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DAMAGES RECOVERABLE IN A PARTIAL TAKING*

by

John S. Palmore**

I. SCOPE AND DEFINITIONS

ANY TIME governmental action has the effect of diminishing a person's right to use or dispose of his property as he sees fit, a "taking" occurs. In this broad sense a zoning regulation amounts to a partial taking with respect to all property affected by it.¹ But for the purposes of this discussion the term "partial taking" will be confined to the acquisition by condemnation of the entire title to a tangible and physically separable portion of a privately owned tract or parcel of real estate, leaving the remaining portion in its previous ownership.

In some jurisdictions the diminution in value resulting to the portion not taken is called "resulting damage" or "damage to the remainder." In others the terms "consequential damage" and "severance damage" are commonly used. For our purposes these expressions may be considered as referring to the same thing, although it should be recognized that "consequential damages" are not always limited to cases of partial taking.²

II. CONSTITUTIONAL REQUIREMENTS

The fifth amendment of the United States Constitution provides that private property shall not be taken for public use "without just compensation."³ Similar provisions are made in most of the state constitutions, and all the states are bound to the same effect by the due process clause of the fourteenth amendment.⁴

It is readily apparent that the problem of measuring just compensation ordinarily will be more difficult in the case of a partial taking than in the instance of a complete taking. All of the valuation principles applicable to a complete taking apply also to a partial taking.⁵ The additional difficulty arises principally with respect to the effect of the taking on the remainder tract.

Despite variations in the formulae by which the end result is reached, and differences as to what factors of loss are compensable and admissible in evidence, the courts seems to be unanimous in holding that the constitu-

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¹ So long as it is not unreasonable, such a taking comes within the police powers of the state and is not compensable. If it exceeds the bounds of the police power, it is either invalid or it must be treated under the principles of eminent domain. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

² 4 P. NICHOLS, *EMINENT DOMAIN* §§ 14.1, 14.2 (1962) [hereinafter cited as NICHOLS].

³ U.S. CONST. amend. V.

⁴ *Chicago, B. & Q. Ry. v. City of Chicago*, 166 U.S. 226 (1897).

⁵ 4 NICHOLS § 14.1.

tional right to compensation for property taken includes severance damages (if any) in partial-taking cases.⁶

III. MEASURE OF RECOVERY

There are two methods of measuring compensation in partial-taking cases. The usual one, which for convenience will be called the "value plus damage" rule, is to assess separately (at least in the evidence, if not in the verdict) the value of the portion taken and the "damages" to the remainder and add the two together. The other is the "before and after" rule, in which the evidence and verdict are directed to the difference in market value between what the condemnee owned immediately before the taking and what he owned immediately thereafter.

This basic divergence originates mainly because in a good many states the constitutional guarantee of "just compensation" means, in effect, compensation in money for the property taken, disregarding compensation in the form of actual or theoretical enhancement to the value of the remainder tract by reason of the use to which the condemned portion is to be put.⁷ Indeed, that was the accepted principle in Kentucky until 1963 and, subject to various modifications, apparently still prevails in most states either by case law, statute, or express constitutional qualification.⁸

If severance damage, or resulting damage to the remainder, falls within the constitutional guarantee of just compensation, it would seem that there is no sound basis for distinguishing between the value of the land taken and the diminution in value of the land remaining. If benefits may be offset against the one, they ought to be offset against both, and that is the net effect of the simple "before and after" rule. Nonetheless, in several jurisdictions the distinction is made, and the offsetting of benefits is confined to the amount allowed for damage to the remainder.⁹ Thus, for example, in Texas the "value plus damage" formula has been expressed as the value of the land actually taken plus the difference in value of the remainder before and after the taking.¹⁰ From state to state there are further variations, such as the differentiation in Arkansas, California and Kansas between condemnations in favor of private corporations and those in favor of the public.¹¹

The Supreme Court of the United States held long ago that offsetting an increase in the value of the remainder against the value of the portion taken does not offend the Federal Constitution.¹² Text writers agree that

⁶ Cf. *United States v. Grizzard*, 219 U.S. 180 (1911); *Baumann v. Ross*, 167 U.S. 548 (1897); 4 NICHOLS § 14.2; 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 48 (2d ed. 1953) [hereinafter cited as ORGEL].

⁷ 27 AM. JUR. 2d *Eminent Domain* § 362 (1966); 4 NICHOLS §§ 14.23, 14.232(1); cf. OKLA. CONST. art. 2, § 24.

⁸ See Annot., 145 A.L.R. 7, 156 (1943). Summaries of this phase of the law in each jurisdiction appear in 3 NICHOLS § 8.6211.

⁹ Cf. *Highway Comm'n v. Gray*, 197 La. 942, 2 So. 2d 654, 660-61 (1941); *Davidson County Bd. of Educ. v. First Am. Nat'l Bank*, 202 Tenn. 9, 301 S.W.2d 905, 907 (1957); *Dawson v. State*, 391 S.W.2d 565 (Tex. Civ. App. 1965), *dismissed by agreement*.

¹⁰ *Wallace v. Van Zandt County*, 264 S.W.2d 202 (Tex. Civ. App. 1954).

¹¹ ARK. CONST. art. II, § 17; CAL. CONST. art. 1, § 14; KAN. CONST. art. 12, § 4.

¹² *Baumann v. Ross*, 167 U.S. 548 (1897).

the "before and after" rule is superior to the artificial approach inherent in any of the various forms of the "value plus damage" rule.¹³ The Kentucky Court of Appeals, which exercises plenary dominion over matters of procedure, decided in 1963 that statutes requiring use of the "value plus damage" formula were invalid under the Kentucky Constitution, and adopted the "before and after" rule without qualification except as to loss of access.¹⁴ The Kentucky court's disenchantment with the "value plus damage" approach resulted from the incorrigible disposition of valuation witnesses and juries to duplicate damages by including, in the assessment of damages to the remainder, compensation for the loss of advantages that inhere in the value of the portion taken.

The diverse state of the law on offsetting benefits has been conveniently summarized by the Supreme Court of New Mexico as follows:

By general benefits are meant those benefits which the adjoining landowner shares in common with the public generally. By special benefits we mean those benefits resulting from a public work which enhance the value of the land not taken because of their advantageous relation to the improvement. . . . When such incidental benefits exist the distinctions which may be drawn between the two factors, benefit and injury, have been variously combined by the courts. Lewis, in Volume 2 of his treatise on Eminent Domain (3d ed. 1918) at page 1177, groups their treatment by the courts into five main classifications: (1) that the benefits cannot be considered at all . . . ; (2) that special benefits may be set off against damages to the remainder but not against the value of the part taken . . . ; (3) that benefits, whether general or special, may be set off only against the damages to the remainder; (4) that special benefits may be set off against both damages to the remainder and the value of the part taken; and (5) that both special and general benefits may be set off against damages to the remainder and the value of the part taken.¹⁵

Without belaboring the subject, suffice it to say that the real measure of damages in any partial-taking case boils down to or at least seeks to achieve the same result as the "before and after" rule, subject to modifications necessitated by the local law with respect to such matters as benefits and noncompensability of loss of access.

IV. ELEMENTS OF DAMAGE

Frontage Value. As in the instance of the basic measure of damages, the provable elements or factors bearing upon the increase or decrease in value of the remainder tract vary from jurisdiction to jurisdiction and are significantly affected by the extent to which benefits are allowable as an offset.

Bearing in mind that market value is the price a willing buyer would give and a willing seller would take, neither being under any compulsion, obviously the price paid for street or highway frontage in a private sale will include whatever diminution in value results (or has resulted at some

¹³ 3 NICHOLS § 8.6206(1); 4 NICHOLS § 14.232(1); 1 ORGEL § 52.

¹⁴ Department of Highways v. Sherrod, 367 S.W.2d 844, 857 (Ky. 1963). See also Department of Highways v. Conley, 386 S.W.2d 750, 753 (Ky. 1965).

¹⁵ Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682, 684 (1953). New Mexico follows the "before and after" rule. State v. Atchison T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

time in the past) to the remainder by reason of its loss of direct access to the public thoroughfare.¹⁶ Comparable sales introduced by the landowner in a condemnation proceeding almost always will reflect that factor. But in a street or highway condemnation case, unless the plans contemplate limited access or non-access, that factor usually will not or should not be present. Hence the prices paid in private sales for comparable property constitute highly deceptive evidence in favor of the landowner. In states using the "before and after" rule there is no problem since the after-value of the remainder parcel includes its frontage value, but, in states that do not permit the offsetting of benefits to the remainder against the award for the portion taken, the result may be that the landowner gets paid for something he has not lost—that is, the frontage value.

An interesting case involving this precise point came before the Court of Appeals of Arizona early this year.¹⁷ In Arizona "the state must pay for the value of the property taken, regardless of the benefits to the remaining property."¹⁸ The owners contended they were entitled to the full value of the frontage taken, though they had substantially the same frontage left after the taking. In a thorough and highly instructive opinion the court resolved the dilemma by concluding that in the ordinary street-widening case "frontage" has no special value and the jury should be instructed substantially to that effect. Contrary decisions by the courts of Texas, California and Hawaii are noted in the opinion.¹⁹

As pointed out in an earlier decision by the Kentucky Court of Appeals,²⁰ the problem arises with the introduction of comparable sales, and this is the stage of the trial at which the fallacy should be attacked and exposed through cross-examination. With all deference to the courts that have decided otherwise, it is submitted that in a simple street- or highway-widening case the condemnor does not acquire frontage and should not be made to pay for it. To the extent that access remains undiminished the frontage is undisturbed. It is not taken, but merely relocated. The remainder parcel is damaged, of course, to the extent that its depth is reduced or for some other reason is less advantageously situated than before the portion was taken, but it is not "benefited" by the frontage, because as a part of the original tract it enjoyed that same benefit before the taking.

Loss of Access. With the interstate highway program, loss of access has become a common problem. Farmer Jones, whose place used to front on a two-lane highway, now has to go three miles down a gravel service road to get onto what is now a four-lane divided superhighway; or he can now go in only one direction where he used to be able to turn either way; or perhaps half of his frontage is now occupied by a deceleration lane or a

¹⁶ Cf. *Department of Highways v. Finley*, 371 S.W.2d 854, 856 (Ky. 1963); *Frenel v. Commonwealth*, 331 S.W.2d 710 (Ky. 1960).

¹⁷ *Deer Valley Indus. Park Dev. & Loan Co. v. State*, 5 Ariz. App. 150, 424 P.2d 192 (1967).

¹⁸ 424 P.2d at 196.

¹⁹ *People ex rel. Dept. of Public Works v. Silveira*, 236 Cal. App. 2d 604, 46 Cal. Rptr. 260 (Dist. Ct. App. 1965); *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961); *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966).

²⁰ *Department of Highways v. Finley*, 371 S.W.2d 854, 856 (Ky. 1963).

clover-leaf ramp. The Court of Appeals of Arizona has stated a concise and well-reasoned exposition of the general rule:

When the controlled-access highway is constructed upon the right-of-way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefore. . . . Other means of access such as frontage roads . . . may be taken into consideration in determining the amount which would be just under the circumstances.²¹

The opposite viewpoint is illustrated by an Arkansas opinion of the same vintage, which in substance holds that the substitution of a frontage road in lieu of direct access to the highway is essentially a *diversion* of traffic authorized under the police power of the state and is not a compensable damage factor.²² In Kentucky, the courts hold that the landowner has no more than a right of "reasonable access to the highway system" and that all interferences with regard to convenience of access which do not deprive him of that right come within the police power.²³

An example of the latter principle occurred in a case in which, incident to a street-widening adjacent to a motel, curbside parking was prohibited.²⁴ This was held to be a noncompensable item of damage because the public authority had the same power to prohibit parking on the newly widened portion as it would have had to discontinue parking on the original street.

Sometimes under the "reasonable access" theory a question will arise as to whether the new means of access is truly reasonable, and whether that is an issue for the jury or the court. Thus far, the Court of Appeals in Kentucky has been inclined to say as a matter of law that so long as the owner is given a connection with the public highway system, no matter how much farther he must travel to reach the new highway, or to reach town, he cannot recover.²⁵ Even though this may seem harsh, the principle is that whatever value property has by reason of its proximity to a public highway was conferred upon it at public expense and may, within reason, be terminated without public liability.²⁶ There is, of course, a limit. In one case the right-of-way of a frontage road provided by the state coincided with the landowner's boundary line along the thread of a creek.²⁷ Needless to say, the state's contention that "reasonable access" had been provided was rejected. A landowner who has been able to reach the highway without the aid of a bridge or culvert cannot reasonably be put to

²¹ State v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 992 (1960).

²² State Highway Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960). See also State v. Danfelter, 72 N.M. 361, 384 P.2d 241, 246 (1963), reaching the same result without reliance upon the police power, and other decisions, pro and con, footnoted in the opinion.

²³ Commonwealth v. Carlisle, 363 S.W.2d 104 (Ky. 1962). See also Department of Highways v. Denny, 385 S.W.2d 776 (Ky. 1964); Department of Highways v. Sherrod, 367 S.W.2d 844, 859 (Ky. 1963). Whether this theory would apply if the landowner has previously been charged for the benefit conferred on his property by the initial construction of the highway, or has had the cost of a street construction or improvement assessed against the property, is an interesting question not thus far decided in Kentucky.

²⁴ Department of Highways v. Mayes, 388 S.W.2d 125 (Ky. 1965).

²⁵ Department of Highways v. Claypool, 405 S.W.2d 674 (Ky. 1966).

²⁶ *Id.* at 676.

²⁷ Department of Highways v. Adkins, 396 S.W.2d 768, 770 (Ky. 1965).

the necessity of building one in order to regain access to the highway system.²⁸

In jurisdictions that do not permit recovery based on loss of direct access a practical trial problem is presented by the necessity of separating that factor from the other considerations affecting the residual value of the remainder tract. As in the instance of frontage, the question arises when a witness undertakes to discuss the diminished value of, or damage to, the remainder. The Kentucky approach (however unsatisfactory it may be from a practical standpoint) has been to require the witness to base his estimate on the hypothesis that the property still has access as before,²⁹ with an appropriate admonition to the jury (if requested).³⁰ This is an interesting converse of the "let's pretend" situation that exists in states that do not allow benefits to be considered, when the expert witness must base his opinion on what the remainder tract would be worth, or how much it would be damaged, if the condemned portion of the property were not to be used as a street or highway.³¹

Inconvenience. The matter of inconvenience frequently arises when land is divided by a strip taken for a new highway. Barns and pasture land may be left on one side and the water supply on the other. Such inconvenience is generally allowed as a proper item for consideration.³² In a recent case the Supreme Court of Oklahoma said without qualification that "in Oklahoma the rule long applied is that the jury is entitled to consider inconvenience, which interferes with the owner's use and enjoyment of his property, in assessing damages."³³ However, since the objective sought in most if not all jurisdictions is to measure the damage in terms of loss of market value (subject, as pointed out heretofore, to differences in treatment of access and benefits), it seems more logical to confine such evidence to those matters of inconvenience which really affect the market value. As stated by the Supreme Court of Mississippi, "The inconvenience to be considered is not that which is peculiar to one who by reason of age, disinclination or preference may react . . . adversely to the readjustment of his boundaries. The test is the extent to which those, whose present or prospective interest will create a market value, will take these factors into account."³⁴

Again the subject of benefits is encountered. It may be, and often is, that the remaining parcels have greater value as separate tracts, and perhaps the highest and best use of one or both will be different from what it was before. Often the new highway frontage will convert farm land into highly desirable residential or commercial property. Under the "before and after" rule the question of inconvenience becomes irrelevant unless

²⁸ Department of Highways v. Dotson, 405 S.W.2d 30 (Ky. 1966).

²⁹ Department of Highways v. Claypool, 405 S.W.2d 674 (Ky. 1966).

³⁰ Department of Highways v. Adkins, 396 S.W.2d 768 (Ky. 1965).

³¹ Cf. Hamer v. State Highway Comm'n, 250 Iowa 1228, 98 N.W.2d 746, 748 (1959); Pearl River Valley Water Supply Dist. v. Wood, 172 So. 2d 196, 207 (Miss. 1965); Finley v. Board of County Comm'rs, 291 P.2d 333, 336 (Okla. 1955).

³² 4 NICHOLS § 14.243.

³³ Turnpike Authority v. Burk, 415 P.2d 1001, 1005 (Okla. 1966).

³⁴ State Highway Comm'n v. Smith, 202 Miss. 488, 490, 32 So. 2d 268, 270 (1947).

the highest and best use remains the same, and unless the highest value of the remaining property is still as a single unit rather than separate parcels.

In Kentucky the courts have been frequently confronted with this problem, usually when trial counsel have not been careful to develop the subject of whether the remaining property has greater value as a unit or as separate parcels. In one case it is said that "[t]he fact that the separate parcels into which the farm has been split cannot feasibly be operated as a single unit has no relevance except as may be given as a value-affecting factor by a witness who testified that the separate parcels would bring less on the market, sold as separate parcels, than they would bring if they could be sold as a single unit."³⁵ Later, however, it was decided that the burden of proof in this respect should rest on the condemnor, and that "where a farm is involved and no evidence is introduced by either party, it may be assumed the 'highest and best use' of the farm is that of 'farming' and that its highest value is as a single unit."³⁶ The net result is that inconvenience and interference in continuing to use the property as it was being used before the taking is admissible as a value-affecting factor unless it is clearly shown that the remainder parcels will have greater value if sold separately.

Fencing and Restoration Costs. Consideration of whether the highest and best use of property left after the taking remains the same as it was before leads naturally into the subject of restoration costs—that is, to what extent is it proper to prove what it will cost to restore fencing and improvements, or take other measures designed to minimize or offset the effect of the taking?

It seems to be the generally prevailing rule that the cost of fencing made reasonably necessary by the taking is admissible in evidence, whether as a separately compensable item or as information relevant to the diminution in value of the remainder.³⁷ The condemnation statutes of Kentucky at one time required that fencing be allowed as a separate item, and for many years after the requirement disappeared from the statutes it remained a part of the law,³⁸ until in 1963 the court shifted course to enter the main current of the "before and after" rule.³⁹

Naturally, the price a purchaser is willing to pay for a piece of real property will reflect the cost of work necessary to make it usable for the intended purpose. Hence under any theory the cost of the work if in fact it is necessary, is relevant evidence. There are, however, certain definite pitfalls in the admission of this type of evidence. First and most obvious is the tendency toward duplication. In states that follow the "value plus damage" rule the landlord should be awarded the value of his old fence as part of the amount awarded for the portion taken. If he is then permitted to show the cost of a new fence as bearing on the diminished value of the

³⁵ *Department of Highways v. Burns*, 394 S.W.2d 923, 926 (Ky. 1965).

³⁶ *Department of Highways v. Sea*, 402 S.W.2d 842, 843 (Ky. 1966).

³⁷ 27 AM. JUR. 2d *Eminent Domain* § 313 (1966); 4 NICHOLS § 14.24321.

³⁸ *Greenup County v. Redmond*, 335 S.W.2d 335, 337 (Ky. 1960).

³⁹ *Department of Highways v. Sherrod*, 367 S.W.2d 884, 854 (Ky. 1963).

remainder, he collects twice. This happened in a Kentucky case, before the adoption of the "before and after" rule, in which the award for the portion taken included an amount for a parking area in front of an apartment house.⁴⁰ The witnesses for the owners based their estimates of the reduction in value of the remainder on the lack of parking space. The judgment was therefore reversed.

The other treacherous aspect of this kind of evidence is that, regardless of how desirable the projected expenditure is, it may not be strictly necessary, and cost may also exceed the amount by which it enhances the market value. Particularly is this true if the highest and best use of the property in its new situation is different from that before the taking. For example, if new highway frontage through a farm makes the land more valuable for subdivision purposes, construction of fences and cattle crossings will add nothing, and certainly the purchaser who would pay the highest price would not find it necessary to provide them.

All property has both advantages and disadvantages that contribute to or detract from its value. Swamp land has to be drained. Rough land has to be leveled, and streets have to be put in, in order for it to be subdivided and sold as building lots. A residential lot must have a house built on it before its highest and best use is attained. It is all too easy to go far afield and into the realm of speculation in figuring what expenditures are necessary to restore property to its former use or adapt it to its highest and best use. The safest course, and the one adopted in Kentucky, is to stick as closely as possible to simple before and after values, on an "as is" basis. A farm without a fence has a market value "as is." One purchaser might put up a wire fence, another a plank fence. One costs more and adds more value than the other. A choice between the two in a condemnation proceeding, even on the basis of what kind was there in the first place, is purely arbitrary and introduces conjecture. It is submitted that except under the most extraordinary circumstances (for example, the replacement of a wall in a building), projected cost figures should not be admitted or used in evidence, and the valuation witness should be confined to an enumeration or description of those things which in his opinion must be done in order to adapt or restore the property to its highest and best use and which, presumably, a prospective buyer would take into consideration in arriving at the price he would be willing to pay for it.

V. LEASEHOLDS

An instructive and unique case dealing with the apportionment of a partial taking between landlord and tenant is the Kentucky decision of *Department of Highways v. Sherrod*.⁴¹ This, incidentally, is the case in which the Kentucky court abandoned the "value plus damage" rule in favor of the "before and after" rule.

In 1960 the state condemned a strip of land for the widening of a highway. The parcel included a leased restaurant building and related struc-

⁴⁰ *Commonwealth v. Blanton*, 352 S.W.2d 545 (Ky. 1962).

⁴¹ 367 S.W.2d 844 (Ky. 1963).

tures. The lease could run to 1975 at the option of the lessee. In the aggregate, the landowners were awarded \$31,075 and the lessee \$41,215, including "\$28,350 as damages for the portion of the leasehold taken, \$4,150 as resulting damages to the leasehold interest, \$215 for use of a temporary easement, and \$8,500 for loss of business during the highway construction period."⁴²

That portion of the award to the lessee for diminution in value of the leasehold was based on an instruction incorporating the general rule that a lessee is entitled to the fair rental value minus the actual rent over the unexpired term of the lease.⁴³ However, the trial court failed to instruct on how it was to be applied when only a part and not all of the leased property is taken.

Most of the states, including Kentucky, follow the "undivided fee" rule, under which total compensation is limited to the market value of the real estate, as distinguished from the sum of the different interests therein.⁴⁴ After that determination is made, the simplest approach is to evaluate the lessee's interest and subtract it from the total, the difference being the value of the landlord's interest.

In reversing, the court of appeals came to the conclusion that the value of a lease is the difference between what a willing buyer would pay the landlord for the property free and clear of the lease and what he would pay for it subject to the lease, as in the case of easements to which the premises might happen to be subservient. This means that the lease has value only to the extent that the lessee is obligated to pay less rent than the property would bring if the landlord were free to lease it anew. For example, if the property rents for \$600 per year but at the current rate for comparable property could be rented under the same terms and conditions to another equally reliable tenant for \$1,200 per year, the landlord's investment is returning \$600 less per annum than it should, and theoretically the price a buyer would pay would be reduced by the amount required to offset the difference in income over the remaining life of the lease. Conversely, the lessee, if free to do so, could assign his lease to another tenant at a profit of \$600 per annum. Hence the value of the lease to him is the same amount—that is, the sum necessary to purchase an annuity that will return him \$600 per annum for the remainder of the lease term.

If the rent is exactly what it ought to be, the benefits and the burdens are equal and the lease has no value. The landlord should be able to find another tenant for the same rent and under comparable terms, and the tenant should be able to lease comparable premises under similar terms at no increase in rental.

The Court of Appeals of Kentucky adheres to the theory, right or wrong, that a lease does not add to the value of the property, as such. If the rent is greater than is justified by current and prospective market conditions, the value to the landlord over and above what a buyer would

⁴² *Id.* at 847.

⁴³ 27 AM. JUR. 2d *Eminent Domain* § 352 (1966); 4 NICHOLS § 12.42(3).

⁴⁴ *Cf.* 4 NICHOLS § 12.36.

pay for the property free and clear of the lease is an anticipated profit from his contract, which is frustrated by the condemnation, and, as in the instance of a business interruption, the loss is not compensable.

The opinion goes on to say that these principles apply whether the lease be for a short or long term and regardless of whether the lessee is entitled to any abatement of his rental obligation. (On the latter point the court may well have taken a little too cavalier an attitude.) If the lessee's interest is found to have value (and in nearly all cases it will have value if the tenant has added improvements that will be owned by the landlord at the expiration of the lease), the presumption is made that it is reduced in the same proportion as the value of the unencumbered fee would be reduced. Three questions are submitted to the jury:

- A. What was the market value of the property as a whole immediately before the taking, if sold free and clear of the lease?
- B. What was its market value at that time if sold subject to the lease?
- C. What was the market value of the property left immediately after the taking, if sold free and clear of the lease?

That is all that needs to be ascertained. The rest is a matter of computation, which is done by the trial judge. C subtracted from A gives the total amount of the award. If B is equal to or more than A, the landlord gets it all and the lessee receives nothing. If B is less than A, the difference is the value of the lessee's interest immediately before the taking. This difference is divided by A $[(A-B)/A]$ to obtain the percentage of the award that goes to the lessee. The balance goes to the landlord.⁴⁵

No doubt the *Sherrod* case represents a conservative adherence to the "market value" concepts which have pervaded the law of eminent domain against the facts of life, and possibly it will be criticized as reactionary and unrealistic.⁴⁶ To the objection that the *Sherrod* approach requires a lot of guesswork, the author would reply that so do all condemnation cases. If they could be worked out on a slide rule, trials would be unnecessary.

VI. PRACTICAL LIMITATIONS ON "UNDIVIDED FEE" RULE

In closing, one other problem that was encountered in the *Sherrod* case and that sometimes arises in other factual situations deserves consideration. The leased property in *Sherrod* was a 150-foot by 250-foot portion of a twelve-acre tract. Without delving into the problem of what constitutes a single unit of property for purposes of condemnation,⁴⁷ suffice it to say that in *Sherrod* the court directed that the leased portion be treated as an independent tract, separate from the remainder of the twelve acres, for the stated reason that "the application of the formula would be confusing if the leased land and the land not leased were treated as a single unit."⁴⁸

Sometimes the separate treatment of different portions or different in-

⁴⁵ Department of Highways v. Sherrod, 367 S.W.2d 844, 850 (Ky. 1963).

⁴⁶ Cf. 1 ORGEL § 77; Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477 (1962). See also Annot., 3 A.L.R.2d 286 (1949).

⁴⁷ Cf. 4 NICHOLS § 14.31; Annot., 6 A.L.R.2d 1197 (1949).

⁴⁸ Department of Highways v. Sherrod, 367 S.W.2d 844, 851, 852 (Ky. 1963).

terests in a single piece of property is unavoidable. For example, Farmer Jones owns a 100-acre tract of land, but the oil or coal rights, or all the mineral rights, are part of a 500-acre block of mineral rights owned by someone else. The state condemns a strip through the 100 acres. Technically, under the "undivided fee" and "before and after" rules the court would have to begin with the before-value of the 500-acre fee as if it were not fragmented, and then sift out the respective ownerships, and so on. Probably no court would carry theory to that extreme. The practical solution is to recognize an exception to the "undivided fee" rule and treat the 100-acre surface title and the 500-acre mineral title as separate units.⁴⁹

VII. CONCLUSION

Frankly, the law of eminent domain almost universally is too restrictive. Dispossessed condemnees ought to be made whole, regardless of market value concepts. They should be paid for moving expenses, damage to business, loss of access (especially in those states which allow the offsetting of benefits), and other items of expense occasioned by the involuntary disruption of their affairs. Perhaps the reluctance of courts to move in that direction is founded on an unspoken policy of protecting the public treasury. If so, it is just as indefensible as the doctrine of sovereign immunity. The public treasury ought not to be preserved by a process of discrimination that is inconsistent with the principles under which it was created. On the other hand, the policy may be justified on the theory that the average jury can be expected to overcompensate the condemnee anyway, and a tight rein helps keep the scales in balance.

⁴⁹ Cf. *Department of Highways v. Chapman*, 391 S.W.2d 367 (Ky. 1965).