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Eminent Domain - Valuation in Partial-Taking Cases

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EMINENT DOMAIN — VALUATION IN PARTIAL-TAKING CASES

WHEN the federal government condemns air space over private property adjacent to an air base, thereby acquiring only the legal right to keep the space clear of obstacles and structures, the question arises whether the assessors of just compensation[1] may, in addition to awarding damages for the actual easement taken and damages to the remainder caused by the taking of the easement, consider also the diminution in value of the remaining property caused by anticipated aircraft flight over the property.

In two recent condemnation cases,[2] the declaration of taking[3] described easements above the "glide angle plane" which extended outward from the ends of airport runways and over certain privately owned property. The "glide angle plane" was described in both cases as an imaginary line serving as a ceiling over the land above which obstructions or structures would not be permitted to extend.

The government contended that in acquiring the right to prevent the landowners from erecting structures which would rise above the "glide angle plane," it did not also acquire easement rights to fly aircraft over the land of the condemnees. Compensation for the easement taken, the government argued, should be computed by determining the value of the property before the easements were taken, and the value immediately thereafter, the difference being the compensation to be paid to the condemnee. The government urged that this "after" value be based on the effect produced on the remaining property by the actual easement taken, without considering damages from illegal or unauthorized use of the easement. This reasoning would exclude damages from anticipated flights over the property, presumably on the theory that the negative easement acquired by the government was limited to keeping a designated air space clear of obstructions, and did not give the condemner the affirmative right to fly aircraft through this space.[4]

The landowners replied that the government at the time of the eminent domain proceedings was flying aircraft at low altitudes over the property, that it would continue to do so, and that the purpose of the easement was to facilitate future flights. Therefore, compensation should be assessed on the basis of the present and potential use of the easements for aircraft flight purposes, in relation to the effect of such use on the real estate value of the remaining property.

In *United States v. 4.43 Acres of Land*,[5] the Texas federal district court held that damages may be awarded only for the actual easement taken in the declaration of taking. Hence, where the only easement condemned is the right to remove and prevent an obstruction from extending into or above the "glide angle plane," damages awarded may not include diminution in real estate value resulting or likely to result from flights of aircraft over such property. The court said that the compensation should reflect the value of condemnee's property after the taking based on the "obstruction" easement and nothing more.[6]

A different approach to the valuation problem is illustrated by the decision of a New York federal district court in *United States v. 48.10 Acres of Land*.[7] The court ruled that any loss or depreciation in real estate value caused by anticipated aircraft flight had to do with the future and could

See pages 107-112 for footnotes.

not be considered in the assessment of compensation.[8] With apparent inconsistency, however, the court stated in its valuation formula that the test was whether a prospective purchaser would pay the price which he otherwise would have paid if no easement existed, such price to be determined from an appraisal of the property's fair market value.[9] It is submitted that this theory in fact contemplates the expressly excluded aircraft damages. The decision, in effect, indicates that, while compensation must be gauged by the effect of the actual easement acquired on the remainder, this effect should be measured by the reaction of the market to the presence of the easement and not by an artificial standard that may be legalistically correct but realistically unjust.[10]

These two cases, while presenting substantially similar fact situations, offer divergent treatment of the valuation problem. If federal district courts in the future follow the fairly restrictive decision of the Texas court, many legitimate claims to compensation will be exposed to dissipation in the uncertainties attendant to statutory action, where the latter course is pursued after the eminent domain suit. Assuming that the real estate value of condemnee's land has been deflated by anticipated aircraft flight, but that he has been compensated merely for the value of the "obstruction" easement, the dissatisfied condemnee may seek recognition and satisfaction of his claim in tort under the Federal Tort Claims Act or in implied contract under the Tucker Act.[11]

However, even if the claimant pursues his statutory remedies, he may be deprived of relief by the application of *"res judicata."* Thus, a court may feel that the amount of compensation for damages to the remainder was or should have been determined in the original eminent domain proceeding, and that the damage for which the claimant now sues was in fact caused by the authorized use to which the easement was put. Under this view, the present suit would be held not to constitute a new cause of action, and therefore, would be barred by *res judicata.*[12] If the court decides that the condemnee's allegations amount to a new cause of action, it might then hold that the judgment in eminent domain was conclusive only as to the award for the value of the "obstruction" easement. Although collateral estoppel would preclude further consideration of the "obstruction" easement issue, *res judicata* would not apply to prevent the claimant from recovering the drop in market value resulting from the influence of aircraft flights on the remainder. Clearly, however, this latter possibility is dependent on the court's finding of a cause of action distinct from that on which the earlier award to the landowner was based.[13]

If he is successful in establishing the separate cause of action, the owner must still convince the court that he has suffered actionable damages, *i.e.*, damages above and beyond those compensated for in eminent domain. He may find this very difficult. There is no binding obligation on the government to pay for property merely because it is damaged. Before there can be recovery, the property must be so severely damaged as to be "taken" in the constitutional sense.[14] While the flight of aircraft might materially lessen the fair market value of the property, such activity might not amount to a compensable taking.[15] Before a compensable taking can be found, there must be proved some actual physical damage impairing the utility of the land.[16] The unfortunate situation may materialize in which aircraft do not pass over the owner's land to a degree sufficient to justify compensation on the basis of a taking or on a theory of trespass, and yet the mere likelihood of such flight, where a negative easement has been taken, may result in a substantial decrease in the value of the land in the eyes of the market.

If the condemnee is successful in proving the existence of actionable damages, he is entitled theoretically to recover an amount equal to the harm

suffered. The court may allow a lump sum payment to cover all the claimant's losses, varying according to the degree of harm suffered. Where it is apparent that the flights have already damaged the property and that they will continue to do so, damages may be awarded for past and prospective future invasions of the land.[17] If the interference is deemed temporary, however, the court may limit compensation to a specific period of time, perforce casting the burden and expense of periodic suits on the landowner who finds that the statutory award does not represent his actual damage.

There is also a hazard from the standpoint of the government, *i.e.*, it may be compelled to pay twice for the same taking if the condemnee pursues his statutory remedy to a successful conclusion. It is possible that the award made in the statutory suit will be so large, in relation to the degree of harm actually suffered, as to include in fact the eminent domain award. It should be remembered that a variety of elements must be considered in determining damages; courts have a tendency to rely heavily on expert testimony, much of which is often slanted in favor of the property owner's interests.[18] Although it is possible that an excessive award may be scaled down or rejected by a reviewing court,[19] in federal courts, where the assessment of compensation may be made by a commission, the commission's report will not be rejected unless the trial judge considers it "clearly erroneous."[20] It is submitted that, in the light of past practice, the danger to the government of double liability in these circumstances, is real and substantial.[21]

The holding in *United States v. 4.43 Acres of Land* opens the door to further litigation of claims that should have been disposed of in the eminent domain proceeding. By a more realistic approach to the valuation problem, the Texas federal district court could have avoided the narrow decision it reached and thus could have obviated to an appreciable extent this threat of future litigation. The court did not dispute the generally accepted rule in partial-taking cases—cases in which the condemner does not take the fee but only a part thereof—that the condemner must pay compensation not only for what he has taken, but also for damages to or diminution in the market value of the remainder caused by the taking and authorized use of the easement.[22] By a strict reliance on the terms of the declaration of taking, however, the court was led to a technical decision. The court held that the government acquired title only to the exact easement described in the declaration, and that the court is powerless to enlarge the easement or rights which the government has condemned and acquired therein. The court concluded that the diminution in value of the remainder caused by the taking of the easement, must be computed on the basis of the *legal* use to which the easement taken could be put, and that being merely the right to keep the air space free of obstructions above the "glide angle plane."[23] The court apparently was impressed by the fact that the government did not acquire the affirmative right to fly aircraft through the easement, and so held that potential aircraft flight could not be an element in the valuation problem. While the court in *United States v. 48.10 Acres* employed a more liberal recovery theory, it agreed in principle with the Texas court that damages from future flights were not in issue and hence not includible in valuation. That principle is questionable.

The declaration of taking described an easement giving the government the right to prevent obstructions from protruding above the "glide angle plane." The seemingly obvious fact that the purpose of the easement was to facilitate air traffic was not referred to in the declaration. The assessors of compensation, in the Texas case, were limited in their consideration to the most damaging use of the easement that the taker would have the legal right to make, this legal right being determined by a liberal construction of the declaration of taking. The assessors were not permitted to consider the

actual damages that would ensue due to the close relation of the functional purposes of the easement to the operation of the air base.

A more realistic approach would be to base the government's liability on the easement's maximum use. On the facts of the *4.43 Acres* case, this might have been accomplished by requiring the government to amend its complaint to specify the use to which the taken easement is to be put.[24] In the absence of such amendment, however, the effect of the decision could still have been avoided by ruling that the scope of the rights acquired is limited to clearance, but that the maximum use of such rights is to abet imminent air traffic. Indeed, logically it could be said that the easement was acquired for "necessary purposes" connected with flights from the adjacent air base.[25]

Such a rationale does not violate the proposition relied on in the Texas case that a court may not enlarge rights acquired in the declaration of taking. In saying that the government acquired rights to effectuate a particular purpose or function, the rights themselves are left untouched. The direct relation between the actual easement acquired and the air base is implied in the declaration, and from the standpoint of property valuation, is not severable.[26]

As long as the government continues to acquire avigation easements without specifying their basic utility for aircraft purposes, the issue of assessing just compensation in such circumstances will have to be faced by the courts, and conceivably many legitimate claims will suffer in the process. It is desirable, therefore, that a uniform formula of assessment be adopted by the federal courts in these cases which will eliminate superfluous litigation and define and protect the rights of the parties concerned. It is submitted that such a formula is in existence, although it has been sparingly used. The formula requires that damages to the remainder be included in the value of the part taken.[27] Perhaps the chief virtue of the formula lies in the fact that it can be used to reflect the *market reaction* to the partial-taking, which should form the basis of the compensation assessment.

Any formula, if used wisely in a given instance, may result in an acceptable determination. The problem, however, is to find that valuation theory which is the most adaptable to a systematic, uniform application by the courts. The "before and after" test, mentioned in connection with the *4.43 Acres* case, has received favorable comment from an eminent authority in the eminent domain field.[28] In practice, however, it has been confused frequently with other less desirable formulas, with a corresponding lack of consistency among the decisions in which the "before and after" test has been used.[29]

Concededly, the "damages to the remainder included in the value taken" formula is also subject to misapplication. Using it, the Texas district court could have reached the same decision it did. The fault lies not with the formula, but with the court applying it. However, the suggested test eliminates the conditions which often have resulted in awards out of all proportion to the actual damage suffered.[30] Furthermore, when used on the basis of market reaction to the easement in avigation easement cases, it will enable courts to lay the foundation for determination of awards which will be more truly reflective of the interests of the condemnee. Other, more popular valuation theories have been used extensively with a great deal of confusion as the result. Certainly, therefore, in the interests of uniformity and justice, the courts in the future should give the most serious consideration to the "damages to the remainder included in the value taken" test in partial-taking cases.

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FOOTNOTES

[1] The fifth amendment provides that "private property shall not be taken for public use without just compensation." U.S. Const. amend. V.

[2] United States v. 48.10 Acres of Land, 144 F. Supp. 258 (S.D.N.Y. 1956); United States v. 4.43 Acres of Land, 137 F. Supp. 567 (N.D. Tex. 1956).

[3] 46 Stat. 1421 (1931), 40 U.S.C. §§ 258a-e (1952). The Declaration of Taking Act provides that in any proceeding brought by the government for the acquisition of any land or easement for the public use, the condemner may file with the complaint, or at any time before judgment, a declaration of taking, declaring that the lands described are taken for the use of the United States. It is imperative that the declaration allege the specific public use for which the land is being taken, together with a sufficient identification of the lands and a statement of the estate or interest in said lands taken. The condemner must also state the sum of money estimated by it to be just compensation for the lands taken. Upon the completion of this procedure, the act vests in the government both title and possession to the condemned property, although litigation may continue as to the final amount of the compensation and its distribution. United States v. .8677 Acre of Land, 42 F. Supp. 91 (E.D.S.C. 1941).

The Declaration of Taking Act is a supplementary condemnation statute permissive in nature and designed to vest title to the described condemned property in the United States immediately upon the filing of a deposit in court, pending the condemnation proceedings. It also gives the condemnee an immediate right to have his compensation determined in the same proceeding. If the condemnee's title is clear, he will be given an immediate cash payment to the extent of the government's estimate of the value of the property. United States v. Miller, 317 U.S. 369 (1943). However, since just compensation is determined as a judicial function, the amount deposited in conformance to the act may be increased or diminished upon final judgment. United States v. Catlin, 142 F.2d 781 (7th Cir. 1944). Upon filing the declaration and making the deposit, the government becomes irrevocably bound to pay the ultimate award regardless of whether or not the award is within the prescribed limits. Hessel v. A. Smith & Co., 15 F. Supp. 953 (E.D. Ill. 1936).

If a district court refers the matter of compensation to a commission, the commissioners are to determine the amount based on the exact easement or estate condemned as described in the declaration of taking. Fed. R. Civ. P. 71A(h). Damages resulting from unauthorized use of the condemned land by the government, a use not sanctioned in the declaration of taking, whether expressed in terms of claims for damages or for just compensation for property taken, are claims against the United States, and as such may be asserted in the United States Court of Claims or in a federal district court under the Tucker Act, 28 U.S.C. § 1491 (1952); 28 U.S.C. § 1346 (1952), or in a district court under the Federal Tort Claims Act, 28 U.S.C. § 2671 (1952). But it would seem that such claims may not be asserted by way of counterclaim in a condemnation proceeding, since this would allow a suit against the United States in a manner and in a court in which the government has not consented to be sued. Oyster Shell Products Corp. v. United States, 197 F.2d 1022 (5th Cir. 1952); State Road Dept. of Florida v. United States, 166 F.2d 843 (5th Cir. 1948).

[4] The government conceded that under circumstances not presented in the *4.43 Acres* case, an appropriation of the condemnee's property by flights of low-flying aircraft might be compensable. But its theory was that prospective use of the superadjacent air space over the condemned property for aircraft flight was independent of the avigation easement acquired, and that damages resulting from the possible materialization of such aircraft rights did not flow from the taking of the easement.

The "obstruction" easement taken by the government is a negative easement in that it merely prohibits a certain activity by the condemnee; the acquisition of the legal right to fly aircraft over the condemnee's property would be an affirmative easement. In the cases under consideration, the government did not take an affirmative easement, and it would be improper to award damages on the basis of an affirmative easement unless such easement has in fact been taken. Moreover, a court can not award compensation on the assumption that the taking of a negative easement will be followed by the taking of an affirmative one. Insofar, therefore, as the government contended that damages could not be awarded for the taking of an affirmative right to fly aircraft over the owner's property, it was correct. The theory of this comment, however, is that in order to determine fairly the damages that flow from the taking of a negative easement (the "obstruction" easement) a proper valuation formula must consider the interrelation of the right to keep air space free of impediments and the complementary presence of an air base with its attendant air traffic. See text at note 25 *infra*.

[5] 137 F. Supp. 567 (N.D. Tex. 1956).

[6] The court expressed their unwillingness to allow the claim for damages for diminution in real estate value due to anticipated aircraft flights: ". . . If the

commissioners are allowed in determining the amount of just compensation to take into consideration past or probable future aircraft flights over the land of these condemnees, and in effect to compensate therefor, the government will be required to pay for something which it has not acquired, and for which it may be compelled to pay damages or just compensation in subsequent proceedings." 137 F. Supp. at 572.

[7] 144 F. Supp. 258 (S.D.N.Y. 1956).

[8] On this point, the opinion cited United States v. 4.43 Acres of Land, 137 F. Supp. 567 (N.D. Tex. 1956). The landowners had claimed damages from fear, noise, vibration and psychological effects, and for impairment of utility of the farm lands for residential development purposes, relying on United States v. Causby, 328 U.S. 256 (1946). The facts indicated that more than one year had passed since the easements were taken, and that the flights of aircraft which had transpired had not impaired the utility of the land for residential development. In the *4.43 Acres* case, there was similar evidence of present flights although it was held insufficient to amount to a taking. As to damage claims pertaining to noise, vibration, etc., it appears that the New York court rightfully excluded them. See United States v. 26.07 Acres of Land, 126 F. Supp. 374 (E.D.N.Y. 1954).

[9] The court added that where residential property is involved, there must be proof of a reasonably imminent demand and market, as of the date of the taking, citing Olson v. United States, 292 U.S. 246 (1934). Furthermore, the burden of proof in establishing damages suffered as the result of the imposition of the easement, rests on the owner, not on the government. Westchester County Park Comm. v. United States, 143 F.2d 688 (2d Cir.), *cert. denied*, 323 U.S. 726 (1944).

[10] The court reasoned that: "Where avigation easements are sought for land adjoining an air base, the land being farm land but situated in an area that is under development for residential purposes, the value should be determined by taking into consideration the limitation imposed on the use of the land in the future. Although there is no showing that the present utility of the land for farm purposes has been impaired by the easements, the marketability of the property may be impaired in the future if it is to be used for residential development purposes." 144 F. Supp. at 258.

The court commendably indicated that the loss in real estate value for residential purposes is to be computed by what price the remainder will bear if offered for sale. This view would seem impliedly to acknowledge that the market, *i.e.*, the willing purchaser, might be unfavorably impressed with the avigation easement in its relation to air traffic.

[11] 28 U.S.C. § 2671 (1952); 28 U.S.C. § 1491 (1952); 28 U.S.C. § 1346 (1952).

[12] The rule that a judgment bars future action between the same parties or their privies with respect to the same cause of action applies to judgments in eminent domain proceedings. Scheer v. Kansas-Nebraska Gas Co., 158 Neb. 668, 64 N.W.2d 333 (1954). It has been held in cases under the Tucker and Federal Tort Claims Acts, that an award of compensation in eminent domain proceedings is conclusive as to every matter which could have been included therein, whether or not it was in fact included. *E.g.*, South Carolina Pub. Serv. Authority v. 11,754 Acres of Land, 123 F.2d 738 (4th Cir. 1941).

[13] An interesting discussion of this problem is to be found in Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?* 21 Ore. L. Rev. 319 (1942). It is said that courts have reached conflicting results even though professing to apply identical rules of law which the author feels is partially due to the vagueness of the term "cause of action." The article contends that these conflicting results can be explained only by the existence of two fundamental but conflicting policies:

> (1) A judgment is "properly a bar on principles of public policy, because the peace and order of society, the structure of our judicial system, and the principles of our government require that a matter once litigated should not again be drawn in question between the same parties or their privies." Freeman, Judgments 1318 (5th ed. 1925). This policy is based on the interests of the defendant, who "should not be twice vexed for the same cause" and on the interests of the public and the state, which bear the expense for the organization of courts, the access to which must be free from obstructions by multifarious suits.
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> (2) On the other hand, there is a strong policy not to cut off substantive rights of a litigant by a struct application of the rules of procedure. "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish." Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79 (1926).
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> According to which of these policies is considered to be stronger,

> the theory of what constitutes a cause of action varies even in the same jurisdiction; as between various types of cases, precedents may determine the policy. *Id.* at 321.

Keeping in mind the fact that the landowner who sues under one of the permissive statutes ordinarily will be attempting to enlarge his earlier award in eminent domain, the following statement is significant:

> . . . [T]here is a fundamental difference between situations in which the plaintiff [landowner] sues after recovery and those in which he sues after defeat. If he sues after recovery, it may be that the facts which are added for the purpose of increasing the . . . recovery and are alleged to constitute a new cause of action have already affected the amount of the first recovery. It is a fundamental policy of the law not to permit double recovery. To carry out this policy the courts are prone to stretch the concept of cause of action when they rationalize the result. It would be dangerous to assume that the same courts would have applied the same concept of cause of action if the first action had been decided against the plaintiff for reasons material only to this first cause of action. *Id.* at 358.

Thus, where the landowner unsuccessfully claims aircraft damages to his property in the eminent domain proceeding, and then attempts to prosecute this claim further under statutory authority, it is quite conceivable that the court might decide that he has failed to establish a cause of action disinct from that on which he received the condemnation award. That, in fact, he was suing on the "identical accusation" forming the basis of the original award.

[14] Peabody v. United States, 231 U.S. 530 (1913) (The mere location of a battery of guns which had not been fired for more than eight years, and which the government had no intention of firing, except in case of war, held not an appropriation for military purposes of the land within their firing range).

[15] Some idea may be gained from the following decisions as to the degree of impairment necessary to constitute a compensable taking. Where the noise and glaring lights of planes landing at or leaving an airport leased to the United States interfered with the normal use of a neighboring farm as a chicken farm, there was held to be such a taking as to give the owner a constitutional right to compensation. United States v. Causby, 328 U.S. 256 (1946). A servitude imposed by the government on land adjoining its fort was held a taking within the law of eminent domain where the government repeatedly fired guns of the fort across the land and had established a fire control service there. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in the suit of an individual whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking of private property. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[16] The degree of physical damage that must be proved by the residential property holder is difficult, if not impossible, to define. In the *Causby* case, *supra* note 15, where the property involved was a chicken farm, it was held that the effect produced on the chickens by the low-flying aircraft destroyed the utility of the property and hence was an actual physical damage to or unreasonable interference in the use of the property. Where residential property is involved, however, and no surface rights have been taken by the condemner, the path to success for the claimant suing for impairment of the utility of the property is thorny indeed.

The cases cited note 15 *supra,* indicate instances in which the landowner prevailed in his claims. The presence of noxious odors and active guns near residential property offer fairly obvious examples of actual physical interference in the use of the property. But where the damages complained of result from aircraft, the litigant faces added subtleties. See Hinman v. Pacific Air Transp. 84 F.2d 755 (9th Cir. 1936). The court in the *Hinman* case, applying the legal premise that the essence of the legal right of property is dominion over it, rejected the contention that the landowner has title to all space above his land ad infinitum, and held that he had rights only to such a height as is, or might become, useful to the enjoyment of his property. The court pointed out that any use of such space which is injurious to the land, or which is in fact an actual interference with the possession or beneficial use, would be a trespass for which the owner would have a remedy. However, the court continued, mere use of the space above the land by an airplane would not of itself constitute actionable trespass. In this regard, such grievances as discomfort from noise, vibration and other inconveniences of a similar character were discounted as a basis for a trespass claim. To maintain an action in trespass, the court concluded, the complainant must allege a case of actual and substantial damage, supported by facts and circumstances.

The question arises, might a diminution in the utility of the land for purposes of sale on the market constitute such an "actual and substantial" damage? It has been held that an interference with the value of private property may constitute

a "taking." City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (1955); State v. Bentley, 231 Minn. 531, 45 N.W.2d 185 (1950). See also Burger v. St. Paul, 241 Minn. 285, 64 N.W.2d 73 (1954), in which the court remarked: ". . . [Statute] defines taking by condemnation proceedings in this state to include every interference, under the right of eminent domain, with the ownership, possession, enjoyment, or value of private property . . ."

Whether or not the particular court in which the condemnee brings suit will follow this reasoning, in the absence of a similar statute, is one of the risks facing the litigant who seeks statutory relief after failing to collect in the eminent domain proceeding.

Between the extremes of a taking and a mere annoyance, there is a twilight zone in which the landowner has few guiding standards. A court unimpressed with his evidence (assuming that the plaintiff has first succeeded in establishing a good cause of action) will find no more than a technical trespass and award nominal damages, or else reject the allegations in toto. ". . . [A]lthough a legal injury to plaintiff is proven, yet if the extent of the injury is not shown, nor evidence given from which it can be inferred, nominal damages only can be recovered." Murray v. Pannaci, 130 Fed. 529, 530 (3d Cir. 1904).

[17] Restatement, Torts § 930 (1939); McCormick, Damages § 127(2)(b) (1935).

[18] "The mere fact that the courts rely so completely on expert testimony need not be in itself a ground of criticism, but what makes it deplorable is that the courts often accept these estimates blindly because of their own inexperience with real estate valuation. . . . The tribunal's task is not made easier by the fact that perhaps the most important qualification of an expert witness from the point of view of the party employing him is his ability to evade questions and to conceal or gloss over facts that are disadvantageous to his employer's side of the case.

"A court or jury is . . . likely to make some arbitrary compromise, usually by splitting the difference between the respective estimates. This practice encourages fantastic claims by property owners' witnesses, and estimates, deliberately undercut, by condemners' appraisers. It puts a premium on perjury. . . . It is unfair to conservative appraisers who have a strong sense of their professional standing, and it places at a disadvantage those owners who set their claims at what they consider the actual market value, rather than at a figure that takes into account the possibility that the tribunal will split the difference between the respective estimates." 2 Orgel, Valuation Under Eminent Domain, § 247 at 262 (2d ed. 1953).

[19] Generally, however, the practice seems to be for the appellate courts to let condemnation decisions stand as long as the compensation allowed falls somewhere between the respective estimates of the various expert witnesses. One reason for this seems to be the great bulk of the condemnation records which appellate courts are not eager to peruse. This attitude "has led to the prevalent impression that the appellate courts will not reverse on questions of quantum. The latter impression is correct insofar as it implies that, within wide limits, the appellate courts will permit findings of the trial courts or commissioners to stand." 2 Orgel, Valuation Under Eminent Domain § 247 at 262-63 (2d ed. 1953).

[20] 6 Nichols, Eminent Domain § 27.3(2) at 341 (3d ed. 1953).

[21] Theoretically, of course, the final judgment in the original proceeding is *res judicata* with respect to the same cause of action in future proceedings, where the same parties are involved. Where the condemnee succeeds in enforcing his claim in a statutory action, the original award in respect of the "obstruction" easement therefor should be excluded from the assessment of compensation.

[22] "To say that such an owner would be compensated by paying only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." United States v. Grizzard, 219 U.S. 180, 185 (1911).

[23] Potential uses beyond the scope of the declaration of taking or such similar charter of taking may not be considered in awarding just compensation in the condemnation proceeding. Where the taker makes such use of the property beyond the scope of the instrument of taking, the condemnee will be entitled to additional compensation in a new action. Chicago & N.W. R.R. v. Milwaukee, R & K Elec. Co., 95 Wis. 561, 70 N.W. 678 (1897).

[24] United States v. Chicago B & Q RR., 90 F.2d 161 (7th Cir.), *cert. denied*, 302 U.S. 714 (1937). In this case, the government was required to make its petition more specific, to enable the landowner to determine and make proof of damage to the remainder of his property resulting from the uses to which the government intended to put the part actually taken. The government had condemned 1.6 acres of the railroad's tract for the purpose of constructing a lake. The railroad contended that the government was actually taking more than it had described in the declaration of taking, in that, due to the height of the dam to be constructed, more of

defendant's land would be flooded than the actual estate condemned. Subsequently, the government filed an additional complaint condemning the land for which damages were claimed. On review, the government protested that the trial court's action in effect had compelled it to accept and pay for more rights than it had asked. The appellate court admitted that this might be true but decided that the consolidation of suits was preferable in that duplication of damages, and the danger of multiplicity of suits would be avoided, as well as securing to the condemnee an opportunity to have adjudicated all damages suffered because of the intended use of the property taken.

In the *4.43 Acres* case, the government contended that if further damages were inflicted on the remainder of the property beyond the amount awarded for the actual easement taken, the condemnee would have the right to sue under one of the permissive statutes. In reference to the facility of this remedy, the appellate court in the *Chicago B & Q R.R.* case commented: ". . . [T]he appellee [landowner] proceeded on the theory that by virtue of the physical appropriation of the 1.6 acres, the government impliedly agreed to compensate appellee for all proximate damages to its remaining property occasioned by the construction and use of the dam, and that recovery therefore was authorized by the Tucker Act . . . that unless appellee presented all its claims for proximate damages to its remaining property at the time of the physical appropriation of the land it would be barred thereafter from recovering those omitted. Appellee's contentions in these respects are sound. . . . If appellee had not asked that the complaint in the first action be made more specific, or if it had not presented its claim in that action for damages to its remaining property, but had merely gone to award on the value of its interest in the . . . land, it might have been placed in a very embarrassing situation in its effort to recover damages to the remaining property on the theory of an implied contract, especially if the government had chosen not to file any subsequent petition (for an increase in the size of the original taking) and certainly it was not necessary for it to do so. The government contends that as a result of (the trial court's order) it was compelled to accept and pay for more rights than it asked. This objection is not tenable . . . because by filing, the government impliedly agreed to pay for all damages to the remaining property, proximately caused by the *use* of that which it had physically appropriated. Hence, it will be presumed to have demanded the right to cause the damage for which it was liable." (Emphasis supplied) 90 F.2d at 167.

It is interesting to note that the opinion cited the Tucker Act as authority for awarding the condemnee all damages resulting from the maximum use of the right acquired rather than upon its maximum intended use. It is not unreasonable to conclude, where the government condemns an "obstruction" easement, that the maximum intended use of the easement as defined by the declaration of taking is to keep the air space free of impediments, but that the maximum use will be to clear the way for air traffic.

The reviewing court in the *Chicago B & Q R.R.* case said that the government manifested a "legitimate" purpose to place the condemnee in the "very embarrassing" position of having to rely on the implied contract theory in a later proceeding and so take his chances that the judgment in the original eminent domain suit would not bar later recovery under the Tucker Act.

This purpose, while termed "legitimate," seems rather hard-boiled. The court had little difficulty in favoring the cause of the condemnee as it was of the opinion that all of the damages for which the government might be liable because of its maximum use of the property could be awarded in one action.

[25] Chicago, K. & N.R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. 472 (1894). Under the law of eminent domain, a railway had condemned a strip of the owner's property for a right-of-way, but its track had been constructed on land other than the condemnee's, but adjacent to it. The legal right acquired by the railway in the use of the strip was to construct embankments and certain pits along the side of the roadbed from which material would be taken for the embankments. The condemnee claimed damages due to the affect on his remainder of the operation of the railroad on the adjacent property, along with other damage claims not material here. In upholding the owner's position, the court held that the land had been taken "for necessary purposes connected with the construction and operation" of the road. The court commented that the condemner was not limited to the use of the one roadway already constructed on the adjacent property, but might, if it chose, construct tracks on the strip taken from the condemnee's land or move its line over onto such land.

The applicability of this reasoning to the case of the "obstruction" easement is impelling. Without the right of clearage, the functioning of the air base is subject to the theoretical hazard of the landowner's erecting a structure that would penetrate into the air space above the "glide angle plane." It could logically be asserted that the easement was taken "for necessary purposes connected with the operation" of the air base.

[26] Whether or not the intended use of an easement for a purpose less obvious than in the principal cases could figure in the determination of compensation, is not material to the problem under consideration.

[27] 1 Orgel, Valuation Under Eminent Domain § 49 at 232-34 (2d ed. 1953). The author explains the philosophy behind the rule in the following words: ". . . [A] court, if unwilling to concede any exception to the principle that compensation should be limited to property that is 'taken,' might nevertheless recognize claims for damages to remaining property by holding that the value of the part which is 'taken,' is a value based on the significance of this part to the owner's entire property. Such a holding . . . would be quite in accord with economic and accounting conceptions of 'value to a going concern.' "

In Louisiana Soc. for Prevention of Cruelty v. Board of Levee Commissioners, 143 La. 90, 78 So. 249 (1918), where the condemner of a plot of land for levee purposes cited the relevant provision in the state constitution requiring compensation only for the value of the property taken, the court held that although the condemnee could recover compensation only for the value of the part taken, such value should be measured by reference to the fall in value of the remainder resulting from the taking of a part. It is worth interjecting at this point, that the court did not limit the fall in value of the remainder by some "use" theory, in relation to the part taken.

Orgel suggests that the formula has failed to gain widespread employment because "its logical implications are so obvious that they would embarrass the courts in placing whatever limits they wish to place on the recovery for 'consequential damages' resulting from the taking of a specific property."

[28] 1 Orgel, Valuation Under Eminent Domain § 64 at 290 (2d ed. 1953). According to the author, the "before and after" rule, literally interpreted, would avoid the danger of double counting of damages and come closer to a true approximation of the actual damage suffered by the property holder.

[29] One of the "less desirable" formulas with which the "before and after" rule has been confused, is the "value plus damages" test. Briefly, the latter test in its operation requires two things: 1. that the part taken be valued by the price for which it could be sold separately, divorced from the whole; and 2. that the decrease in the sale price of the whole resulting from the taking of a part, also be measured. The objection to this rule, is that a jury too often will include as damages to the remainder a part of the same injury which it included in the value of the part taken. The result, in many cases, is an excessive damage award. Despite its literal meaning, the "before and after" test has been so frequently misconstrued in application with the "value plus damages" test, that its positive utility in future cases is open to question. *Id.* at 236, 238, 290-94.

[30] These conditions being the factors attendant to the process of assessing damage based on some theory of value of the part taken and damage to the remainder resulting from the taking. Perhaps the chief merit of the "damages to the remainder included in the value of the part taken" formula, in the interests of efficient, equitable disposition of condemnation suits, is that it does not require the prevailing practice of computing two sets of damages.