Easements and Market Value

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INTRODUCTION

The subject of the study upon which this article is based was conceived as the result of the writer’s experience in condemnation proceedings in the United States District Court for the District of Montana. Several of the proceedings concerned acquisition by a federal agency (the writer serving as an attorney therefor) of transmission line easements in western Montana, and there were involved, as is usually the case, important questions of value. The rules which have grown to meet the needs of those connected with the exercise of the power of eminent domain—the sovereign or its agent as taker or condemnor, and the owner of land as condemnee—speak in terms of market value. Application, however, seems often far removed from the practical considerations of the market-place. The attempt in this article is to suggest careful attention to the conduct of those concerned with evaluation of land upon which there has been imposed an “easement” or “right-of-way” to the end that the judicial and legislative rules established for such evaluation may be more effectively and economically applied.

The suggestion is in keeping with that of Professor Julius Stone in his work, The Province and Function of Law. In part III, concerning “The Practical Objectives of the Study of Law in Society,” he considers the value of studies of contrasts between legal rules for human conduct and the conduct itself, and refers to the ideas of another jurisprudent, Eugen Ehrlich, in this way:

... We ought, said the writer, to have more monographs on the brewers’ supply of beer, or the sale of a physician’s practice, than ‘on the concept of the juristic person’.

One of the legal rules for evaluation of the interests taken in a condemnation proceeding is thus stated by a leading authority:

... The measure of damages is normally the difference in the market value of the land free of the easement and the market value thereof as burden with the easement which has been imposed.

The rule is quite often stated in the vernacular as the “before-and-after rule”—a recognition that the amount of damages is determined by subtracting the value of the land after the easement is taken from the amount which represented its value before it was imposed.

It is well settled, writes Nichols, that compensation for the taking of land in a condemnation proceeding is measured by the market value thereof.

Market value is:

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This article is based upon parts of a thesis written to fulfill a portion of the requirements for the S.J.D. degree of the University of Michigan Law School.

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(2d ed. 1950), § 9, p. 408, n. 91. Something of the same suggestion appears in Simpson and Field, Social Engineering Through Law, 22 N.Y.U.L.Q. 145 (1947), in which the authors call for creation of a school of “applied jurisprudence.”


Nichols, op. cit. supra note 2, § 12.
... the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.4

But the problem of determining the amount of compensation to be awarded is not solved by stating that it is equal to the difference in market value before and after the taking. As Nichols puts it, "(m)arket value is, essentially, based on assumption, not on fact."5 One seeking to answer the compensation question does not look at the ability or desire of the owner to sell what is taken. He looks at the land to be affected as a unit of real property in the market without regard for the identity of the owner, and attempts to find (generally through the use of informed opinion evidence) what that unit is worth in the market at the time of the taking. Then, in the same manner, he looks at what reduction in money value has been accomplished by the imposition of the easement. This result is stated in terms of dollars, which are merely translations into specie of what market opinion is as to the actual difference.

In other words, the willing, unforced buyer asks himself: How much interference results to my present or planned uses of this land? The answer he finds is reflected in his unwillingness to pay the price he would have paid if there were no easement. Considerations of this nature as they relate to the actual diminution of use of the surface of land subjected to rights in others are the subject of the discussion which follows.

**SURFACE EASEMENTS—RAILROAD, HIGHWAY, FLOWAGE**

Although this attitude may be indicative of a tendency to view a "taking" as involving physical things, instead of incorporeal relationships to things, it seems not subject to great dispute that the condemnee who is divested of title to an easement or right-of-way for a railroad or highway loses more of value than one who gives up an easement for an electric power transmission line or for a pipe line or sewer to lie beneath the surface.6 As is the case with the "chicken-egg" controversy, it is probably impossible to determine whether past experience with easement values is evidence of market value or determinative of it. However, one authority reports that his experience and observation indicate that prices paid for easements and rights of way range from a low of ten to fifty percent of the fee value of the land concerned for subsurface easements, through up to eighty percent of the fee value for transmission lines, to the full fee value for highway and railroad easements.7

There are, of course, specific statutory mandates concerning the estate which the condemnor may acquire, but the manner in which some of them are applied indicates the determination of the courts to look to practical effects. Consider a recent Texas case, Thompson v. Janes,8 in—

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4 Nichols, op. cit. supra note 2, § 12.2(1).
5 Nichols, op. cit. supra note 2, § 12.2(2).
7 See note 2 supra. As in all things legal, of course, there is dispute. See the sections concerning subsurface and overhead easements, infra.
9151 Tex. 495, 251 S.W.2d 953 (1952).
volving a petition by a railroad to condemn land for a depot site. It is clear that where a depot stands, there is no value in the surface of the land left to the owner. The court quoted a Texas statute providing that a railroad can not take fee title to land by condemnation, and then made this statement: 10

. . . If the easement leaves the landowner with some beneficial use of the land, as it does, for instance, in the case of easements for pipe lines, power lines, or other similar purposes, then the damages for the condemnation thereof, as a matter of law, will be less than the value of the fee (emphasis added.) . . . A distinction must be drawn, however, between such easements and easements which deprive the landowner of any beneficial use of the land. In the latter class of easements the landowner may recover as damages the market value of the land. . . .

The court used the term “market value of the land” in the last sentence of the quotation, to mean “value of the fee” of the land taken—as opposed to the valuation rule it applied where there was some value left to the owner, the difference in market value of the land before and after the taking.

Statements of this sort, based on legal considerations of exclusive possession as well as the practical one mentioned, are found in a number of cases. 11 Except for the fact that confusion might result from calling an interest an “easement” while treating it as if it were a fee, this approach does not seem unfair. In the loss of the use of the surface of the land and virtually all dominion over it, the owner is deprived of almost any value which it may have for him. 12

A slightly different situation is presented in a recent North Carolina decision, Highway Commission v. Black. 13 And it is a situation which may become more common (and therefore more important in its economic impact) as the current need for more and larger and faster highways causes takings with an eye on the future. 14 The highway commission took an easement 150 feet in width across a farm, and constructed upon it a hard surfaced highway only fifty feet wide. It argued on appeal that the trial court had used a formula which allowed the fee value of the land to the owner, although “there is a vast difference between an easement and a fee simple estate in land,” and the owner could use the unoccupied surface of the easement to his advantage.

The North Carolina court recognized that whether there is any substantial difference in value between the easement and the fee depends on

10Id. at 501, 251 S.W.2d at 956.
11Some of them are: Ensign Yellow Pine Co. v. Hohenberg, 200 Ala. 149; 75 So. 897 (1917); Georgia Power Co. v. McCrea, 46 Ga. App. 279, 167 S.E. 542 (1933); Dethample v. Lake Koen Navigation Co., 73 Kan. 54, 84 Pac. 544 (1906); St. Louis, K. & N.W. Ry. v. Clark, 121 Mo. 169, 25 S.W. 192 (1894) (rev’d. in part on other grounds, 121 Mo. 195, 25 S.W. 906); Chicago, S.F. & C. Ry. v McGrew, 104 Mo. 282, 15 S.W. 931 (1891).
12Barring, of course, value for mineral purposes.
14A concerted and drastic change from the past practice in which the easement is “not very much” greater than the occupied surface would seem to require careful re-examination of the “practical” approach because of the relatively costly subsidization of the owner to the extent that the entire width is not occupied.
the nature and extent of the rights taken, but, it said, since the commission acquired the right to use the entire right-of-way for highway, there was practically no difference in value. It is submitted that, up to the conjunction, that statement is reasonable and fair. After that, it seems necessary to define the phrase "nature and extent of the rights." With reference to the market value yardstick, it would appear that the condemnor acquired rights which depreciated the farm to the extent of the loss of fifty feet of surface at present, with the added (but smaller) depreciation factor equal to the right to make it wider or lay a new one in the future. The court said later:

... In the very nature of things, compensation for private property taken for public use must be determined as of the time of the taking. ... As a consequence, compensation is to be assessed on the basis of the rights acquired by the condemnor at the time of the taking, and not on the basis of the condemnor's subsequent exercise of such rights.

There seems no reason to disagree with this statement as far as it goes; yet its definition of compensation appears to be one-legged. If it is fair to look to the effect which such a taking would have on the market value of the entire farm in order to find compensation (in order to recompense the owner for what has been taken from him), then it is fair to consider what is left in the owner.

A North Dakota decision, re-examining an earlier case, illustrates this approach. Otter Tail Power Co. v. Von Bank concerned an appeal by the company in a proceeding to condemn a transmission line easement along a highway easement. The ground of appeal asserted was that the owner of the fee had been allowed to enter evidence of the value of hay growing upon the untraveled portion of the highway right-of-way. The court held this a proper element of compensation since the owner had voluntarily granted the county an easement for "highway purposes only." The right of way granted was 100 feet wide, but only a twenty-seven-foot width was traveled, the condemnee having reserved to himself agricultural rights not inconsistent with highway use.

In 1909, the North Dakota court had decided in the case of Tri-State Tel. & Tel. Co. v. Cosgriff that it was improper to admit evidence of the value of crops raised upon the untraveled surface of a highway easement. This was a proceeding to condemn a telephone line easement in the boundaries of the highway. An earlier case, Donovan v. Allert, had held that the fee owner retained all rights not inconsistent with the highway use,

239 N.C. at 204, 79 S.E.2d at 784.

It is possible, of course, that an examination (at trial of the issue of just compensation) of the present use to be made might—where there is discrepancy between that and the extent of the rights taken—lead to the kind of conclusion found in Board of Education v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954), where the Grand Rapids board was found to be without authority to take land for a school playground for which there was no present need.

72 N.D. 497, 8 N.W.2d 599 (1943).

Implicit here is the position that use for transmission line purposes is not a highway use. Courts have held both ways on this matter; it is not treated in this study.


and the principal holding overruled the Cosgriff decision to the extent that it disagreed with the Donovan case. The condemnor asked for a rehearing on the basis of that language.

Upon rehearing, the court reviewed the foregoing cases, and said that the Donovan rule was recognized in an earlier Cosgriff decision. It continued:

... While the holding in the later Cosgriff Case, 19 N.D. 771, 124 N.W. 75, 26 L.R.A. (n.s.) 1171, supra, may be considered to be to some extent a rule of property, it should not be applied under the circumstances shown in the instant case in so far as it conflicts with the holding in the Donovan Case.

This language seems to say that the condemnor for transmission line purposes takes away the owner's right to grow crops upon the untraveled portion of the highway right-of-way, and must therefore make compensation for the value of that right. For the purposes of present interest, it means that the value of the entire width of the highway right-of-way is the fee value decreased by the value or the right to crop for some indeterminate future period. This position, it seems, balances the interests very nicely: The condemnor acquires what it needs actually for both present and future, the owner is compensated for what he has lost, and the public is not charged with subsidizing crops until the time that the full width is used for highway purposes.

Within the confines of the element of loss of use of the surface there are other problems, of course. Once it is determined that the effective occupation of the surface deprives the owner of essentially the value of the fee, there is the problem of finding that value. Questions of evidence are generally without the purview of this article, but the mention of a few items will serve to illustrate the problem. Some of them arise in cases concerning another or additional taking, when a lesser right or smaller area has been acquired in the past.

A series of Connecticut cases, placing emphasis on the past and practical use of the highway right-of-way, is discussed in Hollister v. Cox, which concerned the acquisition of additional right-of-way to realign a highway. The position of the state was that since a curve which had been added during the realignment was entirely within the boundaries of the "old" right-of-way, no depreciation of value could be allowed as compensation for the "new" taking. The owner contended that the land was depreciated in excess of the value of the new right-of-way taken because adding the curve "moved" the traveled portion of the highway nearer the house. The traveled portion, however, remained entirely within the boundaries of the "old" easement.

The court discussed three other Connecticut cases, which provided the pattern governing problems of this kind—a pattern formed from considerations of purposes and actuality. In this case, said the court, the pur-

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Andreas v. Cox, 129 Conn. 475, 29 A.2d 587 (1942); Lefebvre v. Cox, 129 Conn. 252, 28 A.2d 5 (1942); Tyler v. Darien, 115 Conn. 611, 162 Atl. 837 (1932).
pose was to make a curve in the highway where it had been straight before. The curve was not placed upon the additional right-of-way taken from the owner, but without that portion, the curve could not have been constructed. The result to the condemnee of adding the curve to the highway was to bring the traveled portion closer to the residence. "The use . . . for this purpose," said the court, "was an essential factor in causing the depreciation found to exist. . . ."

By hypothesizing results upon different facts, the court made it plain that the additional taking must be used for the traveled portion in order for this proposition to apply. Had the traveled portion within the old right-of-way been extended without an additional taking, no damages would be payable. Had there been another taking, but no part of the "new" right-of-way applied to travel, there would be no liability for payment for alleged depreciation due to relocating the traveled portion nearer the owner's house. Hence, the conclusion seems to be a retrospective application of the proposition that just compensation to the owner should reflect the actual market value of that of which he is deprived. It does, in a sense, have regard for the use to which the right-of-way easement will practically be put.

**SUBSURFACE EASEMENTS**

In the acquisition of rights to use the subsurface for sewers, pipe lines, and the like, compensation for loss of use of the surface runs all the way from fee value downward to amounts calculated by formula. In a recent Arkansas case, *Texas Illinois Natural Gas Pipeline Co. v. Lawhon,* concerning an appeal by the condemnor on the ground of alleged excessive award, there had been taken an easement for a gas pipe line across a farm. The court applied a rule taken from an electric power transmission line case,* stating it thus:*

... Under the law of this State, the owner of land is entitled to be paid the full value of the land embraced within the right-of-way easement, as if the fee had been taken even though the landowner, after the pipe line was constructed, had the right to continue using the surface of the right-of-way for farming or other purposes not inconsistent with the use of the easement. Appellant acquired by the condemnation proceedings the power to make such use of the right-of-way as its future needs required for the purpose for which the right-of-way was condemned. *Baucum v. Arkansas Power & Light Company*, 179 Ark. 154, 15 S.W.2d 399.

The last sentence is the key to the holding. The court's position seems to be that since the company acquired the "power" to use the land for its future needs, it has all the effective use of the land, now and forever, even though the owner of the fee may crop it year after year.

On the other hand, the Court of Appeals of Kentucky decided a group of cases in 1949 on a different theory. The primary decision was *Tennessee Gas & Transmission Co. v. Jackman,* which involved an appeal by the

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*220 Ark. 932, 251 S.W.2d 477 (1952).*

*Discussed in connection with the section on "overhead" easements, infra.*

*220 Ark. at 934, 251 S.W.2d at 478.*

*311 Ky. 507, 224 S.W.2d 600 (1949).* This decision was followed in five other decisions appearing with it in the same volume.
company on the ground of excessive award in a proceeding to condemn an
easement to lay and maintain a gas and oil pipe line and the right of in-
gress and egress across a farm. In rejecting the company's contention
that no compensation should be made for the right of entry because it
might never be exercised, the court said:

... Nevertheless, the right of ingress and egress over the remain-
der of the farm, whether exercised or not, imposes a burden on ap-
pellees' proprietary interest and control of the estate. Such in-
fringement on the dominion, in itself, although the right con-
stituting such an infringement may never be exercised, is such a
burden as reasonably may be calculated to decrease the market-
able value of the property on which the burden has been placed,
...

The court recognized that, in the market, one interested in the purchase of
a farm with such a incumbrance upon it would be inclined to pay less in
view of the possibility, however remote, that maintenance and inspection
personnel might trample across his crops at the most inopportune time. This
attitude seems to be entirely in keeping with the idea that just compensa-
tion is equal to the reduction in market value (accent on market). How-
ever, the court saw other elements too, and on the next page said:

... Under the highest value fixed on the land compromising the
entire farm the fee simple title to the strip taken would not ex-
ceed the sum of $200 in value, but the fee simple title has not been
taken: the owner may use and cultivate the surface of the land
subject to the right of the company to enter thereon and do all
things necessary to maintain the pipe line in question...

Given a choice between the Arkansas and Kentucky approaches, the latter
seems preferable for several reasons. First, it considers and gives effect
to a fact which would affect the thinking of a prospective purchaser: How
much less is this farm worth to me because of the possibility that my use
of the surface over the pipe will be interfered with from time to time? In
application of the Arkansas rule, in order to be absolutely fair, the owner
of the farm must not use the surface of the easement for any purpose, be-
cause he has received the market value of it in compensation for the tak-
ing. When and if the owner does make use of the surface above the pipe
line, he is being subsidized by the condemnor to the extent of that use.
Ignoring any economic or political overtones in that kind of situation, it
may yet fairly be said that the ideal stated in Bauman v. Ross is lost sight
of. The United States Supreme Court there suggested that, under the
federal Constitution, the condemnee was entitled "to receive the value of
what he has been deprived of, and no more." For, the Court concluded:

... To award him less would be unjust to him; to award him more
would be unjust to the public...

*Id. at 509, 224 S.W.2d at 661.
*Id. at 510, 224 S.W.2d at 662. This case and its companion decisions take the same
position as the following earlier Kentucky cases: Warfield Natural Gas Co. v. Al-
ley, 233 Ky. 323, 25 S.W.2d 724 (1930); Warfield Natural Gas Co. v. Shepherd, 233,
Ky. 254, 25 S.W.2d 397 (1930); and seven other decisions involving the same con-
demnor appearing in the same volume.
*167 U.S. 270, 17 Sup. Ct. 999, 42 L.Ed. 164 (1897).
In a Kansas case decided the same year as the Jackman case, the consideration by the court of the same kind of evidence which would seem to weigh in the market led to a fair and sensible result. A pipe line company took an easement to lay pipe lines two feet beneath the surface of a farm, there being already two of its lines laid and functioning thereunder. On appeal, the company contended that there was insufficient evidence to support the jury's finding that the taking of the easement damaged the remainder of the farm. The Kansas Court rejected this argument, saying:

... Under instructions of which no complaint was made, the jury had a right to take into consideration that while the pipe lines had to be laid two feet below the surface, the Company was under no obligation to maintain them in that condition. The jury could also consider that although the two lines previously laid by the Company had been so installed, by reason of washing or other cause, at places they were not buried over a few inches. That this situation might soon arise with respect to new lines laid can hardly be said to be speculative, and that if so, it made farming of the entire tract more difficult was certainly an inference the jury was entitled to make. ...

While this decision goes farther than the Jackman case, chiefly on the basis of "judicial notice" of past difficulties, it still does not assume out of hand that just compensation requires payment to the owner of the value of the fee of the "strip" of land across or under which the easement has been imposed. The court struck a nice balance between the rights of the parties when a little later it rejected another argument of the company to the effect that since there was no evidence that the use of the easement for farming was interfered with, the damage done by construction was only temporary, and there was no actual damage. To admit this, stated the court, required consideration only of evidence favorable to the company, ignoring the owner's evidence and the right of the company to lay as many pipes as it could place within the boundaries of the easement taken. The logical end of the argument is this:

... If we give full effect to the argument as made by the Company, it leads to a conclusion that if the line which has been laid had been installed during a period when there was no crop on the land, the landowners would not be entitled to anything. ...

Quite recently, a federal court, in the case of Southern Natural Gas Co. v. Norsworthy, gave recognition to the "rights" remaining in the owner of land traversed by a pipe line alongside of two already there, and then applied a percentage of the entire fee value as the worth of the interests taken in the form of an easement. The report of the case is brief, and there is no showing that there might have been evidence concerning percentages of value. The court made this decision:

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9 Id. at 103, 211 P.2d at 72. A similar holding appears in Prairie Pipe Line Co. v. Shipp, 305 Mo. 668, 267 S.W. 647 (1924).
10 Id. at 104, 211 P.2d at 73.
12 This is reminiscent of the findings of Schmutz. See note 8 supra.
13 98 F. Supp. at 784.
... Therefore, this court is of the view that the fair market value of the land in fee would be $125 per acre. The defendants will have the right to cultivate the entire right-of-way and to use it for pasturage or such other purposes as will not interfere with the operation of the pipeline. The telephone poles and wires are already upon the land and were put there under the right-of-way which plaintiff purchased before defendants acquired the property. From this value of $125, 25% should be deducted, since only the right-of-way will be condemned ($125 minus $31.25), leaving the value of the right-of-way at $93.75.

While the application of a flat 25% "depreciation" factor may seem arbitrary, it is in keeping with the approach that just compensation for the taking of an easement which leaves some use of the surface in the owner is equal to something less than the fee value of that surface. It is to be noted, too, that the court states that there is in the owner a right to make certain uses of the surface which do not interfere with the rights of the holder of the easement. (The opinion does not indicate whether this "right" is based upon statute or the court's interpretation of the extent of the taking; it is submitted, however, that the basis is not important for present purposes.) This expression is perhaps a necessary condition precedent to a finding of less than fee value, but it is in accord with the proposition that whatever is not granted away (or, in these cases, taken) is reserved to the grantor (condemnee) without any specific statement to that effect.

Illustrative of an interpretation of a grant which leaves little to the condemnee is the decision in *Texas Pipe Line Co. v. National Gasoline Co.* on an appeal by the Texas Company from an award for the taking of an easement for a high-pressure gasoline pipe line through land suitable for subdivision. The contention of the condemnor was that the value of the easement should be less than that of the fee. The court quoted the judgment vesting rights in the condemnor as follows:

"... together with the right of constructing said pipe line in such manner as may be required, including the right to clear said right-of-way, make such excavations for such purposes, and place such materials and constructions on said property as may be necessary, with the right to maintain and operate said pipe line, when constructed, to the fullest extent required, together with the right of ingress and egress over, upon and across the said land for the purpose of constructing said pipe line thereon and of maintaining and operating the same, and for the removal of same, if and when the use thereof is discontinued.'

This judgment, said the court, virtually excluded the owner from any use or rights in the land; therefore, while the contention of the condemnor was a sound proposition, there could not be much difference in value in this particular instance. This position seems the same as that of the Arkansas court stated heretofore, taking potentiality (if that it is) for actuality and overlooking, it seems, the practical effects which a prospective purchaser would take into account.

203 La. 787, 14 So.2d 636 (1943).
21 "... of course, ..." said the court.
22 Id. at 701, 14 So.2d at 638.
In *Shell Pipe Line Corp. v. Woolfolk* the Missouri court stated that it would take "judicial notice" of the difference in the use of the surface by railroads and oil pipe lines, but it said that, since the Missouri statute allowed a pipe line to be laid either on or under the surface, the condemnor must specify its manner of use in order to avoid making compensation for the full value. This was in response to the contention of the corporation that the award made to the owner of a farm was excessive. The court continued:

... unless the condemning party expressly limits its surface use or reserves such to the landowner, it cannot be said as a matter of law that it may not, in prosecution of its right to so erect and maintain pipe lines, fence the right of way or otherwise hinder or even entirely prevent surface use of the right-of-way by such landowner. ...

Part of the problem is the difficulty of placing a value upon actions which are to happen in the future (when the determination of damages occurs prior to use, or when, although tried after use, the determination is limited to consideration of value as of the date of the taking). In the Kansas case noted earlier there was evidence that the laying of other pipe lines in the same farm had caused erosion, and it was reasonable to suppose that market value would be affected by consideration of past experience when laying the third line. Something of the same firmer tying down of damage elements occurs when the determination of compensation is made during or after construction of the facility and the rules of the particular jurisdiction allow showing damage during that period as bearing on the question of loss of market value.

This situation is illustrated by the case of *Oklahoma Natural Gas Co. v. Coppedge*. There had been a determination of compensation by the trial judge sitting without a jury for the taking of a natural gas pipe line through an Oklahoma farm. The company, alleging an excessive award, appealed. This court found evidence that crops upon land above the pipe line did not grow as well as elsewhere; that the ridge left by filling over the line caused erosion in surrounding land; that the inspector employed by the company to walk the line made a path across the farm. All of these elements, said the court, acted to impair the value of the farm. Perhaps it is damage of this kind that the practice of awarding the "fee value" of the surface tends to cover; yet it is conceivable that these elements are not common, but rare.

Later, in considering the question of whether an adjoining landowner was entitled to compensation for the laying of a pipe line within the boundaries of a highway easement, the Oklahoma court based its decision on an interpretation of "use" and did not refer to the facts of damage. *Nazworthy v. Illinois Oil Co.* was an action by the owner of a farm to secure such compensation. The trial court gave judgment for the company,

431 Mo. 410, 53 S.W.2d 917 (1932).
110 Okla. 261, 237 Pac. 592 (1925).
and the owner appealed. The court on appeal said that, although there were many thousands of miles of oil pipe lines laid along Oklahoma highways, this was the first case on the point. The court held that this was merely a further proper use of the highways of the state, the chief restriction being that such use should not improperly interfere with the rights of others properly using the same highway. And it determined, ipso facto, that such use properly supervised did not interfere with such other rights. It is true, of course, that a determination of the question whether a "new" use is within the meaning of the public use for which the original taking was made need not go beyond an abstract definition of terms. However, there seems necessarily implied in such a determination a finding or conclusion (even though unconscious) that the owner has lost no more use of surface—among other interests—than he had before; hence, that the market value of the land is not further lessened by this "additional" use. This amounts probably to saying in another way (or from another viewpoint) that the original taking for a highway easement must have included rights to accomplish ends slightly different from the business of transporting the public.

Consideration during trial of the question of compensation of damages or injuries which have already occurred is closely related to the problem of tortious acts by the condemnor after the taking, an element which is not treated in this article. There is, though, one case which may properly be considered here because of its blending of the two matters into a harmonious whole. State v. Williams concerned an action by the State of Washington to acquire a right-of-way for a highway tunnel beneath the surface of Williams' hillside land. The top of the tunnel was about 47 feet below the basement of the condemnee's house; the portal of the tunnel was located about 200 feet away and downhill from the house. This action was brought after construction had commenced, and the uncontroverted allegation of the owner was that such construction had caused the slope of the hill to slide, making the house worthless. There was evidence that the hill under which the tunnel ran was composed of clay beneath sand and gravel, and that disturbance of the clay during construction resulted in movement of the surface. The state contended that the owner could not collect in a condemnation proceeding for damage allegedly the result of negligent acts; that the state constitutional provision did not cover payment for such injury in such proceeding; and that the acts were those of an independent contractor who chose the angle of cut (allegedly the cause of the slippage) without control by the state.

The court held, on the basis of past Washington decisions, that all damages, whether the result of proper or negligent acts, were to be assessed in a condemnation proceeding when the question of compensation was tried after construction had commenced. It held further that negligent acts are within the purview of the constitutional guarantee of just compensation, and that the state, which had knowledge of the formation

"A similar statement, although directed against the interest of the state in a public highway appears in Kansas v. Kansas Natural-Gas Co., 71 Kan. 505, 80 Pac. 962 (1905).

"An interesting application of this kind of approach is to be found in State v. Commissioners, 123 Ohio St. 362, 175 N.E. 590 (1931).

"12 Wash. 2d 1, 120 P.2d 496 (1941).
of the hill and its predisposition to slip, could not excuse itself by placing the construction in the hands of an independent contractor. The matter of importance in this discussion is the disposition of the court to look at the practical effect of the taking of the subsurface easement, to see that the owner has effectively lost all use of his land, and to make compensation accordingly. It is quite clear that the loss of market value of the land for the taking of an easement for a tunnel 47 feet below the basement is, on these facts, equal to the value of the fee.

There is no need to do more than suggest that the considerations applied in the foregoing discussion of compensation for taking subsurface rights may apply wherever there is a question of valuable residual rights in the owner. The theory is as applicable to overhead easements as it is in this connection. Likewise, the suggestions concerning effectual and practical use which appear in the section following may be pertinent elsewhere.

OVERHEAD EASEMENTS

As is the case with subsurface easements, so with overhead easements—telephone, telegraph, electric power lines and the like: There is a difference of opinion as to whether the taking of an easement for such purposes so deprives the owner of use of the surface as to require that the value of the fee of the land lying within the "boundaries" of the easement be paid to constitute just compensation. This difference is illustrated by decisions from neighboring states handed down at about the same time. In Kentucky Hydro-Electric Co. v. Woodard, the Court of Appeals of Kentucky expressed the same view as it did in considering subsurface easements. The case involved an appeal by the company on the ground of an excessive verdict in a proceeding to condemn an easement for the construction, operation and maintenance of an electric power transmission line, together with the right to remove trees growing along the right-of-way which, in falling, would endanger the line, and the right to restrict building on either side of the line within twenty-five feet thereof. The court set forth the boundaries of the easement and the rights acquired by the condemnor, and continued:

... But it must be remembered that neither the 3.43 acres nor the 13 acres were all taken. Excepting the space occupied by the towers, amounting to little more than one-twentieth of an acre, the appellees still have the right of use and occupancy of all this land, except so far as such rights are curtailed by the prohibition against the erection of buildings and by the right of appellant to cut or trim trees...

In another decision reported in the same year, the court repeated this position, held further that it was proper for the trial court to admit evidence concerning the manner of construction and strength of the facilities...
to be constructed upon the land in order that the jury "might determine to what extent the owner's use of the land would be affected."

Meanwhile, in Tennessee, the holding in Kentucky-Tennessee Light & Power Co. v. Beard was to the effect that the condemnor was liable to pay the value of the fee for the land encompassed within the boundaries of the easement. The company had taken rights to construct, inspect and maintain an electric power transmission line, and to prevent the erection of structures and the growing of timber upon the surface of the land within the easement. The trial court had held that the company was bound only to pay the value of an easement, but the intermediate appellate court ruled this error. This court said:

... Any right the owner has to use the premises is subordinate to the prior and superior rights of the power company. The owner has lost his right to build houses, fences, and other structures upon said land. He has lost his right to grow timber upon it. His interest in the property has been reduced to that of a servient estate subject to the rights of petitioner, and petitioner may exclude him absolutely from said premises at any time the exigencies of its business may require.

It would seem that the basis of the court's position is a rule stated by another court in another connection, but equally apropos here:

... When property is taken by the power of eminent domain, the compensation of the owner is to be determined by the actual legal rights acquired by the condemnor and not the use he may make of the rights.

This statement is eminently fair, and few would argue that just compensation should be based upon a guess (however intelligent) as to the extent of future exercise of rights granted now, and scaled down accordingly.

However, is it not possible that the cause of the difficulty in this connection is a matter of defining the right in terms of itself? Barring an explicit statutory exposition of the extent of the rights vested in the condemnor upon completion of the proper procedure, it would seem that the extent must be determined from examination of the petition or judgment in the condemnation proceeding in the light of our current and expected engineering practice. If, as in both the Tennessee and Kentucky cases noted just above, the operator of an electric power transmission line takes the right to construct, operate, and maintain such lines across a farm, and with it, the right to prevent interference with proper operation of the line, has it the right to exclude the owner "absolutely from said premises at any time the exigencies of its business may require"? It is submitted that this question can not be properly answered without knowledge of the state of development of electric power transmission line engineering. The answer, it is submitted, is a practical one, just as is the

452 Tenn. 348, 277 S.W. 889 (1925).
46Id. at 356, 277 S.W. at 891. This decision was followed by, among others, Kentucky-Tennessee L. & P. Co. v. Burkhalter, 8 Tenn. App. 380 (1926).
48This category would include the right to cut danger trees and to prevent obstruction and fire hazards, among others, which, in the interests of more accurate determination of compensation and protection of both parties, should be explicitly set forth.
answer to the question "what is just compensation?" To find just compensation, recourse is had to such concepts as "market value," and "willing buyer and willing seller, neither forced to act"; the hypothetical situation is likened as nearly as possible to the actual. So, it seems, should one approach the problem of determining how much of the total dominion over the surface is yielded up to the condemnor.  

Without attempting to support the statement beyond an appeal to the kind of knowledge which, while perhaps not yet "common" might be the subject of "judicial notice," it is submitted further that the state of transmission line engineering today is such that taking the right to inspect, operate and maintain leaves with the owner of the land a very large proportion of the bundle of abstractions representing complete dominion. Hence, the decrease in market value of his land is proportionately quite small (practically and demonstrably speaking), and he is justly compensated by receiving an amount equal to the loss.

_Little v. Loup River Public Power District_, a decision noted briefly in another connection, dealt with this problem but did not seem to solve it. Among other matters raised on appeal by the district from an allegedly excessive award in a proceeding to condemn a transmission line easement, was its claim that, although it had the right to go on the land to repair and maintain, it had no intention in the near future to do so and it might be 25 years before it had to do so. This attitude, contended the condemnor, should be reflected in lessened compensation. Not so, said the court:  

... This is not important because the fact that the condemnor (sic) has no present intention of exercising all the rights acquired or the probability that its use may be a limited one are not proper matters for consideration in fixing compensation since damages are required to be paid for the right appropriated, even though full use may not be immediately contemplated or never had. The presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent. ...  

This, it seems, is begging the question. If, in fact, the condemnor is vested with a right to go upon the land to repair and maintain from this moment  

In a proceeding to acquire an easement for a transmission line, the condemnor petitioned for rights for "one or more" lines of a specified voltage on a specified width of right-of-way. Counsel for the condemnee made much of the fact that exercise of these rights could accomplish virtual exclusion of the owner by the placing of poles or structures "all over the easement as thick as dog hairs." Good engineering practice permitted the erection and operation of no more than two lines of that voltage upon that width.  

This is not to suggest, of course, that, upon trial of the issue of compensation one must rely upon "common" knowledge or "judicial notice" of these facts. Competent expert engineering testimony can very quickly establish them.  

It would seem that the argument loses none of its validity if one assumes the opposite—that the very hazards of electric power transmission lines are so great as to virtually keep the landowner off the land subject to the easement. Knowing that, the court can assign a value to the right to operate and maintain which accurately mirrors the loss to the owner. It is submitted that the problem is solved more simply and justly by looking at operations, rather than abstractly defining terms.  

See note 5 supra.

150 Neb. at 868, 36 N.W.2d at 264.  

This position does not seem to be in accord with an earlier expression by the same court in _Pearse v. Loup River Public Power Dist._, 137 Neb. 611, 200 N.W. 474 (1940).
on continually and forever, then it is so effectually occupying the land to the exclusion of the owner that fee value should be paid. While it is not suggested that the self-serving and unbound statements of the condemnor should be accepted as determinative of the extent of the right acquired, certainly competent evidence of the expected necessity of such entry should be considered as bearing upon the value of that right.

A 1943 Oklahoma case comes to a conclusion like that of the Tennessee court in the Beard case, but it also suggests a method by which a limitation on the value of the easement may be accomplished. On appeal, the condemnor argued that the trial court committed error in instructing the jury to award the fee value of the land contained within the boundaries of the easement, since the right to use the land for any purpose not inconsistent with that of the condemnor remained in the condemnee. This court held the instruction proper on the ground that there was taken a perpetual easement over the entire “strip,” and that only naked legal title, without value, was left to the owner because the condemnor had the right to exclude him therefrom. But, continued the court:

... In many cases the easement is limited to a specific number of poles or towers, specifies the number of wires and their distance from the ground, and reserves to the landowner his full rights to the remainder of the land embraced in the easement. Where the easement is so limited, the rule contended for by the Authority would probably apply.

Does not the alternative suggest too much? If, for example, the condemnor reserved, in so many words, the right in the landowner to use the surface of the easement in a manner not inconsistent with the rights of the condemnor, this court would seem prepared to regard the value of the rights taken as something less than the value of the fee. But, it appears that the only way to determine the extent to which the owner may use the surface without interfering is to determine how much use the condemnor will make. We are returned to the original situation, then. In either case, unless the condemnor does, in fact, use all the surface all the time, the loss in market value to the farm is less than the fee value.

It is apparent in some instances that difficulties result early in the history of development of a technological innovation because of the tendency of the courts to extend well-established principles by analogy. An early Alabama case concerned an appeal by a telephone company from an award of damages for the taking of right-of-way for a telephone and telegraph line, the question for decision being the propriety of proof by the owner of the land of the value of trees cut in clearing for the line. The court made this statement of the rule which it found applicable:

... The measure of damages in this class of cases is the value of the land when taken—before any injury thereto resulting from the construction of the line—and the injury or diminution in value caused to the remaining and contiguous lands.—M. & O. R.R. Co. v. Hester, 122 Ala. 249, 25 So. 220, and cases cited.

Id. at 617, 138 P.2d at 85.
Id. at 396, 47 So. at 733.
Note that this decision extends, without apparent concern, the rule applicable to damages for the taking of an easement for railroads to "overhead" easements. Six years later, the court was faced with the value problem involving an electric power transmission line in *Alabama Power Co. v. Keystone Lime Co.* In its decision, the court indicated that the full value of the land beneath the wires could not be awarded to the owner because he had rights to use it in common with the company. However, upon a motion for rehearing, the attention of the court was directed to the earlier decision, and it said that, in order to be consistent, it would follow it. So, irrespective of any practical considerations which might have led to the original railroad determination, the appearance of two concepts—analogy and consistency—substituted for an examination of the factors which would affect market value and result in a determination of just compensation.

A similar instance of "borrowing" principles was noted in the discussion concerning subsurface easements in which the Arkansas court allowed fee value for the surface of a pipe line easement, stating that the law of that state was settled by *Baucum v. Arkansas Power & Light Co.* That case concerned an appeal by the owner of the land from an award for the taking of an electric power transmission line easement on the ground that the jury should have been instructed that it was to find the fee value of the surface across which the easement ran. The court recognized that there were two lines of authority on this question, but stated its opinion that the language of the Arkansas constitution required compensation equal to the fee value. The court's holding follows:

We adopt the view of the Supreme Court of Tennessee in the case of *Kentucky-Tennessee Light & Power Co. v. Beard*, 152 Tenn. 348, 277 S.W. 889, where it was held, after a review of the authorities (which we do not repeat), that, where an electric light and power company, in condemnation proceedings, acquired a permanent easement across the land of another, it became liable for the full value of the right-of-way as if the fee had been taken. And the fact that the owner was given the permissive use of the right-of-way could not be considered in reduction of the sum to be allowed as compensation. . . .

Proceeding from a surmise that it was the words "full compensation" in the constitutional provision which led the court to adopt this rule, it is easy to suggest that they mean "complete payment for whatever rights are taken," not full compensation in the sense of payment for the full fee value of the land subjected to the easement.

"191 Ala. 58, 67 So. 833 (1914).
"This statement does not indicate a failure to appreciate the importance of those concepts to the stable development of a legal system. It is suggested that, in this instance, however, the effort to achieve a just balance of interests outweights the other considerations.
"179 Ark. 154, 15 S.W.2d 390 (1929).
"This is a rare instance, admittedly, but the reason will be clear.
"'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, . . . .' Whether the position would be different were the condemnor the sovereign is not clear.
"179 Ark. at 161, 15 S.W.2d at 402.
CONCLUSION

Such after-the-fact speculation serves little purpose, of course. But it is submitted that an examination of the actuality of use would prevent borrowing of principles rather off-handedly. In fact, such examination would most certainly lead to awards of compensation reflecting the actual effect upon market value.

. . . Similar fact situations produce similar legal conclusions. . . .

It is suggested that the reverse of this statement is valid: Similar legal conclusions ought only to result from similar facts. And fact reflects existence.

*Licht v. Ehlers, 234 Iowa 1331, 1337, 13 N.W.2d 688 (1944).*

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