VALUATION UNDER CONDEMNATION-THE ADMISSIBILITY OF PRIOR SALES TO A CONDEMNING POWER

WILLIAM F. WILDER

A practicing lawyer actively engaged in the trying of condemnation suits, will, at sometime in his career, undoubtedly encounter the problem of whether the price paid in comparable land sales, to a party with the power to condemn, is admissible as evidence of the value of the land in controversy. The purpose of this article is to discuss the problem, point out the divergent views, and trace the development of this point in Arizona.

By the time a condemnation suit has reached the trial stage, generally the basic issue to be resolved is the "valuation" of the property (assuming for purposes here that there is no controversy over the power to condemn). Constitutional and statutory provisions almost universally provide that just compensation must be paid when property is taken through eminent domain.[1] However, few statutes undertake to define "just compensation," so it has been incumbent on the courts to do so,[2] and they have generally construed it to mean the value of the property taken.[3] The term "value" is somewhat nebulous and is not susceptible to simple determination. The courts, as a result, have found it necessary to establish a standard by which to measure value, and the one most commonly applied is "fair market value."[4]

The setting of a standard as a basis for determining the compensation to be paid does little more than delineate the problem to be solved; the solution requires a proper determination of the amount of compensation. It thus is incumbent upon the parties to the action to present proof of what the fair market value is, and because there is no precise definition of the standard, conflicts arise as to what evidence of value is admissible. A single, uniform definition of market value is almost impossible to come by. However, one criterion that has become well established is the concept of a "willing seller" and a "willing buyer."[5] This concept is implicit in nearly all judicial definitions of "fair market value" and embodies the notion that an arms-length transaction between parties not under compulsion is a

---

[1] U. S. CONST. amend. V; ARIZ. CONST. art. 2, §17; ORGEL, VALUATION UNDER EMINENT DOMAIN § 1 (2d ed. 1953).

[2] ORGEL, *op. cit. supra*, note 1.

[3] *Ibid.*

[4] *Id.* §§ 15, 17.

[5] Andrews v. Cox, 127 Conn. 455, 17 A2d. 507 (1941); Maher v. Commonwealth, 291 Mass. 343, 197 N.E. 78 (1935); Texas Pipe Line Co. v. Watkins, 26 S.W.2d 1103 (Tex. Civ. App., 1930).

fairly accurate indicator of market value.[6] The importance of this concept should be kept in mind when the admissibility of prior sales is being considered.

Admissibility of Comparable Sales in General

While the precise point considered herein is the admissibility in evidence of the price of similar sales to a condemning party, it is first necessary to determine whether, and under what circumstances, the price paid for prior similar sales in general is admissible.

A majority of courts, in seeking to determine market value, have on direct examination admitted as substantive evidence the price paid for land similar to that in controversy.[7] However, to be admissible, it is necessary that the prior sale have been voluntary, with neither party under compulsion to buy or sell.[8] The rationale for the admission of such evidence is the probative value it has in determining market value.[9] Since market value is the price at which an article sells on the open market, this price is best fixed by sales actually consummated.[10] Such prior sales, when made under normal and fair conditions, are necessarily a better test of the market value than the speculative opinions of witnesses; for this is truly a place where "money talks."[11]

When the price paid in comparable sales is admitted as independent evidence of value, it must be proved in the same manner as any other material fact.[12] It is therefore important to note the distinction that exists between the testimony given by a non-expert and that given by an expert witness.

A non-expert, in order that his testimony not be considered hearsay and inadmissible, must have been either a party to the prior sale, the broker who effectuated the sale, or otherwise have personal knowledge of the price paid.[13]

The rule as to an expert witness is different, however. Accord-

---

[6] *Ibid.*

[7] Jones v. United States, 258 U.S. 40 (1922); Washington Home for Incurables v. Hazen, 70 F.2d 847 (D.C. Cir. 1934); County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549 (1947); NICHOLAS, EMINENT DOMAIN § 21.31 (1962).

[8] Hickey v. United States, 208 F.2d 269 (3rd Cir. 1953); Kankakee Park Dist. v. Heidenreich, 328 Ill. 198, 159 N.E. 289 (1927); Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549 (1947).

[9] *Ibid.*

[10] NICHOLAS, EMINENT DOMAIN § 21.31 (1962).

[11] Paducah v. Allen, 111 Ky. 361, 63 S.W. 981 (1901); Stewart v. Commonwealth, 337 S.W.2d 880 (Ky. 1960).

[12] NICHOLAS, EMINENT DOMAIN § 21.31 (1962).

[13] Stewart v. Commonwealth, 337 S.W.2d 880 (Ky. 1960); NICHOLAS, EMINENT DOMAIN § 21.31 (1962).

ing to the majority view, once an expert has been properly qualified, he may testify on direct examination as to his opinion of market value and support this opinion with his reasons.[14] In such cases, the hearsay rule is considered inapplicable.[15] However, there is a strong minority to the effect that although an expert may testify as to his *opinion* of value, even though it is derived from inadmissible sources, if the *reasons* for the opinion are inadmissible as hearsay, the expert is precluded from testifying as to the reasons.[16] In other words, the fact that hearsay may be grounds for the opinion does not make the hearsay directly admissible.

A few jurisdictions have rejected the view that on direct examination, sales of similar lands are admissible as substantive evidence of value.[17] The theory for this has been that the admission of such evidence introduces a multitude of collateral issues into the suit.[18] For example, questions arise as to the similarity of the land, the remoteness of time and space, and whether the sale was compulsory or not.[19] However, these minority jurisdictions have generally held that on the cross-examination of an expert, it is proper to question him about similar sales and prices paid in the vicinity as a means of testing his knowledge and credibility.[20] In such cases, however, the testimony must be confined to the purpose for which admitted and cannot be used as affirmative evidence of value.[21]

The evidentiary rules set forth above are applicable when the issue involved is the admissibility of prior sales to a condemning party.

Admissibility of Comparable Sales to a Condemning Party

Although the prevailing view of the courts in the United States

---

[14] International Paper Co. v. United States, 77 F.2d 201 (5th Cir. 1956); United States v. 5139.5 Acres of Land, 200 F.2d 657 (4th Cir. 1952); 32 C.J.S. *Evidence* § 545 (1942).

[15] *Ibid.*

[16] National Bank of Commerce v. City of New Bedford, 175 Mass. 257, 56 N.E. 288 (1900).

[17] Westchester County Park Comm'n v. United States, 143 F.2d 688 (2d Cir. 1944), *cert. denied,* 323 U.S. 726 (1944); United States v. Foster, 131 F.2d 3 (8th Cir. 1942); Eames v. Southern N.H. H.E. Corp., 85 N.H. 379, 159 Atl. 128 (1932); Serals v. West Chester Borough School Dist., 292 Pa. 134, 140 Atl. 632 (1928); NICHOLAS, EMINENT DOMAIN § 21.31(11) (1962).

[18] *Ibid.*

[19] Richland Irr. Dist. v. United States, 222 F.2d 112 (9th Cir. 1955); People v. Murray, 172 Cal. App. 2d 219, 342 P.2d 485 (1959); City of San Diego v. Boggeln, 164 Cal. App. 2d 1, 330 P.2d 74 (1958); Stewart v. Commonwealth, 37 S.W.2d 880 (Ky. 1960).

[20] Stewart v. Commonwealth, 337 S.W.2d 880 (Key. 1960); Barnes v. North Carolina State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1957); Roberts v. Philadelphia, 239 Pa. 339, 86 Atl. 926 (1931); Schondart v. Pennsylvania R.R., 216 Pa. 224, 65 Atl. 543 (1907).

[21] *Ibid.*

has been to admit evidence of the price paid in comparable sales of land, these same courts have almost uniformly held that evidence of the price paid at a prior sale to the condemnor or to another potential condemnor is not to be admitted as evidence of the value of the land condemned.[22]

Several reasons are advanced in support of this nearly universal rule.[23] The essential reason, however, for excluding such evidence is the belief that the price paid for other land by a condemning party is not relevant in determining the market value of the land in controversy.[24] The argument is that sales to a party with the power to condemn are consummated under some degree of compulsion and that the price received reflects a compromise of the parties rather than the market value of the property.[25] Thus, the sale has no probative value.

The foregoing reasoning was succinctly stated in the case of *Washington Home for Incurables v. Hazen.*[26] With reference to the admissibility of such prior sales, the court said in part:

> What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. . . . The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case whether in a proceeding by the same condemning party or otherwise.

The exclusionary rule adhered to by the majority of courts has not been without its critics; and a number of cases, notably in recent years, have disagreed with the majority view.[27] The minority

---

[22] Slattery Co. v. United States, 231 F.2d 37 (5th Cir. 1956); State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); Stewart v. Commonwealth, 337 S.W.2d 880 (Ky. 1960); NICHOLAS, EMINENT DOMAIN § 21.33 (1962); ORGEL, VALUATION UNDER EMINENT DOMAIN § 147 (2d ed. 1953).

[23] *Ibid.*

[24] ORGEL, VALUATION UNDER EMINENT DOMAIN § 147 (2d ed. 1953).

[25] Leahy v. State, 214 Ala. 107, 106 So. 599 (1925); Yonts v. Public Serv. Co., 179 Ark. 695, 17 S.W.2d 886 (1929); Coos Bay Logging Co. v. Barclay, 159 Ore. 272, 79 P.2d 672 (1938); Blick v. Ozaukee County, 180 Wis. 45, 192 N.W. 380 (1923); NICHOLAS, EMINENT DOMAIN § 21.33 (1962); ORGEL, VALUATION UNDER EMINENT DOMAIN § 147 (2d ed. 1953).

[26] Washington Home for Incurables v. Hazen, 70 F.2d 847 (D.C. Cir. 1934).

[27] Hannan v. United States, 131 F.2d 441 (D.C. Cir. 1942); Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 345 P.2d 78 (1959); Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549 (1947); Eames v. Southern N.H. H.E. Corp., 85 N.H. 379, 159 Atl. 128 (1932); Shaw v. Monongahela Ry., 110 W.Va. 155, 157 S.E.170 (1931); Annot., 174 A.L.R.2d 370 (1948).

view has reasoned that such evidence (of prior sales to a condemnor) should be admitted if the party presenting it has, as a preliminary fact, established that the land in the prior sale was similar to that in controversy and that the sale was completed without compulsion, coercion, or compromise.[28] On this basis it is said that an objection to such evidence goes only to its weight, not to its admissibility.[29]

In support of this theory of admissibility, the argument has been advanced that an arbitrary exclusion of evidence of prior sales to a condemning party is an illogical rule that fails to consider that such sales are not always compulsory and at times may be very valuable as a guide in determining market value.[30] It is reasoned that all sales are, to a certain degree, a compromise between the parties,[31] and that a condemnor making a purchase may well be paying what it feels the property is worth while the seller is selling for a price he believes is fair.[32] Thus a sale to a party who could condemn might be a voluntary transaction and very useful as a yardstick for determining value. Based on this, it has been held several times that the mere fact that one of the parties to a sale had the power to condemn is no reason to exclude evidence of the sale where it has also been established that no steps had been taken to exercise that power before the sale was negotiated.[33]

In essence, this minority of cases has held that the question of admissibility is one of relevancy. The trial judge, it is said, is the proper person to determine the probative value of offered evidence; and he should be given broad discretion to examine the facts and circumstances of each case to determine whether a prior sale was sufficiently voluntary so as to be a reasonable index of market value.[34]

The Law in Arizona

A series of cases has developed the present Arizona law con-

---

[28] *Ibid.*

[29] State v. McDonald, 88 Ariz. 1, 353 P.2d 343 (1960); Louisiana Ry. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236 (1906); 2 WIGMORE, EVIDENCE § 463 at 505 (rd ead. 1940).

[30] Washington Home for Incurables v. Hazen, 70 F.2d 847 (D.C. Cir. 1934); Eames v. Southern N.H. H.E. Corp., 85 N.H. 379, 159 Atl. 128 (1932); Collins v. Pulaski County, 201 Va. 164, 110 S.E.2d 184 (1959); NICHOLAS, EMINENT DOMAIN § 21.33 (1962).

[31] Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 345 P.2d 78 (1959); County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); O'Malley v. Commonwealth, 182 Mass. 196, 65 N.E. 30 (1902); Curley v. Jersey City, 83 N.J.L. 760, 85 Atl. 197 (1912).

[32] *Ibid.*

[33] O'Malley v. Commonwealth, 182 Mass. 196, 65 N.E. 30 (1902); Bruce v. State Dept. of Pub. Works, 176 A.2d 846 (R.I. 1962).

[34] State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 345 P.2d 78 (1959); County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959).

cerning the admissibility of prior sales to a condemning power. The point was first developed that evidence of prior sales is admissible on direct testimony of a value witness.[35] Then, on two occasions, the court dealt with the issue of admissibility of prior sales to a party with the power to condemn.[36]

It should be noted that Arizona has constitutional and statutory provisions, similar to those in most states, that "just compensation"[37] in light of the "value"[38] of the property taken, must be paid when the power of eminent domain is exercised. No standard of measuring value is set by statute. However, the case law has developed the now well-established rule that the measure of value of property taken is its "fair market value."[39] This rule was well stated in an instruction to the jury in the case of *Mandl v. City of Phoenix*.[40] It was said in part:

> Market value of land is the price it would probably bring after fair and reasonable negotiations where the owner is willing to sell but not compelled to do so and the buyer is willing to purchase but is under no necessity of buying the property. . . .

It is also now well established in Arizona that expert testimony is admissible as evidence of market value, and that on direct examination an expert may disclose the reasons upon which his opinion is based.[41] In this respect, the rule that prevailed for many years was the one set forth in *Viliborghi v. Prescott School Dist.*[42] There it was said that:

> . . . after a witness has properly qualified as an expert, he should state what in his judgment is the market value of the property, without showing upon what factors that opinion is based. On cross-examination, however, he may be asked as to all the different factors which he took into consideration in reaching his ultimate conclusion. This cross-examination, however, is allowed solely for the purpose of testing the value of the witness's testimony, and is not, in itself, evidence of the value of the property.

The effect of this rule was to exclude direct testimony of pre-

---

[35] Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950).

[36] Rayburn v. State, 93 Ariz. 54, 378 P.2d 496 (1963; State v. McDonald, 88 Ariz. 1, 352 P.2d 348 (1960).

[37] ARIZ. CONST. art. 2, § 17.

[38] ARIZ. REV. STAT. ANN. § 12-1122 (1956).

[39] State v. McDonald, 88 Ariz. 1, 352 P.2d 348 (1960); Viliborghi v. Prescott School Dist. No. 1, 55 Ariz. 230, 100 P.2d 178 (1940); Mandl v. City of Phoenix, 41 Ariz. 351, 18 P.2d 271 (1933).

[40] Mandl v. City of Phoenix, *supra* note 39.

[41] Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950).

[42] Viliborghi v. Prescott School Dist. No. 1, 55 Ariz. 230, 100 P.2d 178 (1940).

vious sales of similar land.

Ten years later, the Supreme Court had occasion to re-examine the *Viliborghi*[43] decision. In *Town of Williams v. Perrin*,[44] the court rejected the rule of exclusion set forth in *Viliborghi*,[45] stating that the rule had been followed because it prevailed in California, the state from which our eminent domain statutes were taken. It was pointed out, however, that in the interim period following *Viliborghi*, California, by statute, had departed from the rule and that Arizona was now justified in abandoning the rule.[46]

In rejecting the rule of exclusion, Arizona aligned itself with the majority of courts in the country. In doing so, the court reasoned that since the issue to be determined is market value, the jury is entitled to consider all relevant testimony. Thus, if, in the trial court's discretion, evidence of similar sales is of sufficient probative value, the evidence is admissible subject only to an objection to the weight it is to be given.[47]

Arizona first dealt with the issue of admissibility of similar sales to a party with the power to condemn, in the case of *State v. McDonald*.[48] There, the court pointed out that the majority of jurisdictions have rejected per se the evidence of prior sales to a condemnor. However, the court recognized the fact that there was a minority view to the contrary. The court went on to quote the rule of *Hannan v. United States*,[49] a federal case, that such evidence (of prior sales to a condemning power) should be admissible if, as a preliminary fact, it is shown that the prior sale was made without compulsion, coercion or compromise. In conclusion, our court said:[50]

> We fail to see why evidence of such a sale should be kept from the jury simply because the purchaser has the power to condemn, subject of course to the trial court's sound discretion as to its probative value, and subject to a proper foundation having been laid for its admission, in confirmity with the rule laid down in *Mandl v. City of Phoenix, supra,* and in *Hannan v. United States, supra.*

It was held in this case, however, that no showing was made that the sale was voluntarily entered into; so evidence of the price paid was excluded.[51]

---

[43] *Ibid.*
[44] Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950).
[45] Viliborghi v. Prescott School Dist. No. 1, 55 Ariz. 230, 100 P.2d 178 (1940).
[46] *Ibid.*
[47] Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950).
[48] State v. McDonald, 88 Ariz. 1, 352 P.2d 348 (1960).
[49] Hannan v. United States, 131 F.2d 441 (D.C. Cir. 1942).
[50] *Ibid.*
[51] *Ibid.*

In the recent case of *Rayburn v. State*,[52] evidence of previous sales to the state was offered. The court reiterated the ruling in *McDonald*,[53] saying that just because the sale was to a purchaser with the power to condemn no reason existed to keep the evidence from the jury. However, the evidence was not admitted because no foundation had been laid showing that the sale lacked compulsion, coercion or compromise.[54]

Conclusion

The decisions in the *McDonald* and *Rayburn* cases make it apparent that Arizona has aligned itself with the minority view concerning the admissibility of prior sales to a condemning party. This view does, however, represent the trend of the cases decided in recent years.

It would appear that the minority rule, as now adopted in Arizona, is sound since through it the jury is given an opportunity to utilize evidence which may be of value in determining the ultimate issue to be proved — market value. The majority view which excludes all evidence of sales to a condemning party, fails to recognize that such sales are not always made under compulsion and that they may be quite relevant in establishing value. Arizona has taken a more practical and logical approach to the issue by favoring the admissibility of evidence that the jury might effectively utilize in making its decision. This position conforms to what might be regarded as a movement by courts away from the rigidity of exclusionary rules.[55]

It is interesting to note that in neither the *McDonald* nor the *Rayburn* cases was a proper showing of lack of compulsion made. Thurs, although it is established that under certain circumstances evidence of a sale to a condemning party may be admissible, there is as yet, no Arizona law as to the sufficiency of the foundation that will be required to admit such evidence.

---

[52] Rayburn v. State, 93 Ariz. 54, 378 P.2d 496 (1963).

[53] Viliborghi v. Prescott School Dist. No. 1, 55 Ariz. 230, 100 P.2d 178 (1940).

[54] *Ibid.*

[55] Davis, Administrative Law 245 (1959).