

1969

Eminent Domain: Valuation of Different Real Property Interests in Nebraska

John C. Person

University of Nebraska College of Law, jperson@crosslake.net

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

John C. Person, *Eminent Domain: Valuation of Different Real Property Interests in Nebraska*, 49 Neb. L. Rev. 132 (1970)

Available at: <https://digitalcommons.unl.edu/nlr/vol49/iss1/8>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Comment

EMINENT DOMAIN: VALUATION OF DIFFERENT REAL PROPERTY INTERESTS IN NEBRASKA.

INTRODUCTION

Under the laws of Nebraska, prior to the passage of the Nebraska Uniform Eminent Domain Act¹ in 1951, each body that had been delegated the power of eminent domain had a specific set of statutes² setting out the procedure it was to follow in condemnation proceedings. The language of the various statutes differed and the procedure was not uniform. To a large extent, the enactment of 1951³ remedied these differences; however, a current controversy remains concerning the duties of court appointed appraisers when valuing property in which several people have an interest.

Nebraska is currently confronted with the problem of valuation of damages to the separate interests of real property condemned under the Act. A conflict exists between other state court interpretations of similar statutes and interpretations by the Nebraska Supreme Court prior to the passage of the Act in 1951. This comment will consider the two prominent doctrines in the United States concerned with the question of valuation of separate interests in real property; the majority accept the unit valuation doctrine which asserts that the property must first be valued as a whole and then apportioned among the different interests. There is a minority separate valuation doctrine which determines that different interests in property are entitled to be valued separately in assessing damages.

The Nebraska Uniform Eminent Domain Act contains two statutory sections around which the controversy seems to center. Section 76-706, provides that:

The county judge shall direct the sheriff to summon the appraisers so selected to convene at the office of the county judge at a time specified in the summons for the purpose of qualifying as appraisers, and thereafter proceed to appraise the property sought to be condemned and to ascertain and determine the damages sustained by the condemnee.⁴

¹ NEB. REV. STAT. § 76-701 *et. seq.* (Reissue 1966).

² *E.g.*, Law of April 20, 1921, c. 116, art. III, §§ 59-62 (1921) Neb. Laws 208 (repealed 1951), condemnation procedure for cities of the metropolitan class; NEB. REV. STAT. §§ 31-321, -322 (1943), as amended, NEB. REV. STAT. §§ 31-321, -322 (Reissue 1968), condemnation procedure for drainage districts.

³ NEB. REV. STAT. § 76-701 *et. seq.* (Reissue 1966).

⁴ NEB. REV. STAT. § 76-706 (Reissue 1966).

Section 76-710, provides that:

After the inspection, view, and hearing provided for... have been completed, the appraisers shall assess the damages that the condemnee has sustained or will sustain by the appropriation of the property to the use of the condemnor, and make and file a report thereof in writing with the county judge.⁵

Unfortunately, there are no Nebraska cases interpreting the duties of court appointed appraisers in the valuation of property in which several persons have an interest.⁶ Therefore, to understand the meaning the legislature intended when these sections were enacted, it is necessary to review the case law and relevant statutes governing such cases prior to passage of the Act, together with the relevant portions of that Act. Due consideration is also given to eminent domain statutes of other states and interpretative decisions. An analysis will then be made concerning whether different estates or interests in real property taken under the Nebraska Uniform Eminent Domain Act are to be valued separately, or whether the entire property is to be valued as a unit and the amount apportioned among the separate interests.

NEBRASKA CASE HISTORY PRIOR TO THE UNIFORM ACT

The earliest Nebraska cases concerning the condemnation of separate interests in real property established the duty of the condemnor to bring all parties into the condemnation proceedings having an interest in the estate.⁷ For example, as early as 1913, it was stated in *Gerrard v. Omaha, Niobrara & Black Hills Railroad*⁸ that condemnors have a "duty to bring in all parties having an interest in the estate in order that the condemnation money may be

⁵ NEB. REV. STAT. § 76-710 (Reissue 1966).

⁶ *State v. Platte Valley Pub. Power & Irrigation Dist.*, 147 Neb. 289, 23 N.W.2d 300 (1946), held the general rule to be that the aggregated damages will not exceed the value of the entire parcel taken, but if the damage to the individual interests when added together exceed the value of the property as a whole, the individual condemnee is entitled to be compensated in damages for the amount of his interest taken. This decision was prior to the Nebraska Uniform Eminent Domain Act and involved the condemnation of leased school lands under NEB. REV. STAT. § 72-225 (Reissue 1966).

⁷ *State v. Missouri Pacific Ry. Co.*, 75 Neb. 4, 105 N.W. 983 (1905), held that if a railway company, in condemnation proceedings, fails to make all parties with interests in the land parties to the proceedings or to give them notice of the proceeding so that their rights may be protected, it takes the land subject to such liens as are prior to the rights of the parties to the proceeding. See also *Consumers Pub. Power Dist. v. Eldred*, 146 Neb. 926, 22 N.W.2d 188 (1946).

⁸ 14 Neb. 270, 15 N.W. 231 (1883).

properly applied."⁹ *Gerrard*, however, did not mention whether separate determinations of the value of each party's interest were required.

The Nebraska Supreme Court alluded to the separate valuation concept in *Omaha Bridge & Terminal Ry. v. Reed*,¹⁰ where it established that mortgagees had a right to appeal separately from owners of the fee because they "would have a substantial interest in the augmentation of the fund which is subject to their lien."¹¹ The *Omaha Bridge* decision could be used to support the separate valuation doctrine if it was intended that any increase in damages awarded to the mortgagees be added to the total fund rather than decrease the amount awarded to the fee owner. If this were accomplished the court would actually be applying the doctrine of separate valuation.¹² It should be noted that the *Omaha Bridge* decision did not consider the problem of whether to adopt the separate valuation doctrine, but by its decision it is likely that separate valuation of each separate interest will in fact occur.

In *Beste v. Cedar County*,¹³ the Nebraska Supreme Court moved toward holding that separate determination of each interest is permitted when the aggregate of the damages suffered by each interest would exceed the amount of damages if valued as a whole unit. The *Beste* decision held that a lessee of school land is entitled to damages to the extent of his injury without joining the state as plaintiff.¹⁴

⁹ *Id.* at 271, 15 N.W. at 231.

¹⁰ 3 Neb. (Unof.) 793, 92 N.W. 1021 (1902), *aff'd.*, 69 Neb. 514, 96 N.W. 276 (1903).

¹¹ 3 Neb. (Unof.) at 796, 92 N.W. at 1022.

¹² The court first determined the total value of the land as a unit, which established a fund to be apportioned among the separate interests. If then on appeal the court increases the amount of damages for a particular interest without decreasing the amount available to other interests, it would in fact be determining the amount of damages by consideration of the amount of damages to each separate interest. Of course, if in increasing the award to the particular interest the court reduces the amount available to the other interests by a corresponding amount, then the court would be maintaining the value as a unit doctrine.

¹³ 87 Neb. 689, 128 N.W. 29 (1910). This decision was governed by Neb. Laws, 1879, p. 130, § 46; Neb. Comp. St. 1905, c. 78, § 46, which did not require that damages be assessed on each different interest separately.

¹⁴ In a decision prior to *Beste*, it was held that a purchaser of real estate, and holding the same by contract, may maintain an action in such case for the damages sustained by him. The court added that "at the most there was a defect in parties; but no objection... was made... and therefore he was entitled to recover for the injury to his interest." *Hastings & G.I. R.R. v. Ingalls*, 15 Neb. 123, 129, 16 N.W. 762, 764 (1883).

This offers strong support for the separate valuation concept, for if a lessee is permitted to bring suit for damages without joining the landowner as a party it would in fact be allowing each separate party to have his interest valued separately. However, because of the *Gerrard* decision establishing the condemnor's duty to bring in all interested parties, separate valuation would rarely occur.

Before passage of the Nebraska Uniform Eminent Domain Act, the strongest Nebraska case recognizing the doctrine of separate valuation was *State v. Platte Valley Public Power & Irrigation District*,¹⁵ in which the court stated:

The rule is generally recognized (though not invariably followed) that, where there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof, or damage thereto, separately. Even where separate petitions are filed and the damages are separately assessed, the compensation awarded will not exceed the value of the entire parcel taken. But it sometimes happens that the land as a whole is not damaged at all, though the owner of one interest suffers substantial injury, or the damage to the various interests when added together exceeds the value of the property as a whole. In such cases each is entitled to be compensated in damages for the amount of his interest taken, and if it be true that the values of the two interests are more than the land would be worth if owned by one person, the necessities of the case require an apparent exception to the general rule announced above as to what the condemning party must pay.¹⁶

This statement clearly indicates an intention to place primary emphasis upon just and equitable compensation to all interested parties, rather than adhering strictly to a general rule requiring that total damages not exceed the value of the property as a whole. The *Platte Valley* decision apparently establishes that damages are to be determined by valuation of the property as a unit, unless this would result in an inequitable apportionment to the individual parties. If inequities would result from valuing the property as a unit it seemingly approves measuring each individual party's damages by a separate valuation of his particular damages.¹⁷

¹⁵ 147 Neb. 289, 23 N.W.2d 300 (1946).

¹⁶ *Id.* at 305, 23 N.W.2d at 310.

¹⁷ It should be noted that *Platte Valley* involved the condemnation of state owned school lands that were under lease, and thus was governed by NEB. REV. STAT. § 72-225 (Reissue 1966), which provides: "If the land to be taken is held under lease contract, a finding shall be made as to the interest of the owner in such lease contract, and such value shall be separately assessed. If the land is held under contract

The *Platte Valley* opinion supported its holding by noting that the Constitution of Nebraska¹⁸ would require such a decision, and went on to state:

[O]ur Constitution provides that the property of no person shall be taken or damaged for public use without just compensation. The measures of compensation to each owner must be that which he has lost. It seems to us that those courts which have held that the sum of the separate values of the divided interests may be less than the value of the unencumbered whole have followed this principle. It also seems to us that those courts which have held divided interests may not exceed the value of the unencumbered whole have at that point abandoned the rule that the measure is what has the owner lost, and applied the rule that the measure is what has the taker gained.¹⁹

This statement indicates that if the courts are going to consistently apply the rule that the measure of damages is what the owner has lost, they must then provide for separate valuation of different interests if the sum of such valuation would exceed the value of the property as a whole. Apparently, the court's reasoning in *Platte Valley* is that the Nebraska Constitution requires "just compensation" to be paid to all interested parties in condemnation proceedings. The court defines the measure of just compensation as the value of the interest the owner has lost, and thus if the courts prohibit the total damages awarded to exceed the value of the property as a whole it violates the Constitutional requirement of "just compensation." For if the sum of the damages to each separate party's interest exceeds the value of the property as a whole, then separate valuation must be permitted or "just compensation" will not be provided for all interested parties.

This doctrine of separate valuation, as set forth in *Platte Valley*, was adopted, at least in part, in the recent decision of *Iske v. Metropolitan Utilities Dist.*²⁰ The Nebraska Supreme Court approved the

of sale, the interest of the owner of such sale contract shall be separately assessed." This statute provided an easy means of disposing of the case without dealing with the issue of whether separate valuation of different interests is permissible when this would result in the total damages exceeding the amount of damages if the land is valued as a whole. Therefore, the *Platte Valley* decision can be read as offering strong support for separate valuation of each individual interest when to do otherwise would result in an unjust and inequitable apportionment of damages to the separate interests.

¹⁸ NEB. CONST. art. 1, § 21.

¹⁹ 147 Neb. at 307-08, 23 N.W.2d at 311. This doctrine is supported by *Mathis v. State*, 178 Neb. 701, 135 N.W.2d 17 (1965), where the Nebraska Supreme Court stated that: "Compensation to a condemnee depends upon his pecuniary loss. It is the owner's loss, not the taker's gain, which is the measure of compensation for property taken." *Id.* at 707, 135 N.W.2d at 21.

²⁰ 183 Neb. 34, 157 N.W.2d 887 (1968).

lower court's instruction to the jury for the awarding of damages to a leasehold interest. The *Iske* decision concluded that:

Instruction No. 12 advised the jury that its verdict concerning the taking of the leasehold interest "... will find for the plaintiff, Gerhold Company, A [sic] Corporation, and in assessing the amount of its recovery you will award to it such sum of money, if any, as you find it has proved by a preponderance of this evidence will be just compensation..." The verdict form followed the language of the instruction and contained a finding for the plaintiff and a blank for the amount of recovery.²¹

This instruction indicates that the jury should separately determine the amount of damages to the leasehold interest. However, the *Iske* decision did not decide whether the total damages to the separate interests could exceed the value of the property as a whole.²²

POLICY ON SEPARATE VALUATION IN OTHER STATES

The leading case, *State ex rel. McCaskill v. Hall*,²³ held the refusal in a condemnation proceeding to separately assess the damages for a leasehold interest was not a violation of the United States or Missouri Constitutions²⁴ as denying due process or taking property without compensation. The *Hall* decision also supported the general rule that the court ascertain all damages of the property as a whole, and then apportion this fund among the separate interests. However, the court in *Hall* went on to say:

There may be instances in which, owing to exceptional circumstances, the damages to the various interests when added together exceed the value of the property as a whole; in such case the particular interests should of course be separately appraised, because the owner of each is entitled to be compensated in damages for the amount of his interest taken. But no showing of that kind was made in the circuit court in the proceeding under consideration, nor is any such contention made here.²⁵

²¹ *Id.* at 48, 157 N.W.2d at 897.

²² Although there is dicta to the effect that the total value of the various separate interests should not exceed the value of the property as a whole, the *Iske* opinion noted: "[W]here land taken by eminent domain has a reasonable prospective use for recreational and subdivision purposes, this circumstance may be considered so far as it may affect the market value of the land at the time of the taking, and that part of the realty cannot be separately valued for its prospective use for recreational and subdivision purposes as an item in addition to the market value of the land." *Id.* at 47, 157 N.W.2d at 896. See, e.g., *State v. Dillon*, 175 Neb. 350, 121 N.W.2d 798 (1963); *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 106 N.W.2d 727 (1960).
²³ 325 Mo. 165, 28 S.W.2d 80 (1930).

²⁴ U.S. CONST. amend. XIV, § 1; MO. CONST. art. 1, § 28.

²⁵ 325 Mo. at 172, 28 S.W.2d at 82; see *State ex rel. State Highway Comm'n v. Conrad*, 310 S.W.2d 871 (Mo. 1958), supporting method of assessing in one sum the damages of all interests and then apportionment of the damages among the various interests.

The *Hall* decision has been frequently cited as supporting the doctrine of valuating the property as a whole, and then apportioning this fund among the various interests. However, the above statement in *Hall* would indicate that separate valuation is necessary when the separate damages to the various interests would exceed the value of the property as a whole. Therefore, under *Hall* all that would seem necessary to require separate appraisal is a reasonable contention that the sum of the damages to the separate interests exceeds the value of the property as a whole.

The majority of cases follow the general rule that the property is valued as a unit, and then apportionment of this fund is made to the various interested parties.²⁶ In *State Highway Commission v. Burk*²⁷ the Oregon Supreme Court adopted the majority view, but seemed to go further by indicating that under no circumstances could the amount of damages awarded exceed the value of the property as a whole. The Oregon court in *Burk* decided that a condemnation proceeding is an action in rem; therefore, the amount the condemnor is required to pay is the value of the property taken and not the value of the separate interests.²⁸ Those courts which consider condemnation proceedings in rem seemingly foreclose the possibility, even under the most exceptional circumstances, of ever appraising the separate interest of each interested party. This conclusion was reached by the Alabama Supreme Court when it said:

No contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole.²⁹

There are a minority of courts which hold that separate appraisal is required where there are separate interests involved. The Georgia Supreme Court in *State Highway Department v. Thomas*³⁰ indicated

²⁶ *E.g.*, *In re Kansas Turnpike Project*, 181 Kan. 840, 317 P.2d 384 (1957), holding that the owner of a leasehold interest is not entitled to a separate trial to determine compensation and damages; *State v. Mahon*, 350 S.W.2d 111 (Mo. App. 1961), following the doctrine that property is to be valuated as a whole. See also *State v. Montgomery Circuit Court*, 239 Ind. 337, 157 N.E.2d 577 (1959); *Lee v. Indian Creek Drainage Dist. Number One*, 246 Miss. 254, 148 So. 2d 663 (1963); *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E.2d 313 (1951); *Finley v. Board of County Commissioners of Oklahoma Co.*, 291 P.2d 333 (Okla. 1955).

²⁷ 200 Ore. 211, 265 P.2d 783 (1954).

²⁸ *Id.* at 245, 265 P.2d at 799. See also *City of Dothan v. Wilkes*, 269 Ala. 444, 114 So. 2d 237 (1959); *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E.2d 313 (1951).

²⁹ *City of Dothan v. Wilkes*, 269 Ala. 444, 448, 114 So. 2d 237, 240 (1959).

³⁰ 115 Ga. App. 372, 154 S.E.2d 812 (1967).

that separate valuation is required where different interests are present. It was stated in *Thomas* that:

[U]nder our constitutional requirement,³¹ that the condemnee be paid 'just and adequate compensation' before his property is taken, the question which properly addresses itself to the jury's consideration, as in Missouri and Nebraska, is not "What has the taker gained?", but "What has the owner lost?", and that where there are separate interests to be condemned, the jury, in arriving at just and adequate compensation, is not only authorized but required to consider the value which the thing taken has to the respective owners of the interests being condemned. If just and adequate compensation to the owners of the various interests in the land being condemned requires that the total compensation exceed the value of the land, this presents no difficulty because, under *Bowers*,³² and under the constitutional requirement mentioned, the jury is not only required to render a verdict for an amount which will justly and adequately compensate the condemnees for the value of the land taken, but also for whatever damages result to the condemnees from the condemnation proceeding.³³

Thomas represents an extremely liberal interpretation of a state constitution, and this broad interpretation has not been adopted by any other court. *Thomas* and *Bowers v. Fulton County*³⁴ represent a minority viewpoint which is directly contrary to the majority view concerning the problem of separate appraisal of separate interests in property. Located between these two opposing viewpoints are a significant number of courts which hold that under certain circumstances separate appraisal of the different interests will be permitted.³⁵

³¹ GA. CONST. art. 1, § 3, para. 1. The Georgia Constitutional provision varies from the Nebraska provision in that it requires the compensation be both "just and adequate," while the Nebraska Constitution, NEB. CONST. art. 1, § 21, only provides for "just" compensation. The Georgia Constitution also varies from the Nebraska Constitution in that it requires payment to the condemnee before the property may be taken, while Nebraska's Constitution only requires that compensation be paid for property taken or damaged.

³² 221 Ga. 731, 146 S.E.2d 884 (1966).

³³ 115 Ga. App. 372, 376-77, 154 S.E.2d 812, 816 (1967).

³⁴ 221 Ga. 731, 146 S.E.2d 884 (1966). It should be noted that GA. CODE ANN. § 36-504 (1962), provides that: "The assessors or a majority of them, shall assess the value of the property taken or used, or damage done . . . : Provided, further, that nothing in this section shall be so construed as to deprive the owner of the actual value of his property so taken or used." This phrase would indicate that even without the constitutional argument, the Georgia court would still be justified in requiring separate valuation in cases where to fail to do so would result in compensation that is less than actual loss suffered by the injured parties.

³⁵ *E.g.*, *United States v. Certain Parcels of Land*, 43 F. Supp. 687 (D. Md. 1942); *State ex rel. LaPrade v. Carrow*, 57 Ariz. 429, 114 P.2d 891 (1941); *Town of Perry v. Thomas*, 82 Utah 159, 22 P.2d 343 (1933).

EMINENT DOMAIN STATUTES IN OTHER STATES

In completing this analysis it is necessary to consider a cross section of other state statutes and court decisions which interpret them. The unit valuation doctrine is adhered to by the majority of states, and the eminent domain statutes in those states are similar to the Nebraska Uniform Eminent Domain Act. A minority of states adopt the separate valuation doctrine, but these decisions seem largely dictated by statutes which permit or require separate valuation. Statutes in states which adhere to the unit valuation doctrine will be considered and related to the Nebraska Uniform Eminent Domain Act.

Missouri courts have consistently held since the 1930 decision of *State ex rel. McCaskill v. Hall*³⁶ that the proper method of valuation is to ascertain the value of the condemned land as a whole. The Missouri Condemnation Act³⁷ provides that appraisers shall:

[A]ssess the damages which such owners may severally sustain in consequence of the...condemnation...to which petition the owners of any or all as the plaintiff may elect of such parcels as lie within the county or circuit may be made parties defendant by names if the names are known, and by the description of the unknown owners of the land therein described if their names are unknown.³⁸

The statute goes on to provide that "[a]ny number of owners, residents in the same county or circuit, may be joined in one petition, and the damages to each shall be separately assessed by the same commissioners."³⁹ This section has been interpreted to apply to separate owners of different parcels of land. Missouri courts have steadfastly applied the unit valuation doctrine under the above statutes.⁴⁰

The Nebraska Uniform Eminent Domain Act is similar to the corresponding Missouri statute in that neither statute expressly provides for separate valuation of different interests in the condemned land; and neither specifically requires the condemnor to bring in the owners of any remainder, reversion, mortgage, lease,

³⁶ 325 Mo. 165, 28 S.W.2d 80 (1930); *accord*, *City of St. Louis v. Rossi*, 333 Mo. 1092, 64 S.W.2d 600 (1933); *State v. Mahon*, 350 S.W.2d 111 (Mo. App. 1961).

³⁷ Mo. ANN. STAT. § 523.010 *et. seq.* (1953).

³⁸ *Id.* § 523.010.

³⁹ *Id.* § 523.020.

⁴⁰ However, in *Union Elec. L. & P. Co. v. Dawson*, 228 Mo. App. 1224, 78 S.W.2d 867 (1934), the court held that a condemnor could join all the parties with an interest in the land in one petition, and could have their damages separately assessed. This case, although not specifically overruled, has not been followed in Missouri, and also was decided prior to adoption of section 523.010 of the Missouri statutes in 1939.

security deed, or any other interest.⁴¹ Because of this similarity between Nebraska's and Missouri's eminent domain statutes, Nebraska courts could receive guidance from Missouri decisions interpreting their statute.

The Kansas Eminent Domain Act⁴² is similar to that of Nebraska, and provides for court appointed appraisers "to determine the damages to the interested parties resulting from the taking."⁴³ However, Kansas does require the petition to include "(a) the name of any owner and all lienholders of record, and (b) the name of any party in possession."⁴⁴ This statute seems to be somewhat more explicit in requiring other interests to be brought into the proceedings, but is still sufficiently similar to supply meaningful precedent for determining this issue in Nebraska.

In *Moore v. Kansas Turnpike Authority*⁴⁵ it was determined that an owner of a leasehold estate has a separate interest from that of his lessor and is entitled to compensation, but this right to share in the compensation or damages awarded does not entitle the owner of a leasehold to a separate trial to determine compensation and damages for the separate interest appropriated. Thus, on the basis of similarity between the Nebraska and Kansas statutes, it would seem that Nebraska should apply the unit valuation doctrine.

In considering the minority of states following the separate valuation doctrine, it is essential to note that the majority of these states are bound or permitted by statute to do so. These states have statutes which either specifically require or strongly allude to separate valuation of the different estates in the property to be condemned. The Utah statute provides that:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of differ-

⁴¹ Nebraska does require ten days notice to be served upon the condemnee. NEB. REV. STAT. § 76-706 (Reissue 1966). Condemnee is defined in the statute as "any person, partnership, corporation, or association, owning or having an encumbrance on any interest in property that is sought to be acquired by a condemnor, or in possession of or occupying any such property." NEB. REV. STAT. § 76-701(2) (Reissue 1966). Missouri makes a party necessary only if they are in possession or are the owner of record, MO. ANN. STAT. § 523.010 (3).

⁴² KAN. STAT. ANN. §§ 26-501 to -516 (1964).

⁴³ *Id.* § 26-504.

⁴⁴ *Id.* § 26-502.

⁴⁵ 181 Kan. 840, 317 P.2d 384 (1957).

ent parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.⁴⁶

The Utah courts have applied the separate valuation doctrine specified in the statute, and in *Perry v. Thomas*⁴⁷ the court, in deciding that the condemned land was not properly described in the condemnor's complaint, noted that under the statute each owner is entitled to have separately assessed the value of the land in separate ownership and each estate or interest therein.

The Arizona statute⁴⁸ is similar to that of Utah and adheres to the separate valuation doctrine. In *Gilbert v. State*,⁴⁹ the Arizona Supreme Court allowed the lessees damages for buildings which the lessees erected on the land but did not remove, and applied separate valuation in determining those damages.

Clearly, sections 76-706 and 76-710 of the Nebraska Uniform Eminent Domain Act are not similar nor do they conform to those statutes in other states which apply the separate valuation doctrine. Sections 76-706 and 76-710 do not mention the matter of separate valuation for different interests, and do not in any positive manner allude to the subject of requiring or permitting separate valuation. These sections resemble more closely statutes in those states which follow the unit valuation doctrine. Therefore, on the basis of comparison, precedent would require Nebraska courts to apply the unit valuation doctrine, although this result is in direct conflict with prior Nebraska case law.

CONCLUSION

It is submitted that the Nebraska Uniform Eminent Domain Act should be amended to provide for the separate valuation of different estates or interests in real property.⁵⁰ Such an amendment permitting separate valuation of different interests would be consistent with the *Platte Valley* decision holding that separate valuation is desirable under certain circumstances. In addition, it would allow Nebraska courts to remain internally consistent with prior decisions, as well as establish external consistency between Nebraska eminent domain statutes and the eminent domain statutes of those states which adhere to the separate valuation doctrine.

⁴⁶ UTAH CODE ANN. § 78-34-10 (1953).

⁴⁷ 82 Utah 159, 22 P.2d 343 (1933).

⁴⁸ ARIZ. REV. STAT. ANN. § 12-1122 (1956).

⁴⁹ 85 Ariz. 321, 338 P.2d 787 (1959); e.g., *State v. Carlson*, 83 Ariz. 363, 321 P.2d 1025 (1958).

⁵⁰ See appendix for suggested amendments to sections 76-706 and 76-710.

An amendment permitting separate valuation would also be consistent with the fourteenth amendment⁵¹ requirement as defined in *Boston Chamber of Commerce v. Boston*.⁵² In that case the Supreme Court stated that:

[T]he Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained.⁵³

This decision furnishes support for the separate valuation doctrine in circumstances where the sum of the value of the separate interests would exceed the value of the property taken as a unit. The *Boston* decision is directly in conflict with those cases holding that condemnation is an in rem action, for *Boston* determines that condemnation is instead an action in personam. *Boston* asserts that the important determination is what the owner has lost, which by analogy requires separate valuation of the various interests where their total value would exceed the value of the property as a whole. Therefore, strict compliance with the United States Constitution, as well as the Nebraska Constitution, arguably requires that Nebraska amend the eminent domain statutes to allow separate valuation.

An amendment permitting separate valuation when there are different interests would promote fairness and judicial efficiency. Under the unit valuation doctrine damages are determined for the particular piece of property; in Nebraska the county judge must then file an interpleader in the district court to apportion the fund among the various interests.⁵⁴ This interpleader in district court

⁵¹ U.S. CONST. amend. XIV, § 1.

⁵² 217 U.S. 189 (1910).

⁵³ *Id.* at 195; see *United States v. Certain Parcels of Land*, 43 F. Supp. 687, 689 (D.C. Md. 1942), wherein it was decided that the owner of an easement and the owner of the street bed are not jointly entitled to compensation for the whole, and that their damages should be separately determined. The court then added: "And it may be that the sum of the respective values will be more or less than the value of the whole parcel taken as an entity irrespective of the separate valuations."

⁵⁴ NEB. REV. STAT. §§ 76-706, -707, -710, -712 (Reissue 1966); the county judge has authority to appoint the appraisers, fill vacancies of appraisers, and receive and certify the report of the appraisers. But the county judge is not given the authority to apportion the total amount of damages, as determined by the appointed appraisers, among the various interests in the particular piece of property. Thus, he must file an interpleader with the district court so that the fund may be apportioned among the different estates.

would be at the expense of the various interested parties, which in many cases might amount to a substantial portion of the total award. Separate valuation of the damages sustained by the separate interests would eliminate the unnecessary expense of the interpleader in the district court, and an auxiliary result would be a reduction of the work load in district court, thus increasing judicial efficiency.

John C. Person '70

APPENDIX

Proposed Amendments to Nebraska Uniform Eminent Domain Act:

It is proposed that section 76-706 be amended to read as follows:

76-706. Upon filing of a petition under either section 76-704 or 76-705, the county judge within three days by order entered of record shall appoint three disinterested freeholders of the county, not interested in a like question, to serve as appraisers. The county judge shall direct the sheriff to summon the appraisers so selected to convene at the office of the county judge at a time specified in the summons for the purpose of qualifying as appraisers, and thereafter proceed to appraise the property sought to be condemned and to ascertain and determine the damages sustained by the condemnee *or each condemnee separately where there is more than one condemnee.* * * * (Continue without change).

It is proposed that section 76-710 be amended to read as follows:

76-710. After the inspection, view and hearing provided for in section 76-709 have been completed, the appraisers shall assess the damages that the condemnee, *or each condemnee separately where there is more than one condemnee,* has sustained or will sustain by the appropriation of the property to the use of the condemner, and make and file a report thereof in writing with the county judge.