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Valuation of Leasehold Estates In Eminent Domain

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One of the most perplexing problems encountered in the conduct of condemnation cases is the determination of the proportion of a commission award or jury verdict to which a lessee of the premises is entitled. No condemnation case produces more problems both for the attorney and the appraiser than that in which the landowner has created a leasehold estate in the property for a term of years. In no other situation are the problems, both practical and legal, more difficult to solve. The existence of a leasehold estate in the property sought to be condemned is, of course, quite common. Often the existence of the two legal interests in the same property complicates negotiated sales and is more likely to result in condemnation proceedings than is the case where no leasehold is involved. Frequently the landowner and his tenant will agree as to the amount of compensation for the land taken but cannot agree as to the apportionment of that compensation between them. Little has been written on the subject and the reported decisions give us little practical help in the actual evaluation of a lessee's interest and the apportionment of the commissioners' award or jury verdict between the landowner and his tenant. With the enlarged program of highway development and the construction of superhighways, especially in and around urban areas, more and more leasehold estates are being affected by condemnation proceedings.

Neither the commissioners nor the jury can apportion the award, that is, fix the amount of the landlord's interest and the amount of the lessee's interest. Where there are different interests or estates

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in the property which is being taken in eminent domain, the proper course is to ascertain first the entire compensation for the land taken as though the property belonged to one person and then to apportion this sum among the different parties according to their respective interests.[1] This is the method prescribed by statute in West Virginia.[2] After the commissioners' award or jury verdict (assuming there is no appeal), the amount of compensation should be paid to the clerk of the court by the condemnor. Once the compensation is paid into court, the condemnor has no further interest in the proceedings. The matter of the apportionment of the award is of no concern to the condemnor and is a problem in which only the court and the claimants are involved.[3] The value of the property taken cannot be enhanced by any distribution of the title or estate among different persons or by any contract arrangement among the owners of the different interests.[4] It is not proper for the commissioners or the jury to attempt to apportion the award in their report or verdict. Their duty is to ascertain the amount of compensation to be paid for the entire interest taken in the proceeding.

A tenant or the owner of an interest in the land taken has no right to introduce for the consideration of the commissioners or the jury evidence of the value of his leasehold or interest. All evidence must go to ascertaining the value of the entire parcel taken.[5]

The method of evaluating a leasehold estate depends upon whether there is a taking of the entire parcel under lease or whether there is a partial taking only and whether the lessee's obligation to pay rent is discharged. The measure of a tenant's compensation when all or part of the leased premises is taken depends largely upon whether he is entitled to abatement of rent. If any important portion of the leased premises is taken and

[1] Stanpark Realty Corp. v. City of Norfolk, 199 Va. 716, 101 S.E.2d 527 (1958); Charleston & Southside Bridge Co. v. Cornstock, 36 W.Va. 263, 15 S.E. 369 (1892); 2 LEWIS, EMINENT DOMAIN § 716 (3d ed. 1909).

[2] Stanpark Realty Corp. v. City of Norfolk, *supra* note 1; W. VA. CODE ch. 54, art. 2, § 18 (Michie Supp. 1964); 4 NICHOLS, EMINENT DOMAIN, § 12.42(3) (2d ed. 1917).

[3] 2 LEWIS, *op. cit. supra* note 1; 4 NICHOLS, *op. cit. supra* note 2 § 12.36(1); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 112 (2d ed. 1953).

[4] W. VA. CODE ch. 54, art. 2, § 18 (Michie Supp. 1964).

[5] Kohl v. United States, 91 U.S. 367 (1876); State v. Montgomery Circuit Court., 239 Ind. 337, 157 N.E.2d 577 (1959).

the tenant is still obliged to pay the rent agreed upon for the use of the whole, he is entitled to substantial damages. When a proportionate part of the rent is abated, it may well be that the tenant's damages are merely nominal.[6]

This problem is partially solved by statute in West Virginia.[7] Under the statute, whenever the whole of any tract of land which is under lease is taken under the power of eminent domain, the liability of the tenant to pay rent thereon is terminated, unless the lease expressly provides otherwise. With respect to partial takings, the statute adopts what has been the view of a minority of courts and reduces the rent in the proportion which the value of the land or interest taken bears to the total value of the land upon which the rent was payable, unless the lease expressly provides otherwise. The first step, then, in evaluating a leasehold estate is to determine what provision, if any, is made in the lease with respect to the apportionment or abatement of rent. Unless provision is made in the lease with respect to apportionment or abatement of rent, the statute controls.

For the purposes of this discussion, let us assume a lease which is silent as to rent abatement and that the provisions of the statute control. Thus, a total taking of the leased premises terminates the lessee's obligation to pay rent and a partial taking reduces the rent in the proportion set out in the statute.

Generally speaking, the measure of compensation for an entire leasehold interest taken under eminent domain is said to be the difference between the fair rental value of the leased premises for the unexpired term of the lease and the rent reserved in the lease.[8] If the market value or the rental value of the unexpired term does not exceed the agreed rent, the lessee is generally held not to be entitled to any compensation.[9]

It is usually assumed that market value is equal to the excess of the rental value over the rent reserved.[10]

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[6] 4 NICHOLS, *op. cit. supra* note 2, § 12.42(3); Annot., 3 A.L.R.2d 286, 292 (1949).

[7] W. VA. CODE ch. 37, art. 6, § 29 (Michie 1961).

[8] United States v. Petty Motor Co., 237 U.S. 372 (1945); 4 NICHOLS, *op. cit. supra* note 2, § 12.42(3); Annot., 3 A.L.R.2d 286, 292 (1949).

[9] Housing Authority of Savannah v. Savannah Iron & Wire Works, Inc., 90 Ga. App. 150, 82 S.E.2d 244 (1954); Commercial Delivery Service v. Medema, 7 Ill. App.2d 419, 129 N.E.2d 579 (1955); 4 NICHOLS, *op. cit. supra* note 2, § 12.42(3); Annot., 3 A.L.R.2d 286, 292 (1949).

[10] 1 ORGEL, *op. cit. supra* note 2, § 126.

Where there is a partial taking of premises, which are subject to a lease, the tenant's measure of compensation or damages is said to be the difference between the market value of the whole leasehold before the taking and the market value of the remainder of the leasehold after the taking.[11] This general statement is somewhat confusing for it is not always clear what the courts mean by the phrases "the market value of the whole leasehold before the taking" and "market value of the remainder of the leasehold after the taking". The West Virginia statute sheds little light on this problem.[12] However, the phrase "market value of the whole leasehold before the taking" should be the equivalent of the excess of the rental value of the whole premises over the agreed rent for the whole and the phrase "market value of the remainder of the leasehold after the taking" should be the equivalent of the excess of the rental value of the remainder over the rent which the tenant must pay for the remainder.

The first step to be taken in valuing the tenant's interest is to determine the economic rent for the whole premises. The term "economic rent" is defined as rental value or the value of the use and occupation of the premises.[13] For our purposes the definition must also include the right to the use and occupancy of any improvements. Perhaps the best definition for "economic rent" is the "annual monetary income that an unencumbered freehold can command in the open market at any given time for its highest and best use."[14] The amount of economic rent which the property should command may be determined by two methods:

(1) by the market (comparison) approach in which rentals of similar properties are used as a basis for determining rental value.

(2) by a variation of the income approach, in which the value of the fee is determined and the proper capitalization rate applied to give the rental value.

To establish the so-called economic rent or rental value will require the use of expert witnesses. The market approach, i.e., the use of comparable rentings, is the most persuasive method of

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[11] Annot., 3 A.L.R.2d 286, 296 (1949).
[12] W. VA. CODE ch. 37, art. 6, § 29 (Michie 1963).
[13] 1 ORGEL *op. cit. supra* note 2, § 126.
[14] Kuehnle, *The Appraisal of Leaseholds*, 19 APPRAISAL JOURNAL 208 (1951).

establishing rental value and will present less problems before the court than the so-called income or capitalization approach.

VALUATION WHERE THE WHOLE OF THE LEASED PREMISES IS TAKEN

Let us assume that our tenant occupies the whole of a tract of land containing 2,000 square feet and that comparable properties are renting at two dollars per square foot. Our figure for rental value or economic rent then will be 4,000 dollars annually.

The next step is to determine the contract rent or the rent reserved. The amount of the contract rent can be determined from the lease itself. The rent figure should be adjusted to conform to the type of rental payments found in the comparable rentings used to establish economic rent or rental value. For example, if the subject lease calls for the lessee to pay real estate taxes, while in the comparable properties the lessors have agreed to pay taxes, the taxes should be added to the rent. Let us assume that the contract rent is 3,000 dollars annually and that no adjustments are necessary to conform the reserved rent to the lease terms of the comparable rentings.

The third step is to subtract the contract rent from the economic rent. This will indicate the annual or monthly bonus, as the case may be, to the tenant resulting from a fortunate bargain on his part or from brighter economic conditions than were evident when the lease was made. This bonus will reflect the profit the lessee would realize if he should sublet the premises. If contract rent equals or exceeds economic rent, the lessee has no compensable interest in the condemnation proceedings.[15] As one court has said:

> "If the plaintiff had made a bad bargain, and the fair rental value of the premises was less than the rent he had agreed to pay, he was released therefrom by the statute and the owner had no recourse against him, and in such case he would have sustained no damage. But if he had made a good bargain and the fair rental value of the premises was more than the rent he had agreed to pay, he did sustain damage."[16]

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[15] New Jersey Highway Authority v. J & F Holding Co., 40 N.J. Super 309, 123 A.2d 25 (App. Div. 1956); Annot., 3 A.L.R.2d 286, 293 (1949).

[16] Kafka v. Davidson, 135 Minn. 389, 395, 160 N.W. 1021, 1023 (1917).

In our problem we have determined an economic rent of 4,000 dollars annually and a reserved rent of 3,000 dollars annually. Thus, the lessee's annual bonus is 1,000 dollars. The fourth step involves multiplying the annual bonus by the number of years remaining in the term. This should include all renewal periods or options of the tenant to renew. The basis for including options is that if the tenant does enjoy a bonus, he will exercise any option he may have in the lease.

Let us assume that we have twenty-four months remaining in the primary term of our lease and an option for three additional years. We then have a total of five years as our unexpired term. By multiplying the annual bonus of 1,000 dollars by five years we find the value of the unexpired term of the lease to be 5,000 dollars.[17]

Of course, the tenant will not realize this profit until sometime in the future. In order to find the present value of this profit or bonus we must apply the proper Inwood factor or coefficient. Some authorities do not recognize the need for applying some type of actuarial table to determine the present worth of the future benefits of lessees' interest.[18] However, the application of some type of actuarial table seems to be necessary in order to indicate the present fair market value of the leasehold. Present money commands a premium over future money. One is disposed to pay less for that which is to be enjoyed in the future than for that which is to be enjoyed at present. Stated differently, future amounts have a present worth that is less than their face value in an amount equal to the loss of interest during the time until collection.

Returning to our problem, we have a total leasehold benefit of 5,000 dollars payable in five annual installments of one thousand dollars each. Let us assume that money at present is worth six per cent per annum. Going to the Inwood table showing the present value of one dollar per annum payable each year for five years, we find a factor of 4.212, that is, the present value of

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[17] See, *e.g.*, Yellow Cab Co. v. Howard, 243 Ill. App. 263 (1927).

[18] The case cited in note 17, *supra*, did not require the use of interest tables; 1 ORGEL, *op. cit. supra* note 2, § 126, seems to approve of this approach; but see United States v. Certain Lands in Poughkeepsie, 79 F. Supp. 873 (S.D. N.Y. 1948), in which the use of the appropriate Inwood factor was approved.

receiving one dollar per year for five years would be 4.212 dollars. Multiplying 1,000 dollars, the amount of the annual profit, by the factor of 4.212, we get 4,212 dollars as the present value of the leasehold.

The foregoing computation may be summarized as follows:

The lessee has leased from the lessor 2,000 square feet at an agreed rental of $1.50 per square foot or a total of 3,000 dollars annually. The primary term has twenty-four months remaining and the lessee has the option to renew the lease for three additional years. The whole of the leased property is being acquired for road purposes. Witnesses for the lessee establish the economic rent or rental value to be two dollars per square foot or 4,000 dollars.

Economic rent or rental value of entire premises	$4,000.00
Reserved rent (lease rent)	3,000.00
Annual bonus	$1,000.00

$1,000.00	annual bonus
x 5	balance of term
$5,000.00	value of unexpired term

at 6% the present value of $1.00 per year for 5 years is $4.212 (Inwood factor)

$1,000.00	annual bonus
x 4.212	Inwood factor
$4,212.00	present value of unexpired term

Valuation Where a Part of The Leased Premises is Taken

In partial taking cases the measure of damages to the lessee, as we have seen, is the difference between the value of the use and occupation before the taking and the value of the use and occupation after the taking. The application of this rule provides for consequential damages to the residue.[19] We have no West Virginia case specifically adopting this rule. But it appears to be

[19] Annot., 3 A.L.R.2d 286, 296-97 (1949).

consistent with the rules established in *Strouds Creed & M. R. R. v. Herold*[20] for the valuation of the land itself.

Let us again assume that the leasehold involved has an economic or rental value of 4,000 dollars annually before the taking and that the economic rent or rental value of the residue after the taking is 2,000 dollars annually. In order to determine both of these figures, the services of an expert witness will be necessary and he should determine these values by either the use of the comparison method or the capitalization of income method. The difference in rental value is 2,000 dollars annually. Let us assume further that the value of the whole land is 40,000 dollars and the value of the residue after the take is 16,000 dollars. Our statute provides that the rent for the balance of the term shall be reduced in the proportion that the value of the land taken bears to the total value of the land upon which rent was payable. Under our assumption, the ratio of the value of the land taken to the value of the whole land is sixty per cent. The contract rent of 3,000 dollars annually then is reduced under the terms of the statute sixty per cent or 1,800 dollars, leaving agreed rent of 1,200 dollars for the remainder. The statute further provides "the foregoing provisions shall not affect nor impair any right which a tenant of land may have to compensation from the person exercising the right of eminent domain, for the value of his lease, or other property upon the leased premises belonging to him, or in which he may have an interest, if such value shall exceed the amount of the rent from the payment of which he is relieved by virtue of the provisions of this section." The annual difference in rental value is 2,000 dollars. From this we subtract the amount of rent from which the tenant is relieved of the obligation of payment and we get 200 dollars which is the annual difference in the value of the leasehold before and after the taking less the rent reduction. The balance of the term is five years. The tenant's damage is five times 200 dollars or 1,000 dollars.

To find the present value of the tenant's damage we must use the appropriate Inwood factor, 4.212, which is the present value of receiving one dollar each year for five years. The factor 4.212 times 200 dollars gives us $842.40 which is the amount of damages to which the tenant is entitled for the partial taking of his leasehold.

[20] 131 W. Va. 45, 45 S.E.2d 513 (1947).

These computations may be summarized briefly as follows:

T has leased from L 2,000 sq. ft. at an agreed annual rental of $1.50 per sq. ft. or a total of $3,000.00. The primary term still has 24 months remaining and T has the option to renew the lease for an additional 3 years.

The value of the whole premises has been established at $40,000.00 and an award of $24,000.00 was made for the part taken, leaving the residue with a value of $16,000.00. The value of the land taken then was 60% of the value of the whole tract before the take.

Economic rent or rental value of whole before take	=	$4,000.00
Rental value of remainder after the taking	=	2,000.00
Annual difference in value		$2,000.00
The contract rent of $3,000.00 is reduced by 60% or		1,800.00
Excess of T's value over rent reduction		$ 200.00

Factor 4.212 x $200.00 = $842.40 T's damages

This may be computed in another way which is a literal application of the "before and after rule" stated above.

Rental value of whole	=	$4,000.00
Reserved rent for whole	=	3,000.00
Value before take		$1,000.00
Rental value of residue	=	$2,000.00
Reserved rent after take	=	1,200.00
Value after take		$ 800.00

$1,000.00	value before take
800.00	value after take
$ 200.00	difference in value
x 4.212	Inwood factor
$ 842.40	T's damages

The determination of the lessee's interest is further complicated where the rent is determined in whole or in part by the lessee's receipts. The usual lease of this type is one in which the rental is fixed as a percentage of the lessee's gross sales. The decided cases do not appear to have established any rule or formula for determining the award in such cases. It would seem that the principles discussed above are equally applicable to percentage leases. Thus, in percentage leases, where the tenant is paying less than the equivalent of the rental value, he has a compensable interest. Where the tenant is paying the maximum rental, his interest in the lease would amount to nothing and the entire award would go to the lessor. This will be found to be true in the majority of percentage leases unless, of course, the lessee has placed buildings or other improvements on the leased premises at his own expense for which he may be entitled to compensation. Tables have been established which show the percentage of gross profits used to fix rentals in various lines of retail businesses. It would seem that if the rental in a given lease is based upon a percentage of gross sales which exceeds the percentage usually found in comparable leases in the same type of business, the lessee would have no compensable interest. Margins of profit usually dictate the percentage of gross sales which may be paid as rent in each type of business, and a lease which provides for percentage of gross sales which is higher than that usually provided in similar leases would seem to have little, if any, market value.

Fixtures

The rule in regard to machinery or other articles which were originally chattels but which have been so affixed to a building or to the land by the owner as to indicate an intention that they are to remain permanently and thereby form a part of the real estate is the same as in the case of buildings. In ascertaining the market value of the premises sought to be taken in a condemnation proceeding, the fixtures, if any, are to be taken into consideration to the extent they enhance the value of the whole, and the owner of the land is entitled to recover for their destruction to the extent they add to the market value of the land.[21] In ascertaining the just compensation to which an owner is entitled where fixtures are involved, the majority view is that the land and fixtures are

[21] 4 Nichols, *op. cit. supra* note 2, § 13.12(1).

to be valued as a unit and not by taking the aggregate value of the land and fixtures as separately evaluated. The so-called "unit rule" applies to fixtures, and neither the commissioners nor the jury are to apportion the award as between landlord and tenant.[22]

Under the common law rule, whatever was affixed or attached to the soil belonged to and was a part thereof. This rule has been relaxed in favor of lessees or tenants in some instances.[23] The general rule that whatever is affixed and annexed to the soil becomes part of it and cannot be removed except by the person who owns the freehold is subject to a well established exception. Fixtures which are erected to carry on the business of the tenant may be removed by the tenant during his term and are deemed personalty for many other purposes.[24] In a fairly recent case seventeen dwellings and a garage building erected by the lessee under a mining lease were held by the West Virginia Supreme Court to be removable as trade fixtures and the lessee was held entitled to recover the amount of the award representing the value of the dwellings and garage.[25]

The intention of the lessee in attaching property to the real estate of the lessor, that is, as to whether it was for the purpose of enhancing the value of the land or whether the attachment was for the sole benefit of the lessee in conducting his trade or business, is the controlling factor. In each case there is a question of fact whether fixtures placed upon the land by the lessee are permanent or removable. Structures erected by the lessee of his own violition and for his own benefit intending that they should remain his property are generally removable. Buildings erected pursuant to a provision in the lease which requires the tenant to erect them are not removable unless the right of removal is expressly or impliedly reserved in the lease.[26]

Whatever may be the law respecting fixtures, the parties may fix the character and control the disposition of personal property,

[22] Stanpark Realty Corp. v. City of Norfolk, *supra* note 1; W. VA. CODE ch. 54, art. 2, § 18 (Michie Supp. 1964); 18 AM. JUR. *Eminent Domain* § 253 (1938); 6 MICHIE'S JURISPRUDENCE, *Eminent Domain* § 39 (1964 Supp.).

[23] Milburn By-Products Coal Co. v. Eagle Land Co., 141 W. Va. 866, 93 S.E.2d 231 (1956); 8 MICHIE'S JURISPRUDENCE, *Fixtures* § 9 (1949).

[24] Van Ness v. Pacord, 27 U.S. (2 Pet.) 137 (1829); MacKenzie v. Western Greenbrier Bank, 146 W. Va. 971, 124 S.E.2d 234 (1962); 4 NICHOLS, *op. cit. supra* note 2, § 13.12.

[25] Milburn By-Products Coal Co., v. Eagle Land Co., *supra* note 23.

[26] MacKenzie v. Western Greenbrier Bank, *supra* note 24; 8 MICHIE'S, *op. cit. supra* note 24.

which in the absence of such agreement, would be regarded as a fixture. The provisions of the lease must be construed to determine whether the lessee has the right to remove or not.[27]

Generally speaking, a lessee is entitled to compensation for fixtures, structures or other improvements installed or erected by him upon the property taken, if, as against the lessor, he has the right to remove such improvements prior to or upon the expiration of the term. However, a lessee is not entitled to compensation for fixtures or other improvements placed by him upon the condemned premises, if, as against the lessor, he does not have the right to remove such improvements.[28] The rule is stated in NICHOLS on EMINENT DOMAIN, as follows:

> "It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land or puts fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of a special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. This rule is, however, entirely for the protection of the tenant and cannot be invoked by the condemning party. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant."[29]

The foregoing was quoted by the Supreme Court of Appeals in the case of *Milburn By-Products Coal Co. v. Eagle Land Co.*[30]

Thus, if fixtures are attached to the real estate and would pass with a conveyance of the land, as between lessor and lessee, they remain personal property. In the absence of a special agreement to the contrary, such fixtures may be removed by the tenant at anytime during the term of the lease provided such removal may

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[27] See cases cited note 26, *supra.*

[28] 4 NICHOLS, *op. cit. supra* note 2, § 13.12(2); 18 AM. JUR. *Eminent Domain* § 254 (1964 Supp.); Annot. 3 A.L.R.2d 286, 302 (1949).

[29] 2 NICHOLS, EMINENT DOMAIN § 5.81(2) (3d ed. 1953).

[30] 141 W. Va. 866, 93 S.E.2d 231 (1956).

be made without injury to the freehold. If the fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property.[31] This rule has been stated thus:

> "To the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto, the value of the fixtures must be included in what the city pays, and the tenant is entitled to part of the award, not because the fixtures add to the value of the leasehold but because they belong to him and their value enters into the value of what the city has taken."[32]

Even though a lease may contain a condemnation clause, that is, a clause by which the rights of the tenant to participate in a condemnation award are limited, the tenant's fixtures are considered real property and must be paid for by the condemnor. No leasehold survives the condemnation. Where fixtures are taken together with the land to which they are annexed, such fixtures are not taken because they are the property of the lessor or the lessee but because they are a part of the real property. The so-called condemnation clause is effective to deny the tenant compensation for the value of the unexpired term of his leasehold. But he still retains the right to compensation for his interest in any buildings, fixtures or structures which he has placed upon the real estate which, but for the fact that the real property had been taken, he would have had the right to remove at the end of his lease.[33]

Another perplexing problem is how to arrive at the evaluation of the fixtures or other improvements which are taken. The general rule is that the amount of compensation is to be measured by the value of the land, together with the improvements and fixtures thereon, valued as a whole and not separately.[34] Evidence of the value of buildings or other improvements separate and apart from the value of the land or as separate items of damage is not admissible.[35]

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[31] 4 NICHOLS, *op. cit. supra* note 2, § 13.12.
[32] In the Matter of City of New York, 256, N.Y. 236, 176 N.E. 377 (1931).
[33] 4 NICHOLS, *op. cit. supra* note 2, § 13.12(1).
[34] *Ibid.*
[35] Chesapeake & O. R.R. v. Johnson, 134 W. Va. 619, 60 S.E.2d 699 (1950); 18 AM. JUR. *Eminent Domain* § 253 (1938).

Where the buildings or other improvements taken or injured are suitable and well adapted to the kind of land to which they are attached, the cost of the buildings and fixtures, after making proper and reasonable deduction for depreciation, is recognized as a reasonable test of the amount by which they enhance the market value of the land.[36] As a general rule, the most practical method of valuing fixtures will be cost or reproduction cost less depreciation.

A distinction must be made between property attached to the real estate and thus a fixture, and property not attached to the realty. There is no liability for machinery or other fixtures attached only by screws or which can otherwise be readily removed. They remain personalty. The general rule is that a taking by eminent domain does not include the personal property lying on the premises taken, but not affixed thereto. It is well settled in most jurisdictions that damages for injury to such personal property or the expense of removing it from the premises are not proper elements of compensation.[37] Personal property not affixed to the realty does not affect the value of the property taken and it is incumbent upon the lessee to remove the same from the property.

By the weight of authority a tenant is not entitled to recover the cost of removing personal property or damages or injury to such property resulting from its removal.[38] The rule which is followed by a majority of the courts was stated as follows in *City of St. Louis v. St. Louis I. M. & S. Ry.*:

> "Injury to business, loss of profits, inconvenience to the owner, damage to personal property, or the expense of moving it, are not to be estimated as distinct elements of damages. . . . We therefore hold, in consonance with the great weight of authority everywhere, that respondent was not entitled to recover for loss of profits in its business during the removal of its stock of goods; nor for the expense of the removal of its stock of goods

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[36] Chesapeake & O. R.R. v. Johnson, *supra* note 35; 18 AM. JUR., *op. cit. supra* note 35; 29 C.J.S. *Eminent Domain* § 175 (1941).

[37] NICHOLS, *op. cit. supra* note 2, at § 14.2471(2); 18 AM. JUR., *Eminent Domain* § 255 (1938).

[38] Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958); Pegler v. Inhabitants of Hyde Park, 176 Mass. 101, 57 N.E. 328 (1900); City of St. Louis v. St. Louis I.M. & S. Ry., 266 Mo. 694, 187 S.W. 750 (1915); Becker v. Philadelphia & Reading Terminal Co., 177 Pa. 252 (1896); 4 NICHOLS, *op. cit. supra* note 2, § 14.2471(2); 1 ORGEL, *op. cit. supra* note 2, § 69.

and personal property, as contradistinguished from fixtures, from its old location which was condemned, to a new location; nor for the depreciation in value of such personal property and stock of goods, caused by such removal and reinstallation."

These incidental damages, as they are more accurately named than by the term consequential damages, are rejected generally because they are too remote and speculative in character.[39] Our Supreme Court has consistently refused to allow consequential or incidental damages.[40]

The foregoing is not intended to be an exhaustive study of the law relating to evaluation of leasehold estates in eminent domain. It is simply intended to provide some practical solutions to the problem of apportioning a condemnation award between landlord and tenant.

[39] Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925); 1 ORGEL, *op. cit. supra* note 2, § 77.

[40] For a case in which the court refused to permit evidence of incidental losses or injury resulting from the taking, see Buckhannon & N. R.R. v. Great Scott Coal & Coke Co., 75 W. Va. 423, 83 S.E. 1031 (1914).