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ACQUISITION OF RIGHT OF WAY FOR HIGHWAY PURPOSES IN KENTUCKY—RIGHT OF EMINENT DOMAIN AND JUST COMPENSATION

BY JAMES R. RICHARDSON*

Section 195 of the Kentucky Constitution secures to the Commonwealth its right of eminent domain and sets out the right of the Commonwealth to take property of corporations as well as individuals for public use. Further, Kentucky Revised Statutes 381.020 provides that

“The Commonwealth retains the right of eminent domain in and to all real estate.”

“Eminent Domain is variously defined as

“The superior right of property subsisting in a sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner,”¹ and

“The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use,”² or simply the power to take private property for public use.

An incident to the taking of property for public use is payment therefor. It is fundamental law in the United States that property shall not be taken for a public purpose without the payment of “just compensation.” The Fifth Amendment⁴ to the Federal Constitution has expressly imposed this restriction on the Congress. The Fourteenth Amendment,⁵ while not so

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¹ BOUVIER, LAW DICTIONARY, 1008.

² DILLON, MUNICIPAL CORPORATIONS, sec. 584.

³ West River Bridge Co. v. Dix, 6 How. 536 (U.S. 1848).

⁴ That part of the Fifth Amendment relevant hereto provides that no person shall “be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.”

⁵ The second section of Amendment 14 provides that no State shall deprive any person of life, liberty or property without due process of law.

specific, has been held to impose such restriction on the States.⁶ From this it is inferred that due process of law as applied to the right of Eminent Domain includes just compensation.

Irrespective of the guarantee in the Fifteenth Amendment, only North Carolina and New Hampshire have not provided a just compensation clause in their constitutions. In New Hampshire⁷ the Courts hold that compensation is a fundamental right, and North Carolina reads this provision into its constitution through the "due process" clause.⁸ The Kentucky Constitution, Sec. 13, stipulates that.

"_____nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him."

and Section 242 provides

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid or secured at the election of such corporation before such injury or destruction."

As Kentucky has the just compensation clause in its constitution, the question arises as to what is just compensation in condemnation proceedings. In Constitutional construction, the words "just," "ample," "full," "adequate," "due," etc., prefixed to the word "compensation" have been said to lend no appreciable additional weight⁹ but much stress has often been put on their use by the courts.

"Just Compensation," as provided for in the Kentucky Constitution, has been held to be the value of the land at the time of the taking,¹⁰ and the value of the land taken by eminent domain is fixed at a price at which an owner who desires to sell, but is not required to do so, would sell the property, in its condition at the time of the taking, to a person who desires to purchase, but is not compelled to do so.¹¹

⁶McCoy v Union Elevated Co., 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156. (1917).

⁷Petition of Mt. Washington Rd. Co., 35 N.H. 134 (1857).

⁸ORGEL, VALUATION UNDER EMINENT DOMAIN, Sec. 1.

⁹RAND, EMINENT DOMAIN, Sec. 223.

¹⁰Brock v. Harlan County, 297 Ky. 113, 179 S.W. (2) 202 (1944).

¹¹Commonwealth v Begley 272 Ky 289, 114 S.W. (2) 127 (1938).

The value has been differently phrased as the difference between the fair market value immediately before and immediately after the taking,¹² and an existing established market value, even though the owner declines to sell at such figure, is the yardstick in determining what the government must pay if it decides to take property through condemnation proceedings.¹³ "Just Compensation" has been held to mean payment in money.¹⁴ The Broadway Coal Mining Case, *supra*, so holding, was decided in 1910, and the well considered opinion of the court was written by Judge Carroll. The subject matter of this case will be discussed later on the question of assessment of damages. The writer feels that the opinion of Judge Carroll is the law in this state and it is recommended for study of the practitioner who is confronted with the problem of damages in eminent domain cases.

PROCEDURE IN CONDEMNATION

By KRS 177.080, the Department of Highways may institute proceedings in the county court of the county where the land lies to have any right of way, permanent or temporary, condemned and the damages assessed. Suit is brought by the County Attorney in the name of the State. By KRS 176.280, the County Attorney is required to render legal service to the Department of Highways in carrying out its duties, but not outside his county. KRS 177.100 provides that all condemnation proceedings instituted under the provisions of KRS 177.080 shall be in the manner provided in KRS 416.010 to 416.080. This procedure provides that a petition shall be filed in the office of the County Clerk of the County in which the land is situate. The petition must give a particular description of the land sought to be condemned and apply for appointment of commissioners to assess the damages the owner is entitled to receive. Upon such petition being filed, by KRS 416.020, the court is directed to appoint as commissioners three impartial housekeepers of the county who are landowners. The Commissioners, after being duly sworn, view the land to be taken and award the owner the

¹² Commonwealth v Powell, 258 Ky. 131, 79 S.W. (2) 411 (1935)

¹³ Louisville Flying Service v. U.S., 64 F. Supp. 938 (1945)

¹⁴ Broadway Coal Mining Co. v Smith, 136 Ky. 725, 125 S.W. 157 (1910).

value of the land taken. In addition they are to award incidental damages to the remainder, but from such incidental damages awarded they may deduct the value of the advantages and benefits that will accrue to the adjacent lands from the construction and prudent operation of the highway proposed to be constructed. This question of incidental benefits is one which will merit further consideration in the discussion of assessment of damages.

The commissioners are required to file with the County Court a written report of their findings in damages. Pursuant to KRS 416.030, the clerk of the court issues process against the owner to show cause why the report of commissioners should not be confirmed. At the next regular term of the court, under the provisions of KRS 416.040, the Court enters an order confirming the report, if no exceptions have been filed.

In the event that exceptions are timely filed, the court is directed by KRS 416.050 to impanel a jury to try the issues of fact raised by the exceptions. Either party may appeal to the Circuit Court, provided that such appeal is taken within thirty days. Should the condemnor wish, it may pay the damages assessed in County Court to the Master Commissioner of the Circuit Court and thereby gain immediate possession of the condemned premises. This procedure is sometimes followed in right of way cases to avoid the often lengthy delay occasioned by appeals.

As to the verdict of the jury in condemnation cases, KRS 29.330 provides that in all trials of civil actions in the Circuit Courts, three-fourths or more of the jurors concurring may render a verdict. However, section 242 of the Kentucky Constitution provides that condemnation cases shall be tried by a jury according to the course of the common law. A trial by jury as understood and applied at common law means that the jury should consist of 12 men neither more nor less, and that the verdict should be unanimous.¹⁵ No Kentucky cases on this point have been found. However, the principle has been invoked successfully of late in condemnation cases, and correctly it is submitted, as the constitutional provision is superior to that of the statute.

¹⁵ *Mutual Life Ins. Co. v. Green*, 37 F Supp. 949 (1941).

An alternate procedure for condemnation of right of way is provided by KRS 416.115, whereby action is authorized to be instituted in Circuit Court, commenced by petition and summons and carried on in a manner similar to actions at law. This latter procedure is most frequently followed as it eliminates much time consuming delay connected with proceedings in County Court.

There are two elements necessary to and conditions precedent to institution of condemnation proceedings. Firstly, it must be alleged and shown in the petition that the Highway Commission was unable to agree with the owner as to the value of the right of way.¹⁶ Recently an action to condemn right of way in Rockcastle County was dismissed when the defendant showed that the Highway Department had made no preliminary negotiations in attempt to purchase. Secondly, the necessity of the taking for public use must be shown when made an issue by the defendant, and it is a question of law.¹⁷ Where this point has been put in issue the courts have accepted a certified copy of official order of the Highway Department in regard to the particular right of way as conclusive on question of necessity. This is so, as by KRS 177.010 the Highway Department has the right to exercise its discretion in determining public roads of the primary system to be constructed and maintained. The only question for the jury in condemnation proceedings is the amount of compensation.¹⁸

As attempt to purchase right of way must be shown, it follows that by KRS 177.070 (1) the Highway Department is given the right to agree with any landowner as to the value of land for right of way purposes and, by Sub-section (2) of the same section, any owner may donate a right of way across his land. Right of way is frequently obtained without cash consideration in rural areas where roads are greatly desired and necessary to open up the area by what are called farm to market roads. Conversely, in areas where the residents do not wish a new road, or an old one rerouted, right of way is at times found so

¹⁶ Postlethwighte v. Towery, 258 Ky. 468, 80 S.W. (2) 541 (1935).

¹⁷ Royal Elkhorn Coal Co. v. Elkhorn Corp. 199 Ky. 8, 237 S.W. 1083 (1922).

¹⁸ Baxter v City of Louisville, 224 Ky. 604, 6 S.W. (2) 1074 (1928).

high as to be prohibitive. In such instances projects have been abandoned.

The proceedings discussed above all contemplate ordinary processes in the courts of law before condemned property is taken. A slight variation is provided where on appeal the condemnor may take immediate possession upon paying into court the amount allowed in county court.

During the National Emergency the Federal Government recognized the necessity of immediate possession for defense purposes and passed the Defense Highway Act,¹⁹ which gave the federal agencies concerned the right to enter upon and take possession for right of way purposes where negotiations for purchase failed. The procedure was a declaration of taking, previously authorized, in construction of other public buildings and facilities.²⁰ Under the declaration of taking, the acquiring authority was entitled to immediate possession upon filing in Federal District Court a statement of the necessity and use, and deposit of a sum of money deemed adequate by the acquiring authority to compensate the landowner.

It is believed that a statute authorizing a procedure whereby the Department of Highways might take immediate possession upon deposit of money in court would not be violative of our constitution. Section 242 Kentucky Constitution provides that compensation must be paid or *secured*. Payment into court would secure the payment of all damages to be incurred.

PROPERTY THAT MAY BE TAKEN AND "PUBLIC USE"

The power of eminent domain extends to every kind of property, both real and personal, within the jurisdiction of the sovereignty authorizing its exercise, including dwelling houses and buildings.²¹ It seems to be the generally accepted view of the laymen that right of way through a cemetery may not be condemned. The writer recently read such statement in a magazine of national circulation. The contrary is true, unless cemetery property is specifically exempt by statute,²² and property devoted to cemetery purposes has been held subject to condem-

¹⁹ U.S.C.A. Title 23 Sec. 114.

²⁰ U.S.C.A. Title 40 Sec. 258-a.

²¹ 18 AM. JUR. 82.

²² 109 A.L.R. 1506.

nation under a general eminent domain statute.²³ It has been held that a slight curvature will be made in a public road, rather than have it take part of a public school house, unless the necessity for a straight location affirmatively appears.²⁴

At this time it is well to refer to previous definitions of eminent domain which in effect is "the taking of private property for public use."

From the last two mentioned cases, it can be seen that in a strict sense the definition is not correct. The general opinion gathered from the authorities is that property previously dedicated to a public use may be condemned for a public use if the latter use is greater. Land devoted to hospital uses may be taken for streets and highways,²⁵ and a highway may be established across a railway and the land of the company condemned for that purpose subject to the restriction that the crossing will be such that the use of the highway will not deprive the railroad of the use of its tracks.²⁶ On the other hand, highway property may not be condemned for another public use which will interfere with its use for highway purposes. For instance, a state agency with power to condemn land for a school building would not authorize the obstruction or closing of a public highway.²⁷ However, a highway may be burdened with additional public uses so long as they do not interfere with highway purposes. By KRS 177.110 railroads may construct lines across public highways subject to rules and regulations of the Department of Highways. Telephone and telegraph companies are by KRS 278.540 given the right to construct lines on and along public highways, but not in such manner as to interfere with travel on the road. On the question of public uses, the Kentucky Court of Appeals has held that where a new public use will destroy the previous use to which the property was devoted, the power to condemn the property for such new use must be conferred in express terms, but general authority is sufficient where the new public use will not destroy or materially interfere with the

²³ *Re Board of Street Openings*, 133 N.Y. 329, 31 N.E. 102 (1892)

²⁴ 48 L.R.A. (N.S.) 490, 491.

²⁵ *Penn. Hospital v. Philadelphia*, 245 U.S. 20, 38 S.Ct. 35 (1917).

²⁶ *Ft. Wayne v. Lake Shore & M.S.R. Co.*, 132 Ind. 558, 32 N.E. 215 (1893).

²⁷ 48 L.R.A. (N.S.) 489.

original use to which dedicated.²⁸ Under this decision and the general weight of authority, it seems that current objections to the proposed new Louisville Belt Line Highway which takes in part of Cherokee Park will not be tenable.

It has been shown that public property may in certain cases be taken for public use. So may private property be taken for private use in rare instances. KRS 381.580 provides for condemnation of a private passway over the lands of another where necessary to attend courts, elections, meeting house or railroad depot, or to reach a warehouse, ferry, railroad switch, etc.

In general all lands held by private owners within the geographical limits of the United States are subject to the authority of the Federal Government to take them for such objects as are germane to the execution of the powers granted it,²⁹ but the United States cannot take property devoted to a public use and the loss of which would interfere with the performance of its governmental duties by the state.³⁰ It seems the weight of authority is that a state cannot condemn property within its borders for the use of another state,³¹ and a state cannot condemn land held by the United States and used for public purposes.³²

There does not seem to be any satisfactory comprehensive definition of the term "public use." The difficulty in composing one is probably due to the double meaning of the word "use," which may be either employment or advantage. One author on this subject takes the view that the word has been given too broad a meaning in taking land for the many purposes permitted as public use.³³ The following have been held to be public uses:

An almshouse—*Heyward v City of New York*, 7 N. Y. 314,

A public bath—*Poillon v City of Brooklyn*, 101 N. Y. 132, 4 N. E. 191 (1886),

A school house—*Reed v Inhabitants of Acton*, 117 Mass. 384 (1875)

²⁸ *L. & N. Ry. Co. v. City of Louisville*, 131 Ky. 108, 114 S.W. 743 (1908).

²⁹ *Cherokee Nation v. R. Co.* 135 U.S. 641, 10 S.Ct. 965 (1889).

³⁰ *The Collector v. Day*, 11 Wall 113 (U.S. 1870)

³¹ *Kohl v. U.S.* 791 U.S. 367, 23 L. Ed. 449 (1875).

³² *U.S. v Chicago*, 7 How. 185 (U.S. 1849)

³³ NICHOLS, EMINENT DOMAIN, secs. 206-211.

- A market—*In re Cooper*, 28 Hun 515 (N. Y. 1883),
 Telegraph & Telephone Lines—*Lockie v Tele. Co.*, 103 Ill.
 401 (1882),
 Waterworks—*Bailey v Woburn*, 126 Mass. 416 (1877),
 Drainage—*Wilson v Marsh*, 2 Pet. 245 (U. S. 1829),
 Sewers—*Hildreth v City of Lowell*, 11 Gray 345 (Mass.
 1858),
 Irrigation—*Umatilla Irr. Co. v Barnhart*, 22 Ore. 389, 30
 Pac. 37 (1892),
 Forts—Armories and Arsenals—*Kohl v U. S.* supra note
 31 (1875),
 Turnpikes—*In re Mt. Wash. Rd. Co.*, 35 N. H. 134 (1857),
 Summer resort restaurant—*Prospect Park v C. I. Ry Co.*,
 91 N. Y. 552 (1883),
 Parks—*City of Lex. v Assembly*, 114 Ky 781, 71 S.W 943
 (1903), and
 Cemeteries—*Balch v County Comrs.*, 103 Mass. 106 (1869)

TITLE AND RIGHT ACQUIRED

As a general rule where land is condemned for highway purposes, the public acquires merely an easement, in the absence of special statutes, conveyances or other conditions, such easement being the right of travel thereon. The owner of the fee retains the right to make any use of the land, above the surface or below, which is not inconsistent with the exercise of the public easement.³⁴ Kentucky cases hold that condemnation of land for a roadway does not vest the title but only the use of the right of way in the public authority.³⁵ It is well settled that this right may be abandoned. When land is taken for a public road it remains the property of the owner subject to easement of the public which ceases on termination of the public use.³⁶ but to constitute abandonment there must be an intention to abandon as well as actual relinquishment of the way or right,³⁷ and mere non-user of an easement acquired by the exercise of

³⁴ 18 AM. JUR. Sec. 120.

³⁵ *Lexington Turnpike Co. v. McMurtry*, 42 Ky (3 B. Mon) 516 (1843).

³⁶ *Keown v. Brandon*, 206 Ky. 93, 266 S.W 889 (1924).

³⁷ *Canton Co. of Baltimore v. R. Co.*, 99 Md. 202, 57 Atl. 637 (1904).

eminent domain does not destroy the easement.³⁸ Should the purpose for which the land was taken be totally abandoned and cease, there is a reverter to the owner.³⁹

Though, as stated, a fee may be taken, such intent must be clearly shown, and it would seem that necessity for such must be apparent. A warranty deed conveying "right of way" in fee simple to a railroad company in consideration of construction of contemplated railroad thereon and the additional consideration of one dollar, was held to convey an easement and not fee simple title, so that upon abandonment of the railroad the land reverted to the grantor or its successor in title.⁴⁰ The court said that an unconditional conveyance for a certain purpose, namely right of way, did not convey a fee simple title and there was an abandonment where the company tore up its tracks and attempted to sell the right of way. Here the intention of the parties and the consideration paid were of weight in the decision reached.

The 1946 session of the Legislature passed an act⁴¹ which gave the Department of Highways authority to acquire private or public property and property rights including rights of access, air, view, and light, for limited access facilities by gift, devise, purchase or condemnation, and the Highway authority may acquire an entire lot, block or tract of land, if in its opinion the interests of the public will best be served, though not immediately needed for right of way proper. Limited access *facility* is the name given a highway or street especially designed for through traffic. This statute not only gives the right to acquire in fee but also to acquire property in excess of amount needed for right of way purposes. It is anticipated that the constitutionality of this portion of the act will be questioned.

It is a fundamental rule that property acquired for right of way may not be diverted to another use.⁴² If the new use

³⁸Curran v. City of Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734 (1886).

³⁹Miller v. Ry. Co., 43 Ind. App. 540, 88 N.E. 102 (1909).

⁴⁰Mammoth Cave Pk. v. St. Highway Com., 261 Ky 769, 88 S.W (2) 931 (1935).

⁴¹KRS 177.250.

⁴²Kershaw Motor Co. v. Southern Ry Co., 136 S.C. 377, 134 S.E. 377 (1926).

is of an entirely different character, the public easement is lost.⁴³ The authority may merely subject the easement to an additional servitude which would by its nature not be such change as would constitute an abandonment of the easement but would entitle the owner to additional pay. Where a railroad company leased a portion of its right of way to a fuel company for the purpose of erecting thereon a store building, the grantor of the right of way was held entitled to recover the reasonable rental value of the land on which the building stood.⁴⁴ Though land taken for highway purposes must be so used and there is only an easement therein, it is well to bear in mind that the right of the owner of the fee is subordinate to the public easement and when any conflict arises the owner must give way.

COMPENSATION AND DAMAGES

In the very early days of our country it was customary to acquire highway right of way without compensation to the owner of the land taken. This procedure was justified by reason of reservations in grants of public lands, small value of undeveloped lands and the pressing need for roadways. As has been shown, property owners are now protected against such acts by guarantees in most of the state constitutions and by amendments to the Federal Constitution. It is readily seen that this change in the law was necessary and brought about by economic changes and development, whereby real property values became enhanced.

A. *Assessment of Damages.* As has been previously stated, an owner is entitled to just compensation, or the fair market value of land taken for highway purposes. It is a rare case where there is not damage to the remainder of the land and this is direct damage which is a proper item of damage.⁴⁵ The purchase price or award includes value of fencing and other improvements taken.⁴⁶ Fruit trees are proper items of damage (Combs case, *supra*) as are shade trees and shrub-

⁴³ Neitzel v. S. I. Ry. Co., 65 Wash. 100, 117 Pac. 864 (1911)

⁴⁴ Taylor v. Winson & P. C. Ry. Co., 217 Ky. 698, 290 S.W. 507 (1927).

⁴⁵ Commonwealth v. Combs, 244 Ky. 204, 50 S.W. (2) 497 (1932)

⁴⁶ Perry County v. Riley, 268 Ky. 325, 104 S.W. (2) 1090 (1937).

bery⁴⁷ The Combs case sets out instructions which the court of appeals directed to be given in a right of way condemnation case. These instructions provide for payment to owner for value of property taken plus direct damage to the remainder by reason of the situation in which it was placed by the taking. Damage to the remainder of the land is usually that which is occasioned by splitting a parcel of land in two and is known as severance damage. As an illustration, a hundred acre farm would ordinarily be decreased in value when split in halves by a roadway. The farm for use as a unit would definitely have its value impaired. Included in the damages would be various inconveniences in use, as driving livestock across the road or crossing the road from dwelling to other farm buildings. The grade may be lower or higher in front of property thereby damaging ingress and egress, which is a protected property right.⁴⁸ The question of access is aptly discussed in a Georgia case, wherein it is said that the right of access to a highway may not be taken from abutting owners or materially impaired without compensation. But inconvenience is not construed as materially impairing. It is well settled that the State may in public interest interfere with or even prevent access at certain points. This is not the damage to private property prohibited by the Constitution. Access is had at another point though less convenient. The right of access does not mean access at a specific point.⁴⁹

In most jurisdictions, evidence of sales of similar property in the neighborhood is admissible on direct examination to prove the market value of the property in question.⁵⁰ In the Combs case, *supra*, the court said that evidence should not be received on this point to prove what offers have been made to sell or what prices have been asked or refused. The fact that property is peculiarly adaptable to a special purpose or use may be considered in assessing damages.⁵¹ If the land possesses a special value to the owner, sentiment excluded, which

⁴⁷ *Adams v. Commonwealth*, 285 Ky. 38, 146 S.W. (2) 7 (1940).

⁴⁸ *McCreary County v Roberts*, 292 Ky. 527, 166 S.W.(2) 977 (1942.)

⁴⁹ *State Highway Board v. Baxter*, 167 Ga. 124, 144 S.E. 796 (1928).

⁵⁰ *Kansas City Ry. v. Hooke*, 331 Mo. 429, 53 S.W. (2) 891 (1932).

⁵¹ *Miss. v Patterson*, 98 U.S. 403, 25 L.Ed. (1878).

can be measured in money, this may be shown.⁵² Possible uses of the property which are purely speculative are not admissible on question of damages.⁵³

When assessing damages to property taken, in addition to direct damages, i.e., value of property taken and damage to remainder, there often arises the question of indirect or incidental damages to the remainder. Just what incidental damages constitute I have not found defined in Kentucky or other jurisdictions. In discussing the question with various trial judges and giving consideration to the matter, I have reached the conclusion that "incidental damages" probably had its origin in railroad right of way cases. The phrase would seem to include smoke from trains and noises that would scare livestock. Kentucky now has a statute which provides that incidental damages may be offset by advantages to the owner from the building of the road.⁵⁴ Such a set-off is permissible in many jurisdictions, and in some damages to the remainder may be set off by benefits which are genuine and capable of estimation in money.⁵⁵

The Broadway Mining case, *supra*, is a leading case on the question of assessment of damages and contains an exhaustive analysis of the subject. It notes that section 242 of our Kentucky Constitution provides that an owner must be compensated for property taken, injured or destroyed. The words "injured or destroyed" were added over and above the provision for taking only as stated in section 13 of the constitution. Hence the opinion concludes that the owner must be paid in money for property taken and for the remainder injured or destroyed without consideration as to enhancement of value by reason of the building of the road.

In *L. & N. Ry. Co. v. Chenault*,⁵⁶ the railroad company took right of way through the appellees' land and contended it should be allowed to show benefits accruing to the remainder. The Court said such benefits were too speculative and remote in

⁵² *Brown v. Weaver Power Co.*, 140 N.C. 333, 52 S.E. 954 (1905)

⁵³ *White v. Chicago Ry. Co.*, 122 Ind. 317, 23 N.E. 782 (1890)

⁵⁴ KRS 416.120.

⁵⁵ 18 AM. JUR., Sec. 297.

⁵⁶ 214 Ky. 748, 284 S.W. 397 (1926).

holding that an owner must be paid in money, not benefits, for the damage to his land.

In view of various decisions and constitutional provisions it is not believed that the statutory provision for offsetting damages by benefits would survive a test on its constitutionality. The Department of Highways now makes no effort to secure an instruction on benefits in right of way cases.

B. ASSESSED VALUATION AS A MEASURE IN ASSESSMENT OF DAMAGES.

It would seem that the value a person puts on his property when he lists it for taxation should have a direct bearing on its value when part thereof is taken for public purposes. Such is not the case in practical application.

In a condemnation proceeding, the Commonwealth condemned certain lands near Burnside, Kentucky, to be used in the construction of approaches to a toll bridge.⁵⁷ In its opinion the Court said "It is the well settled rule in this State that in such action the property owner's assessment list for taxation is competent evidence on the amount of damages sought to be recovered, but its weight and effect is to be determined entirely by the jury trying the case." The decision means that, in trying the case, the condemnor is permitted to call the County Tax Commissioner as a witness and have him testify as to the assessed valuation. However, the weight to be given such evidence was entirely left to the discretion of the jury. The facts showed that the State was taking the entire acreage (8.31) in 1933, which was purchased in 1926 at a price of \$2,500.00, and assessed for taxation at \$1,150.00, the jury returned a verdict of \$2,500.00, disregarding the evidence on assessed valuation.

In *L. & N. Ry. Co. v White Villa Club*,⁵⁸ the court said that evidence as to assessed valuation was competent but not controlling. The Court continued to the effect that generally speaking it is well understood by juries and everybody else that the amount at which property is assessed throws little light on its actual value and the assessed value would have little weight with juries in ascertaining real values.

⁵⁷ Davidson v Commonwealth, 249 Ky. 568, 61 S.W.(2) 34 (1933).

⁵⁸ 155 Ky 452, 159 S.W 983 (1913)

In reading the cases on this point, I find no comment on section 272 of the Kentucky Constitution, which provides "all property not exempt from taxation by this constitution, shall be assessed for taxation as its fair cash value." On the contrary, the court seems to take judicial notice of the fact that property is not listed for taxation at its fair cash value.

In *Commonwealth v Powell*,⁵⁹ the Kentucky Court of Appeals states as follows

"It would be extremely unfair to say that defendants, after fixing themselves the value of their farm so as to reduce their taxes (being their contribution to the public treasury) should not be confronted therewith when they seek to take from that fund the damages to the same property resulting from appropriating a fractional part thereof to the public use. It would appear unequitable to take such diametrically opposed positions affecting the public treasury"

These are high sounding words, but left meaningless in light of the decisions on this subject.

Consider *Johnson County v Boyd*,⁶⁰ where the court says "Although defendants may have listed their property for taxation so far below its real value as to amount to a fraud upon the taxing authorities, such action on their part does not prevent them from collecting the reasonable market value of the land taken and the direct resultant damages to the remaining property"

It is conceded that assessed valuation could not and should not be accepted as the sole criterion in assessing damages in condemnation proceedings. To accept such standard would amount to erroneous adoption of the assumption that value for tax purposes and value for condemnation are one and the same. It is a notorious fact that property is rarely, if ever, listed for taxation at market value and the courts generally in reviewing tax valuations limit themselves to corrections of over valuation and inequality. Indeed, Kentucky is in the minority for the courts generally have taken the view that assessed valuation is inadmissible as evidence of market value in condemnation proceedings.⁶¹

⁵⁹ 258 Ky. 131, 79 S.W. (2) 411 (1935).

⁶⁰ 293 Ky. 337, 168 S.W. (2) 1019 (1943).

⁶¹ ORGEL, VALUATION UNDER EMINENT DOMAIN, 150.

C. INADEQUATE AND EXCESSIVE DAMAGES.

Our Court of Appeals has consistently held that the amount of damages in condemnation proceedings is peculiarly a question for the jury, and its verdict will not be disturbed unless so excessive or inadequate as to show passion or prejudice, or unless based on estimates unsupported by the physical facts, or so extravagant as to carry with them the improbability of their correctness.⁶²

This rule is followed for the reasons that, as previously pointed out, the jurors must be landowners, see and hear the witnesses and in most instances view the land taken.

In many condemnation suits, the value placed on land by the owner and his witnesses varies widely from that of qualified witnesses procured by the condemnor.

It is then incumbent upon the jury to determine a figure to reach a verdict which, if within the limits of damages fixed by the witnesses and supported by the physical facts, will be sustained by the court.⁶³

Where testimony of witnesses as to value is highly contradictory, it is within the province of the jury to reconcile the contradictions and arrive at a true verdict in the light of all facts and circumstances. It is only where the verdict at first blush strikes the mind of the court as having been influenced by passion or prejudice or some other motive that shocks the conscience of the court, that it will be set aside as flagrantly against the evidence.⁶⁴

DAMAGES SUBSEQUENTLY ACCRUING.

Damages to private property by public improvement, when assessed, are assessed once and for all, and include all damages sustained by the owner, present or future, by reason of a proper use and maintenance of the public improvement.⁶⁵ Damages assessed in condemnation cases do not include damage that may result from negligent construction of a road. Negligent construction or maintenance of a road may subsequent to the con-

⁶² *Bringardner Lumber Co. v. Knuckles*, 278 Ky. 356, 128 S.W. (2) 727 (1939)

⁶³ *Commonwealth v. Ball*, 246 Ky. 584, 55 S.W. (2) 413 (1932).

⁶⁴ *Bell's Comm. v. Harrodsburg*, 192 Ky. 700, 234 S.W. 311 (1921).

⁶⁵ 18 Am. Jur., sec. 369.

demnation proceedings result in flooding or slides. What may or may not happen by an improper construction of the road, or by its negligent operation, are not matters that enter into the award of compensation.⁶⁶

Such losses are not ones which either party had cause to anticipate and the possibility of such, if suggested, would have been rejected as speculative and conjectural in the condemnation proceedings, and having been incurred, may be compensated for in a subsequent action.

⁶⁶L. & N. Railway Co. v. Asher, 12 Ky. L. R. 815, 15 S.W. 517 (1891).