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EMINENT DOMAIN - MEASURE OF COMPENSATION - ADMISSIBILITY OF EVIDENCE OF PAST PROFITS

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EMINENT DOMAIN — MEASURE OF COMPENSATION — ADMISSIBILITY OF EVIDENCE OF PAST PROFITS — Plaintiff corporation, lessee for a term of ten years of a tract of real estate located at the intersection of a main highway and the tracks of the lessor railroad, was engaged in the poultry business and in the retail buying and selling of automobile equipment. The location of the plaintiff's leasehold enabled the plaintiff to effect many economies in the operation of its business. The defendant municipality constructed a viaduct over the railroad tracks in such a manner that, while none of the plaintiff's property was actually taken, its usefulness as a retail outlet was destroyed. Plaintiff brought suit for damages and attempted to introduce evidence of past profits for the purpose of establishing the market value of its leasehold interest. In its first opinion the court sustained the trial court in refusing to admit such evidence. In a supplemental opinion, *held*, that evidence of past profits, if established with reasonable certainty, "may be admitted, not as an independent or separate element of damage, but for the purpose of showing the value peculiar to the leasehold and its location." *James Poultry Co. v. Nebraska City*, 135 Neb. 787, 284 N. W. 273, 136 Neb. 456, 286 N. W. 337 (1939).

The constitution of the state of Nebraska provides that the property of no person shall be taken or damaged for public use without just compensation therefor.[1] The great majority of cases, in Nebraska as well as in other states, have held that where the property is actually taken under the power of eminent domain the basis of valuation in computing the compensation due the owner is the market value thereof.[2] Likewise, it is generally accepted that where the property is not actually taken, but is only damaged, the owner is entitled to the difference between the market value of the property before and after the injury.[3] If several interests in the fee are involved, the usual procedure is to combine them all to ascertain the value of the fee as a whole, after which the total amount may be divided among the respective interests according to their proportionate share.[4] As exemplified in the principal case, in determining the share due a leasehold interest, exactly the same considerations apply as when the fee is undivided; that is, the owner of a damaged leasehold is entitled to compensation based on the market value of his particular estate.[5] In arriving at a reasonable market value,

[1] Neb. Const., art. I, § 21.

[2] 1 BONBRIGHT, VALUATION OF PROPERTY 413 (1937); 2 LEWIS, EMINENT DOMAIN, 2d ed., § 478 (1900), 3d ed., § 706 (1909); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 16 (1936); Stewart v. City of Lincoln, 108 Neb. 825, 189 N. W. 279 (1922); Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403 (1878).

[3] 18 AM. JUR. 878 (1938); 2 NICHOLS, EMINENT DOMAIN, 2d ed., § 327 (1917); Gillespie v. City of South Omaha, 79 Neb. 441, 112 N. W. 582 (1907).

[4] 2 LEWIS, EMINENT DOMAIN, 2d ed., § 483 (1900), 3d ed., § 716 (1909); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 107 (1936); Carlock v. United States, (App. D. C. 1931) 53 F. (2d) 926; see also the annotation in 48 L. R. A. (N. S.) at 899 (1914).

[5] Philadelphia & Reading R. R. v. Getz, 113 Pa. 214, 6 A. 357 (1886); Iron City Automobile Co. v. City of Pittsburgh, 253 Pa. 478, 98 A. 679 (1916); Mayor of Baltimore v. Gamse & Bros., 132 Md. 290, 104 A. 429 (1918); 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 119 (1917); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 124 (1936).

the evidentiary worth of the amount of past profits made by the owner of the property is limited by the fact that the owner is not entitled to compensation for injury done to his business. In other words, the constitutions allow recovery only for an injury to property, and it is generally accepted that goodwill or one's business are not property within the meaning of these constitutional provisions.[6] The success of a modern business enterprise depends upon so many intangible and unrelated factors, as, for example, the managerial ability of the owner, his standing in the community, or the activities of competitors, that it is almost impossible to ascertain what proportion of the profits is due to the actual structures and tract of land upon which the business is conducted.[7] Furthermore, if by market value is meant the price a buyer willing to buy would have paid for the property at about the time of the taking or injury,[8] evidence of past profits would be useful to such a buyer only as an indication of what he might expect to earn in the future, and business experience has proved that past profits are not a reliable basis for measuring future earnings. Thus, upon grounds of reason as well as precedent the rule seems well established that in the usual case past profits derived from a business are inadmissible as evidence of the market value of the property upon which the business is conducted.[9] But if the primary reason for excluding profits is that it is difficult to ascertain the proportion of those profits attributable to the property for which the owner is entitled to compensation, then it would follow that where the property sought to be valued has in fact peculiar qualities which by themselves produce profits or enable savings, and these profits or savings may be computed with reasonable certainty, they should be admitted in evidence.[10] This seems to be the reasoning upon which

[6] Sauer v. City of New York, 44 App. Div. 305, 60 N. Y. S. 648 (1899); Pemberton v. City of Greensboro, 208 N. C. 466, 181 S. E. 258 (1935); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 161, p. 534 (1936), stating, "The fundamental reason for the exclusion of evidence of profits lies in the rule of substantive law that the condemnor takes only the real property, not the business located thereon"; 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 124 (1917), stating: "An established business or what is called 'good will' has never been held to be by itself property in the constitutional sense." See also 1 BONBRIGHT, VALUATION OF PROPERTY 430 (1937); 2 LEWIS, EMINENT DOMAIN, 2d ed., § 487 (1900), 3d ed., § 727 (1909).

[7] Sawyer v. Commonwealth, 182 Mass. 245, 65 N. E. 52 (1902); 1 BONBRIGHT, VALUATION OF PROPERTY 430 (1937); 2 NICHOLS, EMINENT DOMAIN, 2d ed., § 446 (1917).

[8] 1 BONBRIGHT, VALUATION OF PROPERTY 46 (1937): "the monetary value of any given property is measured by the price for which this property could actually be sold by the person who now owns it, or who has the legal power to sell it, to some other person or persons who are ready to buy it."

[9] Lehigh Valley Coal Co. v. City of Chicago, (C. C. Ill. 1886) 26 F. 415; Sauer v. City of New York, 44 App. Div. 305, 60 N. Y. S. 648 (1899); Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 137 S. E. 458 (1927); ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 161 (1936); 2 NICHOLS, EMINENT DOMAIN, 2d ed., § 446 (1917); 2 LEWIS, EMINENT DOMAIN, 2d ed., § 487 (1900), 3d ed., § 727 (1909).

[10] In Schuylkill River E. S. R. Co. v. Kersey, 133 Pa. St. 234, 19 A. 553 (1890), the court allowed the lessee of a coal yard to show the added expense of handling coal

the court in the principal case proceeds, for the facts indicate that the particular location of the plaintiff's leasehold did enable it to effect certain savings and economies in the conduct of its business.

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not as a specific item of recovery but as affecting the market value of the leasehold. 4 SUTHERLAND, DAMAGES, 4th ed., § 1069, p. 4012 (1916), states: "If the tenant's estate is limited to a particular use and the appliances used by him in conducting business are rendered useless by an entry thereon, and it becomes necessary to reconstruct them, and thereby the expense of doing business is increased and the profits are diminished by waste, all these matters may be proven as descriptive of the injury sustained and as affecting the market value of the lease, but not as specific items of damage." See ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 156 (1936), for discussion of other instances where income might be an acceptable measure of market value.