NOTE

VALUATION IN EMINENT DOMAIN PROCEEDINGS IN PENNSYLVANIA

Construction and expansion of complex interstate highway systems to accommodate ever-increasing automotive transportation necessitates appropriation of private property to an extent unparalleled in history, and equalled only by the volume of litigation it occasions. One may well wonder why the seemingly simple condemnation proceeding should be so productive of lawsuits. Given a body duly constituted and authorized to exercise the power of eminent domain for a recognized public purpose[1] in accordance with procedures set forth by statute, why does the process of "taking" so often result in resort to the courts by the condemnor and the condemnee? The answer lies in the desire of the latter, heightened by a natural resistance to the peremptory nature of the taking, to maximize his compensation and a determination, on the part of the appropriator, to pay no more than the property is worth. The amount of damages, then, provides the usual basis for disagreement, and the controversy normally centers about a misunderstanding of the elements of damage or of the procedures through which these elements are translated into value. This Note will attempt, for pedagogical purposes, a separation of inseparables—specifically, an examination of the elements, or objects, of compensation inherent in a taking in Pennsylvania by eminent domain to the exclusion of procedure, except where given procedures tend to affect materially (or even frustrate) the ascertainment of value.

Our concern will be only with the situation where the Commonwealth or a municipal or other corporation[2] effects a taking, in whole or in part, of a

1. Property may not be appropriated by eminent domain except for a public use. This strict limitation is said to be implied from constitutional provisions prohibiting the taking of private property *for public use* without just compensation. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); PA. CONST. art. 1, § 10 ("nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured"); 2 NICHOLS, EMINENT DOMAIN §§ 7.1-.627 (1950, Supp. 1961).

The term "public use," however, has been broadened to include what might be described as a public purpose. See Belovsky v. Redevelopment Authority of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947), where a condemnation of land for resale to a private developer was sanctioned. The court noted that the purpose of the taking was the "elimination and rehabilitation of the blighted sections of our municipalities, and that purpose certainly falls within *any* conception of 'public use' . . . ." *Accord*, Schenck v. Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950).

2. Private corporations may be invested with the power of eminent domain by statute. See note 8 *infra*.

person's real property in full compliance with applicable constitutional and statutory provisions. The question whether the condemnor is liable for mere consequential injury to nearby property not the subject of a particular taking is thus eliminated.[3] However, it should be noted that, although the Commonwealth is liable only for damage directly attending a "taking" (unless it has chosen to bear greater liability[4]), all municipal and private corporations and many state agencies, in the exercise of eminent domain, bear full responsibility for property taken or injured.[5] This means that the elements to be discussed herein, though chargeable to the Commonwealth only by one who has suffered an actual taking, may be claimed as damages by anyone injured as the result of any taking when the appropriator bears the greater liability. For example, the Pennsylvania Turnpike Commission is liable for "adequate compensation . . . for damages to all public or private property taken, injured or destroyed . . . ."[6] Hence, a person injured by the appropriation of a portion of his neighbor's land by the commission may be entitled to recover for the same elements of damage, *applied to his land,*[7] as is the condemnee. The liability of a given appropriator can be determined by reference to the applicable statute.[8]

The measure of damages when an entire property is taken is the fair market value of that property at the time of the taking.[9] When only a part

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3. Article 1, Section 10 of the Pennsylvania Constitution proscribes only a *taking* without compensation, whereas Article 16, Section 8 renders "municipal and other corporations and individuals" invested with the power of eminent domain liable for just compensation for "property *taken, injured or destroyed* . . . ." (Emphasis added.) Thus, the Commonwealth bears liability only for damages for land taken, but all other condemnors are responsible for injuries as well, as in the case of "consequential" damage, that is, injury to property caused by a taking of nearby but separate property. See Pennsylvania Co. for Ins. on Lives and Granting Annuities, Trustee v. Philadelphia, 351 Pa. 214, 40 A.2d 461 (1945); Soldiers & Sailors Memorial Bridge, 308 Pa. 487, 162 Atl. 309 (1932).

4. See, *e.g.*, note 6 *infra*.

5. See note 2 *supra*.

6. PA. STAT. ANN. tit. 36, § 652.6(11) (1961).

7. One important difference between the condemnee's direct damages and neighboring landowners' consequential damages is that the latter are actionable only if peculiar to the tract purportedly injured, that is, if not common to lands similarly situated, whereas the former are compensable whether peculiar or not. See note 16 *infra*.

8. Except in the case of first and second class cities, the various Pennsylvania municipal codes contain provisions setting forth generally the right of eminent domain. See, *e.g.*, PA. STAT. ANN. tit. 16, §§ 2401-33 (1956), as amended, PA. STAT. ANN. tit. 16, § 2427 (Supp. 1961) (counties); PA. STAT. ANN. tit. 53, §§ 46401-53 (1957) (boroughs); PA. STAT. ANN. tit. 53, §§ 37801-51 (1957) (third class cities); PA. STAT. ANN. tit. 53, §§ 56901-53 (1957) (first class townships); PA. STAT. ANN. tit. 53, §§ 66001-53 (1957) (second class townships); PA. STAT. ANN. tit. 15, §§ 481-93 (1958), as amended, PA. STAT. ANN. tit. 15, §§ 484-85 (Supp. 1961) (corporations).

9. Rothenberger v. Reading City, 296 Pa. 423, 146 Atl. 104 (1929); See Lewis, *Eminent Domain in Pennsylvania*, 26 PURDON'S STATUTES 1, 32 (1958); Rollins, *The Proper Measure of Damages in a Total Taking*, 1959 INSTITUTE ON EMINENT DOMAIN 37, 43 (1959).

is taken, such as a right of way for a railroad or a highway, then the proper measure is the difference between the market value of the entire tract immediately before the taking and as unaffected by it, and its market value immediately after the appropriation and as affected by it.[10] In either situation, the question for the board of view or the jury is the same: what bargain would most likely have been struck over this unique parcel of land between a willing seller, under no compulsion to sell, and a willing purchaser, under no compulsion to buy?[11] Initially, however, the issue of whether the appropriation has been of an entire property or only of a part may assume major proportions.

In either instance, the fair market value of the land at the time of, or immediately before, the taking must be ascertained, but in the event of a whole taking this determination concludes the inquiry. When the taking has been partial, however, the value of the remaining land *after* the taking is deducted from the first figure to arrive at just compensation. It therefore becomes highly advantageous for an owner of adjacent tracts, only one of which has been appropriated entirely or partially, to establish that both tracts actually constitute but one parcel, and that the appropriation of one, or a part of one, is therefore a severance. If the owner is successful in this contention, his award presumably will include not only the value of the appropriated land but also the resultant damage to the remainder.[12] A number of Pennsylvania cases involving this question of severance establish that whether or not two or more parcels of real property will be accorded the status of a legal entity depends upon the use being exacted of each at the time of the taking. If a unity of use[13] between the tracts exists, they will be considered one for severance purposes. If the tracts are contiguous and the owner has effected no physical separation between them, little difficulty will attend a finding of unity, notwithstanding the properties may have been acquired individually.[14] However, the greater the physical separation between the tracts, the more tenuous becomes the assertion of unity. In an early case involving two parcels separated by a stream and steep ravine, one of which had been partially condemned, the Supreme Court of Pennsylvania

10. Brown v. Commonwealth, 399 Pa. 156, 159 A.2d 881 (1960); Mazur v. Commonwealth, 390 Pa. 148, 134 A.2d 669 (1957); see Lewis, *supra* note 9; 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 64 (2d ed. 1953).

11. The "willing seller—willing buyer" concept is implicit in the market value theory. In upholding the exclusion of evidence of purchase of land from a liquidating company, the Supreme Court of Pennsylvania recently suggested: "What a shipowner offers to take for a ship flying distress signals with its decks awash cannot be regarded as market value." Ward v. Commonwealth, 390 Pa. 526, 528, 136 A.2d 309, 310 (1957); see generally, Rollins, *supra* note 9.

12. See Gorgas v. Philadelphia, H. & P.R.R., 215 Pa. 501, 64 Atl. 680 (1906).

13. The "unity of use" doctrine is set forth well in Kossler v. Pittsburgh, C., C. & St. L. Ry., 208 Pa. 50, 57 Atl. 66 (1904); see Rollins, *supra* note 9; Annot., 6 A.L.R.2d 1197 (1949).

14. Ferguson v. Pittsburgh & S.R.R., 253 Pa. 581, 98 Atl. 732 (1916).

concluded that, to constitute an entity, the tracts must necessarily be "so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other."[15] The court noted the inaccessibility of each tract from the other, and the fact that the tracts had never been used jointly for any purpose. Further, concluded the court, the right of way of a railroad over one parcel could not cause injury to the other. The lower court therefore erred in charging the jury to consider the properties as one for determination of damages.[16]

In *Ferguson v. Pittsburgh & Shawmut R.R.*,[17] the supreme court was confronted with the question of unity where a railroad had condemned a right of way through a tract of land alongside the Allegheny River. Two properties contiguous to the affected tract, both rich in coal deposits, were thereby deprived of access to the river. Although the properties thus injured by the taking had not as yet been mined, the injury visited upon them through deprivation of access to natural transportation could not be disputed. The railroad contended, however, that because the tracts had been acquired by the condemnee at different times from different grantors no unity existed, and hence damages only for injury to the tract directly affected were in order. Although no coal had been extracted from the land, the court decided: "The coal under what was formerly the three separate tracts is contiguous and forms one entire body and . . . may be advantageously operated as such . . . . [T]he three contiguous properties, under one ownership, make one coal property."[18] Whether the court relied primarily on contiguity or potential use is not clear, but in either event the decision seems sound. Certainly, contiguity itself, as to lands under common ownership, seems nearly tantamount to unity; furthermore, an element shared in common by adjoining lands and conducive to common future utilization would seem to lend itself to a strong inference of unity.[19]

15. Kossler v. Pittsburgh, C., C. & St. L. Ry., *supra* note 13, at 57, 57 Atl. at 68.

16. In discussing unity and severance in Baker v. Pennsylvania R.R., 236 Pa. 479, 84 Atl. 959 (1912), the court brought out an important distinction between damages to portions of the tract taken (when unity exists) and mere consequential injury to an adjoining tract (when no unity exists). In the former situation *all* injuries are compensable, whereas consequential injury is compensable *only* if peculiar to the tract in question, that is, if not an injury common to owners of property similarly situated. The *Baker* case involved deterioration of property value resulting from smoke, noise, and dirt from a newly constructed railroad—the type of injury that is common to all properties abutting the right of way. Therefore, had the plaintiff not been able (as he was) to show that his tracts, although separated by a turnpike, were in legal contemplation one, the deterioration in value of the land not directly affected would have been *damnum absque injuria*. For this reason, a finding of unity is often crucial to recovery. *Cf.* Peterson v. Pittsburgh Public Parking Authority, 383 Pa. 383, 119 A.2d 79 (1955); *In Re* Melon St., 182 Pa. 397, 38 Atl. 482 (1897).

17. *Supra* note 14.

18. *Id.* at 592, 98 Atl. at 736.

19. This accords with the general market value formula which always takes into

Assuming that a given appropriation has caused compensable injury, one might conclude that a finding of unity among two or more adjacent parcels, one of which has been wholly or partially condemned, will always produce a greater amount of damages than would be recoverable for injury to the tract directly affected. However, as a result of one aspect of the "fair market value" rule, it cannot be said that a given appropriation will always result in *compensable* injury.

Suppose that, because of the use to which the land taken is to be put, an appropriation of a portion of a tract causes the valuation of the remaining portion to equal or exceed the "market value before" of the entire tract. The rule, articulated in 1889 by the Pennsylvania Supreme Court, is as follows: "Compensation consists in giving back an equivalent in either money, which is but the measure of value, or in actual value otherwise conferred."[20] This results from the concept that in a partial taking compensation is not for the land taken, but rather for the difference between the value of the entire tract before the taking and the value of the land remaining afterward.[21] It follows that, if no depreciation has occurred, no payment is forthcoming. This rule is qualified to the following extent: only *special* benefits (benefits peculiar to the land under consideration) accruing from the appropriation are deducted from the damages to arrive at a just award.[22] Whereas, in the instance where the condemnee has suffered an actual taking,[23] all direct damages (whether special or common to many landowners) are compensable, the reduction of the damages is allowed for only those advantages not shared by the community.

In a recent case[24] the plaintiff claimed $10,300 damages because of the acquisition by the City of Philadelphia of a portion of his estate for the installation of a sewer line. The defendant asserted that, because of proximity

account possible uses to which the land is plainly adapted, or to which it might reasonably be put. See Mazur v. Commonwealth, *supra* note 10.

20. Long v. Harrisburg Elec. Ry., 126 Pa. 143, 146, 19 Atl. 39, 40 (1889). That this view of compensation does no violence to the fifth amendment to the federal constitution was decided in Bauman v. Ross, 167 U.S. 548 (1896). See Gorgas v. Philadelphia Elec. Ry., 144 Pa. 1, 22 Atl. 715 (1891); PA. STAT. ANN. tit. 26, § 101(a) (1958) (setting forth the duty of witnesses in an eminent domain proceeding to "state in detail, and costs, all the elements of benefit or damage which they have taken into consideration in arriving at their opinion"); Bishop and Phelps, *Enhancement in Condemnation Cases*, 13 ALA. L. REV. 123 (1960).

21. This is but another way of stating the "market value before—market value after" theory applicable to partial appropriations of land.

22. See Dawson v. Pittsburgh, 159 Pa. 317, 28 Atl. 171 (1893); DRUM, THE LAW OF VIEWERS IN PENNSYLVANIA 150 (1940) ("It is the business of the viewers . . . to balance the advantages that are *special*, against the disadvantages that are *actual* . . . .") (Emphasis added).

23. As distinguished from mere consequential injury (which, as stated in note 16, *supra*, is compensable only if peculiar to the condemnee's land).

24. Simon v. Philadelphia, 23 Pa. D. & C.2d 769 (C.P. 1960).

and access to the new line, the value of plaintiff's remaining property had actually been enhanced by $7,200. Upon a finding that enhancement *at least* equalled damage, the court concluded that no depreciation had resulted, and dismissed the action. Consider, however, the same facts with but one change: the sewer easement was imposed on a small tract, separated from the remainder of the plaintiff's property. Would not the condemnee be well-advised to urge that the properties were distinct, and that no unity of use was present? Were he successful in such an assertion, it would seem, by a parity of reasoning, that any enhancement of the adjoining tract should not be deducted from his award. Assuming the validity of this reasoning, the condemnee should weigh carefully the benefits and damages to adjacent properties before drafting his cause of action.

The difficulties attending a determination of market value in eminent domain proceedings are analogous to the justifications for specific performance of contracts for the sale of real property or unique chattels. Every parcel of realty is unique—who is competent to affix a price tag? Yet, in eminent domain, the federal and state constitutions demand a determination of value, and each state provides machinery for implementing this mandate. Any evaluation or understanding of this machinery, therefore, must be conditioned by a realization of its inherent limitations and of the practical impossibility of precision in this area. No system will be foolproof, and most will leave something to be desired. Valuation in Pennsylvania is no exception.[25]

The best yardstick of market value would seem to be a recent, actual sale price for the land under consideration. Although the Pennsylvania courts excluded such evidence for years,[26] it now seems settled that the owner may be cross-examined concerning the consideration involved in a recent sale, so long as the parties were willing buyers and willing purchasers.[27] What

25. See Graubert, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36 (1954); Dempsey, *Evidence of Prices in Pennsylvania Eminent Domain Proceedings*, 63 DICK. L. REV. 5 (1958). In particular, these writers are critical of the limited scope of cross-examination of "market value" witnesses in eminent domain cases in Pennsylvania, because of the exclusionary rules regarding evidence of selling prices and tax assessments discussed herein.

26. See Graubert, *supra* note 25. One exception to this rule was that, if a witness stated on direct examination that his valuation was based on a specific price, he could be cross-examined as to that price for impeachment purposes. As a practical matter, however, no witness would ever make such a statement unless the price was such that cross-examination would strengthen his position.

27. See Kelly v. Redevelopment Authority of Allegheny County, 26 Pa. D. & C. 2d 662 (C.P. 1961), *aff'd per curiam sub nom.* Kelly v. Allegheny County Redevelopment Authority, 407 Pa. 415, 180 A.2d 39 (1962) (selling price of land six and one-half years earlier properly elicited from owner); B & K, Inc. v. Commonwealth, 398 Pa. 518, 159 A.2d 206 (1960) (selling price of land four years earlier proper subject of cross-examination); Ward v. Commonwealth, *supra* note 11 (price of purchase five years earlier from *liquidating company* properly excluded); Braughler v. Commonwealth, 388 Pa. 573, 131 A.2d 341 (1957) (evidence of purchase price three months before condemnation allowed); Berkley v. Jeannette, 373 Pa. 376, 96 A.2d 118 (1953) (dictum).

constitutes a *recent* sale, however, is not entirely clear. In *Berger v. Public Parking Authority of Pittsburgh*,[28] the supreme court stated: "[A]n owner of property may be asked what he paid for the property and similarly the price at which he offered to sell the property, *if the purchase or sale was not too remote*."[29] (Emphasis added.) The court then held that the owner's purchase of the premises three years earlier was not too remote for this purpose. However, in *Peterson v. Pittsburgh Public Parking Authority*,[30] a sale by the owner two years subsequent to the appropriation was considered "too remote in time"[31] to evidence market value immediately after the taking. One may conclude that the admissibility of this type of evidence is subject to a large measure of discretion on the part of the trial court. This seems proper, bearing in mind such factors as inequality of bargaining positions between buyer and seller, changes in market conditions, and changes in character of neighborhoods. Stated otherwise, the test should merely be one of "relevant evidentiary worth."[32]

A second possible index of market value is the general selling price of land in the neighborhood of the property condemned. This would seem a reasonable gauge, particularly in urban and suburban areas where neighboring lots and dwellings may be in substantial conformance with one another. The Pennsylvania rule is that, while viewers and witnesses should take cognizance of comparable neighborhood sales, a witness may not be asked to testify to *specific* prices, except on cross-examination for impeachment purposes, and only then after he has acknowledged, on direct examination, that his valuation is conditioned by such prices.[33] As a practical matter, however, such testimony is seldom adduced, for competent counsel cannot be expected to place the testimony of their own witnesses in jeopardy. This type of evidence would seem to have some probative value, and its exclusion has been generally criticized.[34] Indeed, the Pennsylvania Supreme Court recently conceded:

> We can appreciate the feelings possessed by many counsel who are greatly restricted by the decisions of this court [not allowing, *inter alia*, evidence of selling prices of neighboring properties] in their cross-examination of expert witnesses in this class of case; especially

28. 380 Pa. 19, 109 A.2d 709 (1954).
29. *Id.* at 22, 109 A.2d at 710.
30. *Supra* note 16.
31. *Id.* at 389, 119 A.2d at 82. Peterson's claim was for the depreciation in value of his land because of the destruction of a private easement in an alley that had been vacated.
32. Berkley v. Jeannette, *supra* note 27, at 381, 96 A.2d at 121.
33. See Berkley v. Jeannette, *supra* note 27; Westinghouse Air Brake Co. v. Pittsburgh, 316 Pa. 372, 176 Atl. 13 (1934); Pittsburgh, Va. & C.R.R. v. Rose, 74 Pa. 362 (1873); Graubert, *supra* note 25; Dempsey, *supra* note 25.
34. Graubert, *supra* note 25; Dempsey, *supra* note 25.

> when the testimony appears to be unbelievable and inexplicable. . . . Such testimony makes the opinion evidence of real estate experts in condemnation proceedings appear at times not only unreliable but ridiculous and the ascertainment and enforcement of justice very difficult.[35]

Nevertheless, this evidence continues to be disallowed.[36]

In the usual absence of specific evidence of selling price, the viewer or juror will be given other criteria to utilize in his ascertainment of market value. He may be advised that, "in estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration,"[37] or that, "the true measure of damages [is] the worth of the land condemned as a whole, taking into consideration *any use for which it [is] reasonably available*."[38] (Emphasis added.) This latter test, which ostensibly permits consideration of mere potential uses, has been referred to as the "highest and best use" doctrine.[39]

This doctrine permits the condemnee to prove not only the present use of his land but also any use to which the land is reasonably suited, or plainly adapted, as bearing on market value. Accordingly, in *Weinschenk v. Western Allegheny R.R.*,[40] wherein the premises appropriated included a spring that had never been used, the Pennsylvania Supreme Court held that the jury might properly be apprised of any uses to which the spring water could reasonably be put. This would include a showing of the volume of water available, its fitness for domestic use, and other related factors tending to enhance market value.[41]

The suitability of land for subdivision is a proper matter of inquiry;[42]

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35. Berger v. Public Parking Authority of Pittsburgh, *supra* note 28, at 28, 109 A.2d at 712, 713.

36. Likewise inadmissible is evidence of tax assessments and owners' valuations on tax returns (except arguably in the latter instance as an admission against interest), these not being considered accurate gauges of market value. Olsen & French, Inc. v. Commonwealth, 399 Pa. 266, 160 A.2d 401 (1960) (also holding that rental capacity, but not amount, is a proper element of market value); B & K, Inc. v. Commonwealth, *supra* note 27; Berger v. Public Parking Authority of Pittsburgh, *supra* note 28.

37. DRUM, *op. cit. supra* note 22, at 151. However, a witness may not break down his total figure into component values of realty and personalty, or land and buildings. He may testify only to a total figure. Peterson v. Pittsburgh Public Parking Authority, *supra* note 16, at 389, 119 A.2d at 82; Dougherty v. Allegheny County, 370 Pa. 239, 88 A.2d 73 (1952); McSorley v. Avalon Borough School Dist., 291 Pa. 252, 139 Atl. 848 (1927).

38. DRUM, *op. cit. supra* note 22, at 151.

39. See note 19 *supra*; see generally, Cromwell, *Some Elements of Damage in Condemnation*, 43 IOWA L. REV. 191, 197 (1958).

40. 233 Pa. 442, 82 Atl. 750 (1912).

41. *Id.* at 447, 82 Atl. at 752. The court also suggested that the plaintiff might show the inconvenience involved in obtaining a comparable amount of water elsewhere, had he been using the spring.

42. In Rothman v. Commonwealth, 406 Pa. 376, 178 A.2d 605 (1962), a tract of unimproved farmland was taken for highway construction. At the trial, a plan of lots

however, a tract not previously subdivided may not fancifully be allocated to a given number of imaginary lots by a witness—this might lead to multiplication of the number by an arbitrary average lot price, the result of which would in no way reflect the value of the unimproved tract to a developer.[43] This reasoning comports with the concept of market value *at the time of the taking.*

Proof of "highest and best use" should be limited only by reasonableness and foreseeability at the time of the taking. If these criteria are met, then presumably the adaptation presented is one which would probably have been contemplated by a prospective buyer, and the relationship to market value is satisfied.[44] The question of a use prohibited by the applicable zoning ordinance may arise. Applying the foregoing standards, it would seem that such an adaptation is not a proper matter of inquiry, because of probable reluctance, on the part of a purchaser, to acquire land for proscribed purposes unless a zoning change or variance seems reasonably certain.[45] The term "highest and best use" therefore seems a misnomer, the doctrine being more aptly described, perhaps, as a "reasonable and foreseeable use"[46] limitation. It has been suggested that "a property owner may expect compensation [only] for reasonable certainties inherent in the present, not for chances or future possibilities. The date of the taking remains the basic reference point."[47]

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with the proposed highway superimposed was admitted into evidence to show possible development and location of the land taken. The supreme court approved of this evidence with two important qualifications: (1) the plan had been prepared long before the taking could have been anticipated; and (2) no evidence was adduced as to the value of individual lots. Query, whether this decision must not be limited to its facts. See E. M. Kerstetter, Inc. v. Commonwealth, 404 Pa. 168, 171, 171 A.2d 163, 165 (1961) (plan of lots *and* value of nearby houses improperly admitted into evidence).

43. E. M. Kerstetter, Inc. v. Commonwealth, *supra* note 42; DRUM, *op. cit. supra* note 22, at 150-51; but *cf.* Rothman v. Commonwealth, *supra* note 42.

44. In Boom Co. v. Patterson, 98 U.S. (8 Otto) 403, 408 (1878), the United States Supreme Court declared: "[C]ompensation to the owner [in condemnation proceedings] is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

45. In 4 NICHOLS, EMINENT DOMAIN 237-38 (1962), it is said:

> [N]o evidence in support of an enhanced value may be admitted where such enhanced value would be the result of a [use proscribed by existing zoning regulations] . . . . [But where] there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value.

In Pennsylvania, a condemnee cannot obtain a variance merely to establish his right to a higher award, because the supreme court has held that such a moot, fictitious question is not justiciable. Sgarlat v. Kingston Borough Bd. of Adjustment, 407 Pa. 324, 180 A.2d 769 (1962).

46. This is precisely the classification employed by Cromwell, *supra* note 39.

47. Gilleland v. New York State Natural Gas Corp., 399 Pa. 181, 187, 159 A.2d 673, 676 (1960) (possibility of development of land for home sites too remote and speculative to affect market value).

In establishing the uses to which his land was being or might have been applied, the condemnee may wish to call to the attention of the viewers or jury particular elements, peculiar to his property, which allegedly heighten its value. Rock and mineral deposits, standing timber, profits from existing business activity, and riparian rights—these factors, in the mind of a willing buyer, would certainly enhance market value.[48] An examination of the extent to which these elements are permitted to influence a determination of fair market value in eminent domain proceedings in Pennsylvania follows.

The general rule regarding rock and mineral deposits not severed from the land applies *irrespective* of whether mines or other facilities for removal of the minerals have been established. The rule is that rocks and minerals and their location, quality, and condition may be pointed to as bearing on market value, but may not be alleged or shown as pecuniary elements.[49] For example, an owner of condemned coal property would be permitted to prove the location and quality of the coal, ease of mining, access to transportation facilities, and demand for the coal in nearby markets. But he would be denied the right to estimate the number of tons available, the current market price per ton, and the anticipated profits from a given volume of sales.[50] The latter considerations are regarded as too speculative and conjectural to relate reasonably to market value at the time of the taking. In a recent case involving the appropriation of a tract containing sand and gravel, the Pennsylvania Supreme Court declared:

> If [the owner's] fields contained diamonds and he never raised his land to take them, he could not expect to be compensated after condemnation for all of his estimated diamonds at Tiffany prices . . . . All he can get is the value of his land as affected by an idea that may appeal to the general or average buyer. . . .[51]

With respect to highway condemnations, the taking occurs when the condemnation plan is approved by the Governor and the Secretary of Highways and is filed in the Department of Highways. Lakewood Memorial Gardens, Inc., Appeal, 381 Pa. 46, 112 A.2d 135 (1955).

48. As in the case where coal land is to be appropriated for construction of a highway, the fact that the condemnor will not realize the financial possibilities of the land is immaterial. Conversely, the fact that the condemnor's activity will subsequently increase market value cannot accrue to the benefit of the condemnee. See Egan v. City of Philadelphia, 108 Pa. Super. 271, 164 Atl. 813 (1933) (fair rental value of land taken temporarily for exposition increased temporarily because of exposition).

49. Reading & Pottsville R.R. v. Balthaser, 119 Pa. 472, 13 Atl. 294 (1888) (limestone deposits); Searle v. Lackawanna & B.R.R., 33 Pa. 57 (1859) (coal deposits); see Bickley, *Compensable and Non-Compensable Damages*, 1960 INSTITUTE ON EMINENT DOMAIN 31 (1960); Annot., 156 A.L.R. 1416 (1945).

50. In Sgarlat Estate v. Commonwealth, 398 Pa. 406, 413, 158 A.2d 541, 545 (1960), *cert. denied*, 364 U.S. 817 (1960), the Pennsylvania Supreme Court noted: "The point is that various elements may be mentioned as themselves affecting value, but without giving their specific value in terms of money."

51. Sgarlat Estate v. Commonwealth, *supra* note 50, at 409, 158 A.2d at 543.

This reasoning appears sound if the owner has "never raised his land to take them," but what if the owner had operated a diamond mine for ten years, wished to show the estimated volume of rough diamonds remaining in the land, and could produce accurate profit statements for each year of business? Would not the crucial concern of a potential buyer be exactly this type of information? A similar rule obtains in the case of standing timber. Until severed, the natural stock can be considered only as bearing generally on market value.[52] In *Brown v. Commonwealth*,[53] the condemnee, whose land was highly developed as a nursery, offered as evidence itemized lists of his remaining stock and direct testimony of losses sustained by reason of the appropriation of a part of his nursery.[54] The trial court permitted the introduction of this evidence, but, on motion of the Commonwealth after a verdict, subsequently concluded that its admission had been improper and granted a new trial. The plaintiff appealed. Noting the usual "market value before and after" rule of damages, the supreme court concluded that recovery for particular items cannot be sanctioned, and accordingly affirmed the order. As in the case of minerals, this failure of the courts to distinguish between undeveloped land and land currently being exploited is open to criticism. How can the disregard of specific evidence, readily available and highly pertinent to market value, be justified? Would the prospective buyer ever disregard this information?

The foregoing rules, applicable to rocks, minerals, timber, and other elements of the realty, are determinative of the market value of resources "in place,"[55] and may be distinguished from the rules underlying valuation of elements already severed from the land at the time of the condemnation, which rules are based on the character of these elements as personalty.

When the natural resources of the land have been severed before the taking, but cannot be removed by the condemnee,[56] their value is considered

52. Brown v. Commonwealth, 399 Pa. 156, 159 A.2d 881 (1960); Savings & Trust Co. of Indiana v. Pennsylvania R.R., 229 Pa. 484, 78 Atl. 1039 (1911); see Bickley, *supra* note 49.

53. *Supra* note 52.

54. A right of way through Brown's nursery had been condemned by the Commonwealth for construction of a highway.

55. The instance of coal land condemned for a right of way for a highway presents a statutory exception to the normal procedure for ascertainment of damages. PA. STAT. ANN. tit. 52, §§ 1501-07 (1954) establishes the State Mining Commission as the sole arbiter in this situation. The Commission is authorized to require coal, underlying or adjacent to the highway, to be left in place for vertical or lateral support (§ 1501), and to determine the damages due therefore (§ 1503). Any coal not required for support is not included in the award (§ 1502), for it may be removed by the condemnee. However, when the Commonwealth appropriates the "absolute right of support" (the fee?) the Commission has no jurisdiction, and normal proceedings (appointment of viewers) are in order (§ 1506). For discussion of this statute, see Kerry v. Commonwealth, 381 Pa. 242, 113 A.2d 254 (1955); Union Collieries Co. Appeal, 345 Pa. 531, 29 A.2d 26 (1942).

56. The condemnee may fail to remove an item of personalty from his land before

apart from the market value of the land, and the measure of damages "is what the owner can get for it, less the cost of marketing it."[57] Profits, then, are of the essence in the valuation of condemned personalty. The rationalization for this distinction is that the conversion involves expenses and risks not confidently calculable, whereas the transportation and marketing costs are susceptible of ready ascertainment.[58] That is, the appropriation of personalty involves estimable loss, but, because of the uncertainties attending the conversion into personalty, to apply the "profit" measure to elements in place would amount to granting the condemnee "a share in the profits of carrying on the business without being subject to the risks or possible losses which might ensue."[59] But are the costs of conversion or extraction of the resources really less calculable than the marketing and transportation costs, assuming that the volume of resources is known?[60] Is this distinction really one of substance? It is submitted that *all* of these costs are reasonably susceptible of ascertainment, and that the exclusionary rule, in its application to resources in place, when the land has been developed, is unsound. Should a landowner who has fully developed his property as a mine, quarry, or

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the condemnation for several reasons: (1) he may be unable to do so because of the size and weight of the thing; (2) he may be unable to do so within the time remaining before the taking; or (3) he may be obliged to surrender the item because the condemnation is of the specific thing. In the first instance, the personalty is treated as part of the land, and requires no further mention. See Finn v. Providence Gas & Water Co., 99 Pa. 631 (1882) (dwelling house). This reasoning should apply to all fixtures normally treated as realty. In the second and third instances, the normal rule for valuation of personalty (see text accompanying notes 57-58 *infra*) will apply.

No allowances are made for the cost of removing (and rebuilding) items of personalty, although the fact of removal and necessity of rebuilding may be considered as elements of market value. See Perla v. Commonwealth, 392 Pa. 96, 139 A.2d 673 (1958); Butler Water Company's Petition, 338 Pa. 282, 13 A.2d 72 (1940); Westinghouse Air Brake Co. v. Pittsburgh, *supra* note 33; but see McMillin Printing Co. v. Pittsburg, C. & W.R.R., 216 Pa. 504, 65 Atl. 1091 (1907) (cost of removing machinery from leased premises allowed as distinct item of damages, both parties having agreed to this at the trial).

In Dyer v. Commonwealth, 396 Pa. 524, 152 A.2d 760 (1959), the condemnee moved a dwelling, *after* the taking, to an uncondemned portion of his land. Since the market value before the taking included the dwelling, but the value of the remaining land *immediately* after the taking did not, the jury was instructed not to consider the moving, thereby allowing the condemnee the value of a dwelling not actually taken. Held: affirmed, the state being remitted to an action of trespass or *quantum valebat!* Although this result seems absurd, the court suggested that "to hold otherwise would be to ignore well-recognized and established rules in eminent domain proceedings and would add confusion in an already complicated field of the law." *Id.* at 528, 152 A.2d at 762.

57. Lehigh Valley Coal Co. v. Wilkes-Barre & E.R.R., 187 Pa. 145, 150, 41 Atl. 37 (1898) (culm containing coal already mined); see Cole v. Ellwood Power Co., 216 Pa. 283, 65 Atl. 678 (1907) (stone severed from quarry); Bickley, *supra* note 49.

58. See Lehigh Valley Coal Co. v. Wilkes-Barre & E.R.R., *supra* note 57, at 150, 41 Atl. at 37.

59. *Ibid.*

60. The expert geologist should encounter little difficulty in ascertaining, within reasonable limits, the volume remaining in the land.

nursery be relegated to the same valuation processes[61] accorded the owner of undeveloped land? Or should the distinction between a tree standing and a tree chopped be abolished, in the interests of just compensation?

The valuation of premises devoted to commercial activity is closely analogous to the valuation of lands being exploited for minerals and timber. The only substantial difference results from the fact that, in the latter situation, the potential productivity of the undertaking to an extent inheres in the land, while in the former the ultimate success of the business depends in great measure upon the acumen and ambition of the proprietor. The valuation of commercial tracts for purposes of eminent domain in Pennsylvania is also based on fair market value. Therefore, specific items of damage (including lost profits) may not be considered by the viewers or the jury, but general factors, such as financial productivity and possible expansion, are proper subjects of concern.[62] In *Stevenson v. East Deer Township*,[63] a portion of a tract containing an office building and a brick-making plant was taken, but the taking did not encompass these structures. The condemnee asserted that continued expansion was essential to the survival of his business and that the taking rendered such expansion impossible, and adduced testimony to that effect. The supreme court held that this evidence was admissible, because these considerations would tend to diminish the value of the remaining land in the mind of a purchaser.[64]

The rule excluding specific elements of damage in the valuation of commercial properties seems of questionable validity. How can viewers or a lay jury begin to evaluate the worth of a commercial enterprise without knowledge of its profit-and-loss statement? What would be the first inquiry of an interested buyer? If the expert witness is not permitted specifically to justify his estimate of value, how can it intelligently be appraised by anyone?[65] The justification for the rule lies in the ostensibly speculative and conjectural nature of future profit predictions, yet businessmen have been accurately and reliably predicting profits for years. In any event, the uncertainty of these estimates pales when compared to the arbitrary determinations of uninformed juries.

61. This is not to suggest that the same processes will result in the same *damages* in cases of developed and undeveloped land; certainly, market value should reflect the difference. The point is that in the former situation more exacting evidence is available and should be utilized.

62. Strause & Beck v. Commonwealth, 41 Schuylkill L.R. 56 (Pa. C.P. 1944); see generally, Bickley, *supra* note 49.

63. 379 Pa. 103, 108 A.2d 815 (1954).

64. *Id.* at 108, 108 A.2d at 817.

65. In allowing condemnation damages to business property measured by loss of profits, the Supreme Court of Texas replied to the proposition that profits are speculative and conjectural as follows:

> Profits which would have been earned by an established business, absent any

The valuation of riparian land in a condemnation proceeding should present little difficulty, if the viewers or jury are adequately apprised of the nature of riparian rights. Although within the context of market value specific valuations are improper, nevertheless the rights of access to, and appropriation and use of, water are obvious elements of the market value of riparian land, and may be proven as such in an appropriate case.[66]

Thus far, the elements of valuation considered have been those which enhance the value of real property, and hence are of concern whether the taking be of a whole or merely of part of a tract. Although in the latter instance compensation is only for diminution, in either event the initial inquiry is concerned with the market value of the parcel immediately before the taking, and the effect of the element in question on that value. The next inquiry will focus upon activity of the condemnor which affects the value of land only *after* the appropriation and therefore, within the limitations of this Note,[67] arises only in partial takings, where diminution is involved. What if the tortious activity of the condemnor harms the otherwise unaffected land of the condemnee? What if the purpose for which the appropriation was made will create danger, or destroy the esthetic nature of the landscape? What if existing easements are appropriated, or fencing will be required? How do these factors relate to market value?

In determining the market value of the land immediately after, and as affected by, the taking, the evaluators may consider only the direct, immediate, necessary, and unavoidable consequences of the condemnor's activity.[68] This rule effectively eliminates the issue of negligence in condemnation proceedings. In the case of *Denniston v. Philadelphia Co.*,[69] a right of way for a gas pipe line had been imposed on the plaintiff's farm, and leakage from the

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> interference therewith, are in their very nature more or less conjectural, uncertain, and speculative, but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery.

City of La Grange v. Pieratt, 142 Tex. 23, 28, 175 S.W.2d 243, 245-46 (1943).

66. Philadelphia v. Commonwealth, 284 Pa. 225, 130 Atl. 491 (1925) ; see 5 POWELL, REAL PROPERTY §§ 710-18 (1956).

67. See note 3 *supra*. Damages resulting from the activity of the condemnor can affect the condemnee only when the taking is partial—when the market value of the land after the taking is in question. Whether or not the same elements may be actionable by nearby landowners as consequential damages (see note 80 *infra*) is not within the scope of this Note.

68. See Lizza v. Uniontown City, 345 Pa. 363, 28 A.2d 916 (1942) (damages to house from subsidence because of water in nearby sewer trenches caused by negligence, hence avoidable, and not compensable in condemnation proceeding) ; Stork v. Philadelphia, 195 Pa. 101, 45 Atl. 678 (1900) (injury to building because of demolition of adjacent structure caused by negligence and actionable only in trespass action) ; Mellor v. Philadelphia, 160 Pa. 614, 28 Atl. 991 (1894) (material diminution of ingress and egress because of street grade lowering held direct, proximate, and substantial result of condemnation and proper element of market value).

69. 161 Pa. 41, 28 Atl. 1007 (1894).

pipe had destroyed grass, crops, and a nearby spring. Noting that the verdict of the jury had undoubtedly been influenced by evidence of the leakage, the Pennsylvania Supreme Court held:

> In this case the plaintiffs were entitled to be compensated for the depreciation in the market value of their farm, due to the location and construction of the pipe line, but not for injuries caused by the negligent operation of it. In considering their claim we must not lose sight of the fact that their right to damages accrued on the location and construction of the line, and that it was in no sense enlarged or abridged by subsequent occurrences.[70]

The court reasoned that the action must be treated as having been brought and tried *before* the leakage occurred, apparently because of the market value (immediately after) rule, and concluded that possible future leakage would not be a proper element of damage "unless it appeared that such would be the natural and ordinary [necessary and unavoidable?] result of the appropriation."[71]

This reasoning certainly accords with the rule for ascertaining market value,[72] and serves to explain the inadmissibility of negligence evidence in eminent domain proceedings. For, unless the injuries are necessary and unavoidable, how could they have been anticipated at the time as of which depreciation is measured? Furthermore, this exclusion provides a measure of simplicity, in that the viewers or jurors are charged with measuring damages as of one time only and pursuant to one theory only. Whether or not this simplicity outweighs the desirability of minimizing litigation and consolidating similar causes of action is a moot question. The negligently injured condemnee must look to his action of trespass.

The exclusion of negligently caused injury from the eminent domain proceeding by no means pre-empts the area of tortious conduct. For, while negligence implies an avoidable type of conduct, there remains a form of activity, the injurious consequences of which are essentially unavoidable yet nevertheless actionable in trespass, sometimes referred to as ultrahazardous activity.[73] The question arises whether damages from non-negligent conduct may be included in the market value formula, notwithstanding the availability of a tort action. The typical situation involves blasting operations conducted by the condemnor's contractor. When the condemnee's premises are damaged as a result of the blasting, there is no question as to his right to recover in

70. *Id.* at 45, 28 Atl. at 1008.
71. *Id.* at 46, 28 Atl. at 1008.
72. *Cf.* Cromwell, *supra* note 39, at 215, 217.
73. See Federoff v. Harrison Constr. Co., 362 Pa. 181, 66 A.2d 817 (1949), wherein the Pennsylvania Supreme Court espoused the doctrine of absolute liability in a blasting situation involving damage from concussion and vibration in the absence of negligence; RESTATEMENT, TORTS § 519 (1938).

tort, irrespective of the degree of care exercised by the contractor, and without regard to the possibility of compensation by way of eminent domain.[74]

Should these considerations, however, militate against the inclusion, in the first instance, of such damages in a condemnation proceeding? Since the injuries, in the absence of negligence, are the necessary, unavoidable outcome of the act of taking, and hence qualify for inclusion in the market value formula, it would seem arbitrary to exclude them merely because of the existence of a concurrent remedy. Although no Pennsylvania authority directly supports the proposition that the remedy of trespass is not exclusive, the superior court has been presented with this thesis and has failed to refute it. The case of *Laventhol v. DiSandro Contracting Co.*[75] was a trespass action against a condemnor's contractor for injuries occasioned by non-negligent blasting. The plaintiff's premises had been damaged by vibration and concussion from the blasting, and his theory of strict liability was grounded in the "ultrahazardous activity" doctrine. The defendant urged that, as the injuries were the natural outgrowth of the process of eminent domain, they would be compensable in the condemnation proceedings, and those proceedings should be the exclusive remedy. Finding no justification for the defendant's position in the Pennsylvania Constitution,[76] the court declared: "We do not interpret the constitutional provision [regulating the exercise of eminent domain by municipalities and private corporations] to prevent a trespass action against an independent contractor where liability exists regardless of negligence. *Whether or not plaintiff could have proceeded by petition for viewers, his remedy in that respect is not exclusive.*"[77] (Emphasis added.)

Certainly the inclusion of this type of damage in the eminent domain proceeding would present no additional valuation problem for the viewers or the jury, because the damages would be but one more element determinative of market value. Since these injuries are often unavoidable, it could be said that the market value of the land immediately after the appropriation, in the mind of the prudent purchaser, would have been conditioned by the inevitability of such damage.

When a partial taking involves the destruction of easements of light,

74. Laventhol v. DiSandro Contracting Co., 173 Pa. Super. 522, 98 A.2d 422 (1953); *cf.* Bumbarger v. Walker, 193 Pa. Super. 301, 164 A.2d 144 (1960); Morrow v. Springfield Township, 2 Pa. D. & C.2d 620 (C.P. 1954).

75. *Supra* note 74.

76. The court examined Article 16, Section 8 of the Pennsylvania Constitution (see note 3 *supra*) and found nothing therein preventing such an action in tort.

77. Laventhol v. DiSandro Contracting Co., *supra* note 74, at 524, 98 A.2d at 423; but *cf.* Locust St. Subway Case, 319 Pa. 161, 179 Atl. 741 (1935), where no compensation was allowed for damage resulting from non-negligent blasting in the absence of a taking, because no common law remedy for that type of injury existed at the time (Federoff, *supra* note 73, was not decided until 1949). See note 82 *infra*.

air, or access, the consequent diminution of market value is cognizable in eminent domain.[78] However, loss of business the result of diversion of traffic has been held not compensable because not directly related to the taking.[79] Although questionable, the rationale seems to be that the loss of business results directly from the construction of a new road, and is "too far removed" from the *appropriation* of property *for that road* for the requisite causal connection to exist.[80] Also, privileges in the nature of property, not enjoyed as of right, are not compensable—this includes licenses and encroachments.[81]

Several elements which presumably would not support a damage claim in the absence of a taking (that is, as consequential damages) may nevertheless be allowed to influence a determination of market value.[82] In *Reed v. Duquesne Light Co.*,[83] the defendant had appropriated an easement for a high-voltage electric wire. The condemnee asserted that the possibility of danger and injury occasioned by the presence of the wire should be considered by the jury as an element of damage. The court concluded that such possibilities could not be specific elements of injury, but observed that, if the danger would tend to create sales resistance in a prospective purchaser, such factor might be brought to the attention of the jury.[84] This distinction

78. Peterson v. Pittsburgh Public Parking Authority, 383 Pa. 383, 119 A.2d 79 (1955) (compensation to landowner deprived of private easement by vacation of alley); Chambersburg Mfg. Co. v. Cumberland Valley R.R., 240 Pa. 519, 87 Atl. 968 (1913) (dictum) (destruction of an easement appurtenant to land constitutes a taking of that land and, as such, is compensable in eminent domain); Myers' Petition, 39 Pa. D. & C. 712, 714 (C.P. 1940) ("it is well settled that a private easement or a right of way is property in the constitutional sense, and that when one parcel of land is subject to an easement in favor of another, and the former or servient tenement is taken for or devoted to public use which destroys or impairs the enjoyment of the easement, the owner of the latter or dominant tenement is entitled to compensation"); *cf.* Soldiers & Sailors Memorial Bridge, 308 Pa. 487, 162 Atl. 309 (1932) (dictum) (easements of light, air, and access compensable as consequential damages).

79. See Tenbart v. Commonwealth, 345 Pa. 528, 29 A.2d 22 (1942).

80. *Id.* at 530, 29 A.2d at 23; Johnson's Petition, 344 Pa. 5, 10, 23 A.2d 880, 882 (1942) ("Here the diversion of traffic was not due to the taking of appellee's land, but was occasioned by the laying out of a new road which attracted the public. . . . In any event, the consequences here were too far removed from the taking . . . .").

81. Vanderwerff v. Consumers Gas Co., 41 Berks L.J. 199 (Pa. C.P. 1949) (permissive easement held not compensable); Leach v. Philadelphia, H. & P.R.R., 258 Pa. 518, 102 Atl. 174 (1917) (removal of encroachment could be ordered without compensation; so also, no compensation when encroachment destroyed).

82. One claiming an "injury" under Article 16, Section 8 of the Pennsylvania Constitution, that is, consequential damage resulting merely from a taking of nearby, separate property, must overcome two obstacles: (1) he must show damage peculiar to his land (see note 16 *supra*); and (2) he must show that his injury constitutes "such a legal wrong as would be the subject of an action for damages at common law." Pennsylvania Co. for Ins. on Lives and Granting Annuities, Trustee v. Philadelphia, 351 Pa. 214, 40 A.2d 461 (1945). The diminution in market value of a tract which has actually suffered a partial taking, however, may be proved by pointing out elements which do not meet these criteria.

83. 104 Pitt. L.J. 474 (Pa. C.P. 1956).

84. *Id.* at 479. In Weinschenk v. Western Allegheny R.R., *supra* note 40, the su-

would seem to imply a requirement of reasonableness—if the fear of injury is reasonable, a buyer might be deterred by it—and, so qualified, the element would bear a substantial relation to market value.[85]

If the nature of the activity for which the land was appropriated will be such that fencing of the unaffected portion becomes necessary, evidence of this necessity may be adduced on the question of market value. Consistent with the market value formula, the Pennsylvania Supreme Court recently held that "the fact of fencing would [be] competent evidence, but not the cost. . . ."[86]

Closely related to the elements of danger and fencing is the fact of impairment of esthetics resulting from the condemnation. If the object of the appropriation will be an unsightly or offensive structure, it might plausibly be contended that the resultant diminution of market value is an obvious by-product of the taking, and hence a proper consideration for the evaluators. There are no Pennsylvania cases in point, but the result would seem to follow from the concept of market value. In terms of depreciated value, certainly this type of injury is as tangible as any other.[87]

Each of the aforementioned elements constitutes a proper component of market value, because the value of each item in the "bundle of rights" inherent in ownership would presumably be contemplated and evaluated by a prudent purchaser. The situation may arise, however, where the purchaser would attach no value whatsoever to one or more of the normal incidents of ownership because of restrictions on the use of the land in question. In such a case the market value of the premises may be unusually low, yet the value to the condemnee may be high. Such a case was *In Re Appropriation of Easement for Highway Purposes*,[88] decided by the Supreme Court of Ohio in 1959.

As the name of the case suggests, the State of Ohio had taken land from the plaintiff for a highway. The unique feature of the land was that its use was restricted by covenants to the maintenance of a children's home, and the plaintiff had operated such a home there for some time. The defendant argued that recovery should be limited to the market value of the land taken as restricted, that is, whatever the plaintiff could hope to realize in a sale of the property, as limited in use. To grant more, it was suggested, would be to allow the condemnee a windfall. In rejecting this argument,

preme court, noting that the jury should consider any burden cast upon the land by the presence of a railroad, included *danger in crossing the railroad* as a proper element of consideration.

85. The relation of fear and danger of injury to market value is discussed by Cromwell, *supra* note 39, at 205.

86. E. M. Kerstetter, Inc. v. Commonwealth, *supra* note 42, at 173, 171 A.2d at 165.

87. See Cromwell, *supra* note 39, at 224.

88. 169 Ohio St. 291, 159 N.E.2d 612 (1959).

the court, disposed to view the land in the context of its value to the condemnor, noted that "it does *not* seem *consistent with justice to estimate* the *value to the owner upon* the *footing of its irrevocable appropriation to . . . purposes from which it has been already withdrawn.*"[89] The alleged windfall, suggested the court, would not exceed the cost of acquiring similar property in the open market, which the plaintiff would be constrained to do. In this instance, although the market value formula was repudiated, substantial justice seems to have been accomplished.[90] The problem has not arisen in Pennsylvania.

The elements of valuation specifically adverted to in this Note by no means constitute a comprehensive compilation. As previously suggested, "everything which gives [the land] intrinsic value is a proper element for consideration"[91] in eminent domain; hence, in a given proceeding, everything germane to a proper valuation of a particular property may (and should) be pointed to. The only limitation, which has manifested itself again and again in this study, is that the evidence of value must be in general terms rather than in figures. This limitation has been viewed by some as destructive of the entire process,[92] because of the extreme disparity between the testimony of experts and the inability of the lay jury to assess market value with no concrete evidence other than the experts' final estimates.

In a recent case involving appropriation of an acre of cemetery property, experts for the plaintiff estimated the value of the land at $300,000 to $400,000 while the defendant's experts ranged from $11,000 to $15,000. The lower court set aside a verdict of $23,968, reasoning that no intelligent valuation could have been made on the basis of the expert testimony. In reversing and reinstating the verdict of the jury, the Pennsylvania Supreme Court stated: "It is the rule, rather than the exception, that in eminent domain proceedings the opinions of the experts, as well as the parties, are quite divergent on the questions of value and loss. . . . In the instant case, the elements of damage were ably and clearly presented to the jury. . . ."[93]

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89. *Id.* at 299, 159 N.E.2d at 618.

90. See Annot., 75 A.L.R.2d 1382 (1961).

91. DRUM, THE LAW OF VIEWERS IN PENNSYLVANIA 151 (1940).

92. "At present, the trial of eminent domain cases in Pennsylvania as well as in other states is like a puppet show. The lawyers, the expert witnesses and the judge know that all the testimony is unimportant except the answers of the experts to the question 'What, in your opinion, was the fair market value of the property at the time of condemnation?' Usually, the jury takes the amount of plaintiff's expert and that of defendant's expert and divides by two." Graubert, *Theory Versus Practice in the Trial of Condemnation Cases*, 26 PA. B.A.Q. 36, 49 (1954).

93. St. Clair Cemetery Ass'n v. Commonwealth, 390 Pa. 405, 407, 136 A.2d 85, 86 (1957). But see Vaughan v. Commonwealth, 407 Pa. 189, 180 A.2d 12 (1962), involving an unimproved lot which had been previously purchased by the condemnee at a tax sale for $300. An award by a board of view of $700 was appealed, and at the trial the condemnee's experts testified to values of $89,900, $83,650 and $68,200! The jury awarded

It has also been suggested that impartial experts be assigned for trials in condemnation cases.[94]

On the other hand, perhaps these criticisms go to the heart of our adversary system. Should not each party be allowed to present his theory of market value? And if market value is a valid criterion, would not evidence of the *specific* cost of each element thereof tend to distort and frustrate this determination? Perhaps the generalized value evidence to which expert witnesses are limited is desirable because of its simplicity and appeal to common experience. An analogy to "reasonable care under the circumstances" might be appropriate. Too much specificity in an instruction in this area is often fatal, because the "feeling" of the juror should not be fettered by too many technicalities. This "feeling" is accorded great esteem in our system of justice, and thoughtful analysis should precede any attempt to effect a substitution in eminent domain proceedings.

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$25,000, and the supreme court, in reversing and remanding, suggested that, although the jury's verdict will not be disturbed in the absence of a manifest abuse of discretion, "the disparity between the award of a board of view and the verdict of a jury is an important circumstance to be considered . . . . Such disparity without explanation is unconscionable." *Id.* at 192, 180 A.2d at 13.

94. See Graubert, *supra* note 92, at 50.