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Foreword

The papers which comprise this RECORD deal with selected aspects of the growing law relating to land acquisition for public use by the power of eminent domain. Their selection has not been made with the idea of providing the reader a complete survey of the current state of the law of eminent domain. Such an undertaking is far too ambitious for this occasion. Rather, the papers discuss a series of areas in which eminent domain lawyers and highway program administrators currently are witnessing growth and evolution in the principles and practices of eminent domain law.

In his paper, Bamford Frankland discusses the effects which 50 years of Federal-state cooperative efforts through the Federal-aid highway program have had on the functional relationship between these two levels of government. Particular attention is paid to the effects of the vast acceleration of this program and increase in its size which resulted from the Federal-aid Highway Act of 1956 and its subsequent amendments.

The entry of the highway program into the Nation's urban areas on a major scale has brought the condemnation attorney face to face with numerous legal problems which are new, either in their form or their magnitude. One of these problems concerns the handling of leasehold interests in land which is being condemned for public use. This is a problem of increasing severity in urban areas, and is discussed by Floyd Taylor and John Paul Walters of the Oklahoma Department of Highways.

Another aspect of eminent domain law which has emerged as a source of new or more intensified problems deals with the handling of fixtures to real property. William J. McCormack, Deputy Attorney General of New Jersey, discusses these problems against the background of a recent leading case from his own state. A companion piece to this paper is the discussion by Carl H. Lehmann, Chief of the Maryland State Roads Commission's Legal Bureau for Baltimore City.

Treatment of severance damages in condemnation is the subject of three discussions. A general review of the rules relating to determination of the land area damages by a partial taking is provided by Joseph L. Droege, Special Assistant Attorney General of New Mexico. Following this, the subject is placed in the context of a specific state by Edwin M. Rams. Mr. Rams' paper is discussed by Leonard I. Lindas, Administrator of Legal Services and Right-of-Way, Nevada Department of Highways.

The increasing instances of so-called "inverse condemnation" actions in the state courts may well be the first signs of a new field of law developing to deal with the cases of hardship for which traditional eminent domain principles offer no suitable relief. D. R. Mandelker of Washington University discusses the doctrinal problems of eminent domain law in these cases. Edward Level, who, at the time of writing his paper, was Assistant Attorney General, Washington State Highway Commission, discusses the practical aspects of inverse condemnation.

All of the papers were prepared for and originally presented at sessions of the Annual Meeting of the Highway Research Board sponsored by the Board's Department of Legal Studies or at sessions of the Board's Workshop on Highway Law held annually for members of the legal staffs of the state highway departments.

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Land Acquisition and Land Use Control in The Federal-Aid Highway Program

BAMFORD FRANKLAND, California Department of Public Works

•THE Interstate Highway Program has had a massive impact on state highway department operations—and not the least part of this has been resulting change in law, policies and procedures as more and more people have found themselves affected by highway location and right-of-way acquisition. The concerns of those affected seem to have found focus in two distinct categories of action.

One major area of concern has been the highway investment and how to protect it; the other has involved affected individuals and communities and how to protect them. The first has resulted in extensions of the powers of highway departments, but this has been accompanied by restraints on powers designed to quiet the second category of concern.

I believe that most of the changes that have occurred during the post-World War II period of rapid highway plant expansion can be conveniently referenced as either an extension or restraint of power. Many of the significant changes have been in law but others, which are equally significant to the operating agency, have been derivations or interpretations from law. In fact, some of these latter have actually preceded law in many states or in the Federal Government.

You can see therefore that, although I will try to proceed through this discussion in a more or less orderly fashion, we are dealing with nonstatic entities and concepts and exact order sometimes becomes a little difficult. In any event, I hope to point out some of, what appear to be, the major landmarks in land acquisition and land use control and to spot along the way some of the forces which appear to be shaping trends.

EXTENSIONS OF POWER

Among the examples of extensions of power which were thought to be most significant are:

1. In most states, beginning in the early 1950's and continuing since, the power to control access from adjacent lands has been expanded. The conventional highway was changed to an expressway, which has, in turn, been changed to a freeway and, in many areas, the limits of access control on connecting roads are also being extended.
2. Also, in most states, the years of the 1950's saw enactment of laws authorizing the state to buy land in advance of need and thereafter hold or lease it until time for construction. This has been a very important extension of power for many highway departments. In California, we feel this authority has made it possible to achieve greater equity for the people from whom we have had to acquire land, as well as to enable achievement of a more orderly planning process.
3. Another major extension of some states' powers came in the enactment of authority to acquire lands in excess of highway needs which has resulted in significant reductions in ultimate acquisition costs and has reduced economic waste of valuable community land assets.
4. A fourth significant power, which goes with both the acquisition of right-of-way and land in excess of needs, is the power to devote that right-of-way to multiple uses; for instance, building developments in air space. This authority came about midway in

Paper presented at a conference session sponsored by the Department of Legal Studies at the 46th Annual Meeting of the Highway Research Board, January 1967.

the Interstate program and three of its most significant aspects have been the possibility that appreciable amounts of land could be returned to local tax rolls, that economic waste in a community could be lessened, and that highway investments could be reduced.

5. Also, most recently, there have been a number of significant extensions of the state's legal powers to protect the highway and its adjacent land from the standpoint of preserving natural beauty. This can be done by acquisition of land along the roadway margins or by removing or screening objectionable roadside features and structures outside the right-of-way.

To the historian of the future the foregoing will be noted as the major extensions of the legal authority which highway departments have had just preceding and during the period of the Interstate program. Along with these extensions of power, however, historians will note various restraints which have been placed on highway departments in use of their powers. These seem necessarily to accompany the extensions of power; for example:

1. A major restraint on the unlimited exercise of the power to acquire land and access rights is the requirement for public hearings. These often result in changes in the location or kinds of takings. In California, this became a matter of law early in the Interstate program and hearings have become most effective, yet we still are arguing about and experimenting with the forms that these public hearings take. Last year the California Legislature enacted a law providing that the highway hearings could no longer be conducted by members of the highway department, but rather by impartial hearing officers. It is almost certain that still further legislation prescribing procedures and other aspects of these public hearings will be enacted.

2. The development of extensive discovery procedures is a major change in eminent domain law which has come about since the Interstate highway program's land acquisition needs have begun to make their impact felt on the community. The possibility of having all of the department's documents and appraisal papers opened to scrutiny under this procedure has significantly changed the way the highway department does its work. The need for documentation and justification has produced sharper, more competent staffs and greater equity for affected owners. In some respects, this has been a good thing for the department and the public; and, in other respects, it has caused the department much inconvenience by reason of paperwork proliferation.

3. California and most other states have had the power of immediate possession for a great many years, but it was not until the highway department began to acquire large amounts of land for the Interstate System that the effect of this power began to be fully appreciated by the public. As a result, and in consideration of the position in which this practice put the property owner, most states must now make a security deposit in the amount of the appraised value of the take and landowners are permitted to withdraw 75 to 100 percent of the deposit which has been paid into the condemnation court.

4. Other forms of assistance to the property owner have also been provided, including laws requiring the state highway department to render assistance in relocation, to pay moving expenses to a new location, and to pay full market value for improvements on property under short term leases such as private cabins on Forest Service land.

5. Also, there has been enactment of laws designed to preserve certain types of land holdings from being encroached upon by other programs. The so-called "green belt" legislation is designed to preserve open space from encroachment by making such other uses difficult and costly. A recent landmark case in the California courts also clarified our State law restricting the highway department's power to acquire land devoted to cemetery purposes. Since that case we have either had to avoid cemeteries, or else ask the Federal Government to acquire the land on our behalf. And finally, there have been restraints placed on the acquisition of land devoted to some other public purpose. Parkland, in particular, is viewed as a precious commodity, and, as a result of the public's concern over the amount of parkland being taken for highways and other purposes, California law now provides that when a piece of parkland is taken for another public use, the public agency taking the land must replace it in kind. This, of course, makes land acquisition more costly in urban areas. When we formerly took a piece of

parkland in a city, we appraised it according to other land values in the area plus park improvements. Now, when we must replace it, we may have to buy land and clear improvements in the immediate vicinity. Naturally, it forces the highway department to proceed with extreme caution when dealing with public lands.

These restraints reflect one aspect of the attitude and values of the community just as the extensions of power reflect another. Their origins can be traced to certain basic feelings, or public desires. To be specific, in the case of access rights, the primary purpose of the power extension is to protect the public investment. This is also the motivating reason for extensions of power such as acquisitions of scenic easements, the control of billboards and junkyards.

Another way of protecting the public investment is through extensions of power for the purpose of facilitating long-range planning. Illustrative of this are the laws authorizing advance acquisition of right-of-way. This type of acquisition permits the communities to make an adjustment to the presence of the highway, prevents economic waste, and prevents proliferation of improvements in future rights-of-way. The power to acquire land in advance of need is fairly common among the states, but to date its applications have been limited. There are indications that Congress is taking a renewed interest in this matter, however, and this may provide the stimulus for greater state use of their authority. From the viewpoints of both the state highway agency and the community, advance acquisition is a desirable thing. As will be seen, however, it may be accompanied by a corresponding restriction of power in other directions.

RESTRAINTS ON POWER

Some of the restraints on power are a bit harder to categorize, but most of them will fall into the following two categories: those aimed at minimizing the hardship on landowners who must give up part of their land (for example, permissive withdrawal of deposits under orders for possession); and those aimed at assuring that there is public knowledge of all important highway department procedures. Since the departments spend large sums of public money, the public is understandably curious about how the department makes decisions relating to the expenditure of this money. It wants to know what the state intends to do and how it intends to do it. In some cases the law goes further, and actively provides for public participation in the processes of planning and location of facilities. The highway departments' greatest problems in the matter of land acquisition have occurred where the public did not have any clear idea of what the department was trying to do, and much of the department's subsequent activities had to be devoted to explaining this. Where there is provision for public participation in the plan-making process, this time and effort may be saved.

Some of the trends that seem to be indicated by the kinds of laws that have been enacted since the Interstate System program was started suggest that we are moving from a situation where the state exercises minimal controls over the right-of-way to a situation where the state exercises full control over the right-of-way. We might visualize these minimum and maximum extremes as a continuum, and locate the various laws on this continuum according to the extent to which they contributed to this trend. We would find, I suspect, that we are somewhere above the midpoint, but not by any means up to the maximum imaginable. There are still large areas where the state may ultimately be asked to assume responsibility. The approaches to interchanges offer a case in point. Here the states are now limited drastically in the amount of control they have over the arrangement of access, land uses, and road design.

This can be illustrated by a case study from California. About four years ago, in connection with our West Side Freeway, which is on new alignment for some 325 miles from the Tehachapi Mountains to Sacramento, the State intervened in the local zoning process and made protective zoning within a one-mile radius of interchange points mandatory. This route is a landmark for the State, and it had been preceded by years of planning, public hearings in 1957 and 1958, and many years of construction. It goes through California's rich central valleys, where agricultural land is very productive, and we had a very difficult time locating the highway so as to minimize the dislocation

of these operations. Interchanges were planned at frequent intervals (5 to 7 miles) in order to serve the farming communities located up and down the valley.

The West Side Freeway legislation was the first entry of the State into the business of zoning, and it was a controversial step, since many people argued strongly that zoning should remain a matter for local government. However, in this instance, the State went only so far as to say that the counties through which the West Side Freeway was located must pass zoning laws to protect an area of one-mile radius around each interchange. The State did not prescribe the kind of zoning that should be provided by the counties. As a result, the State of California has what is considered effective zoning control of land in all of the quadrants of the West Side Freeway. In some cases these controls limit land development to agricultural uses; in others residential and commercial uses are provided. Naturally time will bring changes in these zones; but a firm basis for State and local cooperation in dealing with this problem has been established, along with a legal framework for effectively carrying out public policies. We believe, therefore, that future growth in the interchange areas can be reconciled with the needs of the motorist.

In speaking of the trend from minimal control of right-of-way to full control, we must also remember we are dealing with a process which is capable of reacting to changing circumstances, and which must be adaptable to changing needs. To succeed, it must be capable of operating effectively in the pushing and pulling pressures generated by the social and economic forces in the community. The presence of these forces in the real estate market is particularly well known, but this does not make any easier the problem of working out mechanisms of control to achieve public objectives.

In some situations, the guidance offered by the planning process is better able to influence land use pressures than is the compulsion provided by regulatory laws. Here, again, the history of the state's highway planning laws could be laid out on a continuum ranging from minimum to comprehensive planning. In the broadest sense, our highway planners have always planned comprehensively with respect to the state's highway systems. Since the commencement of the Interstate System, however, the need to plan comprehensively for the integration of the state's several highway systems has been sharpened.

The impact of this highway program has been to cause the communities to plan more carefully and comprehensively. Communities have been forced to think through the problems of their future growth, and to define their goals. If we could view this type of planning legislation and administration on our continuum, we would probably find that we are at present only a little advanced from the minimum. It is only within the most recent years that we have seen the beginning of this type of comprehensive planning.

One very desirable trend which we have seen is the growth of bilateral efforts combining planning efforts at both the state and local levels. This is a very difficult process, and the laws which have been enacted to require communities of over 50,000 population and state highway departments to cooperate in comprehensive transportation planning have been a great help to the highway planner.

Not only has this trend resulted in multilateral planning efforts where once the unilateral planning of the state existed, it has resulted in encouraging multipurpose planning where previously each particular agency planned only for its own facility. Highway planners have been forced to look at the community as a whole and see the effect of their facility on the community's growth. The planner has had to begin to evaluate planning alternatives in this light. To a right-of-way man this is a particularly important trend because it shapes the socioeconomic forces that find their reflection in the real estate market and the population pattern of the community.

An important factor involved in these trends in the growth and restraint of power is the effect that some of our new laws have had in making it possible for the public to know and evaluate the results of highway programs. For the first time in our roadbuilding history we are able to study the impact that a highway program has on land uses, and thereby have a better appreciation of the effects of various alternative proposals in their impact on the community. We are still a long way from being able to make precise predictions in this field, but we are on our way to getting planners to appreciate the broader consequences of what they do.

Sometimes planning decisions have to be made with the realization that communities and individuals will suffer hardship in adjusting to their consequences, and should be compensated. Here, again, we have seen the law move its position on the continuum that reaches from minimum to maximum compensation. The report of the Special Subcommittee on Federal Land Acquisition in 1965 pointed out to Congress the wide differences which existed among various public works programs in their policies and practices regarding land purchases or the exercise of eminent domain.

For example, some agencies testified that to them "market value" meant the price that a landowner would accept, some defined it as the lowest price a piece of property would bring, some the average price, and still others the highest price the property would bring on the market. Not only does this show an uneven use of existing authority for land acquisition, but also the uneven effects of restraints on the use of this power, in the form of requirements that in various instances landowners shall be paid amounts over and above the market value of their property.

Here the laws providing for relocation assistance deserve particular mention. These statutes seem to indicate a growing social awareness in the law relating to land acquisition.

Another rather curious trend, which I believe is a very healthy one and which has not been indicated in anything noted so far, involves the changing position of the highway program in the total program of public works and services. When construction of the Interstate System was started there was no doubt that it was filling a need which had a high priority. The state highway departments were encouraged to go ahead at full speed; obstacles of all sorts, legal and practical, were cleared from their way. However, as this priority need has begun to be satisfied, the public's attitude has begun to change. Today we find that the highway program must compete with other programs for priority. This trend is strongest where demands are made on public funds and priority allocation of resources, and is likely to become increasingly evident in other aspects of the program. From now on, the highway department will have to justify in stronger terms than before what it desires to do in the way of land acquisition and construction. This will be particularly acute in urban areas.

A SYSTEM OF CHECKS AND BALANCES

One may project these trends in any fashion one desires. As the years have passed and the Interstate highway program has gone forward, more power and authority have been granted to the public agencies charged with responsibility for this program. Every year they have found they were able to do a little bit more. But at the same time, restraints against the abuse of these powers have grown and maintained a check and balance in the system. It is probably safe to predict that this phenomenon will continue, and that checks and balances will be built into the future extensions of authority for land acquisition.

This hypothesis may be tested by reference to any of several aspects of land acquisition already mentioned. It is likely there will be further restraints before lasting balance is achieved. One area of change is that involving payment of relocation costs. To broaden the scope of payments to the displaced person will naturally increase the cost of land acquisition and the cost of administration by the acquiring agency, but there is a feeling that such a broadening is necessary in order to be completely fair and equitable with the landowner. California has a relocation assistance law which follows the minimum standards laid down in the Federal aid law; it pays up to $200 to a person to move his personal property, and it pays a business or industrial or agricultural owner up to $3,000 to move his personal property. Discussions have been had on how and where this should be extended. Why place arbitrary limitations on this relocation assistance? If you are going to accept the premise that people should be paid for the moving of their personal property why shouldn't they be paid what it actually costs them?

Surveys have shown that less than 5 percent of the individuals and families spend more than the maximum allowable relocation payment, but it appears that businessmen and farm owners frequently spend from $10,000 to $40,000 to move the personal property they use in their enterprise. Here the $3,000 limitation of the Federal-aid law works a hardship.

Our studies in California show that in most cases the $200 payment is more than enough to move an individual and his family to a new residence, and in so doing they

have revealed another interesting aspect of the relocation problem. We pay residents on the basis of a fixed amount per room. Thus, a resident of a six room house might receive, say $150. But he actually spends $20 to move by renting a trailer, perhaps hiring a truck to haul his refrigerator, and furnishing the labor himself. Where does the remaining $130 go? Probably it does not stay in his pocket very long, for there are always unforeseeable expenses involved in settling into a new home. In effect, then, we are paying him a resettlement allowance? Or a bonus for contributing his own time? Perhaps so.

So, if one looks at this in terms of the continuum, one can see pressures from two directions. People are reluctant to increase the cost of the highway program, but, at the same time, they are also reluctant to compel the individual displaced by the highway to bear the entire cost of adjusting his affairs to the coming of the highway.

All of these extensions and restraints involving the power of highway building agencies have created problems for the states in administering their highway programs. In similar manner, local governments and the public have had cause to give hard thought to these problems and to their future prospects. Wherever one sits in the United States, one may see the effects of a growing concentration of power. Such a concentration is neither all good nor all bad. Some things cannot be done unless power is concentrated; some things become impossible whenever such a concentration occurs. Benefits must be balanced against costs.

For instance, one of the important Federal policy and procedure directives deals with the appraisal of property prior to acquisition. One of its provisions is the rule that whenever property worth more than $25,000 is being appraised there must be two appraisals. No doubt this is an essential device for protecting the public interest represented by the Federal Government—and in some states it is welcomed by the state government. Yet, in other states, it is neither necessary nor welcomed by the road-building agency, and its mandatory application comes close to having the Federal agency tell the state agency how to do its work.

Another example might be cited in the relocation assistance requirements. The Federal directive requires that the state set up a field office on projects involving 25 or more families who must be relocated. In California, we tried to calculate what size staff this would require in the field. We found that at any given time the "state highway department" has 1,200 projects under way, about half of which affect significant numbers of families. If, let us say, we had even as many as 200 to 300 of these projects for which relocation assistance field offices had to be provided, little if anything else would ever get done by the department's right-of-way staff. Fortunately, both in the case of the relocation assistance requirement and the two-appraisal requirement, the state highway department was able to work with the Federal agency involved, and agree on a more reasonable interpretation of the regulations.

Control is often merely a matter of where the emphasis is placed on a standard policy. In a sense, the designation of 25 families as the point at which a field office was required was an arbitrary designation of what was thought to be the best way to control a situation which otherwise would have been difficult to deal with. Like all arbitrary judgments, this one suffered because it was not suitable in all situations. The state agency would rather be in the position of assuring the Federal Government that, say, the state's appraisals are fair and equitable, or that relocation assistance is being rendered in those instances where it is needed. Such assurances should, of course, be subject to investigation by Federal authorities administering public grants-in-aid to the states.

The problem of assuring that policy is carried out without dictating how it shall be carried out is also illustrated by controversy over the Highway Beautification Act of 1965.

The potential solutions to these basic problems of bringing about a balance between extensions and restraints of authority all depend on acceptance of the fact that the power of public acquisition of land is a powerful tool for social and economic change; that it therefore cannot be turned over to any agency or delegate except on terms which guarantee its use for desirable social ends in a reasonable and equitable manner; but that the responsible agency should be fully responsible in its own jurisdiction.

We feel that the power to determine how, when and where public acquistion shall occur should not be concentrated outside the states. In other areas of Federal governmental activity this trend toward centralized control is not present. The "demonstration cities" program is one in which the Federal agency asks the states to submit proposed programs, and then decides which of the proposed programs it will assist with Federal funds. This is a completely different philosophy from that which has grown since inception of the Interstate highway program. It is more like that which prevailed in the days before the Interstate.

This difference in philosophy may become a matter of grave importance in the future. For example, prior to 1956, California had planned a 12,500-mile system of freeways. When the Interstate System program was started, it was made to coincide with this projected freeway system. In this instance, the Federal objective and the State objective were dovetailed. But, in the program that continues after 1972, what direction will the national interest lead the Federal Government to take? Will they coincide with those which Californians feel are paramount for their State? Will we be able to continue making progress on our freeway system which our public needs and wants, or will our efforts be diverted to programs which others want? We think that some flexibility should be introduced into the concentration of power, or preferably that it should be reversed.

In general I am pleased with the trends in laws relating to land acquisition. They have put the highway agency in a better position to carry on its work, basing it on long-range plans which have been worked out cooperatively with local governmental units affected. On the whole, also, the restraints which have been placed on this power, or the assumption of new compensatory obligations along with this extension of power, have been for the good, and have strengthened public acceptance of the land acquisition program by assuring greater fairness.

Leasehold Interests in Eminent Domain

FLOYD TAYLOR and JOHN PAUL WALTERS, Oklahoma Department of Highways

•RECENT years have witnessed an ever-increasing number of condemnation cases besieging our court dockets in nearly every jurisdiction in the United States.[1] Many factors have influenced this development. Perhaps the most significant factor, if, indeed, we can make such a distinction, has been the evolution of a broad new philosophy of government's responsibilities in dealing with the innumerable problems which widespread affluence and modern technology have created. For example, government has been called on to construct a nationwide network of Interstate highways to cope with ever-increasing demands for faster, safer, and more efficient travel facilities for millions of automobiles all across the country. Another example is the urgent need for more jet airports to accommodate millions of travelers to whom speed and comfort are the two most important factors influencing their choices of transportation. Ironically, another consideration influencing the "Topsy-like" growth in the area of eminent domain has been our increasing concern for the squalor and poverty infesting many of our nation's larger urban areas. This concern has taken the form of slum clearance and urban renewal projects. As President Kennedy said in his State of the Union Message in 1961:[2] "Our national household is cluttered with unfinished and neglected tasks." These unfinished and neglected tasks have become the responsibilities of government at all levels—national, state and local. The power of eminent domain has proved to be one of the most essential tools in the governmental arsenal in coping with these problems. Consequently, the frequency of condemnation of private properties is on the rise. More and more leasehold estates are becoming the subjects of condemnation. This has brought about a realization of two matters of primary importance for our discussion:

1. The so-called owner's right to just compensation receives vastly different and inconsistent treatment among the several jurisdictions.
2. There is need for a more practical and realistic approach to the problems in this area.

Any study concerning condemnation of leasehold estates necessarily builds upon legal concepts derived from the exercise of eminent domain upon property owned in undivided fee. Many of the familiar problems that have arisen in the past in respect to such property also have pervaded property held in fragmented ownership, when it becomes the subject of an exercise of the power of eminent domain. What rights are compensable? How do we define "just compensation"? When we have arrived at a suitable definition, how do we measure just compensation? What are the rights of the condemning authority? What are the procedural rights of the "owners"? Are the owners of fragmented interests in property all entitled to notice, judicial hearing, jury trial, participation in the proceedings, statutorily required offers of purchase before institution of proceedings? Even though these problems are familiar ones with respect to condemnation of property held in fee, we must operate amidst a not so fertile field of decided law in the area of fragmented ownership. Separation of legal fee title and beneficial use complicates the

[1] Boyer & Wilcox, An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings, 17 Miami L.Rev. 245 (1963).

[2] State of Union Message, Jan. 30, 1961, 1 U.S.Code Cong.Ad.News 25, 29 (1961).

Paper presented at the 6th Annual Workshop on Highway Law, sponsored by the Highway Research Board and held at the University of Wisconsin, July 1967.

rights and responsibilities of the condemning authority and raises difficult problems in regard to the landlord-tenant relationship.[3]

The Fifth Amendment to the Constitution as well as the constitutions of the respective states require just compensation, where property has been taken under the power of eminent domain.[4] The property interests of both landlord and tenant are among the interests regarded by the appropriate constitutional provisions as compensable. Just compensation is due the tenant who has been deprived of the benefits of his lease. The same is true of the landlord who has lost his present right to income in the form of rent and his future reversionary interest in the beneficial use of the property. The object of this paper is to discuss the rights of the respective parties, both procedural and substantive, the compensability of particular elements of damage, and in general, how we go about arriving at just compensation.

PROCEDURAL QUESTIONS

We shall consider the right of the tenant to compensation as a property owner. Correlatively, we must also consider the questions of whether he is entitled to notice of the proceedings and whether he is entitled to participate therein.

Where a tenant is in possession and is enjoying the beneficial use of property under a written, unexpired leasehold instrument, he is entitled to treatment as an "owner" whose property rights are within the contemplation of the applicable constitutional and statutory provisions. He is entitled to notice and compensation.[5] The lessee is said to have an interest in the land taken by virtue of his lease. He is in effect an indispensable party insofar as the constitutional and statutory provisions in his jurisdiction require certain procedures to be followed with reference to protecting the rights of property owners whose property has been appropriated to a public use.[6]

The tenant's rights will not be defeated in the event of settlement between the condemnor and the landlord. The tenant's rights are entitled to a separate status of sorts, arising out of their nature as "property" within the meaning of the appropriate constitutional provisions and condemnation statutes. Of course, nothing prevents settlement where all of the parties agree. However, the existence of two legal interests in the same property inevitably complicates settlement, and the likelihood of the property going to condemnation is much higher than where no leasehold is involved.[7]

An interesting question arises where the tenant holds over past the term. Whether he has a compensable interest in the event of condemnation will depend upon the meaning of the word "property" in the particular jurisdiction. In re Widening of Gratiot Avenue,[8] the Michigan Court recognized the possibility of a compensable interest. The holding over is presumed to be on the same covenants as the original lease, unless con-

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[3] The Condemnation of Leasehold Interests, 48 Va.L.Rev. 477 (1962).

[4] Kohl v. United States, 91 U.S. 367, 23 L.Ed. 449 (1876).

[5] In re John C. Lodge Highway, 340 Mich. 254, 65 N.W.2d 820 (1954).

[6] South Carolina State Highway Department v. Hammond, 238 S.C. 317, 120 S.E.2d 21 (1961). In re John C. Lodge Highway, supra note 5. City of Santa Cruz v. McGregor, 178 Cal.App.2d 45, 2 Cal.Rptr. 727 (Dist. Ct. App. 1960). State ex rel.McCaskill v. Hall, 325 Mo. 165, 28 S.W.2d 80, 69 A.L.R. 1256 (1933).

"The word 'owner' as used in a condemnation statute has been construed to embrace not only the owner of the fee, but a lessee and any other person who has an interest in the property which will be affected by the condemnation." South Carolina State Highway Department v. Hammond, supra, citing Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 84 S.C. 306, 66 S.E. 194. See 18 Am.Jur. 862, Sec. 229.

[7] A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924). Pierson v. H. R. Leonard Furniture Co., 268 Mich. 507, 256 N.W. 529 (1934), wherein the parties agreed to a single award for the value of the property taken, postponing division thereof to subsequent voluntary apportionment, or court action in the event of failure to agree. 67 W.Va.L.Rev. 101.

[8] 294 Mich. 569, 573-574, 293 N.W. 755, 757 (1940).

sent of the landlord is present and there has been agreement on variance of terms.[9] In United States v. Certain Lands[10] it was held that under New York law, a mere holding over will not result in a tenancy at will without the owner's consent and hence will not give rise to a right of compensation. This area is so interspersed with the different property laws of the various states that it defies generalization. However, it is safe to say that even where a tenant is found to have a compensable interest, he may be entitled to only nominal damages. While the tenant may be denied compensation, because his interest is not of enough economic import to require valuation, there may be a significant right to compensation for the taking or removal of fixtures belonging to the tenant.[11]

The tenant's rights to compensation, notice, and participation are available to the sublessor, sublessee, assignee, where the sublease or assignment did not effectively terminate the lessee's interest as a violation of the original lease.[12]

PROCEDURE

The particular procedure used has a definite effect on the amount of compensation for the land taken as well as its apportionment between the parties.[13] There is great divergence of procedure among the various states. It is likely that the lessor and lessee will occupy relatively antagonistic positions no matter what type of procedure is employed by the particular state.[14]

Ordinarily some effort is made by the condemnor to settle with the parties to the lease.[15] Where the parties cannot agree to a settlement, the usual practice is to conduct an initial determination by commission, judge or jury in order to arrive at a single award for the value of the property taken. Value may be determined by either of two common methods. The majority of the states require a single award for the totality of the property as a single undivided item. The integer under this approach is the unencumbered fee.[16] The award stands in place of the property. Apportionment between the owners is no concern of the condemnor.[17] This must be done in subsequent proceedings between landlord and tenant in some states; however, in others a single jury may determine the value of the property as a whole and apportion the award in the same proceeding.[18] In a number of states the apportionment procedure is prescribed by statute. According to some of these statutes, a single jury estimates the damages

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[9] Wimgert v. Prince, 123 So.2d 277 (Fla. Dist. Ct. App. 1960).

[10] 39 F.Supp. 91 (E.D.N.Y. 1941).

[11] Tate v. State Highway Commission, 266 Mo.App. 1216, 49 S.W. 282 (1932).

[12] People ex rel. Dept. of Public Works v. Rice, 185 Cal.App.2d 207, Cal.Rptr. 76 (Dist. Ct. App. 1960). In re Mackie's Petition, 112 N.W.2d 573 (Mich. 1961).

[13] 48 Va.L.Rev. 477.

[14] Purnell, Valuation of the Leasehold Estate, Southwest Legal Foundation, 1st Annual Institute on Eminent Domain 79, 88-95.

[15] See note 7, supra.

[16] United States v. Honolulu Plantation Co., 182 F.2d 172 (9 Cir. 1950): "If, therefore, the fee owner of one tract holds a lesser tenure in the tract taken, there can be no additional compensation for this reason. The explanation is the fee is the integer. The condemnor takes the particular ground. The whole structure of rights imposed upon this ground are destroyed. Compensation is paid by the parcel."

4 Nichols, s12.42, p.290: "The award stands in place of the land and the owners of each interest may recover out of the award the same proportionate interest which they had in the land condemned." Lambert v. Griffin, 257 Ill. 152, 100 N.E. 496. State ex rel. McCaskill v. Hall, supra note 6.

[17] Grand River Dam Authority v. Gray, 192 Okla. 547, 138 P.2d 100 (1943): "As pointed out above, the nature of the estates of the respective persons in the land involved was of but minor concern to the plaintiff, since upon ascertainment of the damage . . . and payment of the amount assessed . . . the plaintiff had no further interest in the transaction."

[18] Tennessee, Michigan, Alabama, Kentucky, Illinois. Lambert v. Griffin, supra note 16.

to the property in its entirety and as if in the ownership of one individual; and following such determination, the same jury apportions the award between the owners.[19] Some statutes provide for initial determination of the award by the jury and subsequent apportionment by the court.[20] A minority of the states require separate determination of the respective damages of each owner as the initial step. This rule usually permits the amount of the award to exceed the unencumbered value of the fee.[21] Evaluation of the respective merits and disadvantages of these approaches is reserved for comment in a later section of this paper.

Where the lessee does not take an active part in the original condemnation proceeding this does not mean that he should be without representation at that stage. The lessee should retain an attorney to advise the landlord's attorney and keep a close watch on his preparation for trial. The lessee's attorney should be present at the trial in order to pick up as much information as possible for use in later apportionment proceedings. Particularly close attention should be paid to evidence of rental value, since this is precisely what the lessee's attorney must prove when his turn comes.[22]

Where the lessee's interest must be determined in ancillary proceedings, this may be done by motion or such other appropriate procedure as is specified in the particular jurisdiction. At any rate, once the lessor has received an award in the condemnation proceeding, the lessee's attorney must initiate the necessary proceedings to evaluate his client's interest. Usually, the hearing on the award will be held before a judge rather than a jury. After hearing the evidence, the trier of fact will determine the distribution of the proceeds, and judgment will be entered accordingly.[23]

Of course, where the leasehold value is determined in the original proceeding, such as in those states where this result is required by statute,[24] the lessee must be represented by counsel in the original action. The lessee is in fact a true party to the action.

CONDEMNATION CLAUSES

A condemnation clause is often inserted in modern lease agreements. In fact, this practice has become almost customary in drawing leases on valuable urban property. Such clauses usually provide that the term of the lease comes to an end in the event of

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[19] Anno. Laws Mass., c. 79, ss27-29: "The jury shall first find and set forth in their verdict the total amount of damages sustained by the owners of the property, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple, and then apportion such damages among the several parties whom they find entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively, and set forth such apportionment in their verdict."

[20] Alabama Code, Title 19, Section 26.

[21] Arkansas State Highway Commission v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959). Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948). These cases stand for the proposition that compensation, in order to be considered "just," must fairly recompense the owner for what he has lost. This can best be determined by a measure of damages based upon what the owner has lost, and not what the condemnor has gained. See 166 A.L.R. 1212. In the case of State v. Platte Valley Public Power & Irrig. Dist., 23 N.W.2d 300 (Neb. S. Ct. 1946), the court said, "The measure of compensation to each owner must be what he has lost. It seems to us that those courts which hold that the sum of the separate values of the separate interests may be less than the value of the unencumbered fee have at that point abandoned the rule that the measure is what the owner has lost, and applied the rule that the measure is what the taker has gained . . . and have overlooked the factual situation that exists in many of these cases where there is a personal property right taken or damaged, in addition to the real property taken or damaged."

[22] 11 Am. Jur. Trials, s26, p. 220.

[23] 11 Am. Jur. Trials, s27.

[24] 11 Am. Jur. Trials, s28. Supra note 19.

a taking under eminent domain of a whole or a part of the premises leased.[25] However, they may only require proportionate abatement of the lessee's rental obligation in the event of a partial taking.[26] They may strip the lessee of all interest as owner and provide that the entire award belongs to the lessor.[27] Such clauses are enforceable under the view that a tenant may by contract waive his right to participate in a condemnation award.[28] So long as a condemnation clause does not constitute a complete waiver of the lessee's ownership status, the lessee is still entitled to be treated as an "owner" with all of the correlative rights.

THE LEASE

As in other areas of valuation, the use of "comparable" sales of property in the same area as the take may be a most useful method of arriving at the value of a particular leasehold. In some cases a particular leasehold may be quite susceptible to comparative valuation methods. However, most leases are drawn under objective and subjective conditions which are unique to the particular leasehold. It is these conditions which underlie the landlord-tenant relationship and form the basis for the agreed rent. It is against this background that "comparables" must be viewed. Long-term leases are, more often than not, infused with characteristics of a highly unique nature. Such characteristics may have little relation to current conditions, other than fixing the rights between the parties.[29]

Fixing the market value of an unexpired term is no simple matter. A lease is rarely assignable without the consent of the landlord. Consequently, there are infrequent sales and, hence, few comparables. Leases vary so much in length of term, rent reserved, and other particulars that the customary tests of market value are often impossible to apply.[30]

Where a lease has an extremely long period to run, the cases sometimes suggest that a jury would be justified in considering the reversionary interest of no value.[31] It is not accurate to state that the reversion is of no value whatever.[32] It will usually have some value, although the value diminishes in relation to any increase in the length of the term. In fact, the value of the reversion may become negligible. An increase in the

[25] 4 Nichols, s12.42 (1), p. 300. "Under such a lease the tenant has no estate or interest in the property remaining after the taking to sustain a claim for compensation, although under some circumstances he may be entitled to recover for improvements. United States v. Petty Motor Co., 327 U.S. 372, 90 L.Ed. 729, 66 S.Ct. 596. United States v. Inlotts, 26 Fed.Cas.No. 15441 a, affirmed 91 U.S. 367, 23 L.Ed. 449. United States v. 3.5 Acres of Land, 57 F.Supp. 548.

[26] United Cigar Stores Co. v. Norwood, 124 Misc. 488, 208 N.Y.S. 420 (Sup. Ct. 1925).

[27] United States v. Petty Motor Co., supra note 25; Capitol Monument Co. v. State Capitol Grounds Commission ex rel. Murry, 220 Ark. 946, 251 S.W. 472 (1952).

[28] 2 Nichols s5.23(2) p. 41 (1950). See Annotation 98 A.L.R. 254. United States v. Improved Premises, D.C. 1944, 54 F.Supp. 469. In re Improvement of Third Street, St. Paul, 178 Minn. 552, 228 N.W. 162, Matter of City of New York (Allen Street) 256 N.Y. 236, 176 N.E. 377. See Jahr, Eminent Domain—Valuation and Procedure 1130, p. 194, 195 (1953).

"This was, however, a contract and not a property right," Cornell-Andrews Smelting Co. v. Boston and Providence Ry., 209 Mass. 298, 95 N.E. 887.

"The intention of the parties must be determined from the condemnation clause as a whole and not from separate parts thereof taken out of context," State Highway Commission v. Oregon Investment Company, 227 Ore. 106, 361 P.2d 71 (1961). Pettigrove v. Corvallis Lumber MFG. Co., 143 Ore, 33, 21 P.2d 198.

[29] 48 Va.L.Rev. 477, 489.

[30] 4 Nichols s12.42(3), p. 318. State v. Carlson, 83 Ariz. 363, 321 P.2d 1025 (1958). County of Maricopa v. Shell Oil Co., 84 Ariz. 325 P.2d 1005 (1958).

[31] 4 Nichols s12.42(3), p. 320. Chicago, Etc., v. Chicago Mechanics Institute, 239 Ill. 197, 87 N.E. 933.

[32] 48 Va.L.Rev. 477, 490.

discount rate also reduces the value of the reversion. It is with these considerations in mind that some of the text writers suggest that there may be different standards of valuation for long-term as distinguished from short-term leases. Of course, the long-term lease is often far more difficult to value because it is likely to be highly unique in its terms and provisions. Also, in the case of a long-term lease, the lessee commonly has erected buildings or fixtures on the leased premises. Relative rights to such improvements complicate apportionment of the award between landlord and tenant, as well as create complex problems in valuation. Another important factor to keep in mind, when valuing a long-term lease, is the use of an appropriate interest rate in determining the value of the leasehold and reversion.

The short-term lease, however, ordinarily is not attended with problems of such complexity. The lease ordinarily will have been negotiated within a short time of the condemnation proceedings. This reduces the possibility of a major discrepancy between the rental obligation which might be exacted for similar property at the time of condemnation.[33] The lease is likely to have a short remaining term, thus easing the problems encountered in valuing long-term leases relative to the value of the reversion. Relative rights between landlord and tenant to the fixtures and improvements upon the property are more clear cut than in the case of the long-term lease.

EFFECT ON LANDLORD-TENANT RELATIONSHIP

It has been consistently held that where there has been a taking of the entire leased premises by eminent domain, the landlord-tenant relationship is extinguished. The tenant's liability for rent is likewise extinguished. Merger of the reversion and the fee extinguishes the leasehold and its concomitant rights and duties. Every landowner holds his title subject to the sovereign power of the state. Therefore, the state can take the estates of both landlord and tenant for public use.[34]

However, where there has been only a partial taking of the leased premises, the majority of the decisions indicates that the rental obligation continues unabated, and the landlord-tenant relationship is not extinguished. The tenant remains liable for the entire amount of the rent due under the lease and must look to the condemning authority for compensation.[35] This rule has also been applied where there has been a partial taking of a leasehold estate, as distinguished from a partial taking of its area.[36]

The minority rule with respect to a partial taking of a leased premises is that condemnation partially extinguishes the relationship of the landlord and tenant. The tenant is therefore relieved from liability for rent in the proportion that the part of the premises condemned bears to the entire area.[37]

Under the majority rule, where there has been a partial taking, the landlord's security for that part of the rent covering the condemned portion, is gone. He must look solely to the good faith and solvency of the tenant for payment of rent. The tenant has been paid by the condemnor the value of the part of his estate taken plus the present

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[33]Ibid.

[34]Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115, 57 N.E. 214 (1900). Mellis v. Berman, 9 N.Y.S.2d 553 (Sup. Ct. 1938). 14 Baylor L.Rev. 232 (1962). Hudson County v. Emmerich, 57 N.J.Eq. 535, 42 Atl.107 (Ct. of Chancery of N.J. 1898).

[35]P.J.W. Moodie Lumber Co. v. A. W. Bannister Co., 286 Mass. 424, 190 N.E. 727 (1934). Schmid v. Thorsen, 89 Ore. 575, 170 Pac.930, 175 Pac.74 (1918). Gluck v. Baltimore, 81 Md. 315, 32 Atl.515 (1895). 14 Baylor L.Rev. 232, 233 (1962).

[36]Leonard v. Autocar Sales & Service Co., 392 Ill. 182, 64 N.E.2d 477, 163 A.L.R. 670 (1945).

[37]Board of Levee Comm'rs v. Johnson, 66 Miss. 248, 6 So. 199 (1899); Biddle v. Hussman, 23 Mo. 597 (1856); Stein v. W.T. Grant, 269 App.Div. 909, 56 N.Y.S.2d 582 (1945); dissenting opinion, Pasadena v. Porter, 210 Cal. 381, 257 Pac.526 (1927); 14 Bay.L.Rev. 232, 233 (1962).

value of the rent payable on that part during the remaining term of the lease. If the tenant becomes insolvent, the landlord is without a remedy.[38] This inequitable result has been obviated by the enactment of statutes in several states.[39] These statutes usually codify to a certain extent the minority rule as set out above.

VALUATION

The so-called "undivided fee" rule is generally used in proving the value of leased premises which have come under condemnation.[40] The theory behind the rule is that the land alone is taken and not the interests of different owners of separate estates in the land. The rule is well-stated in the leading case of State ex rel. McCaskill v. Hall:[41]

> When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person, and then apportion this sum among the different persons, according to their respective rights. The value of the property cannot be enhanced by any distribution of the title or estate among different persons, or by any contract arrangements among the owners of the different interests. Whatever advantage is secured to one interest must be taken from another, and the sum of all the parts cannot exceed the whole.

Compensation thus is awarded for the land itself and not the separate interests therein.[42] This technique achieves maximum simplicity and ease of application. When the award has been determined, it stands in place of the land. The condemnor has no further interest in the proceedings.[43] The landlord and tenant share in the award in proportion to the damage suffered by each.[44] The "undivided fee" rule permits speedy condemnation and precision in forecasting the probable cost of acquisition.[45]

A minority of the courts endorse the rule that the sum of the respective interests represents the "whole." This approach recognizes the fact that a leasehold estate has an evidentiary value. It is supposed that the sum of the parts would simply be the value of the respective interests, taking the leasehold itself into consideration. Under this view, the total award may exceed the value of the unencumbered fee.[47]

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[38] Biddle v. Hussman, supra note 37.

[39] For example, Title 19 La. Stat. Anno.-C.C., Art.2697: "If, during the lease, the thing be totally destroyed by an unforseen [unforeseen] event, or it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim of damages."

[40] In re Mackie's Petition, 115 N.W.2d 90 (Mich. 1962); State ex rel. Kafka v. District Court, 128 Minn. 432, 151 N.W. 144 (1915). 4 Nichols s12.36(1).

[41] 325 Mo. 165, 28 S.W.2d 80 (1930).

[42] City of Ashland v. Price, 318 S.W.2d 861 (Ky. 1958); Grand River Dam Authority v. Gray, 192 Okla. 547, 138 P.2d 100 (1943); St. Louis v. Rossi, 333 Mo. 1092, 64 S.W.2d 600 (1933). People v. S.&E. Homebuilders,Inc., 142 Cal.App.2d 105, 298 P.2d 53 (1956).

[43] Grand River Dam Authority v. Gray, supra note 42. 2 Lewis on Eminent Domain (3d ed.) s716, p.1253.

[44] Procedural Questions, supra, and cases cited therein.

[45] An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings, Boyer & Wilcox, 17 Miami L.Rev. 245, 259 (1963).

[46] Procedural Questions, supra note 21.

[47] Ibid.

In practical application the undivided fee rule often works to the advantage of the landowner.[48] The rule takes into account all relevant factors contributing to the value of the realty. However, at the same time, it disregards many factors which tend to diminish the value of the property taken. For example, application of the "highest and best use" rule reduces the significance of the present use being made of the land. It also minimizes the value-depreciating influence of burdensome restrictive covenants and zoning ordinances which may preclude or impede further development of the land.[49] In such cases, it usually is found that the value of the unencumbered fee will greatly exceed the total value of the separate interests.

The following discussion, although primarily directed toward proving value under the "sum of the separate interests" rule, also has applicability to the problems which may be encountered in a proceeding to apportion an award between landlord and tenant, when such award was granted by a court using the undivided fee rule.

Application of the sum of the separate interests rule commonly results in an award worth considerably less than the market value of the unencumbered fee. Of course, in some cases the award may exceed the value of the unencumbered fee, but this is, in theory, a rarity. The award is determined by ascertaining the value of the lease, as evidenced by what it would sell for on the open market, and then adding the value of the lessor's interest, similarly determined. This usually results in a relatively low total. Much difficulty can be encountered in proving the "fair market value" of the lease. Sales of leases on comparable plots of realty in the past, and new leases which have been negotiated on land of similar location, are a consensus of the opinions of many businessmen, taking into consideration many of the inherent qualities of the land as well as its applicability for their special purposes. As pointed out, leasehold estates are often negotiated under conditions and for particular purposes, which render such leases unique in nature. These considerations mitigate against the use of other leaseholds as "comparables," but there is yet another factor which must be considered. The use of comparable leasehold estates in proving the value of the subject lease contains an underlying assumption that the parties to the various leases involved were of equal ability and bargaining power in arriving at the rent agreed to be paid under each contract. Even though the fiction of this assumption must be admitted, this does not render the market value approach unsound. It is said that the fair market value of the lease is the amount of money which a prudent businessman would pay for the use of a particular piece of land. This is further refined into the traditional idea of "a willing buyer and a willing seller through the impartial workings of a free and competitive market." The test is economically sound. The assumption upon which it is based is undoubtedly true: that in a competitive market the true value of a piece of property can be accurately determined. Whereas there may be a broad range of offers made for a particular piece of property, no prudent businessman will offer to pay a higher rent than the use of the property is actually worth.[50]

The lessee is entitled to an amount of compensation which will fairly compensate him for his loss.[51] This sum is generally said to be the fair market value of the unexpired term of the lease, less any rent agreed to be paid by the lessee.[52] We have considered the various aspects of finding market value. Therefore, it seems appropriate to pass to a consideration of the rent agreed to be paid by the lessee.

We must first distinguish between the terms "economic rent" and "contract rent." Contract rent is the amount of rent agreed to be paid under the lease instrument. Econ-

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[48] Ibid.

[49] Boyer & Wilcox, An Economic Appraisal of Leasehold Valuation, in Condemnation Proceedings, 17 Miami L.Rev. 245, 264, 265 (1963).

[50] Ibid.

[51] Department of Public Works v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953). 48 Marq. L.Rev. 90, 92 (1964).

[52] Commercial Delivery Service v. Medema, 7 Ill.App.2d 419, 129 N.E.2d 579 (1955); John Hancock Mut. Life Ins. Co. v. United States, 155 F.2d 977, 978 (1st Cir. 1946); United States v. Advertising Checking Bureau, 204 F.2d 770, 772 (7th Cir. 1953). 17 Miami L.Rev. 245, 265 (1963).

omic rent is defined as "the annual monetary income that an unencumbered freehold can command in the open market at any given time for its highest and best use."[53] There are two methods for determining the amount of economic rent that a property should command. First, the market (comparison) approach can be used. Here, rental values of similar properties are used as a basis for determining value. Second, the so-called "variation of the income approach" can be used. Here the value of the fee is determined and the proper capitalization rate applied to give rental value. No matter which of these two methods is used, it will be necessary to establish economic rent with the aid of expert witnesses. The market approach is the more convincing of the two methods. It avoids many of the problems in understanding, comprehension, and communication that exist under the other approach.[54]

Once the economic rent has been determined, it is a relatively simple matter to determine the contract rent. We simply look to the lease. However, adjustments may be necessary to conform the subject contract rent with the contract rent on comparable leaseholds used to establish the subject economic rent. Where, for example, the lease in question requires the lessee to pay ad valorem taxes, while in the comparables, the lessors pay such taxes, the taxes should be added to contract rent in order to achieve true comparability.[55]

It is the economic rent that causes one location to command a higher contract rent and another a lower contract rent. Of course, a tenant will wish to pay as low a contract rent as possible, while the landlord seeks a high contract rent. Where both parties to a lease have equal knowledge of the potential productivity of a lease at the time of its execution, the economic rent should closely approximate the contract rent. But circumstances change over the life of a long-term lease, and there is likely to develop a difference between contract rent and economic rent. If the contract rent exceeds the economic rent, the landlord enjoys a "bonus" value as to the lease, while it represents a negative value, a bad bargain and economic burden to the tenant. Conversely, if the economic rent exceeds the contract rent, the tenant enjoys the surplus. The party enjoying the surplus is entitled to compensation in the event of condemnation. Depending upon how "negative" the other party's negative value is, he may not be entitled to compensation. To the latter, condemnation represents an economic boon. He has been relieved of a bad bargain.[56]

EXPERT WITNESSES

Proving land values cannot be well-accomplished without the aid of expert testimony. This is especially true in the area of leaseholds, where the valuation problems are more complex and more familiar than those pertaining to the fee estate.

Expert witnesses[57] may be chosen from the ranks of qualified real estate dealers and professional appraisers. Counsel should always exercise care in selecting such witnesses because their testimony will be the absolute foundation of his case. Following are a few suggestions dealing with preparation of expert witnesses and presentation of their testimony.

Prior to trial, counsel should go over the expert's testimony with him. Counsel should make notes concerning the testimony and the date to be presented at trial. The appraiser should be cautioned that he will have to justify his opinion under strenuous cross-examination by the opposing counsel. The attorney should not direct the appraisal to be made in any particular manner. The appraiser is quite likely to resent the attorney's interference with the performance of his functions. Such resentment could furnish ammunition for the opposing counsel also! At the same time, however, the appraiser

[53]Kuehnle, The Appraisal of Leaseholds, 19 Appraisal Journal 208 (1951).
[54]Kizer, Valuation of Leasehold Estates in Eminent Domain, 67 W.Va.L.Rev. 101, p. 104-105.
[55]Ibid. p. 105.
[56]Ibid.
[57]8 Am. Jur., Trials, Section 63, Expert Witnesses, p. 121.

should fully inform the attorney as to his methods and findings to be sure that no item of value has been overlooked.

Preparation of an appraisal report containing all of the minute details of the appraisal is a most effective aid in presenting the expert's testimony. It should contain exact dimensions and descriptions of property taken, a compilation of data as to comparable sales, exact figures as to replacement and depreciation, etc. Such appraisal report serves to refresh the recollection of the appraiser during his testimony and fortifies him on cross-examination.

OTHER ELEMENTS OF COMPENSATION

Profits, Good Will, Income

The courts have consistently refused compensation for injury to good will,[58] loss of future profits,[59] loss of profits due to temporary interruption of a business,[60] or for damages representing destruction of a business interest where the taking is only of the physical property and not of the business itself.[61]

Such losses are considered merely consequential and hence not compensable.[62] The general rule is not applicable where there exists a statutory right to compensation for loss of business profits.[63] The general rule of noncompensability rests upon the theory that recoverable damages must be limited to items which are reasonably ascertainable to a satisfactory degree of accuracy. Business profits depend to a large degree on such individual factors as management skills, personnel efforts, and existing and future market conditions.[64] Such factors as these are unrelated to the property itself. The courts have been quite reluctant to speculate in this area with government funds, and compensation has consistently been denied. However, where a lessee conducts a business upon property which has been condemned, some of the cases have admitted such elements of damage, not as independent grounds of recovery, but as evidence of the market value of the leasehold.[65]

Moving Costs

The lessee ordinarily has no right to recover the cost of moving personal property from the condemned premises where there has been a total taking.[66] This general rule of noncompensability is usually relaxed, however, in the case of a lessee's being forced to move fixtures, as distinguished from personal property. When the lessee moves personalty, theoretically, he is not damaged since he would have to move it at the end of the lease anyway.[67] Where, however, the lessee is permitted by the terms of the lease to remove fixtures at the end of the term, he can be compensated, since the value of the

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[58] Henderson v. City of Lexington, 132 Ky. 390, 111 S.W. 318 (1908).

[59] In re Slum Clearance, 332 Mich. 485, 52 N.W.2d 195 (1952); Cudahy Brothers Co. v. United States, 155 F.2d 905 (7 Cir. 1946).

[60] Finley v. Board of County Comm'rs. of Oklahoma County, Okla., 291 P.2d 333 (1955); contra, Hart Bros. v. Dallas County, Tex., 279 S.W. 1111.

[61] Finley v. Board of County Comm'rs. of Oklahoma County, supra note 60.

[62] United States v. 25.4 Acres of Land, 71 F.Supp. 255 (1947), affirmed, United States v. City of New York, 168 F.2d 387 (2d Cir. 1948).

[63] Fla. Stat., Sec. 73.071 (b): "Where less than the entire property is sought to be appropriated, . . ., and the effect of the taking of the property involved may destroy or damage a business of more than five years standing, owned by the party whose lands are being so taken . . .; any person claiming the right to recover such special damages shall set forth in his written defenses the nature and extent of such damages."

[64] 5 Nichols, S.19.3, p.340. Hot Springs County v. Crawford, 316 S.W.2d 834 (Ark. 1958).

[65] 4 Nichols, Sec. 13.3(3), p. 451. State v. 0.15 Acres of Land, 164 A.2d 591 (Del. 1951).

[66] United States v. 5.42 Acres of Land, 182 F.2d 787 (3 Cir. 1950).

[67] 4 Nichols, Section 14.2471(2).

fixtures as severed will be decreased to the extent of the cost of detaching and reattaching them elsewhere.[68] The courts, however, favor compensation to the lessee under these circumstances not under a rule that permits recovery as an item of substantive damages, but rather it is held that the award should include such damages insofar as the costs of removal are considered in determining the market value of the leasehold as enhanced by the fixtures.[69] Rental value is determined with the fixtures attached, and the cost of relocation, since it diminishes the value of the fixtures, diminishes the rental value of the leasehold.[70]

Fixtures and Improvements

Generally, there is a right to compensation for the taking or damaging of fixtures attached to the realty of a condemned leasehold. The right of the tenant to be compensated depends on the terms of the lease and the state of the law in his particular jurisdiction. If the tenant has the right to remove the fixtures at the end of the term of his lease, he is entitled to compensation when the fixtures are taken.[71] In addition, where the landlord is obligated under the lease to purchase the fixtures from the tenant at the end of the term, the tenant is entitled to compensation.[72] There is no right of compensation for mere personalty, even though used in conjunction with the realty.[73] The test for whether a particular item is a fixture or personalty was set forth in In re Slum Clearance,[74] as follows:

> These are, first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold. In applying these tests, consideration must be given to the nature of the structure and the use to which it was to be put when completed.

This doctrine is not without its limitations. In In re Acquisition of Land,[75] the same court (Michigan) refused to extend the rule of compensability to trade fixtures which had to be removed from the condemned premises. Here, the trade fixtures were passenger vessels, while the condemned premises was a wharf. Many of the cases permit compensation for the taking or damaging of trade fixtures where they satisfy the conventional tests for fixtures.[76] In determining the total award for the condemned premises, fixtures will be treated as real estate, but in apportioning the award, they will be treated as personal property.[77] The rule was stated in In the Matter of City of New York[78] as follows:

> To the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto, the value of the fixtures must be included in what the city pays, and the tenant is entitled to part of the award, not

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[68] In re Widening of Gratiot Avenue, supra note 8.

[69] Shipley v. Pittsburgh, C. & W. R.R., 216 Pa. 512, 65 Atl. 1094 (1907); 48 Marq.L.Rev. 97 (1964).

[70] Ibid.

[71] 4 Nichols, Section 13.15, p. 384.

[72] United States v. 15.3 Acres of Land, 154 F.Supp. 770 (N.D. Pa. 1957); 48 Marq.L.Rev. 97 (1964).

[73] 4 Nichols, Section 13.13, p. 380; Foster v. United States, 154 F.2d 243.

[74] 332 Mich. 485, 52 N.W.2d 195 (1952). Kizer, Valuation of Leasehold Estates in Eminent Domain, 67 W.Va.L.Rev. 101, 113 (1965).

[75] 335 Mich. 485, 56 N.W. 375 (1953). 48 Va.L.Rev. 477 (1962).

[76] United States v. Certain Parcels of Land, 102 F.Supp. 854 (So. D. N.Y. 1952).

[77] 4 Nichols, Section 13.12; 67 W.Va.L.Rev. 101, 112, 113 (1965).

[78] 256 N.Y. 236, 176 N.E. 377 (1931).

> because the fixtures add to the value of the leasehold but because they belong to him and their value enters into the value of what the city has taken.

A condemnation clause is effective to deny the tenant the right to share in the award made for the realty taken. If a particular item is a fixture, it is a fixture because it is regarded as part of the realty. The tenant may not share in the compensation to the extent of the value of his unexpired leasehold. He is also barred from recovering for fixtures, except where he has erected fixtures or structures upon the property, which he would have a right to remove at the end of the lease.[79]

Valuation of the fixtures or other improvements can be quite problematical. The general rule is that the amount of compensation is to be measured by the value of the land, together with the improvements and fixtures thereon, valued as a whole and not separately.[80] Evidence as to the separate values of particular fixtures apart from the value of the land or as separate items of damage is inadmissible.[81]

Option to Renew

The existence of a covenant in the lease, constituting an option to renew, is admissible in evidence in most jurisdictions as an item tending to show the market value of the interests taken by eminent domain.[82] The legal effect of the existence of a right of renewal is to extend the remaining term of the lease.[83] Where, for example, a lease contains an option to renew for an additional term of fifteen years, the fifteen years will be added to the remainder of the lease in determining market value of the lease. An option to renew has no compensable value as a separate element of substantive damage. It is only when considered as an extension of the original lease that the option to renew has a compensable value to the lessee, and then only to the extent that it increases the market value of the unexpired term of the lease.[84]

Unexercised Option to Purchase

The majority of the courts hold that an unexercised option to purchase property is a bare contract right and not an interest in property that gives rise to a claim for compensation when the property is condemned.[85] In Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.,[86] the Massachusetts court sustained an exception to the trial court's

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[79] 4 Nichols, Section 13.12(1). Ibid. note 77.

[80] Ibid.

[81] Chesapeake & O.R.R. v. Johnson, 134 W.Va. 619, 60 S.E.2d 699 (1950); 18 Am.Jur., Eminent Domain, Sec. 253 (1938); 67 W.Va.L.Rev. 113 (1965).

[82] Tinnerholm v. State, 15 Misc.2d 311, 179 N.Y.S.2d 582 (1958). 48 Marq.L.Rev. 95 (1965).

[83] 4 Nichols, Section 12.42(1), p. 299; Department of Public Works & Buildings v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953); In the Matter of City of New York, 1959 Misc.2d 887 (1st Dept. 1939); Hercey v. Board of Freeholders, 99 N.J.Eq. 525, 133 Atl. 872 (Ch. 1926); State v. Parkley. 295 S.W.2d 457 (Tex. Civ. App. 1956); 48 Va.L.Rev. 477 (1962). But, where the option is exercisable only by mutual consent of lessor and lessee, the option was not allowed to extend the term in Pause v. City of Alabama, 98 Ga. 92, 26 N.W. 489 (1896). See 9 Kan.L.Rev. 399, 410, 411 (1961) for the difficult problems posed by the customarily renewed lease and legal unenforceable understanding of landlord and tenant that the lease will be renewed. The valuation of an option to renew must take into consideration an unexercised right of cancellation belonging to the landlord, In the Matter of City of New York, supra.

[84] 48 Mar.L.Rev. 95 (1964). 67 W.Va.L.Rev. 101, 113 (1965).

[85] 85 A.L.R.2d 588; Cravero v. Floria State Turnpike Authority, 91 So.2d 312 (Fla. 1956); Phillips Petroleum Co. v. Omaha, 171 Neb. 457, 106 N.W.2d 727, 85 A.L.R.2d 570.

[86] 209 Mass. 298, 95 N.E. 887 (1911).

refusal to rule that the value of the lessee's option to purchase the premises at the end of the term could neither enhance nor diminish the lessee's claim. It was held that the option was not part of the lessee's estate in the land, but was a mere right of contract; and that therefore the lessee was not entitled to have the value of his estate in the land increased by the value of the option. There have been a few cases, however, which have given compensation for the value of the option.[87] The value of the option is said to be the difference between the condemnation award and the price stated in the option. Two New York cases give a most interesting light to this problem. In the case of In re Waterfront in Tompkinsville,[88] the court said:

> But the tenant had, under the option, the right to purchase the property at a certain time and at a certain price, irrespective of the termination of the lease. This option, however, was, by condemnation, acquired by the city, and the tenant's rights thereunder vested in the city. Had the tenant exercised its option before condemnation, it would have become a vendee under an executory contract of sale. It would have then held the equitable title and estate in the property. That it did not become such an equitable owner was because the condemnation proceeding prevented it from exercising such option during its life. After the condemnation proceeding, it could not have given any notice or made any tender provided for in the option clause, because the rights thereunder had vested in the city. In other words, these rights were taken away by the city in the condemnation, and the award made shows that they were valuable.

This reasoning was disapproved in In re Waterfront on Upper New York,[89] wherein the court said:

> Such a thing cannot be; it is not only unreasonable, but not within the terms and conditions of the lease itself. That provides that in the event that the City of New York takes the premises under the right of eminent domain, the lease shall cease and come to an end. This terminates the option as well as the lease. If the tenant had an option to renew the lease instead of to purchase, this certainly would terminate under this clause. Why should not the option to buy terminate as well as the option to extend the term.

The courts are in general agreement that an option to purchase which has not ripened into a mutually binding contract by its exercise prior to condemnation is not such an interest in land as to entitle the optionee to share in the award.[90]

CONCLUSION

Condemnation of leasehold estates involves a whole range of problems not present in condemnation of properties wherein ownership is unencumbered. The various states seem to have reached different solutions to many of these problems, each state claiming to have given just compensation. It seems that just compensation is a variable concept. In some situations, immediate equities take precedence over logic and reason in arriving at just compensation. This is particularly true as to those states which deny

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[87] In re Waterfront, 219 App.Div. 387, 220 N.Y.S. 23, 26, 27 (1927).
[88] Ibid.
[89] 246 N.Y. 1, 157 N.E. 911, 927 (1927).
[90] 85 A.L.R.2d 588.

consideration of benefits as an offset to the landowner's damages. Hopefully, in most applications, reason and logic and immediate equities coincide with a finding of just compensation. But there are areas in the law of eminent domain wherein reason and logic have overtaken immediate equities and have produced rules of law with rather transparent claims to just compensation. This is especially true in the case of business profits. Where the owner of a condemned business property is denied compensation for lost profits, occasioned by the condemnation, no one possibly could argue that he has been made whole for his loss. Yet, reason and logic demand a rule of noncompensability. Just compensation apparently involves a balancing of reason and equity as regards the relative rights of the landowner and the public. Insofar as compensability of particular items in leasehold condemnations is concerned, different states have placed different emphases on principles of reason or equity, and in so doing they have arrived at different balances of the two concepts. Hence, rules of just compensation differ. The courts have been most reluctant in allowing the "deep pocket" theory to seep into the law of eminent domain, although juries have not shown the same reluctance. The right to jury trial in eminent domain cases is perhaps the most significant and effective method of insuring the precedence of immediate equities over cold logic and reason in finalizing the rights of the parties. Of course, the jury cannot stray far outside the bounds of logic and reason in applying a layman's sense of justice to a particular rule of compensability or noncompensability. Nevertheless, in actual experience, the jury has been able to rectify inequitable results of strict applications of rules of noncompensability, not meeting the expectations of the "lay-legal" conscience. Yet, the question remains as to whether this is fair to the condemning public. Just compensation is not a one-sided term. It is a relative concept, demanding consideration of both sides of the case. Hopefully, a jury's verdict will lie somewhere in the gray area between the layman's conscience and the legally defined rights of the public. Perhaps this is the best definition of just compensation.

The Gallant Case: A New Look at Just Compensation

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•THE doctrine enunciated in New Jersey by State v. Gallant[1] cannot be fully understood removed from context. Prior to Gallant, New Jersey had recognized, in condemnation cases, the same rules which applied generally in landlord-tenant law regarding which items were part of the realty and which retained their character as personalty. Thus, the condemnor which could acquire only realty, was under a duty to compensate only for real property taken,[2] and not for personalty. The result was that, generally, the same piece of equipment was treated by the courts as either real or personal property, depending on the circumstances surrounding its annexation, and not dependent on whether the case arose between landlord and tenant or between condemnor and condemnee.

The Appellate Division, in State v. Gallant stated that even if the equipment there at issue was held to be a fixture, it might yet be noncompensable because it was removable. The New Jersey Supreme Court in the same case, however, reversed the Appellate Division and formally disapproved the existing New Jersey Law and Proceeded to create a standard for eminent domain actions totally divorced from the law in other contexts.

Gallant involved a dozen looms installed in a fabric weaving plant in Paterson, N. J. The looms had been operating at the site of the taking from 1917 until 1961 when the State acquired the site in connection with the construction of Interstate 80. One of the looms was 9 ft long, seven were 15 ft long and four were 18 ft long. Their average weight was 8,000 pounds. With the exception of one self-powered loom they were attached to a central power unit by a shaft and belt system. They were bolted to the floor with 3-in. lag screws. Removal of the looms, however, presented a serious problem in that the weight and length of the looms dictated that they be dismantled and reassembled at the new location, because of the stresses occasioned by removal. Furthermore, the looms had, over a period of years, "worn together," and once removed would have to be reassembled in order to insure that each part would be in the same position, relative to the other parts.

For purposes of the appeal, the court accepted testimony that the total value of the looms where located was $52,000 and that the cost of moving would be $39,600 for dismantling and reassembling, plus transportation costs. The court did not indicate how these figures were computed nor did it indicate whether the value in place was as an enhancement to the value of the realty, or as a separate item. The State argued that, pursuant to long settled rules regarding fixtures, that the looms were not part of the realty but were in fact personal property and thus not compensable.

The Supreme Court did not deem it necessary to consider the question of whether the looms in this matter were personal or real property, saying: ". . . compensability for the looms is not dependent upon a determination of whether they would be regarded as fixtures in other contexts." (42 N. J. at p. 586.) The court then, having departed from the line of cases defining realty and personalty, created a new test for compensability of equipment and machinery: "Where, therefore, a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value."

[1]State v. Gallant, 42 N.J. 583 (1964).

[2]American Salvage Company v. Housing Authority of Newark, 14 N.J. 271 (1954).

Paper presented at the 6th Annual Workshop on Highway Law, sponsored by the Department of Legal Studies, Highway Research Board, at the University of Wisconsin, July 1967.

The question of valuation of personal property becomes important, under a literal reading of the court's opinion, at two stages. First, to determine if there is a "substantial" increment in value to the realty, as part of the threshold question of compensability. Second to determine the quantum of compensation if the initial question has been affirmatively answered.

By departing from the traditional concepts of real and personal property and by creating an entirely new category of property which is compensable regardless of its character, the courts appear to have done two things: (a) they have expanded the concept of just compensation, and even the concept of what constitutes a taking, and (b) by requiring compensation for items not previously considered compensable, have challenged the basic principles of appraisal, which may or may not be applicable to this newly created category of things to be appraised.

The concept of just compensation has been subliminally expanded by the New Jersey court to become a comprehensive rather than definitional idea. Until this case, fair market value of real estate taken has been considered the judicially acceptable counterpart of the constitutional mandate for just compensation. It had been recognized that public improvements might necessarily be the proximate cause of loss to certain members of the community for which such members would not be made entirely whole.[3] Until Gallant, the types of loss thus characterized as noncompensable included loss of profits, good will, circuity of access, moving expenses, as well as personal property not affixed to the freehold. The concept of fair market value carved out the area of loss for which the condemnor would indemnify, and corollarily excluded those items of loss which did not fall within the ambit of fair market value. The judicial, and probably societal, reasoning was that non-fair market value areas of loss were speculative, not capable of measurement, largely transferable to new business locations, or not often of very great significance. The disadvantages to society as a whole of allowing compensation in these areas was greater than the advantages to the condemnees in permitting them.

The court in Gallant, however, reasoned that the concept of fair market value was, with a little stretching, expanding to include at least some measure of compensation for losses which are reflected, the court thought, in the fair market value of the property taken. Implicit in the court's thinking was the kind of reasoning expressed in the comment in the Yale Law Journal,[4] which the court cited throughout the opinion. The author of this article took as his thesis that the quantitative increase in condemnation activity, activated by major injections of Federal funds for urban renewal and highway purposes, should effect a corresponding qualitative change in the internal workings of the condemnation process. He states that the large scale acquisition of properties by the public has vastly complicated the removal and relocation of businesses formerly located within the taking area. Therefore, he reasons, the rationale of the earlier doctrines has, in large part, ceased to exist. Profit losses, good will loss, and moving and relocation costs are no longer insubstantial. Therefore, he argues, the businessmen who are compelled to move from areas where they have established trade are only partially compensated by receipt of moneys representing the value of the real estate taken. He contends that full compensation demands that the concept of fair market value be used as the starting point only and that additions thereto be made for a variety of items heretofore considered noncompensable.

In this respect the New Jersey Supreme Court's decision in Gallant goes beyond the mere determination of whether a particular set of looms in a particular factory should be paid for by the condemnor. Gallant may have become an opening in our basic understandings within the condemnation structure. It challenges the fundamental assumption that just compensation and fair market value are not only interrelated ideas, but that they are identical. Once this assumption of identity has been challenged, how long will it survive?

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[3]See, e.g., Beseman v. Pennsylvania Railroad Co., 52 N.J.L. 235, (Sup. Ct. 1888), aff'd o.b. 58 N.J.L. 221 (E&A 1889).

[4]67 Yale L.J. 61 (1957).

Gallant was followed, in our state by a trial court decision in a later case (Port of New York Authority v. Copper Pigment & Chemical Work, Inc., unreported) in which the principle enunciated in Gallant was given a novel turn. In a lengthy opinion by the trial judge, sitting as the trier of fact, the court found to be compensable certain machinery and equipment "fastened to deep concrete bases, connected by numerous pipe lines and electric wiring to other equipment and to the structures on the land." The peculiar nature of the dye and pigment business is such that among the most valuable assets of the condemnee were the patents and special processes used in the manufacture of its product. The court found, as a matter of fact, that the patents and processes were so integral to the operation of the business that "there is no market value for such a plant as this without a sale of the secret processes for which constructed and the good will of the business. It is therefore only possible to arrive at a valuation on the basis of reproduction costs." [Emphasis added.]

Thus, while recognizing that the machinery and equipment, as a market item, will be of little value, the court goes on to apply the real estate condemnation principle of reproduction cost to arrive at a value for this equipment, which value was then added to the real estate valuation—this, despite the fact that Gallant specifically turned on the determination that compensation should reflect the enhanced value of real estate by reason of the presence thereon of certain classes of personal property.

The Copper Pigment case thus extended, and perhaps clarified, the doctrine of Gallant. At the same time, it obscured many of the practical necessities of acquiring property for public use. If Gallant is a move toward total indemnification of the condemnee for all loss occasioned by the condemnation, then it is only logical that the court should use any approach at hand to achieve this objective. The more fundamental questions, however, remain unanswered: Is total indemnification a proper objective, and are the courts the proper or even the most efficient organs of government to accomplish this end? If there are legitimate and reasoned arguments for answering either of these questions in the negative, however, then the doctrine of Gallant and cases like Gallant should be reassessed.

I also suggest that the Gallant doctrine, in addition to its impact on the traditional conception of just compensation, may prove to have a more immediate impact on another concept in eminent domain, the taking. What constitutes a taking has become, in New Jersey, a particularly sensitive question. A recent Supreme Court of New Jersey opinion effectively postponed decision on this point for at least two years. In that case The Board of Education of Morristown[5] commenced an inverse condemnation action on the theory that the State would deprive it of the beneficial use of its property, by building a highway so close to an elementary school that it would make continued use of the property for school purposes difficult or impossible. It was claimed that in this instance that the State would take the property, in the constitutional sense requiring just compensation, even though it would not physically appropriate one inch of its land, and would acquire no easement or other right or interest therein.

The New Jersey Supreme Court held that the action to compel condemnation was premature because the road had not yet been constructed, and it would therefore be impossible to determine the effect which the road would have when completed. The court specifically reserved decision on the central question of whether, if a total or substantial deprivation of beneficial use exists, such deprivation would, in fact, constitute a taking in the constitutional sense. New Jersey's constitution does not provide for compensation for "damage."

The State had argued before the Court that the word "take" in the New Jersey Constitution does not mean the same as "damage" or "deprive." The concept of taking involves not only the deprivation of rights in realty, but the corrollary acquisition of those rights by the taking authority.

The rationale and assumptions of Gallant, however, run directly counter to the State's understanding of what is implied by the word "taking." In Gallant, as in other constructive annexation cases, the condemnor is only empowered to take real estate.

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[5]Board of Education of Morristown v. Palmer, 46 N.J. 522 (1966).

When the court flatly states that the condemnor will be required to make compensation for an item regardless of whether that item is classed as real or personal property in other contexts, it would seem to be saying that it makes no difference what the condemnor acquires, but that full focus will be on what the condemnee loses.

Besides expanding fundamental legal concepts, the Gallant doctrine will pose some rather puzzling problems in its practical application: By creating a new category of items which whether considered to be real or personal property are nonetheless compensable in condemnation, the courts have invited appraisal problems of a new order.

It will be likely that the courts will continue to encounter circumstances comparable to those in the Copper Pigment case, where market data sufficient to form a sound appraisal estimate cannot be found, and perhaps do not exist. The courts, drawing on past precedents in the real estate condemnation context, will probably continue to apply reproduction cost less depreciation to compensable personalty. The familiarity which the courts have with this approach should not mislead them into believing that it will be equally applicable to every personal property appraisal situation. Even in the real estate appraisal context the reproduction less depreciation method is generally recognized as a means for setting the upper limit of value. There is no reason to suppose that, even where appropriate, this approach will yield a more accurate result in the field of personal property evaluation.

The starting point of arriving at a reproduction cost is not uncomplicated. In many instances constant improvement of techniques makes the cost of a machine less today than when purchased; in other cases replacement machinery has a greater efficiency or capacity than the machinery to be evaluated. Cost new is obviously a fallacious criterion for a variety of reasons. Furthermore, the characteristics of industrial machinery and equipment are such that they are more typically subject to obsolescence than realty, and the obsolescence is often of a totally different and novel nature. Technological advances, for example, daily render obsolete equipment which is apparently new and modern.

Even the relatively standard forms of depreciation may have no relevance, and where relevant may be difficult to apply. Expected life, for example, may be of no concern where machinery is habitually replaced periodically within the industry. In some instances, machinery and equipment will have a longer life expectancy than the buildings which house them. If enhancement in value to the realty is the standard, what depreciation factor should be used? In those cases where the taken equipment is obsolete by virtue of technological advances, what factor for physical depreciation should be used?

I mean only to suggest some of the questions which the court's new look at just compensation will generate. They are not, of course, insoluble, but solution will not be easy. In the long run, however, the greatest problems created by these decisions and by the judicial feelings which underlie them, may be the continued enlargement by the courts of those areas of loss for which government will be liable in condemnation. If such an enlargement is necessary or proper it is suggested that thought be given to legislative rather than to judicial implementation. It has not been the purpose of this paper to support the theories of expanded compensation, but rather to question whether we are not at a crossroad in the evolution of our eminent domain doctrine.

Fixtures in Condemnation

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•IF there is anything that can be considered as uniform in the law of fixtures it is the often expressed conviction in the cases and in the literature that the problem of defining a fixture is as difficult as the venerable problem of defining "virtue." For example, "The law of fixtures is murky and obtuse."[1] "The problem as to what do and what do not constitute fixtures is often a difficult one, and there is a considerable twilight zone."[2] Just to show that the same confusion reigns in the Far West as in the East, we quote the Supreme Court of Washington, as follows[3]:

> We will not undertake to write a treatise on the law of fixtures. Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take . . . . "There is a wilderness of authority. . . . [Fixture cases] are so conflicting that it would be profitless. . . to review or harmonize them."

Specific examples are numerous: A log-chain in Maine held to be a fixture and part of the realty; a three-ton engine, firmly attached, held to be personalty in Massachusetts. In Maryland cutting tables and crates[4] were held to be constructively annexed, while a multi-ton traveling crane[5] was held to be personalty.

In Maryland fixtures were first "defined" in Dudley v. Hurst[6] in which the Court of Appeals laid down the following rules, which, by endless repetition, both by our Court and by many other authorities, have attained the status of Scripture:

> The tests by which a fixture is determined are generally these:
>
> 1st. Annexation to the realty either actual or constructive.
>
> 2nd. Adaptation to the use of that part of the realty with which it is connected.
>
> 3rd. The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed. . . .
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> Of these tests the most important is the question of intention. This is clearly shown by the fact that the law is very different between landlord and tenant and mortgagor and mortgagee, or what is the same,

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[1]Stiller, S.D., The Maryland Law of Fixtures, 23 Md.L.Rev. 21 (1965).
[2]Born v. Hammond, 218 Md. 184, 140 A.2d 44, 47 (1958).
[3]Strain v. Green, 25 Wash.2d 692, 172 P.2d 216 (1946).
[4]Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am.St.Rep. 368 (1887).
[5]Consolidated Gas and Electric Co. v. Ryan, 165 Md. 484, 169 Atl. 794 (1934).
[6]Later cases following the precepts of Dudley v. Hurst are as follows: Solter v. McMillan, 147 Md. 580, 63 Atl. 70 (1906); Anderson v. Perpetual Building & Loan Assn., 172 Md. 94, 190 Atl. 747 (1937); Schofer v. Hoffman, 182 Md. 270, 34 A.2d 350 (1943).

Paper sponsored by the Department of Legal Studies.

> vendor and vendee. Many things being held as fixtures between vendor and vendee, which do not loss their character of personal chattels when the question is between landlord and tenant. . . .

The Court first enunciated the doctrine of constructive annexation in this case in the manner following:

> That where in the case of machinery the principal part becomes a fixture by actual annexation to the soil, such part of it as may not be so physically annexed, but which if removed would leave the principal thing unfit for use, and would not of itself and standing alone be well adapted for general use elsewhere, is considered constructively annexed.
>
> Thus the key of a lock, the sail of a wind-mill, the leather belting of a saw-mill, although actually severed from the principal thing, and stored elsewhere, pass by constructive annexation. They must be such as go to complete the machinery which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use. . . .
>
> In this case there are some articles not actually annexed to the soil, such as crates, capping machines and work tables, but are essentially necessary to the working of the principal machinery, and pass by constructive annexation. The main machinery would not be in working condition without them, and they are not adapted for general purposes.

Subsequently the court made plain that the doctrine of trade fixtures as it relates to the landlord-tenant relationship has no application to the condemnor-condemnee relationship and that the latter relationship is identical with that of vendee-vendor.[7] Obviously, therefore, that body of cases dealing with "trade fixtures" as such has no application to a determination of what are or are not fixtures under Maryland law.

The doctrine of constructive annexation has so far been applied only to industrial establishments by our Court, and the case of the 13-ton traveling crane involved a contention by a mortgagee of the realty that the same was constructively annexed; the rails upon which it traveled being firmly embedded in concrete. Our Court distinguished that case from Dudley v. Hurst pointing out that the obvious function of the traveling crane was to carry raw materials and finished products from place to place within the plant, and was, therefore, in no wise connected with the productive processes of the plant.

The Himmel case[8] made it quite clear that the effect of fixtures upon value of the whole property in condemnation is identical with the effect of any other permanent improvement on the land. Accordingly, there should be adherence to the concept that what is valued is the land as enhanced by the permanent improvements upon it. If the improvements add nothing to the land—as where the entire value is greater for another use—then the improvements, be they buildings or fixtures, are to be regarded as a detriment rather than an asset to the land[9]. For example, if a blacksmith's shop with its forges, anvils and metal-working equipment is located on land obviously worth in the area of \$50.00 per square foot, then the value would be based upon \$50.00 per square foot, less what it would cost to dispose of the "improvements." In such instance, were the blacksmith to receive \$50.00 per square foot for his land, plus the replace-

[7] Warren Manufacturing Co. v. Baltimore, 119 Md. 188, 86 Atl. 502 (1913).

[8] Baltimore v. Himmel, 135 Md. 85, 107 Atl. 522 (1919).

[9] See also Hance v. State Roads Commission, 221 Md. 164, 156 A.2d 644 (1959), and Sackman, J. L., Fixtures in Condemnation: Concepts New and Old, in Proceedings of Institute on Eminent Domain (Southwestern Legal Foundation, Dallas, 1964).

ment less depreciation value of his buildings, machinery and equipment, he would be "double-dipping" into the public treasury.

We must also be aware of the other side of the coin. For example, a specialized machine shop consisting in large measure of huge metal shaping and turning machinery, well-engineered, and an apparently successful enterprise on land suited for the use, could contend that the individual pieces of equipment add more to the value of the land than their simple replacement cost less depreciation.

Historically, in Baltimore City and in the State of Maryland, the value of a manufacturing enterprise has been arrived at in the following manner: A real estate appraiser is hired to value the land and buildings and a machinery and equipment appraiser is hired to value the machinery and equipment, utilizing only the method known as the replacement cost, less depreciation. The depreciation referred to has almost uniformly consisted only of physical depreciation and little or no attention has been paid to the possibility of functional obsolescence, either of individual pieces of equipment or of the entire operation, and economic obsolescence. This situation has required an entire new look at our method of valuation. The principle announced in Himmel is difficult to apply in that it has been virtually impossible to find persons capable of correlating the entire picture in any of such cases.

SOME CASE HISTORIES

The discussion which follows presents some individual cases and the approach to value which has been suggested. Where an approach has not been either decided upon or suggested, the problem is outlined as we see it.

Ice House

In the first case, an ice plant located downtown must be wholly taken for expressway purposes. In addition to real estate appraisers, two independent machinery and equipment appraisers valued the individual items of machinery and equipment regarded as fixtures, using the summation method. Both appraisals were in the neighborhood of $500,000.00, each starting from a replacement cost base of $1 million. The machinery and equipment specialists utilized price lists and information gained from the manufacturers of the machinery under consideration as to present-day price, and they, by eyeball inspection, determined what, in their experience, was the proper depreciation factor to be used.

As a check upon such valuation, the State's Right-of-Way Department uncovered an engineer who had recently designed and built a plant of the identical capacity (300 tons per day) for some $325,000.00. The reason for the difference in value new of that placed on the subject and the actual cost of the new plant was the advance in technology in such industry. The compressors and much of the other equipment in the plant had been long outmoded and are virtually impossible to replace today. It is proposed, therefore, to ignore the original machinery and equipment valuation and to proceed from the more realistic replacement cost indicated.

Stone Yard

The second case involved a taking of a stone yard. Baltimore is known as the "Monumental City" due to (I think) two things—first that it was the first city to erect a monument to the "Father of Our Country," and second, due to the vast numbers of statues to be found decorating parks and squares, much of the marble having come from local sources. At the turn of the century, there were many stone yards such as the one under consideration, but today this is the only one existent. It was established as a family business and has been maintained as such for about 75 years.

Evaluation of the land, buildings, machinery and equipment amounted to more than $250,000.00, arrived at by the addition of land and buildings to machinery and equipment appraisals from the same people who made them in the preceding case. It was learned that the gross sales of this enterprise amounted to approximately $85,000.00 a year. Naturally, such information would have no place in a condemnation case; how-

ever, it is valuable in permitting us a check upon the value arrived at by the so-called traditional means. These facts suggest that if the appraisers are correct, a buyer, ready, willing and able to buy, and fully informed as to all factors of value, would pay $250,000 to go broke.

One of the items of machinery and equipment valued at approximately $4,000 was a generator, the purpose of which was to convert alternating into direct current. Modern technology has developed a converter costing some $200.00, which has no moving parts; which weighs about 50 pounds; consumes one-third of the current of the generator; and does precisely the same job.

Another item of "valuable equipment" was a huge lathe used in turning marble columns. This lathe, according to the owner, had not been used in many years and only then to replace a column in an old building which had been damaged by accident. It is obvious that this enterprise has suffered from economic obsolescence. Other building methods and materials have usurped the function of stone yards, and what we have here is an obsolescent enterprise, barely marginal in the economic sense.

Bakery

In the third case, a bakery, manufacturing only hot-dog and hamburger rolls, was taken for the purposes of one of the State highways and all of the machinery and equipment was considered to be either actually or constructively annexed to the realty. The owner took advantage of the condemnation to go into business in a new location in a completely automated plant. He undoubtedly got a windfall from the condemnation in that machinery and equipment appraisers in the business of evaluating, as well as the buying and selling of bakery equipment, had simply valued such equipment by the summation method without allowing for obsolescence.

Fish Oil Reduction Plant

The fourth case concerns a factory engaged in the refining of menhaden oil. The industry of which the refinery is a part employs a fleet of airplanes to locate schools of menhaden and to direct its fleet of fishing boats. The fish are taken by purse seine, transported to on-shore reducing plants which separate the crude oil from the fish. Fish meal is one of the products; crude menhaden oil is the other. The crude oil is subjected to a tremendously complicated and varied series of chemical and mechanical processes to produce various oils used in the paint and varnish industries and in a growing number of processes. The plant can best be described as a pipe-fitter's nightmare—a labyrinth of tubes, pipes, coils, tanks, cables, and wires running overhead, underground and both inside and outside of the buildings. It is the only industry of its kind in the country, and no one who has not grown up with it knows very much about it.

Condemnation would pose enormous problems for the management of this plant. Production cannot be stopped, since what the condemnation would take is but one link in an industrial chain, and the refining plant is a continuous operation. It is tentatively proposed to start construction of another plant, and to reconstruct brand-new approximately one-third of the operation. When this has been done, one-third of the productive machinery will be dismantled and reassembled at the new location. When this has been done, another third will be moved. The last third will be abandoned.

Machine Shop

Condemnation of a highly specialized machine shop has similar problems. In order not to curtail operations, the plant wants to move its huge machine tools piecemeal by dismantling and reinstalling them over weekends, so that that part of the operation is uninterrupted. Moving costs in this instance may be expected to be at least doubled in that such moving must be done at night and on weekends when the cost of highly specialized labor needed for moving is at time and a half, or double time. The condemnor might be able to solve this matter by purchasing such of the machinery as would qualify

under Maryland law as fixtures, rather than to pay huge moving costs which would be largely nonparticipating. If such an arrangement is worked out, it is hoped that a contract negotiated for the purchase of these fixtures would provide for a resale to the owner at the market prices for the individual items of the equipment. The latter would be significantly lower than the in-place value and enough to take care of the cost of moving the equipment.

Some Views on the "Larger Tract" Doctrine

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•COURTS and text writers, when considering the question of damages to a landowner's remaining land—the so-called "larger tract" concept—have generally set up three criteria for use in determining whether certain parcels of land constitute a "larger tract" or/are simply separate parcels of land in one ownership. These criteria are (a) unit of ownership; (b) unity of use; and (c) contiguity. While helpful, these criteria oversimplify the problem somewhat, and may have, to some degree, engendered confusion in handling the larger tract concept. A more detailed set of criteria might, in some measure, remove the major part of this confusion, and the following framework for analysis of the valuation problem where partial takings occur through condemnation:

1. Unity of ownership: (a) as to the owners of the fee estates, and (b) as to the owners, if any, of lesser included estates.
2. Unity of use—disunity of use: (a) as to the owners of the fee estate, and (b) as to the owners, if any, of the lesser included estates.
3. Unity of Estates: (a) as to the owners of the fee estate, and (b) as to the owners, if any, of the lesser included estates.

Unity of use and contiguity do not have the same meaning in this context, for physically noncontiguous tracts may be constructively contiguous due to the relation which the usage of the two tracts have to each other. On the other hand, a single physical tract may be considered to contain two separate tracts for assessing damages because of two distinct and separate uses. Contiguity has, therefore, been discarded as a criterion in the discussion which follows.

Unity of ownership and unity of estates also have an interlocking relationship. For example, if A owns one tract and B owns another which he leases to A, there is a disunity of ownership and disunity of estates, depending on whether the fee or the leasehold estate is used as the criterion. If, therefore, unity of estate is substituted for contiguity in applying the criteria to determine what constitutes the larger estate, much of the travail which has hampered the solution of this problem may be obviated. Viewed in its true perspective, contiguity, in nearly all instances, is little more than a derivative of unity of use, and not in itself a separate factor. Retention of contiguity as a criterion merely beclouds the issue. This point may be illustrated as follows:

Example 1: Suppose two separate but adjacent tracts of land are acquired from different owners at different times by a third owner. Unity of ownership and contiguity are both clearly present, and the question of whether or not the two tracts constitute one larger tract can only be determined on the basis of unity of use. If both tracts are used together for the purpose of a single enterprise with such inseparability of use as to make the taking of all or part of one tract harmful to the other tract, then, clearly, the two tracts constitute a single larger tract.

Example 2: On the other hand, suppose that each tract is used for completely divergent uses or business—a garage on one tract and a farming operation on the other. The unity of ownership and contiguity still remain as in Example 1 but there is absolute lack of unity of use. Under these circumstances, each tract is the larger tract.

If a situation is assumed in which all elements of the foregoing examples are the same except that the two tracts are separate and noncontiguous, the lands in Example 1 above have unity of use without contiguity, and the taking of all or part of either sep-

arate tract damages the other. Here both of the separate tracts should be considered as constituting the one larger tract. Applied to Example 2, however, the opposite result occurs. Since the two separate, noncontiguous tracts are used for completely divergent purposes, the taking or damaging of all or part of one tract does no injury to the other tract, and each separate tract constitutes a separate larger tract.

The foregoing examples demonstrate that contiguity is not an essential element or criterion for determining the larger tract. Unity of use can either divide one tract into two larger tracts, or combine two separate tracts into one; contiguity or the lack thereof plays no decisive role in solving the problem. At best contiguity is an evidentiary factor.

A few courts have timidly begun to move toward this proposed reduction of criteria by suggesting that separate tracts with unified use have "constructive contiguity." Still fewer have stated that contiguity is an evidentiary rather than an operative fact, and therefore not a controlling criterion. For example, in Baetjer v. United States, the court said:

> Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but, we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges. [Emphasis added.][1]

If this proposal is adopted, a further bothersome problem is virtually eliminated. In considering the separate tract problem, many courts have spent considerable time on the separative element. Some have held that if the different tracts are separated from the fee ownership, the decision goes one way, and if the tracts are separated by a public or private easement or natural divider, the decision goes in another direction. There appears to be no good reason for such finite distinctions, and by concentrating on the three criteria proposed above, all these court-made difficulties and distinctions disappear. Thus, the rule could easily be stated as follows: If there is unity of ownership and inseparable unity of use, separate tracts are to be considered as one. On the other hand, where portions of a single tract are subject to uses which are separate and distinct, with no real integrated unity of use, the land must be considered as separate tracts for valuation purposes.

Two situations would still present some difficulty, namely: where a single tract is rented to a number of different tenants—as in the case of a shopping center—and where the land is vacant or unused, and thus its usage cannot be established. In the case of the shopping center, the fact that the tenants or lessees only rent a portion of the structural improvements on the land, and have a sort of joint or common interests in the remaining (parking) area would seem to indicate that the shopping center was in fact one tract. Here contiguity might well play an important evidentiary role. In the case of the undeveloped tract or tracts, there is no combining usage, and the tracts must remain separate. Or, if only one tract is involved, the tract could not be subdivided for purposes of valuation.

It is possible, also, to visualize a problem arising where various tracts are purchased for the clear purpose of assembling plottage, on which all existing improvements will eventually be demolished, so that a new integrated single usage may be developed. What would happen if condemnation of a portion of this tract (or all the assembled plottage) intervenes before the developer's intent can be effectuated?[2] Barnes v. State

[1] 143 F.2d 391 (Puerto Rico, 1944), cert. den. 323 U.S. 772.

[2] Delay could result from a variety of circumstances; for example, title problems, financing negotiations, probate and estate delays, or existence of long or short term leases on some of the desired property.

Highway Commission, which will be discussed in some detail later, comes close to this situation, except that no improvements existed on the several tracts. Straight forward application of the larger tract criteria would clearly require holding that each parcel was a separate tract, although, in unusual circumstances, other evidentiary elements might temper this result. For example, does the avowed intention of the landowner fit into his general pattern of operations? (Is his primary business the building of shopping centers?) Or, how far have the landowner's plans progressed as evidenced by ante litem motam evidence—blue prints, advertising, statements at stockholders' meetings, requested zoning changes, and the like. Unsupported oral evidence by an owner as to his itentions should be treated with skepticism. Contiguity might in this case also be entitled to weight, for, if one or more plots in the area have not yet been acquired, it might well be that the plottage could not ever be assembled and the entire plan could be frustrated by an adamant landowner.

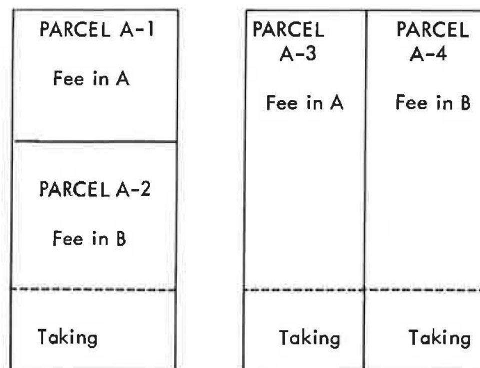

Figure 1.

In the outline of proposed criteria set forth above, a careful distinction was made between the owner or owners of the fee estate and the owner or owners of lesser included estates. For purposes of this discussion lesser included estates will generally be considered as, and limited to, leasehold interests. This limitation is based on several reasons:

1. A leasehold is probably the most commonly found and used lesser estate, and what law exists on this subject involves leases. In the southwestern United States, because of the vast areas of state and federally owned land—generally leased for grazing purposes—this is certainly the case.
2. The rules or rationale applicable to leaseholds are, in all important respects, equally applicable to other types of lesser interests.
3. A proper handling of the larger tract concept requires that it first be explored and limited by the assumption that only fee estates are involved.

This is the simplest aspect of the problem, and once the rules relating to fee estates are derived with reasonable clarity and certainty, the process can be repeated in cases with mixed estates—fee estates and leaseholds.

FEE ESTATES

At the outset, it may be helpful to illustrate the larger tract concept by means of diagrams of typical situations in which the problem of larger tract determination arises.

In Figure 1, the tract is divided into two parcels of land. Parcel A-1 is owned by A, and Parcel A-2 is owned by B. The taking by condemnation is from Parcel A-2 only. Owners A and B have no legal interest in each other's parcels, and are strangers to each other. No connective use or joint use of the parcels exists.

The second tract (Fig. 1) is also divided into two parcels. Owner A owns Parcel A-3; owner B owns Parcel A-4. In this case the taking is from both parcels. In other respects the circumstances are similar to the first example, that is, the landowners have no legal interest in each other's parcels, and there is no joint or connective usage of the two parcels.

Based on these circumstances, the query may be made: Can Parcels A-1 and A-2, or Parcels A-3 and A-4 be combined into a single larger tract for the purpose of assessing damages in the event of a partial taking? Aside from the mere physical contiguity and a taking from both parcels, there is nothing which would justify the combining of either of these pairs of parcels into a single larger tract. If these par-

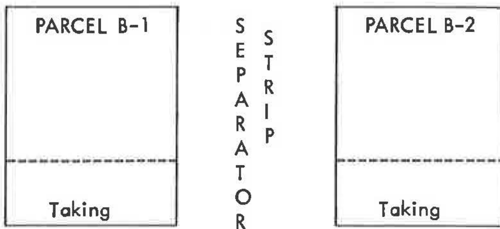

Figure 2.

cels could be combined, then the entire area, be it a city, county, state or nation, would always be the larger tract, and the larger tract doctrine would be reduced to an absurdity. Although there is physical contiguity in the case of the parcels in both tracts, there is no unity of ownership or unity of use. In order to allow combination into a larger tract, both of these factors (unity of ownership and unity of use) must be present, and the lack of either is fatal notwithstanding the presence of contiguity of the parcels.[3]

In the circumstances which were assumed for Tracts A-A and A-B, there was no joint or connective usage of the parcels. In one instance, where either A or B was adversely using or occupying the other's parcel, there could be a possible, although remote, chance of a connective or joint use. Until such use had ripened into a prescriptively acquired right, the user would, however, be at sufferance, and the person asserting it would be a trespasser. Since trespassers have no standing in an eminent domain proceeding, such used could hardly satisfy the requirement of unity of use.[4]

It is possible, however, to inject the factor of connective use into the problem by two small changes in the facts. If it is assumed that landowners A and B are not strangers, but are related (either by family or business ties), and if it is further assumed that these owners actually conduct their business relating to their parcels in a close and coordinated manner, the possibility of determining that a larger tract may be created from a combination of two parcels is not nearly so remote as in the case of the trespasser.

Figure 2 introduces the factor of physical obstructions to joint or connective use. Here Parcels B-1 and B-2 are both owned by A, but they are physically separated by a divider. Such a divider may be of several sorts, and either man-made or natural. Man-made dividers might include railroad or other rights-of-way, streets, highways or alleys, canals or ditches, political boundaries, or other fee estate landholdings. Natural dividers include terrain features (mountains, canyons, arroyas), water courses or bodies of water (lakes, bays), or simply the matter of distance. As to the tracts in Figure 2, the question is whether Parcels B-1 and B-2 can be combined into a single larger tract for the purpose of assessing damages for a partial taking.

In this instance, the unity of ownership is present, therefore success in combining the two parcels into one larger tract depends on: (a) whether the unity of use is sufficient to make these apparently separate parcels constructively contiguous and unified; (b) whether there is actual physical contiguity based on ownership of the underlying fee of the separator strip, or whether the separator is naturally or artificially created; and (c) whether the lack of use (non-use) of any of the land in question is a controlling factor. Decisions in cases involving separated parcels of land merely point up differing results without clarifying any rule or rationale.[5] However, a close examination of the circumstances of the cases indicates that if contiguity is disregarded a pattern of results controlled by the factors of unity of use and unity of ownership can readily be seen.

Figure 3 illustrates the problem of "paper subdivision." Parcel C-1 is entirely owned by A, who has caused it to be surveyed for subdivision into blocks and lots. However, no subdivision plat has been recorded, and no lots have been sold, so, presumably, A may cancel his plan and withdraw his offer to dedicate streets. Under these circumstances, the proposal of a partial taking through condemnation presents

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[3]See: Sharp v. United States, 191 U.S. 341, (1903); Kennedy v. State Highway Department, 132 S.E.2d 135 (Ga. App., 1963); Duggan v. State, 242 N.W. 98 (Iowa, 1932).

[4]San Benito County v. Copper Mountain Mining Co., 45 P.2d 428 (Cal. App., 1935).

[5]Annotation in 6 A.L.R2d 1219-1226 contains cases involving various separative factors, including waterways and watercourses, highways, railroads, fee lands of third parties.

PARCEL C-1 ALL OR PARTLY SUBDIVIDED; NO LOTS SOLD Fee in A		
BLOCK 4	BLOCK 5	BLOCK 6
LOT 1	LOT 1 Taking	LOT 1

PARCEL C-2 ALL OR PARTLY SUBDIVIDED; SOME LOTS SOLD (All to different owners) Fee in A		
BLOCK 4	BLOCK 5	BLOCK 6
LOT 1	LOT 1 Taking	LOT 1

Figure 3.

A with the question of whether to treat the entire Parcel C-1 as the larger tract, or each individual surveyed lot as a separate larger tract.

The results in this set of circumstances may be compared with those in the case of Parcel C-2, where A owns the entire tract, and has not only subdivided it, but also sold off lots in one of the blocks to several owners. In the event that a partial taking of Parcel C-2 removes one lot from each of the three platted blocks in the subdivided portion, what part of the parcel is to be regarded as the larger tract? For a taking of Lot 1 in Block 4, there is no difficulty; the lot itself is the larger tract. However, in Blocks 5 and 6, the problem for A is whether his larger tract includes Blocks 5 and 6 or the entire parcel of partly subdivided, partly unsubdivided land. Understandably, this is a situation in which the facts play a decisive role, and evidence of how far the owner, A, has gone in actually developing separate uses for the subdivided and unsubdivided portions of his land holds the key to the valuation problem.[6]

UNITY OF FEE OWNERSHIP

One of the earliest discussions of the effects of unity of ownership on the valuation problem in eminent domain occurred in the Illinois supreme court's decision in Conness v. Indiana Railroad Co., in 1901.[7] Here John Conness owned one parcel of land in fee with his brother, and another parcel in his own name, subject to a life estate held by his mother. Each parcel consisted of a quarter-section of land, and the two parcels had been farmed as a single unit for a number of years. All the farm improvements were located on the tract owned by John Conness subject to his mother's life estate. When the condemnation in the case occurred, it involved taking part of John Conness' parcel, and the question of determining the larger tract was raised not only by the unity of usage, but also the fact that John Conness' brother claimed an oral lease in this parcel from his mother subject to her life estate.

In discussing the application of the larger tract doctrine, the Illinois court said:

> A special complaint is made, however, of [the] instructions...upon the ground that they told the jury that, in fixing the compensation to be paid, they must not take into account the fact that the right of way divided the two interests of the appellant in the two quarters, but must consider each interest separately and as if standing alone, or as if the other of the two interests belonged to an entire stranger. There was no error in this. In the view that we entertain and have expressed above,—that the interests of appellant, as shown by the evidence, were so distinct and so unlike in character that they cannot be said to have anything in common, then those instructions were in keeping with that view, and were right. [Emphasis added.][8]

[6] Ibid., at 1197.
[7] 62 N.E. 221.
[8] Ibid., at 223.

A decade later, the Indiana court held to essentially the same view in Glendenning v. Stahley[9], as follows:

> Appellant...Glendenning owns an 80 acre tract of land lying immediately north of the proposed road, and the 20 acres lying directly south of the same, and south of the road, is owned by Glendenning and his wife as tenants by entirety. Appellants sought to show the market value of the 20 acres considered in connection with and as part of the 80 acre tract as now used and farmed, and also considered, in the same was, what its value would be with the highway established. The court excluded the offered testimony. It is settled that in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm, without regard to governmental subdivision.... This principle cannot be extended to cover land owned by different proprietors, although contiguous and used under one management and for a common purpose. Claims for damages in proceedings of this character are personal, and must be asserted in the name of the actual owners of the lands affected. One person may not recover damages sustained by another, and manifestly special damages suffered by one proprietor could not be compensated by benefits accruing to another. The court did not err in sustaining appellees' objections to the questions propounded.[10]

Both these Illinois and Indiana decisions were available to the Tennessee court in 1916 when it decided Tillman v. Lewisburg & Northern Railroad Co.[11] There, plaintiff and her husband owned a 105-acre tract as tenants by the entirety, and plaintiff later became the owner "to her sole and separate use" of a 25-acre tract separated from the 105-acre tract by a public turnpike. The residence of the plaintiff was located on the smaller tract, and the two tracts were operated together as a farm. The water supply for the residence and the other farm improvements were all located on the 105-acre tract. The railroad's condemnation took part of the 105-acre tract, but in accepting compensation for the taking, plaintiff reserved the right to claim damages for incidental injury to the 25-acre tract. When suit was commenced later for this purpose, the Tennessee supreme court sustained the railroad's demurrer, noting that there were few authorities on the point, but citing the Conness and Glendenning decisions and concluding that where the two tracts were held by different persons under different titles they must be considered as separate for valuation purposes. In two of the above cases the different owners were married couples. The same results, however, were applied by the Iowa court where a brother and sister jointly owned the lands in question.[12]

Whereas most of the law of the 19th and early 20th centuries on this point was made in cases involving railroad condemnations, the enlarged program of highway construction in the 1950's and 1960's led to a series of cases in which roadbuilding agencies' land acquisition was the setting for determining the larger tract question. In most of these cases, the earlier precedents of the railroad era were followed. Thus in 1963, the Iowa court considered the question of valuation where three lots were taken in their entirety.[13] One of the three was owned jointly by a husband and wife; the remaining two were owned by the husband individually and used in his auto repair business. The jointly owned lot was separated from the other two by an alley, but testimony was offered that it was used in conjunction with the others. On appeal the admission of this testimony was upheld, but the court made it plain that it could only be used to show the reasonable market value of the jointly owned lot, and not to permit damages to be as-

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[9] 91 N.E. 234 (Ind., 1910).
[10] Ibid., at 238.
[11] 182 S.W. 597 (Tenn., 1916).
[12] Duggan v. State, 242 N.W. 98 (Iowa, 1932).
[13] Crist v. Iowa State Highway Commission, 123 N.W.2d 424 (Iowa, 1963).

sessed for the lots owned by the husband individually. Highest and best use rather than unity of use, therefore, was the determining factor.[14]

In Washington, the state supreme court considered the case of three tracts owned by members of the same family, and farmed as a unit with profits divided among the three owners under an alleged oral trust.[15] Striking out the trust under the Statute of Frauds, the court declared that the fact that the ownership was divided disqualified the owners of adjacent tracts from collecting damages notwithstanding the fact that all three parcels were operated as a single farm unit. Similarly, in Kansas the same result occurred where the taking affected all of the several parcels which were operated as a single farm unit.[16] And, in South Dakota, where father and son owned two tracts which were operated as a single ranch, the court refused to allow a stipulation that the lands were to be treated as a single unit for condemnation purposes.[17]

An unusual fact situation was presented in the Louisiana case of State v. Rachl, where condemnation proposed to take 2.7 acres of a 9.1-acre tract.[18] Within this tract it was undisputed that Rachl owned 2.5 acres, but title to the remaining 6.6 acres was in dispute. After commencement of the condemnation proceedings, all claimants to the title entered into an agreement that recognized Rachl's ownership of an undivided one-half interest in this portion. However, the taking did not physically affect the 2.5 acres which Rachl owned individually, and the court held that he was not entitled to severance damage on this part of the total tract.

One of the most interesting recent highway condemnation cases to illustrate the unity of ownership question was Jonas v. State, in which the ownership of land was held by corporate persons.[19] Here the highway department took 7 acres of land with buildings and fixtures thereon. Jonas & Sons, Inc., owned two of the buildings involved, and Jonas Fur Farm, Inc., owned the remaining building and fixtures. Jonas & Sons, Inc., also owned a 1½-acre parcel separated from the 7-acre tract by a street. The 1½-acre parcel was used for the manufacture of fur farm equipment which was displayed and sold on the 7-acre parcel. The stock of each corporation was held in equal shares by Jonas and his two sons, and there was no showing of a written lease between any of the parties either as individuals or corporations. In discussing the question of valuation the court said:

> A corporation is treated as an entity separate from its stockholder or stockholders under all ordinary circumstances. Although courts have made exceptions under some circumstances, this has been done where applying the corporate fiction "would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim...." Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result. In the present case, those who created the corporation in order to enjoy advantages flowing from its existence as a separate entity are asking that such existence be disregarded where it works a disadvantage to them. We do not consider it good policy to do so.
>
> Moreover, even if the stockholders of Jonas & Sons, Inc., Mr. Jonas and his two sons, were to be considered as the real owners of the parcel west of Martin Avenue, the two sons had no real interest in the fee of the parcel to the east. There the owners were Mr. and Mrs. Jonas.
>
> We conclude that the issues as to the unity of use, the value of the two parcels considered together before the taking, and the value of the parcel west of Martin Avenue should not have been submitted to the jury.[20]

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[14] The opinion cites Nichols, Eminent Domain, (3d ed., Albany, 1950), §12.314 and 18 Am. Jur. Eminent Domain, §245 indicating that the court felt that the highest and best use factor was more important to the decision of the case than the unity of use.

[15] State ex rel. Wirt v. Superior Court, 116 P.2d 752 (Wash., 1941).

[16] McIntyre v. Board of County Commissioners, 211 P.2d 59 (Kan., 1949), citing, also, 6 A.L.R.2d 1197.

[17] State Highway Commission v. Fortune, 91 N.W.2d 675 (S. Dak., 1958), in which the court held the stipulation to be a nullity as being a stipulation of law rather than facts.

[18] The court cited 18 Am. Jur., Eminent Domain, §271; 29 C.J.S. 983, §140; and 1 Orgel, Valuation of Property in Eminent Domain, §47.

[19] 121 N.W.2d 235 (Wis., 1963).

[20] Ibid., p. 238, also citing Nichols, Eminent Domain, (3d ed., Albany, 1950), §14.31.

Recent cases of highway right-of-way condemnations have followed this pattern when dealing with the question of unity of title. In Kennedy v. State Highway Department, condemnation of two parcels of land was carried out in a single proceeding.[21] The tracts were owned by different individuals, and, over objection, the highway department's expert valuation witness was allowed to offset benefits as to one parcel against the other. The court commented:

> Regardless of whether the evidence showed any unity of use or that the tracts were physically contiguous such as would authorize the offsetting of consequential benefits to one tract against the consequential damages to the other, it is clear that the evidence affirmatively showed that there was diversity of the two tracts. Under the circumstances, it was imperative that the consequential damages, if any, resulting to the separate parcels be assessed separately, and the consequential benefits, if any, be assessed separately.[22]

In still another factual setting, the California court considered the case of two parcels of land, each one owned by one partner of a business and leased to the partnership. The two noncontiguous parcels were used in the same junkyard business, and were connected across an intervening strip of land (owned in fee by a third party) by a private road easement. The condemnation took all of one parcel and part of the other. In the case, damages were stipulated and the issue of the larger tract was tried by the court, which held that the two parcels must be considered as separate.

The court explained that, while unity of use was conceded, the existence of unity of ownership and contiguity were missing. "The existence of the lease," according to the court, "shows that the partners retained the parcels in individual ownership, effecting by the lease the right of the use for the partnership."[23] While the court did not overlook the existence of the private road easement and the possibility of constructive contiguity, it concluded that "no evidence was presented except the bare stipulated fact that both parcels were used in the salvage business."[24]

Without stating it categorically, the California court appeared by this decision to hold that unity of usage requires something more than mere like usage; that is, unity of use requires like usage plus what might be called an element of inseparability. The usage of the parcels must be so linked and intertwined with each other that there would be a serious impairment to the operational usage of the whole if there was a taking from either parcel. The California court, like the others mentioned earlier, seems to point up the judicial insistence on absolute unity of fee ownership before separate parcels of land can be combined to make one larger tract.

A decision contrary to this series of cases comes from the New York Court of Claims in Guptill Holding Corporation v. State.[25] Here, one Guptill, on advice of counsel and his accountant, set up three corporations called "Mastodon," "Guptill Sand & Gravel" and "Guptill Holding Corporation." All three were family-held, and all of the stock was owned by Guptill, except one share held by his wife and one held by his father. Of the two parcels involved, one had been purchased by Guptill in 1947 and transferred to the Holding Corporation in 1956; the other was purchased in 1958, but not immediately transferred to the Holding Corporation.[26] In practice, Guptill regularly comingled the funds of the three corporations, and used them as necessity dictated. The two parcels involved were laid out as one residential subdivision, and a substantial amount of work was done on both to cut roads, construct drainage ditches, terracing and grading. Guptill was served with notice of the condemnation before the second parcel had been transferred to the Holding Corporation.

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[21] 132 S.E.2d 135 (Ga.App., 1963).

[22] People v. Dickinson, 41 Cal.Rptr. 427 (1964).

[23] Ibid., p. 429.

[24] Ibid., at p. 431.

[25] 251 N.Y.S.2d 766 (1964).

[26] As to the second parcel, Guptill received a deed to the property in January 1958, and at the mortgagee's insistence retained title in his own name rather than have it transferred immediately to the holding corporation. The property was held in this manner when condemnation proceedings commenced in May 1959.

The question of what constituted the larger tract arose on appeal, and led the court to say that the facts brought out in the evidence amounted to unity of ownership in addition to contiguity and common use, and thus warranted a finding of severance damage to both parcels of land.

The Jonas case had been decided in Wisconsin only a year before, but the New York Court of Claims bypassed it in favor of reliance on the body of precedent provided by the English Land Clauses Act—a rather surprising step since this law clearly related to unity of use rather than title.

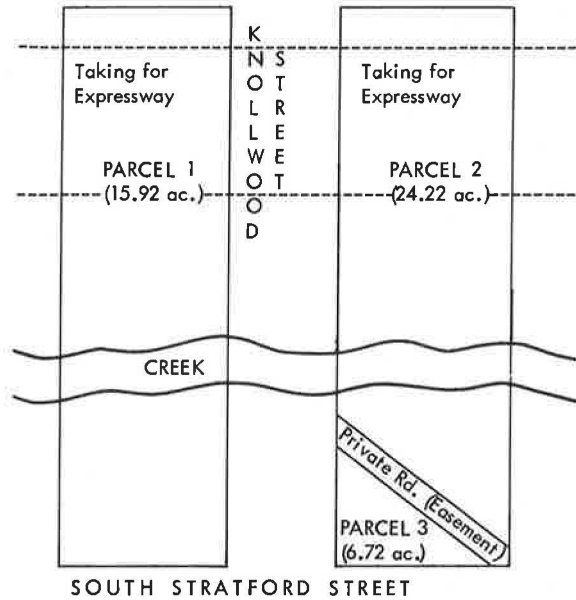

Figure 4.

The Court of Claims' reasoning might well have suited the situation where Guptill Holding Corporation was facing a bankruptcy, and where the creditors were in danger of being unable to reach the individually owned parcel of land (which may have been kept in individual ownership for that very reason), but, in the context of this condemnation proceeding, the court's decision appears to present the owner with an unjustified advantage. And the same advantage would be present where lands were owned by a widely held corporation (as compared to the family corporation of the Guptill case) and one of its subsidiaries under circumstances that indicated unity of use. To say the least, the result of the Court of Claims' effort to give Guptill greater compensation in this eminent domain context is to raise questions of more far-reaching dimensions, for example, does this step toward destruction of the corporate veil mean that tax advantages or other benefits of operating through two corporations may be lost in the future as the court's approach is pushed to its logical limits?

Another instance in which the unity of ownership principle was discussed with some doubt as to its application is Barnes v. North Carolina State Highway Commission.[27] The factual setting of the case is indicated by the diagram in Figure 4. The issue was whether Parcel 3 could be considered as part of a larger tract, and if so, what constituted the larger tract. The court's decision does not make it clear whether Parcel 1 and 2 were combined, or Parcel 2 alone was used as the larger tract for Parcel 3. However, the court's discussion of the lack of unity of ownership for Parcels 1 and 2 was as follows:

> The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract....Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of ownership. Different owners of adjoining parcels may not unite them as one tract, nor may the owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages.[28]

[27] 109 S.E.2d 219 (N.Car., 1959).

[28] Ibid., at p. 225.

Since diversity of ownership was not a factor in the Barnes case, the foregoing comments are dicta. However, its subsequent discussion of unity of use is pertinent to the decision since the parcels in question were vacant at the time of condemnation and evidence of an intended subdivision use had to be considered. This dicta aside, however, the North Carolina court's decision followed the course indicated by precedent in holding that the separation of Parcels 2 and 3 by a private road easement did not compel it to treat the parcels as separate tracts. As a result, it may be said in summary that with rare exceptions the courts which have passed on the unity of fee title question in determining larger tracts have held that any difference in the fee ownership requires treatment of the parcels in question as separate tracts, and this is so even where unity or use and actual or constructive contiguity exists.

UNITY OF USE

Consideration of questions relating to unity of use must be based on the assumption that the basic requirement of unity of fee ownership is satisfied. In such cases, what are the factors which may determine the existence or absence of unity of use?

Initially, certain physical circumstances which have a separative effect must be recognized. Some may be physical, as, for example, alleys, streets, roadways, canals, railroad tracks, natural watercourses, political boundaries,[29] and the presence of intervening land owned in fee by another person. While these factors may have the capability of producing separative effects, circumstances will always determine whether they do operate this way. The nature of each use must be considered in the context of its circumstances, and logic would suggest that there is little validity in a distinction that allows noncontiguous parcels to be combined for valuation purposes when they are separated by a highway or railroad, but not where they are separated by intervening land owned in fee by a stranger.

Some early cases can be found holding that such a distinction exists,[30] but the most recent ones are typified by the view offered by the Kansas supreme court in Ives v. Kansas Turnpike Authority, as follows:

> Actual contiguity or physical connection, however, is not a conclusive test. While actual contiguity or, if physically separated, the distance between the tracts, is an important element to be considered on the question of unity of use, depending upon the facts of the particular case, integrated use becomes the test whether two or more tracts are to be considered as a unit. In other words, separation of the tracts is an evidentiary fact bearing upon, but not necessarily determinative of the ultimate issue.[31] [Emphasis added.]

[29] Interposition of a political boundary between two parcels may also affect the jurisdiction of the court in dealing with a proposed combination of parcels. See Atchison-Nebraska Railroad Co. v. Gough, 29 Kan. 94 (1882); also, State v. Bentley, 12 N.W.2d 347 (Minn., 1943), where a split decision resulted in affirming trial court's ruling that damages could be assessed by a Minnesota court for lands lying in South Dakota. In State Highway Commission v. Denver-Chicago an unreported decision from San Juan County, N. Mex., the New Mexico court limited itself to dealing with property located in New Mexico only where land being acquired for Interstate highways was situated both in New Mexico and Arizona.

[30] 29A C.J.S. 594 states the rule thus: "...the fact that several tracts used as one are separated by a street or highway, a watercourse, a railroad right of way, or a county line does not necessarily preclude them from being considered as one in determining the damages....While it has been held that, where two or more parcels of land are used as one enterprise and constitute such dependent elements thereof that the taking of one necessarily injures the other, they may be taken as one, even though separated by an intervening fee, generally parts of the same establishment separated by intervening lands privately owned by another are considered independent parcels...."

Sharp v. United States, 191 U.S. 341 (1903), furnishes an early discussion on unity and disunity problems, and is considered a leading case for its time.

[31] 334 P.2d 399 (Kan., 1959), at 406-407.

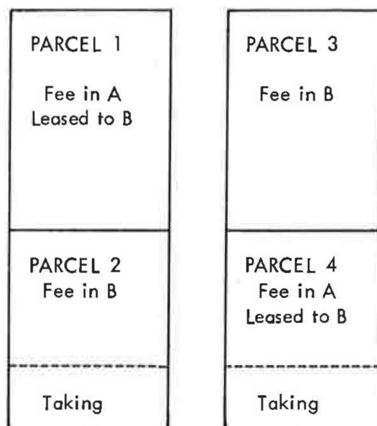

Figure 5.

As a guiding principle for considering the unity of use in various situations, the Rhode Island court commented that "it is generally held that the two tracts can be considered as one only when they are so inseparably connected in the use to which they are applied that the taking of one necessarily and permanently injures the other."[32]

Figure 5 illustrates the fallacy of combining or not combining parcels of land based on the presence of separative factors in the physical environment. Unified use of parcels in identical ownership is assumed. Experience would seem to indicate that Parcels 1 and 3 should not be considered one tract, while Parcels 2 and 4 should be. Yet, if the existence of an intervening fee ownership is considered decisive, and if it is further assumed that the highway, canal or railroad shown as the separative feature is also owned by the public in fee, it becomes impossible to recognize a larger tract by combining Parcels 2 and 4. And, the result becomes even more illogical if, by changing the intervening road or railroad from fee ownership to an easement, the opposite result could be reached and a larger tract could be recognized in Parcels 2 and 4.

Comparisons may usefully be made here between these cases and the evolution of the law relating to abutters' rights of access to and across highways. The early cases showed concern for the question of who owned the underlying fee in the street or roadway, and suggested that rights of access were somehow valuable where the abutter owned the fee in the roadway and valueless where the public owned the fee. These precedents were discarded as more realistic appreciations of the function of access and the function of streets and highways developed.[33] Thus in the cases where the larger tract question arises, reliance should not be placed on artificial or unrealistic distinctions. Unity of use should be judged according to whether the taking of or from one parcel inevitably damages the other parcel or parcels substantially and permanently. Where a taking merely discommodes, inconveniences, or has no substantial effect on the claimed joint use, the several parcels should be considered separate notwithstanding common ownership.

DISUNITY OF USE

The problem of disunity of use is a corollary to the question of unity of use. This problem arises where an owner of a single tract of land uses it in such a way as to voluntarily, and perhaps unknowingly, sever its use and separate it into several tracts. Thus, Nichols has said: "When an owner actually uses parts of what would otherwise constitute a single tract for different or separate purposes the parts may be held to be independent though they are not physically separated."[34] An example of this was furnished in a condemnation involving two contiguous parcels of land—one of 37 acres and the other of 1 acre—both owned by the same person. Both parcels contained dwellings and improvements, and both were rented to different tenants and never had been used by the owner in connection with each other. In this instance, the Iowa supreme court held that each tract should be considered separately for valuation purposes.[35]

FEE AND LEASE CONDEMNATIONS

Special problems may be presented where an effort is made to combine land which is owned in fee with land held in leasehold interest for the purpose of increasing the

[32] Sasso v. Housing Authority, 111 A.2d 226 (R.I., 1955).

[33] See generally, Netherton, R., Control of Highway Access, (Madison, 1963), 44-49.

[34] 4 Nichols, Eminent Domain, (3d ed., Albany, 1950), 728

[35] Hoeft v. State, 266 N.W. 571 (Iowa, 1936)

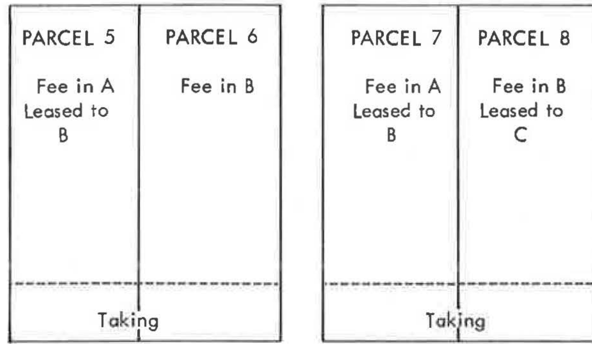

Figure 6.

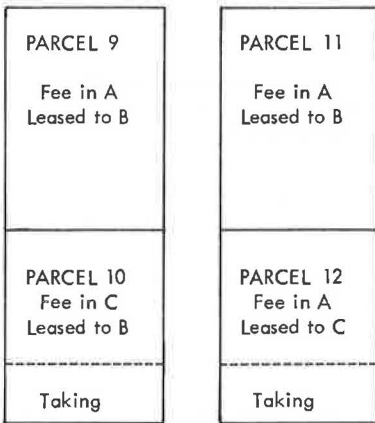

Figure 7.

value of either parcel when part of the entirety of either estate is taken under eminent domain. Figure 5 illustrates two possibilities of this sort. In Figure 5, Parcel 1 is owned in fee by A, who has leased it to B. Parcel 2 is owned in fee by B. The taking through condemnation is entirely from Parcel 2. The situation is also shown in reverse, with B holding Parcel 3 in fee and having a lease on Parcel 4, which is owned by A. In this instance the taking is entirely from Parcel 4. In these cases, can Parcels 1 and 2 be combined for purposes of assessing damages? And, if so, can Parcels 3 and 4 be similarly combined for valuation purposes in their circumstances? Initially it would appear that the answer should be the same for both cases. Moreover, an assumption that B, in either case, has subleased to a third party should not change the result, since this cannot affect his rights in a condemnation proceeding.

Figure 6 presents a slightly different variation of this situation. Where, in Parcels 5 and 6, B leases one of the parcels from A and owns the other in fee, and the taking is from both parcels, B would seem to have a slightly stronger claim for combination of the parcels than in the case of Parcels 7 and 8, where B leases one parcel from A and rents the parcel which he owns to C. These examples differ from those in Figure 5 not only by assuming that the taking here affects both parcels, but by posing the additional factor that in one instance two different leases are involved. Here, again, it would seem that both cases in Figure 6 must be treated the same, for clearly the leases do not strengthen the claim of a unified use, even if it is assumed that B and C are business partners.

Figure 7 compels consideration of the question of whether the unity of use rule operates only as to fee owners or also as to lessees. Where A owns Parcel 9 and C owns Parcel 10, and both lease their land to B, can B combine Parcels 9 and 10 into one larger tract for the purpose of assessing damages to B and/or C? In this regard, one cannot avoid considering the question of whether the result will be affected by the type of use B pursues on his leased land, and whether this is a unifying or a non-unifying use. Also, as in the case of Figure 5, it would appear here that if B subleases Parcel 9 to D the effect of a partial taking of Parcel 10 on B's interest is not affected for better or worse thereby.

A possible combination of leased parcels for the benefit of the common owner is illustrated by the examples of Parcels 11 and 12 in Figure 7. Here the owner, A, has leased Parcel 11 to B and Parcel 12 to C, and the partial taking is solely from Parcel 12. Suppose, also, that Parcel 11 is classified as commercial income property for A

and Parcel 12 is used for a separate distinct commercial enterprise conducted by B and C. Does this require that the parcels be considered as separate tracts and preclude the possibility of combination for A's benefit in assessing damages? If the unity of use principle can be applied in favor of the owner of separate parcels to create a single larger tract, logic would seem to require that where the owner, through different leases for different purposes, voluntarily breaks up the unity of use, he should be compelled to treat his property as separate tracts.

A variation of the situation presented in Figure 7 may be visualized where the taking through condemnation affects both parcels of leased property. This possibility is illustrated in Figure 8.

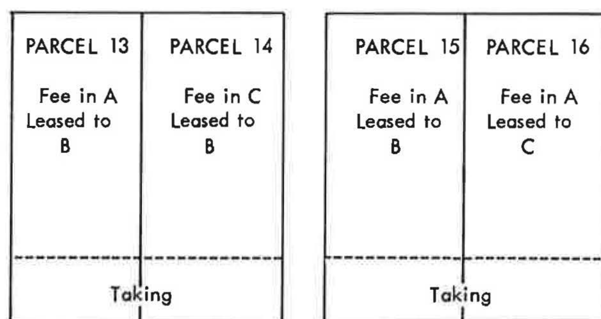

Figure 8.

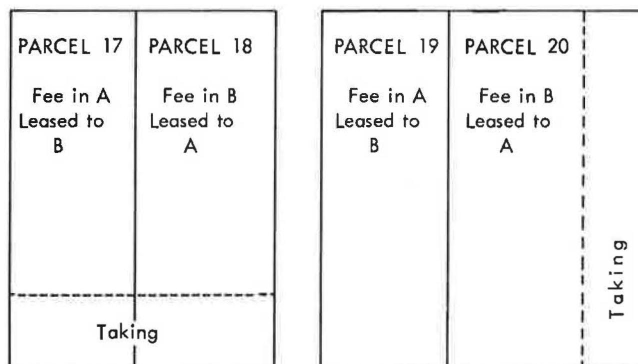

Figure 9.

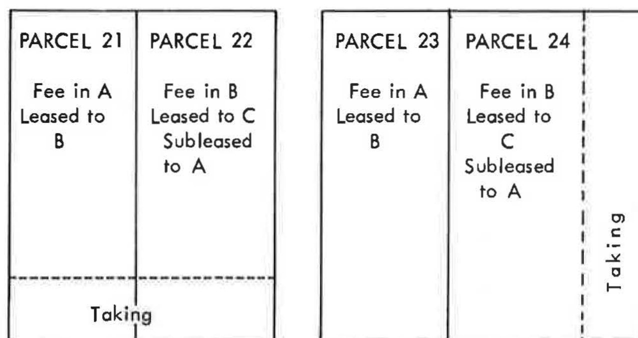

Figure 10.

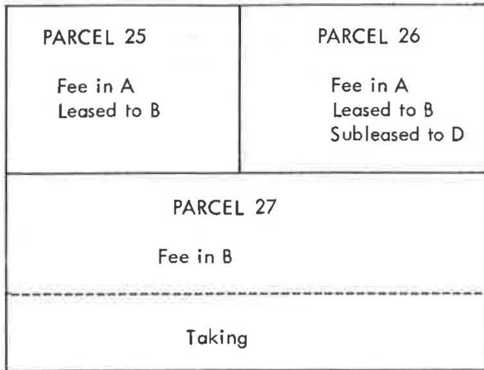

Figure 11.

The device of cross-leasing is illustrated in Figure 9. A factual situation similar to this was present in State ex rel. Wirt v. Superior Court, [36] noted earlier in the discussion of fee ownership. Here the court indicated that the factor of fee ownership was controlling, and that "the fact that the three tracts are used as one farm, inasmuch as the ownership is divided, does not entitle the owners of adjacent tracts to damages." The point is pertinent when cross-leases are considered, for a lessee can take his interest in the land only from and through his lessor, and if a lessor is barred from combining parcels to make a single larger tract, so also is his lessee.

Figure 10 tests the possible effects of subleasing on the basis for creating of larger tracts. Here Parcel 21 is owned by A and leased to B; Parcel 22 is owned by B, leased to C, and subleased to A. Unity of use is assumed as far as A and B are concerned, and the taking in question is from both parcels. In the case of Parcels 23 and 24, the ownership and leaseholds are similar to the previous case, but the taking occurs solely on Parcel 24. As to the prospects of being able to combine Parcel 21 with Parcel 22 or Parcel 23 with 24, it would appear that the rights of the parties are governed by the same principles that applied to cross-leases. If combination cannot be effected in the cross-lease situation, it should also be denied here, for the presence of the sublessee does not alter or improve the basis which the lessee derives through his fee owner, and, as a practical matter, may substantially complicate the apportionment of a condemnation award among the parties.

In the problems posed by Figures 6 through 10, it has been assumed that the lease or sublease covered the entire and same parcel of land comprising the underlying fee. In real life, of course, this situation is likely to be rare, and the more usual case will involve fractionalized holdings. An example of a situation which is more realistic is contained in Figure 11 where Parcels 25 and 26 are owned in fee by A and leased to B, who, in turn, has subleased Parcel 26 to D. Parcel 27, adjoining these two holdings, is owned in fee by B, and is the parcel from which the partial taking occurs. The case raises the question of whether Parcels 25, 26 and 27 can be combined in assessing damages, or should Parcel 26 be excluded. On these facts it is difficult to see how a taking from Parcel 27 could in any way damage B's leasehold in Parcel 26 (currently subleased to D). However, consideration must be given to various aspects of the leaseholds before a determination can be made. Here the long- or short-term nature of the lease, and its expiration date will have a bearing. So will the inclusion of renewal or cancellation clauses, and whether step-up, step-down, graduated, percentage or revaluation provisions exist. In places following the "before-and-after" rule in estimating damages, the task of combining fee and leasehold estates under these circumstances could pose extremely complex problems of appraisal and apportionment. Market data in any appreciable amount do not exist. The task of trying to combine fee and leasehold estates thus runs the risk of speculation as to several elements that are critical to the valuation process.

UNITY OF ESTATES

Figures 6 through 11 have illustrated a number of possible situations with which courts may be faced where there are attempts to combine mixed estates or estates of unequal dignity. In principle, the unity of ownership rule does not require that the owner or owners have the same quantity or quality of estate or interest in all parts of

[36] Supra, note 15.

the tract.[37] This principle, however, has not been refined in any detail by court decisions. Early opportunities to develop a doctrine on this aspect of the larger tract problem were treated in a rather offhand manner, as, for example, in Chicago v. Dresel, decided by the Illinois supreme court in 1884.[38] There Dresel occupied 14 lots on which he operated a flower gardening business. He owned six lots and occupied the remaining eight under a lease which had two years to run at the time of condemnation by the plaintiff railroad. The taking affected two of the leased lots for which the annual rent was $18.75 each. In the condemnation proceedings the jury was instructed to find separate damages for lessor and lessee, and an appeal objection was raised regarding this instruction. The Illinois court's discussion of this aspect was as follows:

> Appellant proposed to take a portion of the lots held by the lease. If by so doing the market value of the whole tract was lessened during the two years which appellee had the right to hold and use the same, to that extent he was damaged, and while no part of the lots he owned in fee was taken, still, by the taking, as his property held in fee and by lease was damaged, he, in justice, ought to be entitled to recover so far as the market value of his property was depreciated.[39] [Emphasis added.]

In their briefs, the parties to this case sparred extensively before coming to grips with the question of combining the fee and leasehold interests of Dresel. Ultimately, however, they had the following exchange: Defendant Dresel argued that

> Upon what principle the damages to the lots in fee simple should be cut down to two years, we are unable to understand. True, appellee Dresel's lands are held by different tenures and for different periods. But can it be said the tracts are not both his lands?

And Plaintiff Chicago Railroad replied:

> The owner's compensation for the injury to his remaining land is limited to the parcel or track [sic] of which the land taken formed a part, and is not extended to other lots or estates of the same proprietor, which are separate and distinct from the one which has been in part appropriated for the public use.[40] [Emphasis added.]

Plaintiff's reply went on to argue that where there were divided interests in a tract of land, it was customary to award compensation as to the fee simple and let this total award be apportioned among the different estates included in the fee.

The Dresel decision was not an entirely satisfactory discussion of the fee-leasehold problem in larger tract determination, and did not enjoy any extensive recognition among the cases that occurred in later years.[41] Thus, in 1950, the Federal court in United States v. Honolulu Plantation Co.[42] chose to consider the problem as a new one. In this case thirteen actions were consolidated in the government's condemnation action which was directed to land which the plantation company held under long-term leases. The leases contained condemnation clauses purporting to reserve to the fee owners all condemnation awards. Defendant plantation company appealed from the court's denial

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[37] 29A C.J.S. 595, stating that "...the parcels claimed as a single tract must be owned by the same party or parties, but it is not a requisite for unity of ownership to have the same quantity or quality of interest or estate in all parts of the tract."

[38] 110 Ill. 89.

[39] Ibid., at 92.

[40] Citing Pierce on Railroads 112 and St. Louis, Vandalia & Terra Haute Railroad v. Brown, 58 Ill. 61 (1871).

[41] Supra, note 7.

[42] 182 F.2d 172.

of damages in regard to the lands not covered by formal lease, but with respect to which defendant operated under a business arrangement. As to this point, the court wrote:

> If compensation were not limited to owners of interests in property condemned, the sovereign, in taking property for public use, would be subjected to limitless claims of inconvenience, business loss and damage to prospects yet unborn.[43]

The court also paid its respects to the condemnation provision of the lease, saying:

> ...[E]ven if Plantation, with superficial cleverness, has attempted to distort the true meaning by the weasel wording of this proviso, agreed upon between lessor and lessee, with the definite purpose of forcing the United States to pay each for the full value of the fee. Honolulu Plantation Company has heretofore attempted to collect money from the United States by the use of the same theory in another of its protean forms. This court refused to be misled then as now....[44]

Viewing the problem in its basic terms, the court summarized thus:

> The rule requiring compensation for loss in market value to the remainder of the tract is applied strictly only where there is but a single parcel owned by one party in fee simple. An extension of the doctrine permitted the inclusion of another parcel in the same ownership if it lay contiguous to the principal tract. It is likewise perfectly true that land cannot be valued alone without buildings or other structures which have been added thereto and which are a part of the real property. According to common law, these are as much a part of the soil as are the rocks, sand, and other natural features. With some reluctance, the courts have held that the owner of one parcel in fee may be compensated for loss in market value thereof as a result of the taking of another parcel owned in fee by him, even if the latter is not contiguous, provided that, by actual and permanent use, a unitary purpose is served by both parcels. But strict proof of the loss in market value to the remaining parcel is obligatory. Where part of the tract in fee ownership is condemned, the loss in market value to the remainder cannot be augmented by consideration of the damage caused thereto by the taking or prospective use of lands held by third parties in fee simple as part of the same project. Nor can the fact that an enterprise upon one parcel depends upon other lands in fee ownership of third parties for supply of an essential material be used to connect the two for purposes of compensation. It is the estates in the separate parcels that must be connected. If, therefore, the fee owner of one tract holds a lesser tenure in the tract taken, there can be no additional compensation for this reason. The explanation is that the fee is the integer. The condemnor takes the particular ground. The whole structure of rights imposed upon this ground are destroyed. Compensation is paid by the parcel. Of course, a lease upon one parcel of land cannot be a part of the fee simple estate of another parcel.
>
> A lease is a chattel, a contract right which carries with it the right of possession which goes back to the fee owner upon end of the term. The ownership of a fee of one parcel and a lease upon another do not connect the estates in the two. From earliest times in federal condemnation, additional compensation has been refused where the owner of the fee of one tract has a lease upon another parcel held in fee by a third party, where the leasehold alone was taken.[45]

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[43] Ibid., at p. 175.

[44] Ibid., at p. 178.

[45] Ibid., at pp. 178-179.

Although the Honolulu Plantation case appears to have enunciated the rule for Federal condemnation, the situation among state court decisions in recent highway land acquisition is not so clear. State Highway Commission v. Bloom seemingly holds that lease lands may be considered where, within the exterior boundaries of a 4,000-acre ranch operated by condemnee and his father, the total area contained a number of 40-acre tracts held under leasehold for long terms.[46] Referring to the Fortune case noted earlier,[47] the South Dakota court said:

> The same principle applies to the privately owned land which has been leased by the defendant for thirty years. Such leased quarter section is completely surrounded by defendant's land. It is a small parcel of grazing land of such a character and so located that it is adapted for use only as a part of a larger grazing unit. It is reasonably certain that such land will be available for continued use in the future as grazing land under lease by the owner of the surrounding lands. Its availability for rental and accessibility for use for grazing purposes under the circumstances shown is an appurtenant element of value of the base land for ranching purposes limited by the terms and likely duration of the lease and the possibility of its termination.[48]

Conceivably, also, the question of combining parcels owned in fee with others held by other tenures could be raised where land was held by adverse possession. Or where a parcel owned in fee was proposed for combination with land on which the owner had an option which had not yet ripened into title. Both situations have common elements. The adverse possession problem was considered in Campbell v. New Haven,[49] where the Connecticut court held that the adverse possessor's title must have matured before the separate parcels could be combined to form a larger tract. The option case also resulted in denying combination of parcels in East Bay Municipal Utility District v. Keiffer.[50] As to the option to purchase, the California Appellate Court noted that it did not constitute an interest in the land itself, and that the holder of a mere option to purchase land being condemned was not entitled to any part of the compensation award. Axiomatically, therefore, the holder of an option was not compensably injured by reason of the severance of part of the land subject to the option from his adjacent fee holding.

Potts v. Pennsylvania Schuylkill Railroad Co.[51] raised the question of whether a verbal lease constituted an interest sufficient to permit combination of parcels. Here plaintiffs engaged in quarrying marble on three parcels of land—a quarry area, a storage and shipping area at Spring Mill, and a salesyard in Philadelphia. The taking by condemnation was from the storage and shipping yard at Spring Mill. Denying the combination, the court said that the parcels were not only different properties, applied to different uses, but the fee was held by different persons. Like the cases of options and adverse possession, the court here seemed to be saying that the unity of estates concept requires that the estate, of whatever degree and nature it is, must not be an expectancy or contractual right, but instead must have fully ripened into a form of real property which the party asserting it holds in his own right.

SUMMARY

The review of the court decisions and the discussion of hypothetical situations show the principal ramifications and potential pitfalls that relate to problems of determining what constitute "larger tracts" in cases where condemnation engages in partial takings. Adoption of the three criteria proposed at the outset can result in the development of a

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[46] 94 N.W.2d 572 (S.Dak., 1958). 77 A.L.R.2d 533.
[47] Supra, note 17.
[48] Ibid., at p. 540.
[49] 125 Atl. 650 (Conn., 1924).
[50] 279 Pac. 178 (Cal. App., 1929).
[51] 13 Atl. 291 (Pa., 1888).

clearer, more easily applicable, and more equitable doctrine than has existed in recent years. The essential elements of these criteria may be restated thus:

Unity of ownership should require that there be absolute identity of fee owners of the different parcels with the presence or absence of one or more owners constituting a clear failure of unity of ownership.

Unity of estates should require that the separate parcels be held by the owners through estates of equal dignity or quality, and if there is any difference in dignity or quality there is a clear failure of unity of estates.

Unity of use should require a clearly inseparable connective use, the disruption of which would virtually destroy the overall joint operation carried on upon the separate parcels.

Strictly applied, a doctrine based on these criteria may seem unduly rigid, for it would proscribe any fee-leasehold combinations and perhaps other forms of land holdings which the commercial and industrial community favors for its convenience. Yet the law cannot with consistency and good conscience allow the commercial and industrial community to have it both ways. If, for example, tax advantages indicate the desirability of a certain type of corporate structure or arrangement for holding land titles, these will have to be measured against possible disadvantages in the event that condemnation takes part of this property for public purposes. The doctrine of valuation should have its own elements of certainty and logic.

Unity of estates and unity of ownership thus become nearly inseparable in their application, with the result that the search for equity may often seem difficult in cases where parties have staked their personal plans on lease-purchase arrangements, options, or adverse possession. Yet here, again, the need for greater certainty in the valuation process would seem to override other considerations.

Unity of use presents a problem with possibilities of almost unlimited variety. Judgments here must be based on study of specific situations, and future application of these criteria should be prepared to draw heavily on the contribution which modern technology will make to the building industry. Thus, in urban areas the future cases may well be three-dimensional in character as increased use of air space occurs. But unity of use will always be a criterion which comes into play after the first two unities—those of ownership and estates—are satisfied, and sound application of the larger tract concept will require that this logical order of steps be present in assessing damages for eminent domain.

Just Compensation in Texas—The Carpenter Case Revisited

EDWIN M. RAMS, Director, Urban Research Associates, Economic and Real Estate Consultants, Washington, D. C.

•THREE decades ago the case of State of Texas v. Carpenter[1] provided the basis for the "severed land" doctrine in reference to a partial taking of property for public use. At that time, the premise on which the decision was based was a novel one, and even today it remains atypical of the means employed in determining compensation in an eminent domain proceeding. Yet it is a recurring subject of discussion in domain law.

The initial case was ruled on by the Civil Appeals Court on November 25, 1932, rehearing denied December 29, 1932. The facts of the case are as follows: The subject property consisted of a total of 240 acres; 200 acres were in cultivation and the remainder in pasture land. The improvements consisted of a ten-room residence, two tenant houses, plus a number of other buildings. The state proposed to take a strip of land traversing the property; the total take was 8.03 acres (Fig. 1).

The trial court authorized the jury to estimate the value of the part taken by finding the value of the entire tract and allowing such proportionate part as the acreage of the strip bore to the acreage of the whole property. Specifically, the court permitted the basis of physical proportion (ratio, in acres, of part taken to total) to be the measure of economic value. From this award the state claimed error, which was decided January 8, 1936.

The question of error concerned charges of the court in submitting questions as to compensation.

Special Issue No. 1

> In connection with Special Issue No. 1, you are instructed that the market value of the 8-3/100 acres of land within the right of way, is not the market value of said land taken for right of way purposes when considered by itself alone, but is its market value as a part of the entire tract of which it forms a part.

The jury assessed the value to be $803 in responding to this issue.

Special Issue No. 3

> What amount, in dollars and cents, do you find, from a preponderance of the evidence, that the remainder of the R. B. Carpenter farm will be reduced in market value by the condemnation of the 8-3/100 acres of land, if any?

The jury answered $3, 477.
Total Award: $803 plus $3, 477

As to Special Issue No. 1 the court stated:

> Perhaps if the value of the strip of land taken had been the only issue submitted, it would have been proper to submit the question of its value, considered as a part of the

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[1] 89 S.W.2d 194; rehearing denied, 89 S.W.2d 979 (1932).

Paper presented at the 46th Annual Meeting of the Highway Research Board, January 1967.

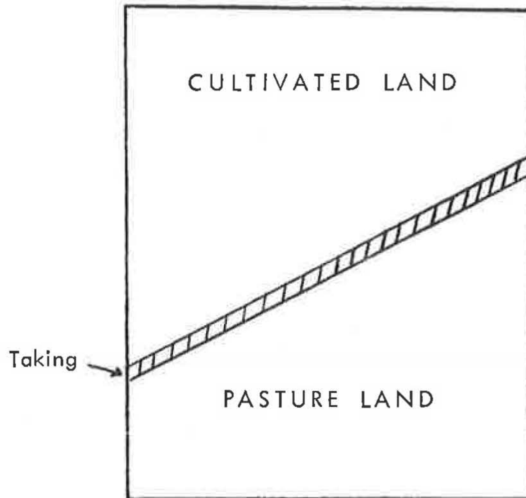

Figure 1.

> whole tract. However, it seems to us obvious that when the value of this strip was ascertained "as part of the entire tract of which it forms a part," this necessarily included to some extent a part of the damages to the remainder portion. . . . It seems to us that if the part taken be valued as a part of the entire tract of which it forms a part, there would be opportunity for double damages. (Emphasis Added.)

The court supported its position with the following explanation:

> When the part condemned has a special value as constituting part of the whole tract, it is immaterial—unless it be important by reason of a set-off for special benefits—whether we say that the owner is entitled to compensation for the part condemned on the basis of the higher value, or that the award should be for the value of the part condemned, as severed land, plus depreciation by reason of the severance. The latter formula seems more technically correct; and it is submitted that it must be applied where accuracy is required in order to give due effect to the statutory rule that the diminution of the residue may be offset by special benefits.[2] (Emphasis Added.)

And, the court also stated:

> In submitting the issue of damages to the remainder of the tract, consideration is taken of damages caused by the severance of the part taken from the whole tract as well as of consequential damages to the remainder of the farm.

Several aspects of the court's reasoning with reference to partial takings deserve examination, namely:

1. On a partial taking, where no damage to remainder is claimed, the value of the part taken can be considered as part of the whole tract. The court in essence is approving the proportionate basis of compensation.
2. Damages to remainder—damage caused by severance of part taken from tract plus consequential damages to remainder of tract. The court seems to suggest two kinds of damage to a remainder: (a) severance, and (b) consequential. Obviously both types of damages cannot exist under the stated circumstances.

The court in setting aside the judgments of both the Court of Civil Appeals and the trial court suggests the framing of special issues in the following manner:

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[2] 16 Texas Jurisprudence 988-989.

Question No. 1

From a preponderance of the evidence, what do you find was the market value of the strip of land condemned by the State for highway purposes at the time it was condemned considered as severed land?
Answer in dollars and cents.

Question No. 2

From a preponderance of the evidence, what do you find was the market value of defendant's tract of land, exclusive of the strip of land condemned immediately before the strip was taken for highway purposes?
Answer in dollars and cents.

Question No. 3

Excluding increase in value, if any, and decrease in value, if any, by reason of benefits or injuries received by defendants in common with the community generally and not peculiar to them and connected with their ownership, use, and enjoyment of the particular tract of land across which the strip of land has been condemned, and taking into consideration the uses to which the strip condemned is to be subjected, what do you find from a preponderance of the evidence was the market value of the remainder of the defendants' tract of land immediately after the taking of the strip condemned for highway purposes?
Answer in dollars and cents.

* * *

Developing a means for precluding double damages is the principal reason for implementing the "severed land" doctrine. Any re-examination of the case must necessarily inquire as to whether the rule is equitable as between public and private interests; is there equal protection under the law as between private interests whose property is subjected to a taking for public use; finally, is due process of law sufficiently served and uniform to forego any issues of partiality thereby injecting questions of constitutionality?

Take the following two cases. In Case I, the property is valued on the proportionate value premise. In Case II, the severed land premise is employed. In each instance the value of the remainder after the taking is the same (9 units).

Case I

Whole Property	Part Taken	Severance Damage	Benefits
12 units	4 units	5 units	6 units

Value of remainder before: 8 units (12 - 4)
Value of remainder after: 9 units (8 - 5 + 6)

Award: 4 units (severance damage set-off by special benefits; owner compensated for value of property taken)

Case II

Whole Property	Part Taken	Severance Damage	Benefits
12 units	3 units	6 units	6 units

Value of remainder before: 9 units (12 - 3)
Value of remainder after: 9 units (9 - 6 + 6)

Award: 3 units (severance damage set-off by special benefits; owner compensated for value of property taken)

The net effect of the severed land premise is to shift part of the value of the property, thereby increasing severance damage. Obviously, if no special benefits are present, the result would in fact represent just compensation—value of part taken plus severance damages. However, if special benefits equal or exceed severance damage, the severed land doctrine results in under-compensation.

The cue for unjust enrichment is self-evident. In cases where the special benefits are anticipated to be large, the defendant might only claim value for the part taken on a proportionate basis, more so where the taking is of a small portion of the fee (rear strip, small corner, etc.) and severance damages are nil. Consequently, special benefits cannot and will not be considered; the owner will be compensated for the value of the property taken.

As an alternative the defense might claim special value, as in the words of 16 Texas Jurisprudence, "has special value as constituting part of the whole tract." Case III illustrates what could develop.

Case III

Whole Property	Part Taken	Severance Damage	Benefits
12 units	5 units	4 units	6 units

Value of remainder before: 7 units (12 - 5)
Value of remainder after: 9 units (7 - 4 + 6)

Award: 5 units (severance damage set-off by special benefits; owner compensated for value of property taken)

In essence then, three distinct results of just compensation are possible, under the above-stated conditions and limitations, which are in accord with the language and thinking of the Carpenter case.

Award: 3 units—implementing "severed land doctrine."
4 units—implementing "proportionate value premise."
5 units—implementing "special value as part of whole tract."

* * *

The proportionate value premise is without economic foundation, though it is widely used; for we know that each square foot or front foot, or acre, as the case may be, of a parcel of land, regardless of best use, simply does not have equal utility and consequently equal value. A physical proportion does not of itself prove identical and simultaneous economic worth. Take the following illustrative case.

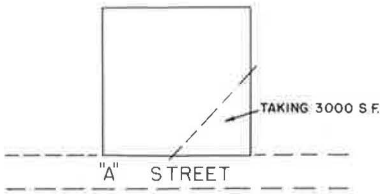
An eight-room, one-year-old suburban dwelling is located on a ten-acre site. Its market value is $40, 000. The state proposes to take a narrow one-acre strip along the rear lot line. Following the language of the initial Carpenter case[3] (55 S.W. 2nd 219) and assuming no severance damage to be an issue, then in the words of the court (89 S.W. 2nd 194), the value of the part taken would be one-tenth of $40, 000, or $4, 000. Following this through to its logical conclusion, if the owner had 15 acres the award would be $2, 667; at 20 acres, $2, 000; at 40 acres, $1, 000, etc.

Yet the proportionate value premise is not without adherents. Madison Rayburn in his text states:

> Whatever may be said about the pros and cons of the argument, on the meaning of "considered as severed land," we think from the practical standpoint that the triers of fact in Texas have always, and probably always will, assign a market value to that part taken, which bears a direct proportion, or percentage of its value, compared to a valuation of the entire trace, lot, or parcel of land. (Emphasis Added.)[4]

[3] 55 S.W.2d 219 (Tex.)

[4] Rayburn, M., Texas Law of Condemnation 1960.



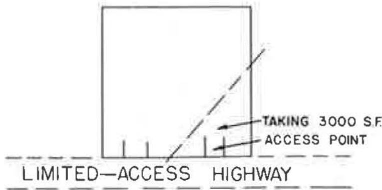
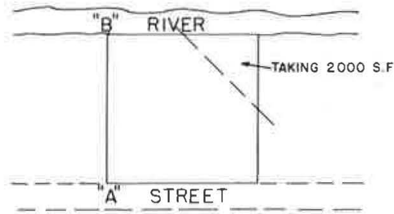


Figure 2.



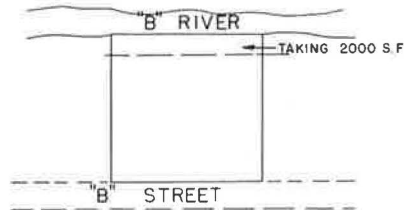
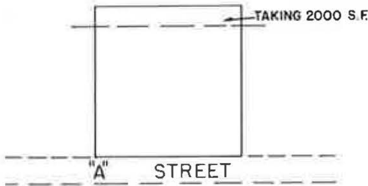


Figure 3.

If the value of land or land and improvements is so well ordered, making a physical proportion the exact counterpart of its economic value, then all the attention given to access, street frontage, size of parcel, etc., is completely redundant and without need of consideration.

Obviously its neatness and simplicity encourage acceptability. The writer has previously noted and cautioned that these relationships may be equal only on a random basis.[5]

The following illustrations show instances where the physical taking is identical (in the arithmetic-proportional sense) but the economic and utility aspects and consequences of the takings are entirely different. Implementing the severed land premise can result



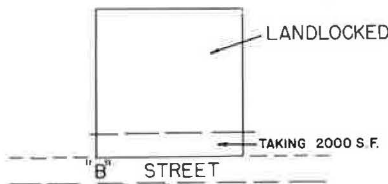


Figure 4.

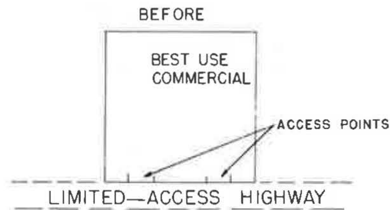


Figure 5.

[5] Schmutz, G. L., Condemnation Appraisal Handbook, (Rams, E., ed., N.Y., 1963), 98.

in under-compensating the property owner; this can circumvent the constitutional provision of just compensation for the taking of private property for public use (Figs. 2, 3, 4, and 5).

One of the most controversial results derived from the implementation of the severed land doctrine is the recent case of State v. Meyer.[6] The state proposed to acquire 14.9456 acres of land, a strip 2, 618.93 feet long with a depth of 240 feet, fronting on South Post Oak Road in Houston. The take was being carved out of an original 103 acres bounded on the north by Beechnut Street, on the east by the city sewage treatment plant, on the west by Post Oak Road, and on the south by Brays Bayou (Fig. 6). After the taking, the remainder 88-acre tract is to front on an access road; the original part of Post Oak Road is to be part of a new limited-access road. Additional neighborhood access to the Meyer land is to be provided by Frankway Drive and North Braeswood Boulevard.

Defendant's motion in limine was granted which permitted exclusion of exhibits, discussion, or cross-examination of witnesses in reference to remainder tract; in essence the court permitted valuation of part taken as severed without reference or mention of remaining parcel. Defendant waived severance damage, thereby precluding consideration of special benefits.

With reference to the retention of access by the remainder parcel, the Supreme Court of Texas stated:

> . . . we hold that when the landowner seeks damages to his remainder by reason of the severance of the land condemned, denial of access is to be considered in arriving at such damages and retention of access is to be considered in offsetting such damages. Respondents had the right to waive damages to the remainder. Having done so, the issue of access rights became irrelevant to a determination of the issue of the fair market value of the fee title to the tract of land actually condemned. Therefore, the circumstance of retained access cannot be considered in reaching an opinion as to the value of the land taken. To allow such testimony before the jury would be to permit, in effect, the consideration of an element of enhancement to the remainder in determining the taking issue. (Emphasis Added.)[7]

Once the court approved the motion in limine, excluding all reference to the remainder parcel, the above position had to be taken for obvious reasons of consistency. In reality, the quality of access before and after remains the same; for matters of access to constitute an enhancement would require that the subject land enjoy specific and peculiar improved access over that of adjoining properties and the general area of the public improvements. This does not appear to exist in the present instance. Further, access to the proposed limited-access freeway cannot be considered simply because it does not exist and therefore no rights of access and related compensation can be attributed to the subject land under condemnation.

The most disturbing issue is for the Supreme Court of Texas to state that retained access rights are "irrelevant to a determination . . . of the fair market value" of the part taken in a partial taking situation.

The net result of the court's reasoning was to treat the subject taking as if the remainder was landlocked, which is not the case. The owners were compensated for the fair market value of the 14.9456 acres of land including access rights to Post Oak Road, and had a remainder with substituted access rights of equal quality on the new service road connecting to the proposed limited-access freeway.

The unjust enrichment is directly attributable to the Carpenter case, i.e., permitting the treatment of the part taken as "severed land." Yet the Carpenter case rests squarely on the proposition that:

> When the part condemned has a special value as constituting part of the whole tract . . . that the award should be for the value of the part condemned, as severed land. (Emphasis Added.)[8]

[6] 391 S.W.2d 471 (Tex. Civ. App.); affirmed and rehearing denied, 403 S.W.2d 366 (1966).
[7] 403 S.W.2d at 374.
[8] 16 Texas Jurisprudence 988.

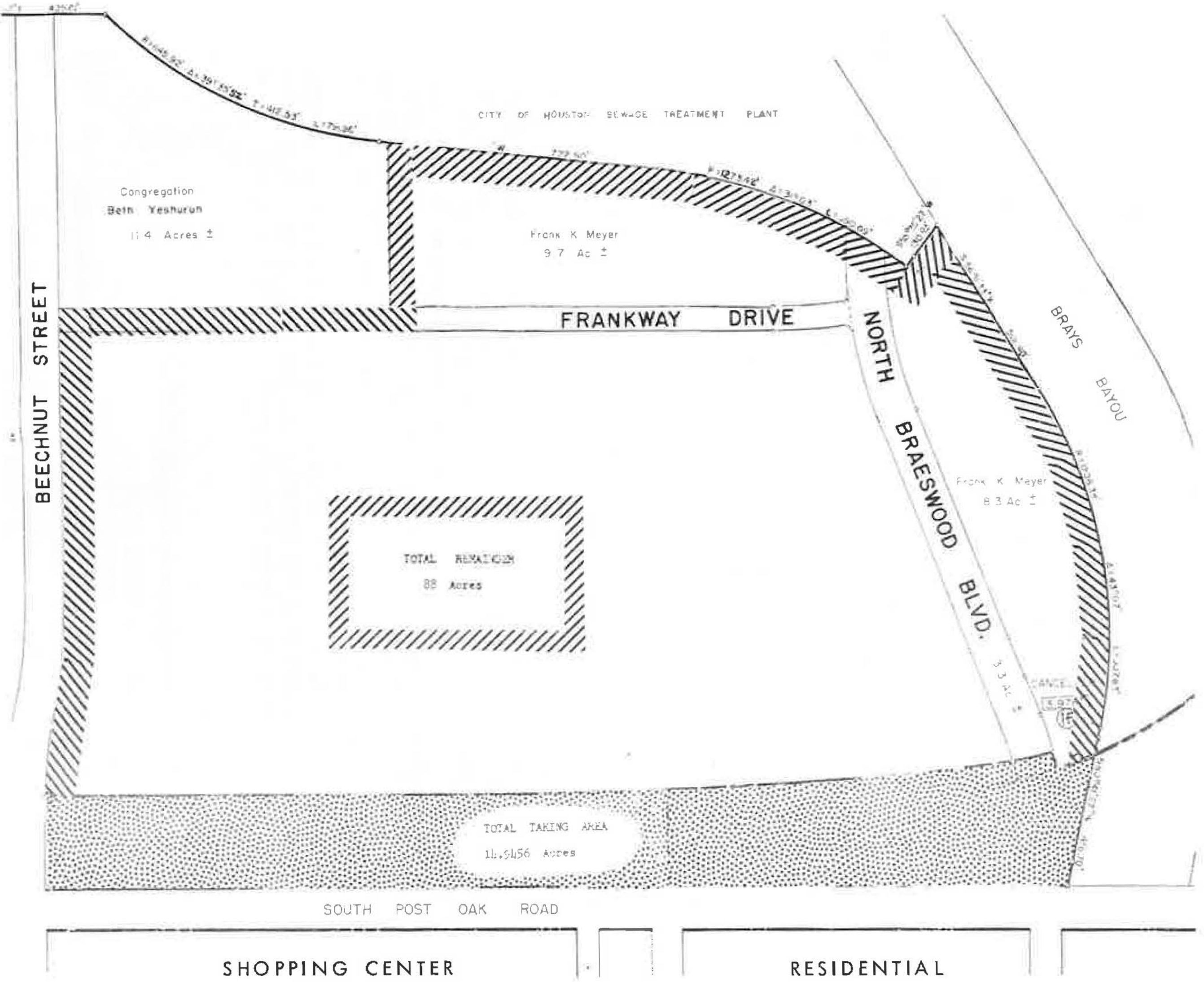


Figure 6.

Counsel for the defendant claimed that the subject 14.9456 acres of land had a higher value than the back lands; further that a sewage treatment plant along the eastern boundary made the rear land less desirable, even though an adjoining use to the treatment plant is a church, Congregation Beth Yeshurun.

It would appear that the severed land doctrine was taken out of context and applied. This may be tested against the hypothetical case where a freeway is constructed along with the service road along which the remainder has access. Where the state or other public agency seeks to acquire the entire remainder for a public facility, the owner will be compensated for the land in fee including all rights of access. The result is double damages—the owner is paid twice for access.

The only net gain in State v. Meyer is that the court rejected the state's expert witnesses who testified as to average per acre value of the entire tract. In substance it rejected the proportionate value premise previously approved in the Carpenter case.[9]

* * *

Neither the proportionate value premise nor the severed land doctrine meets the test of fairness, uniform application, or economic reality. What remains is the utility premise. In the writer's view it is the only valid premise and concept that has foundation. The utility premise can be framed in the following querry: What is the value of the property proposed to be taken in terms of its functional relationship to the whole property?

Note that it is not the physical relationship but rather economic value, i.e., its function in contributing to the utility and related value of the whole property. For example, in Figure 2 the physical takings illustrated are identical. In the first case access remains uninhibited on A Street, after the taking. In the second instance, one access point remains, the other being included as part of the take. In Figure 3 several instances of similar physical takings are illustrated. If, for example, the best use of the land is for a saw mill, in the second instance the after land use would be significantly affected. Similar lines of arguments and reasoning are applicable to the cases illustrated by Figures 4 and 5.

It is for these reasons and others not alluded to that the courts in the majority of states have adopted the classic before-and-after method of valuation on partial takings, i.e., the fair market value of the entire property before the taking; then the fair market value of the property after the taking. The method fully and properly measures the utility and related values. Each value finding is premised on economic worth as reflected in the marketplace. The types and kinds of quantities measured are in evidence from market activity and transactions; those instances involving less typical situations, for example, remainder properties, still permit measures of market value that are plausible. However, the so-called "modified before-and-after rule" is suspect on the same grounds as the Carpenter case severed land doctrine.[10]

The severed land doctrine has no legal precedent, economic foundation, or sound valuation support. In essence it appears to be a legal fiction or abstraction; semantically and conceptually it appears to have merit, but from a day-to-day operational

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[9] 403 S.W.2d 374-375.

[10] The rule is implemented by the following determinations:

a. Estimate the market value of the entire property;
b. Estimate the market value of the property to be taken;
c. Deduct (b) above from (a) above to find value of the remainder before taking;
d. Estimate market value of remainder after taking;
e. Item (c) above minus (d) above to find measure of severance damage;
f. Award: item (b) plus item (e) less any allowable benefits.

The estimate of (b), value of property to be taken, can falter in several ways. If the value is based and derived as part of the whole property, then the proportionate value premise is likely to be used; or it might be valued as an entity (severed land). In either instance violation of economic principles is inescapable, thereby resulting in over-or-under-compensation heretofore discussed.

viewpoint it fails to achieve the very essence of eminent domain, i.e., just compensation. It requires imagining a condemnation of part of a fee simple interest—a leasehold, life estate, mineral rights, air rights, scenic easements—without reference to the dominant estate and considered as an entity—severed land. Further, how shall such just compensation be supported by a preponderance of evidence, which of necessity must be fictional since few if any similar "less than fee" interests are sold, traded, or exchanged as "severed" in the real estate market? Finally, the rationale employed by the court in the Carpenter case might be tenable if:

1. Economies of scale were inapplicable to real property.
2. Perfect divisibility of real property were possible and two fundamental principles, economic size and economic division, were without substance.[11]

Manifestly, the economics of land utilization and the feasibility of real estate developments are constantly viewed and evaluated within a paramount framework bounded by the concepts of utility, marginal utility, and disutility.

CONCLUSION

A multitude of uncertainties exist concerning the measurement and adjudication of just compensation. Many states are codifying and simplifying eminent domain statutes in an effort to minimize the time, effort, and unnecessary litigation as related to the many property acquisition programs by public agencies. By far the principal reason has been to insure just compensation to the affected property owners.

In recent years the Carpenter case has evoked many discussions and arguments, generated by highway development, school expansion programs, etc., because of the extensive acquisitions of property. Numerous opportunities have occurred to properly frame constitutional issues for an appeal to the Texas Supreme Court.

Regrettably the Meyer case, in the writer's view, only compounded the situation. A full cycle has been reached. The initial Carpenter case adopted the "severed land doctrine" to preclude double damages. Now the Meyer case modified the Carpenter case in a manner permitting double damages. Obviously some correction is in order to preclude further adaptation or expansion of the legal tenets expressed by the Texas Supreme Court in State v. Meyer and State v. Carpenter.

Discussion

LEONARD I. LINDAS, Nevada State Department of Highways—In discussing Mr. Rams' paper, I would not only like to make reference to the Carpenter case but also to the cases of State v. Silveira,[12] a 1965 California case, and State v. Meyer[13] a 1966 Texas case, in which like holdings were handed down by the courts.

The factual situations were somewhat different. The taking in the Carpenter case was on a new location which severed the owners 240 acres, leaving a remainder of about equal size on both sides of the new highway.

In the Silveira case, an existing highway was being widened, the taking involving a strip of land of varying widths from 30 feet at the southerly end of the property to 850 feet at the northerly end. The larger tract comprised 354 acres, bounded on the west by the highway being widened, and on the other three sides by private ownerships. The taking involved 9.3 acres and rights of access, the remainder to be served by a frontage road with no control of access in the after condition.

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[11]The two concepts—principle of economic size and principle of economic division—were formulated by the author several years ago. See Rams, E., Economic Size and Value; in Schmutz, G. L., Condemnation Appraisal Handbook (New York, 1963), 20-23.

[12]46 Cal.App. 260 (1965).

[13]403 S.W.2d 366 (1966).

In the Meyer case, an existing highway was also being widened, the taking involving a strip of land 240 feet in width and 2619 feet in length. The larger tract comprised 103 acres, bounded on the west by the highway being widened, on the north by a city street, on the south by a bayou and on the east by public ownership. The taking involved 15 acres, the remainder to be served by limited access to the newly widened highway in the after condition.

The appeals in all three cases were by the condemning agency. Interestingly, however, the state in the appeal of the Carpenter case was urging the separate and distinct parcel approach to value was proper, while in the Silveira and Meyer cases the states were urging that the separate and distinct parcel approach to value was improper.

In the Silveira case the state's contention was that the trial court erred in the giving of the following instructions:

> When the condemnor does not take the whole, but only takes a part of the tract, owned by the landowner, then you must determine the market value of the part taken according to the following method:
>
> You must determine whether it has a greater value considered as a separate and distinct piece of property disconnected from the remainder of the tract, or whether the part taken has a greater value when considered as a fraction or part of the entire tract.
>
> You must then select from those two valuation methods whichever one produces the highest and greatest market value, and make your awards accordingly. The landowner is entitled to the highest value.
>
> In this case before you, a strip of land of varying widths is being taken by the State, and the strip is a part of a larger parcel of land. In determining the market value of the strip you need not consider it as though it were being sold as a distinct and separate piece of property in the market, unless you find that it would have a higher and greater value if sold that way, having in mind that the owner is entitled to the highest value in the market.

The appeal court affirmed the above, holding there is no support for the proposition that in all instances of "partial takings," the exclusive method for valuing the part taken must be as a part of the whole. The court went on to say that "the requirement that the part taken must be valued as a part of the whole and not as if it stood alone has been imposed because ordinarily this relationship gives the part—particularly where it is a narrow strip—a greater value.

This rule has been applied in order to protect the landowner and assure him a just award because otherwise the part taken would normally be useless and valueless if considered by itself.

The argument was advanced that the part taken must be valued as a part of the whole because otherwise a separate valuation would result in the inclusion of severance damages in the award of the part taken. The court disposed of this contention by stating that the following instruction given by the trial court precluded such double damages from occurring. Those instructions state:

> After you have determined the market value of the property sought to be acquired, you must then ascertain the amount of damage, if any, to the remaining property.
>
> This damage, if any, is determined by ascertaining the market value of the remaining property as it was on the date of taking, and by deducting therefrom the market value of said remaining property after the severance of the part acquired and the construction of the highway in the manner proposed by plaintiff.
>
> In computing such severance damage, if any, you are to exclude the portion to be acquired and are to consider only the before and after value of the remaining property. You will separately assess in your verdict the market value of the portion sought to be acquired.

In the Meyer case, the state's appraisers in arriving at their opinions as to value, averaged the lower priced acreage on the remainder with the higher priced frontage being condemned, reaching a uniform acreage price throughout the entire 103 acres. Timely objection to the giving of their opinion was made and the court refused to allow them to give an opinion of value.

The state's theory was that since the frontage on the highway in the before condition was merely being moved over 240 ft to the remaining property, thereby increasing its value, the state had in effect only condemned a composit 15 acres of the whole tract. This theory the court would not adopt. (I cannot say I agree with this particular approach either since I feel the take should be valued in light of the value it contributes to the value of the whole property.)

The court went on to state that while a post-condemnation increase in value of the owner's remaining land may occur, such appraisal would result in offsetting the estimated enhanced value of the remainder against the market value of the part taken, stating further that it is well settled that the value of the part taken should be ascertained by consideration of such portion alone and not as a part of the larger tract.

Additionally, the court held that enhancement in the market value of the residue of land by reason of the special benefits is a legitimate offset to damages thereto, but not to the part actually taken.

Of much interest in the reading of this decision is the fact the court, in justifying the distinct and separate parcel approach to value in situations such as before them, stated that while in theory this approach is unsound, they resorted to it because too many communities were over sanguine in regards to beneficial results of projected public improvements, which resulted in some landowners receiving less than just compensation for their property. Because of this, they felt that the distinct and separate parcel approach to value would more often achieve justice for all parties.

I might state parenthetically, my trial experience has been just the opposite, as courts and juries have been found to be extremely wary about the assessment of special benefits.

Just one comment about the Carpenter case. Mr. Rams' paper outlines the court's holdings; however, I would like to point out that the court, in reversing the lower court, seemed concerned that the state might be required to pay double damages if the part taken was valued as part of the whole, stating:

> However, it seems to us obvious that when the value of this strip was ascertained "as part of the entire tract of which it forms a part," this necessarily included to some extent a part of the damages to the remaining portion.
>
> In submitting this issue of damages to the remainder of the tract, consideration is taken of damages caused by the severance of the part taken from the whole tract as well as of consequential damages to the remainder of the farm.
>
> From this it necessarily follows, it seems to us, that if the part taken be valued as a part of the entire tract of which it forms a part, there would be an opportunity for double damages.

In analyzing the above court decisions, the following question seems worth of discusion: Does the separate and distinct parcel approach to valuation make possible unjust enrichment to the landowner?

Nichols, in his work on Eminent Domain, with reference to partial takings, states that in the determination of just compensation, the formulas followed by the various states may be listed in three groups.[14]

Group 1—Value of the land taken plus (value of the remainder area before the taking minus value of the remainder area after the taking) equals just compensation.

Group 2—Value of the entire parcel before taking, minus value of the remainder after taking, equals just compensation.

Group 3—Value of the land taken plus (damages to the remainder area minus benefits to the remainder area) equals just compensation.

Since the implication of the cases in Group 2 is that if the land not taken is increased in value in amount equal to the value of the land taken, the owner would be entitled to no compensation whatever, this rule is no doubt followed in those states permitting benefits

[14] Nichols, Eminent Domain, (3d. ed., Albany, 1950), v.4, §14.23.

to be offset not only against damages to the remainder, but also against the value of the part taken.

The court, in the Oregon case of State v. Bailey,[15] states that when the formula for just compensation is properly applied, there is no real difference between the formulas contained in Groups 1 and 3. The court went on to say that damages to the remainder area minus benefits to the remainder area, means damages and benefits as reflected in market value, and therefore the final test is the value of the remainder before taking less value thereof after taking, that is to say, depreciation in the market value of the remainder.

The question for discussion however, is whether in the application of the formulas pronounced in Groups 1 and 3, the part taken should be valued as a part of the larger tract of which it forms a part, or as a separate and distinct parcel of land without reference to the larger tract. Let me suggest the following questions:

1. If we can agree that a portion of a larger tract contributes to the overall value of the larger tract of which it forms a part, does it not follow that the value of the part taken is that amount it contributes to the whole, plus damages to the remainder area minus benefits to the remainder area?

2. If we can agree that a tract of land has but one true value as measured in the market place, and the remainder has but one true value as measured in the market place, has not the landowner been made whole when he is paid the difference between those two values, as determined by the formulas set out in the three groups heretofore referred to and in light of the value the part taken contributes to the value of the whole?

3. In other words, do not those formulas envision the value the part taken contributes to the whole property of which it is a part?

Nichols manifestly feels it should, his text stating:

> The land taken must be valued as a portion of the tract of which it is a part, and not as if it stood alone. This principle is predicated upon the obvious fact that the value of part of a tract is dependent upon its relationship to the remainder of the tract. Ordinarily this relationship gives it a greater value than the value inherent in it as a separate tract. By the same reasoning the value of the remainder is likewise enhanced by consideration of its relationship to the whole tract . . . .[16]

In the cases under discussion, it is obvious the Texas and California courts feel there will be situations when the value of the tract taken, considered as a distinct and separate parcel of land, will have a higher value than when considered as a part of the larger tract of which it forms a part. If they did not, there would have been no reason for making the rulings they did.

So let us consider a situation where the larger tract, if sold on the open market would have a true value of $100,000. That there has been a taking of a part of this tract, and the true value of the remainder, as measured in the market, is $80,000, determined by the use of one of the three formulas, the valuation of the part taken being considered in light of the value it contributes to the whole.

4. Under such circumstances has not the owner been made whole if he has been paid the sum of $20,000?

5. Considering the same situation, but in valuing the take as a separate and distinct parcel, if the appraisers find a value of $30,000, as measured in the market, but also find the remainder still has the value they found in the first instance, to wit, $80,000, has not the landowner been unjustly enriched to the extent of $10,000? Stated differently, has he not been paid more than just compensation if the true before value is $100,000 and the true after value is $80,000, the taking being considered in light of the value it contributes to the whole?

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[15] 319 P.2d 906 (Ore., 1957).

[16] Nichols, Eminent Domain, note 14 supra., §14.231 (p. 544). See also Aaronson v. United States, 79 F.2d 139 (1935); Frank v. State, 127 N.W.2d 300 (Neb., 1964); Commonwealth v. Blanton, 352 S.W.2d 543 (Ky., 1962).

6. If, in constructing a highway, the facility injured a landowner in one particular, but would benefit him in some other particular to an extent of his injury, would you agree that there is nothing morally wrong, as between him and the state, in refusing to compel the state to pay him in excess of acts which do him as much or more good then injury, other than pay him for the value the part taken contributes to his whole property?
7. In the cases under discussion, is this not what the courts are compelling the state to do when they adopt the separate but distinct parcel of land approach to valuation?

Let us look again at the Meyer case, and the admitted theoretically unsound approach to value the court adopted. Why did they resort to it? It was not because they were concerned the state might be compelled to pay double damages, as pronounced by the court in the Carpenter case. It was adopted because: ". . . too many communities were over sanguine in regards to the beneficial results of projected public improvements, which resulted in some landowners receiving less than just compensation for their property."

8. Is not the court, by that statement, saying the triers of the fact, the jury, is not competent to weigh the evidence and reach a just verdict, because they might become over enthusiastic about special benefits?
9. Is not the court saying that if the part taken is valued as a part of the tract of which it forms a part, the jury might consider the special benefits too liberally, resulting in payment to the landowner of less than just compensation?
10. Is not the court, by so doing, invading the province of the jury and changing the rules, not because they are unsound, but because the court feels the jury might, in a given case, become so enamored of the value of special benefits, the landowner might suffer thereby?

In the Silveira case, the court, in adopting the separate and distinct parcel approach to value, based its opinion upon the definition of market value, it being the highest price in cash a willing buyer would pay a willing seller, both being fully informed, etc. The court reasoned that if the taking, considered as a separate and distinct parcel of land would bring a higher price in the market than if considered as a part of the entire tract of which it was a part, the landowner should be paid that amount.

11. Is not the court in so ruling, saying in effect the value of the parts can exceed the value of the whole?

Assume a landowner, who is the owner of a 5-acre tract of land, voluntarily and of his own choosing, decides he would like to own additional land. Over the course of a year or two, there being no change in the market, he makes 4 purchases of abutting 5-acre tracts, the market value of and price paid for each 5-acre tract, along with his original 5-acre purchase, is $225 per acre.
He is now the owner of a 25-acre tract of land, which we will assume has a market value of $5000, or $200 per acre.

12. In the event of a total take, do you believe the Texas and California courts would require the state to value each 5 acres as a separate and distinct parcel of land, thus permitting the landowner to secure more than the market value of the whole?
13. If your answer is no, why then, in event of a partial take, should those courts require the state to pay more than the value the part taken contributes to the whole?
14. If the rulings of the Texas and California courts are followed through to their logical conclusion, and in the event of a total acquisition, are they not opening the door to permit a landowner to divide his whole property into individual segments, value each segment as a separate parcel, the values of which when added together, would secure for him something in excess of the value of the whole?

In the Meyer and Silveira cases, frontage is being restored, even though limited to frontage on a service road in the former instance, and limited as to access in the latter. This would not occur if the landowners decided to place the areas involved on the open market for private sale. If either did, a subsequent sale would completely dispossess them of frontage to their remaining property along the highway being improved.

15. Do you not believe it logical, therefore, that a prudent seller would weigh such a proposed sale in relation to the total market value of his larger tract and the value of the remaining property would have after the sale of the part?

16. If this be true, why should the courts require a different rule of evaluation to be applied when the state needs to acquire the same property for a public purpose?

17. Take the following example for instance: If an owner felt his entire holding to have a market value of $100,000, but the remainder following the proposed sale would only have a value of $20,000, would he not want to secure $80,000 for the part he wished to dispose of?

18. If you agree with this, are you not also agreeing with the proposition a prudent seller is relating the part he wishes to dispose of to the value of the whole property?

19. If, in a private sale such as above related, the market indicates an owner relates a proposed sale of part of his larger holding to the value of the whole, why is it so inequitable for appraisers for a condemning agency to follow the same procedure?

20. Has not a court, by permitting the separate and distinct parcel approach, made it possible for an owner to receive a higher value for a part of his holding, regardless of the amount that part contributes to the larger part, thus, in effect, destroying the principle of unity of use and title, as well as ignoring the physical fact of contiguity?

21. In a situation, such as the widening of a non-access-controlled highway, where the frontage was restored, has not the court made it possible for the landowner to again receive a higher value for the restored frontage, based on the separate and distinct parcel valuation approach?

22. Stated differently, has not the court made it possible for a landowner to obtain frontage value for two segments of his property, should there be a second widening, or the one widening and a private sale of the second frontage, based on the separate and distinct parcel approach to value, which it would have been impossible for him to obtain had he originally placed the first segment on the open market for sale himself?

23. Is not the court, in so doing, saying that if you take the ham from an order of ham and eggs, you must pay in excess of what the ham contributes to the eggs, even though you have given him back the ham and in effect taken one of the eggs?

In the Silveira case, the court would not permit the valuation of the part taken as a part of the whole tract of which it formed a part, stating such an approach is not exclusive. The court stated such a rule was only adopted for protection of the landowner in order to prevent a separate and distinct parcel approach being restored to in cases where a non-marketable and valueless strip of land of small width was being acquired.

24. Should it not also be adopted to protect the state and its taxpayers from paying in excess of just compensation if the other approach makes it possible for such a result to occur?

25. In their efforts to protect a landowner, do you not feel the Texas and California courts are overlooking the universal requirement that just compensation not only means compensation that is just to the landowner, but also just to the public as well?

Our state constitution, as well as the 5th Amendment of the U.S. Constitution, provides, in one form or another, that private property shall not be taken for a public use, except upon the payment of "just compensation."

26. If a court, by its ruling, makes it possible for a landowner to obtain in excess of just compensation, or stated another way, requires a state to pay in excess of just compensation, is not that ruling violative of our constitutions?

At this point, I have commented enough upon this most interesting subject, and whether it is more equitable, both for the landowner and the state, to value a partial taking as a separate and distinct parcel of property, or view it in light of the value it contributes to one's whole property. It is probably obvious that I do not agree with the holding of the Texas and California courts. Of course, I have disagreed with the courts on other holdings, but since they have the last say, it really did not do me a great deal of good.

Inverse Condemnation and the Doctrine of Sovereign Immunity

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•INVERSE condemnation cases offer a challenge on two very different levels. On the one hand they present extremely practical problems of settlement and litigation, and on the other they present some of the most difficult theoretical questions imaginable. The discussion in this paper relates chiefly to water damage cases. The problems in this area are not by any means all resolved, but the water cases constitute a substantial body of law, and appear to be among the most difficult.

A typical water case might be as follows: A highway is built over a creek on a new location. Something has to be done with the creek, so a culvert is placed under the highway to take the creek through. From the engineering standpoint there is nothing else to be done except to make the surveys and select the kind of culvert that conditions require. But this may not be the end of the matter. If the culvert is too small to contain the creek, water may back up and permanently flood a field. The farmer then files a claim.

This case can be varied slightly, but realistically, to make it more difficult. Let us assume that the culvert is adequate. Later it becomes blocked with brush and other debris for lack of maintenance, and the temporary obstruction is the immediate cause of the flooding. Litigation in cases like this is grounded on the broadly stated "taking or damaging" provision, and for this reason raises the issue of state responsibility in its most abstract sense.

In actual practice I do not think that judicial results vary substantially under the two forms of the eminent domain clause. In the states which have a "damaging" provision the landowner may have an easier time of it. But in the long run, the landowner in a "taking" state may come out just as well. The clue lies in the interpretation, stretching back to the famous Eaton case, that finds a taking whenever there has been an interference with the use or enjoyment of property.[1]

So we start with a constitutional provision which says that property may not be taken or damaged without compensation. The trouble is that a constitutional provision of this kind calls down for decisional purposes all of the legal doctrines that have ever been used to solve problems of public responsibility for private injuries. Obviously, plaintiffs' attorneys and highway lawyers can use eminent domain concepts, and through them the law relating to consequential damages, in order to solve inverse problems. Lawyers also are likely to start talking about the police power cases, because the police power is the other half of the eminent domain power. Since the constitution also says that "property" may not be damaged without compensation, a reference is quite naturally made to various principles in the property law field. Property law contains a large body of doctrine on water rights, which is applicable to inverse cases. And finally, since the constitution may also have the word "damaging" in it, or may be interpreted to include the damaging principle, it is possible to call forth all of those doctrines which deal with damage to others, and which are subsumed under the category of law called tort.

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[1] Eaton v. Boston, C. & M.R.R., 51 N.H. 504 (1872). An interference with the use of property, short of taking of the fee, is equivalent to a "damaging."

Paper presented at the Highway Research Board's Second Annual Workshop on Highway Law, held at the University of Wisconsin, July 1963.

Difficulties come when the courts try to decide which body of doctrine to use in solving inverse claims. Inconsistencies arise within as well as between jurisdictions, and the same court may shift from property, to tort, to eminent domain concepts as it moves from case to case. As a result, inverse condemnation law is as chaotic as any you will find. The reason for this, I think, is that the courts are faced with the bar of sovereign immunity, and are bucking at it all the time, trying to find ways of allowing recovery. But they do not want to admit it, and so they simply may not explain themselves very well in order to avoid facing the impact of what they are doing.

WHAT IS INVERSE CONDEMNATION?

This, then, is the theoretical focus for the policy problem that is presented by inverse condemnation. The second question is: What is the nature of the inverse condemnation action? Is it merely a procedural device to collect certain specific kinds of damage, or is it by itself an independent body of substantive law? Some contend that the inverse action is merely a procedural device for collecting certain kinds of damage that would have been compensable in the original condemnation proceeding, had the state seen fit to pay. For example, prior to 1960 in North Carolina all condemnation actions were inverse. The state merely turned its bulldozers loose on a site and waited for the landowners to sue. And much inverse damage can be reduced to a condemnable property interest. For example, the state can avoid paying flooding damage by condemning sufficiently extensive flowage easements contemporaneous with construction. So in many situations the inverse action is used to collect damage, that would have been compensable originally.

But not all inverse claims cover damage that would have been compensable in the original condemnation action. I refer to the well-established doctrine that no compensation will be paid for damage that is speculative and conjectural. Consequently, some inverse damage is not compensable in the original proceeding because at that time there is only a probability that it will occur. A highway embankment, for example, may or may not slide. So it seems to me that some inverse actions present substantive as well as procedural issues, and that there is a body of substantive law being generated by these cases.

What is the nature of the substantive issue? Is it the consequential damage issue? Not all inverse damage is consequential. Inverse claims may arise on remainders and even on severed parcels following a partial take, because of the rule prohibiting the award of speculative damage. So it is not entirely true to say that the consequential damage issue is the inverse issue.

Is the body of substantive law relating to inverse condemnation merely a series of specific and very troublesome damage claims arising out of noise, dust and fumes, loss of access, and the like? There is some tendency to look to the inverse condemnation action as a means of taking care of new forms of damage as they develop. The accelerating impact of the highway program has brought forth new and novel claims, and when the administrative policy is not to pay them they will be brought into the courts for adjudication. In California, for example, the law of access was first developed through inverse condemnation, but well-established access claims are now paid in the original condemnation proceeding. But it is mistaken to confuse passing controversies with the basic problem underlying the inverse condemnation issue. It is true that the inverse action probably has a role to play in domesticating new kinds of damage claims and new types of substantive rights, but it is more than that.

On what basis can we isolate the substantive issue that inverse condemnation raises? It seems to me that the inverse action presents us with two kinds of claims, and I have designated these as "evident claims" and "probable claims." An evident claim would be based on a taking or damaging that is fully evident on the completion of the highway, and for which the highway agency refused to pay. For example, loss of access could be determined at the time of the original proceeding. While the measurement of damage may be the subject of further negotiation, the basic question of whether access is or is not going to be cut off is clearly ascertainable. This sort of claim ought to be capable of being handled in the original condemnation and should not be dealt with in a

later inverse action. The more difficult claim is the one based on a taking or damaging which is only probable at the time of the original proceeding, and which the agency did not recognize at that time, or for which payment could not have been made under the speculative damage rule. Damage from landslides or floods falls in this category.

APPROACHES TO PROBABLE INVERSE DAMAGE

I would like to put the category of evident claims aside for purposes of this analysis, and concentrate on claims that were only a probability at the time of the improvement. My purpose is to indicate how the several different doctrinal approaches—tort, property, nuisance, eminent domain—have been used to determine liability for claims that have arisen in the probable damage category.

A property rights analysis is often used. The court will begin with one of the historic approaches to inverse liability, which holds the public agency liable only if in the same situation a private party would have been liable. Since the eminent domain clause affords compensation for "property" taken or damaged, a convenient private law analogy for inverse cases is the law governing private rights in water. In cases in which adjacent land has been flooded by the highway, inverse decisions frequently take the law governing private rights in water, and apply it to the highway agency to determine its liability.

In my opinion it is neither equitable nor proper to apply to a public agency the same rules of liability that govern private individuals. The public agency has a responsibility to the whole community and must concern itself with an equitable distribution of the burden of loss from highway improvements. A private individual has no such duty. Apparently the California courts have felt the same way, because in some cases they have suggested that private water law is not fully applicable to public agencies. California follows the common enemy rule, which is based on the premise that a private individual may protect himself against surface water passed on by another. But a private individual has no such right in the case of a public improvement. So the California courts have had to modify traditional property law doctrines in order to fit them realistically into the situations in which inverse claims have arisen, and have tended to expand inverse liability.[2]

What about tort solutions? The analogy of the recent airport overflight cases[3] suggests that the taking of a servitude may be based on a continuing trespass. Another possibility is nuisance. The nuisance approach is quite interesting, because the nuisance liability of local governments grew up as an exception to immunity in tort in cases which could also have been handled on inverse condemnation grounds. For example, California has a long line of cases holding that if water backs up in a public street and damages adjacent land the municipality can be held on a nuisance theory. No talk about taking or damaging property, no talk about sovereign immunity, just a nuisance action. By taking one short step further, the court can find a taking or damaging when a condition created by the municipality has damaged adjacent property. Indeed, the development of inverse condemnation law and municipal liability for a nuisance has been interwined in the California cases.[4]

A related development in the overflight cases deserves comment. In some of the recent cases, planes flew across adjacent land rather than over the claimant's property, and the claimant has alleged that these flights amounted to a nuisance which took or damaged his property. There has been a lot of fuss over these cases in the courts and in the law reviews, because the grounding of inverse condemnation recovery on a nuisance basis has been thought unusual. But a look at the older street liability cases reveals a sizable and respectable body of law on which this theory can be based. Clip the wings off the airplanes and put them on the highway and what have you got? The

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[2]Beckley v. Reclamation Bd., 205 Cal.App.2d 734, 23 Cal.Rptr. 428 (1962).
[3]Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).
[4]See Van Alstyne, A Study Relating to Sovereign Immunity 225-30 (California Law Revision Commission, Jan. 1963).

construction of the highway, leading to traffic noise, dust, and fumes, may very well give rise to inverse actions by adjacent landowners. Nuisance theory is one possible basis for these lawsuits.

Negligence may also be used as the basis for inverse recovery, although it is not often attempted. It is a half-tort, half-taking theory, and consequently courts have generally been wary of it because it forced them to face problems of sovereign immunity. Therefore, most courts have said that they will not base inverse liability strictly on a negligence theory. One example is an Oregon irrigation district case,[5] although the Oregon court changed its mind later. The California court took the other point of view in Bauer v. County of Ventura,[6] a leading case. In the Bauer case, the county raised the bank of a ditch subsequent to the construction of the ditch so that the bank was higher than plaintiff's land, and as a result his property flooded. Stumps and debris which clogged a culvert were also partly responsible. Plaintiff sued in negligence and recovered. While the court held that it would not impose liability for what it called "negligence in the routine operation," they did say that they would allow recovery for "deliberate acts of negligence." But an analysis of the Bauer opinion would indicate that recovery could not have been based on an act, since the raising of the bank was not of itself negligent. Liability must have been placed on an omission—the failure to take additional steps protective of the plaintiff. But when liability is placed on a failure to take a series of protective measures, the necessity of balancing the cost of protection against the risk of harm requires a weighing of utilities, a balancing process that belies the simplicity of the "deliberate" negligence analysis.

SOVEREIGN IMMUNITY AND THE UTILITY APPROACH

The road leads back to tort and to sovereign immunity, and the retreat from immunity in Arizona, California, Wisconsin, and other states suggests open recourse to tort liability as the basis for handling inverse claims. Is the tort liability of public agencies going to solve all of the problems of the landowner? Our analysis of the Bauer opinion points to limitations on recovery under the tort approach.

Many inverse cases arise in the exercise of discretionary functions of the highway agency, often in connection with the approval, preparation, or implementation of plans. Bauer falls in this category. The Federal Tort Claims Act, which waives Federal immunity in tort, excepts cases in which damage arises out of the exercise of a discretionary function, and the exception has been applied to bar liability in conventional cases of inverse damage. Most cases of probable inverse damage arise from a failure in design or in the implementation of a design, and the Federal courts have seen fit to apply the discretionary function exception to cases of this character. Consequently, Federal liability for damage that would be handled on an inverse basis has, if anything, been restricted by the Federal Tort Claims Act. Legislative and judicial acceptance of the discretionary function exclusion at the state level points to a similar result.

With this background in mind, we can look more closely at eminent domain doctrine to see if it provides a more satisfactory basis for inverse liability. A clue is provided by Thornburg v. Port of Portland,[7] a recent Oregon overflight case in which planes flew near to but not over plaintiff's property. The court imposed liability on the airport in language that requires the weighing of utilities in an explicit eminent domain context:

> Inverse condemnation . . . provides a remedy where an injunction would not be in the public interest, and where the continued interference amounts to a taking for which the constitution demands a remedy. If reparations are to

[5] Patterson v. Horsefly Irr. Dist., 157 Ore. 1, 69 P.2d 282, 70 P.2d 36 (1937).
[6] 45 Cal.2d 276, 289 P.2d 1 (1955).
[7] 376 P.2d 100 (Ore. 1962).

> be denied, they should be denied on grounds of policy which are themselves strong enough to counterbalance the constitutional demand that reparations be paid.[8]

The court then resorted to nuisance theory to ground liability:

> [N]uisance theory provides the jury a useful method for balancing the gravity of the harm to the plaintiff against the social utility of the airport's conduct.[9]

This opinion offers a possible solution to problems of inverse liability, an approach that may not be attractive to all, but which is worth nothing. Thornburg suggests that the real basis of the inverse action lies not in an analysis of property rights thought entitled to protection, nor in fault notions common to negligence law. Inverse condemnation rests instead on the role of eminent domain in underwriting the burden of loss that public improvements place on private landowners. This role, in turn, requires the weighing of utility that is implicit in the Bauer case, the balancing of harm to the plaintiff against the social utility of the public improvement. Substantive clarification of inverse condemnation can well use the weighing of utilities as a starting point for analysis.

If doctrinal improvement is to come, however, it most likely will be achieved through court decision. In an area like this, in which decisions have turned so frequently on the equities of the case and on ad hoc considerations, substantive definition through statutory codification has real limitations. With no satisfactory judicial guideline to start with, statutes have not been very successful in delineating the scope of inverse liability. Pragmatic statutory isolation of claims, for which liability can be imposed on a near-absolute basis, appears as the only possibility in this direction. It should also be possible to proceed administratively to reduce the risk of liability after construction. Acquisition of slope and flowage easements is another possibility, and could be made to operate as a release of future damage.

There are no easy answers, and the doctrinal chaos in the cases reflects an attempt by the courts to reach a rough level of justice in the face of conflicting directions. I feel that the inverse action has a role to play as a dispenser of equity, but I also think that highway counsel have a responsibility to make sure that the courts are called upon to draw consistent and clearly explained lines between cases in which compensation should be paid, and cases in which it should not. Otherwise, the danger of expanding and erratic liability in the inverse field is very real.

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[8] Ibid. at 106.
[9] Ibid. at 107.

Practical Aspects of Inverse Condemnations

EDWARD E. LEVEL*

THE so-called "inverse condemnation" can involve problems differing from those in the usual condemnation. This paper is a discussion of some of these problems, most of which have been experienced by the attorney general's division of the Washington State Highway Department.

To assist you in understanding these problems, brief reference will be made to the substantive and procedural law which is the basis of our inverse condemnations. Washington's constitution prohibits the "damaging" and "taking" of private property for public use.[1] There are no statutes defining either what sort of injury is actionable or the procedures, either informally or in court, for the handling of claims for such injuries. Our case law has defined the injuries which are actionable and permitted actions on such claims as in other civil actions. Such actions must be tried by a jury, unless waived.[2] The jury determines the facts of liability as well as those relating to damages. Jurisdiction of such suits is confined to the county in which our state capital is located.

The most common unconstitutional takings and damagings encountered relate to impairments of access including changes of grade, water damages, slides, damages to lateral support, and encroachments. Not all injuries are actionable, the constitution not creating a cause of action where none existed under the doctrine of damnum absque injuria.[3] Actions sounding in tort[4] or involving exercises of the police power[5] have been distinguished from those involving acts under the power of eminent domain.

PROBLEMS PRELIMINARY TO TRIAL

Preliminary Investigations

Requests for the investigation of the factual bases of claims for unconstitutional takings or damagings of private property are referred to our regular engineering staff, the volume of such work handled not justifying a separate investigating staff. Such investigations generally require work differing from that usually handled by the engineers, and they are apt to be casual as to the extent of investigations and the contents of reports to be submitted by them. They do not always appreciate that they are expected to submit a factual report on the claimed cause of the damage and the extent of the injuries but seem to proceed on the theory that they are expected to prepare one-sided or "whitewash" reports. Reliance on such reports has caused us considerable embarrassment in court. The investigator, regardless of who he is, must be told what is expected of him. His conclusions should be approached critically and verified before relying on them in court. Limitations of departmental personnel should be recognized early and independent consultants retained to investigate and testify in the unusual case.

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*At the time of writing this paper, the author was Assistant Attorney General, Washington State.

[1]Amendment 9, Art. 1, Sec. 16, Washington Constitution.
[2]Ibid.
[3]Wilkening v. State, 54 Wn.2d 692, 344 P.2d 204 (1959).
[4]Wong Kee Jun v. Seattle, 143 Wash. 479, 255 Pac. 645 (1927).
[5]Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921); 18 A.L.R. 393; Sandona v. Cle Elum, 37 Wn2.d 831, 226 P.2d 889 (1951).

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Investigation Before Construction

It was anticipated that the construction of the freeway through downtown Seattle would result in a number of claims for damages to structures due to slides, jarring of the earth, and damages to lateral support. To be certain of the before condition of a number of buildings which could be damaged, the Washington State Highway Department, prior to construction, retained a contractor qualified in the construction of all types of buildings to conduct a room-by-room survey and submit a report indicating the location of all cracks, settlings, and similar structural defects in such buildings. These preconstruction reports are now serving as an excellent basis for evaluating claims now being received. The same contractor is now being sent back to evaluate the physical after condition of the same buildings. Preliminary studies are also being conducted to determine the present noise level of a hospital which will claim substantial damages from freeway noise.

Federal participation in the cost of these preconstruction surveys of buildings has, in the past, been seriously questioned. The Federal Government's argument is that its funds can lawfully be used in right-of-way costs but not in costs incidental to tort claims. Applied to the cases described above this argument is unsound as the damages in question do not sound in tort under the law in Washington, but are either unconstitutional takings or damagings. It is impossible for a highway department to anticipate all damages that will result on a particular project and unreasonable to expect it to acquire rights-of-way to the extent necessary to avoid all possible damages to property.

Discovery

With the liberal rules of pleading such as contained in the Federal Rules of Civil Procedure, most of which we have adopted in Washington, it is often difficult to tell from a complaint how a property owner has been damaged. It is therefore generally more necessary to resort to discovery procedures in the inverse situation than in the usual condemnation. Interrogatories can help on problems of ownership, possible witnesses, contents of written contracts and leases, rentals, and other factual material that can readily be secured by an owner. Interrogatories are of little help where an owner is not sure of the factual basis of his suit until just before trial, which is more often the rule than the exception. Depositions as well as interrogatories may be required in this situation. It may be possible to restrict the owner's case by requesting admissions of fact as permitted under Federal Rule of Civil Procedure No. 36. Unless the case is obviously one where there is no legal liability, a motion for summary judgment will generally be fruitless as there almost always will be unresolved questions of fact relating to liability or damages or both.

STATUS OF THE CONTRACTOR

Under the case law of Washington, if the contractor is acting within the scope of his contract as an independent agent, he will not be personally liable for takings or damagings of private property incidental to his performance of the contract.[6] He will be liable for damages caused by negligence in the performance of the contract.[7] This liability is expressly recognized in Washington's Standard Specifications for Road and Bridge Construction, which also require that the contractor's bond indemnify the state from "any direct or indirect damages that shall be suffered or claims, for injuries to persons or property, during the carrying out of the work of the contract." We have not felt that these specifications secure indemnification from unconstitutional takings or damagings.

Recently we have inserted in some contracts special provisions extending the contractor's liability to unconstitutional takings and damagings. We have yet to find what real indemnification we may secure from the contractor or his surety because of this

[6] Ettor v. Tacoma, 77 Wash. 267, 137 Pac. 820 (1914).
[7] Curtis v. Puget Sound Bridge & Dredging Co., 133 Wash. 323, 233 Pac. 936 (1925).

specific provision. We have also required the contractor to secure a public liability policy, with substantial limits, insuring the state against all losses arising from the performance of the contract. If insurance is required, care should be taken to insure against any "occurrence" rather than against any "accident." Our supreme court recently held that an unconstitutional damaging (water pollution) was not an accident and therefore not covered by a general public liability policy.[8]

It is often difficult to tell whether a particular damage resulted from the contractor's negligence or was incidental to the performance of his contract. If the owner has not joined the contractor as a defendant in his inverse condemnation action and the contractor's negligence may have contributed to the loss in question, the state should see that the contractor is joined as a defendant if such is permitted under local rules. Once the contractor is involved, it is possible that he, his surety, or his insurance carrier may be willing to participate financially in a settlement at a sum which the state would not be willing to pay alone.

Usually when a contractor has been named as a defendant, he immediately tenders his defense of the action to the state. As it is generally possible to infer fault of the contractor as well as the state from the general allegations of a complaint in which the contractor has been named a defendant, we usually refuse this tender. Dire consequences because of our refusal are promised by the contractor. We have found no legal justification for holding the state liable for declining a tender of defense if judgment is ultimately for the contractor. Local law may be otherwise however. There could be remedies for the state if a contractor refused a tender of defense made by the state based on indemnity provisions of the contract involved.[9]

We have accepted a tender of defense where the contractor was obviously acting within the scope of his contract and would not be liable. Defending and ultimately paying a judgment against the contractor can be awkward in this situation unless the state is also named in the judgment.

SOME VALUATION PROBLEMS

Permanent and Temporary Injuries

Two general measures of compensation have been laid down in Washington. One relating to permanent injuries is the before and after rule;[10] the other for temporary injuries is "the reasonable expense of restoring the land, and the loss of income pending such restoration within a reasonable time."[11] We have a number of cases involving this distinction, but none of them lay down a rule for determining whether a particular injury is permanent or temporary. "Income" as alluded to in the temporary situation is usually approached in terms of rental, but the use of the ambiguous word "income" does cause us concern. If the injury is temporary but continuing, there is a possibility that successive actions may be allowed for the continuing injury.[12] The before-and-after rule of compensation will generally be more economical to the state and we therefore attempt to establish that an injury is permanent rather than temporary. If possible, this issue should be resolved at a pretrial hearing such as is allowed by Federal Rule of Civil Procedure No. 16 rather than permitting all the owner's proof on damages to go to the jury.

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[8] Town of Tieton v. General Insurance Co., 61 Wn.2d 716, 380 P.2d 127 (1963).

[9] See 27 Am. Jur., Indemnity, Sections 26 and 27.

[10] The Washington court has held that where earth materials are taken, the measure of compensation is the effect on the value of the land from which the materials are taken rather than the value of the materials. Ghione v. State, 26 Wn.2d 635, 175 P.2d 955 (1946); Armstrong v. Seattle, 180 Wash. 39, 38 P.2d 377, 97 A.L.R. 826 (1934).

[11] Messinger v. Frye, 176 Wash. 291, 28 P.2d 1023 (1934); Harkoff v. Whatcom County, 40 Wn.2d 147, 241 P.2d 932 (1952); see 29 C.J.S., Eminent Domain, Sec. 142.

[12] Island Lime Co. v. Seattle, 122 Wash. 632, 211 Pac. 285 (1922).

Care should be exercised to see that the final release or judgment expressly covers future damages if that is its intention. If the effect of an inverse condemnation is to establish that the state has taken or damaged rights in certain land, these rights and the description of the land involved should also be spelled out in the final judgment.[13]

Cost to Cure

Whether the injury be termed temporary or permanent, a cost to cure the injury approach to damages may be more economical to the state, easier to apply, and more readily acceptable to the owner than a before and after determination of compensation. Examples are where the state agrees to pay the costs of a new well where construction has dried up the old one and the costs of cleaning up materials sloughed from highway construction into the beds of streams and ponds on private property. Often this particular problem can be anticipated in the original right-of-way settlement by provisions to reimburse the owner for his costs to correct such damages, if they occur, upon presentation of proof of such costs. We have also paid for or performed such work directly where agreeable with owners.

In the event of trial to determine compensation, the cost to cure the injury has been held the measure of damages where it is less than the decrease in the market value of the premises.[14] Even where the owner relies upon decreased market value, the defendant may show a cost of restoration to its former relative position.[15]

A costs to cure approach to settlement may not be satisfactory where the damage is continuing or recurring. One settlement on a before-and-after basis recognizing the possibility of future damage would be more desirable than settling on a cost to cure and then being liable in the event of a subsequent injury from the same cause.

EFFECT OF PRIOR JUDGMENTS

Res Judicata

Often the property remaining after a partial taking will be damaged during or as a result of the construction for which the taking was made. To what extent will the prior right-of-way settlement or judgment be a bar to a subsequent action for such damages? An example of this situation is found in Compton v. Seattle, where the court held that a prior condemnation judgment was res judicata as to all questions of damages raised and which might have been raised in the condemnation.[16] Our court has indicated that to raise this defense defendant must bring up "so much of the proceedings in the condemnation as was necessary to show that the grounds upon which recoveries were had were identical."[17]

Actual items of damages claimed may be made specific by inclusion in the final judgment in the condemnation action. The problems involve those damages "which could have been claimed" in the first action. In the trial of a condemnation action in Washington we are obligated to present our construction plans and damages are predicated upon such plans.[18] This should ease the problem of determining what issues could have been raised. Numerically however the holdings of Washington cases favor the owners in finding that the damage in question was not such as would normally be anticipated or differs from that claimed in the first action.

A situation which we have encountered several times recently is that in which there has been a claimed injury to property and the state subsequently condemns or other-

[13] See Little v. King County, 159 Wash. 326, 293 Pac. 438 (1930); Cf. Steiger v. City of San Diego, 329 P.2d 94 (1958).
[14] 4 Nichols, Eminent Domain (3d ed.), Sec. 14.22; 5 Nichols, Eminent Domain (3d ed.), Sec. 23.2.
[15] In re Mercer St., 55 Wash. 116, 104 Pac. 133 (1909).
[16] 38 Wash. 514, 80 Pac. 757; see 29 C.J.S., Eminent Domain, Sec. 328.
[17] Downs v. Seattle & Montana Ry. Co., 5 Wash. 778, 32 Pac. 745 (1893).
[18] State v. Ward, 41 Wn.2d 794, 252 P.2d 279 (1953).

wise acquires the property. The source of much of this litigation is State v. Corey,[19] indicating that RCW 47.28.026 prohibiting improvements within the limits of recorded highway plans could result in a compensable injury to property. A defense in this situation is suggested by Anderson v. Port of Seattle,[20] in which plaintiffs sought to maintain an action for damages caused by airplane noise, which action had accrued and been commenced before the defendant had acquired the property damaged by purchase at a fair price and without depreciation for the alleged damages. The court held that the owners were fully compensated in the purchase and could not subsequently maintain an action for the prior damages, whether temporary or not.

The Plan Change

A problem arises where a partial taking of right-of-way is based upon certain construction plans and the department subsequently changes its plans. Does this situation create a cause of action for the owner? A case involving this problem is Feuerborn v. State.[21] The plans presented in the trial of the original condemnation provided for a grade intersection at the corner of the Feuerborn property. The plans were changed so that this proposed intersection was closed. Among other things, the state argued that it was not liable in the cul-de-sac situation and that the closure was a proper exercise of the police power. The supreme court did not find it necessary to consider these arguments of noncompensability but concluded that the state, having elected to have damages determined in relation to specific plans and evidence, was bound by such plans and evidence. By way of dicta the court discussed the measure of compensation in this situation as follows:

> The measure of damages is the difference between (1) the amount of compensation that was awarded in the Grant County judgment for the taking of the right of direct access to the highway when plans to construct an eastbound on-and-off ramp adjacent to the corner of appelants' property were in evidence, and (2) the compensation to which they would have been entitled had the present construction plans been placed in evidence in the condemnation proceeding. In other words, the measure of damages is the difference between the amount of damage to the condemnees' property under the original plan and under the later plans.

Under the original plans the owners would have had a service station corner. The language quoted above has the advantage of avoiding the state's having to pay for this paper benefit when it changed its plans.

We have had a number of actions similar to the Feuerborn case due to plan changes required by the higher standards of the Bureau of Public Roads, most of which spring from deed provisions relating to construction and expressly reserving certain access rights. Where the construction provided, such as a frontage road, is not built, our trial courts have held that the state is obligated to build within a reasonable time or be liable in damages to the owner. Where a facility has been built as promised and then is changed, owners have been given causes of action for their damages resulting from such change. Most of the highways involved have been opened for only a short time. We have not had a case in which the possible conflict between the state's right to abandon a highway or change its route and the reservations of access rights in such deeds has been

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[19] 59 Wn.2d 98, 366 P.2d 185.

[20] 49 Wn.2d 528, 304 P.2d 705.

[21] 59 Wn.2d 142, 367 P.2d 143; other cases in which owners sought damages because of a change or abandonment of plans are Williams v. N.C. Highway Commission, 252 N.C. 772, 114 S.E.2d 782 (1960); Fleming v. Noble, 171 N.E.2d 739 (Ohio, 1959); and Bessemer Improvement Co. v. Greensboro, 247 N.C. 549, 101 S.E.2d 336 (1953).

resolved. The promissory language contained in the deeds appear to create an interest which will run with the land.[22]

The only way to avoid this problem is to avoid express obligations and rights in the original transaction. In condemnation trials in Washington, damages are predicated on evidence of current plans,[23] and we cannot avoid their binding effect. Where the facility involved is a "new" location to which the owner has no prior right of access, it should be easier to avoid such promissory language than in those situations where prior rights are affected. Whether the state wishes to take the risk in expressly providing for rights is essentially a matter of economics, but there are some risks in this practice.

Although an interest in land may run, a cause of action for the taking or damaging of such interest is personal and will not run unless expressly conveyed.[24] If you are sued by the current owner of a piece of property, it is possible that the cause of action arose before he acquired title and that he does not own the cause of action. This in turn leads to the problem of when does a cause of action arise. This may not be the date upon which the damages were actually done but when the project involved is entirely completed.[25] This latter rule will also be of importance in considering whether or not the statute of limitations has run on the damages in question.

TRIAL CONSIDERATIONS

Procedures and tactics in the trial of an inverse condemnation are similar to those in the trial of the usual condemnation. Often, however, not only will there be a dispute as to the amount of compensation but also as to the fact of liability. We have not faired well when our position has been that, although there are damages, the state did not cause them or that the state is not legally responsible for such damages. As to the amount of verdicts, our record on inverse condemnations is not so impressive as in direct condemnations. This may be due in part to the inference created in the inverse condemnation that the state is a wrongdoer. As we often contest liability as well as damages, compromises are less frequent in the inverse situation.

A tactic sometimes suggested by insurance counsel in tort cases is that liability not be admitted although it is obvious in the hope that by trying all issues, perhaps something will come out which will result in the jury's doing some equity for the defendant. This is most unlikely in an inverse condemnation where the state is on one side and the issues are the comparatively unemotional ones of injury to land and its value. The fairness of the state can be made more obvious by an admission of liability and indicating early that the owner must still prove his damages.

We always ask for a trial by jury. Our experience has been that judges are more liberal than juries in either direct or inverse condemnation. In a trial to the court a reversal on appeal may be rendered more difficult than in a jury trial by the trial court's entry of adequate findings and conclusions.

There are not many defenses that can be raised in a condemnation action. Negligence of the owner may bear on whether he has breached his obligation to mitigate damages,[26] if such an obligation exists under local law, or on whether acts of the defendant actually were the cause of the damages. Possible defenses suggested throughout this discussion include that the contractor, not the state, is liable, that the injury is tortious or arises from an exercise of police power, that it is consequential or damnum absque injuria, that it is barred by the applicable statute of limitations, or that the action is barred by a prior judgment. Local law may also require the filing of claims,

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[22] See Williams v. N.C. State Highway Commission, supra note 21.

[23] Supra note 18.

[24] 30 C.J.S., Eminent Domain, Sec. 389 et seq., Gillam v. Centralia 14 Wn.2d 523, 128 P.2d 661 (1942).

[25] Gillam v. Centralia, supra. Foley v. Cedar Rapids, 133 Iowa 64, 110 N.W. 158 (1907); Dougherty County v. Edge, 216 Ga. 100, 114 S.E. 2d 862 (1960).

[26] 4 Nichols, Eminent Domain (3d ed.), Sec. 14.22, p. 527. See Hinckley v. Seattle, 74 Wash. 101, 132 Pac. 855 (1913).

the posting of bonds, or commencing actions in certain courts or in a certain manner. Factually either liability or damages, or both, may be controverted.

Care should be exercised in deciding whether or not to appeal an inverse condemnation judgment. The error should be substantial. The record will contain proof of some act by the state and some injury suffered by the owner. If equity indicates that there should be a remedy for the owner, the appellate court will generally find a link between the state's act and the owner's injury. Appellate judges seem to favor either property or personal rights, the state having no appeal in either classification.

Although inverse condemnations are similar to direct condemnations, more care must generally be taken at each stage of the case, including preparation as well as trial, than in the usual condemnation. It is hoped that this discussion will be of some assistance to you in anticipating problems that can arise in such actions.