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EMINENT DOMAIN DAMAGES

J. B. STEINER

The question of damages in eminent domain has ever been a matter of great controversy between litigants, and not infrequently the litigation ends in an unjust award. Generally the popular mind looks upon condemnation awards with ridicule. Naturally the condemnee is exacting in his claims; all claimants, in whatever field of damages, ask for more than they expect to receive, just as condemnors are reluctant to admit the amount of damages they should pay. The late Judge Faris of the Supreme Court of Missouri once said that damages ranged "from nothing to a quarter of a million dollars."

True, it often happens that condemnation awards are excessive. On the other hand, condemnors are not without fault; in fact, they are equally to blame with the owners. There is no excuse for a condemnor to attempt to get property for less than its actual value; an owner is entitled to all the value there is in his property. Condemnors' experts often negotiate settlements that are not above reproach, and this is especially true where an owner does not have valuation and legal advice. These experts very often become advocates in their zeal, with the result that their errors lie buried in public improvements as memorials of silent sacrifices of property owners, but these errors are never discovered by the public, and, therefore, they never become a public joke.

I. JUST COMPENSATION

Constitutions guarantee "just compensation" for property "taken or damaged." Broadly speaking, "taken" means appropriated; "damaged" means not physically taken, but injured, depreciated in value, and essentially the taking of rights and uses from property. Property is damaged by being reduced in area and by change in grade in all forms, as

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impairment of access, cutting off of access, or the removal of lateral support. The damaging of property gave rise to the terms "consequential damages" and "proximate damages." These damage elements, being a natural development of the exercise of the power of eminent domain, found constitutional sanction in state constitutions in 1870 in the "damage clause." In addition to grade damages, the "damage clause" insures protection to the owner whose property is damaged by reason of a portion thereof being taken and the remainder thereby being reduced in area. The damaging of remainders, being complicated and not always understood, constitutes a field of eminent domain damages wherein property owners sustain the most uncompensated damages.

The purpose of this article is to study the fundamental elements of eminent domain damages and the application of the market value rule as a means of arriving at just compensation.

The language of the federal and several state constitutional provisions guaranteeing just compensation and due process of law is substantially identical. Just compensation is comprehensive of all elements of value as of the time the owner is deprived of his property. It is the full and fair equivalent of the property taken, and that value is measured by what the owner has lost. It includes the value of the land taken and

5. U. S. CONST., Fifth Amendment: "... nor shall private property be taken for public use without just compensation."
6. For example, Mo. CONST. art. II, § 21, see note 2, supra.
7. U. S. CONST., Fifth Amendment: "No person shall be . . . deprived of . . . property without due process of law;" Fourteenth Amendment: "... nor shall any State deprive any person of . . . property without due process of law." Mo. CONST. art. II, § 30: "That no person shall be deprived of . . . property without due process of law." A discussion of these duplications in the federal and state constitutions is found in Hager v. Reclamation District, 111 U. S. 701, 707 (1884).
10. In Illinois the date of valuation is the date of filing the petition for the reason that the owner is not entitled to the increased value resulting from the cause. Sanitary District v. Chapin, 226 Ill. 499, 503, 80 N. E. 1017, 1019 (1907). Under the Missouri railroad cases it is the time of the appropriation. Chicago, Milwaukee & St. Paul Ry. v. Randolph Town-Site Co., 103 Mo. 451, 461, 15 S. W. 437, 439 (1890). In that case, however, the court indicated that the date might be fixed by statute. Statutes fixing dates of valuation have been held valid. In California and Utah the date of the issuance of the summons has been approved by the courts. California Southern R. R. v. Kimball, 61 Cal. 90 (1882); Los Angeles v. Fomeroy, 124 Cal. 597, 57 Pac. 585, 602 (1899); Oregon Short Line & Utah Northern Ry. v. Mitchell, 7 Utah 505, 27 Pac. 693 (1891). In New Jersey the date of the filing of the petition was held proper. Ross v. Palisades Interstate Park, 90 N. J. L. 461, 101 Atl. 60, 63 (1917).
12. Bauman v. Ross, 167 U. S. 548, 574 (1897); Boston Chamber of Com-

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the depreciated value of the remainder. It was held to be market value in *Puget Sound Power & Light Co. v. Payallup.* In the old case of *Sinnickson v. Johnson,* it was held to be a settled principle of universal law, reaching back prior to all constitutions, that the right to compensation was co-ordinate with the power of eminent domain. Just compensation is natural justice.

II. DUE PROCESS OF LAW

Due process of law also requires that the owner be paid the full value of his property. In *Smyth v. Ames,* the court held that a judgment of a state court is wanting in due process of law, under the Fourteenth Amendment, if property is taken without just compensation. In *McCoy v. Union Elevated R. R.,* the court said that if the necessary result was to deprive a man of his property without just compensation, then due process of law was denied. In addition to the payment of just compensation, due process of law requires that the procedure shall not make it impossible to obtain just compensation. The instrumentalities of the state must provide for due process of law, as the court held in *Chicago, Burlington & Quincy R. R. v. Chicago,* Notice and opportunity to defend are essential parts of the procedure. At some stage in the proceedings there must be an opportunity to be heard. No judgment of a court without notice


15. 169 U. S. 466, 525-6 (1898); Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226, 241 (1897). In United States v. Chicago, B. & Q. R. R., 82 F. (2d) 131, 134, 140 (C. C. A. 8th, 1936), the Court held that the condemnee must be made whole for what was taken from him. In Chicago, B. & Q. R. R. v. Naperville, 166 Ill. 87, 47 N. E. 734, 736 (1897), the court in speaking of just compensation said: "Unless the owner is made whole, he would not receive the compensation which the constitution guarantees him." This case was followed in St. Louis v. Brown, 165 Mo. 545, 56 S. W. 298, 302 (1900). See latter part of note 31, supra.

16. 247 U. S. 354, 363, 365 (1918), and cases therein cited. In that case the question was whether the assessment of benefits by reason of the construction of an elevated railroad deprived an abutting owner of property without due process of law. Held it did not. The evidence showed the elevated brought a vast amount of traffic to said property.

17. 166 U. S. 226, 241 (1897).


19. Webster, in Dartmouth College v. Woodward, 4 Wheat. 518, 581 (U. S. 1819), said: "By the law of the land is most clearly intended the general law:
amounts to due process.\textsuperscript{20} The state cannot confiscate property even when used in the violation of the criminal laws,\textsuperscript{21} nor can a street or road be extended across a railroad right of way by trustees of the town except by condemnation proceedings.\textsuperscript{22} In \textit{St. Louis v. Hill},\textsuperscript{23} it was held that a building line could not be established without condemnation and notice to the owners affected, but in the recent case of \textit{Gorieb v. Fox},\textsuperscript{24} a building line was established under the police power. In \textit{Barker v. St. Louis County},\textsuperscript{25} the statute which required the owner to file his claim for damages within a specified time or be forever barred, was held unconstitutional as contravening the clause guaranteeing just compensation. The court in \textit{State ex rel. McCaskill v. Hall},\textsuperscript{26} refused to require condemnation commissioners to allocate the award of damages between the lessor and lessees. That was merely a matter of distribution for the court after the final determination of the damages.\textsuperscript{27}

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\textsuperscript{20} See Hurltado v. California, 110 U. S. 516, 535 (1884); Wilcox v. Phillips, 260 Mo. 664, 169 S. W. 55, 58 (1914). The commissioners were not required to give property owners a hearing in \textit{St. Joseph v. Geiwitz}, 148 Mo. 210, 49 S. W. 1000 (1899), but the statute gave them the right to file exceptions to the report of the commissioners. In \textit{St. Louis v. Senter Commission Co.}, 336 Mo. 1209, 54 S. W. (2d) 133, 139 (1935), where the statute did not provide for a hearing on exceptions before commissioners, it was held constitutional. However, an opportunity was given for filing exceptions.


\textsuperscript{22} 116 Mo. 527, 22 S. W. 561, 563 (1893).

\textsuperscript{23} 274 U. S. 603, 607 (1927).

\textsuperscript{24} 104 S. W. (2d) 371, 376-7 (1937), \textit{rev'd}, Petet v. McClanahan, 297 Mo. 677, 249 S. W. 917 (1923). By mere inaction the owner was deprived of his property, but the court in Chicago, B. & Q. R. R. v. Chicago, 186 U. S. 226 (1897), held that the instrumentalities of the state must provide due process of law. The court commented on the fact that a person may waive trial by jury, citing and discussing \textit{Hodgson v. Belyea}, 327 Mo. 377, 37 S. W. (2d) 444, 447 (1931), but the waiving of the trial by jury is not waiving one's cause of action. See Mo. Rev. Stat. (1929) § 7840.

The simplicity of the procedure before a condemnation commission in Missouri is well expressed by the court in \textit{State ex rel. Union Electric Light & Power Co. v. Bruce}, 334 Mo. 312, 317, 66 S. W. (2d) 847, 849 (1933), as follows: "A landowner whose property is sought to be condemned may sit idly by, file no pleadings and permit the suit to progress until the commissioners make their award. If he be satisfied with the award he has the right to accept it and go his way without any expense whatsoever. If he is not satisfied with the award he has the right to file exceptions and demand a jury."

\textsuperscript{25} 325 Mo. 165, 28 S. W. (2d) 80 (1930).

\textsuperscript{26} In \textit{St. Louis v. Senter Commission Co.}, 233 Mo. App. 804, 108 S. W. (2d) 107 (1937), in a matter of distribution the court held that the lessee is entitled to the reasonable market value of the unexpired term of his leasehold. This case is ably discussed by Rehm in (1938) 3 Mo. L. Rev. 203.
III. Measure of Damages

The sole question to be decided, saith the courts, is, what is just compensation? The question appears to be simple, yet the courts do not always agree. Much depends on a clear understanding as to what is taken, invaded, damaged, or whether certain injuries grow out of governmental functions such as the construction of revetments along the bank and within the bed of a navigable stream, all of which elements are hereinafter discussed. As a means of determining just compensation, time and experience have developed the market value rule with which to measure the damages sustained by property owners. That rule, as stated by Lewis, is as follows:

"The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it."

Without quoting at length from the author, it is enough to say that there must not be any element of a forced sale in the transaction. It must represent a transaction on the free, open market. This definition is generally accepted by all the courts. Where a parcel of property does not have a market value its actual value may be shown, and the absence of market value does not absolve the condemnor from paying just compensation. Where part of a parcel is taken, the measure of damages is

31. In Idaho-Western Ry. v. Columbia Synod, 20 Idaho 568, 119 Pac. 60, 62 (1911), where there was no market value in a college building, the owner was allowed such compensation as would be a substitute for the property taken. In Stockton v. Ellingwood, 96 Cal. App. 708, 275 Pac. 228 (1929), it was held that absence of market did not absolve the condemnor from paying compensation, but an owner must suffer a loss in order to receive compensation. Los Angeles v. Harper, 139 Cal. App. 331, 35 P. (2d) 1029 (1934). In Illinois Light & Power Co. v. Bedard, 343 Ill. 618, 175 N. E. 851, 852 (1931), the court held that a church, college, cemetery, club house or railroad terminal did not have a market value, in which case the law permitted the introduction of any evidence available to prove values. In Waco v. Craven, 54 S. W. (2d)
the difference in market value before and after the appropriation. This rule applies to buildings just as it applies to land, for buildings are part of the land, and therefore they cannot be valued separate and apart from the land. With a building the question is, what enhancement in the market value does the building add to the property? Houses are part of the realty and must be paid for as realty. For the same reason, if a part of a building is taken it must be paid for and the title passes to the condemnor.

In connection with the taking of part of a building, the remainder should be restored unless the taking of the part destroys the whole of it. If the remainder building is still usable, it must be restored, or else it is destroyed. Hence, the necessity of constructing a new front wall on the remainder building. Restoration is the practical compensatory method

883, 887 (Tex. Civ. App. 1932), it was held that where property had no market value, the actual value could be shown.

In this connection we refer to note 15, supra, where several cases are cited to show that the owner must be made whole, otherwise he does not receive just compensation. Where all of a parcel is taken, the market value equivalent would make the owner whole; but where property does not have a market value, the owner is made whole by paying him for his loss, or actual value. In cases where the remainder is damaged and where restoration is required, the owner is made whole by paying him the cost of restoration. The question becomes, what is the cost of restoration, not market value. Restoration is a construction matter entirely. Take the case of United States v. Chicago, B. & Q. R. R., notes 98 and 99, infra, and the text supported thereby, where it became necessary to estimate the value and cost of raising and broadening the railroad embankment and of protecting it from erosion, saturation, and distortion from waves and ice by riprapping with rock, there was no application of the market value rule. On page 138 the court pointed out that the market value rule did not apply to the situation, and it became necessary to make the property whole for the loss sustained. The question was not asked as to whether the restoration costs equaled or were greater than the value of the property damaged. The question was, what was the cost and damage for restoring the property to as good a condition as it was in prior to the damage committed by the condemnor?


33. Newgrass v. Railway Co., 54 Ark. 140, 146, 15 S. W. 188 (1891), followed in Kansas City Southern Ry. v. Second Street Improvement Co., 256 Mo. 386, 404, 166 S. W. 296, 301 (1914). In State ex rel. State Highway Comm. v. Haid, 332 Mo. 606, 69 S. W. (2d) 1067, 1059 (1933), the court said: "... the house, barn, and fences, being fixtures to the land condemned ... pass to the condemnor.”


35. Kansas City v. Morse, 105 Mo. 510, 519, 16 S. W. 893, 895 (1891).

36. Ibid. There the court said: “Buildings taken, in whole or in part, are to be treated as realty so far as they are taken or damaged.” See St. Louis v. Aebel, 170 Mo. 318, 70 S. W. 708 (1902).
of making the remainder usable and of paying the damages or cost there-


37. The court, in Springfield Southwestern Ry. v. Schweitzer, 173 Mo. App. 650, 158 S. W. 1055, 1060 (1913), in commenting on St. Louis v. Abeln, said: "A part of the wall of a building was torn down, which, if left down, would necessarily render almost valueless the part of the building not taken, and the court allowed the cost of rebuilding the wall for the purpose of reducing the damage to the property not taken." Similar rulings are found in West Chicago Masonic Ass'n v. Chicago, 215 Ill. 278, 74 N. E. 159, 161 (1905); In re Widening of Michigan Avenue, 280 Mich. 539, 273 N. W. 798, 802 (1937); Shoulster v. Arizona, 48 Ariz. 523, 63 P. (2d) 189, 190 (1936). Even as far back as 1838 the cost of a new wall was allowed as damages in Patterson v. Boston, 37 Mass. 159 (1838).


39. Nestlehut v. DeSoto, 202 S. W. 425, 426 (Mo. App. 1918), and cases therein cited.

40. 123 Mo. 23, 31, 30 S. W. 314, 316 (1895). The owner introduced evidence tending to show a damage of about $6,000.00, based on lowering the grade of the lot and building to the same relative position to the new grade as it occupied prior to the change. The City denied any liability for damages. The verdict was for $2,750.00.
of the property by reason of the injury, such cost of restoration is the proper measure of damages.’’

If the cost of restoration is less than the diminution in the market value of the property, then the cost of restoration is the proper measure of damages, but the physical facts present a practical situation where the change in the grade leaves a residence fourteen feet above the new street level. In such a case there are two possible ways of restoring the property: one is to build a retaining wall that will hold up the lot and building, and the other is to lower the lot and building to the same relative grade above the new street as it stood above the street prior to the change. Nothing short of the latter plan will adequately compensate the owner for the damages he sustains. If the rule in Smith v. Kansas City is followed strictly, it will in many instances deprive the owner of his property without just compensation. The owner is entitled to have his property left in as good a condition after the work is completed as it was prior thereto, but no better except where new material and new construction work would make the property better. Private property is not usable if it is not accessible to streets. If cost of restoration is to be the measure of damages in such cases, then the amount of damages should be ample fully to restore the property to its former condition, otherwise the property owner is not made whole for the losses sustained and he is deprived of his property without just compensation. This rule applies to all property without regard to location or type of construction. The Constitution makes no distinction as to character of property in restoration.40a

The right of access to property is an easement which cannot be taken away or impaired without just compensation.41 The right of access includes the right to stop in front of the owner’s premises.42 It is the right to have his "family, guests or customers come and go with reasonable limitations" and without interference except by reasonable traffic regulations. Neither statute nor ordinance may require or permit the use of a public street in such a manner "as to destroy rights of ingress or egress to property abutting" on a street without just compensation.43

40a. See notes 15 and 31 and text supported by note 99 in regard to making the property owner whole by restoration.
41. Bourg v. Manufacturer’s Ry., 245 S. W. 43, 44 (Mo. 1922). In Siemens v. St. Louis Electric Terminal Ry., 343 Mo. 1201, 125 S. W. (2d) 865, 868 (1933), the court said: "... that continued, though temporary, deprivation of access to the building, resulting in loss of rents or use, which there was evidence tending to show, is an element of damage properly for consideration."
42. Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114, 123 (1937); (1928) 44 C. J. § 3711.
43. Versteeg v. Wabash R. R., 250 Mo. 61, 156 S. W. 689 (1913). The
If change of grade cuts off access, or removes the lateral support of an abutting owner, a cause of action arises. The Supreme Court of Missouri, in Siemers v. St. Louis Electric Terminal Ry.,\(^{44}\) quoting from In re Board of Rapid Transit R. R. Commissioners,\(^ {45} \) recently said:

"An abutting owner is entitled to lateral support or compensation for its destruction, as against a municipality which is constructing a subway. . . . And a city on taking the land or an easement of an abutting owner for the purpose of constructing a subway under the street, must compensate him for the cost of deeper and stronger foundations to his buildings necessitated by reason of the loss of lateral support."

The court pointed out that the rule governing lateral support between adjoining owners does not apply where the municipality removes the lateral support. In such cases justice demands that adequate retaining walls be required to support the abutting property.

There are times when the market may cause prices to soar and the condemnor may have to pay dearly. In United States v. New River Collieries Co.,\(^ {46} \) during the World War export coal sold considerably higher on the market than domestic coal. The Government requisitioned 60,000 tons, and urged in the trial court that proof of the real value of the coal, instead of the market value, should govern; that market value and just compensation were not necessarily synonymous. The trial court ruled against the Government, and the Supreme Court said:

"This ruling was right, because it was shown beyond controversy that there were market prices previously when and where the coal was taken . . . . The owner was not entitled to more and could not be required to take less (than the market value). The owner's cost, profit or loss did not tend to prove market price or value at the time of taking, and was therefore immaterial."

It is no part of the application of the market value rule to pay for moving a building to the remainder of the parcel not taken in the proceedings. Damages for "moving" were not allowed in St. Louis v. Koch.\(^ {47} \)

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\(^{44}\) 345 Mo. 1201, 125 S. W. (2d) 865, 868 (1938).
\(^{45}\) 197 N. Y. 31, 90 N. E. 456 (1909).
\(^{46}\) 263 U. S. 341, 344 (1923).
\(^{47}\) 76 S. W. (2d) 398 (Mo. 1934). The court followed Kansas City v. Morse, 105 Mo. 51, 16 S. W. 892, 895 (1891), adopting the rule thus stated: "The cost of removing the houses has nothing to do with the measure of damages, for they become the property of the city so far as they are taken by the city." State v. Miller, 92 S. W. (2d) 1073 (Tex. Civ. App. 1936), held such a
The city in that case tried to justify moving on the theory of minimizing damages, but there is no such rule in condemnation. The question is, what is the value of the property before and after the damage is done? A building cannot be paid for on the basis of moving unless the owner consents thereto, in which event the damages agreed to is in the nature of a compromise award instead of the market value.

V. LEASEHOLD INTERESTS

The determination of damages is comparatively simple where the whole parcel is taken. This is also true if the parcel is subject to lease, although there may be numerous parties interested in either the reversion or the leasehold estate. The damage award covers the whole property, and only one award need be made by the commission or jury. While an award cannot be enhanced by the number of parties interested, it may possibly be affected in some rare instances by the leasehold. It must be remembered that the public right to condemn is exercised upon the land itself without regard to the ownership of the interests therein, and the court will not, therefore, compel commissioners to allocate an award between the parties. However, all parties having or claiming an interest

rule would be intolerable; of Department of Public Works v. McBride, 338 Ill. 347, 170 N. E. 295 (1930). The case of Brown v. United States, 263 U. S. 78, 83 (1923), is justified by reason of a special statute, the Survey Civil Act of March 4, 1921, which authorized the condemnation of land for a new town site to replace three-fourths of the town (American Falls, Idaho) taken for the purpose of a reservoir as part of a government irrigation project. Held the "method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution." The court cited as a close analogy, the case of Pitznogle v. Western Maryland R. R., 119 Md. 673, 87 Atl. 917 (1913), where the company condemned an additional strip of land for a roadway as a substitute for another roadway taken as a part of the land condemned for railroad purposes. Held that such a taking was justifiable on the ground of public necessity.

47a. See text supported by notes 32-37, supra.

48. The parties have the same interest in the award that they had in the property. Peterson v. Minneapolis, 175 Minn. 300, 221 N. W. 14 (1928); Schill v. Essex County, 98 N. J. Eq. 469, 131 Atl. 584 (1926); St. Louis v. Rossi, 333 Mo. 1092, 64 S. W. (2d) 600, 604 (1933), and cases therein cited. 49. In State ex rel. McCaskill v. Hall, 325 Mo. 165, 28 S. W. (2d) 80, 82 (1930), the court pointed out that there might be exceptional circumstances where the values of the various interests would exceed the value of the whole, in which instances said interests should be separately appraised, citing but refusing to follow Baltimore v. Latrobe, 101 Md. 621, 61 Atl. 203, 205 (1905); see St. Louis v. Rossi, 333 Mo. 1092, 64 S. W. (2d) 600, 607 (1933). The McCaskill case (note the discussion of the Latrobe case) recognizes there may be exceptions to the general rule. An instance of such an exception would be where the land is leased to a responsible concern at a high rental, and such land would necessarily sell for more on the market than adjoining land not so fortunately leased. Instances of this character are very rare.


in the property must be made defendants in order to acquire their interests, unless the proceeding is strictly in rem. 52

But where land proposed to be taken is under lease with fixtures installed by the lessee, the measure of damages becomes more complex. However, much of the differences in opinions may be distinguished on the basis of facts. In Hanna v. County of Hampden, 53 a tenant at will was held to have no estate that entitled him to damages. It is fundamental that damages can only be awarded for land, buildings and fixtures. 54 Where a tenant installs fixtures on the demised premises and the lease ends pending the condemnation proceedings, the lessee is not entitled to damages. 55 The

52. Parties having an interest in property must be made defendants. State ex rel. Siegel v. Grimm, 314 Mo. 242, 284 S. W. 490 (1926). This is elementary in any jurisdiction. A mortgagee or lienholder is a proper party. Morgan v. Willman, 318 Mo. 151, 1 S. W. (2d) 193, 200 (1927). An exception would be where the proceedings are in rem. North Laramie Land Co. v. Hoffman, 263 U. S. 276, 285 (1925); Rudacille v. State Commission on Conservation, 156 Va. 508, 166 S. E. 229 (1931); In re Condemnation of Property for Park, 263 S. W. 97, 100 (Mo. 1924); Elsberry Drainage Dist. v. Harris, 267 Mo. 139, 184 S. W. 89, 91 (1916).

53. 250 Mass. 107, 145 N. E. 258 (1924). In Tate v. State Highway Comm., 226 Mo. App. 1216, 1220, 49 S. W. (2d) 282, 284 (1932), the court in reviewing many authorities said: "... a tenancy at will is incapable of being the subject-matter of a sale," and therefore it has no market value. The court distinguished the case from Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544 (1905), where a tenant at will was the owner of a valuable building, with the right of removal. The property was damaged on account of change of grade, a damage to the possession and not a taking or acquisition of property.

54. Kansas City Southern Ry. v. Second Street Improvement Co., 266 Mo. 386, 404, 166 S. W. 396, 301 (1914); cf. St. Louis v. St. Louis, L. M. & S. Ry., 266 Mo. 694, 182 S. W. 750, 752 (1916); LEWIS, EMINENT DOMAIN (3d ed. 1909) § 728.

55. In Schreiber v. Chicago & Evanston R. R., 115 Ill. 340, 3 N. E. 427 (1885), where the tenant installed certain fixtures considered by the court as trade fixtures, and the lease expired before the payment of the award, the court held the tenant was not entitled to damages because he was not dispossessed by the condemnation proceedings. He had an obligation to move at the end of the term. In Cincinnati v. Schmidt, 14 Ohio App. 426 (1921), the city condemned the fee simple title to the land, and the tenants were permitted to remain in possession after the title had passed to the city and until after the expiration of the lease. The buildings were owned by tenants who leased the premises from year to year with the privilege of removal. Held the tenants were not entitled to compensation. In Smith v. Jeffcoat, 196 Ala. 30, 71 So. 717 (1916), the tenant held under a lease entered into after the condemnation suit had been filed, and the court held the tenant was not entitled to damages, his rights being subject to said suit. In the case of Los Angeles County Flood Control District v. Andrews, 52 Cal. App. 788, 205 Pac. 1085 (1921), the lessee claimed damages under a lease with an option for renewal. Held the option gave no right of possession, which, of course, was a rather strict construction. The lease expired on June 1, 1919, and the date of valuation was March 20, 1919, the date of the issuance of summons, which date, the lessee claimed, entitled him to damages. Held "the rule that damages are to be assessed ... as of the date of the issuance of summons relates only to property actually taken," but no property was taken because the lessee remained in possession until the end of his term.

The Schreiber case was followed in the three preceding cases to sustain the rulings. To these authorities may be added LEWIS, EMINENT DOMAIN (3d ed. 1909) § 718, and the case of Wright v. Logan, 25 S. W. (2d) 799, 802 (Mo.
fixtures thus attached to an expired leasehold do not constitute an element of damages, but where a tenant for a term of years installs fixtures on the premises, they can be considered to the extent to which they increase the market value of the unexpired term of the leasehold. These fixtures contribute to the increased rental value of the property. The value of the lessor's interest in the property is fixed by the rent reserved in the lease, and the increment of value in the property goes to the lessee. This is especially true in long term leases.

It would appear from the decisions that trade fixtures attach to the leasehold rather than to the freehold. In contemplation of law, trade

App. 1930), which held that an option for five-year extension of the lease was as much a part of the lease as any other matters therein. This ruling is, of course, contra to the Andrews case.

56. In Emery v. Boston Terminal Co., 178 Mass. 172, 185, 59 N. E. 763 (1901), the tenant, dispossessed on April 5th, twenty-one days prior to the end of the lease, on May 21st, was entitled to damages for the use of the premises and fixtures during the unexpired term. The mere fact that the lessee had for several years regularly renewed the lease could not be considered for purposes of further renewals with the tenant. Such possible intentions of the parties added nothing to the legal rights of the tenant. It is legal rights that must be paid for. "Even if such intention be added to the salable value of the lease, the addition would represent a speculation on a chance, not a legal right." In Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489 (1895), the court said: "The increased value of the premises for rent in consequence of the putting in of such fixtures . . . may properly be considered in computing the damages to the leasehold." In Bales v. Wichita Midland Valley R. R., 92 Kan. 771, 141 Pac. 1009 (1914), the award to a tenant was based on the fact that certain fixtures increased the value of the lease. In Consolidated Ice Co. v. Pennsylvanina R. R., 234 Pa. 497, 494, 73 Atl. 987 (1909), the railroad purchased the fee and filed a condemnation suit to acquire the lessee's interest in the premises. The railroad company removed and sold certain fixtures (ice house and machinery) installed by the tenant who had refused to move them. Held, the railroad was liable for the unexpired term of the lease plus the sale price realized from the machinery. The value of the use of the fixtures until the expiration of the lease was included in estimating the value of the unexpired leasehold. See Iron City Auto Co. v. Pittsburgh, 253 Pa. 478, 98 Atl. 679 (1916), for a review of authorities on leaseholds and fixtures. In St. Louis v. St. Louis, I. M. & S. Ry., 266 Mo. 694, 182 S. W. 750, 754 (1916), where the respondent's unexpired term was three years, the court held "respondent was entitled to be paid the reasonable market value of its fixtures . . . which were contained in and affixed to the leasehold premises condemned."


fixtures are the lessee's equipment and are not considered as annexed to the freehold, although they are sufficiently attached to the premises to serve the purposes of the tenant. It is generally the intention of the parties that the tenants will move his fixtures at the end of his term.

VI. LAND, BUILDING AND FIXTURES

The term "fixture" has always been difficult to define. It may be safely said that a fixture depends upon three elements, namely, annexation, adaptation and intention.\(^{58}\) Annexation, however slight and easily displaced, will not prevent an article becoming a fixture where it is adapted to its location in the building with the intention of becoming a part thereof.\(^{60}\) The tendency is for adaptation and intention to control in the test, and not annexation. So, a manufacturing plant where parts of the equipment installed by the owner are only slightly fastened to the premises, and some not at all, is considered as a unit and as a going concern, held to be a fixture.\(^{61}\)

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59. Crane Co. v. Epworth Hotel Const. & Real Estate Co., 121 Mo. App. 209, 219, 98 S. W. 795 (1906); Security Stove & Mfg. Co. v. Stevens, 222 Mo. App. 1032, 1034, 9 S. W. (2d) 808, 811 (1928); Glueck & Co. v. Powell, 227 Mo. App. 1226, 61 S. W. (2d) 406, 408 (1933). The old rule of annexation is found in Potomac Electric Power Co. v. United States, 85 F. (2d) 243, 248 (1936), where the court said: "The rule applicable to so-called fixtures in buildings taken in federal condemnations is that, if they can be removed without substantial injury either to the real estate or to the fixtures, they remain personally and need not be taken as part of the realty." The court there overlooked both adaptation and intention. The omission of intention from an instruction in Cooke v. McNeil, 49 Mo. App. 81, 84 (1892), was error. In Moller-Vandenboom Lbr. Co. v. Boudreau, 231 Mo. App. 1127, 86 S. W. (2d) 141, 149 (1935), it was held that brooder houses were fixtures because it was the intention that they were to remain there. Incidentally, the federal courts follow the state courts in the law of fixtures. Randall v. LeBron Elec. Works, 1 F. (2d) 313 (C. C. A. 8th, 1924); In re Johns-Manville Sales Corp., 88 F. (2d) 520 (C. C. A. 6th, 1937); In re American Pile Fabric Co., 85 F. (2d) 961, 963 (C. C. A. 3rd, 1936); United States v. Wiener, 210 Fed. 832, 834 (C. C. A. 2d, 1914), cited in St. Louis v. St. Louis, I. M. & S. Ry., 266 Mo. 694, 182 S. W. 750, 754 (1916).

60. See note 59, supra. Hooven, Owens & Rentschler Co. v. John Featherson's Sons, 111 Fed. 81, 94 (C. C. A. 8th, 1901). In McCarthy Lbr. & Const. Co. v. Kinder, 206 Mo. App. 287, 225 S. W. 1024, 1027 (1920), the court held that bookcases and a skirt box, all built to fit particular spaces in a building were fixtures.

61. In Kelvinator St. Louis, Inc. v. Schader, 225 Mo. App. 479, 39 S. W. (2d) 385, 388 (1931), the court held that a refrigerating plant was a complete system and a fixture, and every part was necessary to the operation of the whole plant, even though certain parts, as coils and condensors, are easily detached without serious damage. In White v. Cincinnati, R. & M. R. R., 34 Ind. App. 287, 71 N. E. 276, 278 (1904), the court held the machinery of a paper mill was part of the realty. In Banner Milling Co. v. New York, 240 N. Y. 533, 544, 148 N. E. 668, 672 (1926), the court said: "The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials and machinery considered separately, but if they have been combined, adjusted, synchronized and perfected into an efficient functioning unit of property, then it must be paid for as a going concern. In Los Angeles v. Klinker, 219 Cal. 193, 25 P. (2d) 826 (1933), all of the printing equipment of a metropolitan newspaper
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In determining whether an article is a fixture in condemnation proceedings, the courts, in St. Louis v. St. Louis, I. M. & S. Ry.,62 and in Los Angeles v. Klinker,63 held that the rule between vendor and purchaser applied instead of the rule between landlord and tenant. This holding is correct because the condemnor is a purchaser even though the sale is enforced.

VII. APPRAISAL OF PROPERTY

In appropriating land, the uses to which it is plainly adapted must be taken into consideration. Property is not to be regarded as worthless or of a mediocre value because the owner allows it to go to waste or is unable to put it to use. Another may be able to utilize a parcel of property to the best use to which it is adaptable, and to such a use as may be reasonably expected in the immediate future.64 Some courts very positive-

plant, the complete "processing equipment," was held to be a fixture for which compensation was required to be made. In Jackson v. New York, 213 N. Y. 34, 35, 106 N. E. 758 (1914), the factory plant consisted of a warehouse which contained machinery shafting, elevators, and conveyors, valued at $4,363.20. Judge Cardozo, later Associate Justice of the Supreme Court of the United States, said: "It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value. An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held."

The unit idea of a complete system and fixture as well illustrated in Southern California Tel. Co. v. State Board of Equalization, 82 P. (2d) 422, 428 (Cal. 1938), where the central office equipment included articles as head-sets, breast-sets, and operators' stools, which were readily portable and not attached by bolts and screws to the building, were held to be fixtures as part of the whole equipment.

62. 266 Mo. 694, 182 S. W. 750, 754 (1916).
63. 219 Cal. 198, 25 P. (2d) 826, 831 (1933).
64. The most frequently cited authority in this point is Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 408-9 (1878). There Patterson owned one island and an interest in two other islands in the Mississippi River. It appeared that these islands were ideally located for boom purposes and the Boom Company sought to condemn them for said purposes. The jury awarded damages in the sum of $9,358.33 and $300.00 of which was land value when not considering the land for boom purposes. The court reduced the award to $5,500.00, and the Boom Company appealed. In affirming the judgment the Supreme Court said: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. . . . but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. . . . Their
ly hold that appraisers should take into consideration the highest and best uses to which land is adapted. Remote and speculative uses must be excluded from all consideration.

In appraising property, rents may be introduced in evidence. Rental value as a basis for appraisements is not derogatory to the unit value rule in the McOskill case. Generally property is worth what it produces, although consideration must be given to the character of the improvements in determining whether the property is serving its highest and best uses and whether the property is producing its best return.

Sales of similar property, located in the same neighborhood and made about the time in question, are admissible in evidence to aid in determining the value of the property pending before the court. Valuable stone or minerals in the ground are not valued separately from the land itself; such appraisements would be wholly speculative in that there is no way of estimating the quantity and value of minerals in the ground. The proper method of valuing such lands is to consider them as containing minerals or stone deposits. After all, it is the land that is being appraised, not the minerals.

Irregular parcels are often difficult to appraise. For example, an owner might pay a "holdup" price for a strip one foot wide adjoining

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. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned."

Judge Brandeis in St. Louis & O'Fallon Ry. v. United States, 279 U. S. 461, 503 (1929), said: "... such loss (in condemnation proceedings) must be determined 'not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.' Boom Co. v. Patterson, 98 U. S. 403, 408."

65. In Yonts v. Public Serv. Co., 179 Ark. 695, 17 S. W. (2d) 886 (1929), where the land was of little value as a farm, and was of great value as mineral land or as a town site, the adaptable uses may be shown, although the land had never been so used. See Illinois Light & Power Co. v. Bedard, 343 Ill. 618, 175 N. E. 851, 852 (1931). In Joint Highway Dist. v. Ocean Shore R. R., 128 Cal. App. 743, 18 P. (2d) 413 (1933), it was held proper to consider the land available for railroad purposes, although the proceedings were for highway purposes. Cf. Webster v. Kansas City & So. Ry., 116 Mo. 114, 22 S. W. 474, 475 (1893).


68. See, for example, State ex rel. State Highway Comm. v. Cox, 336 Mo. 271, 77 S. W. (2d) 116, 119 (1934); St. Louis Belt & Terminal Ry. v. Carter Real Estate Co., 204 Mo. 565, 103 S. W. 519 (1907); Department of Public Works & Buildings v. Hubbard, 363 Ill. 99, 1 N. E. (2d) 383 (1936); Seattle & Montana R. R. v. Roeder, 30 Wash. 244, 70 Pac. 498, 505 (1902).
his land, but that price would not represent market value. Of course, there is no absolute standard of appraising property. In the absence of sales or rental information in the neighborhood, the nearest approach to the value is the opinion of practical appraisers who are acquainted with the property.

In appraising property it must be borne in mind that "the owner of property has the right to exercise exclusive dominion over it and to devote it to such lawful uses as will best subserve his private and personal interests and purposes... This principle is particularly appropriate in appraising restoration damages of remainder improvements, and is well illustrated in the case of Chicago, Rock Island & Pacific Ry. v. Prigmore, where it was urged, in order to avoid damages for cutting off access to the front of the Prigmore lots, that he could have made an entrance on the side of said lots which he had fenced prior to the damaging of his property. The court held the owner had the right to fence the property and could not be compelled to open an entrance on the side along Frisco Avenue.

VIII. Federal Decisions

The federal decisions call for applications of the measures of damages to new situations. In Boston Chamber of Commerce v. Boston, the condemnor sought to acquire nearly 3,000 square feet of land—a private street and way—in which area the Chamber of Commerce owned the fee, rather the reversion, the Dock Corporation held the easement of way, light and air over the land in question, and the Savings Bank held a mortgage on the area subject to the easements. All parties agreed to combine their interests, attempting to create a fee simple title, freed of the easements, but the court said:

"... 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 unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with the persons, not with the tracts of land."

72. 180 Okla. 124, 68 P. (2d) 90, 92 (1937). On a question of cutting off access this case was followed in Siemers v. St. Louis Electric Terminal Ry., 343 Mo. 1201, 125 S. W. (2d) 865, 868 (1938).
73. 217 U. S. 189, 195 (1910).
Perhaps the better statement is that the court took the land as it found it, burdened with easements which had absorbed the substantial value of the land, a situation very much like the one found in *St. Louis v. Clegg;* where, in the condemnation of a private alley, the court held that the damages were nominal for the reason that the substantial value had been taken from the property by common law dedication. However the damages in each instance were properly measured by what the owner had lost and not by what the condemnor had gained.

In *Bauman v. Ross,* it was held that if the remainder was left in such shape or reduced in area as to be of less value, the owner was ‘‘entitled to additional damages on that account.’’ This damage is essentially consequential, that is, direct and proximate, a depreciation in the market value of the remainder. In *Sharp v. United States,* where several separately improved tracts were owned by one person and only one tract was taken, a damage to the remaining tracts ‘‘was denied because there had been no actual appropriation of any part of such separate parcels.’’

Likewise, where land is flooded there is an appropriation and there may be a depreciation in the value of the remainder. In *Pumpelly v. Green Bay Co.,* the right to compensation grew out of the overflowing of land by backwater from a dam erected in the Fox River to improve navigation. The court held that where there is a flooding of land there is a taking for which the owner is entitled to compensation. In *United States v. Lynah,* the court held that where the dam erected in the Savannah River by the Government in aid of navigation, and which raised the water above its natural height, backing the water up against the embankment of plaintiff’s property thereby destroying the land for plantation purposes, there was a taking. The invasion of private property in

74. 289 Mo. 321, 233 S. W. 1, 5 (1921).
76. 167 U. S. 548, 574 (1897); Arkansas State Highway Comm. v. Kincannon, 193 Ark. 450, 100 S. W. (2d) 969, 970 (1937).
77. 191 U. S. 341, 353 (1903).
78. 13 Wall. 166 (U. S. 1871). This dam was constructed under the authority of the State of Wisconsin. The project was permissible under the state law, in the absence of action by Congress, although the dam was constructed in a navigable stream. See United States v. Cress, 243 U. S. 316, 324 (1917).
79. 188 U. S. 445 (1903). In *King v. United States,* 60 Fed. 9 (1893), a rice plantation became unfit for rice culture because the backwater (from a dam in the Savannah River) prevented drainage, although the owner for three years attempted to grow rice. Some of the knolls or patches were still cultivated by colored people. Held, the back of the water upon the land was a taking; that in order to constitute a taking it need not be taken in the narrowest sense of the word. In *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 170 (U. S. 1871), the court said: ‘‘The right of the mill owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use.’’
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d this case is distinguished from Scranton v. Wheeler,80 where the Government built a dike or pier upon submerged lands of a riparian owner thereby cutting off access from his upland to the deep water of the St. Mary's River, and it was held that the owner's qualified title was subject to the public right of navigation.

In Monongahela Navigation Co. v. United States,81 a lock and dam and franchise to take tolls were condemned in the interest of navigation. Said improvements were constructed under the authority of the state, but also at the instance and the implied invitation of Congress. There the court held the company was entitled to compensation under the Fifth Amendment. This case is distinguished from United States v. Chandler-Dunbar Water Power Co.,82 where the right of the Government to destroy the water power of a riparian owner was upheld, and from Lewis Blue Point Oyster Cultivation Co. v. Briggs,83 where the allowance of compensation for the destruction of privately owned oyster beds was denied. The last two cases were ruled on the theory that when one obtains a privilege

80. 179 U. S. 141, 163 (1900). In Jackson v. United States, 230 U. S. 1, 22 (1913), certain levees were constructed on the west bank of the Mississippi River to prevent crevasses in aid of navigation. These levees, constructed in the channel, raised the height of the river and flooded the plaintiff's land on the east bank of the river. The court said this flooding was not an invasion nor a direct taking but was merely a consequential damage. Another case of the same class is that of Bedford v. United States, 192 U. S. 217, 225 (1904), where it was held there was not a taking, where as a result of revetments, consisting of willows and stone, constructed along the west bank of the Mississippi River, and which were neither upon nor in contact with appellant's land. The lands affected, which consisted of 2300 acres located six miles below the construction work, were flooded and seriously damaged. The revetments were intended to prevent further erosion and overflow. It was a matter of conjecture whether the improvements caused the damage, as the court pointed out. The Scranton, Jackson and Bedford cases, supra, belong to that class of case where improvements were made in the river bed to keep the channel within due bounds in aid of navigation, a governmental function.

81. 148 U. S. 312, 334 (1893). A similar case is that of Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 421, 430 (U. S. 1855), where the company constructed over the Ohio River, under a Virginia statute, subject however, to the power of Congress to regulate the navigation of the river, the court held the bridge was a nuisance, but before the orders of removal were executed Congress declared the bridge a lawful structure.

82. 229 U. S. 53 (1913). The Chandler-Dunbar Company, under a permit from the Secretary of War, constructed certain improvements in the bed of the St. Mary's River, a navigable stream 3,000 feet long with an 18 foot fall, as a power plant, within which area two-thirds of the volume of water constituting the falls and rapids, flowed. Held, the flow of the stream was in no sense private property, hence no compensation was allowed therefor; that "every such structure in the water of a navigable stream is subordinate to the right of navigation." The case of Monongahela Bridge Co. v. United States, 216 U. S. 177 (1910), is significant of the power of Congress over navigation. Certain alterations in the bridge were ordered by the Secretary of War, under the Rivers and Harbors Act. The condition of the bridge prevented the passage of rafts and steamboats engaged in commerce. The Court held such changes were not such a taking of private property as must be paid for under the Constitution.

83. 229 U. S. 82 (1913); see United States v. Cress, 243 U. S. 316, 320 (1917).
from the state or nation to make use of a medium of interstate commerce, subject to the dominant power of the Government, such permit may be withdrawn without compensation.

In *United States v. Welch*,74 a part of the owner’s farm was permanently flooded, an outright taking for which it was agreed that he should be paid. The rest of the farm was lessened in value because a private road across the lands of others was cut off permanently, thereby depriving the owner of access, the only outlet to Ford County road. Held, said easement of way was property, being an appurtenance to the land taken and damaged. Another leading case is *United States v. Grizzard*,75 where seven and one-half acres were permanently flooded, hence a taking of plaintiff’s land, located on Tate’s Creek, a tributary of the Kentucky River. Another result of said dam was that the backwaters flooded an easement of access, leading from Grizzard’s farm to Tate’s Creek pike, which flooding and taking also depreciated the value of said farm, hence the court held the plaintiff was entitled damages therefor, in the sense of an invasion, a taking.

In *United States v. Cress*,76 the district court found at the time of the erection of the dam in the Cumberland River, the plaintiff owned about seven acres on Whiteoak Creek, a non-navigable stream, which tract became subject to frequent overflows on account of backwater from the dam, thereby depreciating the land one-half of its value and destroying a ford across Whiteoak Creek and also part of a pass or way leading to Cress’s property. Held, the flooding was a direct invasion, a taking to the extent of one-half of the value of said seven acres; that the “private way and ford” were appurtenant to the Cress property, and for the destruction of which he was entitled to damages to his land. This case came squarely within the holding of *United States v. Welch*, and *United States v. Grizzard*. Cress recovered damages on the theory that where there is a taking, there is an implied promise77 to pay compensation. The court also found that at the time of the erection of the dam in the Kentucky River the plaintiff owned a tract of about five and one-half acres on Miller’s Creek,

74. 217 U. S. 333 (1910).
75. 219 U. S. 130 (1911).
76. 243 U. S. 316 (1917). The court, in quoting from *United States v. Lynah*, 188 U. S. 445, 470 (1903), said: “... where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.”
77. The implied promise to pay under the Tucker Act (28 U. S. C. A. § 41 (20)), is discussed in *Campbell v. United States*, 266 U. S. 368, 370 (1924).
a tributary. The plaintiff had a mill on the tract and the backwater from the dam, at pool stage, was about one foot below the crest of the mill-dam, which flood prevented the drop in the current which ran the mill, thereby destroying the mill. This destruction of the power that ran the mill was held to be a taking of private property.

In Sanguinetti v. United States,\(^88\) the invasion was not conclusively shown. There the Government built a canal and diversion dam for the purpose of diverting waters from one river to another. The plaintiff's land had been subject to overflow, and the plaintiff contended that the canal, being insufficient to carry the water, had increased the overflow, thereby damaging plaintiff's farm and crops, but the extent to which the overflow was increased was not shown. It must appear, the court said:

". . . that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. These conditions are not met in the present case."

The soundness of Christman v. United States\(^89\) has been questioned. There the Government built a dam in the Ohio River which increased the depth of the water above previous overflows about eight feet. The appellants owned a 71-acre farm on Indian Creek, a tributary of the Ohio. It appeared that the flooding of the farm was caused by ""the joint action of freshets coming down the tributary and meeting the backwater produced by the dam in the Ohio river,"" but it appeared this situation had always been true, and apparently the new dam had not affected the frequency of the overflows. The district court found there were no damages as a proximate\(^90\) result of the new dam. Therefore, there was no taking of property, and of course, there was no implied contract to pay damages under the Tucker Act. Such damages were, therefore, merely consequential, sounding in tort, for which the Government is not liable.

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\(^88\) 284 U. S. 146, 149 (1924). This case arose under the Tucker Act.

\(^89\) 74 F. (2d) 112, 114 (C. C. A. 7th, 1934). See United States v. Chicago, B. & Q. R. R., 82 F. (2d) 121, 138 (C. C. A. 8th, 1936), and 90 F. (2d) 161, 168 (C. C. A. 7th, 1937) where the Christman case is discussed.

\(^90\) In Loiseau v. Arp, 21 S. D. 566, 572, 114 N. W. 701, 703 (1908), the court said: "". . . damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self-efficient cause. The latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause."" The freshet coming down Indian Creek under the definition was the intervention of a self-efficient cause. On page 573, 114 N. W. 703, the court also said: ""Proximate damages are those that are the ordinary and natural results of the defendant's act, such as are usual, and might therefore have been expected. Remote damages are such as are the result of accident or an unusual combination of circumstances which could not be reasonably anticipated, and over which the party sought to be charged had no control."
Probably the most important federal condemnation case recently decided by the courts is that of United States v. Chicago, Burlington & Quincy R. R.,91 where the dam and flood control cases are reviewed and distinguished, and where the matter of proximate and remote damages is given full consideration. In that case, the Government sought to condemn a floodway easement on and over a portion of the right of way and railroad embankment of the appellee, which runs along the Mississippi River above Hastings, Minnesota, on account of the construction of a dam in said River in aid of navigation. The plan was to raise the water to an elevation of 699 feet above the Memphis datum which elevation marked a line on the embankment of appellee’s roadbed about 3.45 feet below the top of the railroad ties. As a result, twenty-four acres, situated along about four miles of the appellee’s track, was flooded. The pool which contacted appellee’s property was nearly two miles wide and about seven miles long.

It was conceded by the parties that appellee was entitled to compensation for the twenty-four acres of land actually and permanently flooded. Appellee claimed damages on account of the rise of the water at pool stage, to the end that it might have as good and as safe a track after the proceedings were finished as it had before; that it became necessary to widen and elevate the railroad embankment to protect it against the effects of saturation and wave action; to raise bridges and culverts to prevent flooding and silting; and to riprap with rock its embankment to protect it against erosion and distortion by waves and ice.

The court held as a fundamental proposition that the appellee had the right to build its railroad along the bank of the river, a navigable stream, and, in so doing, it had the right to rely upon the continued maintenance of the natural level and flow of the stream; that the right to increase the water level, to the injury of the appellee above that established by nature, could only be maintained by the appellant through the power of eminent domain and the payment of just compensation.92

Matters giving rise to the main controversy were damages to the remainder, a consequential damage, as used by Lewis,93 a direct and prox-

91. 82 F. (2d) 131 (C. C. A. 8th, 1936). The Hastings dam was one of ten dams authorized to be constructed in the Mississippi River near St. Paul, Minn., pursuant to act of Congress, Jan. 21, 1927 (44 Stat. 1010).
93. LEWIS, EMINENT DOMAIN (3d ed. 1909) §§ 686, 710.
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mated damage as used by the court and defined as being "those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause." It was pointed out that that rule in the federal courts had been in fair accord with the rule, as given by Lewis. For example, in United States v. Grizzard, it was held in addition to actual damages for the land invaded, that the owner, on account of the destruction of the easement of access and the corresponding depreciation in value of the farm, sustained a direct, proximate damage. The court referred to the fact that neither Grizzard, nor any other case cited, included all the specific damage elements involved in the case at bar, which items included "the effect of saturation, waves, and ice on the roadbed, track and right of way of appellee, and of silting and backwater on culverts and bridges and tracks;" that all of these were elements which, if paid for at all, had to be paid for in the pending action. All of these came from natural causes which were put into action by the waters of the dam, hence the damages were direct and proximate, for which loss and depreciation in value just compensation had to be paid. The court said:

"We are impelled to the conclusion that the elements of damage as to ice and wave action, saturation, and silting, and expense of prevention, and protection, submitted to the jury were proper and so exceptions to instructions embodying them were not well taken."

"Just compensation," the court very forcibly pointed out, meant that the "condemnee must be made whole for what is taken from him." In damages that term meant such sum of money as would enable the

94. 82 F. (2d) 131, 136 (C. C. A. 8th, 1936); see notes 90 and 99, supra. Consequential damages was used in Central Georgia Power Co. v. Mays, 137 Ga. 120, 124, 72 S. E. 900, 902 (1911), in the sense of a direct, natural, proximate damage to the remainder.


96. 82 F. (2d) 131, 136 (C. C. A. 8th, 1936).

97. The court refused to rule on the question whether the damage elements in Christian v. United States, 74 F. (2d) 112 (C. C. A. 7th, 1934); Jackson v. United States, 230 U. S. 1 (1913); and Sanguinetti v. United States, 264 U. S. 146 (1924), came within the well settled definition of consequential damages, as distinguished from direct and proximate damages. Such a ruling was not necessary to the matters involved in the case, but the court said: "Confusion comes from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e.g., acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate." Those cases arose under the Tucker Act where the damages were held to be merely consequential and not proximate, and where there was not an invasion, that is, a physical taking.

railroad company to have "as good a track and as safe a track as it had before condemnation."

The elements of damages in this case were, except for the twenty-four acres of land taken, physical reconstruction of the railroad embankment to withstand all of the effects of raising the water to a new elevation. To call the reconstruction work the application of the market value rule would be a mere fiction. With respect to the measure of damages where the market value rule cannot be applied, as here, the court said:

"When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.'"

The problem then is to determine what money loss the owner has suffered by reason of the condemnation. In other words, the owner must be paid such sum of money as will make him whole for what is taken from him.99

The recent case of United States v. Chicago, Burlington & Quincy R. R.,100 follows closely, both in point of facts and law, the preceding case of the same style from the eighth circuit court of appeals. In this last Burlington case, for the purpose of constructing the lock and dam in the Mississippi River at Alma, Wisconsin, the Government filed two condemnation suits, later consolidated, to appropriate a tract of 1.6 acres, and a flowage easement upon appellee's right of way. The area thereby affected extended along and near the Mississippi River for a distance of twenty-eight miles above the dam. In this area were two large sloughs: Beef Slough near the dam, and Lake Pepin in the northern portion of the damaged area. The tributary rivers entering the Mississippi in the flooded district were Beef, Chippewa and Rush, with a combined drainage area of more than 10,000 square miles. The construction of the dam called for a crest elevation of 667 feet sea level datum. This elevation of the water made necessary the elevation of the grade of the right of way, the construction of new bridges, and of riprapping the embankment with rock to prevent erosion. It was held that this construction work, being the direct and proximate result of building the dam, constituted the elements of damages to the appellee's property, that is, the flowage easement as it

100. 90 F. (2d) 161 (C. C. A. 7th, 1937), cert. denied, 302 U. S. 714 (1937).
affected the remainder. In reaching this conclusion the court followed United States v. Grissard,\textsuperscript{101} and applied the law as expressed as follows:

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury to the use to which the part appropriated is to be devoted."

Here there was a physical appropriation together with an extensive damage to the remainder of appellee's property, which damage was measured by the construction cost necessary to restore the appellee's right of way to its former usable condition. In Christman v. United States, there was no appropriation, but as the trial court found, the flooding was the result of freshets from adjacent hills and of backwater from the Ohio in times of flood, and this same condition prevailed prior to the new dam. Hence the damages were merely consequential and based upon tort for which the Government is not liable. Held, that since the appellant was seeking to condemn easements in lands to an elevation of 670 feet above sea level, the appellee could not be limited by "an averment that the Government did not intend to exercise its full right," and that compensation for the railroad "must be based upon the maximum use of the right acquired;" that the appellee was entitled to damages for elevating the water above natural levels upon which riparian owners could rely,\textsuperscript{102} and erect their improvements.

The most unusual case of all is that of Olson v. United States,\textsuperscript{103} where the land in question had no market value and the owners received no compensation. That land bordered on the Lake of the Woods, which is located in Minnesota and Canada, and which has a surface of about 1,500

\textsuperscript{101} 219 U. S. 180, 183 (1911).
\textsuperscript{102} 90 F. (2d) 161, 170 (C. C. A. 7th, 1937); see case of same style, 82 F. (2d) 131, 134 (C. C. A. 8th, 1936). As to what are natural levels may be seen in the following language: "The line of ordinary high water divides the upland from the river bed. The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow. Harrison v. Fite, (C. C. A.) 143 F. 781. Beyond that point the Government can not go without compensation for proximate damages." However, the rights of riparian owners are partially governed by the laws of the states. For example, in State ex rel. Citizens Elec. L. & P. Co. v. Longfellow, 169 Mo. 109, 69 S. W. 374, 377, 379 (1902), the court held: "A riparian owner is entitled to access to the waters and to the use of the waters for all purposes not inconsistent with the public right of navigation thereon," but said right of navigation does not deprive the riparian owner of the right of access. The riparian owner owns to low water mark in Missouri.

\textsuperscript{103} 67 F. (2d) 24 (C. C. A. 8th, 1933), aff'd, 292 U. S. 246 (1934); see also United States v. Wheeler Township, 66 F. (2d) 977 (C. C. A. 8th, 1933).
square miles. In 1898 a Canadian power company built a dam in the Winnipeg River in Canada, the only outlet of the Lake, thereby raising the lake level about three feet and flooding shore lands. By treaty between the United States and Great Britain, it was agreed, among other things, that the "flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on the Lake of the Woods," and each nation assumed responsibility for damages to overflowed lands within its borders.

Condemnation suits were filed pursuant to acts of Congress\textsuperscript{104} to acquire flowage easements on shore lands, then for thirty years under flowage by trespass. The court held that the measure of damage was market value at the time of taking\textsuperscript{105} contemporaneously paid in money.\textsuperscript{106} The land in question had adaptability for flowage purposes, but it had no value as a flowage use. No one could use the land, and therefore no one would buy it. Without prospective purchasers there can be no market value. The case is probably without parallel in judicial history.

We are forced to the conclusion that although the decision is sound under the law, nevertheless great injustice was done. The court said: "The commissioners were not authorized to make any award on account of damages caused by unlawful flooding of shore lands prior to the taking,"\textsuperscript{107} nor did Congress authorize a date of valuation prior to the unlawful flooding. Such a date of valuation would have been most unusual, yet it would have afforded a remedy. The whole situation was an unfortunate affair due to the fact that the shore lands had been unlawfully flooded and taken for thirty years, during which time the property owners were without a remedy.

\section*{IX. Conclusion}

"Just compensation" is damages to property, actual and proximate, that is, damages for property taken and for the depreciation of the remainder (damaged); the same elements of damages apply to buildings with this difference, however—in addition to the depreciation a building sustains by reason of cutting off a portion thereof, the cost of restoration

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of a new front must be added as part of the damages to make the property whole and usable. A property owner is made whole when he is paid a sum of money that will put the property in the same condition after the project is completed as it was in before. These principles apply with even greater force to the damaging of remainder property, in the ordinary change of grade, in grade separations, in the removal of lateral support, or by reason of raising the water elevation in the dam and flood control projects. The test is, what is the owner’s loss or depreciation? Nothing more, nothing less.

Due process of law requires that an owner shall receive just compensation, the money equivalent for property taken and depreciated. Due process of law also means that the owner shall receive due notice of the proceedings and an opportunity to be heard in court. In other words, the appellate courts require that the instrumentalities of the state must provide for due process of law.

The market value rule has been generally adopted by the courts to measure just compensation, but that broad rule cannot be properly applied to all the varied conditions found in condemnation proceedings. For example, no strained construction can make market value out of restoration. Restoration is a distinct element of damages. If restoration costs are to be limited by the value of the remainder property, there will be times when owners are deprived of their property without due process of law.

Private property under some circumstances does not have a market value, yet, it has some value and the damages must be paid according to the extent of the owner’s loss and depreciation; absence of market value does not absolve the condemnor from paying the actual value of the owner’s loss. By the payment of the actual losses, and restoration damages in proper cases, the owner is made whole, justice done, and the constitution satisfied. That is the tendency of the courts where the market value rule cannot be applied.