relevancy, materiality, permissible scope of cross-examination, and the like, will of course arise in condemnation trials as well as in other trials. The following are illustrations taken from the sample of highway condemnation cases reviewed.

Cumulative Evidence

A couple of California cases held that it was not an error to exclude evidence where the effect would be merely cumulative[865] or where the point sought to be proved has already been admitted in evidence.[866] The landowner in one case was held to have been properly prohibited from giving testimony relating to the physical condition of his entire property and its relation to the contemplated improvements because such was well known to the witnesses testifying as to value.[867] In the other case, the landowner challenged the trial court's refusal to permit him to prove, through the testimony of an architect and structural engineer, the geology and physical characteristics of the hill and tunnel as facts affecting the use to which the particular parcels involved could be put.[868] Conceding that, because in ". . . ascertaining the market value of real property any evidence which tends to show the physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted, is competent," [869] the testimony was admissible, the appellate court held its rejection was not a prejudicial error under the circumstances of the case.[870] Other testimony was given by the landowner's witnesses relative to the land's highest and best use, and no suggestions were made by the condemnor that the property was not adaptable for the highest and best use as indicated by the landowner's witness, either by reason of any geological or structural defect in the land which would render it either dangerous or unsuitable for such a purpose. Consequently, both parties were in agreement as to the adaptability of the parcels of land involved and as to the absence of any geological difficulties offered by the hill or tunnel in relation to the possible types of construction consistent with the claimed highest and best use. Conse-

[859] *Id.* at 517, 162 A.2d at 166.
[860] Blount County v. McPherson, 268 Ala. 133, 137, 105 So.2d 117, 120 (1958). Landowners are entitled to compensation caused by the loss of access through the construction of a limited-access highway. 268 Ala. at 135, 105 So. 2d at 119.
[861] Posey v. St. Clair County, 270 Ala. 110, 112–13, 116 So. 2d 743, 744 (1959).
[862] *Id.* at 113, 116 So. 2d at 744.
[863] Shelby County v. Baker, 269 Ala. 111, 120, 110 So. 2d 896, 904–05 (1959).
[864] *Id.* at 120, 110 So. 2d at 905.
[865] People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 312–13, 194 P.2d 750, 753–54 (1948).
[866] City of Los Angeles v. Cole, 28 Cal. 2d 509, 518–19, 170 P.2d 928, 933–34 (1946).
[867] People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 313, 194 P.2d 750, 754 (1948).
[868] City of Los Angeles v. Cole, 28 Cal. 2d 509, 518, 170 P.2d 928, 933 (1946).
[869] *Id.* at 518, 170 P.2d at 933–34.
[870] *Id.* at 518, 170 P.2d at 934.

quently, the testimony of the engineer would have served only to corroborate an undisputed fact established by competent evidence.[871]

Latitude in Cross-Examination

The range of cross-examination permitted for the purpose of establishing the credibility of a witness and the weight of his testimony is very broad. Its latitude rests largely within the sound discretion of the trial court, whose ruling ordinarily will not be reversed unless that discretion has been so grossly abused that a prejudicial error clearly appears.[872] One reason for permitting the trial court to have such a wide discretion in the latitude of the cross-examination is that the field of inquiry for testing a witness' credibility and weight of his testimony is so extensive that such a discretion is necessary to keep the examination of witnesses within reasonable bounds to prevent an undue extension of the trial. When deciding whether the trial judge's discretion has been abused, the appellate court's inquiry is whether a sufficiently wide range has been allowed to test the witness' credibility and weight of testimony rather than whether some particular question should or should not have been allowed.[873]

A couple of Alabama cases offer examples relative to the range of testimony. One held it was proper to question an expert witness on cross-examination as to whether he knew that an addition had been made to a church in the neighborhood in recent years, in order to establish the witness' familiarity with the subject property in relation to the surrounding area on the date of condemnation.[874] The other case held it was proper to cross-examine one of the condemnor's expert appraisal witnesses, who had testified as to the value of the land in question, relative to his appraisal of adjoining property he claimed to be similar in order to test his qualifications, accuracy of his knowledge, reasonableness of his estimate, credibility of his testimony, and the method by which he arrived at the opinion of the value of the land.[875]

Latitude in Rebuttal Evidence

A California case seems to indicate that a wide latitude is permitted in introducing rebuttal evidence where the credibility of a witness has been attacked.[876] Here, a witness for the condemnor had testified on direct examination as to the value of the property taken and amount of severance damages. On cross-examination the landowner was permitted to attack the witness' credibility by showing his alleged interests, bias, and prejudice. Such was done by bringing out the fact that before the instant proceeding was initiated, the witness was a member of the county planning commission at the time the landowner had submitted a proposed subdivision map of her property to that body and he had made the suggestion that the map be rejected and sent to the State Division of Highways. However, since the landowner was permitted to introduce such evidence, the appellate court held it was proper for the condemnor to introduce evidence relating to the reason the map was sent to the State Division of Highways.[877] The appellate court said: "If a party introduces evidence which tends to impeach a witness of his opponent, the latter may in rebuttal offer evidence to support his witness' credibility."[878]

Indefinite and Vague Questions

A Georgia case held the trial court did not err in excluding several questions and answers from evidence because the questions were too indefinite and vague to be answered intelligently.[879]

Unresponsive Answers and Unanswered Questions

Answers that are not responsive to the questions should be excluded from evidence, according to an Alabama case. However, that case held the failure to strike such unresponsive answers did not constitute a reversible error where those answers were not prejudicial to the appellant's rights.[880] A prejudicial error is not committed in allowing a witness to answer an objectionable question when he answers that he does not know.[881] Similarly, objectionable questions asked a witness on cross-examination, but which were not answered, does not constitute a reversible error.[882]

Absence of Timely Objection

A party to a condemnation proceeding cannot now complain about the introduction of evidence if such evidence had been previously introduced without an objection earlier in the trial.[883]

Correction of Earlier Error

An error in rejecting a witness' testimony at one stage of a proceeding has been held to be harmless when substantially the same evidence was given by the same witness later in the trial and allowed this time to remain before the jury.[884]

SUMMARY AND CONCLUSIONS

The miscellany of issues discussed in this chapter does not lend itself well to summarization in one neat paragraph, so separate comments are made relative to the more significant items discussed.

The courts have had no trouble in finding that admission of evidence of the Federal Government's contribution to-

[871] *Id.* at 518–519, 170 P.2d at 934.
[872] State v. Farabee, 268 Ala. 437, 440, 108 So. 2d 148, 151 (1959); Blount County v. Campbell, 268 Ala. 548, 553, 109 So. 2d 678, 682 (1959); People v. LaMacchia, 41 Cal. 2d 738, 743, 264 P.2d 15, 20 (1953); People *ex rel.* Dep't of Public Works v. Lucas, 155 Cal. App. 2d 1, 7, 317 P.2d 104, 107 (1957).
[873] People v. LaMacchia, 41 Cal. 2d 738, 743, 264 P.2d 15, 20 (1953); People *ex rel.* Dep't of Public Works v. Lucas, 155 Cal. App. 2d 1, 7, 317 P.2d 104, 107 (1957).
[874] State v. Farabee, 268 Ala. 437, 108 So. 2d 148, 151 (1959).
[875] Blount County v. Campbell, 268 Ala. 548, 553, 109 So. 2d 678, 682 (1959).
[876] People v. Adamson, 118 Cal. App. 2d 714, 258 P.2d 1020 (1953).
[877] *Id.* at 718–19, 258 P.2d at 1023–24.
[878] *Id.* at 719, 258 P.2d at 1024.
[879] Tift v. State Highway Dep't, 99 Ga. App. 387, 388–94, 108 S.E.2d 724, 726–29 (1959).
[880] Wallace v. Phenix City, 268 Ala. 413, 415, 108 So. 2d 173, 175 (1959).
[881] State Highway Dep't v. J. A. Worley & Co., 103 Ga. App. 25, 29, 118 S.E.2d 298, 300 (1961) (witness responded that he did not know, in answer to a question regarding the amount paid to another landowner by the condemnor); State v. Stabb, 226 Ind. 319, 321–22, 79 N.E.2d 392, 394 (1948).
[882] Wallace v. Phenix City, 268 Ala. 413, 415, 108 So. 2d 173, 175 (1959).
[883] Justice v. State Highway Department, 100 Ga. App. 794, 797, 112 S.E.2d 307, 310 (1959).
[884] State Highway Dep't v. Tift, 98 Ga. App. 820, 820–21, 107 S.E.2d 246, 246–47 (1959).

ward the cost of the project is error. Such evidence does not have any bearing on the market value issue. However, as previously indicated, the admission of such evidence may not always be prejudicial error.[885]

Attempts to prove the sales price of comparable parcels from the revenue stamps on the deeds is likely to run into the hearsay objection. As the New Hampshire court indicated, it may be pertinent to distinguish between the case where the comparable is sought to be used as independent evidence of value and the case where it is used merely to support an expert witness' opinion of value.[886] The Colorado statute seems to represent a desirable clarification.[887] It permits a witness who is testifying to his opinion of value to state the consideration involved in any recorded transfer of property that was examined and used by him in arriving at his opinion, provided he has personally examined the record and communicated directly with and verified the amount of such consideration with either the buyer or seller.

As the Massachusetts court pointed out in one case, the size of the mortgage taken out on a parcel of real property conceivably can have some probative force in determining the market value of that property.[888] The mortgagee must have at least a rough idea of how much the property is worth in deciding how much he will lend. However, there would seem to be much better evidence of value available in most condemnation cases, and the use of mortgages as evidence would best seem to remain in the sound discretion of the trial court.

The Maryland court seems to have correctly concluded that Building Code violations may have a bearing on market value.[889] A condemnee, as a matter of public policy, generally is not entitled to be compensated for value created by an illegal use. If the use of a building for dwelling purposes is unlawful because the building does not comply with the Building Code, the fact of such noncompliance is relevant to the determination of the property's fair market value, if it is assumed that the use of the property for dwelling purposes is its highest and best use. The Illinois statute previously referred to illustrates a way of clarifying this point.[890] It permits the introduction of evidence as to any unsafe, unsanitary, substandard, or other illegal condition, use, or occupancy of the property and the reasonable cost of correcting the illegal condition, even though no official action has been taken to require the correction. Of course, one can visualize situations where noncompliance with a Building Code would be irrelevant, such as where a dilapidated apartment house is located on a piece of land which has become valuable for commercial purposes and anyone who might buy the property would be likely to raze the present structure and put up a modern high-rise building.

A number of states have statutes stating whether evidence of the condemnor's offer or award are admissible in evidence in a subsequent trial of compensation issues.[891] Such evidence usually is excluded, apparently on the ground that it is in the nature of a compromise. However, this rationale for excluding the evidence would seem to be greatly weakened in those states where the condemnor purports to follow a fixed offer policy rather than a bargaining policy. Such an offer presumably represents the condemnor's finding as to the fair market value of the property and would seem to have great probative value. Perhaps the exclusion can be justified on auxiliary policy grounds. For example, it might be argued that permitting the condemnee to introduce the offer in evidence would tend to place a floor under what the condemnee is likely to recover in a court action and therefore would tend to unduly encourage litigation.

Evidence of "cost to cure" relates to the after-taking value of property involved in partial takings or, in other words, the damages to the remainder. It is reasonable to assume that a buyer of the remainder would consider the costs of making the property usable to its highest productivity, that he would make a judgment as to its value in its most productive use, and that his offer for the property would be up to this value, less the cost of putting the property in productive condition. Courts generally have gone along with this idea and, with various reservations, have permitted evidence of "cost to cure" to be introduced, not as an absolute measure of damages but as one of the factors bearing on the after-taking value of the property. If an expert witness is testifying to the basis for his opinion of after value or damages, it would seem proper to permit him to testify that he took "cost to cure" into account. The reasonableness of the "cure" should go to the weight of his testimony rather than to admissibility.[892]

---

[885] Blount County v. McPherson, 270 Ala. 78, 79–80, 116 So. 2d 746, 748 (1959); Barber v. State Highway Comm'n, 80 Wyo. 340, 352, 342 P.2d 723, 725–726 (1959).

[886] Berry v. State, 103 N.H. 141, 145–46, 167 A.2d 437, 440–41 (1961).

[887] COLO. REV. STAT. ANN. § 50–1–22 (1963).

[888] Onorato Bros., Inc. v. Massachusetts Turnpike Authority, 336 Mass. 54, 59–60, 142 N.E.2d 389, 393 (1957).

[889] Hance v. State Roads Comm'n, 221 Md. 164, 169–72, 156 A.2d 644, 646–48 (1959).

[890] ILL. REV. STAT. ch. 47, § 9.5 (1965).

[891] *E.g.*, ARIZ. REV. STAT. ANN. § 12–1116 H (Supp. 1967); FLA. STAT. § 74.081 (1967); WIS. STAT. §§ 32.05(10)(a), 32.08(6)(a) (1965).

[892] *See generally*, RATCLIFF, *supra* note 191, at 50–51.

APPENDIX

STATUTORY PROVISIONS RELATING TO EVIDENCE IN EMINENT DOMAIN PROCEEDINGS

The statutory provisions in this appendix are not intended to be an exhaustive compilation of all the statutes relating to evidence in eminent domain proceedings. Where statutes on this subject have been enacted, the qualifications of witnesses, jury views, and admissibility of evidence may be governed by statutory provisions enacted to deal specifically with compulsory taking actions or those that pertain to judicial proceedings in general. No specific attempt was made here to search for and collect the legislation that existed outside condemnation procedure laws. The provisions set forth in the following are, therefore, limited for the most part to the evidentiary rules stated in the procedural acts applicable to eminent domain. However, those laws that have been compiled are believed to constitute the bulk of evidential provisions peculiar to the public acquisition of land under the eminent domain power.

A search of the eminent domain procedure acts reveals that there are relatively few statutory provisions dealing with evidence in condemnation proceedings. Only California [CAL. EVIDENCE CODE §§ 810–822 (West 1966)] and Pennsylvania [PA. STAT. ANN. tit. 26, §§ 1-701 to -706 (Supp. 1967)] have enacted legislation that spells out in some detail various evidentiary matters relating to eminent domain. Both are set forth in the following.

Statutes in other states appear to be applicable to only one or two evidential items. The most common type of provision deals with jury views. Some pertain to jury trials in general, while others relate to eminent domain proceedings in particular. Many jury view acts are similar in nature, and very few state the evidentiary effect of such a view. Maryland appears to have the most comprehensive viewing statute [MD. R. of P., R. U18]. A few states have legislation specifying whether preliminary condemnation awards may be introduced in evidence at subsequent jury trials of compensation issues and whether the valuation commissioners may be called as witnesses to testify at such trials. Condemnation procedure acts also occasionally state whether the usual rules of evidence are to apply in proceedings before valuation commissioners, and who is qualified to testify as an expert valuation witness. Samples of most of the laws described previously and a few other miscellaneous ones are included in this compilation.

Many of the rules of compensability or valuation affect the admissibility of evidence by implication. If by statute a particular loss or damage is compensable, evidence indicating the amount of that damage or loss must then be admissible at the trial. An example would be a statute permitting compensation for the loss of goodwill and future business profits. With regard to valuation, acts affecting the rules for determining value, the methods of determining severance damages in partial-taking cases, the set-off of benefits, and acts specifying the date of valuation or taking are all-important to the issue of admissibility of evidence. Except for valuation statutes for Maryland [MD. ANN. CODE art. 33A, §§ 4-6 (Repl. 1967)] and Pennsylvania [PA. STAT. ANN. tit. 26, §§ 1-601 to -607 (Supp. 1967)], which are included only for the sake of example and interest, legislation pertaining to compensability and valuation are excluded from this Appendix.

ALABAMA

Ala. Code Ann. tit. 7, § 367 (1940) (Recomp. 1958)

§ 367. MARKET VALUE; HOW PROVED. Direct testimony as to the market value is in the nature of opinion evidence. One need not be an expert or dealer in the article, but may testify as to value, if he has an opportunity for forming a correct opinion.

Ala. Code Ann. tit. 19, § 10 (1940) (Recomp. 1958)

§ 10. HEARING CONDUCTED AS IN CIVIL CASES. The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law.

Ala. Code Ann. tit. 19, § 14 (1940) (Recomp. 1958)

§ 14. COMPENSATION NOT REDUCED OR DIMINISHED BECAUSE OF INCIDENTAL BENEFITS. The amount of compensation to which the owners and other parties interested therein are entitled must not be reduced or diminished because of any incidental benefits which may accrue to them, or to their remaining lands in consequence of the uses to which the lands to be taken, or in which the easement is to be acquired, will be appropriated; provided that, in the condemnation of lands for ways and rights of ways for public highways, the commissioners may, in fixing the amount of compensation to be awarded the owner for lands taken for this use, take into consideration the value of the enhancement to the remaining lands of such owner that such highway may cause.

ARIZONA

Ariz. Rev. Stat. Ann. §§ 12-1116 F to H (Supp. 1967)

§ 12-1116. ACTION FOR CONDEMNATION; IMMEDIATE POSSESSION; MONEY DEPOSIT; SUBSTITUTION FOR CASH DEPOSIT.

. . . .

F. The parties may stipulate as to the amount of deposit, or for a bond from the plaintiff in lieu of a deposit.

G. The parties may also stipulate, in lieu of a cash deposit in double the amount of probable damages as found by the court, that:

1. The plaintiff may deposit the amount for each person in interest which plaintiff's valuation evi-

dence shows to be the probable damages to each person in interest, and,

2. Each person in interest may, on order of the court, withdraw the amount which plaintiff has deposited for his interest, and,

3. The plaintiff shall deposit a separate amount which is equal to the difference between double the amount of the court's determination of probable damages and the total amount which is deposited for the withdrawal of all persons in interest, or the parties may stipulate for a bond in lieu of a separate deposit equal to the difference between double the amount of the court's determination of probable damages and the total amount which is deposited for the withdrawal of all persons in interest.

. . .

H. No stipulation which is made nor any evidence which is introduced pursuant to this section shall be introduced in evidence or used to the prejudice of any party in interest on the trial of the action.

ARKANSAS

Ark. Stat. Ann. § 27-1731 (Repl. 1962)

§ 27-1731. JURY MAY VIEW SUBJECT OF LITIGATION. Whenever, in the opinion of the court, it is proper for the jury to have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

Ark. Stat. Ann. § 76-521 (Repl. 1957)

§ 76-521. ASSESSMENT OF DAMAGES IN CONDEMNATION SUITS. All courts and juries in case of condemnation of land for right-of-way for state highways shall take into consideration the fact that lands are required to be assessed at 50% of their true value and shall also take into consideration the fact that owners of automobiles and trucks living miles off of a State highway pay the same gas and auto license tax as those being fortunate enough to own land adjoining a state highway, and any court or jury considering claims for right-of-way damages shall deduct from the value of any land taken for a right-of-way the benefits of said State highway to the remaining lands of the owner.

CALIFORNIA

Calif. Code of Civil Proc. § 610 (West 1955)

§ 610. VIEW; REGULATIONS.

View by Jury of the Premises. [See ARK. STAT. ANN. § 27-1731 (Repl. 1962).]

Calif. Evidence Code §§ 810 to 822 (West 1966)

§ 810. INTENT OF ARTICLE. This article is intended to provide special rules of evidence applicable only to eminent domain and inverse condemnation proceedings.

§ 811. VALUE OF PROPERTY. As used in this article, "value of property" means the amount of "just compensation" to be ascertained under Section 14 of Article I of the State Constitution and the amount of value, damage, and benefits to be ascertained under subdivisions 1, 2, 3, and 4 of Section 1248 of the Code of Civil Procedure.

§ 812. EFFECT OF ARTICLE UPON EXISTING SUBSTANTIVE LAW. This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms "value," "damage," or "benefits" as used in Section 1248 of the Code of Civil Procedure.

§ 813. MANNER OF SHOWING VALUE OF PROPERTY.

(a) The value of property may be shown only by the opinions of:

(1) Witnesses qualified to express such opinions; and

(2) The owner of the property or property interest being valued.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

§ 814. LIMITATION ON OPINION OF WITNESS AS TO VALUE OF PROPERTY; BASIS OF OPINION. The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property and which a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest being valued, including but not limited to the matters listed in Sections 815 to 821, unless a witness is precluded by law from using such matter as a basis for his opinion.

§815. PRICE AND OTHER TERMS AND CIRCUMSTANCES OF SALE OR CONTRACT TO SELL AND PURCHASE PROPERTY BEING VALUED. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.

§ 816. PRICE AND OTHER TERMS AND CIRCUMSTANCES OF SALE OF CONTRACT TO SELL AND PURCHASE COMPARABLE PROPERTY. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the

sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

§ 817. RENT RESERVED AND TERMS AND CIRCUMSTANCES OF LEASE OF PROPERTY BEING VALUED. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation. A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at his opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

§ 818. RENT RESERVED AND TERMS AND CIRCUMSTANCES OF LEASE OF COMPARABLE PROPERTY. For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

§ 819. CAPITALIZED VALUE OF REASONABLE NET RENTAL VALUE ATTRIBUTABLE TO LAND AND EXISTING IMPROVEMENTS THEREON. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

§ 820. VALUE OF LAND AND COST OF REPLACEMENT OR REPRODUCTION OF EXISTING IMPROVEMENTS. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

§ 821. NATURE OF IMPROVEMENTS ON PROPERTY IN GENERAL VICINITY OF PROPERTY BEING VALUED AND CHARACTER OF EXISTING USES. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

§ 822. INADMISSIBLE EVIDENCE. Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain.

(b) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(c) The value of any property or property interest as assessed for taxation purposes, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(d) An opinion as to the value of any property or property interest other than that being valued.

(e) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(f) The capitalized value of the income or rental from any property or property interest other than that being valued.

COLORADO

Colo. Rev. Stat. Ann. § 50-1-6(2) (1963)

§ 50-1-6. ADJOURNMENT—COMMISSION—COMPENSATION—DEFECTIVE TITLE—WITHDRAWAL OF DEPOSIT.

. . . .

(2) . . . The commissioners may request the court or clerk thereof to issue subpoenas to compel witnesses to attend the proceedings and testify as in other civil cases and may adjourn and shall hold meeting for that purpose. . . .

Colo. Rev. Stat. Ann. § 50-1-10(1) (1963)

§ 50-1-10. INSPECTION OF PREMISES—EXPENSES—VERDICT. (1) When the jury has been selected, and the jurors have taken an oath faithfully and impartially to discharge their duties, the court, at the request of any party to the proceeding, and in the discretion of the court, may order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff, and examine the premises in person. . . .

Colo. Rev. Stat. Ann. § 50-1-22 (1963)

§ 50-1-22. EVIDENCE CONCERNING VALUE OF PROPERTY. Any witness in a proceeding under this chapter in any court of record of this state wherein the value of real property is involved, may state the consideration involved in any recorded transfer of property which was examined and utilized by him in arriving at his opinion, provided he has personally examined the record and communicated directly with and verified the amount of such consideration with either the buyer or seller. Any such testimony, shall be admissible as evidence of such consideration and shall remain subject to rebuttal as to the time and actual consideration involved and subject to objections as to its relevancy and materiality.

DELAWARE

Del. Code Ann. tit. 10, § 6108(d) (1953)

§ 6108. TRIAL; CHOICE OF COMMISSIONERS; VIEWING PROPERTY, ETC.

. . . .

(d) The court, in its discretion, may determine whether or not the commissioners shall view the premises and if a view is ordered shall designate the time therefor. The view, if ordered, shall be conducted under the supervision of the court by the court bailiffs and the view shall not be considered as evidence but only for the purpose of better understanding the evidence presented at the trial, nor shall any testimony be taken at the view. This restraint shall not prevent the parties from designating and identifying the property during the view.

Del. Code Ann. tit. 10, § 6108(e) (Supp. 1966)

§ 6108. TRIAL; CHOICE OF COMMISSIONERS; VIEWING PROPERTY, ETC.

. . . .

(e) At the trial any party may present competent and relevant evidence upon the issue of just compensation and all such evidence shall be given in the presence of the court and the commissioners. The court shall, during the course of the trial, determine all questions of law and the admissibility of all evidence.

FLORIDA

Fla. Stat. § 73.071(5) (1967)

§ 73.071. JURY TRIAL; COMPENSATION; SEVERANCE DAMAGES.

. . . .

(5) The jury shall view the subject property upon demand by any party or by order of the court.

Fla. Stat. § 74.081 (1967)

§ 74.081. PROCEEDINGS AS EVIDENCE. Neither the declaration of taking, nor the amount of the deposit, shall be admissible in evidence.

ILLINOIS

Ill. Rev. Stat. ch. 24, § 9-2-29 (1965) [Local Improvement Act]

§ 9-2-29. VIEW BY THE JURY. The court upon the motion of the petitioner, or of any person claiming any such compensation, may direct that the jury, under the charge of an officer, shall view the premises which it is claimed by any party to the proceeding will be taken or damaged by the improvement. . . .

Ill. Rev. Stat. ch. 47, § 2.2(d) (1965)

§ 2.2. HEARING—PRELIMINARY FINDING OF COMPENSATION.

. . . .

(d) Such preliminary finding of just compensation, and any deposit made or security provided pursuant thereto, shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid, and shall not be disclosed in any manner to a jury impaneled in such proceedings; and if appraisers have been appointed as herein authorized, their report shall not be evidence in such further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings.

Ill. Rev. Stat. ch. 47, § 9 (1965) [Eminent Domain]

§ 9. VIEW OF PREMISES. Said jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same. and after hearing the proof offered make their report in writing,

. . .

Ill. Rev. Stat. ch. 47, § 9.5 (1965)

§ 9.5. ADMISSIBILITY OF EVIDENCE. Evidence is admissible as to (1) any unsafe, unsanitary, substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use or occupancy.

KENTUCKY

Ky. Rev. Stat. § 29.301 (1962) [Juries, General]

§ 29.301. JURY MAY VIEW PROPERTY OR PLACE. [See ARK. STAT. ANN. § 27-1731 (Repl. 1962)].

Ky. Rev. Stat. § 177.087(1) (Supp. 1966) [Condemnation, Highways]

§ 177.087. TIME FOR FILING AND PROCEEDINGS UPON APPEALS TO THE CIRCUIT COURT AND COURT OF APPEALS. (1) . . . All questions of fact pertaining to the amount of compensation to the owner or owners shall be determined by a jury, which jury, on the application of either party, shall be sent by the court, in the charge of the sheriff, to view the land and material. . . .

Ky. Rev. Stat. § 416.050 (1962) [Eminent Domain, General]

§ 416.050. TRIAL OF EXCEPTIONS; JUDGMENT. . . . Upon the request of either party, the jury may be sent by the court, in charge of the sheriff, to view the land or material. . . .

MARYLAND

Md. Ann. Code. art. 33A, §§ 4 to 6 (Repl. 1967)

§ 4. TIME AS OF WHICH VALUE DETERMINED.

The value of the property sought to be condemned and of any adjacent property of the defendant claimed to be affected by the taking shall be determined as of the date of the taking, if taking has occurred, or as of the date of trial, if taking has not occurred, unless an applicable statute specifies a different time as of which the value is to be determined.

§ 5. DAMAGES TO BE AWARDED.

(a) *For taking entire tract.* The damages to be awarded for the taking of an entire tract shall be its fair market value (as defined in § 6.)

(b) *Where part of tract taken.* The damages to be awarded where part of a tract of land is taken shall be the fair market value (as defined in § 6) of such part taken, but not less than the actual value of the part

taken plus the severance or resulting damages, if any, to the remainder of the tract by reason of the taking and of the future use by the plaintiff of the part taken. Such severance or resulting damages are to be diminished to the extent of the value of the special (particular) benefits to the remainder arising from the plaintiff's future use of the part taken.

(c) *Right of tenant to remove improvement or installation.* For the purpose of determining the extent of the taking and the valuation of the tenant's interest in a proceeding for condemnation, no improvement or installation which would otherwise be deemed part of the realty shall be deemed personal property so as to be excluded from the taking solely because of the private right of a tenant, as against the owner of any other interest in the property sought to be condemned, to remove such improvement or installation, unless the tenant exercises his right to remove the same prior to the date when his answer is due, or elects in his manner to exercise such right.

(d) *Churches.* The damages to be awarded for the taking of a structure held in fee simple, or under a lease renewable forever, by or for the benefit of a religious body and regularly used by such religious body as a church or place of religious worship, shall be the reasonable cost as of the valuation date, of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body. Such damages shall be in addition to the damages to be awarded for the land on which the condemned structure is located.

§ 6. FAIR MARKET VALUE

The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date for the highest and best use of such property which a seller, willing but not obligated to sell, would accept for the property, and which a buyer, willing but not obligated to buy, would pay therefor excluding any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner.

If the condemnor is vested with a continuing power of condemnation, the phrase the effective date of legislative authority for the acquisition of such property, as used in this section, shall mean the date of specific administrative determination to acquire such property.

Md. Rules of Proc., Rule U18

Rule U18. TRIAL—VIEW

a. View by Trier of Fact.

Before the production of other evidence, the court shall direct one of its officers to take the jury to view the property sought to be condemned, or if the case is tried before the court without a jury, the judge hearing the case shall view the property.

b. Presence of Parties and Representatives.

The parties, their attorneys, engineers and other representatives may be present on the property sought to be condemned with such officer of the court and the jury, or with the judge if the case is tried without a jury.

c. Spokesman at View by Jury.

If the case is tried before a jury each party shall inform the court, before the jury leaves for the view, of the name of the person who shall speak for such party at the view. Only one such person shall represent all of the plaintiffs, and only one such person shall represent all of the defendants, unless the court shall otherwise order for good cause shown. Such persons shall be the only persons who shall be permitted to make any statement to the jury during the view, and the court shall so instruct the jury. Such persons shall point out to the jury the property sought to be condemned and its boundaries and any adjacent property of the owners claimed to be affected by the taking. Such persons may also point out the physical features, before and after the taking, of the property taken and of any adjacent property of the owner claimed to be affected by the taking.

d. Judge—Presence at View.

Unless his presence and personal supervision shall be waived by all parties to the proceeding in the manner provided by section e of this Rule, the judge shall be present at the view and shall supervise the proceedings.

e. View May Be Waived.

In the discretion of the court, the view by the trier of fact may be omitted upon the filing of a written waiver thereof by all parties. In the case of a defendant under disability, in gestation, not in being or unknown, such waiver may be made for him by his guardian, guardian *ad litem* or committee.

MASSACHUSETTS

Mass. Ann. Laws ch. 79, § 22 (Supp. 1965)

§ 22. PLEADING AND PROCEDURE.

. . . In case of trial by jury, if either party requests it the jury shall view the premises. . . .

Mass. Ann. Laws ch. 79, § 35 (1964)

§ 35. EVIDENCE OF ASSESSED VALUE OF LAND TAKEN OR INJURED.

The valuation made by the assessors of a town for the purposes of taxation for the three years next preceding the date of the taking of or injury to real estate by the commonwealth or by a county, city, town or district under authority of law may, in proceedings, brought under section fourteen to recover the damages to such real estate, the whole or part of which is so taken or injured, be introduced as evidence of the fair market value of the real estate by any party to the suit; provided, however, that if the valuation of any one year is so introduced, the valuations of all three years shall be introduced in evidence.

MINNESOTA

Minn. Stat. Ann. § 117.07 (1964)

§ 117.07. COURT TO APPOINT COMMISSIONERS OF APPRAISAL.

Upon proof being filed of the service of such notice, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall hear all competent evidence offered for or against the granting of the petition, regulating the order of proof as it may deem best.

. . .

Minn. Stat. Ann. § 117.20(8)(c) (1964)

§ 117.20. PROCEEDINGS BY STATE, ITS AGENCIES, OR POLITICAL SUBDIVISIONS.

. . . .

Subdivision 8.

. . . .

(c) . . . A commissioner in a condemnation proceeding may be called by any party as a witness to testify as to the amount of the award of the commissioners.

Minn. Stat. Ann. § 546.12 (1947)

§ 546.12. VIEW OF PREMISES; PROCEDURE.

When the court deems it proper that the jury should view real property which is the subject of litigation, or the place where a material fact occurred, it may order them to be taken, in a body and in the custody of proper officers, to the place, which shall be shown to them by the judge, or a person appointed by the court for that purpose; and while the jurors are thus absent, no one other than the judge or person so appointed shall speak to them on any subject connected with the trial.

MISSISSIPPI

Miss. Code Ann. § 2770 (Recomp. 1956)

§ 2770. JURY MAY VIEW PROPERTY.

Either party to the suit, on application to the court, shall be entitled to have the jury view the property sought to be condemned and its surrounding under the supervision of the judge; or, the judge on his own initiative may so order.

NORTH DAKOTA

N.D. Cent. Code § 28-14-15 (1960)

§ 28-14-15. VIEW BY JURORS. [See ARK. STAT. ANN. § 27-1731 (Repl. 1962)]

OREGON

Ore. Rev. Stat. § 17.230 (Repl. 1965) [Jury, General]

§ 17.230. VIEW OF PREMISES BY JURY. [See MINN. STAT. ANN. § 546.12 (1947)]

Ore. Rev. Stat. § 366.380(4) (Repl. 1965) [Condemnation, Highway]

§ 366.380. PROCEDURE.

. . . .

(4) Upon the motion of either party made before the formation of the jury, the court shall order a view of the property or premises in question; and upon the return of the jury, the evidence of the parties may be heard. . . .

PENNSYLVANIA

Pa. Stat. Ann. tit. 26, §§ 1-601 to -607 (Supp. 1967)

§ 1-601. JUST COMPENSATION.

The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this article.

§ 1-602. MEASURE OF DAMAGES.

Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.

In case of the condemnation of property in connection with any urban development or redevelopment project, which property is damaged by subsidence due to failure of surface support resulting from the existence of mine tunnels or passageways under the said property, or by reason of fires occurring in said mine tunnels or passageways or of burning coal refuse banks the damage resulting from such subsidence or underground fires or burning coal refuse banks shall be excluded in determining the fair market value of the condemnee's entire property interest therein immediately before the condemnation.

§ 1-603. FAIR MARKET VALUE.

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) The present use of the property and its value for such use.

(2) The highest and best reasonably available use of the property and its value for such use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.

§ 1-604. EFFECT OF IMMINENCE OF CONDEMNATION.

Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

§ 1-605. CONTIGUOUS TRACTS; UNITY OF USE.

Where all or a part of several contiguous tracts owned by one owner is condemned or a part of several noncontiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

§ 1-606. EFFECT OF CONDEMNATION USE ON AFTER VALUE.

In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. Special benefits to the remaining property shall in no event exceed the total damages except in such cases where the condemnor is authorized under existing law, to make special assessments for benefits.

§ 1-607. REMOVAL OF MACHINERY, EQUIPMENT OR FIXTURES.

In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The

condemnee may within thirty days of such notice elect to remove said machinery, equipment or fixtures, unless the time be extended by the condemnor. If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate.

Pa. Stat. Ann. tit. 26, §§ 1-701 to -706 (Supp. 1967)

§ 1-701. VIEWERS' HEARING.

The viewers may hear such testimony, receive such evidence, and make such independent investigation as they deem appropriate, without being bound by formal rules of evidence.

§ 1-702. CONDEMNOR'S EVIDENCE BEFORE VIEWERS.

The condemnor shall, at the hearing before the viewers, present expert testimony of the amount of damages suffered by the condemnee.

§ 1-703. TRIAL IN THE COURT OF COMMON PLEAS ON APPEAL.

At the trial in court on appeal:

(1) Either party may, as a matter of right have the jury, or the judge in a trial without a jury, view the property involved, notwithstanding that structures have been demolished or the site altered, and the view shall be evidentiary. If the trial is with a jury, the trial judge shall accompany the jury on the view.

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after the condemnation and his opinion of the highest and best use of the property before the condemnation and of any part thereof remaining after the condemnation, on the opposing party at least ten days before the date when the case is listed for pre-trial or trial, whichever is earlier.

(3) The report of the viewers and the amount of their award shall not be admissible as evidence.

§ 1-704. COMPETENCY OF CONDEMNEE AS WITNESS.

The condemnee or an officer of a corporate condemnee, without further qualification, may testify as to just compensation.

§ 1-705. EVIDENCE GENERALLY.

Whether at the hearing before the viewers, or at the trial in court on appeal:

(1) A qualified valuation expert may, on direct or cross-examination, state any or all facts and data which he considered in arriving at his opinion, whether or not he has personal knowledge thereof, and his statement of such facts and data and the sources of his information shall be subject to impeachment and rebuttal.

(2) A qualified valuation expert may testify on direct or cross-examination, in detail as to the valuation of the property on a comparable market value, reproduction cost or capitalization basis, which testimony may include but shall not be limited to the following:

(i) The price and other terms of any sale or contract to sell the condemned property or comparable property made within a reasonable time before or after the date of condemnation.

(ii) The rent reserved and other terms of any lease of the condemned property or comparable property which was in effect within a reasonable time before or after the date of condemnation.

(iii) The capitalization of the net rental or reasonable net rental value of the condemned property, including reasonable net rental values customarily determined by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises, as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon.

(iv) The value of the land together with the cost of replacing or reproducing the existing improvements thereon less depreciation or obsolescence.

(v) The cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.

(3) Either party may show the difference between the condition of the property and of the immediate neighborhood at the time of condemnation and at the time of view, either by the viewers or jury.

(4) The assessed valuations of property condemned shall not be admissible in evidence for any purpose.

(5) A qualified valuation expert may testify that he has relied upon the written report of another expert as to the cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation, but only if a copy of such written report has been furnished to the opposing party ten days in advance of the trial.

(6) If otherwise qualified, a valuation expert shall not be disqualified by reason of not having made sales of property or not having examined the condemned property prior to the condemnation, provided he can show he has acquired knowledge of its condition at the time of the condemnation.

§ 1-706. USE OF CONDEMNED PROPERTY.

In arriving at his valuation of the remaining part of property in a partial condemnation, an expert witness may consider and testify to the use to which the condemned property is intended to be put by the condemnor.

RHODE ISLAND

R.I. Gen. Laws Ann. § 9-16-1 (1956)

§ 9-16-1. COURT ORDER FOR VIEW. In all cases in which it shall seem advisable to the court, on request of either party, a view may be ordered; and in all such cases the court shall regulate the proceedings at the view and in its discretion accompany the jury.

SOUTH CAROLINA

S.C. Code Ann. § 25-120 (1962)

§ 25-120. DETERMINATION OF VALUE OF LAND; ADMISSIBLE EVIDENCE. For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor in a hearing before a special master or in a trial before a jury, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted as evidence and considered by the special master or the jury, the case may be, to wit:

(1) Evidence that a building or improvement is unsafe, unsanitary or a public nuisance or is in a state of disrepair and evidence of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition;

(2) Evidence that any State public body charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or unsanitary structures issued an order directing the abatement or correction of any conditions existing with respect to such building or improvement or demolition of such building or improvement and of the cost which compliance with any such order would entail;

(3) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on account of obsolescence or depreciation of such property;

(4) Evidence that any such building or improvement is being used for illegal purposes or is being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use; and

(5) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

S.C. Code Ann. § 38-302 (1962)

§ 38-302. JURY MAY VIEW PLACE, PROPERTY OR THING. The jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision, if the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which shall be afterwards taxed like other legal costs if the party who advanced them prevails in the suit.

SOUTH DAKOTA

S.D. Code § 28.13A09 (Supp. 1960)

§ 28.13A09. DUTY OF JURY; BENEFITS CONSIDERED; VIEW PREMISES; WHEN. . . . Upon the demand of any party to the proceeding, if the Court shall deem it necessary, the jury may view premises under the rules of law for viewing by the jury.

UTAH

Utah Rules of Civil Proc., Rule 47(j)

Rule 47. JURORS.

. . . .

(j) View by Jury. [See ARK. STAT. ANN. § 27-1731 (Repl. 1962)]

VERMONT

Vt. Stat. Ann. tit. 12, § 1604 (1959)

§ 1604. VALUE OF PROPERTY; OWNER AS COMPETENT WITNESS.

The owner of real or personal property shall be a competent witness to testify as to the value thereof.

VIRGINIA

Va. Code Ann. § 25-46.21 (Repl. 1964)
[Eminent Domain, General]

§ 25-46.21. VIEW BY COMMISSIONERS; HEARING OF TESTIMONY; COMMISSIONERS' REPORT; EXCEPTIONS TO REPORT AND HEARING THEREON. Upon the selection of the commissioners, the court shall direct them, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the commissioners upon such view. Such view shall not be considered by the commission or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. . . .

Va. Code Ann. § 33-64 (Supp. 1966)
[Highway Condemnation]

§ 33-64. VIEW, TESTIMONY AND REPORT; EXCEPTIONS TO REPORT; WHEN REPORT CONFIRMED OR SET ASIDE. Upon the selection of the commissioners, the court, or the judge thereof in vacation, shall direct them, in the custody of the sheriff or one of his deputies, to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the commissioners upon their view of the land. Upon completion of the view, the court or the judge in vacation shall hear the testimony in open court on the issues joined. . . .

WASHINGTON

Wash. Rev. Code Ann. § 4.44.270 (1962)

§ 4.44.270. VIEW OF PREMISES BY JURY. [See MINN. STAT. ANN. § 546.12 (1947)]

WEST VIRGINIA

W.Va. Code Ann. § 54-2-10 (Michie 1966)

§ 54-2-10. PROCEEDINGS ON REPORT; TRIAL BY JURY.

. . . a view of the property proposed to be taken shall not be required: Provided, that in the event a demand therefor is made by a party in interest, the jury shall be taken to view the property, and in such case, the judge presiding at the trial shall go with the jury and shall control the proceedings.

WISCONSIN

Wis. Stat. § 32.05(10)(a) (1965)

§ 32.05. CONDEMNATION FOR STREETS, HIGHWAYS, STORM OR SANITARY SEWERS, WATER COURSES, ALLEYS AND AIRPORTS.

. . . .

(10) *Appeal from commission's award to circuit court.*

(a) Neither the amount of the jurisdictional offer, the basic award, nor the award made by the commission shall be disclosed to the jury during such trial.

Wis. Stat. § 32.08(6)(a) (1965)

§ 32.08. COMMISSIONER OF CONDEMNATION

. . . .

(6)

(a) . . . The amount of a prior jurisdictional offer or award shall not be disclosed to the commission. . . .

Wis. Stat. § 270.20(1965)

§ 270.20. JURY MAY VIEW PREMISES, ETC.

The jury may, in any case, at the request of either party, be taken to view the premises or place in question or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision. . . .

WYOMING

Wyo. Stat. Ann. § 1-125 (1957)

§ 1-125. VIEW OF PLACE OR PROPERTY BY JURY. [See ARK. STAT. ANN. § 27-1731 (Repl. 1962)]