The Measure of Compensation in Eminent Domain

Charles T. McCormick
THE MEASURE OF COMPENSATION IN EMINENT DOMAIN†

By CHARLES T. McCORMICK*

1. The Value of the Property Actually Taken: Improvements: Value to the Taker

The principal item of the “just compensation” which is required to be made when property is taken for public use is the value of the property actually taken. In case of land, this must include, of course, the value of all buildings, improvements, trees and unmatured crops. Fair market value of the land for its highest and best available use is said to be the measure of compensation. Consequently, while estimates directly of the value of the property for any particular use are sometimes held to be incompetent, yet evidence of the different advantageous uses to which the property is adapted in its present condition is admissible, and likewise any use to which the property might be put in the future ought to be considered, if such use is sufficiently practical and probable as to be likely to influence the price which a

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†This article will appear as one of the chapters in an elementary text book on Damages to be published by West Publishing Co., St. Paul, Minn. Valuable assistance in collecting the decisions and other material used in preparation of the article was furnished by Mr. W. S. Perlroth.

3 Weiser Valley Land & Water Co. v. Ryan, (C.C.A. 9th Cir. 1911) 190 Fed. 417, 422.
4 Wassenich v. City and County of Denver, (1920) 67 Colo. 456, 186 Pac. 533.
present purchaser would give for it. Thus, if farm land on the borders of a city is to be valued, the fact that it could be profitably subdivided into lots seems competent. But remote and speculative possibilities cannot be regarded.

A vexed and unsettled question which often arises, and which cuts deep into problems of fundamental policy relating to the purpose and the extent of the law's protection of the claims and interests of property-owners, is the question of how far the special fitness for public use of the property taken shall be considered in arriving at the value of the property. In determining the "fair market value" of the land shall the tribunal assume that the "market" of hypothetical possible purchasers does or does not include the following: (1) purchasers who, before the present improvement was legally launched, were influenced by the possibility that the property might in future be needed or condemned for the present purpose; for example, for a railway, street, reservoir or water-power development? (2) purchasers who are influenced by the fact that the present project has actually been undertaken, and that the land will probably or necessarily be taken in eminent domain? (3) the present condemnor who seeks to take the land by eminent domain? Ultimately, the question seems to be: ought the owner to be compensated specially because his property is specially suitable to be used for a "public" purpose? So far as the property

5 Ranck v. Cedar Rapids, (1907) 134 Ia. 563, 111 N. W. 1027, 1028 ("all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale and all other facts which would naturally influence a person of ordinary prudence desiring to purchase").

6 Chicago, D. & C. R. Co. v. Simons, (1918) 200 Mich. 76, 166 N. W. 960; 20 C. J. 774 n. 90. Similarly, the fact that a house now used as a family residence is suitable for conversion into an apartment building, Bonaparte v. City of Baltimore, (1917) 131 Md. 80, Atl. 594. But the owner's intentions, as such, with respect to future use are immaterial. Board of Education v. Heywood Mfg. Co., (1923) 154 Minn. 486, 192 N. W. 102. Compare In re Inwood Hill Park, (1930) 230 App. Div. 41, 243 N. Y. S. 63, order of reversal affirmed, (1931) 256 N. Y. 556, 177 N. E. 138. In that case a vacant suburban tract was sought to be condemned for park purposes. The owner offered in evidence a plan, prepared for purposes of the trial, under which the tract would be developed for apartment house sites. There was testimony that this was the most profitable use to which the land could be devoted. The plan could only be effectuated if approved by the City (the condemnor) to which it had never been submitted, but such approval was unlikely. The trial court's exclusion of the plan was held erroneous. The decision is criticised in a comment in (1931) 40 Yale L. J. 308 as opening the door to speculative possibilities of future enhancement.


8 The decisions on the question are collected in Decennial & Current Digests, Eminent Domain, sec. 134, 20 C. J. sec. 232.
may be used by the owner himself or by others, for this purpose, without exercising the power of eminent domain, this value seems one which should be paid for. However, in many cases, this power of eminent domain is essential to the utilization of the owner's property for the purpose for which it is sought to be condemned. Thus, a water reservoir site could ordinarily be devoted to this use only if the right to lay conduits to a city could be compulsorily taken. A pass in the hills suitable for the laying of a railway track could ordinarily be so used only by one who could condemn a right-of-way to points beyond. Shall the fact that possible buyers know that "just compensation" must be made if the land, strategically situated for public use, is taken in eminent domain, be allowed to enhance the measure of that "just compensation," in cases where the owner, if no eminent domain proceedings were possible, could use his land only for pasture or farm? So far as this attitude of willingness to pay more is prompted by the anticipation that a jury or commissioners in condemnation would award more than the law warrants, the resulting "value," though genuine, should of course not be paid for. But the question remains what compensation is, or should be warranted by law, where the land-owner, due to the strategic location of his

9This seems to be the basis for the decision in Boom Co. v. Patterson, (1878) 98 U. S. 403, 25 L. Ed. 206, which involved the valuation of three islands in the Mississippi which were taken in eminent domain by a company which was erecting a log-boom. The court said: "The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. We do not understand that all persons except the plaintiff in error were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use."

10The courts found that because of the scattered ownership of other necessary lands, the power of eminent domain was essential to the utilization of the owner's property for reservoir purposes in the following cases: McGovern v. N. Y., (1913) 229 U. S. 363, 372, 33 Sup. Ct. 876, 877, 57 L. Ed. 1228, 1232; New York v. Sage, (1915) 239 U. S. 57, 61, 36 Sup. Ct. 25, 60 L. Ed. 143; Medina Valley Irr. Co. v. Seckatz, (C.C.A. 5th Cir. 1916) 237 Fed. 805.

11Compare the following language in the Minnesota Rate Cases, (1913) 230 U. S. 352, 451, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N.S.) 1151, Ann. Cas. 1916A 18 (quoted by Hale, (1931) 31 Col. L. Rev. 11): "It is impossible to assume in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value."
property, is in a position to demand and to receive, in a process of bargaining, from the present taker an amount greater than any purchaser would be willing to pay for the land for any other than the "public" use for which it is being taken, and which no purchaser could effectively utilize for this "public" purpose except through the aid of the governmental power to "take" by condemnation? If the land is essential, the maximum that the taker would be willing to pay, if he had to, would be the largest amount which would just stop short of rendering it more profitable to abandon the whole enterprise than to pay; if not essential, then the cost of other land which could be used as a substitute. In either event, this may be greatly in excess of any price which the owner could secure for the land from purchasers for private uses, and in extreme cases would give him the advantages of a partnership in a public utility enterprise without any corresponding risk. The minimum price which the seller would be willing to take would be the best price which he could secure from other purchasers not armed with the power of eminent domain.

A leading case in the English Privy Council involves the expropriation, for purposes of an electric power development, of certain islands in the rapids of the St. Lawrence River. The islands were advantageous but not essential to the project. The islands were first valued by arbitrators, who fixed the value at the bare amounts for which the islands could be sold for agricultural use. The lower court set this aside, and awarded sums which seemed to be based upon the "value to the taker;" that is, the maximum sums which the taker could afford to pay for the islands. On appeal, the Privy Council held that neither of these awards was sustainable, but that the owner should be given such sum as he could probably have secured for the islands, in the light of the situation as it existed before the present taker acquired the right to take the property; that is, ignoring the present necessities of the taker, but considering the enhancement which would come from the expectation that the islands might probably

12This was pointed out in Gilmore v. Central Maine Power Co., (1929) 127 Me. 522, 145 Atl. 137, 138 (valuation of land overflowed by hydro-electric dam; value of the flowed land "for water power purposes," held, not the proper criterion. "This theory, if adopted, would make the owner of any land flowed in a hydro-electric development a quasi partner, entitled to share in the value of the entire development without sharing in the burden of its cost or the risk of its failure.")

be needed for such an enterprise. This position represents a compromise of the opposing contentions. The decision was followed in England by a statute which in cases of property taken by governmental agencies, as distinguished from privately owned public utilities, decisively settles the matter by denying any recognition to claims for "special value." 14

In the United States the decisions seem to warrant the following conclusions:

1. That the compensation to be paid the owner is not measured by the value of the property to the taker. 15 That is, the owner is not entitled to a proportionate share of the value of the completed enterprise fixed by the degree to which his property contributes to its success, nor to the amount which the taker would pay for his property rather than abandon the enterprise. 16 It is to be valued as of the time of the taking, but on the imaginary supposition that the market has not been affected by the fact that the particular development has been undertaken. 17

2. The owner is, however, entitled to the highest value which he could secure for his property in the market, including any increase in value which would result from the probability that, if the present taker's enterprise had not been launched, other purchasers would give more for the land by reason of their expectation that because of its stratetic situation it might be used in a similar development. 18

14(1919) 9 & 10 Geo. V, ch. 57, sec. 2 (3): "The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any government Department or any local or public authority. . . ."


3. By what is probably the prevailing view, this enhancement of value by reason of the special fitness of the land for the public use cannot be considered where it would be impracticable to utilize the property for this purpose, except by the exercise of the power of eminent domain to secure other tracts necessary to complete the development. Whether it would be impracticable is frequently a difficult and speculative question, and the appellate courts frequently assume an answer one way or the other without disclosure of the basis for the assumption.

A recent writer points out, in a learned and illuminating article, in which both the legal and the economic considerations are thoroughiy canvassed, that the whole question of the extent to which "strategic" value should be paid for in eminent domain involves a weighing of the conflicting interests of the land-owner on the one side and of the tax-paying or rate-paying public, on the other. He concludes that the results reached by our courts, whereby "strategic" values, if they are such as would attract other purchasers, must be paid for by the taker, are consistent with our general economic practice with respect to the protection of property values without regard to whether they are created by socially

19 The federal cases cited in n. 11, supra, lend support to this view.

20 If there is conflict in the evidence as to practicability then the issue is for the jury. Ford Hydro-Electric Co. v. Neely, (C.C.A. 7th Cir. 1926) 13 F. (2d) 361 (semble). But in the absence of evidence on the question, should practicability be presumed, and evidence of special utility be admitted? The court in City of Stockton v. Ellingwood, (1929) 96 Cal. App. 708, 275 Pac. 228, seems to say yes, but in Medina Valley Irrigation Co. v. Seckatz, (C.C.A. 5th Cir. 1917) 237 Fed. 805 the court seem to place the burden upon the proponent of such evidence.


22 Hale, Value to the Taker in Condemnation, (1931) 31 Col. L. Rev. 1.

23 Where property is taken by a tax-levying governmental body, such as the state, a city, or a drainage district, the holding that "strategic" value for the taker's purposes need not be paid for is reasonably sure to entitle to the benefit of the tax-payers. On the other hand, where the property has been taken by a hydro-electric power company or by a railroad, which are operated for the profit of the stockholders, the effectiveness of present governmental control of rates is not such as to furnish any guaranty that the saving will be reflected in the rates. The company would not be limited to the amount actually paid for the property under the condemnation award, but could demand that it be valued for rate-making purposes as part of the going concern. This consideration, though not mentioned, may well influence some courts to be more liberal in awarding special-use value in cases involving such projects as privately owned power plants and irrigation dams, than in cases involving such publicly owned conveniences as parks and streets. Supposedly it must have been influential in shaping the English statute (supra. n. 14) which denies compensation for value to the taker, only when the taking is by a governmental body.
useful efforts. If in this instance the enhancement in market value is to be denied recognition as a basis for compensation, because it is due solely to public needs and not to any efforts on the owner's part, it should be done by the legislature, as in England. He suggests, on the other hand, that where the land has a special value to the taker by reason of improvements which have been placed upon the land by the present owner, as where an abandoned canal embankment is adapted to be used by a railway, this value, contributed not by nature but by the owner's efforts, should be paid for, to the extent of its cost, by the condemnor so far as it is benefited.\textsuperscript{24}

2. Special Value to the Owner of Land Taken, and Diminution in Value of Land Retained

If the owner has improved his land as a farm, or has placed a store-building or apartment house upon it, obviously these improvements are proper to be considered as affecting the amount which a purchaser would be willing to pay for it; that is, as affecting its market value. The ordinary standard of market value, where the whole tract is taken, is usually adequate in such cases. But that standard—always a rather speculative and theoretical one as regards land—becomes even more tenuous where the land taken has been devoted by the owner to uses which are non-commercial or so highly specialized that such property is only very rarely the subject of sale. Consequently, the problem

\textsuperscript{24}The value for railway purposes of an abandoned canal site was held to be a proper element to be considered. Matter of N. Y. Lackawanna & W. R. Co., (1882) 27 Hun (N.Y.) 116; See 20 C. J. 779, n. 8. Similarly, the value to the taker of the graded roadbed of a railway constructed while the land was leased by the condemnor was held to require consideration in Charles v. Big Sandy & C. R. R. Co., (1925) 142 Va. 512, 129 S. E. 284. It appeared, however, that the railway would have been valuable for the landowner's uses also. In the recent case of Davenport v. Franklin County, (1931) 277 Mass. 89, 177 N. E. 838 the abandoned site of an old interurban railway was acquired by the county for a highway. The owner, who had bought the roadbed from the receiver of the railway properties, proved in the condemnation proceedings that the strip ran over a hillside and a swamp, and that the hill had been cut through for the roadbed, and the soil thus removed was used to fill in the swamp. The court held that the obvious value for highway purposes of this cut and fill were not compensable, since they neither enhanced the usability of the land to the owner, nor increased its marketability to persons other than the condemnor. Perhaps this result may be reconciled with the view that special value to taker should be paid for when it has been added by the owner's labor or expenditure, upon the ground that here it was the former owner and not the present one that had improved the land.
of compensation is a special one where property is sought to be
condemned which is devoted to such uses as a cemetery, a church,
a college, a club-house, or a railway or steamship terminal. In
those cases the value to the owner must be generalized in terms of
what a hypothetical purchaser (a cemetery association, a church,
a college, etc.) having the same needs as the present owner would
be willing to pay if such a special purchaser could be found.\footnote{As examples of such cases, see the following: First Parish in Woburn v. Middlesex County, (1856) 73 Mass. 106 (church); Idaho Western R. Co. v. Columbia Conference, (1911) 20 Idaho 568, 119 Pac. 60, 38 L. R. A. (N.S.) 497 (college campus); Sanitary District v. Pittsburgh, Ft. W. & C. R. Co., (1905) 216 Ill. 575, 75 N. E. 248 (railroad terminal); Re Canadian S. S. Lines, Ltd. & Toronto Term. R. Co., (1930) 4 Dom. L. R. 626 (ship terminals).}

In still another aspect, the value of the land taken to the owner
may be far greater than its ordinary market value. Usually the
taker does not require all of the owner's land, but only a strip
or part. This strip may be a vital and strategic part of a farm, a
factory-site, a base-ball park, or a warehouse. Obviously, the
owner values it, not as an isolated parcel, but as an integral part
of his whole property. It may have a value to him far greater
than to any ordinary purchaser. Usually, in fact, the strip taken
would, because of its very shape, have no market value, considered
alone, in the sense of having any general appeal to any large group
of potential buyers, and would not be usable at all except as part
of the particular type of public improvement contemplated, such
as a street, railroad, or drainage ditch. A recent Kentucky case\footnote{Producers' Wood Preserving Co. v. Commissioners, (1928) 227 Ky. 159, 12 S. W. (2d) 292.} offers a concrete illustration. A plant for creosoting railroad ties
and other timbers was situated on a tract of one hundred and
seventy acres on the outskirts of Louisville. A large area was
needed for drying the timbers. Only two units of the plant had
been installed, and two additional units were planned. To make
this possible, seventy acres of the tract were reserved at the out-
set for expansion. For the time being, this was used as a golf
course. The average cost of the tract as a whole, including the
cost of grading and drainage, was about nine hundred dollars per
acre. The entire plant with improvements was worth one million,
five hundred thousand dollars. The public authority now pro-
cceeds to condemn a strip across the tract about two hundred feet
wide and about nine acres in extent, following the former course
of a small stream, for an open sewer. The strip separates the
main plant from the area reserved for expansion. To connect the separated parts of the tract with the necessary bridges will cost one hundred thousand dollars, and even with this done, the use of the whole tract as a unit will be rendered less convenient by the presence of the ditch. It is apparent in this situation that the "value to the owner" of this strip—what he would give for it if he unexpectedly discovered that his supposed title to it had failed—is far greater than its value for sale independently to the ordinary purchaser of suburban acreage. Market value in that sense would not justly compensate the owner for the strip taken. In these situations, while the courts frequently cling to the phraseology of "market value of the land taken," they use the term with a special meaning. Their aim seems to be to give as compensation for the strip a fair share of the market value of the entire tract apportioned according to the strategic importance and fractional area of the strip. This shades into an allowance of the damage to the entire tract by the taking; that is, of the difference between the market value of the whole tract before, and its market value after the taking. This last formula seems to be practically universally approved by the courts for use in cases where a part is

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27The blending of the formulas, market value of the land taken, proportionate value as part of the entire tract, and loss in value of the entire tract by the taking is interestingly seen in the following instructions which were ordered to be given to the jury, in the case cited in the next preceding note: "You are therefore to consider the fair market value of the tract of 9.3 acres taken in relation to the entire 170 acres of which the said tract was a part, and as it was before it was known or understood that the channel was to be constructed over and through this property, taking into consideration all the purposes for which you may believe from the evidence this 170 acres was adapted. You are further to consider the damage, if any, to the remaining 160.7 acres, after these 9.3 acres are taken, and prudently used for the purposes taken, the shape of the pieces left, their condition, connection with and relation to each other, and the added burden, if any, of erecting and thereafter maintaining any bridges or other improvements that you may find from the evidence will, after and because of the taking be reasonably necessary to afford the defendant such reasonable use and enjoyment of its property as was had before the taking; and considering these things, you will award the defendant such a sum as you may believe from the evidence is the fair and reasonable market value of the 9.3 acres taken, and in addition, such sum as will reasonably compensate defendant for the damage, if any, done to the 160.7 acres remaining. The entire amount of your finding should not exceed the difference between the actual fair market value of the entire tract of 170 acres immediately before it was known or understood that the channel was to be constructed over and through the land of the defendant, and the fair market value of what is left immediately after the taking."

28United States v. Grizzard, (1910) 219 U. S. 180, 31 Sup. Ct. 162, 55 L. Ed. 165, 31 L. R. A. (N.S.) 1135 (part of farm permanently flooded, cutting off rest of farm from access to the highway; owner entitled to recover not merely the separate value of the flooded land, but the diminution
taken from a larger tract, best usable or salable as a unit.29 It is a useful and understandable method of stating to juries or commissioners what is often a complex and difficult problem of compensation. Of course, none of these formulas can furnish universal or automatic solutions to the widely varying and infinitely complex questions of apportionment and appraisal raised in these cases of partial takings. They inescapably require the use of individual judgment, experience, and discretion in the application of the formulas to the particular case. Those states which delegate this function to juries secure tolerable results only by virtue of the measure of control exerted by trial and appellate courts.

3. The Valuation of Limited Interests

The ownership of land is for ordinary purposes looked upon as a simple and single property right. For other purposes, how-

29Since the standard by which the effect on a large tract is considered usually yields more generous damages than a formula which confines attention solely to the value of the parcel taken, disputes occur as to when the other nearby lands of the owner are to be deemed part of the same tract. Where an owner had three adjoining farms, separately used and improved, one of which was taken in its entirety, the compensation was confined to the value of the farm taken. Sharp v. United States, (1903) 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211. But the fact that the owner has platted the tract into lots and blocks does not prevent the entire tract from being regarded as a unit. Alabama Central R. C. v. Musgrove, (1910) 169 Ala. 424, 53 So. 1009. If used as one body of land, it is immaterial that it is traversed by roads. St. Louis M. & S. E. R. Co. v. Drummond Co., (1907) 205 Mo. 167, 103 S. W. 977, 120 Am. St. Rep. 724. Or that a mining property is crossed by a railroad. Missouri, K. & N. W. R. Co. v. Schmuck, (1906) 79 Kan. 545, 100 Pac. 282. A building, constructed and used as a unit, is to be so considered, in assessing damages for the construction of an elevated railroad, though the building also has another frontage on another street. Bischoff v. N. Y. El. R. Co., (1893) 138 N. Y. 257, 33 N. E. 1073. See Decennial & Current Digests, Eminent Domain, sec. 137.
ever, it is convenient to think of the various component parts of 
this thing we call ownership. When ownership of a piece of land 
is complete and unincumbered, it includes a great host of interests 
and advantages which the owner may enjoy under the protection 
of the courts. It includes the privileges of occupying and using 
the land in all conceivable ways which are not hurtful to others, 
the right to have other people refrain from trespassing on the land 
and from inflicting nuisance upon the occupants, and the power 
to sell, lease, mortgage, or otherwise transfer various of these in-
terests and advantages.\textsuperscript{30} In previous sections we have been dis-
cussing compensation for the taking of the owner's land upon the 
provisional assumptions that the owner's ownership was as com-
plete as the law recognizes, that is, an unincumbered fee simple in 
possession, and that the taking was equally complete, that is, a 
vesting in the condemnor of all of the owner's title. As often as 
not, however, the entirety of interests and advantages constitut-
ing "title" to the land condemned may be parcelled out among 
various holders, and likewise the taking may be only of some one 
privilege such as a right of way. Naturally, this complicates the 
problem of measuring compensation, since a given holder can of 
course demand payment only to the extent of his interest, and 
then only to the extent to which that interest has been lessened 
by the taking.

Usually the statutes provide that all the persons having inter-
ests which will be affected by the taking shall be made parties to 
the proceeding, and compensation is to be assessed as a whole, 
with distribution among the various claimants to be made when 
their respective interests have been ascertained.\textsuperscript{31} However, the 
claims of particular claimants of partial interests are frequently 
isolated by the fact that other holders of interests have settled with 
the condemnor for their claims, and only the particular claim-
ants remain to be litigated with.\textsuperscript{32} Furthermore, despite such 
statutes it is not always true that the whole is equal to the sum of 
its parts. The title to land may be so divided that the buying in 
of the outstanding interests so as to acquire a present complete 
ownership would be so difficult that the sum of the values of the 

\textsuperscript{30}See Hohfeld, Fundamental Legal Conceptions, (1917) 26 Yale L. J. 
710.

\textsuperscript{31}See for example, Massachusetts, Gen. L., 1921, ch. 79, sec. 29. See 

\textsuperscript{32}As, for example, in Ft. Worth & D. S. P. Ry. Co. v. Judd, (Tex. 
various interests is worth much less than the complete title would be. Thus, in a case in which the City of Boston sought to condemn a strip of land for a public street, it appeared that the strip was already burdened by a private right of way in favor of the owner of a neighboring wharf to which it furnished access. The fee-owner of the strip and the wharf-owner who held the right of way sought to have the strip valued as a unit as if unincumbered. It was agreed that if it were unincumbered the entire estate would be worth sixty thousand dollars, but as burdened by the easement, the interests of all claimants would only be damaged to the extent of five thousand dollars by taking away the right to exclude the public from what was already an open passageway. It was held that the City was only bound to pay the lesser sum. This view, that where strips of land already burdened by easements of way which make it impracticable to use them for other purposes are taken for public use so as to impose no further practical disadvantage upon the owner either in respect to the use of the strip or of his adjoining land, the owner is entitled only to nominal compensation, finds frequent application. Interesting analogous situations are presented in the frequent instances where land, already condemned for railway purposes, is sought to be burdened by an additional public use, such as the construction of a telegraph line along the railroad, or the opening of a highway across the tracks. Whether in such cases the owner of the fee is entitled to be compensated as for an "additional burden" and, if so, how his damages are to be measured, are matters upon which the courts are not in agreement.

33Boston Chamber of Commerce v. City of Boston, (1909) 217 U. S. 189, 30 Sup. Ct. 459, 54 L. Ed. 725. In that case, the court said: "It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. [Citations] But the constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unincumbered whole when it is not held as an unincumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement."

34City of Lewiston v. Brinton, (1925) 41 Idaho 317, 239 Pac. 738; City of St. Louis v. Clegg, (1921) 289 Mo. 321, 233 S. W. 1, 17 A. L. R. 1242; Current & Decennial Digests, Eminent Domain, sec. 149.

35See notes, relating to the addition of telegraph lines along railroad or highway, 8 A. L. R. 1293, 19 A. L. R. 383. As to the railroad's compensation, when a street-crossing is made, see comment, see (1925) 39 Harv. L. Rev. 774.
A lease-holder or tenant for a term is entitled to compensation to the extent of the net market value of the term; that is, the value of the occupancy for the rest of the term, over and above the amount which under the lease must be paid out as rent.\textsuperscript{35} Here again market value is highly theoretical, being what it would presumably be worth while for a hypothetical purchaser to pay. An interesting question, related to those discussed in earlier sections of this article, is presented by the situation where an owner has leased the land for a fixed term under a lease which binds the tenant to use the premises only for certain specified purposes. Land is, as we have seen, usually valued at the amount which a hypothetical purchaser who intended to devote it to the highest and most profitable purpose should presumably be willing to pay. Suppose the most profitable use would be for a store, but the tenant is restricted to the use of the premises as a residence, may his lease be valued as if available for store purposes? Seemingly not,\textsuperscript{36} and here again the whole estate might be worth more than the sum of the values of the tenant’s and landlord’s separate interests. Where the landlord reserves the power to cancel the lease upon payment of a certain sum to the tenant, that sum is the outside limit of the value of the term, for presumably the landlord will cancel if the market value of the right of occupancy for the term comes to exceed this amount.\textsuperscript{37}

\textsuperscript{35}Des Moines Wet Wash Laundry v. City of Des Moines, (1924) 199 Ia. 1082, 198 N. W. 486, 34 A. L. R. 1517; City of Baltimore v. Gamse & Bro., (1918) 132 Md. 290, 104 Atl. 429; In re Seventh Avenue, (1921) 196 App. Div. 451, 188 N. Y. S. 197. As to methods of valuing the respective interests in long-term leases, see Zangerle, Principles of Real Estate Appraising, ch. 15; Nat’l Ass’n of Real Estate Boards, Real Estate Appraising, ch. IX. Improvements, including those added by the lessee, are to be considered in valuing the leasehold, only to the extent that they enhance its value. Carlock v. United States, (App. D.C. 1931) 53 F. (2d) 926; Bales v. Wichita M. V. R. Co., (1914) 92 Kan. 771, 141 Pac. 1009, L. R. A. 1916C 1090. But if tradefixtures, installed by the lessee and removable by him at the end of the lease, are taken, the lessee is entitled to their full value. City of St. Louis v. St. Louis, I. M. & S. R. Co., (1916) 266 Mo. 694, 182 S. W. 750, L. R. A. 1916D 713; In re Allen Street & First Avenue, (1931) 255 N. Y. 236, 176 N. E. 377. See infra, sec. 4, notes 16-18. The shares of the compensation given to tenant and landlord respectively will be affected by whether the tenant must continue to pay rent after the taking. The tenant no longer need pay any rent if the whole premises are taken, but if only part is taken, the cases are divided, most courts holding that the tenant must continue to pay the full rent, but a minority holding that the rent is reduced proportionately. See Corrigan v. Chicago, (1893) 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Decennial & Current Digests, Landlord & Tenant, sec. 191; 36 C. J. 319.

\textsuperscript{36}North Coast R. Co. v. A. A. Kraft Co., (1911) 63 Wash. 250, 115 Pac. 97 (tenant’s use of premises restricted to harness and saddlery or similar business).

\textsuperscript{37}Kafka v. Davidson, (1917) 135 Minn. 389, 160 N. W. 1020 (tenant’s
When we come to assess the value of the interest of the landlord or reversioner at its market-value, we find that it is affected not merely by the usable qualities of the land, but by the actual terms of the lease and particularly the amount of the rent.\textsuperscript{39} If the rent reserved in the lease is greater, as it often may be, than the amount for which property could now be rented, the value of the reversion might conceivably even be greater, if the lease is for a long term, than the value of the entire fee simple in possession.

If the land is held by a life-tenant, the life-estate and the reversion, under the procedure obtaining under some statutes, may be valued with the aid of the tables of mortality which show the life-expectancy of the tenant,\textsuperscript{40} or under others, the amount of the compensation for the land as a whole may be placed in the hands of a trustee to pay the interest to the life-tenant, on whose death the principal goes to the reversioner.\textsuperscript{41}

The interests of a lessee or a life-tenant give them the right to possession. They may easily be thought of as "owners" for the time being. There are other types of interests whose holders would hardly be regarded as "owners" of the land, and this has sometimes been a stumbling-block. A recent New York case denied compensation to a lessee for the value of an option to purchase, which had not been exercised when the condemnation was instituted.\textsuperscript{42} Such an option, if the price at which it may be exercised is favorable, may be a highly valuable interest, in the nature of a "power," and its value is readily measurable, and should be paid for.\textsuperscript{43} Even more clearly is the holder of an easel-lease being terminable by landlord on 60 days notice and payment of $1500, his damages could not exceed $1500 plus excess of value of occupancy for 60 days over rentals payable during that period).

\textsuperscript{39}See for example, City of Chicago v. Lord, (1917) 276 Ill. 544, 115 N. E. 8, 11, where the court held that the land might be valued at twenty times the annual rent under the existing lease, and in referring to evidence of rentals on nearby property, said: "Such evidence is sometimes valuable, but the question in this case is not what the property could or might be rented for, but what it actually was rented for, and the corresponding cash value to the owner."

\textsuperscript{40}Miller v. City of Asheville, (1893) 112 N. C. 769, 16 S. E. 765; Pittsburgh, Va. & Charleston R. Co. v. Bentley, (1878) 88 Pa. St. 178; See comment, (1931) 31 Col. L. Rev. 169, which deals also with the valuation of remote contingent interests, such as executory devises, and possibilities of reverter.

\textsuperscript{41}See Turner v. Robbins, (1882) 133 Mass. 207.

\textsuperscript{42}In re Water Front, (1927) 246 N. Y. 1, 157 N. E. 913.

\textsuperscript{43}In re Water Front, (1927) 41 Harv. L. Rev. 100. Compare Hercey v. Board, (1926) 99 N. J. Eq. 325, 133 Atl. 872 which allows compensation to a lessee for the value added to the lease by an option to renew.
ment in the land condemned not an "owner" in a popular sense, but his interest is regarded as compensable. Moreover, under the better and prevailing view, where restrictions are imposed upon land to the effect that it shall be used or built upon only in certain ways, the benefit of such restrictions (now almost universally imposed in the sale of land in subdivisions) is likewise "property" which is "taken" when part of the land is condemned for public uses which violate the restrictions. In the case of the standardized type of easements, such as an easement of way across neighboring land for access to the owner's land, or an easement of light, it would seem that the normal standard of lessening in market value of the benefited land by deprivation of the advantage of the easement would suffice. Equitable restrictions are sometimes imposed from aesthetic motives, which are important to the owner but might not affect prospective purchasers. Can compensation be given on that account? In an interesting recent Connecticut case, the owner of a spacious country house was protected in the outlook over a neighboring tract by an equitable restriction against buildings thereon which would cut off the owner's view. The town built a high school on the tract, so as to obstruct the view. The court held that the owner should not be limited to the sum found to be the amount of the lessening of market value, but that while no separate assessment of "individual damages" could be made, the whole award might be made on the basis of the lessening of the "actual" value to the owner, to determine which the owner's individual deprivation of enjoyment of the premises might be considered. Thus again is illustrated the elasticity of the "value" concept.

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44 Village of Bradley v. N. Y. Cent. R. Co., (1921) 296 Ill. 383, 129 N. E. 744 (privilege of operating railroad in street); Decennial & Current Digests, Eminent Domain, sec. 85.


46 See, for example, Neff v. Penn. R. R. Co., (1902) 202 Pa. St. 371, 51 Atl. 1038 (for deprivation of use of right of way, by removing bridge, owner allowed to recover diminution in value of farm to which it gave access).

4. CONSEQUENTIAL DAMAGES CAUSED BY THE TAKING: EXPENSE OF MOVING, INCONVENIENCE, INTERRUPTION OF BUSINESS, AND LOSS OF GOODWILL

Does the fact that the land which is taken for public use is occupied and used as a business establishment or otherwise, and that this occupancy will be terminated by the seizure of the premises, affect in any way the measure of compensation? It is apparent that the disturbance of a business causes loss beyond that suffered by one from whom improved but vacant land is taken. Usually, the state constitutions follow the Federal Constitution which merely provides in general terms for "just compensation" for "property taken." Most statutes, likewise, go no further than to provide for the payment of the "value" of the "property," or in general terms for "compensation." Under these general statutes the courts almost universally deny recovery for any loss other than the value of the land taken. Nevertheless, "value" is a term of relative flexibility, as has already appeared.

One principal detriment which may be suffered by one whose business location is taken from him is loss of goodwill; that is, the value of anticipated future profits based upon past performance. This element of goodwill is constantly considered by sellers and buyers as one of the items going to make up the selling price of a business. If the business itself is taken by eminent domain, and not merely the physical property, the goodwill as an element of the value of the business must be paid for. But where merely the land and buildings are taken, the owner, of

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49For example, Illinois, Rev. Stats., Smith-Hurd, 1931, ch. 47, secs. 8, 9.
50See cases in notes 52, 57, 59, this section.
51An excellent short discussion of the use of the term "goodwill" by economists and lawyers appears in (1931) 6 Encyc. Soc. Sciences 698. The author says: "Goodwill originally meant that part of the value of an established business which was attributable to the continued patronage of its customers. This meaning has since been extended. Economists continue to adhere essentially to the original concept of goodwill as a relation between the business and the market. But while they still consider the goodwill of the consumer as by far the most important type they recognize also the existence of goodwill in the labor market, the credit market and elsewhere." Definitions of the term are quoted in (1927) 65 U. of Pa. L. Rev. 783.
course, can re-establish and continue his business in a new location. He loses goodwill only to the extent that his patronage cannot be transferred to a new location. In the case of retail stores and other businesses, where customers are dealt with directly, goodwill is to a substantial degree attached to the old place. In other businesses, the specific location is of much less importance. The courts, however, have treated all businesses alike in this respect, and have consistently held, in this country, that under the general constitutional and statutory provisions no compensation will be made for the loss of goodwill. A doubt that goodwill is "property" could hardly have been a controlling reason for their conclusions, since "property" has many meanings which include, beside the meaning of interests in tangible things, the meaning of pecuniary interests generally. For other purposes goodwill is readily recognized as "property" by the courts. The English and Canadian courts, moreover, have no difficulty in finding that goodwill is property which is "taken" and is to be paid for when a business location is appropriated. The real reason, probably, which has brought the courts to the unusual position of denying payment for this undoubted business loss is an administrative one. It is "speculative," they say, or in other words it is difficult to value, since the


54 Goodwill is recognized as a partnership asset in Slater v. Slater, (1903) 175 N. Y. 143, 67 N. E. 224. It may be sold, or passed by will. Howard v. Taylor, (1889) 90 Ala. 241, 8 So. 36.


56 Banner Milling Co. v. State, (1925) 240 N. Y. 533, 148 N. E. 668. Compare the language of Holmes, C. J. in Sawyer v. Commonwealth, (1902) 182 Mass. 245, 247, 65 N. E. 52: "No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed
economists and accountants themselves have worked out no accepted formulas which can be followed, and the allowance of this item therefore might open a door to unjust and exaggerated awards.

As the commercial world moves toward a standardized practice in computing the value of goodwill, and as the jury in eminent domain proceedings gives place more and more to expert commissioners of appraisal, we may expect a growing tendency of legislatures and courts to give compensation for injury to the goodwill of a business by a forced change of location.

Much less "speculative" is the direct loss of business which may be imposed by the cessation of operations for the period necessary for moving to a new location. But even this loss, unless expressly made compensable by the statute, is usually cast upon the owner by the courts.

Another serious element of loss, about which no tinge of uncertainty or difficulty of ascertainment exists, is the actual expense necessitated by moving the stock and movable equipment of the business to a new location. Even here the courts, where the statutory provision for "just compensation" is general, and does not specifically authorize compensation for this, adhere to their holding that only the "value" of the land taken may be given and that the general expense of moving may not be awarded as an independent item of compensation. One court for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes absolutely to protect.

See (1931) 6 Encyc. Soc. Sciences 698, supra n. 51.

City of St. Louis v. St. Louis I. M. & S. R. Co., (1916) 266 Mo. 701, 182 S. W. 750, L. R. A. 1916D 713, Ann. Cas. 1918B 881 (claim by lessee, denied); State Airport Commission v. May, (1930) 51 R. I. 110, 152 Atl. 225 (claim by owner of land taken for airport for injury to poultry business, denied. "In the instant case the business conducted on the land in question was not taken, and it may be moved to and conducted at another location. Compensation for the property actually taken for public uses is provided for, and any incidental loss or inconvenience to the business must be borne by the owner in the interest of the general public."

The suggestion is made in the first case cited in the next preceding note that there is uncertainty in that different owners would move different distances. This seems hypercritical. The actual cost of any move within a reasonable ambit is a criterion which offers little difficulty on the score of certainty.

suggests that, since in case of a private sale the seller moves at his own expense, the same result should follow in case of forced sale in condemnation. Accordingly, compensation was denied for the cost of removing a large quantity of hay from a ranch which was taken as a reservoir site and for the removal of a stock of goods from a warehouse.

Somewhat different considerations apply to fixtures and improvements, as distinguished from the occupant's movable property. If these built-in improvements are taken, as part of the land, they must of course be paid for. The owner of the land is entitled to the amount to which they enhance its value, unless the premises are occupied by a tenant, in which event the latter shares in the compensation for the fixtures so far as they increase the value of the tenancy, if the tenant has installed the fixtures and has the power of removal. Frequently, however, the appropriator is empowered by statute to exclude the fixtures and improvements from the property taken, or this exclusion is agreed upon by the parties. In such event, while the decisions are not harmonious, it would seem that compensation for the cost of removal to a new site, within a reasonable distance, might be worked out in favor of the owner of the land by use of the doctrine.

Pacific Live Stock Co. v. Warm Springs Irr. Dist., (C.C.A. 9th Cir. 1921) 270 Fed. 555 (6). See also In re Post Office Site, (C.C.A. 2nd Cir. 1914) 210 Fed. 832 (3).
See note 36 supra. For examples of statutes construed to require the condemning authority to take fixtures as part of the land, see In re Allen Street and First Avenue, (1931) 256 N. Y. 236, 176 N. E. 377 (tenant's fixtures); City of Goldsboro v. Holmes, (1920) 180 N. C. 99, 104 S. E. 140 (house on premises).
See supra, n. 1.
See supra, part 3, n. 36.
For example, Massachusetts, Gen. Laws, 1921, ch. 79, Massachusetts, Pub. Stats. 1882, ch. 49, sec. 9.
trine that where only part of the land is taken, the measure of compensation is the difference between the value of the entire property before the taking and the value after the condemnation of the part not taken. Under this theory, the owner would recover the value of the land and improvements, less the value of the improvements required to be removed. Of course, this deduction would be diminished by the fact that the value of the improvements would be no greater than what they were worth after subtracting the cost of making them usable by moving them to a new location.

This theory has been used to justify a similar allowance for expense of moving fixtures in favor of a tenant, who is permitted by the condemnor to retain the improvements he has installed. The appropriateness of the theory as a basis for allowing to the tenant, even indirectly, the full present cost of moving fixtures seems dubious. The value of the entire interest that the tenant had before the taking consisted of (a) the value of the right of occupancy for the term, and (b) the present value of the power of removing the fixtures in future and using them at the end of the term. It is apparent that the value of item (b) is directly lessened by the prospective cost of removal. But from the aggregate of (a) and (b) we must deduct (c) the value of the property not taken; that is, the value of the fixtures now prematurely detached. Item (c) again is concededly depreciated by the present cost of removal, but since (b) is depreciated by the prospective cost of removal, the award of (a) plus (b) minus (c) seems to result in canceling out the claim for cost of removal, except to the extent of the value of the privilege of postponing the expenditure until the end of the term. Since the tenant would ultimately have been faced with paying the cost of removing fixtures, in the absence of condemnation, it is difficult to see why the condemnor should have to pay the whole cost, simply because it is prematurely imposed on the tenant.

An examination of the cases dealing with the liability of the condemnor for the incidental, but often serious, losses imposed

70See part 2, supra.
72Compensation to a tenant for cost of removing fixtures was denied on this ground in Baltimore v. Gamse, (1918) 132 Md. 290, 104 Atl. 429.
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upon the occupant of premises by his being forced to move out discloses an interesting progression in judicial thought toward expanding the concept of "market value" so as to embrace these losses.\textsuperscript{73} It is true that the occupancy of business premises does in some respects unquestionably enhance the market value of the land. A piece of property which has a record of continuous successful occupancy is more highly regarded by a prospective purchaser than a similar building which has a record of vacancies.\textsuperscript{74} Likewise, the mere operation of a manufacturing plant as a "going concern" adds to the value of the plant, above the value of its constituent parts, by reason of their being combined into an efficient, functioning unit.\textsuperscript{75} These matters do influence market value.

But courts have frequently said that loss of goodwill, loss of business and inconvenience from interruption, and cost of removal also influence market value. Market value being either the actual current price for like property, or the hypothetical price at which a willing seller and a willing buyer would meet each other's demands, can we say that market value would be affected by these costs, so that a jury should be instructed to consider them in estimating such value? It is suggested\textsuperscript{76} that a seller would be unwilling to sell except at a price which would cover, not merely the amount at which he valued the land and buildings, but the incidental losses of business and the expense and inconvenience which would result from breaking up his establishment. It is submitted, however, that this does not stand the test of sound economic theory. Regardless of the desires of the seller, the purchaser will seek in the market the property which meets his needs at the lowest price. In most instances, buildings temporarily vacant, or occupied by tenants who are intending to vacate, which are suitable to the purchaser's requirements will be offered him. These other sellers will have no motive to demand a price which will cover the losses incidental to removal, for the sale by them would have no such effect. They can afford to offer their prop-

\textsuperscript{73}It is possible that the desire of legislatures and courts in an earlier day to encourage the building of highways and railroads so as to hasten the development of the country may have had its influence in molding the severely restrictive rules as to compensation for incidental damage. Such damage is likely to be less important also in pioneer rural conditions than in present-day urban surroundings.

\textsuperscript{74}Ranck v. City of Cedar Rapids, (1907) 134 Iowa 563, 111 N. W. 1027 (1).


\textsuperscript{76}See note, 51 L. R. A. 320 at pages 330, 333.
roperty at a price which includes no such items, and presumably they will do so. Presumably, therefore, the purchaser will offer our seller, who is facing removal-expense, no more than such purchaser would pay for other equally desirable property. Consequently, it seems that except in the unusual instance of property which would be in demand from purchasers who could not, because of an absence of available vacant property, supply their needs except by buying land occupied by going business establishments the incidental losses mentioned cannot properly be awarded, or even considered, as an element of market value. Unless the language of the statute limits the compensation to market value, however, it seems open to the courts to summon into use the doctrine that when market value is inadequate to afford fair reimbursement to the owner, the damages may be measured by the value of the property, not on the market but to the owner himself. An ascertainment of "value to the owner" might well take account of the losses that the occupant will sustain if he is forced to part with his business location. Whether this expanded use of the "value" idea should be adopted is a question of policy. Under some statutes these losses are expressly made compensable. More often this is not the case, and only general words such as "value," "compensation" or "damage" are employed. Most courts have concluded that the legislature by not specifying these losses as compensable has intended to impose them upon the individual land-owners rather than upon the public enterprise for the furtherance of which the land is taken. Strong reasons of policy and fairness support the view that recompense for these losses should be specifically authorized by the legislature, or should be sanctioned by the courts where the way is open, by the use of the concept, not of "market value," but of "value to the owner."

5. COMPENSATION FOR DAMAGE NOT RESULTING FROM THE TAKING ALONE: INJURY TO REMAINING LAND FROM THE USE OF THE LAND TAKEN, OR THE CONSTRUCTION OR OPERATION THEREON.

In the preceding sections we have directed our attention chiefly to the loss which the owner of property suffers in direct consequence of the taking of his land, which chiefly consists of the value of the land taken, or, where part only is taken, of the lessening in value of the whole tract merely because this particular part was severed from it.

\(^7\)See part 2, supra.
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It is obvious, however, that the remaining land may be lessened in value, not only to the extent that its area and useability have been diminished by the fact that a strip or corner has been cut off, but its value may likewise be conspicuously depreciated by the new public or semi-public works or enterprise for which the land taken is to be used. Under many types of condemnation statutes as judicially construed, where land is to be taken, the landowner is entitled to compensation for this depreciation in value of his remaining land due to the prospective construction or operation of the condemnor's enterprise. This is commonly true of statutes authorizing the appropriation of land for railroad rights-of-way, for electric power transmission lines, for streets and highways, and for power dams and drainage-ditches. Certain limitations, however, upon the compensation for depreciation in value due to prospective construction or operation seem to be rather generally recognized. Thus, while all of the probable injury that will flow from the public improvement is to be considered by the tribunal, as it would be considered by a prospective purchaser, speculative and unlikely possibilities of harm are to be excluded, as well as the possibility of unlawful or negligent construction or operation of the enterprise. For example, ordinary danger of fires on surrounding lands unavoidably caused by operation of a railroad may be considered in condemnation of land for a railway, and so also the effect on the value of the land retained of the prospect of nearby smoke, noise, cinders, and vibration from the trains. Numerous recent decisions relate to the condemnation of rights-of-way for electric power transmission lines, and it has been necessary here to curb over-imaginative speculations as to possible dangers. It has been held in certain of these cases that evidence of the necessity of the entry of the power company's employees upon the land to patrol and repair the line and the probable consequent disturbance of cattle, as

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79See cases in succeeding notes, to this section.


81Arizona Hercules Copper Co. v. Protestant Episcopal Church (1920)
bearing upon the market value of grazing land through which the line ran,82 is competent, as is also proof of the probable inconvenience to and obstruction of farming operations by such a power-line,83 but that danger that such employees would bring in cattle-diseases or would leave gates and fences down was too remote,84 as was also the possibility that fires85 might be produced by a break in the line, or through added danger from lightning, or the tear in the minds of prospective purchasers of injury to persons or property from the breakage or falling of the lines.86

Depreciation in value because of apprehension of improper construction87 of the improvement or its negligent or wrongful operation88 is excluded. The appropriation which is to be sanctioned will not authorize such wrongful acts, and if they do later occur, damages for actual harm inflicted may then be recovered, as in case of any other tort. Another important restriction upon recovery for depreciation in value due to the proximity of the improvement is that the landowner must bear without compensation such depreciation as comes from the prospect of inconvenience and damage common to the whole neighborhood. It is only special injury suffered by the land because of its immediate proximity that is compensable, ordinarily.89 This reluctance to

84Missouri Power & Light Co. v. Creed, (Mo. App. 1930) 32 S. W. (2d) 783.
87Richardson v. City of Centerville, (1908) 137 Ia. 253, 114 N. W. 1071 (construction of sewer), and cases collected in Current & Decennial Digests, Eminent Domain, sec. 92.
88Cleveland, etc., R. Co. v. Smith, (1912) 177 Ind. 524, 97 N. E. 164, 171 (operation of railroad) and see cases in note 80 supra. Compare O’Neill v. S. P., etc., R. Co., (1911) 38 Utah 475, 114 Pac. 127.
89In re Hull, (1925) 163 Minn. 439, 204 N. W. 534, 205 N. W. 613, 49 A. L. R. 320 (one whose lands did not abut on street closed cannot recover compensation for the closing); Lowell v. Buffalo County, (1930) 119 Neb. 776, 230 N. W. 842 (vacation of highway, farm-owner, left with no through outlet, held to suffer special injury); Lewisburg & N. R. Co. v.
open the door to claims which would be common to everyone in
the community and the consistent tendency to center upon redress
only for those who have suffered real and substantial loss by
reason of the public improvement are manifested also in the
occasional holdings to the effect that prospective harm from con-
struction or operation of the improvement on lands other than
those taken from the claimant is not compensable. 90

The courts manifest a rather surprising tendency in these
cases to shield the condemnor from liability for damage to the
market value of the remaining land of the owner, so far as such
depreciation is claimed to come from the unsightliness of the
structure or improvement. 91 This probably proceeds from a dis-
trust of the fact-finders' ability to evaluate the injury satisfac-
torily.

Not infrequently, the public enterprise to be established may
be one which in its use and operation will come directly in com-
petition with a business of the landowner, and damages are
claimed for the lessening of business from such competition. Un-
less the claimant is by virtue of a lawful franchise entitled to enjoy
a monopoly, of course this claim cannot be allowed. A recent ex-
ample is a case in Georgia where the state condemned part of the
land belonging to the operator of a ferry for use in building the
approaches for a new bridge. A claim for loss of profits in the
operation of the ferry from the erection of the bridge was dis-
allowed. 92

Hinds, (1915) 134 Tenn. 293, 183 S. W. 985, L. R. A. 1916E 420 (owner
of land part of which is taken for railroad may recover for impairment of
market value of remainder due to operation of trains, though other nearby
landowners, none of whose land is taken, cannot.) Cases are collected
in Decennial & Current Digests, Eminent Domain, sec. 91.

90Campbell v. United States, (1924) 266 U. S. 368, 45 Sup. Ct. 115,
69 L. Ed. 328, comment, (1925) 9 MINNESOTA LAW REVIEW 385, (damages
to plaintiff's lands from proposed use for industrial purposes of lands
taken from others not compensable) ; Lewisburg & N. R. Co. v. Dudley,
(1930) 161 Tenn. 546, 30 S. W. (2d) 278 (prospective injury from noise,
etc. from operation of trains limited to operation of trains over the land
taken, and noise while trains approaching over other lands excluded:
rather a fine distinction).

91See, for example, Illinois Power & Light Co. v. Peterson, (1926)
322 Ill. 342, 348, 153 N. E. 577, 49 A. L. R. 697 (compensation denied for
unsightliness of power-line on land taken). Compare St. Louis S. W. R.
Co. v. Heilbron, (1908) 52 Tex. Civ. App. 575, 113 S. W. 610, 979
(damages for unsightliness of railway cut, not on land taken from plaintiff,
denied).

92State Highway Board v. Willcox, (1929) 168 Ga. 883, 149 S. E.
182, comment, (1930) 14 MINNESOTA LAW REVIEW 296. See also Muscoda
Bridge Co. v. Grant County, (1929) 200 Wis. 185, 227 N. W. 863, (where
Let us suppose that lands have been taken in condemnation and in such proceedings damages were allowed or allowable for depreciation in value of the other land of the owner due to prospective construction or operation of the enterprise. Then, of course, if due to such construction or operation in a non-negligent way the actual expected harm ensues, no damages for such harm may later be recovered. The statute or condemnation decree has conferred upon the condemnor, at a price, the lawful privilege of thus constructing or operating the enterprise, and such conduct, though it inflicts harm upon the plaintiff, is not an actionable wrong. Quite frequently it happens, however, that the improvement was erected and set in operation without any formal condemnation proceedings, or such proceedings purported to cover only the “taking” of land directly appropriated, and not the prospective damages incidental to construction and operation. In such cases, if the construction or operation of the improvement does later in fact, whether properly or negligently conducted, cause special injury to a nearby landowner, such owner may recover for such damage in an independent action at law. Such

land taken from owner of toll-bridge for approach to new public free bridge no compensation should be made for loss of traffic over the toll-bridge).


As in Moses v. Town of Morgantown, (1928) 195 N. C. 92, 141 S. E. 484, where action was brought for damage due to pollution of water caused by the operation of a power dam, and it was allowed on the ground that in the condemnation proceedings this item of damage was expressly excluded by stipulation.

Southern R. Co. v. Perfection Laundry Co., (C.C.A. 5th Cir. 1930) 38 F. (2d) 74 (change in grade of street); Illinois Power & Light Co. v. Talbott, (1926) 321 Ill. 538, 152 N. E. 486 (10) (Power transmission line. “The Constitution, in prohibiting the taking or damaging of private property for public use without just compensation, recognizes the right of the owner of property damaged by a public work to recover the amount of such damage. This right may be asserted by the owner as a plaintiff in action at law where none of his property is actually taken, or as a defendant to an eminent domain proceeding for the condemnation of property actually taken.”); McGowan v. Town of Milford, (1926) 104 Conn. 452, 133 Atl. 571 (where town changed grade of street without institution of proceedings for that purpose, life-tenant of abutting lot allowed to recover diminution in value of her interest). See cases collected, 20 C. J. 1162, n. 22. There are limitations, such as that against suing the state or other authority acting in a governmental capacity without its consent.
COMPENSATION IN EMINENT DOMAIN

claims, in respect to the measure of damages, are closely analogous
to ordinary actions for trespass or nuisance brought against or-
dinary defendants not vested with the power of eminent domain.
One marked difference appears, however, in the greater willing-
ess of most courts in the class of cases now under consideration
to allow the plaintiff to recover, and to limit him to, the deprecia-
tion in the value of his land due to the injury upon the assump-
tion that it will continue permanently, rather than to allow succes-
sive actions for the continuing disturbance or inconvenience in the
use of his land.

6. BENEFITS ACCRUING TO THE LANDOWNER FROM THE IMPROVEMENT

Since the object of “just compensation” is to prevent injustice
to individual landowners whose land is taken for public enterprises,
the aim of such compensation is to leave the landowner after his land
is taken, and the improvement completed, as well-off as he was before the taking. Fairness does not require that he be placed
in any better position, financially, than he was before, except to
the extent of being allowed to share with the rest of the community
the general enhancement of prosperity and values which may come
from these improvements. It is, accordingly, the usual practice
except when forbidden by special constitutional or statutory in-
hibitions, in arriving at the amount of compensation or damages,

See, for example, the discussion in Pauchogue Land Corp. v. Long Island State Park Commission, (1926) 243 N. Y. 15, 152 N. E. 451.


See notes 114 and 116, infra, this section.
to deduct from the award to the owner whether for the taking of part of his land, or for the construction or operation of the improvement, the value to him of the benefits and advantages which as owner of the remainder of the tract he will derive from the improvement.98 As a result, the landowner may in jurisdictions adopting the rule just stated find part of his land taken for a road or other public improvement, but may be awarded less than the value of the land taken, or no compensation at all may be awarded him, where it is found that his remaining land is benefited by the improvement. But as we saw that the injury to the remaining property to be compensable must be injury to the owner in his capacity as owner of this land, and not in his capacity merely as a member of the community, so here we find the same limitation upon benefits. To be deductible the benefit or advantage must be one which the public improvement brings to the owner of the remaining land because he is such landowner, and one which the rest of the community as a whole does not share.99 This conclusion is based on the view that it is inequitable to charge the landowner whose land is taken or damaged for a benefit which the rest of the community likewise secures but does not pay for.100 This distinction between general and individual benefits is of course a difference in degree and is not always easy to draw. Thus

98Bauman v. Ross, (1896) 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270 (street); Rudder v. Limestone County, (1929) 220 Ala. 485, 125 So. 670, 68 A. L. R. 776 (highway), with note on the constitutionality of statutes providing for deduction of benefits; Cate v. Crawford County, (1928) 176 Ark. 873, 4 S. W. (2d) 516 (highway); Wilcox v. Meriden, (1889) 57 Conn. 120, 17 Atl. 366 (street); Newburyport Inst. for Savings v. Brookline, (1915) 220 Mass. 300, 107 N. E. 939 (taking of private passage-way for public use); McKeen v. City of Minneapolis, (1927) 170 Minn. 124, 212 N. W. 202 (street-widening, no damages where benefits offset loss); Mississippi County v. Byrd, (1928) 319 Mo. 697, 4 S. W. (2d) 810 (road-widening); State v. Hudson County, (1892) 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 575 (road-widening); Stamey v. Burnsville, (1892) 189 N. C. 39, 126 S. E. 103 (side-walk); Hall v. Delaware R. Co., (1918) 265 Pa. St. 292, 105 Atl. 98 (railway); 20 C. J. 813, n. 58; note 9 L. R. A. (N.S.) 781, 794; L. R. A. 1918A 884. Cases on deduction for benefits, are collected in Decennial & Current Digests, Eminent Domain, secs. 144-146, 204, 222 (6). In contrast with the holdings noted above are the decisions referred to in a later note (n. 121) which permit benefits to be offset only against the damages to land not taken.

99Hickman v. Kansas City, (1894) 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658 (applies to cases of damaging as well as cases of taking), and numerous cases collected in Decennial & Current Digests, Eminent Domain, sec. 146.

100Little Rock, etc., R. Co. v. McAllister, (1901) 68 Ark. 600, 604, 60 S. W. 953; Petition of Reeder, (1924) 110 Or. 484, 222 Pac. 724; State v. Brubeck, (Ind. 1930) 170 N. E. 81.
where land is taken for laying out, or widening, streets or highways, or is injured by a change of grade, the furnishing of additional physical facilities for the occupants of the remaining land, such as better means of access, or an improved roadway, is a direct and special benefit which should be offset against the loss or injury, but the general rise in property values in the neighborhood, shared by this tract, because of improvement worked in the community's transportation situation, is not to be considered. Evidence of a rise in value of the tract remaining has been excluded on this ground, but the holding seems questionable. The evidence should come in, but the jury should be instructed to determine how far the rise is due to general, and how far to special benefits.

In railway condemnations, the better access of the remaining tract to market by reason of the increase of transportation facilities is held to be general in some of the cases and special in others. If a siding or a loading track is to be made directly available to the land, this seems a special benefit. Where a right to run a telephone line along a public highway which crossed the owner's farm was condemned, the accessibility of the line to the landowner was held to be merely a general public benefit, though here again the conclusion seems open to question. A similar question arises as to electric power transmission lines. If connections from the line may be made for the taking of electricity for use on the farm over which the line runs, this, it would seem, would be a special benefit.

101Glendenning v. Stahley, (1910) 173 Ind. 674, 91 N. E. 234; Trosper v. Saline County, (1882) 27 Kan. 391; Allen v. Charlestown, (1872) 109 Mass. 247. See note, measure of damages where property is taken to widen street, 64 A. L. R. 1513, 1533; 20 C. J. 824, n. Similarly, where the owner's land was boggy and was drained by the construction through it of a state highway, this was a special benefit. State v. Malone, (Mo. App. 1932) 45 S. W. (2d) 84. In Newberry v. Hamblen County, (1928) 157 Tenn. 491, 9 S. W. (2d) 700 the court said: "Increased accessibility to the owner's property, greater convenience in approach with vehicles, the advantage generally of a front on a more desirable roadway, better drainage, and a more attractive outlook, are improvements tending to enhance the value for use and sale of farm and suburban lands immediately abutting on an improved highway, and constitute special benefits for which allowance may be made."

102State v. Brubeck, (Ind. 1930) 170 N. E. 81 (5).

103The decisions are collected and discussed in Mantorville Railway & Transfer Co. v. Slingerland, (1907) 101 Minn. 488, 112 N. W. 1033, 11 L. R. A. (N.S.) 277.


105But see Kentucky Hydro-Electric Co. v. Reister, (1926) 216 Ky.
In order that a benefit should be "special" it is not essential that it be enjoyed solely by the particular landowner. Frequently other landowners in the vicinity reap like benefits, but this is immaterial if the benefit is one peculiar to owners bordering on the improvement and not shared by the whole neighborhood.\textsuperscript{106}

Despite this genuine though elusive distinction between benefits to the individual landowners as such and benefits to the general community, and the feeling of legislatures and courts that if the rest of the public are to secure free an "unearned increment" from the improvement, so also should the landowner whose property is taken or directly damaged, a landowner who is actually as well-off financially after his land has been taken or injured by the improvement can hardly have any very serious ground of complaint, even though the benefit which made him whole was shared generally. Consequently, we find that in a few states the money appropriated for state highways has been made to go as far as possible by permitting the state to offset against the landowner's claim for compensation, not only special, but general benefits as well.\textsuperscript{107}

We have already seen that compensation for injury to remaining land can only be claimed in respect to land which is part of the tract from which the land is taken, and of course the same is true as to benefits.\textsuperscript{108} Benefits to other disconnected tracts belonging to the landowner cannot be deducted.\textsuperscript{109} Likewise, the

\begin{itemize}
\item[\textsuperscript{103}] See also Alabama Power Co. v. Keystone Lime Co., (1914) 191 Ala. 58, 67 So. 833, Ann. Cas. 1917C 878, and other cases cited in note, 49 A. L. R. 697, 703.
\item[\textsuperscript{104}] United States v. River Rouge Improvement Co., (1926) 269 U. S. 411, 416, 46 Sup. Ct. 144, 70 L. Ed. 339 (benefit to owner of part of riverbank from improvement of channel, may be "special" though similar benefits accrue to other riparian owners); State v. Young, (1929) 324 Mo. 277, 23 S. W. (2d) 130 (8) (hard surface road through farm; error to charge that only those benefits "peculiar to the tract itself" may be deducted); Faulkner v. City of Nashville, (1926) 154 Tenn. 145, 285 S. W. 39 (increased accessibility of lots along widened street); Town of Galax v. Waugh, (1925), 143 Va. 213, 129 S. E. 504 (change of grade of street affecting several property-owners along street, is "special"). The opinion in Peoria, etc., R. Co. v. Vance, (1907) 225 Ill. 270, 80 N. E. 134 which seems to sanction the deduction of "general" benefits in a railway condemnation, probably was intended to go no further than the foregoing case.
\item[\textsuperscript{107}] Wade v. State Highway Commission, (1924) 188 N. C. 210, 124 S. E. 193; Nowaczyk v. Marathon County, (1931) 205 Wis. 536, 238 N. W. 383.
\item[\textsuperscript{108}] See supra, sec. 2.
\item[\textsuperscript{109}] Louisville & N. R. Co. v. Chenault (1926) 214 Ky. 748, 284 S. W. 397. Conversely where a tract is used as a unit and is divided by the railroad right-of-way condemned the landowner cannot claim that benefits
improvement scheme is to be treated as a unit. All special benefits from the entire improvement are to be considered, but not benefits derived from other separate improvements.\textsuperscript{110}

The standard of "reasonable certainty" which the courts use generally in testing claims for damages is used likewise in determining what benefits may be offset. Benefits which are regarded as speculative or conjectural are disregarded.\textsuperscript{112} In this latter class were placed the benefits which a farmer across whose land a power-line right-of-way was taken might derive from the prospect that he might be permitted by the power company to use the strip for farm purpose until otherwise needed by the company.\textsuperscript{113}

Many types of public improvements, especially those which are made by cities or improvement districts, such as the widening of streets and the construction of sewers, are not paid for wholly from public funds derived from general taxation, but are paid for, wholly or in part, by money raised by special assessments levied upon nearby landowners whose property is found to be specially benefited. If an owner, who is subject to such a special assessment, is a party to a condemnation proceeding or an independent action for damages, wherein the loss or injury he has sustained from the improvement is to be ascertained, the usual practice of deducting benefits would make the owner pay twice for the same benefits, once under the special assessment, and again as an offset to his claim for damages. Consequently, an exception is made in such cases, and no deduction is allowed.\textsuperscript{114}
In the application of the doctrine by which the benefits derived by the landowner from the improvement are counted as part of his compensation for land taken, it results not infrequently that he may not secure payment at all for the appropriation of his land. This seems to have been especially resented by the politically dominant rural landowners in the southern and western states, when railroads in their appropriation of land for rights-of-way were able thus to reduce to a minimum the cost of securing land. Consequently, we find in a substantial number of state constitutions provisions which require compensation to be made without regard to benefits. Sometimes they are directly aimed that, where there is an assessment and a condemnation, the amount of the assessment is to be subtracted from the deduction for benefits, or if the condemnation comes first, the deduction for benefits is to be credited upon the assessment. Michigan, Pub. Acts, 1925, Act. No. 352, sec. 18, construed in Board v. Vermander, (1928) 242 Mich. 239, 219 N. W. 74, Compare Betts v. Williamsburgh, (1853) 15 Barb. (N.Y.) 255 (deduction for benefits credited upon assessment).

Some phases of the clash of interest between farmers and railroads are well described in James Truslow Adams, The Epic of America 298-300.

Arizona, const. art. II, sec. 17: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law." Arkansas, const. 1874, art. 12, sec. 9: "No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."; California, const. (as in force Jan. 1, 1931), art. I, sec. 14: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county or the state until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation . . .;" Florida, const. art. XVI, sec. 29: "No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law;" Iowa, const. of 1857, art. I. sec. 18: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of
against railroads in that they apply only to "rights-of-way" taken by private corporations. In other instances, municipal improvements are expressly exempted. In cases to which these provisions apply benefits cannot be set-off either against the value of the land taken or against the injury to the remaining land.

Despite the strength of the landowner's contention that land should be paid for in money and not in benefits, it is difficult to resist the argument that when we come to measure the injury to land not taken, we must consider advantages as well as disadvantages resulting from the improvement, as a necessary part of

117 See supra, n. 116.
118 See supra, n. 116.

the process of determining whether any injury results and, if so, how much.\(^{120}\) This reasoning has been accepted by a large group of courts, which are unwilling to use benefits to the full extent of offsetting them against the value of land actually taken. These courts take a middle ground, and require that the land owner be paid full value for any land actually taken, but allow benefits to be considered in determining the amount of the damage to land not taken.\(^{121}\) This practice is often prescribed by statutes, which commonly provide that the value of the land taken, the damages to land not taken, and the benefits to the latter from the improvements, each be separately assessed by the jury or appraisers, in their verdict or findings.\(^{122}\) This enables the judge to make the deduction for benefits, without leaving it to the jury, and enables him more effectively to pass upon the acceptability of the jury's conclusions.

7. Time for Ascertainment of Compensation

If the land affected by the condemnation is fluctuating in value

\(^{120}\) The party whose land is taken should certainly be paid in full for the land actually taken, without regard to any benefits accruing to the remaining lands; but, when the party seeks to recover for the injury or damage to the remaining lands, it is difficult to see how it can be said that any damage has been suffered, by reason of the change of grade and making of the sidewalk, if the net result of that work has been that the land has been benefited, and not deteriorated, in value. As said by the supreme court of Illinois: 'A partial effect only is not to be considered, but the whole effect. . . . This is not deducting benefits or advantages from damages, but is ascertaining whether there be damages or not.' Town of Eutaw v. Botnick, (1907) 150 Ala. 429, 43 So. 739, 740. In Washington, where by constitutional provision benefits cannot be offset against damages in railroad cases, the court permitted the railroad to show benefits not to offset against damages but "to disprove damages." Murphy v. C. M. & St. P. R. Co., (1912) 66 Wash. 663, 120 Pac. 525. But see (1927) 2 Wash. L. Rev. 197 n. 25.


\(^{122}\) For examples of cases under such statutes, see Sonoma County v. DeWinton, (1930) 105 Cal. App. 166, 287 Pac. 121 (separate findings required by Code Civ. Proc. sec. 1248, waived by failure to object): Denver N. W. & P. R. Co., (1911) 49 Colo. 256, 112 Pac. 779 (9); City of Detroit v. More, (1889) 76 Mich. 515, 43 N. W. 600.
and the proceedings are not swiftly concluded, the question of the date of valuation may be important. The usual constitutional provision for "just compensation" has been held to require that the land taken be valued as of the time of the "taking." At all events, it would seem that no later time could be chosen, if it should result in giving the owner less than his land was worth when taken from him. The time when the land was taken is usually said to be the time as of which compensation should be ascertained. "Taking" is a term of some latitude, however, since the whole course of the condemnation proceedings from beginning to end is the taking in a general sense. It has been necessary to fix the time more specifically. This has frequently been

123 In Benedict v. City of New York, (C.C.A. 2nd Cir. 1899) 98 Fed. 789 certain land was sought to be taken for an aqueduct. Under the statute, the condemning authority filed in the record maps showing the owner's land as part of the area to be taken. This was done in 1896. Two years later, in 1898, after the land had depreciated in value, appraisers were appointed and took oath, to appraise the land. At this point, it was provided that title to the land should vest in the public authority. The owner claimed that the land should be valued as of the time when the maps were filed, but the claim was denied, and the court said: "The fundamental doctrine that private property cannot be taken for public uses without just compensation does not require that the compensation be made in all cases concurrently in point of time with the actual exercise of the right of eminent domain; and it is competent for the legislature, in the absence of any constitutional interdiction, to prescribe whether the compensation be made at the time of the projection of the work, at the inception of the condemnation proceeding, at any subsequent stage of the proceeding, or at the time of taking actual possession of the property for the construction of the work. But, at whatever time the compensation is to be made or paid, just compensation entitles the owner to the full market or pecuniary value of his property at the time of the taking; and the authorities are so generally in accord upon this proposition that it may be accepted as the settled rule. By some of the statutes the owner is divested of his title or possession, actually or potentially, at the time of the enactment; while by others this does not occur until the proceeding has arrived at some advanced stage of progress, or been finally consummated, or until his damages have been paid. In every case, therefore, the application of the rule depends upon the provisions of the particular statute in terminating the dominion of the owner and segregating the property for the public use. . . . The lands were taken when the commissioners of appraisal filed their oaths of office. They were taken at that time because by the terms of section 10 the city then acquired the right to occupy them in perpetuity, subject, of course, to a condemnation proceeding. Until then the purpose to appropriate them was merely a tentative one, and the proceeding might never culminate in an actual appropriation. Until then there was no statutory act indicative of a final intention by the city to acquire lands. It was the contemplation of the legislature that they should be deemed taken at that time, and compensation awarded with reference to it, because the act provides that from that time the city shall pay interest upon the amount."

done by statute, but more often the courts have had to determine the particular step in the proceedings which shall be selected as the date of valuation. The "taking" might appropriately be defined as the stage in the proceedings at which the right to immediate possession of the land passes to the condemnor, and this of course varies with the particular statutes. Among the different steps in the process which are selected under various condemnation statutes as the time with reference to which compensation will be made are the following:  

1. The date of the filing of the petition for condemnation;  
2. The time of the entry or actual occupation of the land by the condemning authority;  
3. The time of the award by the jury or appraisers;  
4. The time of the trial.  

If the land has been occupied wrongfully for a public improvement, without taking the proper proceedings to condemn it, the landowner has been allowed to recover its value at the time of trial, together with loss of the value of its use down to the time of trial. In such cases, he might well also be given an election to take the value at the time of the occupation, with interest.  

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125The cases are collected in Decennial & Current Digests, Eminent Domain, sec. 124.  
127Oregon, W. R. & N. Co. v. Campbell, (1921) 34 Idaho 601, 202 Pac. 1065 (all compensation, including injury to land not taken to be computed as of date of issuance of summons, and damage which could not then have been reasonably anticipated is excluded).  
129North Carolina State Highway Commission v. Young, (1931) 200 N. C. 603, 158 S. E. 91; Board of Commissioners v. Richardson, (1922) 122 S. C. 58, 114 S. E. 632. Where payment or deposit of the money is required before taking possession, the time of payment is sometimes taken. City of Tulsa v. Horwitz, (1928) 131 Okla. 63, 267 Pac. 852.  
133See Fish v. Chicago, etc., R. Co., (1901) 84 Minn. 179, 87 N. W. 606.
As to the injuries and benefits to remaining land from construction or operation of the improvement, the time as of which the net damage will be measured depends on whether the improvement has been constructed at the time of the trial. If it has not, of course, the best that can be done is to determine from the plan of construction how much the property will be injured or benefited. But it often happens that the improver (with or without having started condemnation proceedings) has gone ahead with the construction before the trial of the claim for damages. If so, the landowner recovers the diminution in value as of the time of the construction, or if it is still proceeding then the ultimate


135 In New Jersey, I. & I. R. Co., (1907) 168 Ind. 205, 80 N. E. 420 the railroad company instituted proceedings to condemn a right of way across a farm, and partially completed its embankment before the trial. This embankment crossed a drainage ditch, and only an insufficient tile drain was installed, thus causing the backing up of water upon the farm. The court held that while under the Indiana practice all damages are assessed on the basis of the injuries that were reasonably foreseeable at the time of the filing of the condemnation complaint, yet it was proper to consider the actual results of so much of the construction as had been completed at the time of the trial. So also in In re Board of Rapid Transit Commissioners, (1909) 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N.S.) 647 it was held improper to limit the damages of owners of land on a street under which a subway was being constructed to such injury as was apparent or foreseen at the time when title vested in the condemnor by the statute, and that the damaging effects of the actual later course of construction must be considered. The court (Vann, J.) said: "The rule of evidence adopted by the commissioners was erroneous. They limited the witnesses in their estimates of value to the time when it was known that the subway was an assured fact by the filing of the oaths, although the work of construction had not been commenced, and instructed them to exclude from consideration any physical damage which had actually been inflicted at the time of the trial, when the work in front of the premises in question had been substantially completed. In estimating the market value on this basis, the experts were confined to supposition and speculation, for filing a paper in a public office worked no physical change in the property, and they were not allowed to consider the realities as shown by time and experience. The test presented to them was what the market value would probably be if an intending purchaser knew that the road was to be built. This left everything open to the mere estimate of experts, not founded on fact, but on conjecture. Certainty is better than conjecture, and the injuries actually inflicted a better guide than the opinions of experts as to the market values just before and just after the oaths of the commissioners were filed, or during the same five minutes. The value of such evidence, always a dangerous and uncertain guide, and in this case especially so, owing to the restrictions of the commissioners, is shown by the fact that experts called by the claimants estimated the amount of the depreciation of the property just after the oaths were filed at 50 per cent of its value just before the oaths were filed, while those called by the city, apparently of equal intelligence and experience, placed it at 10 per cent."
permanent damages which are foreseeable at the time of trial in the light of what has then been done and of the plans for completion.\textsuperscript{135}

8. Interest

The condemnation statutes often specifically provide that interest from a particular time, upon the compensation, shall be included in the award. "Just compensation" doubtless requires that some protection be extended to the owner against undue delay in payment, and it has been said to entitle him to interest upon the value of land taken from the time of the taking.\textsuperscript{136} Sometimes, interest is given from the time of the institution of the proceedings,\textsuperscript{137} but the more usual result is to give interest on the value of land taken from the time when the condemnor actually takes possession.\textsuperscript{138} If the statute gives interest from an earlier date, the landowner is sometimes required to offset the value of the rents and occupation against the interest.\textsuperscript{139}

Courts are divided on the question of whether interest accruing before the award may be given upon the amount assessed, not for the value of land taken, but for the injury to remaining land.\textsuperscript{140} Where the injury has been inflicted by a structure already completed, the allowance of interest upon the damages, that is, upon the amount determined to be the diminution in value of the remaining land, computed from the date of completion of the structure, seems consonant with equity.

\textsuperscript{135}United States v. Rogers, (1920) 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566. See cases collected in Decennial & Current Digests, Eminent Domain, sec. 148.

\textsuperscript{136}As in Brown v. United States, (1923) 263 U. S. 78, 44 Sup. Ct. 92, 68 L. Ed. 171 where in a condemnation proceeding on behalf of the United States for land in New Mexico, it was held that the conformity act required the court to follow the local statute which allowed interest from the date of the summons.


\textsuperscript{139}It is allowed in Dallas County v. Barr, (Tex. Civ. App. 1921) 231 S. W. 453; but denied on the ground that the amount of damage is not a liquidated sum, in City of Chicago v. S. Obermayer Co., (C.C.A. 7th Cir. 1920) 268 Fed. 237.