Supreme Judicial Court of Massachusetts, Middlesex.
Rubin v Arlington 327 Mass. 382 (1951) 99 N.E.2d 30

The petitioner had a verdict assessing her damage caused by the taking of her land for "public improvement" by the town of Arlington. Her exception to the exclusion of certain testimony offered by her as to the value of the land is before us. The taking was made on July 15, 1946. The land had been purchased by Robert P. Cable, Frank Leeder, and A. Alfred Franks on January 31, 1946, subject to a first mortgage, and the title taken in the name of one Johnson, a straw. Johnson gave a second mortgage to the three purchasers "without the payment of money" and then conveyed the property to the petitioner, who was also a straw. At the trial A. Alfred Franks was called as a witness by the petitioner and was asked what, in his opinion, was the fair market value of the land on July 15, 1946. Counsel for the respondent objected "on the ground that the witness was not the owner and was not qualified as an expert to express an opinion." The judge excluded the question, subject to the petitioner's exception. The witness had previously testified that he lived in Brookline; that he was a graduate of Massachusetts Institute of Technology; that he attended Harvard Business School for one year; that he was in the clothing business; that he was interested in the land "as a business man"; that after purchasing the land he and his associates had plans drawn "for the development of this property for business purpose"; that he "examined ... [the property] quite carefully, and considered all its capabilities and potentialities for future development"; and that he was "familiar with its characteristics."

Qua, Lummus, Spalding, WILLIAMS, Counihan
February 7, 1951.
May 9, 1951.

NOTES: In *Rubin* the court stated: “whether a witness is qualified to give an opinion as to value is a preliminary question of act to be decided by the trial judge.”

It is the contention of the petitioner that the witness although not an expert was one of the owners and as such should have been permitted to testify. In Menici v. Orton Crane & Shovel Co. 285 Mass. 499, 503, after a full discussion of the principle involved, it was stated, "The rule which permits the owner of real or personal property to testify as to its value does not rest upon the fact that he holds the legal title. The mere holding of the title to property by one who knows nothing about it and perhaps has never even seen it does not rationally and logically give him any qualification to express an opinion as to its value. Ordinarily an owner of property is actually familiar with its characteristics, has some acquaintance with its uses actual and potential and has had experience in dealing with it. It is this familiarity, knowledge and experience, not the holding of the title, which qualify him to testify as to its value." Consideration was given in the opinion to Wooley v. Fall River, 220 Mass. 584, 589, and Meyer v. Adams Express Co. 240 Mass. 94, 95, cases upon which the petitioner relies. See also Patch v. Boston, 146 Mass. 52, 57; Lincoln v. Commonwealth, 164 Mass. 368, 380; Shea v. Hudson, 165 Mass. 43; Maher v. Commonwealth, 291 Mass. 343, 348; Davenport v. Haskell, 293 Mass. 454; Ryder v. Lexington, 303 Mass. 281, 291.

Whether in the instant case the witness was sufficiently qualified by familiarity, knowledge and experience to be permitted to testify, was a preliminary question of fact to be decided by the trial judge. Flint v. Flint, 6 Allen, 34, 36-37. Nunes v. Perry, 113 Mass. 274, 276. Commonwealth v. Sturtivant, 117 Mass. 122, 137.

Perkins v. Stickney, 132 Mass. 217, 218. His decision was conclusive unless upon the evidence it was erroneous as matter of law. Commonwealth v. Sturtivant, supra. Perkins v. Stickney, supra. Ames v. New York, New Haven & Hartford Railroad, 221 Mass. 304, 306. By reason of having seen and heard the witness he was in a position to pass upon the credibility of the evidence relating to qualification. Foster v. Mackay, 7 Met. 531, 538. Biancucci v. Nigro, 247 Mass. 40, 44. There may be cases where the decision of the trial judge is plainly erroneous and must be reversed. Commonwealth v. Spencer, 212 Mass. 438, 448. See Muskeget Island Club v. Nantucket, 185 Mass. 303; Old Silver Beach Corp. v. Falmouth, 266 Mass. 224. But such cases are rare. Corrao v. Sears, Roebuck & Co. 298 Mass. 23, 26. Langis v. Danforth, 308 Mass. 508, 510. Snow v. Merchants National Bank, 309 Mass. 354, 362. In the present case there appears to have been no error in excluding the testimony. The witness possessed none of the qualifications suggested in Swan v. County of Middlesex, 101 Mass. 173, 177, where the rule was stated which permits one who is acquainted with property to give a nonexpert opinion as to its value. The witness lived in Brookline. He had no official connection with Arlington which would give him a knowledge of real estate values in that town. He had no knowledge of the prices at which similar property in the vicinity had sold. He had no general knowledge of real estate values. The evidence as to his familiarity and acquaintance with the property falls far short of that which in the cases above cited was deemed sufficient to warrant the reversal of the preliminary finding of the judge.

The petitioner also contends that, because the respondent's objections were stated to be on the grounds that the witness was not an owner and was not qualified as an expert, the exclusion of his testimony amounted to a ruling that the witness was not an owner of the land in question. We should need clearer evidence than that which is disclosed by the record to sustain this contention. As stated above, the admissibility of an owner's testimony as to the value of property does not depend upon the fact that the witness was an owner. It is not to be assumed that the judge excluded the offered testimony because of a misconception of the law since it appears that a tenable reason for its exclusion existed. The judge was not bound by the grounds stated by objecting counsel. See Wigmore on Evidence (3d ed.) § 18, page 342. On appeal his exclusion of the testimony is to be sustained if it can be supported on any legal ground. Bristol v. Noyes, 106 Vt. 418, 422. Eschbach v. Hurtt, 47 Md. 61, 66. Eckman v. Funderburg, 183 Ind. 208, 210.

Exceptions overruled.