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THE LAWYER MEETS THE APPRAISER-WITNESS

John C. Burke*

In any condemnation case, the appraiser is one of the more important witnesses. Upon his testimony, his knowledge, his demeanor, his presentation, and the jury's acceptance or rejection of the same, may well depend the attorney's case. The author, no stranger to the appraiser-witness, emphasises the need for pre-trial consultation between the attorney and the appraiser, pointing out many of the more common pitfalls of which the attorney and his witness should be aware.

The Editors

I. INTRODUCTION

It is . . . indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness.

Lord Chief Justice Campbell - 1856¹

Not too many years ago, expert testimony concerning value was looked upon with distrust and suspicion by both lawyers and judges as well as by laymen. Real estate appraisers were fair

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¹ This quotation is taken from Lord Chief Justice Campbell's charge to the jury in the famous trial of William Palmer. Palmer was charged with the murder of one Cook by poisoning, the trial being held within Central Criminal Court, Old Bailey, London, in the year 1856. The reports of the trial differ in some minor respects. One report quotes the pertinent part of the charge as follows:

With regard to the medical witnesses, I must observe that, although there were among them gentlemen of high honor, consummate integrity and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate nor an advocate into a witness.

For a complete report of the trial, see: Knott, *Trial of William Palmer*, Cromarty Law Book Co., Philadelphia (1912).

game for the cold, pointed pen of the fact minded jurist.² However, in recent years, real estate appraisers have made rapid strides in gaining the confidence of the legal profession and the general public. The appraisal of real property is fast being reduced to a science, and the expert real estate appraiser in condemnation cases has recently been characterized as "that scoundrel who stands between the landowner and sudden wealth."

Today, expert testimony on value is the accepted and perhaps the only practical method of proving value in condemnation cases.

For purposes of this paper, it is assumed that the lawyer confronted with the trial of a condemnation case has selected the best real estate appraiser available; one who will qualify as an expert at the time of trial. The lawyer is now ready to sit down with the expert and prepare the case for trial.

II. CONFERENCE WITH APPRAISER

The trial of a condemnation case requires the utmost preparation and coordination by the lawyer-appraiser "team." The lawyer, of course, occupies the role of the advocate; the appraiser plays the dual role of teacher and salesman.

It is not unnatural that an appraiser of strong conviction, yet honest and unpurchasable, should become the earnest advocate of his theory and somewhat over zealous in his testimony. Yet, this is a pitfall for the lawyer to avoid in the trial of a condemnation case. Once the appraiser becomes an advocate, his effectiveness before the jury is diminished and the ends of justice are not served. On the other hand, the lawyer is not required to select a lukewarm, half-convinced appraiser. The solution to this perplexing problem appears to lie in a thorough understanding by the appraiser of what his function is to be in the forthcoming trial. The function of the appraiser ". . . is to present an appraisal of the property, setting forth his independent valuation conclusion, doing

² The court in *Sands v. City of New York*, 172 N.Y.S. 16, 18 (1918) stated: "Facts, not the purchased opinions of professional witnesses, count with courts. The naked, arbitrary opinions of men who call themselves 'experts' are of little value." See: *Ferguson v. Hubbel*, 97 N.Y. 507, 514, 49 Am. Rep. 544, 549 (1884), where the court said: "It is generally safer to take the judgment of unskilled jurors than the opinions of hired and generally biased experts."; also *Winans v. N.Y. & N.E. Ry.*, 62 U.S. 88, 101 (1858), where a judge of the Supreme Court of the United States declared: ". . . experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount."

it in such a manner that his recitation becomes a clear, coherent and convincing story. It is not his function to win the lawsuit."³ The appraiser must not be left with the impression that he carries the whole case on his shoulders and must decide questions that ought to be left to the jury.

In addition to testifying at the trial of the condemnation action, it is the function of the appraiser to assist the lawyer in the preparation of his case. He should bring to the lawyer a complete knowledge of every fact and circumstance bearing on the property to be taken. Nothing is more devastating to the testimony of the appraiser than to have it brought out in cross-examination that he is unfamiliar with or has overlooked certain facts having a definite effect on the market value of the property. The landowner is familiar with every inch of his property and the improvements thereon. He is generally acquainted with every real estate transaction in recent years in the vicinity of his property. In a recent condemnation trial in Douglas County, the landowner had lived on his farm for seventy-three years. If you are representing the landowner, he will serve as a valuable crutch for your appraiser in his search for the facts. If you are representing the appropriator, it simply means that your appraiser will have to work all the harder to gather the information necessary for his presentation.

Inasmuch as the appraiser will necessarily occupy the role of a teacher before the jury, it is important that he know something about the background and education of his pupils so that he can gear the level of his presentation accordingly. Hence, it is advisable that the lawyer and the appraiser sit down together prior to the time the appraiser takes the witness stand and discuss the information gained from the jurors on *voir dire* examination. If one of the jurors has had technical training in an allied field, it might be that the lawyer would want the appraiser, as a matter of strategy, to direct a complicated aspect of his presentation to that particular juror with the hope that the juror would "carry the ball" for him on that particular phase of the evidence when the jurors retire to the jury room. Further, the appraiser should be encouraged to use visual aids in his presentation. Visual aids should be so prepared that they may be received in evidence and taken by the jurors to the jury room.

When it was stated that the appraiser would also play the role of a "salesman," the writer did not mean to imply that it

³ See Watson A. Bowes, The Function of the Appraiser in Condemnation, The Appraisal Journal, July 1958.

was the function of the appraiser to "sell" his opinion to the jury. Neither was it implied that it was his function to take the stand as a bought and paid for witness of a party. Nevertheless, it is the function of the appraiser to influence the thinking of the jury and to convince the jurors that the techniques used and the facts assembled by the witness in making his appraisal were fair, necessary and just in order to arrive at the fair market value of the property. In view of the fact that the jury has the absolute right to evaluate expert testimony and to determine what weight should be given it or any part of it, in the light of all the general facts and circumstances developed at the trial, and of its own common knowledge and ordinary experience,⁴ the appraiser must be encouraged to "dress up" his presentation so that it will be interesting and understandable. A "cold" presentation by the appraiser, like the reading of a deposition, is of little help to the lawyer in his efforts to obtain a favorable verdict for his client.

III. FORMULA FOR DAMAGES

After having received the detailed written appraisal submitted by the appraiser, it then becomes the work of the lawyer to fit together the data in such a manner that the appraiser will be allowed to testify at the trial concerning the facts which he has gathered and the conclusions which he has reached. Generally, the appraiser will know little about rules of evidence and he will rely heavily upon the lawyer for guidance in this respect.

The courts have not all agreed on the formula for measuring damages in partial taking cases. However, two formulas seem to be in wide use, namely:

Just compensation = Fair market value of tract taken *plus* fair market value of remainder before taking *minus* fair market value of remainder after taking.

Just compensation = Fair market value of the whole tract before taking *minus* fair market value of remaining tract after taking.

⁴ In *Burnett v. Central Neb. Public Power & Irr. Dist.*, 125 F.2d 836, 838, (8th Cir. 1942), Judge Johnsen remarked: "... a jury in an ordinary condemnation case . . . must accordingly be permitted to exercise this power of deliberative flexibility, which is one of the principle virtues of our jury system, and it cannot arbitrarily be required to return a verdict within the mathematical limitations fixed by the expert witnesses for the parties." See also: *Jones v. Hartford Fire Insurance Co.*, 104 Neb. 735, 178 N.W. 611 (1920); *Lincoln Land Co. v. Phelps County*, 59 Neb. 249, 80 N.W. 818 (1889).

Formerly in Nebraska, it was held to be,

... a proper course to take the opinion of experts as to the value before it is affected by the location of the road. This done, the testimony on the question of damages should be confined to those matters affecting the value, proper to be considered, leaving the jury to draw their own inferences therefrom, unaffected by the judgment of others.⁵

However, this holding has since been modified.⁶ An examination of the case law reveals that the Nebraska Supreme Court has used both formulas interchangeably.⁷ Nevertheless, the later decisions hold that the proper formula is:

Just compensation = Fair market value of tract taken *plus* fair market value of remainder before taking *minus* fair market value of remainder after taking.

This formula has been criticized because the appraiser, in estimating the value of the part taken as a part of the whole, arrives at a value that is likely to be considerably in excess of the separate sale value of the part taken; and in calculating damages, the formula encourages him to make allowance for damages though none in fact may have been sustained.⁸ In other-words, this formula is based on the assumption that the value of an organic whole can somehow be spread out or apportioned among the parts of that whole in such a way that the sum of the values of the parts constitutes the value of the whole.⁹

⁵ Fremont E. & M. V. R.R. Co. v. Whalen, 11 Neb. 585, 591, 10 N.W. 491, 493 (1881).

⁶ Republican V. R.R. v. Arnold, 13 Neb. 485, 14 N.W. 478 (1882).

⁷ Republican V. R.R. v. Arnold, 13 Neb. 485, 14 N.W. 478 (1882); Blakeley v. Chicago K. & N. R.R. Co., 25 Neb. 207, 40 N.W. 965 (1888); Burlington & M. R. Co. v. White, 28 Neb. 166, 44 N.W. 95 (1889); Chicago R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N.W. 571 (1898); Stull v. Department of Roads and Irrigation, 129 Neb. 822, 263 N.W. 148 (1935); McGinley v. Platte Valley Public Power and Irrigation Dist., 133 Neb. 420, 275 N.W. 593 (1937); Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N.W. 833 (1941); Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N.W.2d 201 (1943), Rev. on App. 144 Neb. 325, 13 N.W.2d 168 (1944); Kennedy v. Department of Roads and Irrigation, 150 Neb. 727, 35 N.W.2d 781 (1949); Medelman v. Stanton-Pilger Drainage District, 155 Neb. 518, 52 N.W.2d 328 (1952).

⁸ I Orgel, Valuation under Eminent Domain, 64 (2d ed. 1953).

⁹ I Orgel, Valuation under Eminent Domain, 52 (2d ed. 1953), at p. 238. "Thus, if half of a homogeneous farm plot is taken, and if the whole farm is worth \$10,000, it will be assumed that each half is worth \$5,000, and this assumption will persist in the mind of the valuer even though he may be aware that each half could be sold separately for only \$3,000 and that, therefore, the taking of either half reduces the market value of the whole by \$7,000 and not merely by \$5,000."

Of course, if the property is not actually taken but is "damaged" within the meaning of the Nebraska Constitution, the following formula would be used:

Just compensation = Fair market value of the whole tract before damage *minus* fair market value of whole tract after damage.¹⁰

IV. HEARSAY

As a result of the conference with your appraiser, it will undoubtedly be brought out that some of the information upon which he bases his opinion of value has a hearsay basis. It is inevitable that there is some intermixture of hearsay with expert opinion evidence.

The courts have generally held that an expert may testify as to value even though his conclusions are based to some extent upon hearsay evidence. Chief Justice Holmes, when a member of the Supreme Judicial Court of Massachusetts, stated:

An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible.¹¹

For example, the fact that the expert chiefly relied on hearsay information regarding the selling price of a comparable tract of land in forming his opinion of the value of the tract of land under condemnation would not render his opinion inadmissible. Nevertheless, the actual selling price of the same tract of comparable property could not be shown by hearsay evidence.¹²

V. COMPARABLE SALES

The appraiser in the course of making his appraisal undoubtedly discovered sales of comparable properties which would be of help to the lawyer in the presentation of his case chiefly

¹⁰ *Quest v. East Omaha Drainage District*, 155 Neb. 538, 52 N.W.2d 417 (1952). In connection with "damage" without "taking" read about the sad fate of Gillespie's saloon in *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N.W. 582 (1907).

¹¹ *National Bank of Commerce v. City of New Bedford*, 175 Mass. 257, 56 N.E. 288, 290 (1900). See also *H. & H. Supply Co. v. United States*, 194 F.2d 553 (10th Cir. 1952); *Bridgeport Hydraulic Co. v. Town of Stratford*, 139 Conn. 388, 94 A.2d 1 (1953); 5 Vand. L. Rev. 432 (1952); *Wahlgren v. Loup River Public Power Dist.*, 139 Neb. 489, 297 N.W. 833 (1941).

¹² *State v. Wright*, 105 Neb. 617, 181 N.W. 539 (1921).

as a means of establishing the value of the real property under consideration.

The majority of jurisdictions follow the so-called "Massachusetts rule" which allows the introduction of this type of evidence on direct examination.¹³ The minority of jurisdictions adhere to the "Pennsylvania rule" and exclude such evidence on direct examination.¹⁴ Prior to the year 1943, Nebraska followed the "Pennsylvania rule" and refused to admit evidence of the sales of comparable properties on direct examination.¹⁵ However, in 1943, the Nebraska Supreme Court joined the majority of jurisdictions by adopting the "Massachusetts rule."¹⁶

Now, the lawyer may introduce evidence of particular sales of other land as independent proof of value where a foundation is laid which indicates that the prices paid represented the market value of such land, that the sales were made at or about the time of the taking by condemnation and that the land sold was substantially similar in location and quality to that condemned.¹⁷

Inasmuch as no two pieces of property are identical, no positive rule can be laid down to fix definitely the degree of similarity, the nearness of time of the sales and the distance of the property sold to justify the admission of proof of such sales. Whether the properties are sufficiently similar to have some bearing on the market value of the land under consideration must necessarily rest in the sound discretion of the trial court.

It should be noted, however, that evidence of prices paid by a condemner for other land similar in location and quality and paid at or about the time of taking by condemnation is inadmis-

¹³ *Patch v. Boston*, 146 Mass. 52, 14 N.E. 770 (1888). See Annot. 118 A.L.R. 870 (1939), 174 A.L.R. 386 (1948); 36 Cornell L. Q. 137 (1950).

¹⁴ *East Pennsylvania R.R. v. Heister*, 40 Pa. 53 (1861).

¹⁵ *Chicago R.I. & P.R. Co. v. Griffith*, 44 Neb. 690, 62 N.W. 868 (1895) (dictum); *Union P.R. Co. v. Stanwood*, 71 Neb. 150, 91 N.W. 191 (1902) (dictum), Rehearing 71 Neb. 158, 98 N.W. 656 (1904); *State v. Wright*, 105 Neb. 617, 181 N.W. 539 (1921); *Rushart v. Department of Roads and Irrig.*, 142 Neb. 301, 5 N.W.2d 884 (1942); *Swanson v. Board of Equalization*, 142 Neb. 506, 6 N.W.2d 777 (1942).

¹⁶ *Langdon v. Loup River Public Power District*, 142 Neb. 859, 8 N.W.2d 201 (1943), Rev. on App. 144 Neb. 325, 13 N.W.2d 168 (1944).

¹⁷ *City of Lincoln v. Marshall*, 161 Neb. 680, 74 N.W.2d 470 (1956); *Lynn v. City of Omaha*, 153 Neb. 193, 43 N.W.2d 527 (1950); *Papke v. City of Omaha*, 152 Neb. 491, 41 N.W.2d 751 (1950).

sible.¹⁸ The courts base their exclusion of this evidence on the ground that a sale to a condemner is, in effect, a forced sale and does not furnish a criterion for market value.

In fairness to all parties concerned, it would seem that the lawyers should disclose, at the pre-trial conference, the sales of comparable property which they intend to introduce on direct examination in order that an investigation might be made concerning the facts underlying the sales. Further, it would appear that the trial judge should place a reasonable limitation on the number of comparable sales to be introduced and thereby prevent too many collateral issues which would confuse the jury and unduly prolong the trial.

VI. ADAPTABLE USES

In determining the fair market value of the land under condemnation, the great majority of jurisdictions adhere to the view that the value should be considered in view of any reasonable use to which the land may be applied and all the reasonable uses to which it is adapted. The minority of jurisdictions determine the value in view of the "value for the best use."¹⁹ Nebraska follows the majority rule and if the property, by reason of its surroundings or otherwise is physically adaptable to some particular use, present or potential, all of the circumstances making up this adaptability may be brought out by the lawyer in the presentation of his case.²⁰

Although the fact of this particular adaptability of the property may be brought out, the expert is not allowed to give his opinion concerning the value of the property for a specific purpose but must state its market value in view of any purpose to which it is presently or potentially adapted.²¹

The catch-phrase "highest and best use" has crept into the jargon of the appraiser, but it would be well to advise your appraiser not to use the phrase in his testimony because it will

¹⁸ *Lynn v. City of Omaha*, 153 Neb. 193, 43 N.W.2d 527 (1950); *Papke v. City of Omaha*, 152 Neb. 491, 41 N.W.2d 751 (1950); *State v. Wright*, 105 Neb. 617, 181 N.W. 539 (1921).

¹⁹ 1 Orgel, *Valuation under Eminent Domain*, 30 (2d ed. 1953).

²⁰ *Langdon v. Loup River Public Power District*, 144 Neb. 325, 13 N.W.2d 168 (1944); *Medelman v. Stanton-Pilger Drainage District*, 155 Neb. 518, 52 N.W.2d 328 (1952).

²¹ *Lynn v. City of Omaha*, 153 Neb. 198, 43 N.W.2d 527 (1950); *Alloway v. Nashville*, 88 Tenn. 510, 13 S.W.2d 123 (1890).

only lead to trouble. The Nebraska Supreme Court in *Langdon v. Loup River Public Power District*,²² held that it was error for the trial court to instruct the jury to determine the value of the damage to the property in the light of "its highest and best purposes."

The next question confronting the lawyer is: What uses will the trial court consider as falling within the sphere of "all reasonable uses to which the land is adapted"?

In the case of *Olson v. United States*,²³ Mr. Justice Butler answered the question in the following language:

Elements affecting value that depend on events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.

In *United States v. Foster*,²⁴ Judge Gardner stated:

To warrant the admission of testimony as to value for purposes other than that for which it is actually used, however, regard must be had for the existing conditions and wants of the community, or such as may reasonably be expected in the immediate future. The uses considered in fixing value must be so reasonably probable as to have an effect upon the present market value of the land and a speculative value cannot be considered.

Therefore, if the lawyer intends to present testimony by the appraiser of the adaptability of the land for purposes other than that for which it is actually used, he must be prepared to show:

- (1) That the land is adaptable to the other use.
- (2) That the "wants of the community" would make the other use reasonably probable within the immediate future.
- (3) That the present market value of the land has been thereby enhanced.

Because the physical adaptability of the land alone cannot be deemed to affect market value, it is incumbent upon the lawyer clearly to demonstrate, through the testimony of the appraiser, that there is a demand in the market for this particular

²² 144 Neb. 325, 331, 13 N.W.2d 168, 172 (1944).

²³ 292 U.S. 246, 257; 54 S. Ct. 704, 709; 78 L. Ed. 1236, 1245 (1933).

²⁴ *United States v. Foster*, 131 F.2d 3, 5 (8th Cir. 1942). See also, *United States v. 711.57 Acres of Land*, 51 Fed. Supp. 30 (1943).

use and that because of this demand, the value of the land has been presently enhanced. The presentation of this proof is one of the most difficult barriers that the lawyer for the landowner has to hurdle in the trial of a condemnation case.

A situation might arise where it is claimed that the land has several adaptable uses. It is not necessary that an appraiser be familiar with, have knowledge of, and take into consideration every possible use.²⁵ What uses the appraiser considered in reaching his opinion can be brought out during cross-examination, and it is then up to the jury to weigh the testimony and determine which of the views they believe.

VII. ELEMENTS OF DAMAGE

In partial taking cases we have seen that in following the formula for damages the jury must add to the value of the tract taken the difference between the fair market value of the remainder of the land before and after taking.

In determining the diminution in value of the remainder it has been held that the jury may take into account every element of annoyance and disadvantage resulting from the taking which would influence an intending purchaser's estimate of the market value.²⁶ However, the elements cannot be considered as independent items of damage, but only to the extent that, taken as a whole, they detract from the market value of the property.²⁷

Some confusion occurs where the landowner suffers so-called "incidental" damages as a direct result of a taking by the condemner. Although the landowner suffers damage, the courts will not allow proof of the damage unless it affects the market value of the land. This is true even in a state, like Nebraska, which has the "taken or damaged" clause in its constitution.²⁸ Removal expenses, loss due to temporary interruption of business and loss

²⁵ *Mendelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952).

²⁶ *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952); *Luchsinger v. Loup River Public Power Dist.*, 140 Neb. 179, 299 N.W. 549 (1941); *Asche v. Loup River Public Power Dist.*, 136 Neb. 601, 287 N.W. 64 (1939); 18 Am. Jur., *Eminent Domain*, 282 (1938).

²⁷ *Crawford v. Central Neb. Public Power and Irrigation Dist.*, 154 Neb. 832, 49 N.W.2d 682 (1951).

²⁸ *Mohler v. Board of Regents of University of Nebraska*, 102 Neb. 12, 165 N.W. 954 (1917); 1 Orgel, *Valuation under Eminent Domain*, 66 et seq. (2d ed. 1953).

of good will are typical examples of uncompensated "incidental" damages.

Although our constitution does not require payment of compensation to the landowner who suffers "incidental" damages which do not affect the market value of his land, some states have passed special legislation extending compensation to these "incidental" damages. Such legislation has been upheld upon the ground that, "It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law."²⁹

VIII. CONCLUSION

In this short article, an effort has been made to forewarn the lawyer of the presence of several common pitfalls which await him unless he and the appraiser witness are adequately prepared to deliver a well coordinated presentation of the facts affecting the value of the property. In the words of Francis X Busch:

With anything short of that kind of preparation you may find your parachute dropping and the pull cord out of order.³⁰

²⁹ *Earl v. Commonwealth*, 180 Mass. 579, 63 N.E. 10 (1902).

³⁰ Francis X. Busch, "Selection of an Expert Witness", 15 *Alabama Lawyer* 37, 46 (1954).



Diamond Interchange at Gretna Is Door to Interstate Driving