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Eminent Domain--Rules of Compensation and the Limited-Access Highway

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The Federal-Aid Highway Act of 1956\(^1\) appropriated money for the construction of an extensive network of highways throughout the United States. Under that act the federal government will match state funds at a 9 to 1 ratio if the states will use the money to construct highways according to federal specifications.\(^2\) These specifications are designed to ensure an Interstate Highway System that will carry a maximum amount of through traffic.\(^3\) In order to accomplish this, the highways must be built so as to by-pass large urban areas as far as practicable.\(^4\) Also, the right of access to these highways will be limited. This means that there will be few, if any, cross-roads, and little or no right of direct access in abutting land owners.

The acquisition of land for such a vast system of highways necessitates extensive condemnation of private land through the use of the states' power of eminent domain. The only issue in most of these judicial proceedings will be the amount that must be paid by the state to the person whose property interest is condemned. One can readily see that such widespread condemnation of land will place new and increased significance upon the question of compensation in eminent domain.

Condemnation of rights-of-way for limited-access highways presents new problems of compensation in addition to the traditional ones. This is true because often underpasses are not economically feasible, and many existing public and private roads will be blocked. Serious problems can arise as to when a property owner is entitled to compensation for the deprivation of his existing right of access to the public highway system. At this time these problems remain largely unsolved. Severance damages present another problem. Heretofore, when an area of land under one ownership was severed by a highway, the owner could continue to use the severed part simply by going across the highway. But when access to the highway is limited, the property owner may be forced to go several miles to get to the severed

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\(^4\) See Note, 42 Minn. L. Rev. 106 (1957).
part—if he can get to it at all. The absolute nature of this severance will often make it the major element of damages.

This note will consider the problems of compensation associated with the limited-access highway. Its purposes are twofold: (1) to analyze and discuss the existing rules for compensation in proceedings to condemn land for highways; and (2) to attempt to apply these rules to the new problems presented by the limited-access highway.

**Basis of Compensation**

The power of eminent domain is inherent in sovereignty and does not depend upon constitutional authority. Constitutions have, however, circumscribed that power with limitations. Most state constitutions, as well as the federal constitution, have provisions that prohibit the taking of private property for public use without "just compensation" to the property owner. For example, section 13 of the Kentucky Constitution provides in part:

> ... nor shall any man's property be taken or applied to public use ... without just compensation being previously paid to him. (Emphasis added)

Constitutional restrictions prohibit the taking of private property for anything except public use or public purposes. And this is true in Kentucky. Since condemnation of land for highways is unquestionably for a public use, only two constitutional problems generally arise in condemnation of rights-of-way. These problems are: (1) what is a "taking of property" within the meaning of the constitution, and (2) what is "just compensation" for the property taken.

Generally, a taking of property is any interference or injury to property or to the rights incidental thereto. This definition includes the taking or damaging of easements, and the interfering with riparian rights, as well as the actual taking of areas of land. However, it does not include damages to property rights resulting from the legitimate exercise of the police power. The exercise of this power is not considered to be a "taking" and therefore requires no compensation. The limits of the police power are vague and undefined, and it is of-

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6 ibid.
7 Note, 42 Minn. L. Rev. 106, 107 (1957).
9 Jahr, op. cit. supra note 5, § 6.
10 Perry v. Hill, 275 Ky. 105, 120 S.W.2d 762 (1938).
11 See 29 C.J.S. Eminent Domain § 110 (1941).
12 Id. § 105.
13 Id. § 107.
14 1 Nichols, Eminent Domain § 1.42 (3) (3rd ed. 1950).
15 Jahr, op. cit. supra note 5, § 3.
ten impossible, in advance of judicial determination, to classify a particular deprivation as a "taking" under the power of eminent domain or an "interference" in the exercise of the police power. Since this note is primarily concerned with the problem of compensation in the law of eminent domain, no attempt will be made to accurately define the limits of the police power.

**Just Compensation**

1. Fair market value

As previously stated, the taking of private property for public use requires the payment of "just compensation" to the property owner. Generally, just compensation is said to be the "fair market value" of the property taken as of the date of acquisition. Fair market value, in turn, is usually defined as the value which the property would bring on the open market between a willing buyer and a willing seller under ordinary circumstances. The primary consideration is the actual sale value of the land, not its value to the taker or to the owner.

Evidence of value is not restricted to a showing of present use; it may include evidence of all legitimate uses to which the property is reasonably adaptable. Thus, an owner may show that his farm near a city is readily adaptable for subdivision into residential lots, or one who owns a residence in town may show that his property has greater value because of its adaptability to business purposes. The courts, however, are careful to exclude evidence of possible uses which are found to be so remote and unlikely that they cannot reasonably be said to affect the market value of the land.

Since the concept of fair market value assumes a willing seller and a willing buyer under ordinary circumstances, evidence of value may not include forced sale prices, or forced purchase prices. And theoretically, at least, the fair market value of land is not affected by temporary economic booms or depressions.

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17 See Jahr, op. cit. supra note 5, § 66.
18 Id. § 70.
19 Id. §§ 68-70.
23 Orgel, op. cit. supra note 14, § 31.
24 Id. § 22.
25 Id. § 23.
26 Id. §§ 24-25.
Just compensation, as determined by the fair market value rule, is not a difficult concept. And if it were applicable as a rule of compensation in all condemnation proceedings, the tasks of the courts and juries would be greatly simplified. But, as will subsequently be shown, it is not the only rule of compensation, and in many cases it is not applicable.

2. Taking of an entire tract

When a public body condemns an entire tract of land, the problem of compensation is relatively simple—the owner is entitled to the fair market value of his land. This single issue will usually be determined by a jury after hearing evidence of both parties as to the value of the land.

3. Taking part of a tract of land

When a public body condemns land for highway rights-of-way, it seldom takes all of a particular tract of land. Generally, only that land lying within the proposed right-of-way is condemned, and the property owner is left with some portion of his former area of land. The fair market value of the portion taken may be nominal, but the taking may greatly reduce or destroy the value of the remaining land. Courts are in agreement, in such cases, that it would be unjust to compensate the owner only for the land taken. Therefore, in partial taking cases, they have interpreted "just compensation" to include damages to remaining land as well as the fair market value of the part taken.

To qualify for damages under this "partial taking" doctrine, a condemnee must meet certain requirements. The first of these is that there must be a taking of a traditionally cognizable interest in land. The condemnation of a fee, leasehold, or an easement will suffice to meet this requirement. Secondly, the owner must retain tangible real estate. If there is condemnation of an entire tract, there can be no recovery for damages to a business conducted thereon, or for damages resulting from the necessity of removing chattels from the land. Thirdly, there must be a physical relationship between the property interest taken and the land for which resulting damages are claimed. In other words, the complete taking of one separate and distinct tract

27 See Jahr, op. cit. supra note 5, § 96.
28 Ibid.
29 Ibid.
30 See 1 Orgel, op. cit. supra note 14, § 47.
31 See City of Ashland v. Price, 318 S.W. 2d 861 (Ky. 1958); see also, Louisville & E. R.R. v. Hardin, 117 S.W. 381 (Ky. 1909) (leasehold).
32 Ibid.
33 Ibid.
34 Ibid.
of land will not entitle the owner to recover damages to a separate tract, regardless of the resulting diminution in value.\(^{35}\)

There are two widely accepted formulas for ascertaining the amount of compensation in partial taking cases. These are: (a) The fair market value of the land taken, plus damages to the remaining land, and (b) the difference in the fair market value of the entire tract immediately before and immediately after the taking.\(^{36}\) Kentucky, as will be shown later, appears to use an anomalous hybrid of these two rules.

(a) The value plus damages rule

In partial taking cases, the majority of jurisdiction hold that the measure of compensation is the fair market value of the land taken, plus damages to the remaining land.\(^{37}\) On its face, the formula appears both logically sound and workable, but in practice, it is neither. Most jurisdictions applying this rule ask the jury to find the fair market value of the land taken, considering its relation to the entire tract, and then to separately find the damages resulting to the remainder because of the taking of this part.\(^{38}\) It would appear that if a jury accurately fixed the value of the land taken, with reference to its relation to the whole, there would be no separate damages to the remainder of the tract. The value of a part with reference to its relation to the whole would by definition include the diminution in value of the whole resulting from the taking.

This rule of compensation would be sounder if the value of the part taken were to be fixed without consideration of its position or value to the entire tract. The jury could then find the damages to the remainder because of this severance, and the two figures would accurately fix the condemnee’s damages. It is extremely doubtful that a jury could value the part taken with reference to the whole and then find damages to the remainder without some double recovery. In all probability such an instruction merely confuses a jury, and they return a verdict in the total amount that they feel the condemnee should be awarded. This is done without any attempt to distinguish between the market value of the part with reference to the whole and the damages to the remainder resulting from the taking.\(^{39}\)

\(^{35}\) Ibid.
\(^{36}\) Id. §§ 50-51.
\(^{37}\) Id. § 50.
\(^{38}\) Jahr, op. cit. supra note 5, § 103.
\(^{39}\) See Adams v. Commonwealth ex rel State Highway Comm’n., 285 Ky. 38, 146 S. W.2d 7 (1941). In this case the jury was asked to return separate awards for the value of the land taken and damages to the remainder. The jury returned a verdict for a lump sum. The condemnee appealed from this verdict claiming that the jury did not follow the court’s instructions. The Court of Appeals dismissed this argument by holding that such a verdict indicated that the jury
(b) The difference in fair market value rule

A substantial minority of jurisdictions have adopted the difference in fair market value rule.\textsuperscript{40} Under this rule, a jury is instructed to return a verdict in the amount of the difference in the fair market value of the entire tract immediately before the taking, and the fair market value of the remainder immediately thereafter.\textsuperscript{41}

Although this rule is theoretically sound and easier to apply than the majority rule, it is not without its shortcomings. Some jurisdictions, such as Kentucky, do not permit benefits accruing to the remainder because of the proposed usage of the condemned land to be set-off against damages.\textsuperscript{42} In these jurisdictions it might be difficult for a jury to determine the value of the land remaining without being influenced by any benefits which would accrue to it.\textsuperscript{43} The danger here, as contrasted with the majority rule, is not double damages, but rather that the condemnee will recover damages only for his \textit{actual} loss instead of the amount to which he is \textit{legally} entitled.\textsuperscript{44}

(c) The Kentucky rule (s)

The Kentucky rule for compensation in partial taking cases is unclear, to say the least. The cases reflect at least four distinct verbal formulas for ascertaining damages, none of which have been expressly overruled. These rules are:

(1) Value of the land taken.
(2) Difference in value before and after taking.
(3) Value of the land taken plus damages to the remainder.
(4) Value of land taken plus damages to remainder, the sum of which is not to exceed the difference in value before and after the taking.

The earliest Kentucky cases said that an owner was entitled to recover the value of the land taken, considering its relation to the entire tract.\textsuperscript{45} In other words, an owner was entitled to recover the value

\textsuperscript{40} I Orgel, \textit{op. cit. supra} note 14, \S 51.
\textsuperscript{41} Jahr, \textit{op. cit. supra} note 5, \S 100.
\textsuperscript{42} See discussion of set-off benefits p. 132 \textit{infra}.
\textsuperscript{43} I Orgel, \textit{op. cit. supra} note 14, \S 64.
\textsuperscript{44} The condemnee's actual loss is the difference in the fair market value of the land before and after the taking, considering any benefits accruing because of the proposed use of the land taken. His legal damages, however, are usually figured without any regard for any possible benefits.
\textsuperscript{45} See Louisville & N. R.R. v. Asher, 12 Ky. L. Rep. 815, 15 S.W. 517 (1891); Richmond and Lexington Turnpike Road Co. v. Rogers, 62 Ky. (1 Duv.) 135 (1868); Henderson and N. R.R. v. Dickerson, 56 Ky. (17 B. Mon.) 187 (1856).
of the land taken from the viewpoint of one who owned the remainder of the tract.\textsuperscript{46} In proving the value of the part taken, one could show all injuries which resulted to the remainder because of the taking, as well as the intrinsic value of the condemned land.\textsuperscript{47}

In an 1871 case,\textsuperscript{48} after stating the above rule, the court explained that the best way to determine this value, was to determine the difference in market value of the entire tract before and immediately after the taking. This difference in value rule was later used in a few cases,\textsuperscript{49} but it soon fell into disuse and disappeared from the cases without being overruled. In 1940, however, it was casually restated in affirming a judgment\textsuperscript{50} and since 1950 it has seemingly been resuscitated.\textsuperscript{51}

The majority rule, value of the land taken plus damages to the remainder of the tract, has not been adopted in Kentucky, but there is at least one case which applied this rule.\textsuperscript{52} This case was not followed, but it is surprising that it was not in view of the fact that the Court of Appeals drafted instructions to be used on retrial of the case, and these instructions clearly embodied the majority rule.\textsuperscript{53}

The rule of damages most often quoted in the Kentucky cases is a combination of the difference in value and the value plus damages rules.\textsuperscript{53a} It is usually stated somewhat as follows (paraphasing):

The defendant (condemnee) is entitled to the value of the land taken, considering its relation to the entire tract, plus any damages directly resulting to the remainder of the tract by reason of the taking. The total award of damages shall not exceed the difference

\textsuperscript{46} See Henderson and N. R.R. v. Dickerson, \textit{supra} note 45.
\textsuperscript{47} See cases cited note 45 \textit{supra}.
\textsuperscript{48} Elizabethtown & P. R.R. v. Helm's Heirs, 71 Ky. (8 Bush.) 681 (1871).
\textsuperscript{50} See Adams v. Commonwealth \textit{ex rel.} State Highway Comm'n., 285 Ky. 38, 146 S.W.2d 7 (1940).
\textsuperscript{51} See Commonwealth v. Gilbert, 253 S.W.2d 264 (Ky.1952); Commonwealth v. Crutcher, 240 S.W.2d 605 (Ky. 1951).
\textsuperscript{52} Louisville & N. R.R. v. Wilson, 165 Ky. 151, 176 S.W. 980 (1915).
\textsuperscript{53} See id. at 157, 176 S.W. at 983.
\textsuperscript{53a} It is interesting to note the accidental development of this rule. It first appeared in the case of Louisville, St. L. & T. R.R. v. Barrett, 91 Ky. 497, 16 S.W. 278 (1891). The Commonwealth appealed the case claiming that the instruction allowed double recovery because of damages for the condemned land and damages to the remainder. The Court of Appeals held that the instruction did not allow double damages and affirmed the judgment below. The Court did not consider the part of the instruction limiting recovery to the difference in value before and after the taking. Fourteen years later in reversing a judgment for error in instructions, the Court of Appeals outlined instructions to be given on retrial, and these instructions included this difference in value limitation. Big Sandy Ry. v. Dils, 120 Ky. 563, 87 S.W. 310 (1905). A similar instruction was laid down in the case of Louisville & N. R.R. v. Hall, 143 Ky., 186 S.W. 905 (1911), and it has been more or less consistently followed ever since.
in the fair market value of the entire tract before and immediately after the taking.\textsuperscript{54}

This formula, of the four that have been used by the Kentucky Court, is the least suited to accomplish its purpose of giving the landowner full compensation for his loss and no more. The jury is asked to find three separate figures: the value of the land taken as a part of the whole, the amount of damages to the remainder because of the taking, and the difference in fair market value before and after the taking. As has been previously pointed out, an accurate fixing of the value of the land taken, considering its relation to the entire tract, would necessarily include any damages to the remainder,\textsuperscript{55} and there should not be any separate damages. Once the evidence warrants such an instruction, a jury will often be encouraged to find damages, when in fact there are very little or none resulting from the taking. It is doubtful that anything is accomplished by the added check of comparing the total finding of damages to the difference in fair market value of the land before and after the taking. If a jury does not accurately fix the value of the land taken and damages to the remainder, it is only a remote possibility that they will accurately fix the difference in value. An instruction framed upon this rule, together with the usual embellishments,\textsuperscript{56} is enough to discourage the most conscientious jury, and in all probability the jury will end up by returning a verdict in the amount that they think the condemnee should have.\textsuperscript{57}

The difference-in-fair-market-value rule is the best of the four rules. It is simple enough for a jury to understand and it is logically sound. It provides for full recovery and theoretically eliminates the possibility of double damages. An instruction based upon this rule would ask a jury to do three things: (1) find the fair market value of the entire tract before the taking; (2) find the fair market value of the land not taken; and (3) find the difference in these two values.

Proving the difference in value under this rule would not be materially different than proving value under the most frequently used Kentucky rule. The usual opinion evidence would be given as to the value of the entire tract before the taking. This evidence would be substantiated by showing all the uses to which the land is reason-

\textsuperscript{54} See, e.g., Commonwealth v. Combs, 244 Ky. 204, 50 S.W. 2d 497 (1932); Producer's Wood Preserving Co. v. Commissioners of Sewerage of Louisville, 227 Ky. 159, 12 S.W.2d 292 (1928); Kentucky-Tennessee Light & Power Co. v. Shanklin, 219 Ky. 279, 292 S.W. 790 (1927).

\textsuperscript{55} The Court of Appeals has denied this. See Louisville, St. L. & T. R.R. v. Barrett, 91 Ky. 487, 16 S.W. 278 (1891).

\textsuperscript{56} See, e.g., Producer's Wood Preserving Co. v. Commissioners of Sewerage of Louisville, 227 Ky. 159, 12 S.W.2d 292, 296 (1928).

\textsuperscript{57} See note 38 supra.
ably adaptable, recent sale prices of this or similar land, or other factors that would affect or show the market value of the land. The value after the taking would be substantiated in the same manner.

Although there might be a difference of opinion as to which is the more logical and sounder rule of damages in partial taking cases, no one could deny that for purposes of consistency and clarity, only one formula should be used to express the damages that should be awarded the condemnee. It is therefore hoped, that in the near future, the Kentucky court will review its past decisions and choose one of the rules that have been used, and then stick to that rule in future cases.\footnote{The Court took a step in the right direction in Gulf Interstate Gas Co. v. Garvin, 303 S.W. 2d 260 (Ky. 1957). However, the attempted clarification fell short of that needed.}

4. Set-off benefits

A partial taking for highway purposes is often beneficial to the remaining land. When a highway is built through a relatively remote area, the value of the land remaining after the condemnation may be increased to the point that it becomes greater than the value of the entire track before the taking. There is no general agreement among the states as to what extent these benefits may be set-off against damages.\footnote{See Jahr, Eminent Domain: Valuation and Procedure § 108 (1953).} Some jurisdictions permit the value of the benefits to be set off against the entire award of damages;\footnote{Id. § 109.} others permit this set-off only to the extent of the amount of damages to the remainder,\footnote{Id. § 108.} while some do not permit any set-off of benefits against damages.\footnote{Id. § 108.}

Kentucky holds that “just compensation” for the taking of land means a payment in money, not benefits.\footnote{Salt River Rural Elec. Co-op. Corp. v. Thurman, 275 S.W.2d 780 (Ky. 1955).} Thus, in Kentucky, there can be no set-off of benefits against damages resulting because of the taking. Juries are instructed to find the value of the land taken, and damages to the remainder, without any consideration of possible enhancement in value of the remainder because of the contemplated usage of the land taken.\footnote{See Commonwealth v. Combs, 244 Ky. 204, 50 S.W.2d 497 (1932).}

However, damages may occur to the remaining land because of the use to which the taken land is to be put, rather than because of the taking itself. These damages are called “incidental” or “consequential” damages by the Kentucky Court,\footnote{See East Kentucky Rural Elec. Co-op. Corp. v. Smith, 310 S.W.2d 535 (Ky. 1955); Music v. Big Sandy & Ky. R. R.R., 163 Ky. 628, 174 S.W. 44 (1915); Broadway Coal Mining Co. v. Smith, 136 Ky. 725, 125 S.W. 157 (1910); Big Sandy Ry. v. Dils, 120 Ky. 563, 87 S.W. 310 (1905).} while damages resulting be-
cause of the taking are denominated "direct damages," or "actual damages." The just compensation requirement of payment in money is held to apply to direct damages. Thus, any damages occurring to the remaining land because of the use to be made of the land condemned may be off-set by the benefits (increased value) accruing to the remainder, at least where the benefits are capable of being estimated in terms of money.

The question of possible set-off benefits will not often occur in condemnations for limited-access highways, since generally no benefits to the remaining land can be attributed to the building of the highway. The problem can arise, however, where part of the land not taken abuts on an approach road, for the remaining land obviously becomes more valuable for business purposes.

**Special Problems of Compensation Arising Out of Condemnations For Limited-Access Highways**

The limited-access highway brings with it into the law of eminent domain some new and troublesome problems of compensation. These problems naturally revolve around the fact that access to these highways will be limited. In general, they may be denominated problems of existing rights of access and problems of severance damages. Some of these will be set out and discussed below, and an attempt will be made to apply the existing rules of compensation to these new situations.

Due to the fact that the limited-access highway is a relatively new innovation in road building, there is at this time little case law on condemnation of land for such highways. Therefore parts of the following discussion will necessarily be somewhat speculative.

1. Problems of right of access
   a. In general

Any new major highway necessarily crosses numerous other highways and other smaller public and private roads. When an ordinary

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67 Music v. Big Sandy & Ky. R. R.R., 163 Ky. 628, 174 S.W. 44 (1915). See also East Kentucky Rural Elec. Co-op. Corp. v. Smith, 310 S.W.2d 535 (Ky. 1958). Ky. Rev. Stat. § 177.085 seemingly allows benefits to be set-off against any damages to the remainder. The statute does this by consolidating direct damages to the remainder (those resulting from the taking alone) with incidental damages (those resulting from the use to be made of the taken land) and then subtracting any benefits. A similar statute was held unconstitutional in Broadway Coal Mining Co. v. Smith, 136 Ky. 725, 125 S.W. 157 (1910).
(non limited-access) highway is built across other highways and roads, an intersection is usually formed, and traffic, relatively unimpeded, continues to use the older roads. When a limited-access highway crosses another highway or road, there are three possible courses of action: (a) an interchange can be built, giving access to the new highway; (b) an underpass or overpass can be constructed, permitting traffic to travel unimpeded along the older road, but without any access to the new highway; and (c) the older road can be blocked. The latter course of action is the one which concerns us here.

When the plans for an interstate highway do not provide for an interchange and when economic or terrain factors preclude the construction of an underpass or overpass, existing roads will be blocked at the point where they intersect the right of way lines of a limited-access highway. The blocking of any existing road is likely to work a hardship on some property owners using that road. The degree of hardship depends, of course, upon the location of the land in reference to the point at which the road is closed. If a property owner's sole means of ingress-egress is extinguished by the closing of a road, his land may be rendered almost worthless. If an alternate route exists, the damage to the value of the land because of the closing of the road will be directly proportional to the circuitry of the alternate route—the greater the distance to town or the primary place of business, the greater the reduction in the value of the land. It can readily be seen that there are as many possible degrees of damage as there are different tracts of land abutting on any road that is closed.

There is no simple and clear cut rule which can be used to determine when a property owner can recover for the blocking of an access route. There are, however, certain factors which are important in determining whether or not he can recover. Some of these factors are discussed below.

The courts seem to agree that one who owns land abutting a highway has an easement of ingress and egress in that highway. Although this easement is a property right and may not be taken without compensation to the owner, it is subject to reasonable regulation through the exercise of the police power. One factor, then, in determining whether the blocking of a road will give rise to damages is presence or absence of such interference with the easement as to amount to a taking, rather than a regulation through the use of the

69 See Jahr, op. cit. supra note 57, § 42.
70 Ibid.
police power. In general, if there is no “taking,” there is no compensable injury.\textsuperscript{72}

An important element in determining whether there is a taking is the presence or absence of service roads.\textsuperscript{73} Service roads are those built to carry traffic previously carried by a road which is closed or converted into a limited-access highway. Although these roads generally are more circuitous than the existing ones, they provide a means of ingress and egress. As of yet, only a few courts have considered the question of service roads and their affect upon any possible recovery for loss of existing access routes. These courts are not in accord. A New York court has denied recovery where a service road was supplied.\textsuperscript{74} The reasoning of this court was that there was only a general right of access to the public highways, and not a specific right in a specific road. On the other hand, the highest court of Washington has reached the opposite result, and has held that there may be damages whenever an existing access route is lost, regardless of the presence or absence of a service road.\textsuperscript{75} California also seems to agree that there may be damages even though a service road is built.\textsuperscript{76}

Recovery for loss of an existing access route, when a service road is built, will generally depend upon whether the jurisdiction conceives of the easement of access as a specific right in a certain road or a general right of access to the public highways. If it is held to be a specific easement, any unreasonable interference will constitute a taking and will be compensable. If, however, the easement is held to be general, damages will probably not be recoverable if a service road is provided. This is true because in the first instance the owner lost a property right when he lost the specific easement. In the latter, he still has his easement, and has suffered only inconvenience. Mere inconvenience and circuity of route occasioned by the new access road are not sufficient to constitute a taking.\textsuperscript{77} These damages are said to be similar in kind to those suffered by the public at large.\textsuperscript{78} The only difference is held to be in the degree of the injury.\textsuperscript{79} A taking occurs when the courts find that the property owner suffers special dam-

\textsuperscript{72} See 1 Orgel, Valuation Under the Law of Eminent Domain § 3 (2d ed. 1953).
\textsuperscript{73} See Note, 42 Minn. L. Rev. 106, 115 (1957).
\textsuperscript{74} Gilmore v. State, 208 Misc. 427, 143 N.Y.S.2d 873 (Ct. Cl. 1955).
\textsuperscript{75} State v. Ward, 41 Wash.2d 794, 252 P.2d 279 (1953).
\textsuperscript{76} People v. Ricciardi, 23 Cal.2d 890, 144 P.2d 799 (1943).
\textsuperscript{77} People v. Flood, 304 Ky. 122, 200 S.W.2d 117 (1947); see Covey, "Control of Highway Access", 38 Neb. L. Rev. 407, 418 (1959).
\textsuperscript{78} See Wright v. Flood, supra note 77; Langley Shopping Centers, Inc. v. State Road Comm'n., 213 Md. 230, 131 A.2d 690 (1957).
\textsuperscript{79} Commonwealth v. Department of Highways, 291 S.W.2d 814 (Ky. 1956); Langley Shopping Centers, Inc. v. State Road Comm'n, supra note 78.
ages, different in kind from those sustained by the general public.\textsuperscript{80}

When several tracts of land are affected by the closing of a road, a state will build service roads in order to hold down expenses. This is especially true when an existing road is converted into a limited-access highway, for without the presence of a service road, a state would often be forced to respond in damages approaching the full value of each tract of land abutting on the road.

Another important factor to be considered in determining whether an interference with a right of access is compensable is whether or not other parts of the owner's land are taken. When physical areas of the tract are condemned, some states will permit recovery for "incidental damages" consisting only of inconvenience,\textsuperscript{81} even though interference alone does not amount to a taking. Thus, an owner's recovery for interference with his right of ingress and egress may well depend upon the position of his land with reference to the new highway. The only possible justification for this rule is that the owner whose land is being taken must be brought into court, whereas one who only has a private easement in a public road may not be. If the rule was otherwise, a state would be faced with numerous suits for damages under the theory of "reverse eminent domain."\textsuperscript{81a}

b. In Kentucky

Although it is well settled in Kentucky that a property owner has an easement of access in an abutting public road,\textsuperscript{82} the Kentucky law as to when a property owner can recover compensation for the deprivation of this easement is not altogether clear. In the last case considering the question, \textit{Dept of Highways v. Jackson},\textsuperscript{83} the Court of Appeals apparently made an attempt to clarify the law on the subject and to formulate a workable rule. In that case, the court said that one who owns property abutting on a public highway has an easement of "reasonable access" to the public highway system, and that he could not be deprived of this right without just compensation. In other words, there is a taking of property whenever the blocking of a public road deprives a property owner of reasonable access to the public highways of Kentucky.

In general, the rule is sound, but it may cause hardship when the

\begin{itemize}
\item \textsuperscript{80} See \textit{Standiford Civic Club v. Commonwealth}, 289 S.W.2d 498 (Ky. 1956); Wright v. Flood, 304 Ky. 122, 200 S.W.2d 117 (1947).
\item \textsuperscript{81} See \textit{Cranley v. Boyd County}, 266 Ky. 569, 99 S.W.2d 737 (1936); \textit{State v. Meyers}, 292 S.W.2d 933 (Tex. App. 1956); see also \textit{State v. Lynch}, 297 S.W.2d 400 (Mo. 1956).
\item \textsuperscript{81a} For a discussion of "reverse eminent domain" see Lewis and Oberst, "Claims Against the State of Kentucky—Reverse Eminent Domain," 42 Ky. L. J. 163 (1954); Note, 47 Ky. L. J. 215 (1959).
\item \textsuperscript{82} \textit{Standiford Civic Club v. Commonwealth}, 289 S.W.2d 498 (Ky. 1956).
\item \textsuperscript{83} 302 S.W.2d 873 (Ky. 1957).
\end{itemize}
property affected is used for certain business purposes. In the case of non-business property, the land will ordinarily not be greatly devalued unless the access route taken is the only reasonable one. Thus, owners sustaining extensive loss in the value of their property can recover, while those whose property value is only slightly affected cannot. As long as there is a reasonable means of access available, inconvenience and circuity of route will not be compensable injuries.

When the property affected by the blocking of a road is used for certain business purposes, the "reasonable access" rule is not entirely satisfactory, but it is consistent with existing law. The property owner may suffer severe damages and be unable to recover. This is especially true when the business is dependent upon a flow of traffic. For example, the blocking of a road would greatly diminish the value of any nearby abutting property which is used as a service station, but the access route left open may be reasonable, and the owner cannot recover. This result may not be too unreasonable in view of the fact that the damage results from the lack of through traffic, not from a lack of access to the property. The same damages would probably occur if traffic was routed around the particular tract of land, or if the road was not kept in repair. It is clear that the injury would not be compensable in either of these instances.84

Through the "reasonable access" rule of the Jackson case, the court seemingly conceives of the easement of access as a general easement, and not an easement in a specific road.85 In so doing, it apparently answers questions arising when service roads are constructed. If a service road affording reasonable access were constructed, the property owner would be unable to recover damages under the rule. Whether this will be the court's interpretation and application of the rule remains to be seen; however, the last case directly considering the question, Cranley v. Boyd County,86 held otherwise. In that case the court considered the easement of access as an easement in a specific road, and permitted a property owner to recover damages resulting from the closing of an abutting road despite the fact that another road affording reasonable access had been constructed. Evidence of the existence of the new road was said to be relevant only in so far as it reduced the damages caused by the loss of the easement.87

84 See Wright v. Flood, 304 Ky. 122, 200 S.W.2d 117 (1947); Cranley v. Boyd County, 266 Ky. 569, 99 S.W.2d 737 (1936).
85 If the easement of access were in a specific road, the closing of that road would be a taking of property and compensable. If there is no compensable injury when the property owner is left a reasonable means of access to his property, his easement of access must be general, and not at any specific point or in any specific road.
86 266 Ky. 569, 99 S.W.2d 737 (1936).
87 Id. at 575, 99 S.W.2d at 741.
Although Cranley v. Boyd County has neither been overruled or distinguished as to the point in question, the Court of Appeals probably will not follow that decision. The case came before the development of limited-access highways, and to follow it would permit endless suits to recover damages against the Commonwealth. The cost of closing an existing road would become prohibitive, if every person using that road as a means of access to his property were permitted to recover damages. The Cranley case recognized this possibility, and dictum in that case restricted recovery to persons having property adjacent to the road at the point it was blocked. However, subsequent cases have disavowed this dictum, leaving the specific easement concept intact without any restrictions. This concept is unworkable today, and in all probability, the court will overrule the Cranley case when the occasion arises.

Another vexing problem in the taking of easement of ingress and egress is the time when payment must be made to the property owners. Undoubtedly, if property other than an easement of access is taken, compensation must precede entry upon the land. But payment may not have to precede entry when only the easement of access is taken. In Standiford Civic Club v. Commonwealth, the Court of Appeals affirmed a lower court's refusal to grant an injunction to prevent the closing of a road, even though it was the sole means of ingress and egress of some of the plaintiffs. The Court held that the nature of the public interest involved overrode the private property interests, and intimated that an action for damages would be sufficient remedy. This decision is difficult to reconcile with section 13 of the Kentucky Constitution, but it does not appear that the plaintiffs presented the constitutional argument in this case. It will undoubtedly be presented in the future.

If, as intimated in the Standiford case, some of the plaintiffs were entitled to damages, the court appears to be in error. If damages were recoverable, there must have been a taking of an easement of access. Since an easement of access is property, it cannot be taken without "compensation being previously paid" to the owner.

The court was manifestly swayed by the nature of the public interest involved. The building of an interstate highway would be unreasonably hampered, and considerably more expensive if the state were

88 See Dep't of Highways v. Jackson, 302 S.W.2d 373 (Ky. 1957); Standiford Civic Club v. Commonwealth, 289 S.W.2d 498 (Ky. 1956).
89 Sec. 13 of the Ky. Const. provides: "... nor shall any man's property be taken or applied to public use without just compensation being previously paid to him."
90 289 S.W.2d 498 (Ky. 1956).
91 See note 89 supra.
92 See Standiford Civic Club v. Commonwealth, 289 S.W.2d 498 (Ky. 1956).
93 See section 13 of Ky. Const., note 89 supra.
forced to condemn every easement of access taken. There is no reason why the remedy of damages, after the closing of the road, would not be sufficient; nevertheless, the constitutional prohibition is present, and it is difficult to see how it will be circumvented when the issue is squarely presented to the court.

2. Severance Damages

The condemnation of a right-of-way for any new highway inevitably results in the division of single tracts of land into two or more tracts. Often such a division produces a diminution in the total value of the resulting tracts, in addition to the loss for the land taken. This diminution in value is called severance damage.

Severance damage obviously is not new to the law of eminent domain, or peculiar to the limited-access highway. Such highways do, however, vastly increase the importance of this element of damages. The building of an ordinary road through a farm will usually give rise to some severance damage, but generally the damage is not extensive, since the farmer can continue to use the farm as a unit. The same is not true when a limited-access road bisects a farm. Unless the farmer is provided with an underpass, the severance will be absolute, and the farm ordinarily can no longer be operated as a unit. The resulting loss in market value may be many times the value of the land actually taken. A dairy farm, for example, may be divided in such a manner as to leave a milk barn on one side of the road and pasture on the other. Or perhaps, a farm residence may be separated from fields that must be tended daily. Whenever severances such as these occur, the loss in value will unquestionably be great. In fact, the major part of the damages will probably be severance damage.

Severance damages come within the ordinary rules of compensation. This is true regardless of which rule the jurisdiction happens to apply. In those jurisdictions applying the value plus damages rule, the severance damage is probably included in the damages to the remainder. In jurisdictions which apply the difference in market value rule, the loss of value resulting from the severance will be directly reflected in the value of the land immediately after the taking.

Although severance damages present no problem in so far as the rules of compensation are concerned, the increase in this element of damages does present problems of proof. This is especially true in Kentucky for the Court of Appeals will not hesitate to reverse an award as being excessive when the record does not contain adequate proof of damages.94 Thus, when severance damages constitute a major por-

94 See Tennessee Gas Transmission Co. v. Teater, 252 S.W.2d 674 (Ky. 1952); Southern Ry. v. Gaines, 238 S.W. 2d 165 (Ky. 1951); Tennessee Gas
tion of the condemnee's claim, he must clearly point up these damages through every means available. Otherwise, on appeal, the award may appear excessive because of the great disparity between the value of the land taken and the damages given.

Conclusion

The widespread condemnation of land in acquiring rights-of-way for the Interstate Highway System has brought new and concentrated attention to the law of eminent domain. The rapid increase in the number of cases, and the new problems presented by these cases, have pointed up the need for a clarification and modernization of the law on the subject. Some of the older concepts, such as specific easements of access in public roads, will have to be abandoned; others need to be modified or clarified.

The Kentucky Court urgently needs to undertake such a redefinition. It needs to abandon the present cumbersome and unsound rule of damages; it needs to clearly abandon the specific easement concept of the Cranley case; and it needs to expand and clarify the "reasonable access" concept of the Jackson case.

After such a re-definition, the court would have some workable general rules by which cases could be decided, and there would be no need for the case to case improvising that has frequently characterized the past Kentucky decisions in the field of eminent domain.

Carl R. Clontz

Transmission Co. v. Million, 314 Ky. 137, 234 S.W. 2d 152 (1950); Petroleum Exploration, Inc. v. Hensley, 313 Ky. 98, 280 S.W. 2d 464 (1950); Tennessee Gas Transmission Co. v. Lewis, 311 Ky. 517, 224 S.W. 2d 666 (1949).