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ing of the jurors is infected by unnecessary and detrimental impressions. It would be better if nothing was introduced into the trial that suggests to a jury that its verdict is inconclusive.[24]

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DETERMINATION OF ACTUAL CASH VALUE FOR INSURANCE PURPOSES

The recent federal case of *Harper v. Penn Mut. Fire Ins. Co.*[1] deals with the problem of determining the actual cash value of a building under a policy of insurance covering damage by windstorm. The policy contained an 80 per cent co-insurance clause,[2] so that the insurer was interested in establishing a high actual cash value, so as to bring the co-insurance clause into operation, and the insured wanted to establish a lower value for the property. The insurer urged adoption of the theory of replacement cost less depreciation while the insured, in all probability, argued for the adoption of the broad evidence rule.

In the absence of a controlling Virginia decision, the court used the broad evidence rule to determine actual cash value. The broad evidence rule permits the introduction and consideration of any evidence

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[24]People v. Esposito, supra note 17.

[1]199 F. Supp. 663 (E.D. Va. 1961).

[2]The purpose of the co-insurance clause is to compel the insured to carry an amount of insurance at least equal to a specified percentage (usually 80%) of the value of the property by requiring him to bear part of any loss incurred if he fails to do so. For example, assume that an insured has a policy for $50,000, with an 80% co-insurance clause. The actual cash value of his property is $100,000, and he suffers a loss of $40,000. The amount of insurance required by the co-insurance clause is $80,000. Since the insured is only carrying five-eighths of the required amount, the insurer will be liable for only five-eighths of the $40,000 loss ($25,000) and the insured will have to bear the remainder of the loss ($15,000). See Pearl Assur. Co. v. Hartford Fire Ins. Co., 239 Ala. 515, 195 So. 747 (1940); Buse v. National Ben Franklin Ins. Co., 96 Misc. 229, 160 N.Y. Supp. 566 (Sup. Ct. 1916). The co-insurance provision, from its very nature, can only take effect where the loss is partial. Templeton v. Insurance Co. of North America, 201 S.W.2d 784 (Mo. Ct. App. 1947). Where, for example, the amount of insurance equals the specific percentage of the actual cash value of the property at the time of the loss or where the loss is total, the insured will recover in full, but not in excess of the amount of the policy. Hence, by the terms of the co-insurance clause, the liability of the insurer may vary with changes in the value of the property. For a discussion of the background and function of co-insurance, see Templeton v. Insurance Co. of North America, 201 S.W.2d 784 (Mo. Ct. App. 1947); Aldrich v. Great Am. Ins. Co., 195 App. Div. 174, 186 N.Y. Supp. 569 (1st Dep't 1921).

logically tending to the formation of a correct estimate of the value of the property at the time of the loss.[3]

Actual cash value is a term susceptible of various interpretations. The courts have said there is no single criterion applicable to all cases.[4] Generally, actual cash value depends on the nature of the property insured, its condition, and other circumstances existing at the time of the loss.[5] With respect to buildings, however, the courts have developed three general criteria or tests.[6] They are: (1) market value, (2) replacement or reproduction cost less depreciation, and (3) the so-called broad evidence rule.

One view is that actual cash value means the market value of the property at the time of the loss. The court in *Butler v. Aetna Ins. Co.*,[7] which involved the loss of a grain elevator, said that actual cash value means the market price of the property at the time of the loss "and where there is no established market the market price must be estimated at such amount as in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably given substantial weight in such bargaining."[8] The difficulty with this view[9] is that the value of a building is often dependent upon the marketability of the land on which the building is situated. If there is little market demand for the land, the building will also have a lower market value.[10] Buildings are not ordinarily bought and sold in the market separately from the land and so do not have a market value apart from the land, in the strict sense of the term.[11] For example, one might have an insured

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[3]Harper v. Penn Mut. Fire Ins. Co., 199 F. Supp. 663 (E.D. Va. 1961).

[4]See, e.g., Canadian Nat'l Fire Ins. Co. v. Colonsay Hotel, [1923] 3 D.L.R. 1001 (Can. Sup. Ct.). The trial court in this case had ruled that the test of actual cash value was replacement cost less depreciation. This was unanimously reversed on appeal, on three different grounds.

[5]Featherston v. Hartford Fire Ins. Co., 146 F. Supp. 535 (W.D. Ark. 1956); Castoldi v. Hartford County Mut. Fire Ins. Co., 21 Conn. Supp. 265, 154 A.2d 247 (Super. Ct. 1959); Newark Fire Ins. Co. v. Martineau, 26 Tenn. App. 261, 170 S.W.2d 927 (1943).

[6]Annot., 61 A.L.R.2d 711 (1958).

[7]64 N.D. 764, 256 N.W. 214 (1934).

[8]256 N.W. at 215.

[9]It would appear that in cases where there is no established market this test would result in substantially the same actual cash value as derived through the use of the so-called broad evidence rule.

[10]See, e.g., State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333 (1890); Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944).

[11]Kingsley v. Spofford, 298 Mass. 469, 11 N.E.2d 487 (1937); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928).

building of the value of $100,000 in an undesirable location. And if there was little demand for land in that location, the building might not be sold at all; yet, the building might still be worth $100,000 to the owner for business purposes. Hence, most courts reject market value as the sole test for determining actual cash value, but allow it to be considered along with other evidence.[12]

Another test adopted by a number of courts is replacement or reproduction cost less depreciation.[13] it would appear that in most cases the cost of a new building of the same material and dimensions as the one destroyed, less the amount the destroyed building has depreciated through use is readily ascertainable. By applying this test one can estimate with reasonable accuracy the actual cash value of a structure. The main objection to this test, however, is its inflexibility where a structure has become obsolete.[14] For example, in *McAnarney v. Newark Fire Ins. Co.*,[15] the insured owned a brewery which was no longer economically useful for producing malt because of the passage of the National Prohibition Act. The court rejected as the sole measure of damage the cost of reproduction less physical depreciation.[16] Clearly, in such a case, if the building could no longer be used for producing malt, its value to the owner would be considerably lessened and the exclusive use of the reproduction cost less physical depreciation may well result in the determination of an excessive total actual cash value.

The tendency on the part of a substantial number of courts has been to adopt what is termed the broad evidence rule.[17] The main fac-

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[12]State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333 (1890); Castoldi v. Hartford County Mut. Fire Ins. Co., 21 Conn. Supp. 265, 154 A.2d 247 (Super. Ct. 1959); Smith v. Allemannia Fire Ins. Co., 219 Ill. App. 506 (1920); Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944); Kingsley v. Spofford, 298 Mass. 469, 11 N.E.2d 487 (1937); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928); Third Nat'l Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

[13]Knuppel v. American Ins. Co., 269 F.2d 163 (7th Cir. 1959); Svea Fire & Life Ins. Co. v. State Sav. & Loan Ass'n, 19 F.2d 134 (8th Cir. 1927); Boise Ass'n of Credit Men v. United States Fire Ins. Co., 44 Idaho 249, 256 Pac. 523 (1927); Smith v. Allemannia Fire Ins. Co., 219 Ill. App. 506 (1920).

[14]See 37 Yale L.J. 827 (1928).

[15]247 N.Y. 176, 159 N.E. 902 (1928).

[16]159 N.E. at 904.

[17]Britven v. Occidental Ins. Co., 234 Iowa 682, 13 N.W.2d 791 (1944); Eshan Realty Corp. v. Stuyvesant Ins. Co., 25 Misc. 2d 828, 202 N.Y.S.2d 899 (Sup. Ct. 1960); Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E.2d 574 (1954); Sebring v. Fireman's Ins. Co., 227 App. Div. 103, 237 N.Y.S. 120 (4th Dep't 1929); McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928); Rochester Am. Ins. Co. v. Short, 207 Okla. 669, 252 P.2d 490 (1953); Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912).

tors to be considered under this rule in determining actual cash value were pointed out in the leading case of *McAnarney v. Newark Fire Ins. Co.*[18] The court said:

> "Where insured buildings have been destroyed, the trier of fact may, and should, call to its aid, in order to effectuate complete indemnity, every fact and circumstance which would logically tend to the formation of a correct estimate of the loss. It may consider original cost and cost of reproduction; the opinions upon value given by qualified witnesses; the declarations against interest which may have been made by the assured; the gainful uses to which the buildings might have been put; as well as any other fact reasonably tending to throw light upon the subject."[19]

Factors such as rental values or income, expenses in connection with the operation of a building, and the valuation placed upon the building by public listers have been held admissible as bearing upon the question of actual cash value.[20] In the case of a destroyed dwelling house, the jury was sent to the neighborhood in which the residence was located with the instruction to view the entire neighborhood with regard to its character as a consideration affecting the value of the property.[21]

A modern application of the broad evidence rule is illustrated in the case of *Thorp v. American Aviation & Gen. Ins. Co.*,[22] in which the actual cash value of a motion picture theatre was in issue. The trial judge, in addition to instructing the jury to consider the factors set forth in the *McAnarney* case,[23] also advised the jury to consider that during the building's entire existence as a theater it had lost money in its operation, despite good management; that it was affected by a water condition which wet the theater and its contents; that there was no sewerage system in town; that the effective drawing power of the theater was limited to a three or four mile radius; that the average daily receipts for six weeks prior to the fire were less than $45.00; that some sixty-six theaters in the area had been closed down, abandoned, or converted to other uses in the period shortly before and subsequent to the date of the trial; that the theater had no air-conditioning; and that the increase in the distribution of television sets

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[18]247 N.Y. 176, 159 N.E. 902 (1928).

[19]159 N.E. at 905.

[20]Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Vt. 267, 84 Atl. 970 (1912).

[21]Rochester Am. Ins. Co. v. Short, 207 Okla. 669, 252 P.2d 490, 492 (1953).

[22]212 F.2d 821 (3d Cir. 1954).

[23]247 N.Y. 176, 159 N.E. 902 (1928).