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SLICING THE CONDEMNATION PIE: COMPENSABLE
INTERESTS UNDER EMINENT DOMAIN
IN PENNSYLVANIA

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I.

INTRODUCTION

THE RIGHT of the sovereign to acquire private property for public use, upon making just compensation is known as the right of eminent domain.¹ The right is said to inhere in sovereignty² and, indeed, is as “enduring and indestructible as the state itself.”³ While the right to condemn is granted by neither federal nor state constitutions, both provide that private property cannot be condemned unless “just compensation” is paid for the property rights taken.⁴ When a piece of land is condemned, a number of individual interests may be terminated, raising significant questions as to the number and nature of the interests represented and the right to compensation of the various owners of the interests. The purpose of this article is to consider which property interests are compensable; there is no attempt to present the law on evaluation of a compensable right, but allusion is made to this area as it bears relation to, or solves the question of whether or not such a right exists.

At the outset, it should be pointed out that a condemnation award is made in a lump sum, based on the fair market value of the land actually taken, regardless of the interests represented. Compensation is paid for the property taken, not the individual interests in the property.⁵ After the total award is determined, it is then apportioned among the various claimants⁶ which has made it incumbent upon the

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1. *Garrison v. City of New York*, 88 U.S. (21 Wall.) 196 (1874).

2. *Lazarus v. Morris*, 212 Pa. 128, 61 Atl. 815 (1905).

3. JAHR, *EMINENT DOMAIN VALUATION AND PROCEDURE* 3 (1953).

4. U.S. CONST., amend. V; PA. CONST. art. I, § 10.

5. See ORGEL, *VALUATION UNDER EMINENT DOMAIN* (1953): “The general legal doctrine . . . is that compensation must be paid for the land that is taken, regardless of the separate interests in the land, and that the sum of the separate values of the divided interests may not exceed the value of the whole.” *Id.* at 461.

6. PA. STAT. ANN. tit. 26, § 44 (1958), requires that the fee owner and tenant’s claims be tried together. The total award is fixed first, and then apportioned among the various claimants. The proposed Eminent Domain Code would continue this procedure. An Act to Codify, Amend, Revise and Consolidate the Laws Relating to Eminent Domain (hereinafter cited as Eminent Domain Code) H.B. 1, § 507 (1964).

courts to insure that all the parties receive the share of the pie which most nearly represents their interest in the land. The authority for this procedure reaches back to an 1886 Philadelphia decision.⁷ In that case a Board of View award of the full fee value of the land to the owner and a separate additional value to the owner of a ground rent was reversed on the theory that only one fee simple had been condemned, and that the fee holder and the owner of the ground rent would have to share one award. This approach continues to be followed⁸ with the pie-slicing chores being committed to the judiciary to work out on a case by case basis.

II.

ESTATES IN LAND

A. *Life Estate, Remainder and Reversion*

In Pennsylvania the difficulty with a life tenancy has not been in recognizing it as a compensable property interest in condemnation proceedings,⁹ nor has it been in bringing the estate within the bounds of the familiar damage formula entitling the life tenant to the difference between the market value of the property before and after the taking.¹⁰ Most troublesome, however, has been applying the measure to effect an equitable apportionment between the life tenant and the remainderman.

In the leading case of *Pittsburgh, Va. & C. Ry. v. Bentley*,¹¹ the plaintiff was a life tenant on a seventy-seven acre farm, 2.7 acres of which were condemned. The court sustained a damage award which calculated the value of the estate by multiplying the net annual value of the premises by the life-tenant's life expectancy and reduced by a determination of the present cash value.¹² This is the so-called "life expectancy" method of evaluating a life estate, which has been criticised as an inaccurate formula, but employed by the courts "either through lack of actuarial knowledge or through a preference for a simple basis of calculation."¹³ Orgel has taken the position that this "method of valuation entirely ignores the possibility that the respective damage to the life estate and the remainder . . . might be wholly out of line with

7. In the Matter of the Opening of Twenty-fifth St., 18 Phila. 488 (Pa. Quarter Sess. 1886).

8. Where relevant, portions of the proposed Eminent Domain Code of Pennsylvania will be discussed with reference to its effect, if any, on compensable property rights.

9. The interest was early recognized in *Railroad v. Boyer*, 13 Pa. 496 (1850). For a good article dealing with the condemnation of this and other future interests, see *Stoyles, Condemnation of Future Interests*, 43 IOWA L. REV. 241 (1958).

10. *Schuylkill Navigation Co. v. Thoburn*, 7 S.&R. 411 (Pa. 1821).

11. 88 Pa. 178 (1875).

12. *Id.* at 185.

13. 2 BONBRIGHT, VALUATION OF PROPERTY 739 (1937); cf. The Inheritance and Estate Tax Act of 1961, PA. STAT. ANN. tit. 72, § 502 (Supp. 1961): "The value of a life interest shall be determined in accordance with the Mortality Table. . . ."

the proportions which the values of these estates bore to the value to the fee."¹⁴ By way of illustration, one might posit a situation where the condemnor takes valuable timber to the injury of the fee, though not to the detriment of the life tenant who has no right to use any more timber than is necessary for house use or for repairing or fencing.¹⁵ Despite the soundness of these criticisms, *Pittsburgh* would still appear to be the law.¹⁶

Since the question of apportionment has been so thorny, some writers advocate solutions which avoid apportionment.¹⁷ Some courts have appointed a trustee to invest the compensation award, paying the income to the life tenant and upon his death paying the corpus to the remaindermen.¹⁸ This appears the more satisfactory approach from the standpoint of the intention of the party creating the two estates. Still another alternative is to pay the entire corpus to the life tenant upon his posting security, thereby assuring that the remainderman will actually receive the fund. There is an early Pennsylvania case¹⁹ where the court employed this device in a dispute over apportionment between landlord and tenant.²⁰ The case is not clear as to whether invoking this method of distribution is dependent on a dispute between the parties. There is no real justification for such a limitation, and no subsequent case has taken up the issue.

When the compensation award is not paid simultaneously with the taking, some upward adjustment (by way of interest payments) must be made to qualify the sum as "just." There is a presumption to the effect that the delay in making the award warrants detention payments as compensation for the former owner's inability to use the funds.²¹ In competition between life tenant and remainderman over

14. ORGEL, *op. cit. supra* note 5, at 55 (1953).

15. *Pittsburgh, Va. & C. Ky. v. Bentley*, 88 Pa. 178, 181 (1878).

16. In the Matter of Oyster, 11 Dauphin Co. Rep. 233 (Pa. C.P. 1908), *A* devised to *B* for his support "and if he should be spared to have family . . . to . . . [his] children." *Passmore v. Philadelphia, W.&B. R.R.*, 9 Phila. 579 (Pa. Quarter Sess. 1872); *cf. Conner's Estate*, 239 Pa. 449 (1913). A property was held in trust for the life of *A*, remainder over to *B*. The property was taken by the city. It was held that "the life tenant . . . is no more entitled to an allowance or apportionment from the principal of the estate than he would be if the premises were destroyed by fire and remained without a tenant until the rebuilding was completed from the insurance moneys." *Id.* at 452.

17. ORGEL, *op. cit. supra* note 5, at 511-15; JAHR, *op. cit. supra* note 3, at 187.

18. *Bartlow v. C.B.&Q. R.R. Co.*, 243 Ill. 332, 90 N.E. 721 (1909); *United States v. 122,000 Acres of Land*, 57 F. Supp. 421 (D. Tex. 1944). See ORGEL, *op. cit. supra* note 5, at 511 n.64.

19. *Crangle v. Borough of Harrisburg*, 1 Pa. 133 (1845).

20. The relief in this case was granted in the following form:

If there is a doubt or dispute among the parties claiming the money, that must be settled amongst themselves, and, in the meanwhile, the borough may pay the money into court. The court may award it to the widow, as tenant of the life estate, upon her giving security for the forthcoming of the principal on her marriage or death; or award it otherwise by agreement, or have it invested. . . . *Id.* at 135.

21. *Wolf v. Commonwealth*, 403 Pa. 499, 170 A.2d 557 (1961).

this additional sum, the courts have favored life tenants because "the remaindermen have not been injured by the delay of the payment of what will not be theirs until the termination of the life estates."²²

The issues in litigation between life tenant and remainderman are apportionment and evaluation; fees subject to a condition subsequent and determinable fees raise the issue of whether or not there is a compensable property interest. A surface reading of the cases would answer in the negative; but actually at issue is valuation.

In theory, at least, such an interest should be compensable, because the power to condemn extends to every type of interest, estate, possession or expectancy.²³ In practice, however, the courts have stumbled on valuing the interests. *Lancaster School District v. Lancaster County*²⁴ demonstrates the inability of the court to cope with valuation of a conditional estate resulting in a complete denial of compensation to the party most seriously injured. The plaintiff school district acquired land from the county "for the use of the [school district], so long as the building erected on said lot . . . shall be used . . . for the purpose of education . . . and when the same shall cease to be so used . . . the said lot shall be vested in the commissioners of the County of Lancaster, for the uses of said county."²⁵ At the time of the condemnation by the federal government, the land was being used by the school district for "educational purposes." The county's claim for damages was upheld with the court holding that the deed passed "the fee to the county with merely a conditional estate in the school district, and upon condemnation the use ceased."²⁶

A later case, *Chew v. Commonwealth*,²⁷ has preferred the reversioner over the conditional estate but for a more defensible reason. In 1905, the Philadelphia and Western Railway condemned a strip of land for railroad purposes paying 73,000 dollars therefor. By virtue of these proceedings, the railway acquired a fee simple "subject to defeat in the event the . . . company abandoned the land as a railroad right of way."²⁸ In June 1955, the company applied to the Public Utility Commission to eliminate the right of way. In November of the same year, the Commonwealth of Pennsylvania condemned the right of way for highway purposes, but prior to the Commission's approval of the company's application which occurred in the following

22. Magee's Estate, 45 Pa. Co. Ct. 427, 429 (Philadelphia, 1917).

23. Stoyles, *Condemnation of Future Interests*, 43 Iowa L. Rev. 241, 243 (1958).

24. 295 Pa. 112, 144 Atl. 901 (1929).

25. *Id.* at 119, 144 Atl. at 903.

26. *Ibid.*

27. 400 Pa. 307, 161 A.2d 621 (1960).

28. *Ibid.*

year. The heirs of the owner in 1905 were held to have a compensable interest.

At first blush, the cases appear to be consistent in favoring compensation of the reversioner. However, in *Chew* the court followed the rule for evaluation of reverters as formulated by the *Restatement of Property*. Broadly stated, the value of the interest is determined by the imminence of the stated condition or event upon which the possessory estate is to terminate. If, viewed from the time of the condemnation proceeding the stated event is not probable within a reasonably short period of time, the holder of the possessory estate takes the entire award as if he were the holder of a fee simple absolute;²⁹ if the converse is true, and the stated event will probably occur within a reasonably short period of time, the reversioner receives the entire award.³⁰ The *Chew* case adopted the position of the *Restatement* in holding that the railway company's Public Utility Commission application made termination of the estate imminent; *Lancaster School District* favored the reversion, saw no valuation problem, and regarded the case a simple, but strict, interpretation of the words of condition. Had the *Restatement* view been followed in the latter case, the opposite result would have been reached, because there was only a remote possibility that the land would cease being used as a school. Hopefully *Chew* reflects the present judicial attitude towards the valuation of reversionary interests.³¹

B. Leaseholds

A leasehold interest cannot be condemned for a public use without the payment of just compensation.³² The parties to a lease have clearly definable interests in the leased premises: the tenant, a possessory estate and the landlord, the reversion. However, "leasehold interest" is not as broad as the term would imply. A tenancy at will is not such an interest that requires the payment of damages. The tenant at will is not entitled to possession and quiet enjoyment for any period, however short.³³ Thus, when the lessor's estate is terminated, even

29. RESTATEMENT, PROPERTY § 53, comment *b* (1936).

30. RESTATEMENT, PROPERTY § 53, comment *c* (1936).

31. The court did not consider controlling the doctrine that the possibility of a reverter prior to the breach of the condition will not support an action for damages. See ORGEL, *op. cit. supra* note 5, at 516-20; 46 CORNELL L.Q. 631 (1961); *cf.* Williamsport Nat'l Bank v. Commonwealth, 7 Lycoming 72 (Pa. Quarter Sess. 1959). The right of first refusal in a lease did not afford any claim for damages as a result of the condemnation of the leasehold. The possibility of a reverter has been held compensable. *Petition of Namura*, 41 Luz. Leg. Reg. (Pa. C.P. 1950).

32. *Lafferty v. Schuylkill River R.R.*, 124 Pa. 297, 16 Atl. 869 (1899); *Pennsylvania R.R. v. Eby*, 107 Pa. 166 (1884); *North Pa. R.R. v. Davis & Leeds*, 26 Pa. 238 (1856); *Brown v. Powell*, 25 Pa. 229 (1855).

33. *Gianfrancesco's Petition*, 35 Pa. D.&C. 525 (Lawrence Co. Quarter Sess. 1939).

though by involuntary alienation, the tenant's estate is terminated leaving the latter with no compensable right.³⁴

While it is in some respects similar to a tenancy at will, a lease giving the landlord the right to dispossess the tenant at any time, on short notice, does not defeat the tenant's right to damages.³⁵ However, the option, if unexercised, will be a factor in determining the value of the leasehold interest.³⁶ If notice to terminate the lease is given by the lessor under the authority of a cancellation clause, and termination occurs prior to the effective date of the condemnation, the lessee remaining in possession is but a trespasser and not entitled to compensation.³⁷ On the other hand, the cancellation clause cannot be exercised by the condemnor to defeat the lessee's right to compensation for the balance of the term. In *Shipley v. Pittsburgh*,³⁸ the tenant had sixteen months of unexpired term. The defendant argued that the lessor's reversion fully vested in the condemnor, and that he had thereby succeeded to all the lessor's rights including the right to cancel with ten days notice. The court rejected this contention on the theory that the notice had been given after the condemnor had already appropriated the tenant's interest, and thus the parties' rights were fixed as of that time.

Taking cognizance of the time lapse between municipal planning and municipal action, the courts have permitted tenants to recover the value of their leasehold interests when the lease is executed with full knowledge of a pending condemnation proceeding.³⁹ In upholding an award to the tenant for removing a portion of his building leased after the passage of an ordinance authorizing the widening of the street on which the property was located, Justice Green wisely observed: "Surely the owner is not obliged to abstain from using by himself or by his tenant, such premises during the uncertain period which elapses, and which may long continue to elapse after the passage of the ordinance to widen and before the widening is commenced."⁴⁰

Since judicial opinion would appear to favor compensating the lessees, great care should be taken by the tenant to insure that he does

34. *Lyons v. Philadelphia & R. Ry.*, 209 Pa. 550, 58 Atl. 924 (1924). Here a parol lease provided that the lessees could remain as long as they wanted. The court held the tenant was entitled to notice and a reasonable time to remove goods.

35. *Iron City Auto. Co. v. City of Pittsburgh*, 253 Pa. 478, 98 Atl. 679 (1907).

36. *Id.* at 496, 98 Atl. at 685.

37. *West End Auto Wrecking Co. v. Pittsburgh*, 396 Pa. 233, 152 A.2d 678 (1959). Here, parties knew condemnation was contemplated when the lease was renewed. See facts at 17 Pa. D.&C. 287 (Allegheny Co. C.P. 1959). See also *Shaaber v. Reading City*, 150 Pa. 402, 24 Atl. 692 (1892).

38. 216 Pa. 478, 97 Atl. 1094 (1907).

39. *Herron v. Pittsburgh*, 281 Pa. 401, 127 Atl. 64 (1924); *Justice v. City of Philadelphia*, 169 Pa. 503, 32 Atl. 592 (1895); *Witman v. City of Reading*, 191 Pa. 135, 43 Atl. 140 (1899).

40. *Justice v. City of Philadelphia*, *supra* note 39.

not abrogate his rights by a premature removal or abandonment of the premises. In *Ehlers v. Philadelphia*,⁴¹ the plaintiff had a year to year tenancy. The owner, not the lessee, was notified by the city that in three months the land would be condemned. Prior to the expiration of the three month period, and hence before the date of the taking, the lessee vacated, even though there was an unexpired portion of the leasehold yet remaining. Recovery was denied, with the court stating:

If the plaintiff chose to cease paying rent and remove from his holding, the City's action in entering upon it was not a taking in respect of which he is entitled to compensation. One cannot be deprived of what he has abandoned of his own free will. . . . Plaintiff acted precipitately and moved before he was obliged to do so.⁴²

If the tenant holds the property under a lease with an option to renew, the option can be considered to the extent that it enhances the value of the leasehold.⁴³ One writer has urged that factors such as the new rental to be paid for the renewal term, the duration of the term and whether the rent reserved in the renewal term is the proper rent, should be considered in the evaluation equation.⁴⁴ However, Pennsylvania has awarded full compensation for the renewal term apparently without regard to any of the above factors or other circumstances.⁴⁵ This statement must be qualified by noting that the option must be contained in a covenant in the lease; the courts have not and cannot be expected to compensate for an option which is at best speculative or a mere possibility as, for example, where the lease has been renewed out of custom.⁴⁶

Once it has been determined that certain, definite, compensable interests exist as between landlord and tenant, the courts must grapple with an equitable apportionment of the award. This process would appear uncomplicated, at least when compared with future interests, because the rights of the two parties are defined by their written

41. 234 Pa. 591, 83 Atl. 431 (1912).

42. *Id.* at 594, 83 Atl. at 432.

43. ORGEL, *op. cit. supra* note 5, at 525 n.88.

44. JAHR, *op. cit. supra* note 3, § 130 at 187.

45. *North Pa. R.R. v. Davis & Leeds*, 26 Pa. 238 (1856). The condemnors "extinguished the estate of the lessee—both their actual interest under the two years' term in the lease and their possible interest under the covenant of renewal. They took all that the lessees had in the land. Ought they not pay for it all? . . . The direct injury done to them . . . was to be measured by the worth of the lot, at the stipulated rents for the whole term of three years." *Id.* at 241.

46. *Shaaber v. Reading City*, 150 Pa. 402, 24 Atl. 692 (1892); 2 NICHOLS, EMINENT DOMAIN (1917): "When a lease is renewed in accordance with the custom of the parties, but without any covenant making renewal obligatory upon the lessor . . . the lessee cannot recover . . . before the renewal. . . ." *Id.* at 40. *But see, Witman v. City of Reading*, 191 Pa. 134, 43 Atl. 140 (1899) (renewal consisting of a memorandum on the original lease that satisfied statute of frauds held sufficient to enable lessee to recover).

obligations in the lease, as contrasted with the rather elusive concept of "reasonably short time"⁴⁷ or statistical probabilities.⁴⁸ Yet apportionment in this area has been called the most troublesome problem facing the courts.⁴⁹

The case authority discussed above indicates that the courts will assign value to a leasehold interest where it is found that the interest is of some demonstrable value to its holder or to the purchasing community, that is, market value.

Compensation is paid for the property condemned, and not for the various interests in the property. The interests of the owner and the lessee are, therefore, in conflict, for the more the tenant is awarded, the less the owner should receive. What damages, then, has the lessee suffered upon a condemnation? He has lost the right to have continued uninterrupted use of the leasehold.⁵⁰ What is the "value" of this loss? It has been held to be the difference between the rental value of the leased premises, and the rent actually reserved in the lease.⁵¹ Or, put another way, the difference between the rent the tenant *is* paying, as compared to the rent he *should be* paying on the free market.

For example, a lease with ten months remaining provides for a monthly rental of 100 dollars at the time of a total taking. If it is determined that the fair monthly rental value is 150 dollars, the value of the leasehold interest is 10 times 50 dollars or 500 dollars reduced to present value. Conversely, if it can be shown that the fair rental value is not worth more on the market than the contracted rent, the tenant has suffered no damages for the loss of his leasehold.⁵²

On the other hand, consider the case of a partial taking: a lease with ten months remaining provides for a monthly rental of 100 dollars at the time of the taking. After the taking, the fair monthly rental value of the leasehold for the remaining land is 85 dollars. The damage is then 15 dollars times 10 months, equalling the present value of 150 dollars. This assumes that the contract rent was the fair rental. If the fair monthly rental value before the condemnation was 150 dollars,

47. See *supra* on the valuation of reversionary interest.

48. See *supra* on the valuation of life estates.

49. JAHR, *op. cit. supra* note 3, at 190; 2 NICHOLS, *op. cit. supra* note 46, at 714; ORGEL, VALUATION UNDER EMINENT DOMAIN § 119 (1936).

50. *McMillin Printing Co. v. Pittsburgh C. & W. R.R.*, 216 Pa. 504, 65 Atl. 1091 (1907). "The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term." *Id.* at 511, 65 Atl. at 1094.

51. *Philadelphia & R. R.R. v. Getz*, 113 Pa. 214, 6 Atl. 356 (1886).

52. Under the common law a total taking terminates the obligation of the lessor to continue paying rent. *Dyer v. Wightman*, 66 Pa. 425 (1870). See 4 NICHOLS, *op. cit. supra* note 46, at 177: "Where rent reserved in the lease is equal to or in excess of the rental value of the balance of the demised term, it has been held that the lessee has suffered no damage. . . ."

the damages would be 65 dollars times 10, equalling the present value of 650 dollars.⁵³

This adoption of the fair market value test to leasehold interests has caused troublesome and vexatious problems, both from the legal and appraisal point of view. As was stated in *McMillin Printing Co. v. Pittsburgh R.R.*⁵⁴ “. . . market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all, because a lease rarely has any market value. . . .”⁵⁵ While the truth of this statement is unquestioned, the fair market value test is still the law,⁵⁶ even though the terms, duration and nature of the leasehold use are so unique and particular as to render a judgment concerning the market value, fanciful.⁵⁷

This basic conflict of interests between landlord and tenant, competing for apportionment of the award has generated the frequent use of condemnation clauses in leases—an effort by sophisticated lessors to protect their right of damages from apportionment with a lessee. The theory of the clause is to cause an abrupt termination of the leasehold, or portions thereof in a partial taking, as of the date of the taking. Consequently, no leasehold remains which has been affected by the condemnation. The legality of the clause has been upheld, and its effect is to effectively bar the lessee's right to damages.⁵⁸

If the lease is not terminated automatically by the condemnation, but requires affirmative action on the part of the lessor, the lessee will be entitled to damages.⁵⁹ Finally, the effect of this clause on the ability

53. Under the common law the tenant was not relieved of his obligation to continue paying the full rent upon a partial taking. There was no apportionment of the original contract rental. ORGEL, VALUATION UNDER EMINENT DOMAIN 521-22 (1953). If the lease does not reduce the rent proportionately, it is obvious that the lessee is entitled to damages for the payments he is required to make for premises no longer available to him. Since any money the lessee receives means that much less the owner receives, the standard form leases now provide for a proportional reduction in rent for a partial taking as to the land actually taken. The tenant, none the less, can still recover if he establishes the diminution in value of the remaining portion not condemned and for which he must continue to pay the original agreed upon rent.

54. 216 Pa. 504, 65 Atl. 1091 (1907).

55. *Id.* at 511, 65 Atl. at 1094.

56. *Welsbach St. Lighting Co. of America v. Philadelphia*, 318 Pa. 166, 178 Atl. 126 (1935); *Iron City Auto. Co. v. City of Pittsburgh*, 253 Pa. 478, 98 Atl. 679 (1916); *Philadelphia Ball Club v. City of Philadelphia*, 192 Pa. 632, 44 Atl. 265 (1899).

57. As to the appraising problems, see SCHUMTZ, CONDEMNATION APPRAISAL (1949).

58. *Scholl's Appeal*, 292 Pa. 262, 141 Atl. 44 (1928). The clause here provided that: “In the event that the premises demised, or any part thereof, are taken or condemned for a public or quasi-public use, this lease shall, as to the part so taken, terminate as of the date title shall vest in the condemnor, and rent reserved shall abate proportionately as to the part so taken, or shall cease if the entire premises demised be so taken.” *Id.* at 265, 141 Atl. at 45.

59. *In re Plot of Ground for Municipal Purposes*, 8 Pa. D.&C. 739 (Philadelphia Co. C.P. 1927), the lease provided: “In the event that the premises, or any part thereof, are taken or condemned for a public or quasi-public use, then, as to such part as is taken or condemned, this lease shall, three days after notice thereof shall be sent by lessor to the lessee, as herein provided, terminate and rents reserved shall abate proportionately.” *Id.* at 741.

of the lessee to have trade fixtures considered in determining lessee's damages remains unclear under the present law.⁶⁰ Some attempt to explore this morass is undertaken later in this article.

C. Easements

An easement is an interest in property demanding the payment of just compensation upon its condemnation.⁶¹ On the whole, Pennsylvania cases have compensated the owner of an easement without the difficulties and fine distinctions prevalent in other areas of eminent domain law. The types and varieties of easements are as diverse as real property law permits,⁶² and Pennsylvania law has been flexible enough to accommodate the holders of such interests. Thus, for example, under current law, recording a plan for the sale of dwellings, with streets set out on the plan creates a private easement in the streets on behalf of the buyers.⁶³ The taking of these easements requires compensation.⁶⁴

D. Dower

The widow's right to a life estate in one-third of the real property of which her husband dies seised is known as her dower right. This right which the wife possesses in her husband's property during his life is her inchoate right of dower. While it is undoubtedly a valuable asset of the wife, it has no market value, since it is not transferable. Some jurisdictions have tackled the valuation problem and arrived at a figure thought to represent this interest. The leading Pennsylvania

60. Generally, the law provided that all the tenant could recover was the value of the unexpired leasehold. Fixtures and equipment were relevant as bearing on such value, but not as an independent item of damage. The cases in other jurisdictions are confusing and mixed as to reasoning and results. ORGEL, *op. cit. supra* note 53, at 524-28; 4 NICHOLS, *op. cit. supra* note 46, at 214-220.

61. *Stuart v. Gimbel Bros.*, 285 Pa. 102, 131 Atl. 728 (1926); *Rodgers' Petition*, 9 Pa. D.&C. 2d 182 (Lackawanna Co. C.P. 1956).

62. In *Stuart v. Gimbel Bros.*, *supra* note 61, plaintiff owned a private easement in a street placed upon the city plan, but never opened. The easement was held to be inviolate from "temporary" digging by the city. In *Rodgers' Petition*, *supra* note 61, the plaintiff had a right of way over the land of A in order to gain access to mine the land of B. A highway condemnation took the right of way. It was held that the plaintiff had an easement entitling him to petition for viewfers to assess damages.

63. *In re Opening of Brooklyn St.*, 118 Pa. 640, 12 Atl. 664 (1888). See RHYNE, MUNICIPAL LAW 419-20 (1957), concerning the various ways in which municipalities accept streets so recorded as public ways.

64. *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R.*, 240 Pa. 519, 87 Atl. 968 (1913): "... our cases hold that the purchasers of lots from the proprietor of a plan upon which streets are plotted, acquire an easement in all the streets of the plan and that this easement is appurtenant to the land of every lot owner." *Id.* at 527, 87 Atl. at 971. See also *Hawkes v. Philadelphia*, 264 Pa. 346, 107 Atl. 747 (1919), for a good summary of "street law" and private rights. In *Tesson v. H.R. Porter Co.*, 238 Pa. 504, 86 Atl. 278 (1913), it was held that no such private easements came into being because the borough had located and adopted them before any lots had been sold; *Trustees of the Second Presbyterian Congregation v. Pittsburgh Pub. Parking Authority*, 383 Pa. 383, 119 A.2d 79 (1956); *Paul v. Carver*, 24 Pa. 207 (1855). See also *Scholl v. Emerich*, 36 Pa. Super. 404 (1908).

case⁶⁵ has taken a somewhat more realistic approach and resolved the issue against the wife on the theory that there was no interest to be compensated. Conceding that contingent dower is a "thing of value" the court nevertheless held "inchoate dower is not such a lien, encumbrance or interest as will attach to a fund realized in condemnation of land."⁶⁶ This position is in accord with most jurisdictions. If, however, the husband dies prior to the taking, the dower right then becomes an interest in land for which compensation must be paid.⁶⁷

E. *Condominium*

One final interest remains to be considered, and this one unknown in Pennsylvania until last year—the condominium.⁶⁸ Case authority is of course lacking, but judging from the comprehensive structure of the statute, there would seem to be very little to dispute outside the provisions of the act. The statute creating condominiums has a built-in device which overcomes, if not solves, the two areas which have most frequently been brought to the courts for settlement: the recognition of a compensable right and the problem of apportioning the award. Section 803 of the act provides that whenever "all or part of the common elements shall be taken, injured or destroyed, by eminent domain each unit shall be entitled to notice thereof and to participate in the proceedings incident thereto. . . ."⁶⁹ The apportionment question is answered in a manner characteristic of condominiums. The statute confers on each unit owner the right to share in damages in the same proportion as his individual interest in the common elements.⁷⁰

III.

LAND UNDER CONTRACT OF SALE

A. *Vendor-Vendee*

The claim for just compensation has been held to be personal: only the owner of the property interest at the time of the condemnation

65. *Briegel v. Briegel*, 307 Pa. 93, 98, 160 Atl. 581 (1931).

66. ORGEL, *op. cit. supra* note 53, at 507 states: "The question is—given land subject to an inchoate right of dower, what are the rights of the owner's wife on condemnation? In most cases the answer has been, none."

67. In *Burgess & Inhabitants of York v. Welsh*, 117 Pa. 174, 11 Atl. 390 (1887), the Orphan's Court awarded land to *A* with a dower right of \$60 yearly to the widow. *A* conveyed to *B* reciting this encumbrance. This deed was not recorded. Upon condemnation, *B* was paid in full for the entire fee interest in the land. In a subsequent action by the widow, she was held to have an "interest" in land for which compensation must be paid.

68. For a good note discussing Condominium in Pennsylvania see 8 VILL. L. REV. 538 (1963).

69. PA. STAT. ANN. tit. 68, § 700.803 (Supp. 1963).

70. *Ibid.*

is entitled to receive the damages from the condemnor.⁷¹ Consequently, a subsequent purchaser of the property cannot participate in the condemnation award of his predecessor in title.⁷² Under present law, it is difficult, if not at times impossible, to always know when there has been a condemnation and the effective date of the passage of title.⁷³

Once settlement is completed, a vendee will be without a remedy against the condemnor upon learning that a portion, or all, of his newly acquired property had previously been condemned.⁷⁴ However, if the condemnation occurs after the agreement of sale, but before settlement, the buyer is entitled to damages from the condemnor for the taking of his equitable interest.⁷⁵ In these cases the court will scrutinize the documents in question to determine if in fact they constitute an "agreement of sale."⁷⁶ Since the vendee in this situation is entitled to damages, he has the right to a credit on the purchase price, if the vendor collects the award.⁷⁷

If the taking occurs before the agreement of sale, the vendee, to protect himself, must obtain a written assignment of the condemnation award, or a reduction in the sales price.⁷⁸ The assignment of the

71. *Quade v. Columbia & P.D. Ry.*, 233 Pa. 20, 81 Atl. 813 (1911).

72. *Campbell v. City of Philadelphia*, 108 Pa. 300 (1885); *McFadden v. Johnson*, 72 Pa. 335 (1872). In *Kaufmann v. Pittsburgh*, 248 Pa. 41, 93 Atl. 779 (1915), the land was owned by four brothers. Brother A died. In a subsequent partition suit the three living brothers bought the property interest of the dead brother. Two months before the partition sale was completed, the city condemned part of the tract. It was held that A's widow was entitled to a $\frac{1}{4}$ share of the condemnation proceeds, because the taking occurred prior to the effective passage of title under the partition.

73. GOLDBERG, *SALE OF REAL ESTATE IN PENNSYLVANIA* 251-53 (1957).

74. In *Wood v. Evanitzky*, 369 Pa. 123, 85 A.2d 24 (1951), settlement was completed before anyone realized that the Commonwealth had taken part of the land for highway purposes. Both the Common Pleas and Superior Court rejected the claim of the vendee to offset the condemnation award secured by the vendor against the outstanding mortgage given the vendor. The Supreme Court reversed, holding that the general warranty clause in the deed of conveyance would provide for such a result. This case illustrates a resourceful counsel and a sympathetic court.

75. *Petition of Butler County Comm'rs*, 141 Pa. Super. 597, 15 A.2d 504 (1940); *Borough of Rose Valley v. Henderson*, 41 Del. Co. 392 (Pa. C.P. 1954).

76. In *Synes Appeal*, 401 Pa. 387, 164 A.2d 221 (1960), B agreed to buy land provided it could be rezoned for commercial use. The agreement was entered into in September 1952. B paid \$9,000 at that time. The zoning reclassification was unsuccessful. In March 1954, the land was condemned. By a four to three vote, the Supreme Court held that "... there having been no obligation on [B's] part to purchase because of the failure of the Borough to rezone, all [B] had was an option . . . which terminated upon the condemnation. . . . The agreement . . . was not . . . sufficient in law to work an equitable conversion of the realty in question." *Id.* at 393-94, 164 A.2d at 224. In *West v. Peoples First Nat'l Bank & Trust Co.*, 378 Pa. 275, 106 A.2d 427 (1954), defendant owner of 142 acres of land entered into an agreement with plaintiff whereby plaintiff undertook to "develop" the land, with an equal distribution of any profits realized. In 1947, 58 acres of land were condemned, for which plaintiff claims an interest. It was held that "nowhere in the agreement is there any provision . . . to grant plaintiff any title to, interest in, or lien upon the land; its only obligation was to account to plaintiff for his share of the net profits." *Id.* at 284, 106 A.2d at 432.

77. *Mezza v. Beiletti*, 165 Pa. Super. 609, 70 A.2d 395 (1950).

78. GOLDBERG, *op. cit. supra* note 73, at 251-53.

damages must be in writing. In *Smith v. Commonwealth*,⁷⁹ *A*, the owner of 105 acres of land, prior to the condemnation conveyed thirty-five acres to *B*. At *A*'s trial for damages, both *A* and *B* testified that they had orally agreed that any damages arising from the condemnation of the thirty-five acres shall be *A*'s.⁸⁰ This testimony was held to constitute error. "Where a deed does not reserve the right to future damages which may arise out of an eminent domain proceeding, the right to such damages is in the owner at the time the land is condemned and parol evidence is inadmissible to show an agreement entitling the grantor to such future damages."⁸¹ Not only must the damages be assigned in writing, but they must be *clearly* assigned.⁸²

B. Options

The option has already been considered in light of its potential to enhance the damages to the leasehold interest of the tenant. If the buyer has an option to purchase land, and there is a subsequent condemnation of all or a portion thereof, the question arises as to whether the buyer will be compensated if he exercises the option. *Phoenixville, P.F. & S. Elec. Ry's. Appeal*⁸³ decided that the holder of the option is entitled to the award less the purchase price due the seller. The theory of recovery in these cases is that by exercise of the option, the

79. 351 Pa. 68, 40 A.2d 383 (1945).

80. By doing this, the jury was able to assess the damages to 105 acres, instead of only 35 acres. *Elgart v. Philadelphia*, 395 Pa. 343, 149 A.2d 641 (1959).

81. *Id.* at 70, 40 A.2d at 384.

82. See *Petition of Fleishman*, 106 Pittsb. Leg. J. (N.S.) 64 (1958). Plaintiff argued that a provision in the agreement and deed that "Said conveyance shall be made subject to . . . all public or private streets, roads, highways . . ." was an assignment. The court held that ". . . the provision . . . obviously refers to existing roads or easements." *Id.* at 65. In *Appeal of Powell*, 385 Pa. 467, 123 A.2d 650 (1956), the agreement provided that the buyer shall pay \$1500 for each acre of land, but land included in right of way lines for two state roads shall not be included in the computation of acreage. "Upon the execution by the optionee of an agreement of sale to purchase land hereunder, and in the event the said land or a portion thereof shall thereafter be appropriated, condemned, or taken by eminent domain. Optionee shall be entitled to the damages for such taking." *Id.* at 471, 123 A.2d 650. It was held that since the takings were on May 12, 1950, and the agreement was not executed until March 9, 1953, the seller was entitled to the damages. In *Krill v. Petitto*, 405 Pa. 203, 175 A.2d 54 (1961), defendant owner conveyed land in August 1949, with the following deed reservation: "The grantor herein reserves to herself and her heirs any and all money or consideration that may hereinafter be paid or accrue as damages by reason of the proposed relocation of Rt. No. 31 which may be constructed over or through any part of the lot hereby conveyed." *Id.* at 204, 175 A.2d at 54. At the time of the deed, a plan was in existence showing that Route No. 31 cut through defendant's land. On June 23, 1952, the condemnation occurred. Defendant collected damages from the Commonwealth. On June 29, 1955, grantee conveyed the land to *C*, "subject to reservations made in prior deeds, and to rights of way necessitated by . . . Highway . . . No. 31." *Id.* at 205, 175 A.2d 55. On September 10, 1957, Route No. 31 was made a non-access road, with more land being condemned. Defendant owner claimed the damages. It was held that the 1949 deed reservation was paid in full when the highway was *then* relocated.

83. 70 Pa. Super. 391 (1918).

ownership of the optionee relates back to the date of the granting of the option.⁸⁴

IV.

COMMERCIAL SECURITY INTERESTS

A. *Mortgages*

When mortgaged property is condemned, the mortgagee is not entitled to the payment of "just compensation" by the condemning body.⁸⁵ Recovery is denied on the theory that the mortgagee is only a lienholder in the realty, and upon the condemnation, the lien attaches to the fund created for the payment of just compensation.⁸⁶ Notice of the condemnation need not, therefore, be given to the mortgagee.⁸⁷ Immediately, a significant question comes to mind: suppose, for instance, that the condemnor, with full knowledge of the mortgagee's claim, pays the fee owner the full amount of agreed upon damages, can the mortgagee assert a claim against the condemnor? From the above, the answer would seem to be no, and this is evidently the conclusion reached by the courts, at least in the absence of fraud.⁸⁸ The mortgagee would be similarly prejudiced if the owner of the fee released the condemnor without the payment of any compensation, even after a Board of View had awarded damages.⁸⁹

There is no reported case holding that a release, such as above, was a fraud on the mortgagee.⁹⁰ Thus, the mortgagee must look to the owner as "trustee" for his mortgage lien.⁹¹ If the owner refuses to proceed and establish damages, or, if he knows that the mort-

84. The theory is that by the exercise of the option, the ownership of the holder relates back to the date of the granting of the option. Appeal of Powell, 385 Pa. 467, 123 A.2d 650 (1956).

85. Knoll v. New York, C. & St. L. Ry., 121 Pa. 467, 15 Atl. 571 (1888).

86. Briegel v. Briegel, 307 Pa. 93, 160 Atl. 581 (1931); Philadelphia v. Peters, 62 Pa. Super. 90 (1916).

87. Jackson v. Pittsburgh, 36 Pa. Super. 274 (1908).

88. Knoll v. New York, C. & St. L. Ry., 121 Pa. 467, 15 Atl. 571 (1888); *In re Road Upper Dublin & Whitmarsh Townships*, 94 Pa. 126 (1880); Reese v. Addams, 16 S.&R. 40 (Pa. 1827).

89. Gottlieb Appeal, 360 Pa. 589, 63 A.2d 42 (1949). Six acres were taken for drainage purposes. Following a Board of View award of \$5,280, and an appeal therefrom by the city, the condemnee released the city from all claims. A first mortgagee of \$40,000 objected. It was held, *inter alia*, "Just why claimant and his counsel decided to discontinue and end the case we do not know; it would . . . be reasonable to presume that they reached the conclusion that 60 acres of land protected by drainage channels and dikes were more valuable than 66 acres of land exposed and subject to periodic floods. . . ." *Id.* at 591, 63 A.2d at 43. The same result occurs even without notice to the mortgagee of the release, or of the intended condemnation. Shields v. City of Pittsburgh, 252 Pa. 74, 97 Atl. 124 (1916).

90. It should also be noted that in none of the reported cases was the entire fee simple interest condemned. A release here, with existing mortgagees unpaid, may present a different case.

91. Briegel v. Briegel, 307 Pa. 93, 160 Atl. 581 (1931).

gages and liens will be greater than the damages, and decides to abandon the case, the mortgagee may very well be left devoid of a remedy.

There is at least one avenue of protection open. The mortgagee in these cases can intervene in the condemnation proceedings. This means that the lienholder will then be acting in place of the owner. Damages may be agreed upon or established by the mortgagee in place of the former owner. From these damages the mortgagee can then obtain his money.⁹² There is a caveat: if the condemnor settles with the mortgagee without first insisting upon formal intervention, the condemnor runs the risk that within the statutory period the former owner will appear and assert his right to establish damages. There is no question as to the legitimacy of this demand, so that if the owner establishes damages in excess of that paid to the mortgagee, the excess will inure to the condemnee at the expense of the condemnor.⁹³

Suppose, however, that the mortgagee for some reason does not intervene. If the owner proceeds to establish damages, can the mortgagee assert rights against the fund created prior to its distribution to the owner? Many statutes provide that the petition for viewers must allege the lienholders of record, that the viewers in their report on damages must make findings of fact of the amount of the liens, and that the amount found to be payable shall be paid "first to the owners of said liens in the order of their priority, then to the owners of the land . . . appropriated. . . ."⁹⁴

To the extent that these acts are applicable, the mortgagee is fully protected at all times during a Board of View proceeding, and prior to distribution. When these acts are inapplicable, however, the mortgagee has one remedy enabling him to assert his rights against the fund while the money is still in the possession of the condemnor. It is his right to intervene.

92. *Knoll v. New York, C. & St. L. Ry.*, 121 Pa. 467, 15 Atl. 571 (1888). "If the owner should refuse to move . . . the courts upon a proper application by lien creditors would no doubt treat him as a trustee and require him to do, or permit his creditors to do in his name, what might be necessary to an adjustment of the damages. . . ." *Id.* at 474, 15 Atl. at 573.

93. "Formal intervention" means a Petition and Rule to Show Cause why the mortgagee should not be permitted to appear before the Board of View appointed to assess damages. When the Rule is made absolute, the condemnee can proceed to establish damages before viewers, or amicably settle with the condemnor.

94. PA. STAT. ANN. tit. 53, § 56912 (1957). See also PA. STAT. ANN. tit. 53, §§ 56907, 56911 (1957) (First Class Township Code applying to all condemnation proceedings, except street, highway, or sewer improvements). Similar provisions are provided in PA. STAT. ANN. tit. 53, §§ 66009-11 (1957); PA. STAT. ANN. tit. 53, §§ 37811-13 (1957) (Third Class City, applying to all condemnations except street or sewer improvements); PA. STAT. ANN. tit. 53, §§ 5610-12 (1957) (Second Class County Code applying to all condemnations without restriction); PA. STAT. ANN. tit. 53, §§ 46409-11 (1957) (Borough Code applying to all condemnations except street or sewer improvements); PA. STAT. ANN. tit. 26, §§ 121-3 (1958). The application of this act is limited by many specific repealers, and by its reference to condemnations, for all practical purposes, as exercised by non-governmental entities such as railroads, gas companies, and other "non-municipal" bodies.

As we have already seen, however, it is quite possible for the condemnee to release *all* claims against the condemnor, either before or after a Board of View proceeding.⁹⁵ It would appear that in the absence of fraud or bad faith by the former owner, the mortgagee would be powerless, even by intervention, to prevent release. Thus, when the former owner is actually proceeding with his claim, the only realistic purpose of intervention by the mortgagee is the establishment of the priority of his claim against a fund which the *owner* finally establishes to be due because of the condemnation. Of course, the next question is how much is the mortgagee entitled to when the "just compensation" is finally established? It has been held that all of the final award shall be the mortgagee's to the extent necessary to satisfy the mortgage lien.⁹⁶ It does not matter whether the entire property is condemned,⁹⁷ whether part of the property is taken,⁹⁸ or whether the damage to the property is consequential without any of it having been taken.⁹⁹ In some instances, the mortgagee lienholders have gone so far as to have foreclosed, bought the property in a sheriff's sale, and then claimed the award to the extent necessary to satisfy the unpaid balance of the mortgage after the sale. Here, the courts have adopted a different theory. Since the mortgage lien is discharged by the sale, the mortgagee must allege and prove that the mortgage interest had been impaired by the condemnation.¹⁰⁰ Failure to allege and prove the impairment, either in the intervention proceedings, or in a subsequent claim against the condemnor, will preclude additional recovery by the mortgagee.¹⁰¹ Curiously the purchase of property at a sheriff's sale at a price considerably less than the mortgage debt is insufficient evidence of impairment.¹⁰² As with so many other areas of the law,

95. Gottlieb Appeal, 360 Pa. 589, 63 A.2d 42 (1949).

96. Woods Run Ave., 43 Pa. Super. 475 (1910). "While the award is in the name of the owner . . . he becomes a trustee for the mortgage creditor and until there has been an actual payment of the damages assessed to the owner by the municipality the mortgage creditor has standing to intervene and claim the fund to the extent necessary to satisfy his lien." (Emphasis added.) *Id.* at 478.

97. Harris' Appeal, 323 Pa. 124, 186 Atl. 92 (1936).

98. Woods Run Ave., 43 Pa. Super. 475 (1910).

99. Street gradings and paving are the common example. *Sarapin v. City of Philadelphia*, 306 Pa. 388, 159 Atl. 866 (1932). Here, other lienholders asserted that the mortgagee must show the extent to which the security interest was impaired. The court held: "It does not lie in the mouth of the owner or his assignees . . . to contend that the . . . mortgagee should be satisfied with an impaired or lessened equity. . . . The award itself shows that the mortgaged premises have been reduced or impaired in value. . . ." *Id.* at 390, 159 Atl. at 867.

100. *Dollar Sav. Fund & Trust Co. v. Borough of Bellevue*, 230 Pa. 240, 79 Atl. 496 (1911).

101. *Irons v. Pittsburgh*, 64 Pa. Super. 126 (1916); *Fidelity-Philadelphia Trust Co. v. Kraus*, 325 Pa. 581, 190 Atl. 874 (1937). The mortgagee brought an equity suit to restrain the city from paying the award to the former owner without first satisfying the mortgagee's claim.

102. "The fact that the property mortgaged for \$5,500 brought \$706.51 at sheriff's sale would not be conclusive of its value. There should be some definite allegation showing the actual loss suffered. For all we may know the real value of the property

intervention by the mortgagee must be timely, and failure to act with diligence may preclude the mortgagee's right to do so.¹⁰³

Even though the law as construed above implies great freedom with regard to mortgagees' claims when they are not protected by statute or when there is no intervention, condemnors, in practice, do not usually pay money to the former owner until all liens and mortgages of record are satisfied. This usually occurs at a settlement pursuant to a title report. The cases, as noted, do not seem to compel this result, for in the absence of formal intervention by the mortgagee, payment could be made directly to the former owner without any resulting liability to the condemnor.

As another practical alternative, the condemnor can refuse to pay the former owner when it has knowledge of the existence of mortgages exceeding the award, and instead, can pay the money into court for distribution by the court.¹⁰⁴ This can be done even without notice to, or request from, the mortgagee.¹⁰⁵ As the discussion has shown, there are many rules and practices regarding the orderly administration of the claims of condemnees and mortgagees. Some statutory reform is needed whereby a clear cut statement of the law is evolved.¹⁰⁶

Assuming that a lien against the "fund from compensation" is established, the general rules concerning the distribution and priority of liens apply, and no attempt will be made to discuss them here. One interesting aspect of priority, however, has arisen in cases involving the rights of lienholders vis-à-vis the fee of the attorney representing the former owner seeking damages. In *Harris' Appeal: Jacoby's Appeal*,¹⁰⁷ the city condemned the entire property interest of the fee

may be such to protect the [mortgagee] for all it has in it. It is the injury to it on which its right to recovery must rest." *Irons v. Pittsburgh*, 64 Pa. Super. 126, 131 (1916). *Accord*, *Chartiers Ave. Widening*, 86 Pittsb. Leg. J. (N.S.) 429 (1936) (Pa. C.P. 1936).

103. In *Gottlieb Appeal*, 360 Pa. 589, 63 A.2d 42 (1949), the mortgagee intervened 21 years after the condemnation, and after the former owner had released the city from all damages. The motion was held untimely. See *Chartiers Ave. Widening*, 86 Pittsb. Leg. J. (N.S.) 429 (Pa. C.P. 1936). A four year delay was not held untimely when the City Solicitor stated that the condemnation proceedings would be revoked. *Butler County Comm'r's Petition*, 141 Pa. Super. 597, 15 A.2d 504 (1940). Intervention denied two years after condemnation and four months after an award.

104. *Philadelphia & R. R.R. v. Pennsylvania Schuylkill Valley R.R.*, 151 Pa. 569, 25 Atl. 177 (1892).

105. *Philadelphia & R. R.R. v. Pennsylvania Schuylkill Valley R.R.*, *supra* note 104.

106. Section 521 of the Eminent Domain Code accomplishes this result. It provides that damages payable to a condemnee "shall be subject to a lien for . . . all mortgages . . . and said liens shall be paid out of the damages in order of priority before any payment thereof to the condemnee."

107. 323 Pa. 124, 186 Atl. 92 (1936); *accord*, *Chester Housing Authority-Range's Land*, 30 Del. Co. 384 (Pa. C.P. 1941). Municipal taxes have priority over the attorney's charging lien, see *In re Allegheny County Housing Authority*, 106 Pittsb. Leg. J. (N.S.) 271 (Pa. C.P. 1955); *Blakley's Petition*, 39 Pa. D.&C. 675 (Allegheny Co. C.P. 1940).

owner. The owner hired an attorney who represented him through the viewers proceedings, securing an award of 67,000 dollars. The mortgagee of record then intervened and demanded the entire award to satisfy an unpaid balance of 109,000 dollars. The attorney filed a charging lien against the fund for his services in securing the award. It was held that the mortgagee's lien was subordinate to the attorney's lien.¹⁰⁸ In *Thomas v. Monroe County*,¹⁰⁹ an award to tenants was ordered paid to the mortgagee of record. The tenant's attorney claimed a charging lien, citing *Harris' Appeal*. It was denied on the grounds that the fund created for the tenant was carved out of the owner's rights, and that, therefore, services rendered to the tenant were inimical to the rights of the owner and the owner's lienholders. In *Recht v. Clairton Urban Redevelopment Authority*,¹¹⁰ attorney *A* represented the former owner before the viewers and secured an award which was then appealed to the courts. The former owner then discharged attorney *A* and hired attorney *B*. After attorney *B* secured a verdict, attorney *A* claimed a charging lien against the fund for services rendered before the viewers. It was denied on the theory that the appeal to the courts created a de novo matter. The fund created in the de novo hearing, therefore, had no relationship to the services of attorney *A* before the viewers. While these theories seem somewhat arbitrary, they are logical and seemingly follow a pattern.

B. Lienholders

The rules concerning general lienholders seem to be no different than those regarding mortgagees.¹¹¹ One interesting problem area, however, is that concerning the respective rights of the parties following a tax foreclosure sale. In *Hunter v. McKlveen*,¹¹² the condemnor took land in October of 1938 that had been purchased by the county at a tax sale in June of the same year. The county disclaimed any right to the land. However, in 1942, the former owners paid the back taxes and claimed the damages from the taking. The period of statutory redemption had expired on June 13, 1940. The court held "the [former owners] lost all interest in the lands when they did not

108. *Willock v. Beaver Valley R.R.*, 60 Pa. Super. 589 (1915).

109. 52 Pa. D.&C. 21 (*Monroe Co. C.P.* 1943).

110. 402 Pa. 599, 168 A.2d 134 (1961).

111. *Accord*, *Pennsylvania Turnpike Comm'n v. Hermann*, 58 Lack. Jur. 221 (Pa. C.P. 1957). The redemption occurred 14 years after the purchase by the county at the tax sale. In *Urban Redevelopment Condemnation Case*, 406 Pa. 6, 178 A.2d 149 (1961), land in title of *A* was sold at a tax sale being listed there as the title of *B*. No taxes had been paid for 31 years. It was held that since the city had improperly assessed and sold for taxes, the land was therefore owned at the time of the condemnation by *A*'s heirs, who were entitled to the damages.

112. 353 Pa. 357, 45 A.2d 222 (1946).

redeem within the statutory period," and hence the damages were the county's. In *Petition of Fayette County Comm'rs*¹¹³ a similar fact situation was presented. Without mentioning *Hunter*, the court held that the county was not entitled to the damages.¹¹⁴

V.

FIXTURES

As the frequency of condemnations in urban areas for highway, municipal, redevelopment and other public purposes increase, their effect upon business trade fixtures or machinery becomes an important problem. Many questions come to mind: are the trade fixtures and machinery "condemned" along with the real estate? If so, how are they valued? Does it make any difference whether the condemnee is a fee owner or a lessee? The law in Pennsylvania as to all of these questions is unclear.

A. Fee Owner

In *Brockton v. Ohio & Pa. R.R.*,¹¹⁵ the railroad condemned a right of way pursuant to a statute which enabled it to take "land." It was averred that this language prohibited it from taking and, or, removing a dwelling house on the land. The court rejected this argument, making the following very broad dictum concerning the full effect of a condemnation proceeding:

It condemns everything fixed to the ground, and everything above or below the surface of it; that it comprehends . . . houses, and other buildings; and that, not only the soil, *but everything in it or on it, passes by it.* . . .¹¹⁶ (Emphasis added.)

Did this dicta mean to include trade fixtures in a condemned building such as drug store, grocery, or meat store fixtures, or other business equipment? There is no reported case in Pennsylvania specifically on this point. However, in *Diamond Mills Emery Co. v.*

113. 386 Pa. 382, 126 A.2d 737 (1956).

114. *Id.* at 387-88, 126 A.2d at 740.

115. 14 Pa. 241 (1850).

116. *Id.* at 243. *Accord*, *Finn v. Providence Gas & Water Co.*, 99 Pa. 631 (1882). The lower court held the measure of damages when land with buildings were condemned to be the value of the land and the removal costs of the building. The Supreme Court reversed, stating "The house on the land taken was part of the realty, and could not be considered except in connection therewith. The plaintiff was not required, nor had he a right to remove any of the buildings or improvements on the land appropriated by the company, and hence an inquiry as to the cost of such removal was entirely foreign to the question before the jury." *Id.* at 640. See also *Dyer v. Commonwealth*, 396 Pa. 524, 152 A.2d 760 (1959); 4 NICHOLS, EMINENT DOMAIN 211 (1917); ORGEL, VALUATION UNDER EMINENT DOMAIN 227 (1953).

Philadelphia,¹¹⁷ the plaintiff's machinery and equipment in the condemned land and building were removed to another location. The court indicated what would have happened had this removal not taken place:

The proper application of this rule to the present case would require the plaintiff to prove the value of the whole plant before the taking. In estimating this value, the land, buildings and machinery must all be taken into consideration. After the taking the plaintiff had nothing unless the city expressly or tacitly permitted it to remove the machinery. If the permission to remove the machinery was given while the machinery was fastened . . . then the city would be entitled . . . to the value of that machinery upon those beds. The cost of removal would . . . be merely an indirect piece of evidence as an explanation of the relatively low value of machinery which had to be removed . . . [The trial court held that the city only took the land and buildings.] This . . . was a misconception. Fixtures upon the property taken must be valued and paid for as part of the real estate. . . . The true theory would seem to be that the city took the whole property and was liable for the whole but that its liability was abated to the extent of the value of the machinery taken by the plaintiff.¹¹⁸

This case stands as the only judicial pronouncement in this state concerning whether business or trade fixtures or equipment are condemned along with the realty. The above case seems to settle everything by adopting the so-called common-law doctrine that everything "which was attached to the freehold was considered to be a part of it."¹¹⁹ On the other hand, there is another well held doctrine in the law of eminent domain, whereby the condemnation only affects real estate, and not the business of the condemnee. This has led the courts to hold, *inter alia*, that there is no taking of good will,¹²⁰ and has led them to prohibit testimony concerning the loss of business profits.¹²¹ Hence, are business fixtures part of the "business," or part of the realty, or both?¹²² This question the above case does not answer.¹²³ However,

117. 22 Pa. County Ct. 9 (Phila. C.P. 1898).

118. *Id.* at 11.

119. 2 NICHOLS, *op. cit. supra* note 116, at 207.

120. ORGEL, *op. cit. supra* note 116, at 325. "There has been general agreement in the American cases that the owner may not receive compensation for loss of good will apart from the market value of the land taken, even though there is no doubt that the good will has been substantially damaged." *Race St.*, 24 Pa. County Ct. 433 (Phila. Co. C.P. 1900).

121. *Schuykill Navigation Co. v. Thoburn*, 7 S.&R. 411 (Pa. 1821). *Sgarlat Estate v. Commonwealth*, 398 Pa. 406, 158 A.2d 541 (1960).

122. For industrial mortgage purposes, the doctrine of "a going concern" was established to protect the lenders. *Commonwealth Trust Co. v. Harkins*, 312 Pa. 402, 167 Atl. 278 (1933); *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 Atl. 540 (1923); *Vourhis v. Freeman*, 2 W.&S. 116 (Pa. 1841). There are other areas of "fixture" law, such as determining whether it was "real" or "personal" property for inheritance purposes, tax purposes, and the like. These cases have limited application here.

123. ORGEL, *op. cit. supra* note 116, at 467 n.20, "We are not here concerned with the difficult problem of determining when an article attached to the freehold becomes

if the law is as expressed in *Diamond Mills*, it would appear that the condemnor takes the business fixtures as well as the real estate. But, if it is ultimately held that such fixtures are the personal property of the condemnee, there is case law denying recovery for its removal.¹²⁴

It is arguable that if fixtures are attached to the realty, though removable, the appraiser may be able to consider the extent to which the fixtures increase, or decrease, the market value of the realty as an element in arriving at the realty's fair market value. The theory would be that a potential buyer considers the realty without the fixtures, while the seller's price would include his cost of removing the fixtures. To this extent, at least, the fixtures would be an element in determining the fair market value of the real estate. All that is clear at the present time, however, is that there is general confusion.¹²⁵

B. *Lessee*

It has already been noted that the general rule is that a lessee, upon a condemnation, can recover the market value of his unexpired leasehold interest.¹²⁶ Our question, then, is whether or not trade equipment, or business fixtures installed by the lessee can be considered in determining the so-called market value of the unexpired leasehold interest. Conflicting legal concepts are involved in the answer to this question. It is well settled that the removal costs of personal property cannot be considered in determining the damages occurring upon a condemnation.¹²⁷ Hence, the removal by a lessee of loose, unattached items such as desks, chairs, stock in trade, and the like, cannot be considered in determining leasehold damages. On the other hand, under the common law, everything "which was attached to the freehold was considered to be a part of it."¹²⁸ Hence, lessee improvements to the freehold became owned by the fee owner. To protect a lessee who installed trade fixtures in a business, the common law developed the doctrine which gave the tenant the right to remove these fixtures upon

a fixture, for which compensation must be paid. . . . This is a question of real estate law which must be determined by the law of the state in which the realty is located." Query: is it real estate law, or is it a determination by the courts of the policy of the law: to pay that which the condemnee lost, or that which the condemnor received?

124. *Becker v. Philadelphia & R.T. R.R.*, 177 Pa. 252, 35 Atl. 617 (1896).

125. Different condemnors treat this problem in different ways. The federal government takes the position that the items are the personal property of the owner and should be removed at his expense. The Highway Department assumes that fixtures are condemned. The Redevelopment Authority of the City of Philadelphia considers the fixtures to the extent that they are an element in affecting the value of the real estate.

126. *Iron City Auto. Co. v. Pittsburgh*, 253 Pa. 478, 98 Atl. 679 (1916).

127. *Becker v. Philadelphia & R.T. R.R.*, 177 Pa. 252, 35 Atl. 617 (1896).

128. 2 NICHOLS, *op. cit. supra* note 116, at 207.

the expiration of the leasehold.¹²⁹ As to the "attached fixtures" upon condemnation, in *Consolidated Ice Co. v. Pennsylvania R.R.*,¹³⁰ the court stated: "The filing . . . of the bond . . . did not deprive the plaintiff (lessee) of the ownership of or the right to remove the property. . . . The appropriation . . . did not take the fixtures and machinery placed upon the demised premises. . . ." ¹³¹ Thus if the fixtures are not condemned, how are they considered in determining the lessee's damages? As was stated in *Consolidated Ice Co.*:

The value of the leasehold proper for the unexpired term would be what the premises would be worth for any purpose for which they could reasonably be used over and above the rental and other charges by the lessee. To this must be added the use value of the machinery and fixtures until the expiration of the lease. These are not substantive elements of damage but are for the consideration of the jury in estimating the plaintiff company's loss by being deprived of the residue of the term.¹³²

Hence, to the extent that such fixtures enhanced the value of the unexpired leasehold, the fair market value of such fixtures could be used to determine, in effect, the fair market value of the leasehold.¹³³ It must be remembered that damages to fixtures are not compensable claims in and of themselves;¹³⁴ however, in arriving at the fair market value of the fixtures, since they were not condemned, and must be removed, consideration is given to their value as severed from the freehold.¹³⁵ As was stated in *Iron City Auto. Co. v. Pittsburgh*:¹³⁶

If a purchaser had appeared upon the scene to take over the lease, the fact that the holder thereof would be obliged to remove the business with the machinery to another location would, of course, cause the prospective lessee to diminish his bid for the balance of the term accordingly; hence, the cost of removal and the depreciation in value of the machinery were proper elements for consideration and deduction in measuring the value of the lease.¹³⁷

129. 2 NICHOLS, *op. cit. supra* note 116, at 208; *Lindsay Bros. Inc. v. Curtis Publishing Co.*, 236 Pa. 229, 84 Atl. 783 (1912).

130. 224 Pa. 487, 73 Atl. 937 (1909).

131. *Id.* at 494, 73 Atl. at 939.

132. *Ibid.*

133. *Accord*, *Iron City Auto. Co. v. City of Pittsburgh*, 253 Pa. 478, 98 Atl. 679 (1916); *Shipley v. Pittsburgh, Carnegie & W. R.R.*, 216 Pa. 512, 65 Atl. 1094 (1907); *Philadelphia & R.T. R.R. v. Getz*, 113 Pa. 214, 6 Atl. 356 (1886).

134. *Campbell v. City of Philadelphia*, 230 Pa. 516, 79 A. 718 (1911); *Wilkinsburg's Petition*, 65 Pittsb. Leg. J. (N.S.) 536 (Pa. C.P. 1917).

135. In *Consolidated Ice Co. v. Pennsylvania R.R.*, 224 Pa. 487, 73 Atl. 937 (1909), the lessee left the fixtures of an ice making plant on the premises, and claimed as compensation their value in the premises. The court held this to be improper: "Clearly the plaintiff was not entitled to have considered . . . as an element of damage the value of the machinery in place at the time of the condemnation proceedings." *Id.* at 494, 73 Atl. at 939.

136. 253 Pa. 478, 98 Atl. 679 (1916).

137. *Id.* at 486, 98 Atl. at 682.

In other words, assume the case of a lessee installing fixtures valued on the market at the date of condemnation at 3,000 dollars. If the cost and depreciation in removing the fixtures is 1,000 dollars, he would have spent 1,000 dollars in improving the leasehold interest during his unexpired term. The law would then require the 1,000 dollar figure to be used by the appraiser in determining the extent, if any, to which it affected the fair market value of the condemned leasehold. To merely state this rule and its application is to expose its difficulty of practical application. If a lessee under a ninety-nine year lease installs heavy machinery and equipment which would cost 10,000 dollars to remove, a condemnation in the fifth year of the leasehold would be to his great detriment. It is reasonable to assume that such a lessee's right of removal was not seriously considered by him in the business judgment of installing the equipment under a long term lease. If the same lessee, however, is condemned in the ninety-seventh year of the lease, the removal and depreciation cost of the machinery would probably bear no relation to the value of the remaining unexpired leasehold. The greatest problem is presented, however, when there is no unexpired leasehold to value, and the tenant has installed trade fixtures. As noted, without a leasehold to value, the removal and depreciation costs of trade fixtures are not in and of themselves compensable.¹³⁸ It has already been seen that a favorite device of landlords is the use of the "condemnation clause" which terminates the leasehold as of the date of the condemnation. Thus the question arises: where a condemnation clause terminates the leasehold, are the removal and depreciation costs of trade fixtures recoverable by the lessee? The specific answer to this question seems unresolved in Pennsylvania,¹³⁹ but the unfairness in denying recovery for the cost of moving these trade fixtures is obvious. It would seem, however, that the doctrine that compels the courts to value the unexpired leasehold interest would seem to dictate that upon the absence of such an interest, the lessee is without a compensable

138. *Becker v. Philadelphia & R.T. R.R.*, 177 Pa. 252, 35 Atl. 617 (1896).

139. 4 NICHOLS, *op. cit. supra* note 116, at 214. "Even though a lease contains a condemnation clause the tenant's fixtures are considered real property and must be paid for in eminent domain. . . . The condemnation clause is effective to deny the tenant compensation for the value of the unexpired term. . . . But he still retains the right to compensation for his interest in any annexations to the real property . . . (citing cases)." The rule and cases cited by Nichols are not from jurisdictions, such as Pennsylvania, holding that the fixtures are but an "element" of the valuation of the unexpired leasehold. These jurisdictions view the problem as one of real property law, that is, what was *taken*, instead of what was the tenant's *property loss*. *In re Allen St. & First Ave.*, 256 N.Y. 236, 176 N.E. 377 (1931). *Cf. Fenton Label Case*, in 144 Leg. Intelligencer 1 (February 20, 1961) which upheld recovery for a tenant's fixtures notwithstanding a condemnation clause on the theory that the fixtures were condemned. This case appears wrong on its law. Personal experience indicates a great diversity in practice among various condemnors. For a good discussion of the problem, see ORCEL, *op. cit. supra* note 116, at 465-70.

right. However, this doctrine is by no means universally accepted. The question should be not what the lessee lost, but what the condemnor has taken.¹⁴⁰ However, under existing law in Pennsylvania the outlook for lessees with condemnation clauses is, at best, dim.

140. See *Jones v. New Haven Redevelopment Agency*, 21 Conn. Supp. 141, 146 A. 2d 921 (1958): "The taking authority must pay the value of what it takes. To the extent that the value of the real property as a whole may be enhanced by the alleged fixtures annexed thereto, the value of the fixtures must be included in what the taking authority pays, and the lessee may be entitled to part of the award, not because the alleged fixtures would add to the value of the leasehold, but because they would belong to the lessee and their value would enter into the value of what the taking Authority has taken." *Id.* at 143, 146 A.2d at 923.