PROPOSED EMINENT DOMAIN LAW OF 1963

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
September 1962

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as last amended 1959, December 8, P. L. 1740, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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EMINENT DOMAIN LAW

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INTRODUCTION

The Joint State Government Commission is currently engaged in a study to codify, amend, revise and consolidate the laws relating to eminent domain in Pennsylvania, pursuant to House Resolution No. 59 (Serial No. 64), adopted finally in the Senate on October 1, 1959, which provides:

"There is widespread dissatisfaction in this Commonwealth with the present laws relating to the condemnation of private property for public purposes and with the procedure in effect thereunder for determining the amount of damages to be awarded in connection with such takings. This dissatisfaction is increasing because of highway extension programs, suburban expansion, urban redevelopment, municipal growth and public authority activities. It has been heightened further because of the lack of uniformity in law and procedure as evidenced in the multifarious laws under which the various condemnors in this State must now act. The courts have been handicapped in developing satisfactory procedures to aid in arriving at substantial justice between the parties involved because of these statutory variances and because of judicial precedents which originated largely during the agrarian period of the Commonwealth's history and which fail to take into consideration the problems created by a changing economy, the expanding population and a revised concept of what constitutes public use.

"A thorough and exhaustive study of all statutes on the subject of eminent domain now in force in this Commonwealth should be made, and, in addition, comparable legislation of other states should be examined, for the purposes of:

"(1) Developing a single procedure, if possible, to provide for a determination of compensation to be paid in all cases regardless of the identity of the condemnor;

"(2) Providing for the use of court-appointed appraisers, but permitting the parties to offer additional testimony if they so desire;

"(3) Providing for payment to condemnees and other interested parties of a percentage of the value of the property taken, as determined by the court-appointed appraisers, within a definite period of time following the filing of their appraisal report in court;

"(4) Developing a more workable and modern definition of

'just compensation' which shall be applicable to all condemnors alike;

"(5) Defining 'time of taking' so that it shall be uniform in practice for all condemnors;

"(6) Requiring condemnors to institute proceedings for determination of damages payable within a definite period of time following the taking;

"(7) Requiring such damage proceedings to be instituted against the owners of all of the property taken;

"(8) Requiring that notice be given to all owners of property taken within a definite period of time after the taking;

"(9) Requiring that personal or mailed notice of taking be given to tenants, mortgagees and other lienholders of record of the property taken;

"(10) Giving tenants, mortgagees and other lienholders the statutory right to intervene and participate in damage proceedings to protect their respective interests in the damages to be paid;

"(11) Requiring that a description of the property taken be recorded in the Recorder of Deed's office;

"(12) Requiring that a notice of taking be filed in the Recorder of Deed's office, indexing the condemnee's name in the grantor index and the condemnor in the grantee index;

"(13) Requiring that the Commonwealth be made liable, as other condemnors are, for consequential damages;

"(14) Prohibiting condemnors from acquiring base fee interests in the property taken; and

"(15) For making such other improvements in the law and procedure pertaining to this subject as may after such study prove to be equitable and just; therefore be it

"Resolved (the Senate concurring), That the Joint State Government Commission be directed to study and investigate exhaustively the law and procedure relating to the exercise of the right to condemn property for public purposes in Pennsylvania and for the payment of damages therefor, with a view toward proposing a complete revision and codification thereof into one statute in order to eliminate present inconsistencies, produce uniformity in practice and procedure, assure just and equitable treatment between all interested parties and in general improve the administration of justice in this field of law."

The Joint State Government Commission appointed a task force to conduct this study. To aid in the inquiry, the Commission

appointed an advisory committee giving representation to the judiciary in metropolitan and rural areas, the Pennsylvania Bar Association, the Department of Highways, the Department of Justice, real estate appraisers, municipal government, redevelopment and housing authorities, metropolitan and rural boards of viewers, schools of law, public utilities, and practitioners familiar with the law of eminent domain.

The purpose of the code is to improve the law and procedure in the exercise of the powers of eminent domain presently invested in condemnors by the Constitution and by statute. The code is not intended to enlarge or abridge the power of condemnation presently possessed by any condemnor, nor to change the method by which a condemnor proceeds to condemn, such as, by ordinance, resolution or otherwise. The change in the law begins with the actual taking of property and the passage of title thereto. It is believed that the proposed code brings a higher degree of certainty and protection to all parties concerned.

While substantial work has gone into its preparation, the very nature of the proposal demands that it be critically examined by those possessing the power of eminent domain, by groups having specialized knowledge of the subject as well as owners of property which may be taken, and by practitioners, and that the Commission and its advisors be given the benefit of such criticism.

Suggestions, criticisms, and recommendations regarding the Proposed Eminent Domain Law of 1963 should be addressed to the Joint State Government Commission, Post Office Box 1361, Harrisburg, Pennsylvania.

AN ACT

To codify, amend, revise and consolidate the laws relating to eminent domain.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

ARTICLE I
SHORT TITLE

SECTION 101. *Short Title.*—This act shall be known and may be cited as the "Eminent Domain Law of 1963."

ARTICLE II
DEFINITIONS

SECTION 201. *Definitions.*—The following words, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) "Condemn" means the taking, injury or destruction of private property by authority of law for a public purpose.

Comment: This language is suggested by the Pennsylvania Constitution, Art. XVI. § 8.

(2) "Condemnee" means the owner of a property interest taken, injured or destroyed, and the owner of a property interest whose access, light, air, support or quiet enjoyment of possession has been permanently impaired whether or not his property has actually been taken, but does not include a mortgagee, judgment creditor or other lienholder.

Comment: Mortgagees, judgment creditors and lienholders have been excluded from the definition since, under this act, they do not have such an interest in the property as to be considered condemnees. This is in accord with present law.

(3) "Condemnor" means the entity taking, injuring or destroying private property under authority of law for a public purpose.

Comment: The definition of condemnor is intended to include the Commonwealth and all of its agencies and instrumentalities and all the various municipalities, public bodies, corporations, etc., which have the power to condemn property.

(4) "Court" means the court of common pleas.

ARTICLE III

SEVERABILITY AND EFFECTIVE DATE

SECTION 301. *Severability.*—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act, and the application of such provision to other persons or circumstances, shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

Comment: The inclusion of a severability section is necessary in view of the language of the court in *Willcox v. Penn Mutual Life Insurance Co.,* 357 Pa. 581, (1947).

SECTION 302. *Effective Date.*—This act shall take effect on the first day of January, one thousand nine hundred sixty-four.

ARTICLE IV

PROCEDURE TO CONDEMN

SECTION 401. *Jurisdiction and Venue.*—The court of common pleas shall have exclusive jurisdiction of all eminent domain proceedings. All eminent domain proceedings shall be brought in the court of common pleas of the county in which the property is located or, if the property is located in two or more counties, then in the court of common pleas of any one of the counties. Where the property is located in two or more counties, and a proceeding

is commenced in the court of one of the counties, all subsequent proceedings regarding the same property shall be brought in the same county.

Comment: This section gives common pleas courts exclusive jurisdiction of all eminent domain cases. The common pleas court has jurisdiction of eminent domain cases under most statutes. Jurisdiction in the court of common pleas is prescribed in: The County Code, 1955, August 9, P. L. 323, § 2408, (16 P. S. § 2408); The Borough Code, 1927, May 4, P. L. 519, Art. XIV, § 1420, as amended, (53 P. S. § 46420); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1920, as amended, (53 P. S. § 56920); The Second Class Township Code, 1933, May 1, P. L. 103, Art. X, § 1020, as amended, (53 P. S. § 66020); the turnpike acts, 1937, May 21, P. L. 774, No. 211 § 6, (36 P. S. § 652f), and subsequent turnpike acts; the Corporation Act of 1874, April 29, P. L. 73, § 41, as amended, (15 P. S. § 481). On the other hand, under the State Highway Law, 1945, June 1, P. L. 1242, Art. III, § 304, (36 P. S. § 670–304), jurisdiction is in the court of quarter sessions. The purpose of this section is to make the law uniform in the matter of jurisdiction.

Insofar as concerns venue, this section is generally in accord with present law under which the court of common pleas of the county where the condemned property is located has jurisdiction. This section does, however, change existing law in this regard as to condemnation by a water supply district under The Water Supply District Law, 1931, May 29, P. L. 215, Art. I, § 1, (15 P. S. § 1474a), which provides that: " . . . the court of common pleas of the county wherein reside the greater number of consumers and other patrons to be supplied with water by the district . . . " has jurisdiction when the district condemns.

It is not intended by this section to affect jurisdiction and venue of courts as established under interstate compacts which in many cases provide for jurisdiction and venue of eminent domain cases in the Court of Common Pleas of Dauphin County. See, for example, the Act of 1919, May 8, P. L. 148, § 4, (36 P. S. § 3274). Condemnations under these compacts are not included in this section or act.

SECTION 402. *Condemnation; Passage of Title; Declaration of Taking.*—

(a) Condemnation shall be effected only by the filing in court

of a *declaration of taking,* with security when required, and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor.

(b) The *declaration of taking* shall be in writing and executed by the condemnor, shall be captioned as a proceeding in rem, and shall contain the following:

(1) the name and address of the condemnor;
(2) a specific reference to the statute, article and section thereof under which the condemnation is authorized;
(3) a specific reference to the action, whether by ordinance, resolution or otherwise, by which the *declaration of taking* was authorized, including the date when such action was taken, and the place where the record thereof may be examined;
(4) a brief description of the purpose of the taking;
(5) a description or plan of the property taken sufficient for the identification thereof, specifying the city, borough, township or town and the county or counties wherein the property taken is located;
(6) a statement of the nature of the title acquired;
(7) a statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located;
(8) a statement of how just compensation has been made or secured.

Comment: This section radically changes existing law and represents a distinct trend away from the history of condemnation in Pennsylvania, which has always been concerned with the property interest of the person rather than with the property. In other words, condemnation under this provision is now a proceeding *in rem.* This section also introduces a new concept in the procedure which a condemnor must follow in order to take property. Under this new procedure the condemnor must file a *declaration of taking* in court in order to condemn. Generally, the section was derived from the Federal declaration of taking procedure. 40 USCA § 258a.

This section is not intended to enlarge or abridge the power of condemnation presently possessed by any condemnor, nor to change the method by which they provide for a condemnation, such as by ordinance, resolution, or otherwise. However, this section is intended

to specifically provide that the actual condemnation is effectuated only by the filing in court of the *declaration of taking* pursuant to the required action by the condemnor to provide for the taking, and that the date of taking shall in all cases be the date of filing of the *declaration of taking*.

Subsection (b) (6) is derived from Rule 71A of the Federal Rules of Civil Procedure.

Subsection (b) (8) is new. Where the condemnor has taxing power, it must state in the *declaration of taking* that it has taxing power which is security for just compensation. Where the condemnor does not have taxing power, it must file a bond with the *declaration of taking*, and state in the declaration that just compensation is secured by a bond. See Section 403 relating to security.

This section also changes existing law by eliminating the requirement that the condemnor try to agree with the owners as to damages. This requirement has not been followed. Condemnors merely allege that they are unable to agree.

SECTION 403. *Security Required.*—

(a) *Bond.*—Except as hereinafter provided, every condemnor shall give security to effect the taking by filing with the *declaration of taking* its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

Comment: This section changes existing law. Generally, under present law when a condemnor is required to give security, the condemnor must tender a bond to the owner and if the bond is not accepted by the owner, the condemnor must file it in court and have it approved. See, e.g., The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1903, as re-enacted 1949, May 27, P. L. 1955, § 40, (53 P. S. § 56903), and as to corporations, the Act of 1874, April 29, P. L. 73, § 41, as amended, (15 P. S. § 482). It is intended by this section to eliminate the necessity of tendering a bond to the condemnee; the condemnor merely files an open end bond with the *declaration of taking*. If the condemnee desires to challenge the bond, he may file preliminary objections thereto after being served with notice. See Sections 405 and 406. It is intended by this subsection that the bond filed shall be an open end bond.

(b) *Power of Taxation.*—Where a condemnor has the power of taxation, it shall not be required to file a bond with the *declara-*

tion of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

Comment: This subsection broadens existing law by exempting all condemnors having the power of taxation from entering security. Under present law, for example, cities are not required to give bond for security and their taxing power is made security for damages (1927, May 4, P. L. 728, No. 377, § 1, (53 P. S. § 1204)), but boroughs (1927, May 4, P. L. 519, Art. XIV, § 1403, as re-enacted, (53 P. S. § 46403)) are required to give security before possession is taken. There is no logical reason why there should be any distinction in this regard between the various condemnors having the power of taxation. The municipalities which are required to file a bond generally are only required to give their own bond without sureties. (See The Borough Code, *supra,* § 1405 (53 P. S. § 46405).) This subsection emphasizes the fact that no bond should be required of condemnors having the power of taxation.

(c) *Insufficient Security.*—The court, upon preliminary objections of the condemnee under and within the time set forth in Section 406 (a), may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

Comment: This subsection is necessary in view of the fact that under subsection (a) the security which is given with the *declaration of taking* is merely the bond of the condemnor without surety, and under subsection (b) no bond is required if the condemnor has the power of taxation. This subsection authorizes the condemnee to challenge the sufficiency of the bond or the surety where there is a surety, or the power of taxation where the condemnee contends that the condemnor is not financially strong.

SECTION 404. *Recording Notice of Condemnation.*—The condemnor upon filing its *declaration of taking,* shall on the same day lodge for record a notice thereof in the office of the recorder of deeds of the county in which the property is located. If the property is located in two or more counties, the notice shall be recorded in all the counties. The notice shall specify the court term and number of the *declaration of taking* and the date it was filed, and shall con-

tain a description of the property taken sufficient for the identification thereof and the names of the owners of the property interests condemned, as reasonably known to the condemnor, and shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor and the condemnor as grantee. The recorder shall receive as a fee the sum of five dollars ($5.00) for recording each notice and twenty-five cents (25¢) for each name indexed.

Comment: This section, which adds another duty on the condemnor, has no counterpart in existing law. Recording is necessary in order to give notice to prospective purchasers from the condemnees. Under present law, the State Highway Department records a plan, but this recordation is of little, if any, value to title examiners and purchasers. The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, § 2801, as amended, (53 P. S. § 37801), requires the city to record its condemnation ordinance and that it be "indexed in the name of the property owner affected thereby."

In those counties which have registry indexes, the condemnor in trying to ascertain the owner, will be acting reasonably if it relies on the ownership as shown in the index.

SECTION 405. *Notice to Condemnee.*—

(a) Within twenty (20) days after the filing of the *declaration of taking,* the condemnor shall give written notice of the filing thereof to the condemnee.

(b) The notice shall be served within or without the Commonwealth, by any competent adult, in the same manner as a complaint or writ of summons in assumpsit, or by first class, certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

(c) The notice to be given the condemnee shall state:

(1) the caption of the case;

(2) the date of filing of the *declaration of taking* and the court term and number thereof;

(3) the name of the condemnee or condemnees to whom it is directed;

(4) the name and address of the condemnor;

(5) a specific reference to the statute, article and section thereof under which the condemnation action is authorized;

(6) a specific reference to the action, whether by ordinance, resolution or otherwise, by which the *declaration of taking* was authorized, including the date when such action was taken, and the place where the record thereof may be examined;

(7) a brief description of the purpose of the taking;

(8) a statement that the condemnee's property has been condemned and a reasonable identification thereof in the case of a total taking and, in the case of a partial taking, a plot plan showing the condemnee's entire property and the area taken;

(9) a statement of the nature of the title acquired;

(10) a statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located;

(11) a statement of how just compensation has been made or secured;

(12) a statement that if the condemnee wishes to challenge the power or the right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the *declaration of taking,* he shall file preliminary objections within twenty (20) days after service of said notice, where service was personal or by mail, or within thirty (30) days after service by publication and posting.

(d) Service of a copy of the *declaration of taking* together with the information and notice required by subsections (c) (2), (c) (8) and (c) (12) hereof shall constitute compliance with the notice requirements of this section.

(e) The condemnor shall file proof of service of said notice.

Comment: Subsection (a) requires that the condemnor give notice of the condemnation. Under existing law, there is no express provision for written notice of the condemnation with the exception of The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, § 2801, as amended, (53 P. S. § 37801), which requires that a copy of the condemnation ordinance be sent by registered mail to each

property owner, and the Act of 1855, April 21, P. L. 264, § 7, (53 P. S. § 16415), relating to opening of streets in cities of the first class.

Subsection (b) prescribes the manner of giving notice and is in accord with general practice. Where the notice is mailed, the condemnor has the option of using either first class, certified or registered mail.

Subsection (c) provides that the notice must contain generally the same matters which are set forth in the *declaration of taking*. Consequently, where practical to do so, the condemnor, under subsection (d), may comply with subsection (c) by adding to a copy of the *declaration of taking* the additional matters required to be set forth in the notice by subsections (c)(2), (c)(8) and (c)(12) and serving it. In many cases, however, such as where a whole area is condemned and there are many properties and condemnees involved in one *declaration of taking,* it would be burdensome and perhaps confusing to give notice by serving copies of the *declaration of taking* on each condemnee. Accordingly, the condemnor is authorized by this subsection to serve notice on the individual condemnee showing only the property of said condemnee which is involved in the taking.

For preliminary objections procedure see Section 406 and comment.

SECTION 406. *Preliminary Objections.*—

(a) Within twenty (20) days after being served with notice of condemnation where service was personal or by mail or within thirty (30) days after service by publication and posting, the condemnee may file preliminary objections to the *declaration of taking*. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the *declaration of taking*. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within forty-eight (48) hours after filing the same.

(e) The court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment to or direct the filing of a more specific *declaration of taking.*

Comment: This section introduces a procedural innovation in eminent domain proceedings by authorizing the condemnee to challenge the condemnation by filing preliminary objections thereto. This section also clarifies present law which is unclear as to whether the condemnee who wishes to challenge the condemnation must sue in equity. *Frank Mashuda Co. v. County of Allegheny,* 256 F. 2d 241, (1958); *Englehart v. Westmoreland Water Co.,* 165 Pa. Superior Ct. 156, (1949); or raise the question in viewers' proceedings, *Schwab v. Pottstown Borough,* 407 Pa. 531, (1962).

These matters which the condemnee may raise by preliminary objections should be disposed of as soon as possible after the condemnation. Procedurally, it is better to have these matters raised in the condemnation proceeding rather than in a separate suit.

Subsections (b), (c) and (e) were derived from the Pennsylvania Rules of Civil Procedure, Rule 1028, relating to preliminary objections in an action in assumpsit.

Subsection (d) which requires service of the preliminary objections within forty-eight (48) hours after filing was deemed necessary so that the matter could be brought to the attention of the court as quickly as possible.

It is intended by this section to provide that the exclusive method of challenging the power to condemn, the sufficiency of the security, the *declaration of taking* and procedure shall be by preliminary objections.

SECTION 407. *Possession; Entry; Payment of Compensation.*—(a) The condemnor shall be entitled to possession or right of entry upon payment or tender to the condemnee of the amount of just compensation as estimated by the condemnor. If a condemnee thereafter refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule,

returnable in five (5) days after service upon the condemnee, to show cause why a writ of possession should not issue, upon which the court may issue a writ of possession conditioned upon payment to the condemnee or into court of such estimated just compensation and on such other terms as the court may direct.

(b) If within sixty (60) days from the filing of the *declaration of taking,* the condemnor has not paid or tendered just compensation as provided in subsection (a) of this section, the condemnee may tender possession in writing and the condemnor shall on relinquishment of possession make payment of eighty percent (80%) of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon petition of the condemnee, may compel the condemnor to file a declaration of estimated damages or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such damages. The court may, after hearing, enter judgment for eighty percent (80%) of the amount of the estimated damages.

(c) The compensation paid under subsections (a) and (b) of this section shall be without prejudice to the rights of either the condemnor or the condemnee to proceed to a final determination of the damages and the payments heretofore made shall be considered only as payments pro tanto of the damages as finally determined.

Comment: This section changes existing law which generally does not require any payment by the condemnor until final award or judgment and which generally entitles the condemnor to possession upon the filing of security. The purpose of this section is to prevent hardship which occurs in many cases when the condemnor takes possession and the condemnee, who is not satisfied with the offer of the condemnor, must give up possession and relocate elsewhere; in such cases, the condemnee may have some difficulty in obtaining other property because of lack of funds.

Right of entry provided for in this section does not mean the precondemnation entry to make surveys, appraisals, etc. What is meant by right of entry in this section is the case, for example, where an easement is condemned and the condemnor actually does not get possession of the property but merely the right to enter for his easement.

Even though the condemnor does not desire immediate possession after the condemnation, the condemnee, who may want to move immediately, has the right under this section, if the condemnor has not asked for possession within sixty days after the filing of the *declaration of taking*, to deliver up possession to the condemnor and take 80% of the condemnor's estimate of just compensation without prejudice to his right to prosecute his claim for damages. See the Act of 1957, July 10, P. L. 632, (53 P. S. §§ 18001–18004), which authorizes first class cities to deposit the estimated amount of compensation into court for the use of the person entitled thereto.

If the money is not accepted by the condemnee and is deposited in court, the money may be withdrawn from court in accordance with the provisions of Section 519 of this act.

SECTION 408. *Revocation of Condemnation Proceedings.*—The condemnor, by filing a *declaration of relinquishment* in court within one year from the filing of the *declaration of taking* and before taking possession of the condemned property, may relinquish all or any part of the property taken, whereupon title shall revest in the condemnee as of the date of the filing of the *declaration of taking*. Notice of said relinquishment shall be recorded in the office of the recorder of deeds of the county in which the property taken is located, with the condemnor as the grantor and the condemnee as the grantee, and the notice of said relinquishment shall be served on the condemnee in the same manner as provided for service of the *declaration of taking*. Where condemned property is relinquished, the condemnee shall be entitled to the damages sustained by him including costs, expenses and reasonable attorney's fees and such damages shall be assessed by the court, or the court may refer the matter to viewers to ascertain and assess the damages sustained by the condemnee, whose award shall be subject to appeal as provided in this act. The condemnor and the condemnee without the filing of a *declaration of relinquishment* provided herein, may by agreement effect a revesting of title in the condemnee.

Comment: This section changes and clarifies existing law. Present law is somewhat unclear as to when the condemnor may discontinue the proceedings and the condemnation. In *Philadelphia Appeal*, 364 Pa. 71, (1950), the city by ordinance condemned property for a park and later petitioned for viewers; prior to the viewers' hearing to fix the value of one of the properties condemned, the city amended

its condemnation ordinance by deleting the property in question; the court held that it was too late for the city to abandon or discontinue the proceeding as to this property since the original ordinance actually condemned the property. On the other hand, in *Reinbold v. Commonwealth,* 319 Pa. 33, (1935), the court indicated that the condemnation may be abandoned or discontinued at any time "until the proceedings are ended."

It is intended by this section to clarify present law by specifically authorizing condemnors to discontinue or abandon the condemnation by filing in court a *declaration of relinquishment* within one year from the date the property was condemned and before possession of the property was taken. In other words, if more than one year has lapsed from the time the *declaration of taking* was filed or if the condemnor has taken possession of the property, the condemnor may not discontinue or abandon the proceeding.

The condemnor must record the *declaration of relinquishment* in order to clear the records, since a notice of condemnation has previously been recorded.

Where the condemnation is abandoned, the condemnee should be compensated for any damages which he sustained since his land has been "tied up"; there may have been an entry by the condemnor, etc. In the *Reinbold* case, *supra,* the court, at page 46, stated that the condemnee is entitled to "the amount of costs, expenses and damages expended and suffered by (him) by reason of the intended condemnation of his land. . . . " In *Long v. Commonwealth,* 37 D & C 702, (1940), the court allowed the condemnee expenses incurred for plans, photographs, real estate experts and attorney's fees. Expenses incurred for these items would, of course, be recoverable as damages under this section.

See also on this subject the Act of 1891, May 16, P. L. 75, § 7, (53 P. S. § 1092), which authorizes municipal corporations to discontinue proceedings prior to entry upon, taking, appropriation or injury to property within thirty (30) days after filing of viewers' report, but the municipality must pay the costs, and actual damages, loss or injuries sustained by the owner. A similar provision is in The Borough Code, (53 P. S. § 46451); The Third Class City Code (53 P. S. § 37847); The County Code, (16 P. S. § 2433); The Second Class County Code (16 P. S. § 5633).

Upon relinquishment of the property by the condemnor, title is revested in the condemnee as of the date of the filing of the *declaration of taking.* The property is then in the same position as if there had been no taking.

SECTION 409. *Right to Enter Property Prior to Condemnation.*—Prior to the filing of the *declaration of taking,* the condemnor or its employes or agents, shall have the right to enter upon any land or improvement which it has the power to condemn, in order to make studies, surveys, tests, soundings and appraisals. Any actual damages sustained by the owner of property entered upon by the condemnor for the foregoing reasons shall be paid by the condemnor and shall be assessed by the court or viewers in the same manner as provided in Section 408.

Comment: This section is derived from existing statutes which authorize condemnors to enter upon any lands in order to make surveys. See the State Highway Law, 1945, June 1, P. L. 1242, Art. II, § 205, (36 P. S. § 670–205); The Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, § 2603, (16 P. S. § 5603). This section broadens the powers of condemnors by authorizing preliminary entry for studies, tests, soundings and appraisals as well as for surveys. The provision making the condemnor liable for any actual damages sustained by the owner by reason of the entry is new. It is intended that the condemnor should pay for any such damages where entry is made.

SECTION 410. *Abandonment of Project.*—If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the property may be used for any other public purpose or may be resold to the condemnee at the same price paid by the condemnor therefor. If the property is not used for any other public purpose and the condemnee does not repurchase it, the condemnor may then dispose of it.

Comment: Under present law if the condemnor condemns a fee and then abandons the purpose for which the property was condemned, the condemnee has no reversionary interest in the property. *Starkey v. Philadelphia,* 397 Pa. 512, (1959). This section continues and clarifies present law in this regard but goes further and sets forth exactly what alternatives are available to the condemnor if the original purpose of condemnation is abandoned. If the property is not going to be used for any other public purpose the property must be offered to be resold to the condemnee and only if the condemnee refuses to repurchase the property can the condemnor dispose of it in any manner it reasonably chooses.

ARTICLE V

PROCEDURE FOR DETERMINING DAMAGES AND BENEFITS

SECTION 501. *Petition for the Appointment of Viewers.*—

(a) The condemnee may file a petition requesting the appointment of viewers, setting forth:

(1) a caption which shall be the caption of the proceeding substantially as set forth in *declaration of taking,* with an identification of the petitioner and his property;

(2) the date of the filing of the *declaration of taking* and whether any objections thereto have been filed;

(3) the name of the condemnor;

(4) the names and addresses of all condemnees, known to the petitioner, having an interest in his property;

(5) a brief description of his property which may include any or all of his properties included in the *declaration of taking;*

(6) a request for the appointment of viewers to ascertain just compensation.

(b) The condemnor may file a petition requesting the appointment of viewers, setting forth:

(1) a caption which shall be the caption of the proceeding substantially as set forth in the *declaration of taking;*

(2) the date of the filing of the *declaration of taking* and whether any objections thereto have been filed;

(3) the names and addresses of all condemnees, known to the petitioner, having an interest in the property which is the subject of the petition and the nature of their interests;

(4) a brief description of the property which is the subject of the petition and the interest condemned; and

(5) a request for the appointment of viewers to ascertain just compensation.

(c) The condemnor may include in its petition any or all of the property included in the *declaration of taking.*

(d) If a compensable injury has been suffered by a condemnee and no *declaration of taking* has been filed, the condemnee may file a petition for the appointment of viewers substantially in the

form provided for in subsection (a) of this section, setting forth such injury.

Comment: There is now no statutory or rule requirement regulating the form of the petition for viewers, but the suggested averments follow substantially the practice now prevailing throughout the Commonwealth, except that averments as to liens now required by statute are omitted. See, for example, the Act of 1915, April 14, P. L. 122, § 1, as amended, (26 P. S. § 121). To this extent, the suggested form of petition departs from present practice as imposed by statutes which require the setting forth in the petition for the appointment of viewers the names and addresses of mortgagees, judgment creditors and lienholders. It is intended that the rights of these parties should be determined at the time of distribution of the fund unless their interest may be seriously affected, in which case, they should have the right to intervene under the rules of civil procedure.

In the caption of the case it is deemed desirable to use an *in rem* designation rather than the names of the parties in order to conform to the *declaration of taking* caption. See Section 402. This represents a distinct change from the condemnation theory in Pennsylvania where the emphasis has been on the property interest of the person rather than on the property itself. The change in emphasis brings Pennsylvania closer to the Federal concept of condemnation.

Mortgagees, judgment creditors and other lienholders are not condemnees and, therefore, have no standing to file a petition for viewers, unless permitted to intervene.

Subsection (d) is necessary to cover the situation where there is in fact a compensable injury but the condemnor has not formally condemned.

SECTION 502. *View.*—In every proceeding at least one of the viewers appointed shall be an attorney at law who shall attend the view, and at least two of the three viewers appointed shall view the property in question.

Comment: The requirement that at least two of the viewers view the property in every case is taken from existing law. 1911, June 23, P. L. 1123, § 9, (16 P. S. § 9485).

The requirement that one attorney view the property is new and deemed desirable.

SECTION 503. *Appointment of Viewers; Notice.*—Upon the filing of the petition, the court, unless objections to the validity of the taking or jurisdiction, warranting delay, are pending, shall promptly appoint three viewers, who shall view the premises, hold hearings, and file a report.

The viewers shall promptly give written notice of their appointment to all persons named as condemnors or condemnees in the petition for the appointment of viewers and of the place and time of the view, which shall not be less than twenty (20) days from the date of said notice.

If notice of the view does not include notice of a time and place of subsequent hearings and a time and place is not agreed upon by the parties at the view, notice of the hearing shall be given by not less than ten (10) days' written notice.

Comment: This section is a departure from present statutory practice which requires the court in its order of appointment to designate the time of the view and hearings and the return day of the report. Generally, under existing statutes, the view must be held not less than twenty nor more than thirty days after the appointment of viewers. See The County Code, 1955, Aug. 9, P. L. 323, § 2408, (16 P. S. § 2408); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1920, as amended, (53 P. S. § 56920). As for hearings, see the Act of 1911, June 23, P. L. 1123, § 6, (16 P. S. § 9482). Where the court fixes the return day of the report this necessitates continual applications to the court for extensions, and the fixing of arbitrary time limits interferes with the necessary flexibility of the proceedings. For this reason the fixing of the time for views and hearings is left to the viewers with the caution, however, that they must act promptly. It is contemplated that should the viewers fail to perform their duties promptly, the parties could informally bring this to the attention of the court without the necessity of formal pleadings and this in most cases should be sufficient to remedy any dereliction on the part of the viewers.

SECTION 504. *Service of Notice of View and Hearing.*—Notice of the view and hearing shall be served, within or without the Commonwealth, by any competent adult in the same manner as a complaint or writ of summons in assumpsit, or by first class, certified or registered mail, to the last known address of the con-

demnee and condemnor. If service cannot be made in the manner so provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication, at the cost of the condemnor, once in a newspaper of general circulation and once in the legal publication, if any, designated by rule or order of court for publication of legal notices, published in the county. Proof of service and the manner of same shall be attached to the viewers' report.

Comment: This section resolves the conflicting provisions of the various codes and also simplifies the method of service. Section 2414 of The County Code, 1955, Aug. 9, P. L. 323, (16 P. S. § 2414), now authorizes notice to be given in the manner provided for service of summons in a personal action, if the parties can be found within the county, or upon an adult person residing on the premises and by publication in all other cases. The county and other political subdivision codes also require that notice of the appointment of the viewers must in all cases be made by publication and posting and apparently under present practice a second notice by publication is required as to those owners who cannot personally be served with notice of the hearing itself. The proposed section does away with the requirement of double publication and requires actual notice without publication where this is possible and where this is not possible by posting the premises and by newspaper publication.

SECTION 505. *Additional Condemnees.*—Where the petition has been filed by the condemnor, the condemnee at or before the hearing at which his claim is presented shall furnish the viewers the names and addresses of all other condemnees known to him having an interest in his property and the nature of such interests. The viewers shall thereupon notify by written notice all persons who are so disclosed as having an interest in the property, of the pendency of the proceedings and of subsequent hearings. If the additional condemnees have not received twenty (20) days' notice of the hearing, the viewers shall, upon request, adjourn the hearing to allow such notice to the additional condemnees.

Comment: There is no counterpart in present statutory law requiring the condemnee to furnish the viewers with the names and addresses of additional condemnees. The purpose of this section is first, to implement the present statutory requirements that the claims of landlord and tenants are to be adjudicated in one proceeding.

In addition, other types of interests subject to condemnation should also be tried in one proceeding and disclosed at an early stage of the proceedings and not as under present practice in which the first knowledge of such interests may be disclosed during the hearings. It is intended that the claims of a vendee under an agreement of sale, a tenant with an option to purchase, and the owner of an easement or similar interests should all be joined at the earliest possible moment and their rights adjudicated in one proceeding. The question of whether the additional claimants or condemnees have any interest entitling them to damages should be determined as part of the entire proceeding with the order of evidence left to the discretion of the viewers and their findings as to the matter included in their final report. The burden imposed on the viewers should not be an onerous one and does not extend the scope of present statutory practice which requires the viewers to make findings as to law and fact, as to who are the owners of the property and of the interest condemned.

SECTION 506. *Furnishing of Plans to Viewers.*—The condemnor shall furnish the viewers at or before the view with a plan showing the entire property involved, the improvements thereon, the extent and nature of the condemnation and such other physical data, including grades, as may be necessary for the proper determination of just compensation. If, in the opinion of the viewers, the plans are insufficient, they may require the submission of supplemental plans. Copies of the plans shall be furnished at the same time, without cost, to the condemnee upon written request therefor. If the condemnor does not furnish a plan or the condemnor's plans are insufficient, the court, on application of the condemnee, may tax as costs reasonable expenses for plans furnished by the condemnee.

Comment: This section changes existing law. Most of the statutes specifically provide for the inclusion of many details in the plans such as topography, the incline of the slope, the cubic content of buildings and other similar matters. See, for example, the Act of 1925, April 27, P. L. 310, No. 173, § 1, (26 P. S. § 1). Since conditions in each type of condemnation and in different types of properties are so dissimilar, it is deemed preferable to state the requirements as to plans in general terms and with limited requirements, leaving to the viewers and the parties the determination of what is essential in any given case.

The requirement that copies of plans be furnished without

charge to condemnees is in accord with existing law. Act of 1925, April 27, P. L. 310, No. 173, § 2, (26 P. S. § 2); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1909, as amended, (53 P. S. § 56909). The provision that if the condemnor does not furnish a plan, the court may tax as costs the expenses incurred by the condemnee for plans, is new. If the condemnor neglects to furnish a plan, the court should permit the condemnee to have plans made and the costs thereof charged to the condemnor. *Rush v. Allegheny County,* 159 Pa. Superior Ct. 163, (1946).

SECTION 507. *Powers of Viewers.*—The viewers shall have power to administer oaths and affirmations, to compel the attendance of witnesses, the production of books and documents, and to adjourn the proceedings from time to time. All the viewers shall act, unless prevented by sickness or other unavoidable cause; but a majority of the viewers may hear, determine, act upon and report all matters relating to the view for which they were appointed.

Comment: The power of the viewers to administer oaths and affirmations is in accord with existing law. The County Code, 1955, Aug. 9, P. L. 323, § 1105, (16 P. S. § 1105); The Second Class County Code, 1953, July 28, P. L. 723, Art. XI, § 1105, (16 P. S. § 4105).

The power of the viewers to compel the attendance of witnesses, the production of books and to adjourn the proceedings is new. The Act of 1905, April 10, P. L. 125, § 3, (53 P. S. § 2203), gives the viewers the power to issue subpoenas "at the instance of either party, to compel the attendance of witnesses. . . " where cities enter land for sewer purposes. The various turnpike acts provide that if any person refuses to appear and testify before the viewers or refuses to produce books and papers when required, the court on application of the viewers shall make any necessary orders. There does not seem to be any statute generally authorizing viewers to issue subpoenas. However, in *Wheeler Avenue Sewer,* 214 Pa. 504, (1906), the court indicated that the viewers had the authority to call witnesses. The viewers should have this power so that they can, if necessary, call a person as a witness even though the condemnor or condemnee does not call the person.

The second sentence of the section follows substantially the provisions of Section 2408 of The County Code, 1955, Aug. 9, P. L. 323, (16 P. S. § 2408), and also similar provisions in The Second

Class County Code, 1953, July 28, P. L. 723, Art. XXVI, § 2608, (16 P. S. § 5608). There are, however, some minor variations in these codes and related statutes as to the power of viewers and these are made uniform by this section.

SECTION 508. *Report of Viewers; Contents.*—The viewers shall file a report which shall include in brief and concise paragraph form:

(1) The date of their appointment as viewers;

(2) A reference to the notices of the time and place of view and hearing with proof of service of notices, which shall be attached to the report;

(3) A copy of the plan showing the extent of the taking or injury upon which the viewers' award is predicated and a statement of the nature of the interest condemned;

(4) The date of the filing of the *declaration of taking* or of the injury where no *declaration of taking* has been filed;

(5) A schedule of damages awarded or benefits assessed, to and by whom payable, and for which property, separately stated as follows: general damages, moving and removal expenses, compensation for goodwill and other items of special damages authorized by this act;

(6) In case of partial taking, a statement as to the amount of the general damages attributable as severance damages to the part of the property not taken, if such apportionment has been requested in writing by the condemnee;

(7) Where there are several interests in the condemned property, a statement of the total amount of damages and the distribution thereof between or among the several claimants therefor;

(8) Whether there are other claimants to any interest or estate in the property condemned, and the viewers' determination of the extent, if any, of each interest in the property and in the award;

(9) Their rulings on any written requests for conclusion of law submitted to them;

(10) Such other matters as they may deem relevant.

Comment: This section seeks to harmonize the provisions of present statutes and practice. The statutory requirements as to what must be included in the report now relate only to a limited number of matters such as the assessment of damages and benefits and the

apportionment of damages between landlord and tenant. See The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, § 2823, as amended, (53 P. S. § 37823) (Assessment of damages and benefits); Act of 1937, July 1, P. L. 2667, No. 528, § 1, (26 P. S. § 44) (Apportionment of damages between landlord and tenant.) There are also a number of statutes requiring the viewers to make findings as to the necessity of a private road or the location of utility lines, etc., (Finding as to necessity of private roads, see Act of 1836, June 13, P. L. 551, § 12, (36 P. S. § 2732).) These statutes are not repealed or affected by this act. This preliminary procedure is covered in Article IV. Where there are conflicting or adverse claims, the viewers are required to make specific findings on these matters and may not evade the issue, as is possible under some present statutes, by stating that they are unable to determine who are the owners of the property or their interest therein. See, for example, The County Code, 1955, Aug. 9, P. L. 323, § 2428, (16 P. S. § 2428). This requirement cannot prejudice any of the parties since they will have a right of appeal to the common pleas court from the viewers' report. The proposed form of report also omits the requirement of present statutes that the viewers make findings as to all liens upon the property. See The County Code, 1955, Aug. 9, P. L. 323, § 2411, (16 P. S. § 2411); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1911, as amended, (53 P. S. § 56911).

Clause (6) is new. It has been included because of the tax ramifications involved where there is a partial taking. The tax aspects which arise in connection with condemnation can have serious consequences to a condemnee, as severance damages have more favorable tax consequences than general damages. The Internal Revenue Service has taken the position that unless the award specifically indicates what portion of it is severance damages the entire award will be considered general damages. Rev. Ruling 59-173; *Allaben v. Commissioner,* 35 B.T.A. 327.

SECTION 509. *Inability to Agree.*—If a majority of the viewers are unable to agree on a decision, three new viewers shall be appointed by the court upon application of any interested party.

Comment: This section is derived from a portion of Section 9 of the Act of 1911, June 23, P. L. 1123, (16 P. S. § 9485).

SECTION 510. *Notice of Filing of Report of Viewers.*—Ten (10) days before the filing of their report, the viewers shall mail a

copy thereof to all parties or their attorneys of record, with notice of the date of the intended filing and that the report shall become final unless an appeal therefrom is filed within thirty (30) days from the date the report is filed. Prior to the filing of their report they may correct any errors therein and give notice thereof to the persons affected.

Comment: As it stands, this section substantially follows the provisions of the present county codes and the codes of other political subdivisions but omits the requirement of publication and posting. The County Code, 1955, Aug. 9, P. L. 323, § 2416, (16 P. S. § 2416), for example, requires notice by publication after the filing of the report. Similar provisions appear in statutes covering other condemnors. Under this section notice need be given only to those parties who have appeared before the viewers, since publications will have already been made of the original taking and of the viewers' proceedings.

This section does make a radical change in existing law by eliminating the filing of exceptions to the report. A remnant of the exception procedure is, however, retained by the last sentence which permits the viewers to correct any errors in their report. The errors which are contemplated consist of typographical and possibly administrative errors such as the misspelling of a name which are brought to the viewers' attention prior to filing the report.

What are now exceptions are covered by the appeal to court. See Section 513 and comment.

SECTION 511. *Reports.*—A report may be filed as to one or more of the properties involved in a multiple condemnation. The viewers may combine in one report two or more properties referred to them under separate petitions provided such properties are included in the same *declaration of taking*. Each such report shall be final as to the property or properties included therein and subject to separate appeal.

Comment: The filing of reports as to one or more of the properties involved in a condemnation is authorized in order to expedite the proceedings since there may be a considerable number of properties involved in one condemnation (for example, a condemnation by an urban redevelopment authority). It should not be necessary to have all the condemnees wait until all the cases have been heard and awards made by viewers. Where a report is filed as to a property,

all interests in that property must be included in the report. In other words, separate interests in one property cannot be covered by separate reports. The appeal time begins to run from the date the report covering the property is filed. It does not begin to run from the date the last report covering the last property or properties is filed.

The condemnor must proceed as to all condemnees and whether or not the condemnee appears, the viewers should make an award of damages or assessment of benefits, as the case may be, and if there is an award of damages which remains unclaimed it must be paid to the Commonwealth without escheat as provided in Section 519. After twenty years, there is a conclusive presumption of payment. See Section 523.

Where there is a multiple condemnation there may be many separate petitions filed for the appointment of viewers. This section authorizes the viewers in such case, if the properties have been included in the same *declaration of taking,* to include in their report two or more of the properties submitted to them under separate petitions. This, too, is desirable in order to expedite and simplify the proceedings.

SECTION 512. *Appeals; Time of Taking; Consolidation.*—Any party aggrieved by the decision of the viewers may appeal to the court of common pleas within thirty (30) days from the filing of the report. The appeal shall raise all objections of law or fact to the viewers' report. The appeal shall be signed by the appellant or his attorney or his agent and no verification shall be required. Any award of damages or assessment of benefits, as the case may be, as to which no appeal is taken within thirty (30) days, shall become final as of course and shall constitute a final judgment.

The court, on its own motion, or on application of any party in interest may, consolidate separate appeals involving only common questions of law as one proceeding.

If a condemnee having less than the entire interest in the condemned property appeals the award to him, the condemnor shall have an additional fifteen (15) days to appeal the entire award.

Comment: This section differs from present statutes which in most cases provide for a confirmation *nisi* of the viewers' report followed by an absolute confirmation where no objections are filed. The County Code, 1955, Aug. 9, P. L. 323, § 2423, (16 P. S. § 2423), provides that when the report is filed, the prothonotary is to mark

the same "confirmed *nisi*" and if no exceptions thereto are filed within thirty (30) days, the prothonotary is to enter a decree confirming the report absolutely. This confirmation *nisi* procedure has been omitted as an unnecessary procedural step.

The provision of this section authorizing the court on its own motion to consolidate appeals is taken from Pa. R.C.P. 213. (Under present law a party is entitled to a separate trial on appeal. *Comly v. Phila.*, 153 Pa. Superior Ct. 539, (1943); *Edgmont Ave.*, 28 Dist. Rep. 256 (1918), where the court indicated that this right is guaranteed by the Pennsylvania Constitution, Art. XVI, § 8). This section, then, changes present law where the cases are consolidated by the court. There would be no separate jury trial.

The last paragraph giving the condemnor an additional fifteen days to appeal is new. The additional time is necessary so that the condemnor may protect itself where a part owner or tenant of the condemned property appeals when the normal thirty day appeal time is about to expire. If, for example, a tenant appeals on the last day, the condemnor would want to appeal the landlord's award so that the total award for the property will not exceed its fair market value.

Verification of the appeal presently required under existing statutes has been eliminated as unnecessary.

Exceptions to viewers' reports are abolished and matters formerly raised by exceptions are now included in the appeal, as provided by Section 513.

SECTION 513. *Appeals; Contents.*—

(a) The appeal shall set forth:

(1) the name of appellant;

(2) a brief description or identification of the property involved and the condemnee's interest therein;

(3) a reference to the proceedings appealed from and the date of the filing of the viewers' report;

(4) objections, if any, to the viewers' report, other than to the amount of the award;

(5) a demand for trial, if desired. If the appellant desires a jury trial, he shall at the time of filing the appeal, endorse thereon, or file separately, a written demand for jury trial, signed by him or counsel. If no demand for jury trial is made by the appellant, any other party may file a written demand for jury trial within fifteen (15)

days after being served with a copy of the appeal. If no party makes a demand for a jury trial as set forth herein, the right to jury trial shall be deemed to have been waived and the court shall try the case without a jury.

(b) The appellant shall serve a copy of the appeal on all other parties within five (5) days after filing the same. Proof of service of a copy of the appeal shall be filed by the appellant.

(c) No other pleadings shall be required and the cause shall be deemed at issue.

Comment: This section makes a radical change in procedure by combining in one proceeding, designated as an appeal, the present practice of exceptions as to questions of law and the filing of a separate appeal as to questions of fact. There was confusion in many of the lower courts and even appellate courts as to whether exceptions or appeal was the proper procedure, and often as a matter of course to protect the record, attorneys made a practice of filing both. In *Lakewood Memorial Gardens, Inc. Appeal,* 381 Pa. 46, (1955), the court, at page 51, stated that exceptions "are properly limited to procedural matters or questions of law basic to the inquiry. . . "; and in *Urban Redevelopment Authority of Pittsburgh Appeal,* 370 Pa. 248, (1952), the court held that questions pertaining to the elements of property involved in the condemnation and the relevant measure of damages could not be adjudicated by exceptions but should be raised by appeal.

Subsection (a)(4) is intended to cover what formerly were exceptions. "Objections" is not intended to mean objections on rulings on evidence, competency, etc.; it means objections to the report. Under present practice an appeal on the merits as to damages is considered a trial de novo and neither the viewers' report nor any of their findings nor the amount of the award are admitted for the appeal, nor can they be introduced into evidence. *Sweeney v. City of Scranton,* 74 Pa. Superior Ct. 348, (1920) (trial *de novo*); *Berger v. Public Parking Authority of Pittsburgh,* 380 Pa. 19, (1954) (viewers' report not admissible.) Therefore, on the appeal the appellant-condemnee must, for example, introduce proof of ownership and interest, and the record without such proof is defective; this practice is continued.

No other pleadings will be required and the local rules of practice, many of which now require the condemnee to file a complaint followed by an answer, are abandoned. Rule 47 of Allegheny County Common Pleas Court presently requires the filing of a

petition to appeal and an answer, and states that the condemnee shall be the plaintiff and the condemnor the defendant. The issues involved in a condemnation case are generally so comparatively simple and clear as to damages that no pleadings or framing of an issue are considered necessary. Where the appeal concerns questions of law, since they must be set forth explicitly in separate paragraphs, there should be no necessity for any further pleadings.

Subsection (a)(5) changes existing law. Unless a jury trial is demanded, the trial will be nonjury. Under present practice the trial is always by jury unless waived. This subsection is taken from the act creating the County Court of Allegheny County. 1911, May 5, P. L. 198, § 8, as amended, (17 P. S. § 634).

It is contemplated that the form of caption will be established by the rules of the Supreme Court or by local court rule.

Under subsection (c) the case will automatically be at issue on appeal and it will not be necessary to file a praecipe to have the case placed at issue.

SECTION 514. *Disposition of Appeal.*—All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order.

The amount of damages shall be tried by jury, unless waived.

At the trial of the case, the condemnee shall be the plaintiff and the condemnor shall be the defendant.

Comment: The first paragraph of this section follows substantially the present statutory practice under the various codes which provide that the court on exceptions can modify or change the report or refer it back to the viewers. See, for example, The County Code, 1955, Aug. 9, P. L. 323, § 2423, (16 P. S. § 2423), and The Borough Code, 1927, May 4, P. L. 519, Art. XIV, § 1435, as amended, (53 P. S. § 46435). The confirmation *nisi* procedure now present in most of these codes has been omitted (see comments to Sections 512 and 513), and the order of court will constitute a final, appealable judgment.

The second paragraph is in accord with existing law.

The last paragraph is generally in accord with existing practice.

SECTION 515. *Severance and Special Damages; Allocation.*—(a) Upon appeal from an award of viewers, the court, upon

the request of the plaintiff, shall, after the jury or the court, if the trial is without jury, has returned its general verdict, make a specific finding and allocation as to the amount of the general verdict attributable to severance damages to the part of the property not taken.

(b) The jury or the court, in a trial without a jury, shall make specific findings as to the portion of the award or judgment allocated to removal and moving expenses, to payment for goodwill, or to any other items of special damages authorized by this act.

Comment: Subsection (a) of this section is new and is designed to permit, upon request of the condemnee, the allocation of a general award between severance damages to the part of the property not taken and the damages for the part taken. Such allocation may result in definite advantages under the Federal income tax laws by permitting postponement or avoidance of Federal income taxes. Where the matter is tried in court, the allocation is to be made by the court rather than by the jury as a special finding. The allocation made by the court would be at a special hearing, if necessary, at which the evidence would be restricted solely to the amount allocable to severance damages.

As to the items of special damages such as moving expenses and relocation costs, the Federal urban renewal and development program permits reimbursement and payment of these costs up to fixed limited amounts separate and apart from the general damages in connection with the taking. It may therefore be helpful in connection with the Federal urban renewal program and also for Federal income tax purposes to require these special items of damages to be separately allocated. The allocation of these special items of damages is also necessary for situations where Federal funds are used for highways, as some of these items of damages are not compensable from Federal funds and unless such items are separately stated the Federal Government will not contribute funds toward any part of the award. Under subsection (b) these special damages are to be specifically apportioned by the jury or the court in a trial without a jury.

SECTION 516. *Costs of Proceedings.*—All taxable costs, including filing fees, jury fees, statutory witness fees and mileage, expense of preparing plans under Section 506, the expense of transporting the judge and jury to view the condemned property, and

such other costs as the court in the interests of justice may allow, shall be paid by the condemnor.

Comment: This section attempts to clarify case law by providing that all costs are to be paid by the condemnor.

This section also changes some existing statutory law which provides that the costs be paid by the condemnor except that where the condemnee takes an appeal from the viewers' award, the condemnee must pay all costs of appeal if he does not recover an amount greater than the viewers' award. The County Code, 1955, Aug. 9, P. L. 323, § 2425, (16 P. S. § 2425); The Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, § 2625, (16 P. S. § 5625). On the other hand, The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, § 2830, as amended, (53 P. S. § 37830), and The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, § 1931, as reenacted, (53 P. S. § 56931), for example, provide that the costs of the proceedings, including court costs shall be paid by the city or township, without exception. The purpose of this section is to make it clear that the costs shall be borne by the condemnor in all cases.

SECTION 517. *Waiver of Viewers' Proceedings.*—The condemnor and condemnee may, by written agreement filed with the court, waive proceedings before viewers and proceed directly to the said court on agreed issues of law or fact. The proceedings thereafter shall be the same as on appeal from a report of viewers.

Comment: This section follows substantially present statutory practice authorizing waiver of viewers in certain cases. See, e.g., the Act of 1895, May 21, P. L. 89, § 1, (26 P. S. § 81), and The Borough Code, 1927, May 4, P. L. 519, Art. XIV, § 1414, as amended, (53 P. S. § 46414). However, the requirement of some of the statutes that the owner file a statement of claim and rule the defendant to plead is omitted as unnecessary. In eminent domain cases the issues involved are so relatively simple that no pleadings should be required. If the parties are willing to agree to a waiver they would certainly be able to agree as to the framing of the issues. This will be the equivalent of a case stated.

SECTION 518. *Distribution of Award; Liens.*—If the condemnor is unable to determine proper distribution of the damages, it may, without payment into court, petition the court to distribute the

damages and shall furnish the court with a schedule of proposed distribution.

Notice of the filing of the petition and schedule of proposed distribution shall be given to all condemnees, mortgagees, judgment creditors and other lienholders, as shown in the proposed schedule, in such manner as the court may by general rule or special order direct. The court may hear the matter or may appoint a master to hear and report or may order any issue tried by the court and jury as may appear proper under all the circumstances. The court shall thereafter enter an order of distribution of the fund.

Comment: This is a new procedure not found in present practice. Since there will no longer be any requirement under this proposed code that liens be set forth in the petition for viewers or that findings be made as to lienholders and their priority, some procedure is necessary in order that distribution be made. It is contemplated that in most cases the condemnor will have obtained the necessary information through his title search and that distribution can safely be made on the basis of such search. Where there is any question as to lienholders or priority, this section permits payment to be made under the direction of the court, thus relieving the condemnor from any liability.

SECTION 519. *Payment into Court; Distribution.*—Upon refusal to accept payment of the damages, or if the party entitled thereto cannot be found, or if for any other reason the damages cannot be paid to the party entitled thereto, the court upon petition of the condemnor which shall include a schedule of proposed distribution, may direct payment of the damages and costs into court in full satisfaction thereof.

The court thereafter upon petition of any party in interest shall distribute such funds or any funds deposited in court under Section 407 to the persons entitled thereto in accordance with the procedure in Section 518, but if no petition is presented within a period of five (5) years of the date of payment into court, the court shall order the fund or any balance remaining to be paid to the Commonwealth without escheat. No fee shall be charged against these funds.

When the court believes that the person who is entitled to the fund is not a resident of the United States, its territories or possessions, and would not have the actual use, enjoyment or control

of the funds distributable to him, the court shall have the power and authority (1) to direct only such payments to the person entitled thereto as the court deems proper, or (2) to pay it through the Department of Revenue into the State Treasury without escheat to be held for the benefit of the person entitled thereto. The court which directed payment to the State Treasury, upon petition of the person entitled to such funds, and upon being satisfied that petitioner will have the actual possession, benefit, use, enjoyment or control thereof, shall enter a decree directing the Board of Finance and Revenue to make repayment with interest at two percentum per annum from the date the funds were paid into the State Treasury to the date of repayment.

Comment: The first paragraph follows substantially present statutory practice. See, e.g., Act of 1891, June 2, P. L. 172, § 1, (26 P. S. § 42); The County Code, 1955, Aug. 9, P. L. 323, § 2430, (16 P. S. § 2430); The Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, § 2630, (16 P. S. § 5630).

The second paragraph is new. If the funds are not claimed by the person entitled thereto within five (5) years of the date of payment into court, the court must order the money paid to the Commonwealth without escheat. It is contemplated that after the money has been paid to the Commonwealth the person entitled thereto may apply for a refund in accordance with existing statutes. See Section 10 of the Act of 1937, June 25, P. L. 2063, No. 403, as amended, (27 P. S. § 443).

The third paragraph is based on the Act of 1953, July 28, P. L. 674, (20 P. S. §§ 1155 *et seq.*). It was thought advisable to include such a provision in this act, since it is contemplated that awards will be made even though the condemnee does not appear or cannot be found.

SECTION 520. *Joint Claims Required; Apportionment of Damages.*—The claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, and all others having an interest in the property, and the claims of all tenants, if any, of the property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall fix, first, the total amount of damages for the property, and second, the apportionment of the total amount of damages between or among the several claimants therefor.

Comment: This section is derived from the Act of 1937, July 1, P. L. 2667, (26 P. S. § 44), which requires that the claims of the owner and lessee be tried together. The language of this act has been broadened to require that also the claims of tenants in common, life tenants, etc., and all others having an interest in the property be tried together. This changes existing law, except insofar as concerns the owner and the tenant, which does not require the owners of various interests in the condemned property to join in a single suit. See *Adams v. New Kensington,* 374 Pa. 104, (1953); *Railroad v. Boyer,* 13 Pa. 497, (1850). The purpose of this section is, first of all, to prevent several suits for damages for the same property and, secondly, to prevent the possibility of the condemnor paying more for the entire fee simple title than it is worth. Logically, the damages for each of the various interests in the condemned property should not exceed the total amount of damages for the entire fee. On appeal to the court, the claim of one of the parties may be tried separately without trying the claims of all, if the other claimants are satisfied with their awards and the condemnor has not appealed the entire award.

SECTION 521. *Appointment of Trustee Ad Litem.*—The court, on its own motion or on petition of any party in interest, shall appoint a trustee *ad litem* to represent the interests of minors, persons under a disability, unborn or unascertained parties, or parties whose whereabouts are unknown.

Comment: This section is based on the Act of 1929, April 17, P. L. 531, § 2, (15 P. S. § 485), which provides for the appointment of trustees and guardians *ad litem* in eminent domain proceedings by a corporation. This provision has been included in the act to avoid any question of lack of due process.

SECTION 522. *Appeal to Supreme or Superior Court.*—Either party may appeal to the Supreme or Superior Court from any final order or judgment of the court of common pleas within forty-five (45) days from the entry thereof.

Comment: This section is included in order to provide a complete procedure in one act.

SECTION 523. *No Limitation Period; Presumption of Payment.*—No limitations shall apply to the commencement of proceedings to assess just compensation under this act. After the lapse

of twenty (20) years after the filing of a *declaration of taking* or the occurrence of a compensable injury without the filing of a *declaration of taking,* it shall be conclusively presumed that just compensation therefor has been made.

Comment: The statutory provision for a 6-year limitation of actions in eminent domain is omitted. See the Act of 1956, April 3, P. L. (1955) 1366, § 2, (26 P. S. § 152). There is, however, authority that no statute of limitations can bar the constitutional right to compensation for land taken by eminent domain. *Carter v. Ridge Turnpike Co.,* 208 Pa. 565, (1904). But see *Strong Appeal,* 400 Pa. 51, (1960).

Under this act the condemnor is required to proceed as to all condemnees. See comment to Section 511. Consequently, the elimination of the statute of limitations should cause little, if any, difficulty.

Although the statute of limitations has been eliminated, it is thought desirable, in order to protect the condemnor, that where the condemnor does not institute proceedings and the condemnee fails to proceed, a conclusive presumption of payment after twenty years should be included. This changes existing law. See *Carter v. Ridge Turnpike Co., supra.*

ARTICLE VI

JUST COMPENSATION AND MEASURE OF DAMAGES

SECTION 601. *Just Compensation.*—The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this article.

Comment: This section merely codifies what is required by the Pennsylvania Constitution, Article I, § 10 and Article XVI, § 8, and indicates that just compensation is defined and is to be determined as set forth in this article.

SECTION 602. *Basic Measure of Damages.*—The condemnee shall be entitled to the difference between the fair market value of his entire property interest immediately before the taking and as unaffected thereby, except as provided in Section 604, and the fair market value of his property interest remaining after such taking and as affected thereby.

Comment: This section sets forth what the condemnee is entitled to in the first instance when his property is condemned. This section

also codifies existing case law by adopting the "before and after rule" which is firmly entrenched in the law. *Brown v. Commonwealth,* 399 Pa. 156, (1960).

SECTION 603. *Fair Market Value.*—Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) the present use of the property;

(2) the highest and best reasonably available use of the property;

(3) the machinery, equipment and fixtures forming part of the real estate taken;

(4) other factors as to which evidence may be offered as provided by Article VII.

Comment: The introductory clause of this section is included to set forth a general guide to be used in ascertaining fair market value. The guide is the price to which a willing and informed seller and buyer would agree. This changes existing law somewhat in that present law generally states that market value means the price at which a property is sold when the owner is under no compulsion to sell and the purchaser is not for any reason forced to buy. *Ward v. Commonwealth,* 390 Pa. 526, (1957). It is not intended by this introductory clause to radically change the concept established by the cases, but to emphasize that the word "informed" is of the utmost importance in ascertaining the fair market value of the property. An "informed" seller and an "informed" buyer consider many factors in arriving at an agreed price. It is intended that these factors shall also be considered in setting the fair market value of the condemned property.

Clauses (1) and (2) were included in order to clarify existing law which provides that where property is condemned, the damages are ascertained in relation to the highest and best use to which the property can be reasonably adapted and utilized. It is considered advisable to provide some clarification of this concept of "highest and best use." Apparently, there has been a failure to distinguish between the highest and best use of land, the highest and best use of the property as improved, and the highest and best *available* use. Generally speaking, the use to which the property is actually being put, particularly when it has substantial improvements uniquely related to that use, would of course be given major weight.

However, with proper evidence of other more suitable and more valuable uses, these should be given consideration, particularly where it can be shown that buyers in the market would consider them. The same thing is true with zoning. The present zoning would ordinarily be controlling, but where other types of zoning are reasonable, logical and of sufficient probability that such has been reflected in the market price of similarly zoned properties and where sufficient evidence of this fact is presented, such ultimate zoning might properly be related to just compensation in connection with the "highest and best use." If it is claimed that a reasonable use, other than the present use, is controlling, it should be shown that the use is available for such property, after considering the character of the improvements, the zoning, the demand in the market, the supply of competitive property for the claimed reasonable use and all other reasonably pertinent and imminent factors affecting the property.

Clause (3) is in accord with existing law since it assumes that the machinery, equipment and fixtures are part of the real property taken. See *Diamond Mills Emery Co. v. Philadelphia,* 8 Dist. 30, (1899), and also *Railroad Co. v. Getz,* 113 Pa. 214, (1886).

Clause (4) was included in order to make it clear that in ascertaining fair market value, all matters which may be properly introduced into evidence as provided in Article VII of this act may be considered.

SECTION 604. *Effect of Imminence of Condemnation.*—Any decline in market value prior to the date of taking which the condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property, shall be disregarded in determining fair market value.

Comment: This section is new. Although it has no counterpart in existing law, the language of this section is based on the language in *Olson & French, Inc. v. Commonwealth,* 399 Pa. 266, (1960), at page 272, where the court used the phrase "general knowledge of the imminence of . . . condemnation. . . . " In many cases, condemnees suffer an economic loss because of an announcement of the proposed condemnation by the condemnor prior to the actual condemnation. Where such announcement is made and publicized, which is sometimes several years before the actual condemnation, the tenants of the condemnee move out or fail to renew their leases

and new tenants cannot be obtained because of the proposed condemnation. Under these conditions, the property which is to be condemned is economically deteriorated through no fault of the owner-condemnee, and as a consequence, at the time of actual condemnation, the amount of the damages may be affected to the detriment of the innocent condemnee because of lack of tenants or because the condemnee was forced to rent at lower rentals for short terms. This section permits the condemnee to show these economic circumstances in order to prove what his damages actually are at the date of taking. On the other hand, if the condemnee permits his property to physically deteriorate, he may not show the physical condition of the property at a time prior to the taking. Physical deterioration is caused by the condemnee and, therefore, the condemnor should not be responsible therefor. This is obvious since the condemnor has no control over the property at this time. The physical condition of the property on the date of taking is to be the basis for assessing damages.

SECTION 605. *Contiguous Tracts; Unity of Use.*—Where a part of several contiguous tracts owned by one owner is condemned or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

Comment: This section codifies existing case law. *Morris v. Commonwealth,* 367 Pa. 410, (1951) (noncontiguous tracts); *H. C. Frick Coke Co. v. Painter,* 198 Pa. 468, (1901) (contiguous tracts).

SECTION 606. *Effect of Condemnation Use on After Value.*—In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property taken is to be put and the damages or benefits specially and particularly affecting the remaining property due to its immediate proximity to the property taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. Special benefits to the remaining property shall in no event exceed the total damages.

Comment: The provisions of this section are meant to emphasize that the value of the remaining property after a partial taking, as affected by the taking, would be that which a prudent buyer would pay, recognizing the damages and benefits accruing to the remaining

property as they can be interpreted and evaluated at that time. While the ultimate benefits to be derived from improvements within the part taken may be great, the owner of the remaining property may not enjoy them in some cases for several years. By restricting the interpretation to market value immediately after the taking, as affected by the proposed improvement or use of the part taken, the condemnee will receive compensation for the necessary time discount, inconvenience and other effects of the construction period affecting the price which he would receive if he were to sell the remaining property to a third party immediately after the day of taking, but before completion of the improvements.

It is also the purpose of this section to provide, in accordance with existing law, that general benefits and damages which accrue to the community as a whole are not to be considered in arriving at the after value. Only special, particular and direct benefits and damages to the remaining property may be considered in arriving at the after value. The special benefits may not exceed the amount of damages to which the condemnee is entitled; in other words, the condemnor cannot obtain a judgment against the condemnee on the basis that the special benefits exceed the damages. The whole question of benefits has been controversial and never clearly defined under existing law. This is intended to clarify that situation.

SECTION 607. *Removal of Machinery, Equipment and Fixtures.*—In the event the condemnor does not require for its use machinery, equipment, and fixtures forming part of the real estate, it shall so notify the condemnee. The condemnee may within thirty (30) days of such notice elect to remove said machinery, equipment and fixtures. If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate.

Comment: If the machinery, equipment and fixtures are a part of the real estate, they, of course, are condemned with the real estate. See comment to Section 603. In many cases the condemnor is not interested in the machinery, equipment and fixtures. In such cases, this section authorizes the condemnor to so notify the condemnee and the condemnee, if he so elects, may remove them. The condemnee of course is not required to remove the machinery, etc., but if he does, his damages are reduced by the fair market value thereof severed from the real estate.

SECTION 608. *Leases.*—Unless the lease provides otherwise, a

tenant shall have no right in the proceeds of the condemnation of the fee, if the lease will terminate within three (3) years, excluding options to renew, from the date of taking, or if the right to damages has been waived by the tenant. This section shall apply only to leases made six (6) months or more after the effective date of this act.

Comment: This section changes existing law by barring the tenant from damages when the lease is to terminate within three years from the date of taking unless the lease provides otherwise. Under present law, the tenant is entitled to the value of the leasehold when the property is condemned, even though the lease has less than three years to run from the date of condemnation. The three year cut-off period is suggested by the statute of frauds governing leases. The Landlord and Tenant Act of 1951, April 6, P. L. 69, Art. II, § 202, (68 P. S. § 250.202). The three-year period is to be computed without considering options to renew the lease. Barring the tenant with less than three years to go on his lease is considered to be advisable because under present law tenants having small or no claims have blocked negotiations for settlements and have caused needless litigation by asserting unrealistic claims to part of the damages.

SECTION 609. *Removal Expenses.*—If there are machinery, equipment and fixtures, not forming part of the realty, on the condemned property, then the owner or the tenant, even though not entitled to any proceeds of the condemnation of the fee, if under the lease the tenant has the right to remove said machinery, equipment and fixtures, shall be entitled, as additional damages, to reasonable expenses for the removal and reinstallation of said machinery, equipment and fixtures.

Comment: This section adds a new element of damages in eminent domain cases. There is nothing in present law which gives the condemnee or the tenant of the condemnee the right to recover removal and reinstallation expenses of machinery, equipment and fixtures which are on the condemned property but which are not a part of the real estate. Existing law does provide that the cost of removal of machinery, equipment and fixtures although not allowable as a separate item of damages, may be considered in fixing the before and after values. *Butler Water Company's Petition,* 338 Pa. 282, (1940); *James McMillin Printing Co. v. Pittsburg, Carnegie &*

Western R.R. Co., 216 Pa. 504, (1907); *Delaware County Redevelopment Authority v. Carminatti*, 18 D & C 2d 704 (1959).

"Reasonable expenses" of removal are to be considered as not exceeding the market value of the machinery, equipment and fixtures in place and are to be determined in connection with the value of the machinery, equipment and fixtures. If the cost of removal exceeds the value of the machinery, etc., the cost would obviously be unreasonable. In addition, in ascertaining the reasonableness of the removal expenses another factor to be considered is the distance of the move.

SECTION 610. *Goodwill.*—The condemnee shall be entitled to additional damages for loss of the goodwill of a business located on the condemned property, as provided in this section, where it is shown that the business cannot be relocated without substantial loss of patronage. Compensation for loss of goodwill shall be the actual monthly rental paid for the business premises, or if there is no lease, the fair rental value of the business premises, multiplied by the number of months remaining in the lease, not including unexercised options, not to exceed twenty-four (24) months, or multiplied by twenty-four (24) if there is no lease. The amount of compensation paid for loss of goodwill shall not exceed five thousand dollars ($5,000) and shall not be less than two hundred and fifty dollars ($250). A tenant shall be entitled to recover for loss of goodwill even though not entitled to any of the proceeds of the condemnation of the fee.

Comment: This section changes present law which makes no provision for damages for goodwill destroyed by condemnation. Since goodwill is a broad term embracing many intangible factors, the loss of goodwill contemplated by this section is the loss of patronage attributable to loss of business location. The accounting or capitalization of earnings formulas which are used in connection with large business establishments have little relevancy to the loss of goodwill suffered by a small neighborhood merchant put out of business by condemnation of his property. In some cases condemnations may actually be of benefit to such a merchant since it may bring into the immediate neighborhood many new customers such as in the case of a housing development, providing, of course, there are other available locations in the neighborhood to which the business can be removed. In many cases, however, the business cannot be relocated within the immediate area. This section does not attempt to define re-

location by prescribing any territorial limitations which must be observed. This is a question of fact which must be determined by the trier of the facts.

Although there are several accounting procedures for valuing goodwill these procedures were not used because they raise complicated accounting problems in eminent domain cases. This section suggests a relatively simple arbitrary formula to calculate the damages for loss of goodwill. The formula used in this section was derived from New York law.

SECTION 611. *Moving Expenses.*—The condemnee shall be entitled to, as additional damages, the reasonable moving expenses for personal property other than machinery, equipment and fixtures. Paid receipts shall be prima facie evidence of reasonable moving expenses. A tenant shall be entitled to recover these moving expenses even though he is not entitled to any of the proceeds of the condemnation.

Comment: This section changes existing law by allowing the condemnee to recover as a separate and additional item of damages his reasonable expenses for moving his personal property, as distinguished from machinery, equipment and fixtures. *Becker v. The Philadelphia & Reading Terminal R.R. Co.*, 177 Pa. 252, (1896), holds that removal of personal property cannot be considered as an item of damages. See also *Delaware County Redevelopment Authority v. Carminatti,* 18 D & C 2d 704 (1959).

It is the purpose of this section to permit the recovery by the condemnee of these moving expenses in addition to the expenses for moving machinery, equipment and fixtures as provided in Section 609 of this article. If a tenant is involved and has no right to any of the damages for the property taken, he would still be entitled to these moving expenses. In ascertaining whether the expenses are reasonable, a factor to be considered is the distance of the move as well as the total amount of the expenses.

SECTION 612. *Delay Compensation.*—Compensation for delay in payment shall not be included in any award or verdict but shall be added, at the rate of six percent (6%) per annum, to all awards and verdicts at the time of the payment thereof. Calculations shall be made from the date of taking or the date of relinquishment of possession, whichever is later, to the date of payment; provided, however, that no compensation for delay shall be payable with respect to funds paid on account, or by deposit in court, after the

date of such payment or deposit. There shall be no further or additional payment of interest on the award or verdict. The condemnor shall not be entitled to rent or other charges for use and occupancy while the condemnee is in possession and not entitled to delay compensation.

Comment: This section is suggested by the procedure in Federal takings where interest is automatically added to the final award at the rate of 6%, but no interest is allowed on any money paid into court. 40 USCA § 258a.

This changes existing law which states that the condemnee is prima facie entitled to damages for delay except where the delay is the fault of the condemnee (e.g., unreasonable demand by the condemnee). *Moffat Appeal,* 400 Pa. 123, (1960). The courts, however, have been reluctant to find that the delay was the fault of the condemnee. In the absence of evidence of the commercial rate of interest, the condemnee is entitled to 6% for delay compensation. *Lehigh Valley Trust Co. v. Pennsylvania Turnpike Commission,* 401 Pa. 135, (1960). This section sets the figure in all cases at 6%.

Under this section the condemnee is entitled to delay compensation as a matter of right. However, he is not entitled to such compensation on the money which has been paid to him or deposited in court by the condemnor who has done so to obtain possession. See Section 407. Where the money is paid to the condemnee or deposited in court by the condemnor to obtain possession from the condemnee, the condemnee would still be entitled to delay compensation from the date of taking to the date the money is paid to him or deposited in court. The condemnee is only entitled to the one 6% on his award. He would not be entitled to the 6% and then interest on that 6%. In other words, it is not intended by this section to have interest being paid on delay compensation.

The last sentence of this section is included to make it clear that while the condemnee is in possession of the condemned property, he does not get delay compensation but the condemnor is not entitled to rent or other charges for use and occupancy. The reason for this is that while the condemnee is in possession, the condemnee is not building up damages for delay and the condemnor is not accruing liability for delay damages. Consequently, the delay compensation and the rent, in a sense, offset each other.

SECTION 613. *Consequential Damages.*—All condemnors, including the Commonwealth of Pennsylvania, shall be liable for consequential damages which shall include permanent impairment

of access, light, air, support or quiet enjoyment whether or not any property is actually taken.

Comment: Under present law, the Commonwealth is not liable for consequential damages unless liability therefor is expressly provided by statute. *Moyer v. Commonwealth,* 183 Pa. Superior Ct. 333, (1957). Municipal and other corporations are liable for consequential damages. This section makes the Commonwealth liable for consequential damages.

Consequential damages are damages which arise when property is not actually taken or entered but an injury to it occurs as the natural result of an act lawfully done by another. *Soldiers and Sailors Memorial Bridge,* 308 Pa. 487, (1932). An example of a situation where consequential damages would be recoverable is where the grade of a street or highway is changed without any taking. It is this type of situation which this section is intended to cover, except as otherwise provided in this act. However, it is not intended by this section to reduce or enlarge the situations where consequential damages may be recovered.

SECTION 614. *Damages for Vacation of Roads.*—Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken, except where the road, street or highway is vacated by the Commonwealth.

Comment: Under present case law, the vacation of a highway or street is not an injury to the abutting land owners within the provisions of the Constitution requiring compensation for property taken, injured, or destroyed, and in the absence of legislation allowing damages, none can be required. *Howell v. Morrisville Borough,* 212 Pa. 349, (1905). The legislature has, however, provided for damages for vacation of streets in many cases. See, e.g., The Borough Code, 1927, May 4, P. L. 519, Art. XVI, § 1650, as amended, (53 P. S. § 46650); the Act of 1905, March 21, P. L. 46, §§ 1, 2, (53 P. S. §§ 1943, 1945). The purpose of this section is to have a general provision relating to and giving damages for the vacation of public roads.

The Commonwealth has been excepted from this section because when the Commonwealth vacates a road, it reverts back to the municipality in which the road is located.

It is not intended by this section to broaden liability for vacation of streets or to change existing case law which provides

that where the owner must travel further in order to reach the system of streets he is not entitled to damages. *Apple v. City of Philadelphia,* 103 Pa. Superior Ct. 458, (1931). See also *In re Melon Street,* 182 Pa. 397, (1897) involving a *cul-de-sac.*

SECTION 615. *Proration of Real Estate Taxes.*—At the time of payment of the damages, the condemnor shall pay to the condemnee as part of the damages the portion of the real estate taxes on the part of the property taken for which the condemnee is liable for the year in which the taking occurs, prorated as of the date of taking.

Comment: Under present law and practice the condemnee is chargeable with taxes for the whole year where the property is condemned during that year. This is based upon the principle that the owner of the property on the first day of the year is liable for the taxes for the whole year. See *Shaw v. Quinn,* 12 S. & R. 298, (1825). It is intended that the condemnee's liability for the real estate taxes on the part of the property condemned should cease as of the date of condemnation and that he should be chargeable with the real estate taxes only to the date of condemnation.

ARTICLE VII

EVIDENCE

SECTION 701. *Viewers' Hearing.*—The viewers may hear such testimony, receive such evidence, and make such independent investigation as they deem appropriate, without being bound by formal rules of evidence.

Comment: This is to make it clear that viewers may consider everything they deem appropriate, including facts which they have discovered by their own investigation and view, in order to arrive at their decision as to just compensation. Apparently, some viewers have and presently do consider themselves bound by the formal rules of evidence. This section settles the matter by stating that the viewers are not so bound. The purpose is to make viewers' proceedings informal. This is considered desirable since many condemnees appear at viewers' hearings without counsel.

SECTION 702. *Condemnor's Evidence Before Viewers.*—The condemnor shall, at the hearing before the viewers, present expert testimony of the amount of damages suffered by the condemnee.

Comment: Under present law, the condemnor is not required to present testimony before the viewers. In some instances, condemnors have sat back and listened to the condemnee and then have refused to present testimony. This is unfair to the condemnee who has disclosed his figures but does not hear the condemnor's figures until the time of trial on appeal.

It is not intended by this section to require the condemnor to present all its evidence at the viewers' hearing. The condemnor may present additional evidence at the trial in court. As long as the condemnor has one expert testify as to the damages, this is sufficient.

SECTION 703. *Trial in the Court of Common Pleas on Appeal.*—At the trial in court on appeal:

(1) Either party may, as a matter of right, have the jury view the property involved, in which case the trial judge must accompany them, and the view shall be evidentiary;

Comment: This clause changes existing law in several respects. First, under existing law, the matter of view by the jury in court is left to the discretion of the judge. *Rudolph v. Pa. Schuylkill Valley R.R. Co.,* 186 Pa. 541, (1898); *Frazee v. Manufacturers Light & Heat Co.,* 20 Pa. Superior Ct. 420, (1902); Pa. R. C. P. 219.

Under the Act of 1895, May 21, P. L. 89, (26 P. S. §§ 81, 82), either party is entitled to have the trial jury view the premises when viewers have been waived.

The provision in this clause that the view shall be evidentiary also changes present Pennsylvania law. It is well established under present law that the only purpose of the view is to enable the trier of the facts to understand the testimony; the view is not evidence and is not to be substituted for the evidence. *Avins v. Commonwealth,* 379 Pa. 202, (1954); *Roberts v. Philadelphia,* 239 Pa. 339, (1913). This position is apparently the minority position, the majority of the states holding that the view is evidence along with the other evidence in the case. *People v. Smith Co. Ltd.,* 194 P. 2d 750 (Calif., 1948); 5 *Nichols on Eminent Domain,* § 18.31. It is the purpose and intent of this clause to change existing case law by providing, in accordance with the majority view, that the view is evidence along with the other evidence in the case.

There is no requirement under present law that the trial judge go on the view. This clause makes it mandatory for the trial judge to go on the view with the jury.

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after taking and his opinion of the highest and best use of the property before the taking and of any part thereof remaining after the taking, on the opposing party at least ten (10) days before the date when the case is listed for pre-trial or trial, whichever is earlier;

Comment: This clause introduces a new concept in eminent domain cases. Existing law does not require disclosure of the names of valuation experts at any time. The purpose of this provision is to eliminate the surprise element in many cases when one expert is used before the viewers and another, with a different valuation and opinion of the highest and best use of the property, is called at the trial.

(3) The report of the viewers and the amount of their award shall not be admissible as evidence.

Comment: This clause is in accord with the existing law. *Berger v. Public Parking Authority of Pittsburgh,* 380 Pa. 19, (1954).

SECTION 704. *Competency of Condemnee as Witness.*—The condemnee or an officer of a corporate condemnee, shall without further qualification be considered to be and may testify as a qualified valuation expert.

Comment: The portion of this section making the condemnee a qualified valuation expert is in accord with existing law. *Hencken v. Bethlehem Municipal Water Authority,* 364 Pa. 408, (1950). But see *Sgarlat Estate v. Commonwealth,* 398 Pa. 406, (1960), where the court, at page 414, stated "in general" the owner is competent, but "is subject to the current rules and occupies no special position as a witness." This section makes it clear that the owner is always competent to express an opinion as to damages.

The provision of this section permitting an officer of a corporate condemnee to testify as to value when the corporation property is condemned changes existing law which does not permit the testimony unless the officer qualifies as an expert. *Westinghouse Air Brake Co. v. Pittsburgh,* 316 Pa. 372, (1934).

The words "without further qualification" are used to emphasize that the condemnee or officer of a corporate condemnee

is not required to qualify as an expert witness. The mere fact that he is a condemnee or an officer of a corporate condemnee automatically qualifies him to testify as an expert.

SECTION 705. *Evidence Generally.*—Whether at the hearing before the viewers, or at the trial in court on appeal:

(1) A qualified valuation expert may, on direct or cross examination, state any or all facts and data which he considered in arriving at his opinion, whether or not he has personal knowledge thereof, and his statement of such facts and data and the sources of his information shall be subject to impeachment and rebuttal;

Comment: As under present law, the viewers or the trial judge, as the case may be, determine whether the witness is qualified to express an opinion, except in the case of an owner.

The primary purpose and intent of this clause, however, is to change and broaden existing law which unduly limits the examination and cross examination of an expert witness, so as to permit the expert witness to testify on direct, as well as cross examination, to any and all matters which he considered (not necessarily "relied on") in arriving at his opinion of damages. Under present law, as noted before, the expert is unduly limited as to what he may testify to, and as a consequence, he cannot show his competence or what perhaps is more important, his lack of competence. See *McSorley v. Avalon Borough School District,* 291 Pa. 252, (1927).

(2) A qualified valuation expert may testify on direct or cross examination in detail as to the valuation of the property on a comparable market value, reproduction cost or capitalization basis, which testimony may include but shall not be limited to the following:

Comment: It is intended by this clause to change existing law which severely restricts the testimony of the expert witness on the basis that "collateral issues" are introduced. This change is intended to take cognizance of and permit testimony of all modern appraisal methods.

(i) The price and other terms of any sale or contract to sell the condemned property or comparable property made within a reasonable time before or after the taking;

Comment: The purpose of this subclause is to emphasize that any sale of or contract or agreement to sell the condemned property or comparable property, if not too remote in time, is admissible in evi-

dence, both on direct and cross examination, as both impeaching evidence and as evidence of value.

As for sales of the condemned property, present law apparently limits evidence pertaining thereto to cross examination of the condemnee and only as impeaching evidence affecting credibility. *Berkley v. Jeannette,* 373 Pa. 376, (1953); *Greenfield v. Philadelphia,* 282 Pa. 344, (1925); *Rea v. Pittsburg and Connellsville R.R. Co.,* 229 Pa. 106, (1910). But see *Berger v. Public Parking Authority of Pittsburgh,* 380 Pa. 19, (1954), involving an agreement to sell.

Evidence of sales of similar property is not admissible on direct examination and is not evidence of market value under present Pennsylvania law; such evidence is admissible on cross examination, if the witness relied on the sale, for the purpose of testing his good faith and credibility. *Berkley v. Jeannette,* 373 Pa. 376, (1953). It is the purpose of this subclause to allow such evidence on both direct and cross examination of valuation witnesses regardless of whether they "relied on" or "based their opinion on" the sale. Furthermore, it is intended that such evidence be admissible as evidence of market value as well as for credibility purposes.

(ii) The rent reserved and other terms of any lease of the condemned property or comparable property which was in effect within a reasonable time before or after the date of taking;

Comment: Under present law, the rent received from the condemned property is admissible in evidence as an element to be considered in ascertaining market value, although it cannot be shown as a separate item of damages. *Westinghouse Air Brake Co. v. Pittsburgh,* 316 Pa. 372, (1934). This subclause, then, is declaratory of present law on this point.

As for the other terms of a lease, their admission under present law is forbidden. *Olson & French, Inc. v. Commonwealth,* 399 Pa. 266, (1960), where the court held that the admission of the lease was error, but not prejudicial under the circumstances of the case; *Ogden v. Pa. R.R. Co.,* 229 Pa. 378, (1911). This subclause changes present law in this regard.

As for the rent and other terms of any lease of comparable property, this subclause changes present law which does not permit the introduction of the rental value of comparable property.

This subclause also changes existing law which does not allow evidence of the rent or other terms of any lease made after the date of taking.

It is intended that all these matters should be allowed in

evidence since they are matters which the modern appraiser considers in appraising property.

(iii) The capitalization of the net rental or reasonable net rental value of the condemned property, including reasonable net rental values customarily determined by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises, as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon;

Comment: One of the basic methods of appraising property is to capitalize income attributable to the property. This method is generally not accepted by the courts, including the Pennsylvania courts, and consequently evidence thereof is excluded even though an expert appraiser insists that this approach is the only approach to ascertaining market value in a specific case. In many cases, this method of valuation would certainly be a factor which a willing, well-informed purchaser and seller would consider in reaching an agreement on a sales price. If an expert used this method, he should be permitted to so state and give his reasons therefor and a breakdown thereof. Only the reasonable net rental value of the property itself may be capitalized. The income or profits of any business conducted on the property may not be capitalized to show the value of the property; this is in accord with existing Pennsylvania law.

(iv) The value of the land together with the cost of replacing or reproducing the existing improvements thereon less depreciation or obsolescence;

Comment: Under existing law, evidence of reproduction costs is not admissible to fix damages unless the circumstances are such as to render the admission of such testimony absolutely essential in the interest of justice. *A. D. Graham & Co., Inc. v. Pennsylvania Turnpike Commission,* 347 Pa. 622, (1943).

The reproduction method is another basic method of valuing property. If an expert has used such method in a particular case, evidence thereof should be allowed together with any explanation.

(v) The cost of adjustments and alterations to any remaining property made necessary or reasonably required by the taking;

Comment: These matters, in keeping with the liberalization of the

examination of the expert, should properly be considered since they affect market value. This is generally in accord with existing law. *Puloka v. Commonwealth,* 323 Pa. 36, (1936), where the court stated that estimates of the cost of rebuilding specific items of property or injury are not recoverable as distinct items of damages but are useful as bearing on market value.

(3) Either party may show the difference between the condition of the property and of the immediate neighborhood at the time of taking and at the time of view, either by the viewers or jury;

Comment: A considerable time may elapse from the condemnation to the time of view either by the viewers or by the jury. Possession of the condemned property may have been given up by the owners after the condemnation and as a result the property may have become run down or even demolished. On the other hand, the owner may improve the property after the condemnation in the hope of getting more compensation. The purpose of this provision is to make it clear that either the condemnor or the condemnee may show the difference in condition of the property at the time of taking and at the time of view. Of course, just compensation is to be based on the condition of the property at the time of taking. This clause is essentially a declaration of existing law.

(4) The assessed valuations of property condemned shall not be admissible in evidence for any purpose;

Comment: This changes existing statutory law which provides that the assessed valuation is admissible against the condemnor when the condemnor is a county, city, borough, township or town. See the Act of 1915, April 21, P. L. 159, § 2, (26 P. S. § 102); The County Code, 1955, August 9, P. L. 323, § 2418, (16 P. S. § 2418), and the various other municipal codes. The assessed valuation is of no real probative value since it relates to an entirely different matter. Consequently, it should not be admissible against the public condemnor. This clause also continues existing law which does not permit the condemnor to introduce the assessed valuation against the condemnee. *Berger v. Parking Authority,* 380 Pa. 19, (1954).

(5) A qualified valuation expert may not testify that he has relied upon the written opinion of another expert supplied to him with reference to the pending matter unless a copy of such written

opinion has been furnished to the opposing party ten (10) days in advance of the trial.

Comment: If, in arriving at his opinion, an expert has relied upon the written estimate, for example, of a contractor as to the cost to repair part of the property damaged by the taking, the party using such expert is required by this clause to furnish a copy of the contractor's written estimate to the other party in advance of trial. There is no similar provision in present law.

(6) If otherwise qualified, a valuation expert shall not be disqualified by reason of not having made sales of property or not having examined the condemned property prior to the taking, provided he can show he has acquired knowledge of its condition at the time of taking.

Comment: There is nothing in existing law which requires that an expert, in order to testify, must have made sales of property. Apparently, however, some viewers have been disqualifying experts for this reason. The purpose of this clause is to clarify that point. Many highly competent appraisers do not make sales and have not made sales of property.

Under present law an expert may be disqualified because he did not know of or examine the condemned property prior to the condemnation. See *Shimer v. Easton Railway Co.*, 205 Pa. 648, (1903) (trespass case). But see *Hasenflu v. Commonwealth*, 406 Pa. 631, (1962). The purpose of this clause is to provide that an otherwise qualified expert may still testify even though he has not examined the property prior to the condemnation since this is seldom possible under present condemnation practices. However, as the clause states, the expert must have acquired knowledge of the property and its condition at the time of taking; this can be done through the use of photographs and other data available to him.

SECTION 706. *Use of Condemned Property.*—In arriving at his valuation of the remaining part of property in a partial taking, an expert witness may consider and testify to the use to which the condemned property is intended to be put.

Comment: This section is necessary in view of the fact that the use to which the condemned property is put may have a very material bearing upon the value of the remaining property in cases of partial takings. This does not represent a substantial change from present law.

ARTICLE VIII

BOARD OF VIEWERS

SECTION 801. *Board of Viewers.*—There shall be in each county a board of viewers to consist of not less than three (3) nor more than nine (9) members who shall be appointed by the judges of the court of common pleas for a term of not less than three (3) nor more than six (6) years, whether such appointment be for an original or partly expired term. In counties of the first class the board of viewers may be appointed from among the members of the board of revision of taxes of such counties. The judges shall, in each case, determine within the aforesaid limits, the total number of members of which the board shall be composed, fixing and determining such number as shall be necessary for the proper performance of the duties imposed upon the board. The judges may change the total number of members within the above limits.

Comment: This section is taken from The County Code, 1955, Aug. 9, P. L. 323, § 1101, (16 P. S. § 1101), and from The Second Class County Code, 1953, July 28, P. L. 723, Art. XI, § 1101, (16 P. S. § 4101). In the interest of uniformity the minimum number of viewers has been reduced to three for second class counties, the minimum now being six.

SECTION 802. *Appointment of Board Members; Vacancies.*—In counties having more than one court of common pleas, the judges of all courts of common pleas shall meet as a body and make the appointments. In judicial districts which comprise more than one county, the appointment for each county shall be made by the judge or judges of the judicial district in which the county is situate. All vacancies happening from any cause shall be filled by appointment by the judges of the court of common pleas. All appointments shall be subject to the power of the court of common pleas, at its pleasure, to remove members of said board before the expiration of their terms of office, and to appoint successors.

In case of a vacancy in the viewers appointed in any specific case or proceeding before final action has been taken by them, the court may fill such vacancy by appointing another member of the board of viewers.

Comment: The first paragraph is taken from Sections 1103 and

1104 of The County Code, 1955, Aug. 9, P. L. 323, (16 P. S. §§ 1103–1104). Similar provisions appear in The Second Class County Code, 1953, July 28, P. L. 723, Art. XI, §§ 1103–1104, (16 P. S. §§ 4103–4104).

The second paragraph is taken without substantial change from Section 5 of the Act of 1911, June 23, P. L. 1123, (16 P. S. § 9481).

SECTION 803. *Qualifications.*—At least one-third of the members of the board of viewers shall be attorneys. Each member of the board of viewers shall be a resident of the county, provided however, that if by reason of existing conditions it becomes necessary to or the judges are unable to complete the membership of the board from residents of the county, they may appoint residents of adjacent counties. The judges may by general rule or special order establish additional qualifications.

No member of the board shall represent a client or testify as an expert witness before the board.

Comment: This section changes existing law in several respects. Under present law one-third of the board may be attorneys; this section requires that one-third of the board be attorneys. The reason for this change is because of the legal problems and questions which dominate every viewers' proceeding. Secondly, under present law a viewer must be a resident of the county. In some of the smaller counties it is difficult to obtain viewers. Consequently, the change is made to authorize the court to appoint viewers from another county where the court cannot complete the board from residents of the county. In addition, this section eliminates, as being unnecessary, the prohibition in the county codes against a viewer being engaged in any public employment for profit.

The second paragraph is taken without change from Section 1103 of The County Code, 1955, Aug. 9, P. L. 323, (16 P. S. § 1103).

SECTION 804. *Oath of Viewers.*—Viewers shall be sworn to discharge the duties of their appointment as viewers with impartiality and fidelity and according to the best of their learning and ability, upon their initial appointment to the board of viewers, and thereafter need not be sworn in each separate proceeding referred to them.

Comment: There presently is some conflict of opinion among the

lower courts as to the necessity of swearing the viewers for each individual proceeding, and the practice apparently varies from county to county. *Drum, the Law of Viewers in Pa.*, § 11, indicates that the viewers must be sworn for each separate case. The Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, § 2613, (16 P. S. § 5613), and The County Code, 1955, Aug. 9, P. L. 323, § 2413, (16 P. S. § 2413), can be construed to require that the viewers be sworn for each case. The purpose of this section is to make it clear that the swearing of the viewers for each case is not required. The form of oath was included so that there would be uniformity.

SECTION 805. *Fees of Viewers.*—In counties of the first class compensation of viewers shall be fixed by the city council. In counties of the second class compensation shall be established by the salary board. In all other classes of counties the minimum fee per day for services rendered shall be thirty-five dollars ($35) or in such other amount in excess thereof as may be fixed by the salary board; or their compensation shall be such annual salary as may be fixed by the salary board.

Comment: In Philadelphia, the only city and county of the first class, present legislation now specifically provides that the salaries of all county or city officials which are paid by the City of Philadelphia shall be determined by the City Council of Philadelphia. 1945, May 2, P. L. 365, § 1, as amended, (53 P. S. § 13401). This is consonant with the Philadelphia Home Rule Amendment and the Philadelphia Home Rule Act. In other counties, legislation now provides that the county salary boards establish the compensation of county employes. Second Class County Code, 1953, July 28, P. L. 723, Art. XVIII, § 1820, (16 P. S. § 4820); The County Code, 1955, Aug. 9, P. L. 323, § 1620, (16 P. S. § 1620). The compensation of viewers which is presently fixed by statute is much too low and does not permit the court to attract competent and qualified viewers. For example, the various turnpike acts (1937, May 21, P. L. 774, No. 211, § 6, (36 P. S. § 652f), and subsequent turnpike acts) provide that the viewers shall receive a sum not exceeding $10 per day for performing their duties. This section recognizes that each county through its county salary board should be authorized to establish adequate compensation. The minimum salary of $35 per day has been set with leave on the part of the county salary board to establish higher compensation if this is necessary to attract qualified persons as viewers.

For the purpose of compensation, the viewers are to be considered as employes of the court.

SECTION 806. *Viewers' Hearings; Facilities.*—All hearings of viewers shall be held publicly in the court house of the courts of common pleas of the respective counties or in some other suitable place or places designated in each county by the courts thereof. The proper county authorities shall prepare and furnish the hearing place, provide for proper lighting, heating and care of same, and furnish such facilities and do such things as shall be proper to enable the viewers to fully discharge their duties.

Comment: This section is taken from Section 7 of the Act of 1911, June 23, P. L. 1123, (16 P. S. § 9483).

SECTION 807. *Stenographic Notes of Hearings.*—Whenever in the opinion of the board of viewers, it shall be desirable, accurate stenographic notes of hearings shall be taken and copies of such notes shall be furnished to the parties interested when desired upon payment of such sum as shall be fixed by the rules and regulations of the respective courts of common pleas.

Comment: This section is taken from existing law. See the Act of 1911, June 23, P. L. 1123, § 8, (16 P. S. § 9484). The condemnor or condemnee is not required to pay the original expense of a stenographer.

SECTION 808. *Clerks and Stenographers.*—The board of viewers may employ such stenographers and clerical assistants as shall be authorized by the county salary board in counties of the second to eighth class or by city council in counties of the first class.

Comment: This section was taken from The Second Class County Code, 1953, July 28, P. L. 723, Art. XI, § 1106, (16 P. S. § 4106), and The County Code, 1955, Aug. 9, P. L. 323, § 1106, (16 P. S. § 1106). The provision that stenographic and clerical help be paid by city council in counties of the first class was added so that all statutory matters on this point would be consolidated, conveniently, in one section.

ARTICLE IX

REPEALER

Comment: Repeal sections to be added.