NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 104

RULES OF COMPENSABILITY AND VALUATION EVIDENCE FOR HIGHWAY LAND ACQUISITION

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

Officers
D. GRANT MICKLE, Chairman
CHARLES E. SHUMATE, First Vice Chairman
ALAN M. VOORHEES, Second Vice Chairman
W. N. CAREY, JR., Executive Director

Executive Committee
F. C. TURNER, Federal Highway Administrator, U. S. Department of Transportation (ex officio)
A. E. JOHNSON, Executive Director, American Association of State Highway Officials (ex officio)
ERNST WEBER, Chairman, Division of Engineering, National Research Council (ex officio)
DAVID H. STEVENS, Chairman, Maine State Highway Commission (ex officio, Past Chairman, 1968)
OSCAR T. MARZKE, Vice President, Fundamental Research, U. S. Steel Corporation (ex officio, Past Chairman, 1969)
DONALD S. BERRY, Department of Civil Engineering, Northwestern University
CHARLES A. BLESSING, Director, Detroit City Planning Commission
JAY W. BROWN, Director of Road Operations, Florida Department of Transportation
J. DOUGLAS CARROLL, JR., Executive Director, Tri-State Transportation Commission, New York
HOWARD A. COLEMAN, Consultant, Missouri Portland Cement Company
HARMER E. DAVIS, Director, Institute of Transportation and Traffic Engineering, University of California
WILLIAM L. GARRISON, School of Engineering, University of Pittsburgh
SIDNEY GOLDIN, Consultant, Witco Chemical Company
WILLIAM J. HEDLEY, Consultant, Program and Policy, Federal Highway Administration
GEORGE E. HOLBROOK, E. I. du Pont de Nemours and Company
EUGENE M. JOHNSON, President, The Asphalt Institute
JOHN A. LEGARRA, State Highway Engineer and Chief of Division, California Division of Highways
WILLIAM A. McCONNELL, Director, Operations Office, Engineering Staff, Ford Motor Company
J. B. McMorran, Consultant
D. GRANT MICKLE, President, Highway Users Federation for Safety and Mobility
R. L. PEYTON, Assistant State Highway Director, State Highway Commission of Kansas
CHARLES E. SHUMATE, Executive Director-Chief Engineer, Colorado Department of Highways
R. G. STAPP, Superintendent, Wyoming State Highway Commission
ALAN M. VOORHEES, Alan M. Voorhees and Associates

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Advisory Committee
D. GRANT MICKLE, Highway Users Federation for Safety and Mobility (Chairman)
CHARLES E. SHUMATE, Colorado Department of Highways
ALAN M. VOORHEES, Alan M. Voorhees and Associates
F. C. TURNER, U. S. Department of Transportation
A. E. JOHNSON, American Association of State Highway Officials
ERNST WEBER, National Research Council
DAVID H. STEVENS, Maine State Highway Commission
OSCAR T. MARZKE, United States Steel Corporation
W. N. CAREY, JR., Highway Research Board

General Field of Administration
Area of Law
Advisory Panel A111-1

K. W. HENDERSON, JR., Program Director
W. C. GRAEUB, Projects Engineer
J. R. NOVAK, Projects Engineer
H. A. SMITH, Projects Engineer
W. L. WILLIAMS, Projects Engineer

HERBERT P. ORLAND, Editor
ROSEMARY S. MAPES, Editor
CATHERINE B. CARLSTON, Editorial Assistant
L. M. MACGREGOR, Administrative Engineer
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 of 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 authorities on 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 objectivity, 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 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
L C Card No 76-607813

Price: $4.40

This report is one of a series of reports issued from a continuing research program conducted under a three-way agreement entered into in June 1962 by and among the National Academy of Sciences-National Research Council, the American Association of State Highway Officials, and the Federal Highway Administration. Individual fiscal agreements are executed annually by the Academy-Research Council, the Federal Highway Administration, and participating state highway departments, members of the American Association of State Highway Officials.

This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract. It has been accepted by the Highway Research Board and published in the interest of effective dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area.

The opinions and conclusions expressed or implied in these reports are those of the research agencies that performed the research. They are not necessarily those of the Highway Research Board, the National Academy of Sciences, the Federal Highway Administration, the American Association of State Highway Officials, nor of the individual states participating in the Program.

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)
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 divergent 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

1 SUMMARY

PART I

4 CHAPTER ONE Introduction and Research Approach

5 CHAPTER TWO Qualifications of Witnesses Giving Opinion Evidence
   Opinions of Real Estate Salesmen or Appraisers
   Opinions of Owners
   Opinions of Other Persons Claiming Special Knowledge of Value of the Subject Property
   Opinions of Valuation Commissioners
   Effect of Witness' Testimony on His Qualification
   Expert Witness' Opinion Testimony Based on Hearsay
   Summary and Conclusions

16 CHAPTER THREE Jury View of the Property Being Taken
   Right to Jury View
   Procedure for Conduct of Jury View
   Effect of Jury View
   Summary and Conclusions

22 CHAPTER FOUR Admissibility of Evidence of Sales of Similar Properties
   Rules of Admissibility
   Degree of Similarity
   Proximity in Time
   Transactions with Condemnors
   Summary and Conclusions

31 CHAPTER FIVE Admissibility of Evidence of Sales of the Subject Property
   Admissibility
   Summary and Conclusions

34 CHAPTER SIX Admissibility of Evidence of Offers to Buy and Sell
   Offers to Buy or Sell the Subject Property
   Offers to Buy or Sell Similar Properties
   Summary and Conclusions

37 CHAPTER SEVEN Admissibility of Evidence of Valuations Made for Noncondemnation Purposes
   Assessed Valuation for Taxation
   Other Valuations
   Summary and Conclusions

41 CHAPTER EIGHT Admissibility of Evidence of Income
   Evidence of Income as Proof of Market Value
   Evidence of Income as Illustration of Suitability for Use
   Evidence of Loss of Income as an Item of Consequential Damage
   Summary and Conclusions

45 CHAPTER NINE Admissibility of Evidence of Cost of Reproduction
   Original Cost of Improvements
   Cost of Reproduction
   Summary and Conclusions

48 CHAPTER TEN Admissibility of Evidence of Effect of the Proposed Improvement on Value of Property Taken
   Rationale
   Fitting the Sample Highway Condemnation Cases into the Rationale
   Summary and Conclusions
CHAPTER ELEVEN  Admissibility of Evidence of Reputation or Sentimental Value
Inadmissible Evidence of Reputation and Sentimental Value
Commentary
Summary and Conclusions

CHAPTER TWELVE  Admissibility of Evidence of Highest and Best Use for Property
Higher Value of Property for Some Other Use
Intended Use of Property by Owner
Adaptability of Property to Use Currently Prohibited by Zoning
Suitability of Property for Subdivision Development
Summary and Conclusions

CHAPTER THIRTEEN  Admissibility of Photographs or Other Visual Aids
Photographs
Other Visual Aids
Summary and Conclusions

CHAPTER FOURTEEN  Other Issues Relating to Admissibility of Evidence
Federal Government Contribution Toward Cost of Project
Revenue Stamps on Deeds
Mortgages on the Subject Property
Building Code Violations
Preliminary Condemnation Awards and Deposits
Appraisals not Introduced in Evidence
Right-of-Way Agent's Statements as to Value
Business Records and Other Documents
Cost to Cure
Proposed Use of the Property Taken
Miscellaneous Evidential Issues
Summary and Conclusions

PART II

APPENDIX  Statutory Provisions Relating to Evidence in Eminent Domain Proceedings

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.
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

---

studied. 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 and in Pennsylvania, 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 evidence in eminent domain proceedings are considered. The pertinent statutes are collected in the appendix of this report.

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 achieved 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 possessed 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.

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 affected 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 non-compensable 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." 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."
landowners unsuccessfully challenged the competency of the condemnors' witnesses to testify, on the ground that they were biased. 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.

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. 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. Jurors are the judge of a witness' credibility and determine the weight to be given his testimony. 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.

A case in Maryland 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. 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. The question of whether a witness is qualified to give expert testimony is largely within the discretion of the trial judge. 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.

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. According to the court, it was properly 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. 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. Therefore, according to the court, everything that the witness did here was well within his area of expertise.

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. 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. Other Maryland cases have held that witnesses giving opinion testimony must qualify as experts in land appraisal. 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.

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
in the area to making many appraisals, had made purchases of residential property in question. On the other hand, the condemnor's witness, in addition to the witnesses had appraised a substantial number of properties in Needham, Newton Girl Scout Council v Massachusetts Turnpike Authority, 335 Mass 189, 138 N E 2d 769 (1956)

Assistance of a reasonably qualified appraiser in establishing the value of a site zoned for business and industrial purposes, expenence with properties having similar characteristics is 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. 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 of the same size, would be at least as significant as experience with local values. The value of a site located for industrial or business use will manifestly be related substantially to such factors as its location on a highway near 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.)

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. 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. 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 value of this property, and the damage to it, for an important use of the property. 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." 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.

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. Finding that the landowner's witness was not qualified to express an opinion, the verdict was held not to be supported by substantial evidence. 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.
rather than residential property, the best use for the type of property in question here. 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. 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. Because a witness need not be an expert to express opinion testimony in Alabama, 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, lessee, or an officer of the corporate owner 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. In fact, in most of the recent cases the owners were found, under the circumstances of the case, to be competent to testify.

An Alabama case held that an owner solely by virtue of his ownership may testify as to the value of his property.

Cases in other jurisdictions have also held that the owner of an interest in property is competent to testify regarding its market value without further qualification than the fact of ownership. Likewise, under California’s statute and apparently without further qualification than the proof of ownership, an owner may express an opinion as to the value of his property. The reason for permitting an owner to testify solely by virtue of his ownership has been said to be that he is presumed to know the market value of his interest in the land.

The application and reasoning behind this rule is illustrated in a Delaware case, where the competency of a lessee, who was permitted to testify as to the value of his condemned leasehold solely on the basis of his ownership, was challenged by the condemnor on the grounds that he possessed neither the special knowledge nor the qualifications to express an opinion. According to the court, an owner of a leasehold interest, particularly in those situations where he conducts a business on the leased property, ordinarily should be permitted to express an opinion regarding the value of his leasehold. As a justification for permitting him to testify, the court noted that lessees in business are generally cognizant of the fair market value of their leaseholds and know when they are worth more or less than the rental recited in the leases. The lessee derives such an awareness from being in constant touch with existing conditions in the area relating to businesses similar to and competing with his own. Since his relationship to his leasehold in the operation of his business may be regarded as creating in and of itself a special knowledge regarding its value, it would be unusual for a lessee-operator of a business to be unaware of the value of his leasehold.

Consequently, the trial court was held to have properly permitted the lessee to give opinion testimony relating to the value of the leasehold, and the verdict could be based solely on his testimony. The special knowledge and familiarity with the leasehold that the condemnor claimed the witness did not possess was therefore acquired by virtue of his ownership, according to the court. However, the court did recognize that situations may arise where a lessee, either as a bare owner or owner-operator, is so unfamiliar with the issue of value that the trial judge at his discretion may determine that the witness is incompetent to testify. Such would not be the situation in this case, because the lessee did more than to testify that he was the owner and to then give his opinion of the lease’s market value. The lessee showed he was thoroughly familiar with the business and testified as to the gross receipts, expenses, and improvements made, and other factors and reasons tending to show

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.

45 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959)

46 Id.


51 Id. at 593-94.

52 Id.

53 Id.


55 Id.

56 269 Ala. 111, 124, 110 So. 2d 896, 908 (1959).


59 Id. at 593

60 Id.

61 Id. at 593-94

62 Id. at 594

63 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 property66 or an officer of a corporation owning the property67 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

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 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.
64 Id. at 63, 249 P.2d at 589.
65 Id.
66 Id.
69 Id.
70 Id. at 271, 329 S.W.2d at 176.
72 Id.
73 Id.
74 Id. at 669-70, 162 N.E.2d at 274-75.
76 Id. at 669-70, 162 N.E.2d at 274-75.
77 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.
78 Id. at 669-70, 162 N.E.2d at 274-75. 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.
79 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.
80 Id. at 198, 138 N.E.2d at 775-76.
81 Id. at 198-99, 138 N.E.2d at 775-76.
82 Porter v. Columbia County, 75 So. 2d 699, 700 (Fla. 1954).
83 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. 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. By California statute any witness qualified to express an opinion relative to the value of property may do so, but 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. Laymen so qualified may be allowed in Arizona, at the trial court’s discretion, to offer their opinions as experts. 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 and are more able to form an opinion on the subject at issue than citizens in general. 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; it will not be disturbed on appeal except for an abuse of such discretion, and the weight to be given such testimony is for the jury. 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.

Following these rules, the trial court in one case 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. The witness had lived and done accounting work in the area and made some appraisals but was not an expert appraiser; 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. In the other Arizona case, the trial court 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. 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.

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. 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. 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.’ 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.

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.

The witness’ sole qualifications to testify as to his opinion of value of the subject property because he had lived in the vicinity of the condemned property for about 20 years and had done accounting work for about 30 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.

People v. Frahn, 114 Cal. App. 2d 61, 62–63, 249 P.2d 588, 589 (1952)
Id. at 63, 249 P.2d at 589
CAL. EVID. CODE § 813(a)(1) (West 1966)
Id. at 11–12, 352 P.2d at 350
State v. McDonald, 88 Ariz. 11, 11, 352 P.2d 343, 350 (1960). The condemning court held not to have abused its discretion in admitting the witness' opinion testimony because he had lived and done accounting work in the area and had made some appraisals but was not an expert appraiser; 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. The other Arizona case, the trial court 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. 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.

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. 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. 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.' 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.

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.

The witness’ sole qualifications to testify as to his opinion of value of the subject property because he had lived in the vicinity of the condemned property for about 20 years and had done accounting work for about 30 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.

Id. at 255–56, 113 N.E.2d at 322–25
Id. at 264, 113 N.E.2d at 325
Id. at 265, 113 N.E.2d at 325
consisted 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. 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. 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.

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." 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.

Several cases involved issues of whether and under what conditions a nonexpert, such as a farmer living in the neighborhood of the subject property, or the husband of the landowner, 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. 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. 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.

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. 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.

The weight to be given the testimony of any one of the witnesses expressing opinion evidence is for the jury, depending upon the witness' candor, intelligence, experience, and knowledge of values. In one case, the trial court was held not to have abused its discretion in admitting the condemning party'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. The appellate court in another Arkansas case agreed with the landowner's contention that the trial court erred 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 immediate vicinity.

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

---

109 Id. at 44-45, 119 N.E.2d at 764.
110 Id. at 46-47, 119 N.E.2d at 765-66.
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. 543, 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, 1356-57 105 N.W.2d 660 (1960).
115 Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960).
value of the condemned property.\textsuperscript{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.\textsuperscript{128} Those judicial decisions regarding the qualifications of value witnesses are supported by an Alabama statute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{134} and one in Nebraska\textsuperscript{135} provide illustrations of the problem.

The Nebraska case, which was an appeal of the original proceeding,\textsuperscript{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 incompetent in the district court. According to the supreme court, an appraiser in a condemnation proceeding may testify as to the amount of damages as permitted by the trial court. The right of cross-examination where there is evidence on the question of value, however, the award of the commissioners is inviolate.\textsuperscript{137} If the legislature had intended to abrogate that right of cross-examination, it would have expressly done so.\textsuperscript{138}

**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,\textsuperscript{139} on elements of damages not recoverable under the law,\textsuperscript{140} and on comparable sales where their familiarity was shown to be inadequate.\textsuperscript{141} The court's discretion was held not to have been abused in permitting two witnesses to testify in the New Hampshire case,\textsuperscript{142} even though the opinion of one witness was based in part on noncompensable items of damages\textsuperscript{143} and the other's on the wrong method of valuation.\textsuperscript{144} According to the appellate court, the basis of the

\textsuperscript{127}State v Johnson, 268 Ala 11, 13, 104 So 2d 915, 917 (1958).
\textsuperscript{128}Blount County v Campbell, 268 Ala 548, 554, 109 So 2d 678, 683 (1959).
\textsuperscript{129}State v Moore, 269 Ala 20, 24, 110 So 2d 635, 638 (1959).
\textsuperscript{130}Shelby County v Baker, 269 Ala 111, 124, 110 So 2d 896, 908 (1959).
\textsuperscript{131}State v Moore, 269 Ala 20, 24, 110 So 2d 635, 638 (1959).
\textsuperscript{132}Shelby County v Baker, 269 Ala 111, 124, 110 So 2d 896, 908 (1959).
\textsuperscript{133}See Ala Code tit 7, § 367 (1940) (Recomp 1958), in the Appendix of this report.
\textsuperscript{134}County v Baker, 269 Ala 11, 124, 110 So 2d 896, 908 (1959).
\textsuperscript{135}Id at 40, 91 N W 2d at 66.
\textsuperscript{136}MINN STAT ANN § 117 20(8)(c) (1964), in the Appendix of this report.
\textsuperscript{137}State, by Lord v Pearson, 260 Minn 477, 482, 484, 110 N W 2d 206, 210-212 (1961).
\textsuperscript{139}Turner v State Roads Comm'n, 213 Md 428, 431, 132 A 2d 455, 456 (1957).
\textsuperscript{140}Edgcomb Steel of New England v State, 100 NH 480, 131 A 2d 70, 79-80 (1957).
\textsuperscript{141}Id at 492, 131 A 2d at 79-80.
\textsuperscript{142}Id at 492, 131 A 2d at 79-80.
\textsuperscript{143}Edgcomb Steel of New England v State, 100 NH 480, 131 A 2d 70, 79-80 (1957).
\textsuperscript{144}Id at 492, 131 A 2d at 79-80.
witnesses’ opinions was properly ruled to be those matters affecting the weight of the testimony rather than its admissibility. An examination of the first witness indicated he was sufficiently qualified by study and experience to testify as to the value of industrial property, 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.

In *Turner v. State Roads Commission*, 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. 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. 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. 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 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.

A Massachusetts case held that the testimony of the condemning officer’s expert witness was admissible even though his opinion of value before and after the taking was based on unproved facts. 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. 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. 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.

**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 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. 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 finding...
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.¹⁰⁷

The extent to which the witness' opinion of value may be based on hearsay was an issue in two Massachusetts cases.¹⁰⁸ In one case,¹⁰⁹ 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.¹¹⁰ 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, in turn 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.¹¹¹

Testimony based on hearsay knowledge was held to be inadmissible in the other Massachusetts case.¹¹² 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.¹¹³

Hearsay was an issue in a Wyoming case involving the taking of about 158 acres of ranch land for a highway right-of-way.¹¹⁴ 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 $15,000.¹¹⁵ 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.¹¹⁶ While holding that the trial court erroneously admitted the condemnor's witnesses' testimony and that there was no evidence to support the verdict,¹¹⁷ the appellate court did recognize that reviewing courts, lacking the advantage of observation at the trial, are reluctant to reverse the trial court.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹ The weight and credibility to be attributed to witness' opinion testimony is a question for determination by the jury.¹²²

¹⁰⁷ Id at 356, 342 P 2d at 727
¹⁰⁸ Id at 357–359, 342 P 2d at 728–729
¹⁰⁹ Id
¹¹⁰ Id at 355, 342 P 2d at 727
¹¹² Id
¹¹⁴ Barber v State Highway Comm'n, 80 Wyo 340, 342 P 2d 723 (1959)
and is dependent on the witness' candor, intelligence, experience, and knowledge of values. 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. 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. 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. Under the rules established in Maryland and Massachusetts, 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; 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. Some inconsistencies also appear with regard to attitudes toward the hearsay rule and the effect of a witness' using his mere ownership before he may express an opinion as to the value of the condemned property and he testifies in substance that he has done so. 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. 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. Under the rules established in Maryland and Massachusetts, 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; 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. 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 misapprehension of the nature of his objective and who is unfamiliar with the fundamentals 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 Va. 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.

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 in this respect. 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. 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. 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 property.
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. 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.

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. 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 or to eminent domain proceedings in particular.

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. 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.

Even though the judicial power to order a jury view exists independent of any statutory provision, many of
the jurisdictions have adopted various legislation 209 either authorizing 203 or requiring 204 such a jury view. One of the probable reasons for the promulgation of such legislative recognition of jury views is that a view of the premises taken or damaged in an eminent domain proceeding is important, if not essential in some instances, to the assessing tribunal's intelligent understanding of the issues involved in the case.205 Basically, the statutes governing the right to a jury view may be broadly classified as those making a view mandatory under certain conditions, particularly if so requested by either party, 206 and those leaving a view to the trial court's discretion.207 Whether the parties have a right to a jury view of the premises or whether this is discretionary with the trial court is, therefore, settled by statute in many jurisdictions.

Under the statutes of at least one state,208 views of the premises are mandatory regardless of a request. The mandatory right to a view under one of Virginia's applicable statutes 209 was upheld, even though the view had taken place after the buildings were removed from the premises.210 Statutory provisions in some other states change the common-law rule by making a view a matter of right at the request of either party, 211 in Florida 212 and Mississippi 213 the same mandatory provision exists, except that a view may be ordered at the discretion of the trial court if neither party requests one. Maryland's statute provides that the court shall direct the jury to view the premises unless a written waiver is filed by all the parties, and even under those circumstances a view is discretionary with the court.214 Most of the statutes applicable to jury views in eminent domain proceedings are discretionary in nature; 215 therefore, they may be considered merely declaratory of the common law.216 Views under some of those statutes are not considered to be a matter of right, but they may be ordered when deemed proper at the trial court's discretion 217 This would probably be the rule either in the absence of a statute 218 or in the absence of a statute making a view mandatory.219 Whether a view of the premises will or will not be permitted after one has been requested by a party under the other nonmandatory statutory provisions.220 Here, a request for a view is a prerequisite to the trial court's exercise of its discretion. In fact, a request for a view by either party is an important element in some statutes, regardless of whether the view is mandatory or discretionary under the particular statutory provision.221 An analysis of these statutory provisions indicates a lack of uniformity among the various jurisdictions relative to the rights to a jury view.

All of the problems involving the right to a jury view in the recent highway condemnation cases were found to have arisen in those jurisdictions where the view was largely a matter of judicial discretion. Appeals generally arose when there had been some changes in the premises between the dates of taking and viewing; jury views being discretionary with the trial court, the issue on appeal was whether the trial court had abused its discretion by granting or refusing to grant such a view under the particular circumstances of the case. Some of these discretionary refusals to view were upheld in a few of the recent highway condemnation cases,222 in other cases the trial judges were held not to have abused their discretion under the particular circumstances in permitting jury views of the views.223 The basis for the appellate court's affirmation of the trial judge's decision in each case was that views are not a matter of right 224 under the statutes, but are discretionary with the

204 4 Wigmore, supra note 199, § 1163
205 Id. See also 5 Nichols, supra note 199, §§ 18 3(a), (b).
207 5 Nichols, supra note 199, § 18 3(a), 4 Wigmore, supra note 199, § 1164
209 5 Nichols, supra note 199, § 18 3(a), 4 Wigmore, supra note 199, § 1164
211 5 Nichols, supra note 199, § 18 3(a)
212 5 Nichols, supra note 199, § 18 3(a)
213 5 Nichols, supra note 199, § 18 3(a)
214 5 Nichols, supra note 199, § 18 3(a)
215 5 Nichols, supra note 199, § 18 3(a)
216 5 Nichols, supra note 199, § 18 3(a)
217 5 Nichols, supra note 199, § 18 3(a)
218 5 Nichols, supra note 199, § 18 3(a)
219 5 Nichols, supra note 199, § 18 3(a)
220 5 Nichols, supra note 199, § 18 3(a)
221 5 Nichols, supra note 199, § 18 3(a)
222 5 Nichols, supra note 199, § 18 3(a)
223 5 Nichols, supra note 199, § 18 3(a)
224 5 Nichols, supra note 199, § 18 3(a)
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.225

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 case227 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 case230 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,223 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.224 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.230

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 benefited, 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 statute243 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.

---

226 Ibid. at 15-16, 303 P.2d at 61-62.
227 People ex rel Dep't of Public Works v Logan, 198 Cal App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961).
228 Ibid. at 64-65. 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.
229 People ex rel Dep't of Public Works v Logan 198 Cal App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961)
230 Ajoouan v Director of Public Works, 90 R.I. 96, 101, 155 A.2d 244, 246 (1959) (dictum). See also 5 Nichols, supra note 199, § 1853.3
231 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, § 1853.3
232 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.
233 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.
234 Id. Here the appellate court emphasized the importance of permitting the jury to view the premises only in the case of the property in question. 80 Wyo. 340, 352-53, 342 P.2d 723, 726 (1959). Here the landowner alleged that the property was not in the same condition as at the time of the first trial.
235 People ex rel Dep't of Public Works v Logan 198 Cal App. 2d 581, 590, 17 Cal. Rptr. 674, 679 (1961).
236 Id. at 352-53, 342 P.2d at 726
237 Id. at 353, 342 P.2d at 726
238 Id. at 353, 342 P.2d at 726
239 Townsend v. State, 257 Wis. 329, 334, 43 N.W.2d 458, 460 (1950)
240 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.
241 Ajoouan v Director of Public Works, 90 R.I. 96, 103, 155 A.2d 244, 247 (1959)
242 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.
243 Id. Here the trial judge should have required sufficient information to be presented in 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 condemnation 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.
244 Id at 102, 155 A.2d at 247
Commentary

An analysis of these recent highway condemnation cases reveals that several factors were taken into consideration by the trial judges in exercising their discretion to grant or refuse to grant a view. These factors appear in many instances to be dependent on each other. One such factor is the degree of importance of the information to be gained by the view in relation to the inconvenience and time expended in taking a view.248 Presenting facts to a tribunal through a view is often inconvenient, time consuming, and disruptive to the pace and movement of the trial. On occasion, particularly when the nature of the issue or the premises to be viewed render the view inconsequential, the disadvantages of prolonging the trial could outweigh any advantage of a view.249 A factor closely related to the degree of importance of a view is whether the customary purpose for ordinarily allowing a view does exist in the particular case.250 Also associated with the necessity of a view is the amount of information that has been or could be adequately secured from maps, photographs, diagrams, and so forth.251 If information can be gotten from maps and photographs the necessity for a view decreases, particularly if changes have occurred in the condition of the property between the dates of valuation and trial.

Another factor influencing the trial judges' discretion is the extent to which the premises have changed in appearance or condition since the controversy arose.252 As the present condition of a parcel of land is not always a good index of its prior condition at the time in issue, the rule seems to be that a view may be properly refused where there has been such a change in the property's condition that a visit to the premises in its present condition would probably be misleading to the jury or harmful to one of the parties.253

PROCEDURE FOR CONDUCT OF JURY VIEW

One of the issues relating to the conduct of a view involved the procedures for requesting such a view. In light of the fact that so many statutes require a request for a view by one of the parties before the trial judge may exercise his discretion, or before a view may be ordered in those mandatory situations, the issues involved in the procedure for requesting such a view can become important.264 Recent Georgia cases seemed to indicate that it was an improper practice for a counsel to make a motion requesting a view of the subject property in the presence of the jury.255 However, the practice was held not to be prejudicial or harmful, in one of the cases due to the absence of a timely objection to the procedure during the trial,256 and in the other case because the jury was promptly excluded so that it was not present when either the objection to the motion or a motion for a mistrial was made by the appellant.257 Consequently, it appears that before a request for a view made in the presence of the jury constitutes a reversible error, the trial judge would have to refuse the opposing counsel's immediate request to retire the jury and thereby force such counsel to make his objection to the request for the view in the presence of the jury.258

A variety of provisions are generally found in the statutes aimed at safeguarding the jury from outside influences during the view. Among these is the popular provision requiring that the jury be conducted to the premises in a body.259 While conducting the view, jurors in many jurisdictions are in the custody or under supervision of the bailiff,260 the sheriff,261 or an officer.262 Some of these same statutes also provide that the premises will be shown to the jurors by some person appointed by the court for that purpose.263 Under Minnesota's statute the premises will be shown by the trial judge or some other person appointed for that purpose by the court.264 These "showers" appointed by the court to point out to the jurors those features of the scene that have been referred to in the testimony may do so without violating the hearsay rule. Only the Maryland and Virginia266 statutes specifically provide that either party or their representative may accompany the jurors on a visit to the premises. Maryland's statute permits only one representative of all the defendants and one of all the plaintiffs to accompany the jury. Such a representative is the only person permitted to make a statement. He shall point out the property sought to be condemned, its boundaries, and any adjacent parcels that are affected by the taking. Virginia also prohibits other persons from accompanying the jurors. Several statutory provisions prohibit persons other than those appointed by the court as "showers" of the property to speak to any of the jurors on any subject connected with the trial during the inspection.267 Under Delaware's statute,268 testimony may not be taken at the view, except for designation and identification of the property.

248 See, e.g., Arkansas State Highway Comm'n v. Carder, 228 Ark. 11-12, 305 S.W.2d 330, 332-33 (1957), where not even the Jury could see the advantage of a view.
249 See 4 WIGMORE § 1164.
253 See 4 WIGMORE § 1164.
254 See id.
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 Maryland272 and Virginia273 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" See, e g, Mo R P, R U1R, § 6, R I GEN LAWS ANN § 9-16-1 (1966); VA. CODE ANN § 33-64 (Supp. 1966) See also MINN STAT ANN § 546 12 (1947)
270 R I GEN LAWS ANN § 9-16-1 (1956)
271 Mo R P, R U1R, § 6
272 VA. CODE ANN § 33-64 (Supp 1966)
273 State Highway Dept v Peavy, 77 Ga App 308, 313, 48 S E 2d 478, 482 (1948)
274 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 Dept' v Peavy, 77 Ga App 308, 48 S E 2d 478 (1948)
275 State Highway Dept' 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
276 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
277 Id The appellant has the burden not only to show error, but to show probable injury, which could not be done in this case
278 Wallace v. Phoenix 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
279 Id
280 State v Carter, 267 Ala 347, 350, 101 So 2d 550, 553 (1958)
282 Meyer v City of Daytona Beach, 158 Fla 859, 862, 30 So 2d 354, 355 (1947), State Highway Dept' v Andrus, 212 Ga 737, 738-39, 95 S E 2d 781, 782-83 (1956)
283 State v City of Daytona Beach, 158 Fla 859, 862, 30 So 2d 354, 355 (1947), State Highway Dept' v Andrus, 212 Ga 737, 739, 95 S E 2d 781, 783 (1956)

**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 case284 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.285 The courts 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.286 Consequently, a jury's verdict must be within the range of testimony presented at the trial despite the view.287

Verdicts that are not supported by evidence regularly produced in the course of the trial proceedings, but are based solely on the knowledge

284 State v Carter, 267 Ala 347, 350, 101 So 2d 550, 553 (1958)
286 State v City of Daytona Beach, 158 Fla 859, 862, 30 So 2d 354, 355 (1947), State Highway Dept v Andrus, 212 Ga 737, 738-39, 95 S E 2d 781, 782-83 (1956)
287 Meyer v City of Daytona Beach, 158 Fla 859, 862, 30 So 2d 354, 355 (1947), State Highway Dept v Andrus, 212 Ga 737, 739, 95 S E 2d 781, 783 (1956)
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. 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. Verdicts that are based solely on the jury view and contrary to all the other evidence will not be sustained on appeal. Consequently, as stated by the California court, a "... view ... is merely corroborative of the qualitative oral testimony." Similar rulings have been made in North Dakota. 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.

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. Under the Pennsylvania statutes, the view is evidentiary.

**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 conditions 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. 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...
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 evidentiary 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. 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. 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.

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. 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. 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, 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, 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

---

22 WIS. 2d 92, 100, 125 N.W2d 375, 381 (1963)
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. 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 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. Pennsylvania, under the guidance of a recently enacted statutory provision, follows the majority view. 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.

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. 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. 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. 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. 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. 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. 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. The minority view has never taken the position of completely excluding evidence of sales of similar property from the trial. 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
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. Such evidence may be admissible on cross-examination of the witness where the introduction of cross-examination is made as to the weight and competency of the evidence. For example, in an Iowa case, even though it was conceded that the testimony was elicited to test the witness' knowledge and their competency 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.

Positions regarding the admissibility of comparable sales on the examination in chief were changed in California during the period of this study; Nebraska did so in 1943. California's Supreme Court in County of Los Angeles v. Faus 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 condemnor's property. 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. 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.

On the other hand, when Iowa and Nebraska 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, 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. 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. 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 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, 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. 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.

**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. The...
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. Because no two parcels can be exactly alike, property similarly situated need not conform in every detail to the land subject to condemnation. 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. 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. 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. 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.

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. 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. 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. 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. 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 valuable improved, and better suited for farming purposes than the subject property. 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. 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. 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.

The liberal approach referred to previously is particularly applicable to Maryland, where the court of appeals stated in Lustine v. State Roads Commission, and substantially repeated in others, 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

---


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.\textsuperscript{255}

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 \textit{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.\textsuperscript{254} An unsuccessful attempt was made at the lower court level by one of the landowner's expert witnesses to establish 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.\textsuperscript{255}

Prior to the \textit{Lustine} case, the Maryland court had considered whether platted land could be considered comparable to unplatted land that concededly was suitable for platting.\textsuperscript{256} The condemnor in the \textit{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.\textsuperscript{257} 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.\textsuperscript{258} 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.\textsuperscript{259}

A Maryland case decided after \textit{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.\textsuperscript{260} 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.\textsuperscript{261} 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.\textsuperscript{262} On the other hand, the court of appeals held that the trial court in the \textit{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.\textsuperscript{263} 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.\textsuperscript{264}

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

\textsuperscript{255} \textit{Lustine} v State Roads Comm'n, 217 Md 274, 280-81, 142 A 2d 566, 569 (1958). See also \textit{Taylor} v State Roads Comm'n, 224 Md 92, 94-95, 167 A 2d 127, 128 (1961)
\textsuperscript{256} \textit{Lustine} v State Roads Comm'n, 217 Md 274, 277, 142 A 2d 566, 567 (1958)
\textsuperscript{257} \textit{Id.} at 280, 142 A 2d at 569
\textsuperscript{258} \textit{State Roads Comm'n v Wood}, 207 Md 369, 114 A 2d 636 (1955)
\textsuperscript{259} \textit{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
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Taylor} v State Roads Comm'n, 224 Md 92, 95-97, 167 A 2d 127, 128-29 (1961)
\textsuperscript{261} \textit{Winepol} v State Roads Comm'n, 220 Md 227, 231, 151 A 2d 723, 725-26 (1959)
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{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
\textsuperscript{264} \textit{Taylor} v State Roads Comm'n, 224 Md 92, 95-97, 167 A 2d 127, 128-29 (1961)
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.\(^\text{665}\) 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.\(^\text{666}\) 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.\(^\text{667}\) 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.\(^\text{668}\) 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.\(^\text{669}\) 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, its exclusion of such evidence was not held by the supreme judicial court to be an abuse of discretion.\(^\text{670}\)

**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.\(^\text{711}\) 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.\(^\text{172}\) 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.\(^\text{173}\) 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.\(^\text{174}\) 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.\(^\text{175}\) 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.\(^\text{176}\) The landowner in Bergeman v. State Roads Commission\(^\text{177}\) 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.\(^\text{178}\)

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.\(^\text{179}\) 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.\(^\text{180}\)

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

---


\(^\text{666}\) Id at 359-60, 146 N.E.2d at 682-83

\(^\text{667}\) Id at 359, 145 N.E.2d at 682


\(^\text{669}\) Id.


\(^\text{672}\) State v Boyd, 271 Ala 584, 587, 126 So 2d 225 (1960)


\(^\text{674}\) Id.

\(^\text{675}\) Bergeman v State Roads Comm’n, 224 Md 92, 167 A.2d 127 (1961)

\(^\text{676}\) Id at 94, 167 A.2d at 128

---
sales to be admissible. 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. With this interpretation the court of appeals approved the broad rule expressed in the Lustine case.

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. 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. 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. 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 that tended to indicate that evidence of comparable sales should be limited to those made before the taking. 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.

Contrast this with the result reached in a Virginia case. 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. Contending they were not comparable sales, the condemnor in May, State Highway Commissioner v. Dewey claimed the trial court had erred in permitting the landowner to introduce evidence regarding sales of commercial properties placed in use in the vicinity two years after the highway improvement project had been completed and after traffic had materially increased on the improved highway. 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. 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. 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.

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. Questions of whether sales are sufficiently voluntary to be admitted as comparable 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. Transactions with condemning authorities have been said to closely resemble

---

285 Id
286 175 Md at 498, 509, 2 A 2d 663, 673 (1938).
290 Hance v State Roads Comm'n, 221 Md 164, 156 A 2d 644 (1959);
291 Hance v State Roads Comm'n, 221 Md 164, 156 A 2d 644 (1959);
293 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 owner 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 benefited, 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 other prerequisites for admissible comparable sales 221 Md at 173-74, 156 A 2d at 649.
294 Mayor & City Council of Baltimore v Smith & Schwartz Brick Co, 82 Md 458, 31 A 423 (1895).
295 Lustine v State Roads Comm'n, 221 Md 164, 175, 156 A 2d 644, 650 (1959).
296 1 ORCEL § 139, which states "Generally speaking, the demner 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."
297 Id at 95, 167 A 2d at 128.
298 Id at 633-34, 112 S E 2d at 848.
300 See, e.g., State v Boyd, 271 Ala 584, 126 So 2d 225 (1960), State v McDonald, 88 Ariz 1, 352 P2d 343 (1960), Arkansas State Highway Comm'n v Kennedy, 234 Ark 89, 350 S 2d 526 (1961); People ex rel Dep't of Public Works v Univ Hill Farm Foundation, 188 Cal App 2d 371, 374, 352 P2d 343 (1960).
301 §21 3(1)
forced sales, in that neither is voluntary enough to reflect just compensation under the market value concept. 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.

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. 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.

Even though both states follow the traditional rule, opposite results were reached in an Arkansas case and a North Carolina case 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.

In Barnes v. State Highway Commission, 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. However, an error was not found to have been committed by the trial court in excluding the question on cross-examination. 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. 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. 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.

California courts have held evidence of sales to CONDENSATION:
demons 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. 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. 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.

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. 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. 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.

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, 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.

The effect of this "independent evidence—support of 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 . . . " The same statute makes it 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 their opinions of the value of the subject parcel is low, the dis-
ditions since the sale, and the nature of the sale itself

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, supra note 199, § 21 2

Adeissibility 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.

Adeissibility

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

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.125 Purchase prices in the recent cases were admitted on direct examination when introduced by either the landowner127 or the condemnor128 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.129

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.110 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.131 The determination of these qualifying factors in relation to whether the price paid would be a useful criterion of present value or would afford an indication of that value at the time of the property's taking is a matter largely within the trial judge's discretion.145 His decision on the admissibility of such evidence is ordinarily not reversible,428 unless it constitutes an error of law.427 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.418

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,430 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,446 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

---


127 Redfield v Iowa State Highway Comm'n, 251 Iowa 332, 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.442

128 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).

129 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).

130 Redfield v Iowa State Highway Comm'n, 251 Iowa 322, 324, 99 N W 2d 413, 420 (1959). The 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.

131 Redfield v Iowa State Highway Comm'n, 251 Iowa 322, 324, 99 N W 2d 413, 420 (1959).


133 State v McDonald, 88 Ariz 124, 126-27, 359 P 2d 63, 64 (1961).

134 Mintz v City & County of Denver, 133 Colo 104, 107, 293 P 2d 327, 328 (1957).

135 Parker v State, 89 Ariz 124, 126, 359 P 2d 63, 64 (1961).

136 Epstein v City & County of Denver, 133 Colo 104, 108, 293 P 2d 308, 310 (1956). 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 acres of land, from which a 1 1/4 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 1/2 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 condemnee who expressed an opinion that the market value was not more than $25 per acre.


139 Redfield v Iowa State Highway Comm'n, 251 Iowa 332, 343, 99 N W 2d 413, 420 (1959). The 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.

140 Eppstein 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 revenue stamps on the deed were held by the court to be as reliable an indication of the consideration as if the exact 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.

141 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 the various witnesses. However, on appeal, the supreme court, on 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 instructions to the jury and admitted the deed as evidence of value.


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. 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. Error was held to have been committed in excluding evidence of the circumstances of the sale; 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. 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." 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. 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. 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.

California's recently enacted Evidence Code contains a provision regulating the admissibility of evidence of sales of the subject property. 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.

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 various items of personality that the jury could use to readily determine the contract price of the realty.

... 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].
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, Ratchiff 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. 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 of 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 comparable lands. 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. Reasons given for excluding such offers include their inherent unreliability in establishing market value, the difficulty in establishing their good faith, and their representation at best as the opinion of the owner. 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. 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. However, the minority rule does not include offers to purchase received after the filing of the condemnation petition. 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. The bona fide character of an offer is a preliminary question to be decided by the trial court 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. The burden of establishing a sufficient foundation


467 Dept 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). 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.
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.47 In two recent Illinois cases, because the offers to purchase did not comply with the carefully circumscribed conditions necessary under the majority rule, they were held to have been properly excluded by the trial court.488 In one case evidence was not presented to show that the prospective purchaser could pay cash; 489 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.480

Cases in Arizona,471 Colorado,472 and Rhode Island473 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 dura 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.476 Consequently, the court reached the decision without having to pass on the question of whether such offers would have been admissible under other circumstances.477 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.478 Such an offer did not meet the requirements set out for the minority view479 because it was neither a bona fide nor cash offer.480

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 in 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.481

Offers Made by Condemnor

Offers made by the condemner to purchase the properties in question prior to the condemnation proceedings were held to be inadmissible by both the Illinois482 and Rhode Island483 courts, either as evidence of market value484 or as an admission by the condemnor of the value of the property.485 One reason for excluding such evidence is that

477 Id.
478 Dep't of Public Works and Bldgs v Lambert, 411 Ill 183, 191, 103 NE2d 365, 360 (1952); City of Chicago v Harrison-Halsted Bldg Corp, 11 Ill 2d 431, 434-43 (1958).
479 Dep't of Public Works and Bldgs v Lambert, 411 Ill 183, 190-91, 103 NE2d 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, the court reached the decision without having to pass on the question of whether such offers would have been admissible under other circumstances.
480 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. Such an offer did not meet the requirements set out for the minority view because it was neither a bona fide nor cash offer.
481 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 in 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.
482 Ruth v Dep't of Highways, 145 Colo 546, 550, 359 P2d 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 offers to purchase. 
483 State v Dep't of Public Works and Bldgs, 11 Ill 2d 431, 434-35, 143 NE2d 40, 44-45 (1958). The landowner claimed that the condemnor's offer to purchase the property prior to the suit is relevant as an admission by the condemnor of the value of the property. However, the court held that the proffered evidence of the condemnor's offer to purchase was properly excluded.
484 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.
485 City of Chicago v Harrison-Halsted Bldg Corp, 11 Ill 2d 431, 434-35, 143 NE2d 40, 43-45 (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.
an offer of settlement is made without prejudice.\textsuperscript{185} 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.\textsuperscript{186} Consequently, an offer to purchase by the taker is mandatory as a condition precedent to filing the petition.\textsuperscript{187} 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.\textsuperscript{188}

**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.\textsuperscript{189} 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.\textsuperscript{189} 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.\textsuperscript{190}

**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.\textsuperscript{191} One reason for excluding such evidence is that those offers are not a measure of the market value of the similar property.\textsuperscript{191} 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.\textsuperscript{194} 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\textsuperscript{195} 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.\textsuperscript{196}

**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.\textsuperscript{197} Even though the trial court in Blount County v. McPherson\textsuperscript{198} 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.\textsuperscript{199}

**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.\textsuperscript{200} 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.\textsuperscript{201} 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.\textsuperscript{202} 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."\textsuperscript{203}

\textsuperscript{186} Id. 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 in the estate.”
\textsuperscript{187} City of Chicago v Harrison-Halsted Bldg Corp, 11 Ill 2d 431, 434, 143 N E 2d 40, 43 (1958).
\textsuperscript{188} 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.
\textsuperscript{189} 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 demands it is worth is competent evidence against him.
\textsuperscript{190} State v. McDonald, 88 Ariz 1, 7, 8, 352 P 2d 343, 347 (1960).
\textsuperscript{191} Hankey v. Employer’s Cas Co, 176 S W 2d 337, 362 (Tex Civ App 1943). See 5 Nichols, supra note 199, § 21 5 for a discussion of options.
\textsuperscript{192} 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). The offer would have no probative value in addition, under the circumstances of this case, the testimony of the witness was hearsay.
\textsuperscript{193} Id. at 479, 122 S E 2d at 132
\textsuperscript{194} Id at 460, 122 S E 2d at 133
\textsuperscript{196} 268 Ala, 133, 105 So 2d 117 (1958).
\textsuperscript{197} 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 condemnor’s land and that of a neighbor’s. He was asked the amount of his appraisal of the neighbor’s property.
\textsuperscript{199} See also State v. Lincoln Memory Gardens, Inc, 242 Ind 206, 213, 177 N E 2d 655, 658 (1961) (dictum).
\textsuperscript{201} 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.

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.

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.

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.

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.

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. 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. 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.

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. 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.

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 property as shown on the assessment rolls, but as an admission against interest and to test his credibility, judgment of value, and memory. The purpose for offering the tax assessment sheets in evidence must be made clear at the time of their introduction. 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 to be an error. 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, was placed by the condemnee on the tract directly involved in the condemnation proceeding. 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 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. The issue in Colson v. State Highway Board arose, however, because the trial court refused to permit the condemnee to cross-examine the landowner relative 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 assessment?

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.

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 to be an error. 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, was placed by the condemnee on the tract directly involved in the condemnation proceeding. 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 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. The issue in Colson v. State Highway Board arose, however, because the trial court refused to permit the condemnee to cross-examine the landowner relative 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 assessment?

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.

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. The issue in Colson v. State Highway Board arose, however, because the trial court refused to permit the condemnee to cross-examine the landowner relative 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 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. The issue in Colson v. State Highway Board arose, however, because the trial court refused to permit the condemnee to cross-examine the landowner relative 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 assessment?
an appeal from the lister's (assessor's) tax appraisal of the subject property that he had pending. Presumably, the purpose of the condemner'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 condemner'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 condemner to cross-examine the landowner relative to the amount of tax assessment on the land in question. The reasons given for affirming the trial court's decision were: (a) the condemner'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 condemner 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 397-98, 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 condemner.

\(^{520}\) Id at 398, 173 A 2d at 853.

\(^{521}\) CAL. EVIDENCE CODE § 822(e) (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.

\(^{522}\) Central Pacific Ry Co v Feldman, 152 Cal 303, 310, 92 P 846, 852 (1907) See 3 CAL LAW REV COMM'N supra note 422, A-48 to A-49.


\(^{525}\) CAL. EVIDENCE CODE § 822(c) (West 1966), in the Appendix of this report.

\(^{526}\) Ark. STAT. ANN. § 76-521 (Repl 1957), in the Appendix of this report.

\(^{527}\) Id at 397-98, 173 A 2d at 853. Even though the landowner was 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 ut 12, § 1614a (Supp 1967) (relating to cross-examination of witnesses), VT STAT ANN ut 12, § 1604 (1959) (relating to testimony of owner relative to the value of his own property).

\(^{528}\) Id at 398, 173 A 2d at 853.

\(^{529}\) CAL. EVIDENCE CODE § 822(e) (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.

\(^{530}\) 325 Mass 78, 138 N E 2d 609 (1956).

\(^{531}\) 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.

\(^{532}\) Olmshondro v Saline County, 226 Ark. 253, 235, 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.

\(^{533}\) Omohundro v Saline County, 226 Ark. 253, 235, 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.

\(^{534}\) Mass. ANN. LAWS ch 79, § 35 (1964), in the Appendix of this report.
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 pur-
pose 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 cir-
cumstances of the particular case, the time when the
appraisal was made is so remote that any lack of knowl-
edge concerning it is irrelevant.

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 Com-
misson 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.

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 pre-
paring the balance sheet. It was based in part on an appa-
raisal 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.

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 vi-
olate the hearsay rule. In some states that permit land-
owners 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. A few states have adopted statutes permitting the
introduction of assessed value as an element to be con-
sidered by the jury in ascertaining just compensation. In
those jurisdictions the assessed values must be in strict
conformance with the statutory provision.

If noncondemnation appraisals have been made by com-
petent analysts, with the same definition of value as em-
ployed in the condemnation case and following valid and
accepted methods, according to Ratcliff there is no reason
for excluding the evidence. This would be particularly
true if the evidence is used only in support of an expert
witness' opinion of value, rather than as independent evi-
dence 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 pur-
poses, 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 evi-
dentary rules for that state accordingly.

---

*See* City of La Mesa v Tweed & Gambrell Planing Mill, 146 Cal App 2d 762, 778, 304 P 2d 803, 813 (1956).

**Id.** (dictum).

*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 evi-
dence is prejudicial depends upon the use made of the testimony or
exhibits and its probable effect on the jury's verdict. The reason for hold-
ing 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' valua-
tions were false

*Id* at 389, 392, 158 N.E 2d at 14-16

3 Cal. Law Rev Comm'n, supra note 422, A-48 to A-49, 5
Nichols, supra note 199, § 22:1

5 Nichols, supra note 199, § 22:1

See 5 Nichols, supra note 199, § 22:1(1) for a discussion of the
various statutory provisos

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." 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. 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. 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. 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. 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." Evidence of rental income must cover a period reasonably close to the time of the taking to be admissible. 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.

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. 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. 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...
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.

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, 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 value of the property. The court used the admissibility of previous rental fixed by a percentage or other measurable portion of the lease period, and the income therefore was said to be part of the profits. 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. 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. 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. 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 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.

In addition to the statutory exception just noted and,
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, or if the property is designed for or applied to such special use that its market value cannot be ascertained in any other manner. 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.

**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 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. In a Virginia case, indications were made that, to show how the property was being used, 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.

In *Shelby County v. Baker*, 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. Part of a parking lot in a shopping center leased by a supermarket was taken in a Minnesota case. 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.

**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. 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. 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.

A somewhat different issue relative to the admissibility of temporary business losses was involved in an Illinois case. There, the court said, where only a portion of a

---

609 Id. at 79, 83, 109 S.E.2d 409, 413 (1959) (dictum).
610 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 (1952) (dictum)
617 Id. at 316-17, 132 N.E.2d 448, 450 (1951) (dictum).
618 Id. at 316-17, 132 N.E.2d 448, 450 (1951) (dictum).
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. 549

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 551 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. 552 A later decision reversed this interpretation of the Indiana statute. 553

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. 554 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. 555 If appraisers and judges would accept Ratcliff's conclusion 556 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. 557 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. 558 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. 559

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, 560 rather than "reasonable net rental value,"
ADMISSIBILITY OF EVIDENCE OF COST OF REPRODUCTION

A third commonly used method of appraising real property is the Cost Approach. 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. 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. 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. 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.

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. 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. 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.

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. 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. Consequently, the admissibility of such evidence in those jurisdictions is dependent on the particular facts in each case. Courts have justified admit-
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

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 prove the loss by evidence of comparable sales. 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 evidence of reproduction costs alone was not proper evidence therefor. Evidence 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 of reproduction costs.603 Story 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 propery of comparable value in the same general locality. There were sales of comparable property in the vicinity to use in basing a value opinion, but 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 upon. 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 of reconstruction costs was properly excluded.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 upon. 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 of reconstruction costs was properly excluded.
606 Stringer v. Bd. of County Comm'rs of Big Horn County, 347 P.2d 117, 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 no exception must be made to that rule when evidence of comparative sales is lacking.
608 Id. at 10, 150 A.2d at 15.
610 State Highway Dep't v. Murray, 102 Ga. App. 210, 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.
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 whether, if he took the whole building into consideration, he would have gone on the record disclosed that one of the landowner's later opinion witnesses was permitted to testify as to economic factors and reproduction costs.
616 Dep't of Public Works and Bldgs. v. Pellini, 7 Ill. 2d 367, 374, 131 N.E.2d 55, 59 (1955).
617 Replacement 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. The reasoning for so holding was that in a previous case the court had evidence legitimately bearing upon the question of market value of the property is admissible, 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. 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.

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. 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" 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. 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.

---

408 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.

409 Ratcliff, supra note 191, at 27-29

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 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 have much greater value because of the location of the project in the area.

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. 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.

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-
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. 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.

One of the most complete statements with regard to enhancements resulting from advance public knowledge of the project was found in a Colorado case, 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:

"To 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.

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 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.

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. 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. 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." 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.

Depreciation of Value

Advance public knowledge of a proposed project also may have a depressing effect on land values. In a Maryland case, 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."

In a Massachusetts case the landowner claimed compensation for damages to his land allegedly caused by the "cloud of condemnation" that resulted when the condemner 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. This case seems to typify the attitude of the courts in refusing to permit recovery where the injury is inchoate or conjectural.

---

\(^{27}\) Arkansas State Highway Comm'n v Cochran, 320 Ark 881, 327 S.W.2d 723 (1959)

\(^{28}\) Id at 883-84, 327 S.W.2d at 735.

\(^{29}\) Williams v City & County of Denver, 147 Colo 195, 363 P 2d 171 (1961)

\(^{30}\) Id at 199-200, 363 P 2d at 173-74

\(^{31}\) State v Willey, 351 S.W.2d 907 (Tex Civ App 1961)

\(^{86}\) Iowa Dev Co v Iowa State Highway Comm'n, 252 Iowa 798, 108 N.W.2d 487 (1961); Redfield v Iowa State Highway Comm'n, 252 Iowa 1256, 110 N.W.2d 397 (1961).

\(^{87}\) Id at 58-59, 142 N.E.2d at 392-393

\(^{88}\) Congressional School of Aeronautics, Inc., v State Roads Comm'n, 218 Md 236, 146 A.2d 558 (1958)

\(^{89}\) Id at 58-59, 142 N.E.2d at 392-393

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.

440 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. 441 Reputation of the condemned property itself has been defined in an Alabama case as, “at best . . . a matter of sentiment.” 442 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. 443

INADEMISSIBLE 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 444 and sentimental value 445 was held to be inadmissible. For example, in City of Chicago v. Harrison-Halsted Building Corporation, 446 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. 447 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, 448 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. 449

Because reputation of the condemned property itself is a matter of sentiment and all elements of sentiment are

440 For an extended discussion see Ratcliff, supra note 191, at 52-53

441 City of Chicago v. Harrison-Halsted Bldg Corp., 11 Ill. 2d 431, 440, 143 N.E. 2d 40, 46 (1957)
442 Popwell v Shelby County, 272 Ala. 287, 292, 130 So. 2d 170 (1961)
443 Popwell v Shelby County, 272 Ala. 287, 130 So. 2d 170 (1961)
444 City of Chicago v. Harrison-Halsted Bldg Corp., 11 Ill. 2d 431, 440-41, 143 N.E. 2d 40, 46 (1957)
446 Id. at 440-41, 143 N.E. 2d 40
447 Id. at 433-34, 143 N.E. 2d at 42
448 For an extended discussion see Ratcliff, supra note 191, at 52-53
449 City of Chicago v. Harrison-Halsted Bldg Corp., 11 Ill. 2d 431, 440-41, 143 N.E. 2d 40, 46 (1957)
450 Id. at 440-41, 143 N.E. 2d at 46
451 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
452 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 was held to have committed a prejudicial error in permitting the admission of evidence to the effect that the condemnor's property bore a reputation of having been used in the past for gambling purposes. 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. 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.

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.

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, and evidence of sentimental value is inadmissible. 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.

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 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 . . . ." "Fair market value" is defined by both the Maryland and Pennsylvania 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.
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. 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. 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. 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". 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. In estimating Georgia land values inquiries may be made as to all other legitimate purposes to which the property could be appropriated.

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. 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. Quoting with approval from Alabama Power Company v. Henson, 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.'

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. 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. 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.

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. However, the appraisers for the landowner were permitted to value the property on the basis of the use it...
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. 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. 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.

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. 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. 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.

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 whether the highest and most valuable use would be economically unfeasible and unprofitable. 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.

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. 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. 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." 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

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. "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." 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. 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.

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. 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.

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.

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. "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." 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. 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.

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. 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. 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." 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

...
purpose, such a fact should be taken into consideration by the jury in determining the fair market value. A later case, on the other hand, indicates the acceptance of a more liberal view. 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. Quoting with approval from Ranck v. City of Cedar Rapids, 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.

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. 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. A landscape architect's plat that elaborated considerably on the owner's original drawings was, on the other hand, excluded by the trial court. If they are offered merely to show the improvement he was entitled to use in formulating his opinion of the premises by converting certain apartments located on the subject property into additional doctors' offices. 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.

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. 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. 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. 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...
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. 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.

Quoting from King v. Minneapolis Union Railway Company, 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.

At issue in the instant case was the condemning party'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.

ADAPTABLEITY 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 uses that may be considered in proving market value. 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. 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."

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.

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... 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.

---

711 State, by Lord v. Pahl, 254 Minn 349, 356, 95 N.W.2d 85, 90 (1959)
713 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, 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 zoning classification, 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 Alabama724 and Arkansas725 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.


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 250.

722 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.

723 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 as stated was admissible but the proof must be so limited and the testimony restricted to its value for such purposes as not to prejudice the issue of the offer of a proposed plan or a possible scheme of development, and the trial court, it held, but it was not permissible to incorporate in such a plan the speculative price of the individual lots.


725 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 a 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." 730 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 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...
of evidence of its suitability for some other use. This is consistent with sound appraisal theory.\textsuperscript{791} 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.\textsuperscript{792}

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.\textsuperscript{793} 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.”\textsuperscript{794} The admissibility of evidence of the property’s highest and best use is similarly dealt with in the Pennsylvania statutes.\textsuperscript{795} 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.\textsuperscript{796}

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.

\textsuperscript{791} Id at 54–55
\textsuperscript{792} Id at 56
\textsuperscript{793} CAL EVIDENCE CODE § 814 (West 1966), in the Appendix of this report
\textsuperscript{794} CAL EVIDENCE CODE § 821 (West 1966), in the Appendix of this report
\textsuperscript{795} See PA STAT ANN ut 26, §§ 1-703(2), 1-705(3) (Supp 1967), in the Appendix of this report
\textsuperscript{796} 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 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. When a witness who had indicated a personal knowledge of the pictured building identified a photograph as a portrayal 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. In another case, a registered professional engineer employed by the condemning city identified certain aerial photographs as representing the property in question, the neighborhood surrounding it, and the relative position of the improvements. 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. The sufficiency of the certification of a photograph seems to be discretionary with the trial judge.

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. 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. 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.

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 or are of such a nature as to divert the minds of the jurors to irrelevant or improper considerations are excluded from evidence. 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. The reasoning behind the decision was that the two properties were not comparable. 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. 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.

The decisions in some of those recent highway cases indicated, however, that photographs do not have to be
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 value of the property without due process of law. 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. 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 date of valuation. 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.

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. In addition, the photographs afford an opportunity for a comparison of the property before and after the taking. 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. 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.

**OTHER VISUAL AIDS**

Only two of the recent highway condemnation cases involved the admissibility of maps and plats. A copy of a verified plat 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. 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. 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. 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.
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 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. 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. 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. According to the court, such evidence is wholly immaterial to the issue of determining the land's market value in condemnation proceedings. The Wyoming Supreme Court further noted that 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...
unwarranted Federal spending.” 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. 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.

**REVENUE STAMPS ON DEEDS**

Pursuant to a federal statute, 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.

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. 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. 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.” 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.”

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. 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.

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. 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.

As the actual selling price of comparable property could not be shown by hearsay evidence, the sales price should have been proved by the testimony of a person having personal knowledge of it.

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.

**MORTGAGES ON THE SUBJECT PROPERTY**

The admissibility of evidence of a mortgage on the subject property was an issue in two Massachusetts cases. 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. 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. In counteracting the landowner’s claim that
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, 1959816 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
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. 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. 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. 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. 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.

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. 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.

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 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.

**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. 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.

**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. 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.” 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.

---

64. FLA STAT § 74 09 (1963)
65. FLA STAT § 74 09 (1963)
66. Wis STAT. § 32 05(10)(a) (1965)
67. Wis STAT. §32 08(6)(a) (1965)
69. Arkansas State Highway Comm’n v Blakely, 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 provisions of the statute, the landowner withdrew the deposit. See ARK STAT ANN §§ 76-534, et seq (Repl 1957)
70. Id at 274, 329 S W 2d at 159
71. Id at 275-76, 329 S W 2d at 160-61
73. MD ANN CODE art. 88B, § 18 (Repl 1964)
75. Id at 353, 342 P 2d at 726 (dictum)
76. Id
77. Epstein v City & County of Denver, 133 Colo. 104, 113-14, 293 P.2d 308, 313 (1956)
78. Id at 114, 293 P 2d at 313
80. Id at 516, 114 S E 2d at 341
81. 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

845 Id at 150, 286 P.2d at 884
846 Id at 150–51, 286 P.2d at 884–85
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
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 seen it. 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 condemnor 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 cumulative865 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-
quently, the testimony of the engineer would have served only to corroborate an undisputed fact established by competent evidence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{874} The other case held it was proper to cross-examine one of the condemner'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.\textsuperscript{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.\textsuperscript{876} Here, a witness for the condemner had testified on direct 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.\textsuperscript{874} The other case held it was proper to cross-examine one of the condemner'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.\textsuperscript{875}

**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.\textsuperscript{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.\textsuperscript{881}

**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

---

\textsuperscript{871} Id at 518–519, 170 P.2d at 934
\textsuperscript{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 2d 104, 107 (1957).
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)
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)
892 See generally, Ratchford, supra note 131, at 30-31
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 evidentiary 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 condemnation trials 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


§ 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


§ 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


§ 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


§ 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.


§ 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.


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 1 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, and retaining "just compensation" as used in Section 14 of Article 1 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 COMPAREABLE 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 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


§ 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 . . .


§ 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 . . .


§ 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

§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.


§ 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
[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.


§ 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


[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. . . .


§ 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

§ 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 of erecting a new structure of substantially the same kind 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


§ 22. PLEADING AND PROCEDURE.

. In case of trial by jury, if either party requests it the jury shall view the premises.


§ 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


§ 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.

§ 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.


§ 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


§ 28-14-15. VIEW BY JURORS. [See Ark. Stat Ann § 27-1731 (Repl. 1962)]

OREGON


§ 17.230 VIEW OF PREMISES BY JURY. [See Minn. Stat. Ann. § 546.12 (1947)]


[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


§ 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 non-contiguous 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 not 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
§ 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 opinion of the highest and best use of the property involved, and his statement of such facts and data and the sources of his information shall be subject to impeachment and rebuttal.

(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 rea-

sonable 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 as to the use to which the condemned property is intended to be put by the condemnor.

RHODE ISLAND


§ 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


§ 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.


§ 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


§ 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


VERMONT


§ 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


[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.


[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


§ 4.44.270. VIEW OF PREMISES BY JURY. [See Minn. Stat Ann § 546.12 (1947)]

WEST VIRGINIA


§ 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)

The amount of a prior jurisdictional offer or award shall not be disclosed to the com-
mission. . . .

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


§ 1-125. VIEW OF PLACE OR PROPERTY BY JURY
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

Rep. No. Title

---
  * A Critical Review of Literature Treating Methods of Identifying Aggregates Subject to Destructive Volume Change When Frozen in Concrete and a Proposed Program of Research—Intermediate Report (Proj. 4-3(2)), 81 p., $1.80
  1 Evaluation of Methods of Replacement of Deteriorated Concrete in Structures (Proj. 6-8), 56 p., $2.80
  2 An Introduction to Guidelines for Satellite Studies of Pavement Performance (Proj. 1-1), 19 p., $1.80
  2A Guidelines for Satellite Studies of Pavement Performance, 85 p., 9 figs, 26 tables, 4 app., $3.00
  3 Improved Criteria for Traffic Signals at Individual Intersections—Interim Report (Proj. 3-5), 36 p., $1.60
  4 Non-Chemical Methods of Snow and Ice Control on Highway Structures (Proj. 6-2), 74 p., $3.20
  5 Effects of Different Methods of Stockpiling Aggregates—Interim Report (Proj. 10-3), 48 p., $2.00
  6 Means of Locating and Communicating with Disabled Vehicles—Interim Report (Proj. 3-4), 56 p., $3.20
  7 Comparison of Different Methods of Measuring Pavement Condition—Interim Report (Proj. 1-2), 29 p., $1.80
  8 Synthetic Aggregates for Highway Construction (Proj. 4-4), 13 p., $1.00
  9 Traffic Surveillance and Means of Communicating with Drivers—Interim Report (Proj. 3-2), 28 p., $1.60
  10 Theoretical Analysis of Structural Behavior of Road Test Flexible Pavements (Proj. 1-4), 31 p., $2.80
  11 Effect of Control Devices on Traffic Operations—Interim Report (Proj. 3-6), 107 p., $5.80
  12 Identification of Aggregates Causing Poor Concrete Performance When Frozen—Interim Report (Proj. 4-3(1)), 47 p., $3.00
  13 Running Cost of Motor Vehicles as Affected by Highway Design—Interim Report (Proj. 2-5), 43 p., $2.80
  14 Density and Moisture Content Measurements by Nuclear Methods—Interim Report (Proj. 10-5), 32 p., $3.00
  15 Identification of Concrete Aggregates Exhibiting Frost Susceptibility—Interim Report (Proj. 4-3(2)), 66 p., $4.00
  16 Protective Coatings to Prevent Deterioration of Concrete by Deicing Chemicals (Proj. 6-3), 21 p., $1.60
  17 Development of Guidelines for Practical and Realistic Construction Specifications (Proj. 10-1), 109 p., $6.00
  18 Community Consequences of Highway Improvement (Proj. 2-2), 37 p., $2.80
  19 Economical and Effective Deicing Agents for Use on Highway Structures (Proj. 6-1), 19 p., $1.20

---
  * Highway Research Board Special Report 80
50 Factors Influencing Safety at Highway-Rail Grade Crossings (Proj. 3-8), 113 p., $5.20
51 Sensing and Communication Between Vehicles (Proj. 3-3), 105 p., $5.00
52 Measurement of Pavement Thickness by Rapid and Nondestructive Methods (Proj. 10-6), 82 p., $3.80
53 Multiple Use of Lands Within Highway Rights-of-Way (Proj. 7-6), 68 p., $3.20
54 Location, Selection, and Maintenance of Highway Guardrails and Median Barriers (Proj. 15-1(2)), 63 p., $2.60
55 Research Needs in Highway Transportation (Proj. 20-2), 66 p., $2.80
56 Scenic Easements—Legal, Administrative, and Valuation Problems and Procedures (Proj. 11-3), 174 p., $6.40
57 Factors Influencing Modal Trip Assignment (Proj. 8-2), 78 p., $3.20
58 Comparative Analysis of Traffic Assignment Techniques with Actual Highway Use (Proj. 7-5), 85 p., $3.60
59 Standard Measurements for Satellite Road Test Program (Proj. 1-6), 78 p., $3.20
60 Effects of Illumination on Operating Characteristics of Freeways (Proj. 5-2) 148 p., $6.00
62 Urban Travel Patterns for Hospitals, Universities, Office Buildings, and Capitols (Proj. 7-1), 144 p., $5.60
63 Economics of Design Standards for Low-Volume Rural Roads (Proj. 2-6), 93 p., $4.00
64 Motorists' Needs and Services on Interstate Highways (Proj. 7-7), 88 p., $3.60
65 One-Cycle Slow-Freeze Test for Evaluating Aggregate Performance in Frozen Concrete (Proj. 4-3(1)), 21 p., $1.40
66 Identification of Frost-Susceptible Particles in Concrete Aggregates (Proj. 4-3(2)), 62 p., $2.80
67 Relation of Asphalt Rheological Properties to Pavement Durability (Proj. 9-1), 45 p., $2.20
68 Application of Vehicle Operating Characteristics to Geometric Design and Traffic Operations (Proj. 3-10), 38 p., $2.00
69 Evaluation of Construction Control Procedures—Aggregate Gradation Variations and Effects (Proj. 10-2A), 58 p., $2.80
70 Social and Economic Factors Affecting Intercity Travel (Proj. 8-1), 68 p., $3.00
71 Analytical Study of Weighing Methods for Highway Vehicles in Motion (Proj. 7-3), 63 p., $2.80
72 Theory and Practice in Inverse Condemnation for Five Representative States (Proj. 11-2), 44 p., $2.20
73 Improved Criteria for Traffic Signal Systems on Urban Arterials (Proj. 3-5/1), 55 p., $2.80
74 Protective Coatings for Highway Structural Steel (Proj. 4-6), 64 p., $2.80
74A Protective Coatings for Highway Structural Steel—Literature Survey (Proj. 4-6), 275 p., $8.00
74B Protective Coatings for Highway Structural Steel—Current Highway Practices (Proj. 4-6), 102 p., $4.00
75 Effect of Highway Landscape Development on Nearby Property (Proj. 2-9), 82 p., $3.60
76 Detecting Seasonal Changes in Load-Carrying Capabilities of Flexible Pavements (Proj. 1-5(2)), 37 p., $2.00
77 Development of Design Criteria for Safer Luminaire Supports (Proj. 15-6), 82 p., $3.80
78 Highway Noise—Measurement, Simulation, and Mixed Reactions (Proj. 3-7), 78 p., $3.20
79 Development of Improved Methods for Reduction of Traffic Accidents (Proj. 17-1), 163 p., $6.40
80 Oversize-Overweight Permit Operation on State Highways (Proj. 2-10), 120 p., $5.20
81 Moving Behavior and Residential Choice—A National Survey (Proj. 8-6), 129 p., $5.60
82 National Survey of Transportation Attitudes and Behavior—Phase II Analysis Report (Proj. 20-4), 89 p., $4.00
83 Distribution of Wheel Loads on Highway Bridges (Proj. 12-2), 56 p., $2.80
84 Analysis and Projection of Research on Traffic Surveillance, Communication, and Control (Proj. 3-9), 48 p., $2.40
85 Development of Formed-in-Place Wet Reflective Markers (Proj. 5-5), 28 p., $1.80
86 Tentative Service Requirements for Bridge Rail Systems (Proj. 12-8), 62 p., $3.20
87 Rules of Discovery and Disclosure in Highway Condemnation Proceedings (Proj. 11-1(5)), 28 p., $2.00
88 Recognition of Benefits to Remainder Property in Highway Valuation Cases (Proj. 11-1(2)), 24 p., $2.00
89 Factors, Trends, and Guidelines Related to Trip Length (Proj. 7-4), 59 p., $3.20
90 Protection of Steel in Prestressed Concrete Bridges (Proj. 12-5), 86 p., $4.00
91 Effects of Deicing Salts on Water Quality and Biota—Literature Review and Recommended Research (Proj. 16-1), 70 p., $3.20
92 Valuation and Condemnation of Special Purpose Properties (Proj. 11-1(6)), 47 p., $2.60
93 Guidelines for Medial and Marginal Access Control on Major Roadways (Proj. 3-13), 147 p., $6.20
94 Valuation and Condemnation Problems Involving Trade Fixtures (Proj. 11-1(9)), 22 p., $1.80
95 Highway Fog (Proj. 5-6), 48 p., $2.40
96 Strategies for the Evaluation of Alternative Transportation Plans (Proj. 8-4), 111 p., $5.40
97 Analysis of Structural Behavior of AASHO Road Test Rigid Pavements (Proj. 1-4(1)A), 35 p., $2.60
98 Tests for Evaluating Degradation of Base Course Aggregates (Proj. 4-2), 98 p., $5.00
99 Visual Requirements in Night Driving (Proj. 5-3), 38 p., $2.60
100 Research Needs Relating to Performance of Aggregates in Highway Construction (Proj. 4-8), 68 p., $3.40
101 Effect of Stress on Freeze-Thaw Durability of Concrete Bridge Decks (Proj. 6-9), 70 p., $3.60
102 Effect of Weldments on the Fatigue Strength of Steel Beams (Proj. 12-7), 114 p., $5.40
103 Rapid Test Methods for Field Control of Highway Construction (Proj. 10-4), 89 p., $5.00
104 Rules of Compensability and Valuation Evidence for Highway Land Acquisition (Proj. 11-1), 77 p., $4.40
Rep. No. Title

Synthesis of Highway Practice
1 Traffic Control for Freeway Maintenance (Proj. 20-5, Topic 1), 47 p., $2.20
2 Bridge Approach Design and Construction Practices (Proj. 20-5, Topic 2), 30 p., $2.00
3 Traffic-Safe and Hydraulically Efficient Drainage Practice (Proj. 20-5, Topic 4), 38 p., $2.20
4 Concrete Bridge Deck Durability (Proj. 20-5, Topic 3), 28 p., $2.20
THE NATIONAL ACADEMY OF SCIENCES is a private, honorary organization of more than 700 scientists and engineers elected on the basis of outstanding contributions to knowledge. Established by a Congressional Act of Incorporation signed by President Abraham Lincoln on March 3, 1863, and supported by private and public funds, the Academy works to further science and its use for the general welfare by bringing together the most qualified individuals to deal with scientific and technological problems of broad significance.

Under the terms of its Congressional charter, the Academy is also called upon to act as an official—yet independent—adviser to the Federal Government in any matter of science and technology. This provision accounts for the close ties that have always existed between the Academy and the Government, although the Academy is not a governmental agency and its activities are not limited to those on behalf of the Government.

THE NATIONAL ACADEMY OF ENGINEERING was established on December 5, 1964. On that date the Council of the National Academy of Sciences, under the authority of its Act of Incorporation, adopted Articles of Organization bringing the National Academy of Engineering into being, independent and autonomous in its organization and the election of its members, and closely coordinated with the National Academy of Sciences in its advisory activities. The two Academies join in the furtherance of science and engineering and share the responsibility of advising the Federal Government, upon request, on any subject of science or technology.

THE NATIONAL RESEARCH COUNCIL was organized as an agency of the National Academy of Sciences in 1916, at the request of President Wilson, to enable the broad community of U. S. scientists and engineers to associate their efforts with the limited membership of the Academy in service to science and the nation. Its members, who receive their appointments from the President of the National Academy of Sciences, are drawn from academic, industrial and government organizations throughout the country. The National Research Council serves both Academies in the discharge of their responsibilities.

Supported by private and public contributions, grants, and contracts, and voluntary contributions of time and effort by several thousand of the nation's leading scientists and engineers, the Academies and their Research Council thus work to serve the national interest, to foster the sound development of science and engineering, and to promote their effective application for the benefit of society.

THE DIVISION OF ENGINEERING is one of the eight major Divisions into which the National Research Council is organized for the conduct of its work. Its membership includes representatives of the nation's leading technical societies as well as a number of members-at-large. Its Chairman is appointed by the Council of the Academy of Sciences upon nomination by the Council of the Academy of Engineering.

THE HIGHWAY RESEARCH BOARD, organized November 11, 1920, as an agency of the Division of Engineering, is a cooperative organization of the highway technologists of America operating under the auspices of the National Research Council and with the support of the several highway departments, the Federal Highway Administration, and many other organizations interested in the development of transportation. The purpose of the Board is to advance knowledge concerning the nature and performance of transportation systems, through the stimulation of research and dissemination of information derived therefrom.