Problems Peculiar to a Partial Taking in Condemnation

Joseph Irion Worsham

PROBLEMS PECULIAR TO A PARTIAL TAKING IN CONDEMNATION†

by

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BECAUSE of the nature of condemnation proceedings, existing economic conditions, and the fact that a *total* taking involves comparatively few legal complications, it is probably true that the majority of litigated cases in the field of eminent domain which reach the appellate courts involve only a *partial* taking of the property of the owner.

When a partial taking occurs, the basic problem presented by the Texas constitutional provision against the taking of private property without compensation,[1] and the applicable legislative enactments,[2] is the necessity for recompensing the owner, who has lost a part of his property and often has been damaged with respect to the part not taken.

I. Statutory Provisions

For a long time the problem of compensation for the portion of a man's premises taken and for damages otherwise sustained produced uncertainty in the Texas courts. The Texas statute delineating the procedure for the conduct of condemnation proceedings,[3] while couched generally in language appropriate to an initial proceeding by commissioners appointed by the county judge, is nevertheless applicable to a trial in the county court on appeal, and sets out the compensatory standards which must prevail.[4] It provides generally for payment for the portion taken and compensation for damages to the remainder in the following language:

> The commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by reason of the condemnation of the property, and its employment for the purpose for which it is to be condemned,

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[1] Tex. Const. art. I, § 17.

[2] Basically, Tex. Rev. Civ. Stat. Ann. arts. 3264-3271 (1952).

[3] Tex. Rev. Civ. Stat. Ann. art. 3265 (1952).

[4] Perry v. Wichita Falls, R. & F. W. R. Co., 238 S.W. 276 (Tex. Civ. App. 1922).

> and according to this rule shall assess the actual damages that will accrue to the owner by such condemnation.[5]
>
> When only a portion of a tract or parcel of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.[6]

Damages and benefits sustained by the community generally are both eliminated by section 4, which reads as follows:

> In estimating either the injuries or benefits, as provided in the proceeding article, such injuries or benefits which the owner sustains or receives in common with the community generally and which are not peculiar to him and connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the commissioners in making their estimate.[7]

II. Valuation Of Part Taken

The question of valuation of the part taken is pursued in general on the same "willing seller-willing buyer" basis applicable in a total taking.[8] All justifiable approaches to value are employed and thus anything bearing on value is admissible in evidence; however, the fundamental issue is, as indicated, the question of value and not the worth or effect of its component elements.[9] But the part taken must be valued without reference to the use which the condemnor will make of the premises.[10] Otherwise, the appraisal of the land would be influenced by the eminent domain proceeding, since consideration would be given to the value of the land to the condemnor or to its increased worth because of the contemplated improvement in the area. This is not the type of compensation to which he is entitled. Nor can the owner enhance the valuation of the part taken by pointing to the general designation of the area as the site for the project in advance of the filing of the condemnation action.[11]

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[5] Tex. Rev. Civ. Stat. Ann. art. 3265, § 1 (1952).

[6] Id. § 3.

[7] Id. § 4.

[8] City of Austin v. Cannizzo, 153 Tex. 324, 267 S.W.2d 808 (1954). See the definition of market value on p. 415 infra.

[9] Sample v. Tennessee Gas Transmission Co., 151 Tex. 401, 251 S.W.2d 221 (1952).

[10] City of El Paso v. Coffin, 88 S.W. 502 (Tex. Civ. App. 1905) error dism.; Too Fan v. City of El Paso, 214 S.W.2d 158 (Tex. Civ. App. 1948).

[11] But if the public improvement has already been established, and the condemnation comes at a second stage, the improvement may be considered. City of Dallas v. Shackelford, 200 S.W.2d 869 (Tex. Civ. App. 1946) error ref. n.r.e., approved (prior to denying motion for rehearing in Court of Civil Appeals) by Supreme Court of Texas on certified questions, 199 S.W.2d 503.

The initial question, *i.e.*, that of valuing the part taken, does not at first blush seem too troublesome. The difficulty becomes apparent, however, when it is realized that often different answers are produced if the severed land is valued as a separate, distinct tract, and if it is valued as a part of the larger tract out of which it has been carved.

If a farmer owns a rectangular 160 acre tract, all in cultivation, and with a public road along its south side, there would probably be little difference in valuing the east one-half of this tract, as eighty acres considered as an isolated tract, and valuing it as equal to one-half of the value of the 160 acres. However, quite frequently public improvements, particularly roads and highways, must of necessity be constructed without regard to the size, shape or characteristics of the particular tracts on or through which the public improvement is placed. Thus, in the above hypothetical, if a highway were to run across the northwest corner of the 160 acre tract, cutting off eight acres, differing methods of valuation might well produce differing results. Assuming that the 160 acre tract is worth $100.00 per acre as a tract, valuing the eight acres as a part thereof would produce a value of $800.00. On the other hand, to value the eight acres as severed land would not only require consideration of the particular physical characteristics of this eight acre tract,[12] but also, when it is considered as severed land, it must be viewed as a tract too small for economic farming and as completely isolated from any public road or other means of access. Its value under such an appraisal shrinks significantly. The latter approach thus seems rather harsh to the landowner. It is not surprising, therefore, that several early cases concluded that in valuing the tract actually taken, it should be considered as a portion of the larger tract.

A. *Framing The Special Issues: State v. Carpenter*

In a number of cases prior to 1936 the courts, in an effort to be fair to the landowner, required that the value of the strip taken be considered in the light of the value of the tract of which it constituted a part. Thus, in *Routh v. Texas Traction Company*,[13] the jury was instructed that in determining the value of the strip taken for a right-of-way, it should not determine the value of the strip by itself but as a part of the tract of land owned by the condemnees of which it formed a part. The jury was required to determine the value per acre of the entire tract and then to compute the value of the strip taken in proportion to its acreage.

[12] For example, whether it is rocky, or contains a creek, etc.
[13] 148 S.W. 1152 (Tex. Civ. App. 1912).

Similarly, in *Pillot v. City of Houston*,[14] the jury was required to fix the value of the strip as a proportionate part of the value of the entire tract of which the strip constituted a part.

The courts taking this approach in valuing the severed tract did not realize, however, that, in considering the loss the owner would sustain in severing and isolating the land taken, they were in effect anticipating and encroaching upon the second aspect of the compensation problem, that relating to the damages to the remainder of the land (*i.e.*, the part not taken). This aspect under the Texas statute[15] must be separately considered.

The celebrated case of *State v. Carpenter*[16] laid the erroneous approach to rest in an opinion of the commission of appeals by Commissioner German, supplemented by an opinion rendered in overruling the landowner's motion for rehearing. In the *Carpenter* case, eight acres had been taken out of a larger tract. The trial court had permitted the jury to ascribe to the eight acres a corresponding proportion of the value of the entire tract and the court of civil appeals had affirmed this action.[17] Pointing out that this paved the way for double damages by allowing the court to consider the effect of severance first in valuing the strip taken and again in assessing damages to the remainder of the tract, the commission set out three special issues which have since been used in thousands of Texas cases for the submission of a partial taking condemnation suit to a jury.

In the language of the *Carpenter* case, which involved a highway condemnation, first the jury is asked:

> 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?
> You are instructed that the term market value is the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying.[18]

Then to resolve the question as to consequential damages to the *remainder* of the land the jury is asked:

> From a preponderance of the evidence what do you find was the market value of defendants' tract of land, exclusive of the strip of land condemned, immediately before the strip was taken for highway purposes?[19]

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[14] 51 S.W.2d 794 (Tex. Civ. App. 1932).
[15] Tex. Rev. Civ. Stat. Ann. art. 3265, § 3 (1952).
[16] 89 S.W.2d 194, on rehearing, 89 S.W.2d 979 (Tex. Comm. App. 1936).
[17] 55 S.W.2d 219 (Tex. Civ. App. 1932).
[18] 89 S.W.2d at 201, 980.
[19] Id. at 201.

and then this question:

> 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 defendants' tract of land immediately after the taking of the strip condemned for highway purposes?[20]

Subtracting the value of the remainder after the taking from the value of the remainder before the taking gives the damages to which the owner is entitled, in addition, of course, to the value of the strip taken.[21]

The landowner in his motion for rehearing in the *Carpenter* case asserted the practical argument previously mentioned, *viz.*, that while eight typical acres of a 160 acre tract worth $100.00 per acre would generally be considered to be worth $800.00, nevertheless, if the question be considered one as to the value of a tract of severed land, too small to farm and cut off from access to public roads, the eight acres might well be considered to be worth only $100.00. Commissioner German squarely met this contention by responding that under these circumstances, $700.00 difference in value would be salvaged by the landowner in the answers to the issues on damage to the remainder.[22]

Exactly how the language of the two issues provides for the recovery of this difference does not clearly appear. The second issue might well be interpreted as inquiring as to the value of the remaining tract of land before the taking, exclusive of the strip condemned and considered unto itself. From this viewpoint, pursuing the example given above, the remaining 152 acres of the 160 acre tract were worth $15,200.00 before the taking. Since they were not damaged by the severance of the eight acres in the northwest corner, it would seem that (eliminating any question of benefits or damages through the nature of the improvement) they would still be worth $15,200 after the taking, in answer to the third question, thus producing a net finding of no damage. This result can be avoided by treating the second question as ascribing to the remaining tract the value of the total tract before the taking, less the value of the strip

[20] Id. at 201-02.
[21] Wallace v. Van Zandt County, 264 S.W.2d 202 (Tex. Civ. App. 1954).
[22] 89 S.W.2d at 981.

condemned as found in answer to the first question. Since the second issue contains no instruction to the effect that the remaining tract shall be considered as severed land, the latter interpretation is probably the proper one. In any event, it seems that no real harm has resulted to the land owners by this type of submission because juries probably follow a common sense approach in answering issues. Moreover, the form of submission laid down by the *Carpenter* case has met the test of time; this case has come to be regarded by both the supreme court and the bar as the landmark case in its field.[23]

B. *Effect On Issues Where Condemnor Takes Less Than Fee Simple Title*

While many partial takings represent the acquisition of a fee simple title by the condemnor in the strip or area in question, a great many condemnations are by agencies, usually private corporations, which possess the power of eminent domain but cannot acquire a fee simple title. These agencies must take an easement or rights which, while perhaps very extensive, nevertheless terminate when the use ceases and therefore are less than a fee.[24]

Cases where less than a fee is taken require an alteration in the jury issue submission; four issues are submitted rather than three as in the *Carpenter* case. The last two questions (damages as to remainder) are substantially the same, but in lieu of the first question inquiring simply as to the value of the tract taken two inquiries must be submitted. The following illustrate:

> What do you find from a preponderance of the evidence was the reasonable market value of the strip of land covered by the easement involved herein, immediately prior to the taking of said easement?
> What do you find from a preponderance of the evidence was the reasonable market value of the strip of land covered by the easement involved herein, immediately after the taking of said easement?[25]

The difference in the figures supplied in the answers to these two questions establishes the value of the interest in land actually taken.

Less-than-a-fee-taking has produced a subsidiary problem, *viz.*, whether there must always remain something of value to the land-

[23] See City of Austin v. Cannizzo, supra note 8.

[24] See Tex. Rev. Civ. Stat. Ann. art. 3270 (1952). Some types of corporations have special statutes applicable to them. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 6339 (1926) regarding railroads.

[25] These issues were adapted from those submitted in Texas Pipe Line Co. v. Hunt, 222 S.W.2d 128 (Tex. Civ. App. 1949), aff'd 149 Tex. 33, 228 S.W.2d 151 (1950). For examples of the use of four issues, see Tennessee Gas Transmission Co. v. Dishman, 303 S.W.2d 471 (Tex. Civ. App. 1957) and Northern Natural Gas Co. v. Johnson, 278 S.W.2d 410 (Tex. Civ. App. 1954) error ref. n.r.e.

owner in the strip after the condemnation. In a 1950 case, *Texas Pipeline Company v. Hunt*,[26] the supreme court said that when the condemnor took less than a fee, the taking could only entail compensation for less than the value of a fee, and therefore a finding by a jury of a post-condemnation value of zero could not stand, despite expert testimony that the strip had no value. However, two years later in *Thompson v. Janes*,[27] the court pointed out that the rule of the *Hunt* case was applicable only where the owner had some beneficial use left in the land, *e.g.*, where a pipeline or power line crossed under or over his pasture. Where a so-called easement deprived the owner of any and all real beneficial use of the land (*e.g.*, where the taking was for a railroad depot[28]) the landowner might recover as damages the market value of the land before the taking through a permitted jury finding to the effect that the market value of the land after the taking, burdened by the easement, had no value.

The recent case of *Mitchell v. Texas Electric Service Company*,[29] which dealt with a power line easement, held, in following the *Hunt* case, that since there was value left to the landowner in some type of beneficial use, the compensation which the condemnor must pay for the strip taken should be something less than the value of the full fee. The court, following the trial technique used in the *Hunt* case, required a remittitur which, to avoid any possibility of injury to the condemnor, was measured by the difference between the value before the taking and the largest amount assigned by any witness for the condemnor to the value of the strip after the taking.[30] In the even later case of *City of Houston v. Collins*,[31] the court of civil appeals at Houston announced that the rule was "well settled" to the effect that if the taking of an easement deprives the owner of the beneficial use of his property, he is entitled to a recovery of the market value of the fee. Thus, the law is now settled on a practical and common sense basis rather than upon nice distinctions in the law of real property. If the property is in effect lost to the owner, he receives compensation in full.

C. *Benefit To Owner Is Not Considered In Valuing Land Taken*

The law is clear in Texas that, in valuing the land taken, benefits to

[26] 149 Tex. 33, 228 S.W.2d 151 (1950).
[27] 151 Tex. 495, 251 S.W.2d 953 (1952).
[28] The taking in the Hunt case was for precisely this purpose.
[29] 299 S.W.2d 183 (Tex. Civ. App. 1957).
[30] Texas Electric Service Co. v. Vest, 310 S.W.2d 733 (Tex. Civ. App. 1958) error ref. n.r.e. follows Hunt also, in rejecting a finding of no value after the taking of an easement but the court felt itself unable to cure the error by remittitur in the state of the record.
[31] 310 S.W.2d 697 (Tex. Civ. App. 1958).

the land owner are not considered.[32] He is entitled to be compensated for his land in money, not in benefits, no matter how real they may appear to be.

In trying and submitting cases involving limited takings, the court is guided by the rights sought by the condemnor, which may be as varied as the necessities of the situation require. Condemnation proceedings may be instituted for the purpose of, *e.g.*, securing the right to keep an area clear[33] or disposing of water.[34] The nature of the right sought to be condemned determines the damages payable. If, for example, the state condemns the right of access to a highway, compensation therefore must be paid,[35] although, under different circumstances, such a right could be lost or destroyed through an appropriate exercise of the police power, without compensation.[36]

III. Damages To The Remainder

Only if there has been a partial taking does the question arise in a condemnation suit as to damages to property not taken. Obviously, if there is a total taking, there is no property remaining to be damaged, and if there is no actual taking of a portion of a man's property the filing of condemnation proceedings is not necessary and there is no condemnation suit in which to litigate the question of damages.

Under constitutions of this state in effect prior to its present constitution (which was adopted in 1876), there was no provision for liability for *damage* done to property by a public agency as distinguished from a *taking* of the property, and there was no provision under which compensation was payable prior to the taking. Under article I, section 17 of our present constitution, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."[37] However, if the injury is confined to a damaging, and no taking is involved, no advance payment of compensation is required, and the owner is relegated to a suit for damages.[38] Hence, an important practical point revolves around whether there is an actual taking of any portion of the landowner's property. If there is a taking of a portion, no matter how small, payment is made for the part taken in the condemnation proceeding and

[32] Dulaney v. Nolan County, 85 Tex. 225, 20 S.W. 70 (1892); Travis County v. Trogden, 88 Tex. 302, 31 S.W. 358 (1895).

[33] Texas Electric Service Co. v. Perkins, 23 S.W.2d 320 (Tex. Comm. App. 1930).

[34] Schlottman v. Wharton County, 259 S.W.2d 325 (Tex. Civ. App. 1953) error dism.

[35] State v. Meyers, 292 S.W.2d 933 (Tex. Civ. App. 1956) error ref. n.r.e.

[36] City of San Antonio v. Pigeonhole Parking of Texas, — Tex. —, 311 S.W.2d 218, 12 Sw.L.J. 522 (1958).

[37] Tex. Const. art. I, § 17.

[38] Duvall v. City of Dallas, 27 S.W.2d 1105 (Tex. Civ. App. 1930) error ref.

in the same action damages are allowed for the injury suffered by the remainder.[39] If, on the other hand, there is no taking, no condemnation action is necessary and the initiative is upon the landowner to bring suit for his damages.[40] The practical result, no doubt, is that frequently damages are sustained by landowners in the course of the construction of a public improvement, but no compensation for damages is received because no taking was involved, and the matter was not thrust, so to speak, upon the attention of the landowner by the institution of condemnation proceedings.

A. *Common Injuries Or Benefits Not Compensable*

In compliance with section 4 of article 3265, which accords with general concepts of fairness, the jury, in determining damages through appraising the value of the remainder of the land after the taking, is required to eliminate from consideration benefits or injuries common to the community generally.[41] There are, however, two aspects of post-condemnation value that the jury is reminded to consider in accordance with the statutory injunction.

The first requirement is that they consider any damages sustained by this particular land, and any benefits accruing to it, which are peculiar to it and not shared by the community in general. Note that this permits benefits to offset damages, but, as stated above, the law does not allow benefits to be charged against the landowner as to the part taken in the unusual case where there are no damages sustained by the remainder of the tract.[42]

There is no exact definition of what constitutes common injuries and benefits or, conversely, what constitutes special injuries and benefits to the remaining land. The general presence in the neighborhood of an improvement (*e.g.*, a depot) would appear to be a common benefit (or injury).[43] The closing of a street two blocks away has been held to be only a common injury.[44] To constitute a benefit to the specific land, the circumstances should largely affect that particular tract only, *e.g.*, by supplying fencing,[45] or new and theretofore unsupplied access.[46] The furnishing of electricity to a particular tract

[39] Wallace v. Van Zandt County, supra note 21.

[40] See note 38, supra.

[41] Tex. Rev. Civ. Stat. Ann. art. 3265, § 4 (1952).

[42] See cases cited note 32 supra. Thus, if no damages have been claimed by the landowner, evidence as to benefits is not admissible. Hughes v. State, 302 S.W.2d 747 (Tex. Civ. App. 1957) error ref. n.r.e.

[43] International & G.N.R. Co. v. Bell, 130 S.W. 634 (Tex. Civ. App. 1910) error ref.

[44] City of Dallas v. Hallum, 285 S.W.2d 431 (Tex. Civ. App. 1955) error ref. n.r.e.

[45] Isenberg v. Gulf, T. & W. Ry., 152 S.W. 233 (Tex. Civ. App. 1912).

[46] Currie v. Glasscock County, 212 S.W. 533 (Tex. Civ. App. 1919). There is probably no benefit if land is already served by a road. Cook v. Eastland County, 260 S.W. 881 (Tex. Civ. App. 1924); Anderson v. Wharton County, 65 S.W. 643 (Tex. Civ. App. 1901).

has been held to be a special benefit.[47] Generally speaking, it may be stated that whether particular items of benefit or damage are common (and therefore not to be considered) or special (and therefore to be taken into consideration) is a question for jury determination.

The second requirement, which is associated with the first, obligates the jury to consider the use to which the condemnor will put the tract taken. It is this use which determines in part whether there will be damages sustained or benefits realized. Note that this future use by condemnor may be considered only in determining the damage issues; it may not be considered in answering the question as to the value of the strip taken.[48] (There the issue is as to what the strip or area was worth immediately before the taking without regard to the use to which the condemnor will put it or the overall improvement planned by the condemning authority.) Note also that if, because of benefits received, the value of the remainder after taking is higher than its value before, there will be no net damage to the remainder. Further, the landowner's recovery for the part taken (discussed in the *Carpenter* case) will be offset to the extent of any such excess.

Many items of damage other than the impact of the condemnor's special contemplated use on the landowner's remaining property, however, are considered in determining the post-condemnation value of the remainder. In this category falls the compensation, *e.g.*, for the loss of improvements that have gone with the severed land, for operational problems in connection with moving livestock, changing farming technique, or coping with water flow, and for many similar items. These items are not recovered in terms of their own value, of course, but they are reflected in the lower valuation of the remaining land after the taking. Thus, if new barns or fences are required to serve the remaining tract, this fact is reflected in the form of a reduced value for the remaining land and is translated into damages in the subtracting process, when post-condemnation value is taken from pre-condemnation value of the remainder to reach the figure the landowner is entitled to receive as damages.[49]

Our supreme court has said that any element of damages is relevant and material in resolving the ultimate issue, *viz.*, the net amount of damages as reflected by the difference in the value of the remainder "before" and "after" the taking.[50]

[47] Arcola Sugar Mills v. Houston Lighting & Power Co., 153 S.W.2d 628 (Tex. Civ. App. 1941) error ref. w.o.m.; Aycock v. Houston Lighting & Power Co., 175 S.W.2d 710 (Tex. Civ. App. 1943) error ref. w.o.m.

[48] See note 10, supra.

[49] Sample v. Tennessee Gas Transmission Co., 151 Tex. 401, 251 S.W.2d 221 (1952).

[50] Ibid.

Since the damages are ascertained through valuing the remainder of the tract, both before and after the taking, the inquiry arises as to whether improvements and land uses planned by either the condemnor or the landowner may be considered. It is settled that in valuing the remainder after taking the proposed use of the land taken by the condemnor may be considered;[51] and if there are reasonable prospects that the remainder of the landowner's tract will be devoted to a particular use (*e.g.*, commercial development), it may be valued for that purpose.[52] This is true even though zoning ordinances currently forbid such use, for courts recognize that such prohibitions change.[53] The rule of reason prevails, but with a note of moderation. While the landowner's remaining raw land may be valued upon the basis of commercial potentiality, if it is still unimproved, prices paid in recent sales of improved lots are not admissible. Furthermore, opinion testimony as to the front-foot value of non-existent lots in a hypothetical subdivision is too speculative as direct evidence,[54] although it can come in "through the back door," so to speak, as a part of the basis for the expert's valuation of the tract as a whole.

B. *Condemnor's Post- Or Pre-Condemnation Acts As Compensable In Condemnation Action*

While, as stated, the use to which the condemnor will put the land is clearly relevant, considerable uncertainty has existed regarding the extent to which acts detrimental to the landowner and performed by the condemnor either prior to the taking or thereafter may be shown in the condemnation proceedings. A number of decisions have enunciated the rule that acts committed prior to institution of condemnation proceedings are trespasses for which recovery must be sought in a separate action;[55] similarly, others have held that damages arising out of negligent construction of the public work, after the taking, are not recoverable in the condemnation suit.[56] However, the Supreme Court of Texas in the recent decision of *Glade v. Dietert*[57] ruled that, where the trespass consisted of the destruction of shade trees in advance of the filing of the condemnation proceedings, there should be

[51] Gulf Coast Irr. Co. v. Gary, 118 Tex. 469, 14 S.W.2d 266 (1929); Texas Power & Light Co. v. Snell, 15 S.W.2d 180 (Tex. Civ. App. 1929).

[52] State v. Thompson, 290 S.W.2d 319 (Tex. Civ. App. 1956) error ref. n.r.e.

[53] City of Austin v. Cannizzo, supra, note 8.

[54] Minyard v. Texas Power & Light Co., 271 S.W.2d 957 (Tex. Civ. App. 1954) error ref. n.r.e.

[55] Stakes v. Houston North Shore Ry., 32 S.W.2d 1110 (Tex. Civ. App. 1930), and cases there cited.

[56] Ft. Worth & D.S.P. Ry. v. Gilmore, 2 S.W.2d 543 (Tex. Civ. App. 1928); Jefferson County Traction Co. v. Wilhelm, 194 S.W. 448 (Tex. Civ. App. 1917).

[57] 156 Tex. 382, 295 S.W.2d 642 (1956).

but one recovery, and that one in the condemnation action. Thus, at least where the prior trespass may be brought within the scope of traditional condemnation damage issues, there will be, and need be, only one suit; the question as to value before the taking will relate back to a date prior to the trespass, so as to encompass the loss caused by the trespass in the damage formula. A recent decision of the Fort Worth Court of Civil Appeals in *Gulf, C. & S. F. Ry. v. Payne*,[58] extended the applicable damage period in the opposite direction and permitted a showing by the landowner as to the dust, noise, and disturbance arising during the actual construction work—conditions which presumably would not continue after the railroad track and structure had been completed and trains had begun to operate—as bearing upon the value of the remaining land after condemnation. In this fashion recovery was in effect allowed in the condemnation action for damages sustained by the landowner through acts of the condemnor *after* the taking.

C. *Determination Of "The Remainder Of Such Property"*

The statute speaks of damages "which will be sustained by the owner . . . and the benefits that will result to the remainder of such property belonging to such owner,"[59] and the special issues are phrased in terms of the defendant's tract of land. What is the area to which these words refer? How much of defendant's land may be considered damaged and where must it lie to be eligible for consideration? Of course the facts must govern[60]—one type of taking may inflict damage upon an entire large tract, while another injures only the property immediately adjacent—but the land of the defendant which is initially considered or surveyed to determine the extent of damage is all property owned by him lying in one contiguous tract, as well as land intimately connected to it through a unity of use.[61] Cross-fencing, survey lines, and abandoned streets are ignored (though existing and observed subdivision lines are not).[62] Those tracts which form, as a practical matter, one contiguous body are eligible for application of the damage formula to them upon tender of proof of a loss of value. The practical result of this rule of law leaves to peradventure a large element of the potential liability of a condemnor. A one-acre strip

[58] 308 S.W.2d 146 (Tex. Civ. App. 1957).

[59] Tex. Rev. Civ. Stat. Ann. art. 3265, § 1.

[60] Mitchell v. Texas Electric Service Company, 299 S.W.2d 183 (Tex. Civ. App. 1957) error ref. n.r.e.

[61] Southwestern Public Service Co. v. Goodwine, 228 S.W.2d 925 (Tex. Civ. App. 1949) error ref. n.r.e.

[62] City of Denton v. Hunt, 235 S.W.2d 212 (Tex. Civ. App. 1950) error ref. n.r.e.; Concho, S.S. & L.V. Ry. v. Sanders, 144 S.W. 693 (Tex. Civ. App. 1912).

taken for a gas transmission line right of way through a ten-acre tract leaves only nine acres to be considered as damaged. If the strip crosses a 100 acre tract, there are 99 potentially damaged acres remaining, and in this type of proceeding, the potentialities often come to pass.